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Occupation, Colonialism, Apartheid?

A re-assessment of Israel's practices in the occupied Palestinian territories under international law

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Editor's Note:

This report and its Executive Summary represent the first full draft of this study, on which comments are invited.

The HSRC editorial team regrets any typographical errors resulting from desktop printing.

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Acronyms

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Committee on the Elimination of Racial Discrimination (United Nations)
CMWU	Coastal Municipalities Water Utility
EEC	European Economic Community
GDP	Gross Domestic Product
GFU	General Federation of [Palestinian] Unions
GIS	Geographic Information System
GPO	Government Press Office (Israel)
GSS	General Security Services (of Israel)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminel Tribunal on Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israeli Defence Force
ILO	International Labour Organization
JA-WZO	Jewish Agency-World Zionist Organisation
JWC	Joint-Water Committee
NIS	New Israeli Shekels
OCHA	Office for the Coordination of Humanitarian Affairs (United Nations)
OPT	Occupied Palestinian Territories
PA	Palestinian Interim Self-Government Authority
PCATI	Public Committee Against Torture in Israel
PGFTU	Palestinian General Federation of Trade Unions
PHR-I	Physicians for Human Rights-Israel
PLC	Palestinian Legislative Council
PLO	Palestine Liberation Organisation
TRC	Truth and Reconciliation Commission (of South Africa)
TUCSA	South African Trade Union Council
UN	United Nations
UNRWA	United Nations Relief Works Agency
VAT	value-added tax

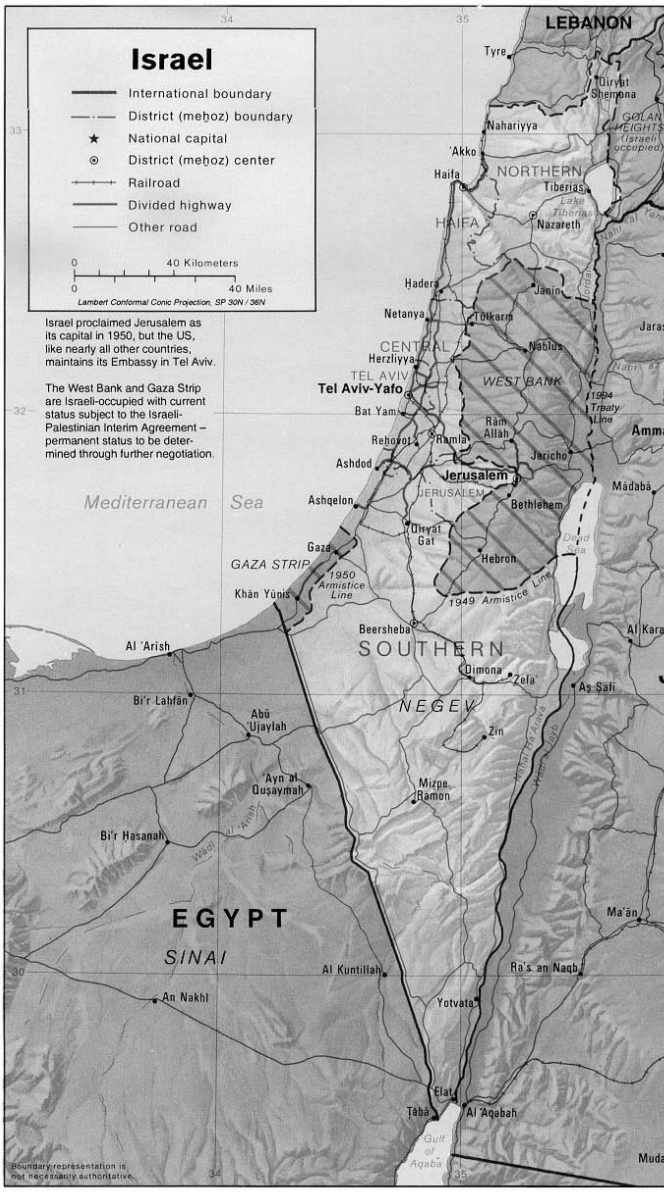
Preface

This study was commissioned and coordinated by the Middle East Project (MEP) of the Democracy and Governance Programme, a research programme of the Human Sciences Research Council of South Africa.

The genesis of this study was the suggestion made in January 2007 by Professor John Dugard, in his capacity as UN Special Rapporteur on the human rights situation in the occupied Palestinian territories, that Israel's military occupation displays elements of colonialism and apartheid. The Human Sciences Research Council commissioned this study to scrutinise Professor Dugard's hypothesis from the perspective of international law.

Over a period of 15 months, the team of scholars engaged in extensive research, discussion, and rounds of lively debate through seven drafts. The result is the consensus represented in this report, offered here for public discussion. Constructive criticism is welcomed, in order that shortcomings in this document may be addressed in a future edition. Although this study is essentially a legal document, observations from other disciplines are encouraged.

The Executive Summary was presented for public discussion on 16 May 2009 at the School for Oriental and African Studies (London), at a public seminar co-hosted by the HSRC and the Sir Joseph Hotung Project in Law, Human Rights and Peace Building in the Middle East, based at the Law School of the School of Oriental and African Studies, University of London.



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Executive Summary

A. Introduction

The Human Sciences Research Council of South Africa commissioned this study to test the hypothesis posed by Professor John Dugard in the report he presented to the UN Human Rights Council in January 2007, in his capacity as UN Special Rapporteur on the human rights situation in the Palestinian territories occupied by Israel (namely, the West Bank, including East Jerusalem, and Gaza, hereafter OPT). Professor Dugard posed the question:

> Israel is clearly in military occupation of the OPT. At the same time, elements of the occupation constitute forms of colonialism and of apartheid, which are contrary to international law. What are the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid for the occupied people, the Occupying Power and third States?

In order to consider these consequences, this study set out to examine legally the premises of Professor Dugard's question: is Israel the occupant of the OPT, and, if so, do elements of its occupation of these territories amount to colonialism or apartheid? South Africa has an obvious interest in these questions given its bitter history of apartheid, which entailed the denial of self-determination to its majority population and, during its occupation of Namibia, the extension of apartheid to that territory which South Africa effectively sought to colonise. These unlawful practices must not be replicated elsewhere: other peoples must not suffer in the way the populations of South Africa and Namibia have suffered.

To explore these issues, an international team of scholars was assembled. The aim of this project was to scrutinise the situation from the nonpartisan perspective of international law, rather than engage in political discourse and rhetoric. This study is the outcome of a fifteen-month collaborative process of intensive research, consultation, writing and review. It concludes and, it is to be hoped, persuasively argues and clearly demonstrates that Israel, since 1967, has been the belligerent Occupying Power in the OPT, and that its occupation of these territories has become a colonial enterprise which implements a system of apartheid.

Belligerent occupation in itself is not an unlawful situation: it is accepted as a possible consequence of armed conflict. At the same time, under the law of armed conflict (also known as international humanitarian law), occupation is intended to be only a temporary state of affairs. International law prohibits the unilateral annexation or permanent acquisition of territory as a result of the threat or use of force: should this occur, no State may recognise or support the resulting unlawful situation. In contrast to occupation, both colonialism and apartheid are always unlawful and indeed are considered to be particularly serious breaches of international law because they are fundamentally contrary to core values of the international legal order. Colonialism violates the principle of self-determination, which the International Court of Justice (ICJ) has affirmed as 'one of the essential principles of contemporary international law'. All States have a duty to respect and promote self-determination. Apartheid is an aggravated case of racial discrimination, which is constituted according to the International Convention for the Suppression and Punishment of the Crime of Apartheid (1973, hereafter 'Apartheid Convention') by 'inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'. The practice of apartheid, moreover, is an international crime.

Professor Dugard in his report to the UN Human Rights Council in 2007 suggested that an advisory opinion on the legal consequences of Israel's conduct should be sought from the ICJ. This advisory opinion would undoubtedly complement the opinion that the ICJ delivered in 2004 on the *Legal consequences of the construction of a wall in the occupied Palestinian territories* (hereafter 'the *Wall* advisory opinion'). This course of legal action does not exhaust the options open to the international community, nor indeed the duties of third States and international organisations when they are appraised that another State is engaged in the practices of colonialism or apartheid.

The scope of this study was determined by the question it poses: whether Israel's practises in the OPT amount to colonialism or apartheid under international law. Hence Israel's practices inside the Green Line (1949 Armistice Line) are not examined, except where they illuminate Israeli policies in the OPT. The history of the conflict before Israel's occupation began in June 1967 as a result of the Six-Day War is also not addressed, except where this is necessary to clarify the application of international law to the OPT. Questions of individual criminal responsibility or culpability for the commission of acts which constitute apartheid are also beyond the scope of this study, which focuses instead on the question of the responsibility of States as a result of internationally wrongful acts.

B. Legal Framework for this Study

This study is based on fundamental concepts and principles of international law and draws on diverse branches of substantive international law, in particular the law regulating belligerent occupation which forms part of the law of armed conflict. Israel remains the belligerent occupant of the OPT as they are territories over which Israel does not possess sovereignty but only a temporary right of administration. Consequently, Israel must abide by the relevant rules of the law of armed conflict—principally the provisions of the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949—in its administration of the territories. The law of armed conflict is supplemented by international human rights law which also applies in occupied territory. The prohibitions on colonialism and apartheid are rooted principally in the field of international human rights law.

Colonialism and apartheid both constitute serious violations of fundamental human rights. Colonialism has been consistently condemned by the international community because it prevents, and aims to prevent, a people from exercising freely its right to determine its own future through its own political institutions and in pursuit of its own economic policy. Although theoretical aspects of colonialism have increasingly been addressed in recent years in post-colonial and third world approaches to international law, the substantive aspects of colonialism have receded from international attention in recent decades following decolonisation in Africa and Asia over the course of the twentieth century. The main instrument of international law regarding colonialism, the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960, hereafter 'the Declaration on Colonialism), condemns 'colonialism in all its forms and manifestations', which includes 'settler colonialism' such as was practiced, for example, in South Africa. Other laws and UN resolutions contribute to an understanding of colonialism, its threat to the enjoyment of human rights and the obligation of all states to ensure its abolition. This body of law and commentary establishes the basis for and the standard against which the review of Israel's practices is undertaken in this study.

Apartheid is an aggravated form of racial discrimination because it is a State-sanctioned regime of law and institutions that have 'the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'. This definition is employed in the Apartheid Convention, which builds on the International Convention on the Elimination of All Forms of Racial Discrimination (1965, hereafter 'ICERD'). The Rome Statute of the International Criminal Court (1998, hereafter 'Rome Statute') includes apartheid as a crime falling within the Court's jurisdiction and, while this study does not consider the criminal responsibility of individuals, the provisions of these three treaties were employed to develop a working definition of apartheid for the purpose of considering Israel's State responsibility for practices that offend against the norm prohibiting apartheid.

The rules of international law prohibiting colonialism and apartheid are peremptory: that is, they are rules 'accepted and recognised by the international community of States as a whole as [rules] from which no derogation is permitted'. Every State owes a legal duty to the international community as a whole not to engage in practices of colonialism or apartheid. Conversely, all States have an interest in ensuring that these rules are respected because they enshrine fundamental values of international public order. Faced with a violation of the prohibitions of colonialism and apartheid, all States have three duties: to co-operate to end the violation; not to recognise the illegal situation arising from it; and not to render aid or assistance to the State committing it.

C. Legal Framework in the Occupied Palestinian Territories

To examine Israeli practices for qualities of colonialism and apartheid one must first consider the wider framework of law in the OPT, including applicable international law and Israeli law. This framework is structured by three basic legal facts.

First, the Palestinian people has the right to self-determination, with all the attendant consequences this entails under the relevant principles and instruments of international law.

Second, the West Bank, including East Jerusalem, and the Gaza Strip remain under belligerent occupation. Israel's arguments that the Palestinian territories are not 'occupied' in the sense of international law have been rejected by the international community. Israel does not possess sovereignty in these territories but only a temporary right of administration. As a consequence, Israel's annexation of East Jerusalem has been dismissed as unlawful and is not recognised by the international community. The occupied status of the West Bank was confirmed by the ICJ in the *Wall* advisory opinion. Israel's 'disengagement' from the Gaza Strip did not constitute the end of occupation because, despite the redeployment of its military ground forces from Gaza, it retains and exercises effective control over the territory. In all of the occupied Palestinian territories, Palestinians are therefore 'protected persons' under the terms of the Fourth Geneva Convention--namely, they are persons who 'find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.

Third, the prolonged length of Israel's occupation has not altered Israel's obligations as an Occupying Power as set forth in the Fourth Geneva Convention and the Hague Regulations. Israel must therefore abide by the relevant rules of the law of armed conflict in its administration of the territories, as these are supplemented by international human rights law.

In the light of this normative framework, Israel's administration of the OPT systematically breaches the law of armed conflict, both by disregarding the prohibition imposed on an Occupying Power not to alter the laws in force in occupied territory and by enforcing a dual and discriminatory legal regime on Jewish and Palestinian residents of the OPT. Israel grants to Jewish residents of the settlements in the OPT the protections of Israeli domestic law and subjects them to the jurisdiction of Israeli civil courts, while Palestinians living in the same territory are ruled under military law and subjected to the jurisdiction of military courts whose procedures violate international standards for the prosecution of justice. As a consequence of this bifurcated system, Jewish residents of the OPT enjoy freedom of movement, civil protections, and services denied to Palestinians. Palestinians are simultaneously denied the protections accorded to protected persons by international humanitarian law. This dual system has gained the imprimatur of Israel's High Court and constitutes a policy by the State of Israel to sustain two parallel societies in the OPT, one Jewish and the other Palestinian, and discriminate between these two groups by according very different rights, protections, and life chances in the same territory.

This system has entailed serious violations of the law of armed conflict, but, as this study shows, also involves violations of the international legal prohibitions of colonialism and apartheid.

D. Findings on Colonialism

Although international law provides no single decisive definition of colonialism, the terms of the Declaration on Colonialism indicate that a situation may be classified as colonial when the acts of a State have the cumulative outcome that it annexes or otherwise unlawfully retains control over territory and thus aims permanently to deny its indigenous population the exercise of its right to self-determination. Five issues, which are unlawful in themselves, taken together make it evident that Israel's rule in the OPT has assumed such a colonial character: namely, violations of the territorial integrity of occupied territory; depriving the population of occupied territory of the capacity for self-governance; integrating the economy of occupied territory into that of the occupant; breaching the principle of permanent sovereignty over natural resources in relation to the occupied territory; and

denying the population of occupied territory the right freely to express, develop and practice its culture.

Israel's annexation of East Jerusalem is manifestly an act based on colonial intent. It is unlawful in itself, as annexation breaches the principle underpinning the law of occupation: that occupation is only a temporary situation that does not vest sovereignty in the Occupying Power. Annexation also breaches the legal prohibition on the acquisition of territory through the threat or use of force. This prohibition has peremptory status, as it is a corollary of the prohibition on the use of force in international relations enshrined in Article 2(4) of the UN Charter. Israel's acquisition of territory in the West Bank also starkly illustrates this intent: the construction of Jewish-only settlements within contiguous blocs of land that Palestinians cannot enter; a connecting road system between the settlements and the settlements and cities within the Green Line, the use of which is denied to Palestinians; and a Wall that separates Jewish and Palestinian populations, as well as dividing Palestinian communities from each other, with passage between Palestinian areas controlled by Israel. By thus partitioning contiguous blocs of Palestinian areas into cantons, Israel has violated the territorial integrity of the OPT in violation of the Declaration on Colonialism.

The physical control exercised over these areas is complemented by the administration that Israel exercises over the OPT, which prevents its protected population from freely exercising political authority over that territory. This determination is unaffected by the conclusion of the Oslo Accords and the creation of the Palestinian National Authority and Legislative Council. The devolution of power to these institutions has been only partial, and Israel retains ultimate control. By preventing the free expression of the Palestinian population's political will, Israel has violated that population's right to self-determination.

The law of self-determination further requires a State in belligerent occupation of foreign territory to keep that territory separate from its own in order to prevent its annexation and also to keep their economies separate. Israel has subordinated the economy of the OPT to its own, depriving the population under occupation of the capacity to govern its economic affairs. In particular, the creation of a customs union between Israel and the OPT is a measure of prohibited annexation. By virtue of the structural economic measures it has imposed on the OPT, Israel has violated the Palestinian population's right of economic self-determination and its duties as an Occupying Power.

The economic dimension of self-determination is also expressed in the right of permanent sovereignty over natural resources, which entitles a people to dispose freely of the natural wealth and resources found within the limits of its national jurisdiction. Israel's settlement policy and the construction of the bypass road network and the Wall have deprived the Palestinian population of the control and development of an estimated 38 percent of West Bank land. It has also implemented a water management and allocation system that favours Israel and Jewish settlers in the OPT to the detriment of the Palestinian population. Not only is this practice contrary to the lawful use of natural resources in time of occupation, which is limited to the needs of the occupying army, but it is also contrary to international water law as the allocation employed is both unjust and inequitable. Moreover, it is significant that the route of the Wall is similar to the 'red line' that delineates those areas of the West Bank from which Israel can withdraw without relinquishing its control over key water resources that are used to supply Israel and the settlements. Thus, by its treatment of the natural resources of the OPT, Israel has further breached the economic dimension of self-determination, as expressed in the right of permanent sovereignty over natural resources.

Finally, self-determination also has a cultural component: a people entitled to exercise the right of self-determination has the right freely to develop and practice its culture. Israeli practices privilege the language and cultural referents of the occupier, while materially hampering the cultural development and expression of the Palestinian population. This last issue renders Israel's denial of the right to self-determination in the OPT comprehensive.

In his report, Professor Dugard suggested that elements of the occupation resembled colonialism. This study demonstrates that the implementation of a colonial policy by Israel has not been piecemeal but is systematic and comprehensive, as the exercise of the Palestinian population's right to self-determination has been frustrated in all of its principal modes of expression.

E. Findings on Apartheid

The analysis of apartheid in this study encompasses three distinct issues: (1) the definition of apartheid; (2) the status of the prohibition of apartheid in international law; and (3) whether Israel's practices in the OPT amount to a breach of that prohibition.

Article 3 of ICERD prohibits the practice of apartheid as a particularly egregious form of discrimination, but it does not define the practice with precision. The Apartheid Convention and the Rome Statute have developed the prohibition of apartheid in two ways: they criminalise certain apartheid-related acts and further elaborate the definition of apartheid. The Apartheid Convention criminalises 'inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'. The Rome Statute criminalises inhumane acts committed in the context of, and to maintain, 'an institutionalized regime of systematic oppression and domination by one racial group over any other racial group.' Both focus on the *systematic, institutionalised, and oppressive* character of the discrimination involved and the purpose of domination that is entailed. This distinguishes the practice of apartheid from other forms of prohibited discrimination and from other contexts in which the listed crimes arise. The prohibition of apartheid has also assumed the status of customary international law and, further, is established as a peremptory rule of international law (a *jus cogens* norm) which entails obligations owed to the international community as a whole (obligations *erga omnes*).

In drafting this study, it was necessary to develop a methodology to determine whether an instance of apartheid has developed outside southern Africa. This aspect of the study was organised according to the definition of apartheid contained in Article 2 of the Apartheid Convention, which cites six categories of 'inhuman acts' as comprising the 'crime of apartheid'. This list is intended to be illustrative and inclusive, rather than exhaustive or exclusive. Accordingly, a determination that apartheid exists does not require that *all* the listed acts are practiced: for example, Article 2(b) regarding the intended 'physical destruction' of a group did not apply generally to apartheid policy in South Africa. Practices not expressly enumerated may also be relevant, as Article 2 mentions '*similar* policies and practices … as practiced in southern Africa'. For the purposes of this study, it was therefore assumed that a positive finding of apartheid need not establish that all practices cited in Article 2 are present, or that those precise practices are present, but rather that 'policies and practices of racial segregation and discrimination' combine to form an institutionalised system of racial discrimination that has not only the effect but the purpose of maintaining racial domination by one racial group over the other.

Fundamental to the question of apartheid is determining whether the groups involved can be understood as 'racial groups'. This required first examining how racial discrimination is defined in ICERD and the jurisprudence of the International Criminal Tribunals for Rwanda and the former Yugoslavia, which concluded that no scientific or impartial method exists for determining whether any group is a racial group and that the question rests primarily on local perceptions. In the OPT, this study finds that 'Jewish' and 'Palestinian' identities are socially constructed as groups distinguished by ancestry or descent as well as nationality, ethnicity, and religion. On this basis, the study concludes that Israeli Jews and Palestinian Arabs can be considered 'racial groups' for the purposes of the definition of apartheid in international law.

In examining Israel's practices under the prism of the Apartheid Convention, this study also recalls the system of apartheid as it was practiced in South Africa because those practices illustrate the concerns and intentions of the drafters of the Apartheid Convention. It must be clear, however, that practices in South Africa are not the test or benchmark for a finding of apartheid elsewhere, as the principal instrument which provides this test lies in the terms of the Apartheid Convention itself.

By examining Israel's practices in the light of Article 2 of the Apartheid Convention, this study concludes that Israel has introduced a system of apartheid in the OPT. In regard to each 'inhuman act' listed in Article 2, the study has found the following:

- Article 2(a) regarding the denial of the right to life and liberty of person is satisfied by Israeli measures to repress Palestinian dissent against the occupation and its system of domination.

Israel's policies and practices include murder, in the form of extrajudicial killings; torture and other cruel, inhuman or degrading treatment or punishment of detainees; a military court system that falls far short of international standards for fair trial; and arbitrary arrest and detention of Palestinians, including administrative detention imposed without charge or trial and lacking adequate judicial review. All of these practices are discriminatory in that Palestinians are subject to legal systems and courts which apply standards of evidence and procedure that are different from those applied to Jewish settlers living the OPT and that result in harsher penalties for Palestinians.

- Article 2(b) regarding 'the deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part' is not satisfied, as the Israel's policies and practices in the OPT are not found to have the intent of causing the physical destruction of the Palestinian people. Policies of collective punishment that entail grave consequences for life and health, such as closures imposed on the Gaza Strip that limit or eliminate Palestinian access to essential health care and medicine, fuel, and adequate nutrition, and Israeli military attacks that inflict high civilian casualties, are serious violations of international humanitarian and human rights law but do not meet the threshold required by this provision regarding the OPT as a whole.
- Article 2(c) regarding measures calculated to prevent a racial group from participation in the political, social, economic and cultural life of the country and to prevent the full development of a group through the denial of basic human rights and freedoms is satisfied on several counts:

  (i) Restrictions on the Palestinian right to freedom of movement are endemic in the West Bank, stemming from Israel's control of checkpoints and crossings, impediments created by the Wall and its crossing points, a matrix of separate roads, and obstructive and all-encompassing permit and ID systems that apply solely to Palestinians. Palestinians living in the West Bank and Gaza Strip are not allowed to visit the other territory and are not allowed to enter East Jerusalem with a pass.

  (ii) The right of Palestinians to choose their own place of residence within their territory is severely curtailed by systematic administrative restrictions on Palestinian residency and building in East Jerusalem, by discriminatory legislation that operates to prevent Palestinian spouses from living together on the basis of which part of the OPT they originate from, and by the strictures of the permit and ID systems.

  (iii) Palestinians are denied their right to leave and return to their country. Palestinian refugees displaced in 1948 from the territory now inside Israel who are living in the OPT (approximately 1.8 million people including descendents) are not allowed to return to their former places of residence. Similarly, hundreds of thousands of Palestinians displaced to surrounding states from the West Bank and Gaza Strip in 1967 have been prevented from returning to the OPT. Palestinian refugees displaced in 1948 to surrounding states (approximately 4.5 million) are not allowed to return to either Israel or the OPT. Palestinian residents of the OPT must obtain Israeli permission to leave the territory. In the Gaza Strip, especially since 2006, this permission is almost completely denied, even for educational or medical purposes. Political activists and human rights defenders are often subject to arbitrary and undefined 'travel bans', while many Palestinians who travelled and lived abroad for business or personal reasons have had their residence IDs revoked and been prohibited from returning.

  (iv) Israel denies Palestinians in the OPT their right to a nationality by denying Palestinian refugees from inside the Green Line their right of return, residence, and citizenship in the State (Israel) governing the land of their birth. Israel's policies in the OPT also effectively deny Palestinians their right to a nationality by obstructing the exercise of the Palestinian right to self-determination through the formation of a Palestinian State in the West Bank (including East Jerusalem) and Gaza Strip.

(v) Palestinians are restricted in their right to work, through Israeli policies that severely curtail Palestinian agriculture and industry in the OPT, restrict exports and imports, and impose pervasive obstacles to internal movement that impair access to agricultural land and travel for employment and business. Although formerly significant, Palestinian access to work inside Israel has been almost completely cut off in recent years by prevailing closure policies and is now negligible. Palestinian unemployment in the OPT as a whole has reached almost 50 percent.

(vi) Palestinian trade unions exist but are not recognised by the Israeli government or by the Histadrut (the main Israeli trade union) and cannot effectively represent Palestinians working for Israeli employers and businesses. Although these workers are required to pay dues to the Histadrut, it does not represent their interests and concerns, and Palestinians have no voice in formulating Histadrut policies. Palestinian unions are also prohibited from functioning in Israeli settlements in the OPT where Palestinians work in construction and other sectors.

(vii) The right of Palestinians to education is not impacted directly by Israeli policy, as Israel does not operate the school system in the OPT, but education is severely impeded by military rule. Israeli military actions have included extensive school closures, direct attacks on schools, severe restrictions on movement, and arrests and detention of teachers and students. Israel's denial of exit permits has prevented hundreds of students in the Gaza Strip from continuing their education abroad. Discrimination in relation to education is striking in East Jerusalem. A segregated school system operates in the West Bank as Palestinians are not allowed to attend government-funded schools in Jewish settlements.

(viii) The right of Palestinians to freedom of opinion and expression is greatly restricted through censorship laws enforced by the military authorities and endorsed by the High Court of Justice. Since 2001, the Israeli Government Press Office has greatly limited Palestinian press accreditation. Journalists are regularly restricted from entering the Gaza Strip and Palestinian journalists suffer from patterns of harassment, detention, confiscation of materials, and even killing.

(ix) Palestinians' right to freedom of peaceful assembly and association is impeded through military orders. Military legislation bans public gatherings of ten or more persons without a permit from the Israeli military commander. Non-violent demonstrations are regularly suppressed by the Israeli army with live ammunition, rubber-coated steel bullets, tear gas, improper use of projectiles such as tear gas canisters, and participants are arrested. Most Palestinian political parties have been declared illegal and institutions associated with those parties, such as charities and cultural organisations, are regularly subjected to closure and attack.

(x) The prevention of full development in the OPT and participation of Palestinians in political, economic, social and cultural life is most starkly demonstrated by the effects of Israel's ongoing siege and regular large-scale military attacks on the Gaza Strip. Although denied by Israel, the population of the Gaza Strip is experiencing an on-going severe humanitarian crisis.

- Article 2(d), which relates to division of the population along racial lines, has three elements, two of which are satisfied:

(i) Israel has divided the West Bank into reserves or cantons in which residence and entry is determined by each individual's group identity. Entry by one group into the zone of the other group is prohibited without a permit. The Wall and its infrastructure of gates and permanent checkpoints suggest a policy permanently to divide the West Bank into racial cantons. Israeli government ministries, the World Zionist Organisation and other Jewish-national institutions operating as authorised agencies of the State plan, fund and

implement construction of the West Bank settlements and their infrastructure for exclusively Jewish use.

(ii) Article 2(d) is not satisfied regarding a prohibition on mixed marriages between Jews and Palestinians. The proscription of civil marriage in Israeli law and the authority of religious courts in matters of marriage and divorce, coupled with restrictions on where Jews and Palestinians can live in the OPT, present major practical obstacles to any potential mixed marriage but do not constitute a formal prohibition.

(iii) Israel has extensively appropriated Palestinian land in the OPT for exclusively Jewish use. Private Palestinian land comprises about 30 percent of the land unlawfully appropriated for Jewish settlement in the West Bank. Presently, 38 percent of the West Bank is completely closed to Palestinian use, with significant restrictions on access to much of the rest of it.

- Article 2(e) relating to the exploitation of labour is today not significantly satisfied, as Israel has raised barriers to Palestinian employment inside Israel since the 1990s and Palestinian labour is now used extensively only in the construction and services sectors of Jewish-Israeli settlements in the OPT. Otherwise, exploitation of labour has been replaced by practices that fall under Article 2(c) regarding the denial of the right to work.
- Arrest, imprisonment, travel bans and the targeting of Palestinian parliamentarians, national political leaders and human rights defenders, as well as the closing down of related organisations by Israel, represent persecution for opposition to the system of Israeli domination in the OPT, within the meaning of Article 2(f).

In sum, Israel appears clearly to be implementing and sustaining policies intended to maintain its domination over Palestinians in the OPT and to suppress opposition of any form to those policies.

The comparative analyses of South African apartheid practices threaded throughout the analysis of apartheid in Chapter 5 is there to illuminate, rather than define, the meaning of apartheid, and there are certainly differences between apartheid as it was applied in South Africa and Israel's policies and practices in the OPT. Nonetheless, it is significant that the two systems can be defined by similar dominant features.

A troika of key laws underpinned the South African apartheid regime—the Population Registration Act 1950, the Group Areas Act 1950, and the Pass Laws—and established its three principal features or pillars. The first pillar was formally to demarcate the population of South Africa into racial groups through the Population Registration Act (1950)and to accord superior rights, privileges and services to the white racial group: for example, through the Bantu Building Workers Act of 1951, the Bantu Education Act of 1953 and the Separate Amenities Act of 1953. This pillar consolidated earlier discriminatory laws into a pervasive system of institutionalised racial discrimination, which prevented the enjoyment of basic human rights by non-white South Africans based on their racial identity as established by the Population Registration Act.

The second pillar was to segregate the population into different geographic areas, which were allocated by law to different racial groups, and restrict passage by members of any group into the area allocated to other groups, thus preventing any contact between groups that might ultimately compromise white supremacy. This strategy was defined by the Group Areas Act of 1950 and the Pass Laws—which included the Native Laws Amendment Act of 1952 and the Natives (Abolition of Passes and Co-ordination of Documents) Act of 1952—as well as the Natives (Urban Areas) Amendment Act 1955, the Bantu (Urban Areas) Consolidation Act 1945 and the Coloured Persons Communal Reserves Act 1961.

This separation constituted the basis for the policy labelled 'grand apartheid' by its South African architects, which provided for the establishment of 'Homelands' or 'Bantustans' into which denationalised black South Africans were transferred and forced to reside, in order to allow the white minority to deny them the enjoyment of any political rights in, and preserve white supremacy over, the majority of the territory of South Africa. Although the Homelands were represented by the South

African government as offering black South Africans the promise of complete independence in distinct nation-States, and thus satisfying their right to self-determination, the Homelands were not recognised by either the African National Congress or the international community and were condemned by UN resolutions as violations of both South Africa's territorial integrity and of the right of the African people of South Africa as a whole to self-determination. Having divided the population into distinct racial groups, and dictated which groups could live and move where, South Africa's apartheid policies were buttressed by a third pillar: a matrix of draconian 'security' laws and policies that were employed to suppress any opposition to the regime and to reinforce the system of racial domination, by providing for administrative detention, torture, censorship, banning, and assassination.

Israel's practices in the OPT can be defined by the same three 'pillars' of apartheid. The first pillar derives from Israeli laws and policies that establish Jewish identity for purposes of law and afford a preferential legal status and material benefits to Jews over non-Jews. The product of this in the OPT is an institutionalised system that privileges Jewish settlers and discriminates against Palestinians on the basis of the inferior status afforded to non-Jews by Israel. At the root of this system are Israel's citizenship laws, whereby group identity is the primary factor in determining questions involving the acquisition of Israeli citizenship. The 1950 Law of Return defines who is a Jew for purposes of the law and allows every Jew to immigrate to Israel or the OPT. The 1952 Citizenship Law then grants automatic citizenship to people who immigrate under the Law of Return, while erecting insurmountable obstacles to citizenship for Palestinian refugees. Israeli law conveying special standing to Jewish identity is then applied extra-territorially to extend preferential legal status and material privileges to Jewish settlers in the OPT and thus discriminate against Palestinians. The review of Israel's practices under Article 2 of the Apartheid Convention provides abundant evidence of discrimination against Palestinians that flows from that inferior status, in realms such as the right to leave and return to one's country, freedom of movement and residence, and access to land. The 2003 Citizenship and Entry into Israel Law banning Palestinian family unification is a further example of legislation that confers benefits to Jews over Palestinians and illustrates the adverse impact of having the status of Palestinian Arab. The disparity in how the two groups are treated by Israel is highlighted through the application of a harsher set of laws and different courts for Palestinians in the OPT than for Jewish settlers, as well as through the restrictions imposed by the permit and ID systems.

The second pillar is reflected in Israel's grand policy to fragment the OPT for the purposes of segregation and domination. This policy is evidenced by: Israel's extensive appropriation of Palestinian land, which continues to shrink the territorial space available to Palestinians; the hermetic closure and isolation of the Gaza Strip from the rest of the OPT; the deliberate severing of East Jerusalem from the rest of the West Bank; and the appropriation and construction policies serving to carve up the West Bank into an intricate and well-serviced network of connected settlements for Jewish-Israelis and an archipelago of besieged and non-contiguous enclaves for Palestinians. That these measures are intended to segregate the population along racial lines in violation of Article 2(d) of the Apartheid Convention is clear from the visible web of walls, separate roads, and checkpoints, and the invisible web of permit and ID systems, that combine to ensure that Palestinians remain confined to the reserves designated for them while Israeli Jews are prohibited from entering those reserves but enjoy freedom of movement throughout the rest of the Palestinian territory.

Whether the confinement of Palestinians to certain reserves or enclaves within the OPT is analogous to South African 'grand apartheid' in the further sense that Israel intends Palestinian rights ultimately to be met by the creation of a State in parts of the OPT whose rationale is based on racial segregation engages political questions beyond the scope and method of this study. Within the scope of this study is that, much as the same restrictions functioned in apartheid South Africa, the policy of geographic fragmentation has the effect of crushing Palestinian socio-economic life, securing Palestinian vulnerability to Israeli economic dominance, and of enforcing a rigid segregation of Palestinian and Jewish populations. The fragmentation of the territorial integrity of a self-determination unit for the purposes of racial segregation and domination is prohibited by international law.

The third pillar upon which Israel's system of apartheid in the OPT rests is its 'security' laws and policies. The extrajudicial killing, torture and cruel, inhuman or degrading treatment and arbitrary arrest and imprisonment of Palestinians, as described under the rubric of Article 2(a) of the Apartheid

Convention, are all justified by Israel on the pretext of security. These policies are State-sanctioned, and often approved by the Israeli judicial system, and supported by an oppressive code of military laws and a system of improperly constituted military courts. Additionally, this study finds that Israel's invocation of 'security' to validate sweeping restrictions on Palestinian freedom of opinion, expression, assembly, association and movement also often purports to mask a true underlying intent to suppress dissent to its system of domination, and thereby maintain control over Palestinians as a group. This study does not contend that Israel's claims about security are by definition lacking in merit; however, Israel's invocation of 'security' to validate severe policies and disproportionate practices toward the Palestinians often masks the intent to suppress Palestinian opposition to a system of domination by one racial group over another.

Thus, while the individual practices listed in the Apartheid Convention do not in themselves define apartheid, these practices do not occur in the OPT in a vacuum, but are integrated and complementary elements of an institutionalised and oppressive system of Israeli domination and oppression over Palestinians as a group; that is, a system of apartheid.

In summary, this study finds that Jewish and Palestinian identities function as racial identities in the sense provided by ICERD, the Apartheid Convention, and the jurisprudence of the International Criminal Tribunals for Rwanda and the former Yugoslavia. Israel's status as a 'Jewish State' is inscribed in its Basic Law and it has developed legal and institutional mechanisms by which the State seeks to ensure its enduring Jewish character. These laws and institutions are channelled into the OPT to convey privileges to Jewish settlers and disadvantage Palestinians on the basis of their respective group identities. This domination is associated principally with transferring control over land in the OPT to exclusively Jewish use, thus also altering the demographic status of the territory. This discriminatory treatment cannot be explained or excused on grounds of citizenship, both because it goes beyond what is permitted by ICERD and because certain provisions in Israeli civil and military law provide that Jews present in the OPT who are not citizens of Israel also enjoy privileges conferred on Jewish-Israeli citizens in the OPT by virtue of being Jews. Consequently, this study finds that the State of Israel exercises control in the OPT with the purpose of maintaining a system of domination by Jews over Palestinians and that this system constitutes a breach of the prohibition of apartheid.

F. Implications and Recommendations

International law is inherently biased towards the protection of State interests. Although the Palestinian people has some international status because of its entitlement to self-determination, the remedies available to it on the international sphere are limited, and principally lie in recourse to human rights bodies in attempts to ensure that Palestinian rights are respected. This relative absence of remedies available to the right-bearer does not, however, have the consequence that Israel's obligations are lessened or extinguished. The conclusion that Israel has breached the international legal prohibitions of apartheid and colonialism in the OPT suggests that the occupation itself is illegal on these grounds. The legal consequences of these findings are grave and entail obligations not merely for Israel but also for the international community as a whole.

Israel bears the primary responsibility for remedying the illegal situation it has created. In the first place, it has the duty to cease its unlawful activity and dismantle the structures and institutions of colonialism and apartheid that it has created. Israel is additionally required by international law to implement duties of reparation, compensation and satisfaction in order to wipe out the consequences of its unlawful acts. But above all, in common with all States, whether acting singly or through the agency of inter-governmental organisations, Israel has the duty to promote the Palestinian people's exercise of its right of self-determination in order that it might freely determine its political status freely pursue its own economic policy and social and cultural development.

The realisation of self-determination and the prohibition on apartheid are peremptory norms of international law from which no derogation is permitted. Both express core values of international public policy and generate obligations for the international community as a whole. These obligations adhere to individual States and the intergovernmental organisations through which they act

collectively. Breaches of peremptory norms, which involve a gross or systematic failure by the responsible State to fulfil the obligations they impose, generate derivative obligations for States and intergovernmental organisations of cooperation and abstention.

States, and intergovernmental organisations, must cooperate to end any and all serious breaches of peremptory norms. The obligation of cooperation imposed upon States may be pursued through intergovernmental organisations, such as the United Nations, should States decide that this is appropriate, but must also be pursued outside these organisations by way of inter-State diplomatic measures. One possible mechanism is that States may invoke the international responsibility of Israel to call it to account for its violations of the peremptory prohibitions of colonialism and apartheid. All States have a legal interest in ensuring that no State breaches these norms, and accordingly all States have the legal capacity to invoke Israel's responsibility. Above all, however, all States and intergovernmental organisations have the duty to promote the Palestinian people's exercise of its right of self-determination in order that it might freely determine its political status and economic policy.

The duty of abstention has two elements: States must not recognise as lawful situations created by serious breaches of peremptory norms nor render aid or assistance in maintaining that situation. In particular, States must not recognise Israel's annexation of East Jerusalem or its attempt to acquire territory in the West Bank through the consolidation of settlements, nor may they bolster the latter's economic viability. Should any State fail to fulfil its duty of abstention then it risks becoming complicit in Israel's internationally wrongful acts, and thus independently engaging its own responsibility, with all the legal consequences of reparation that this entails.

In short, for States the legal consequences of Israel's breach of the peremptory norms prohibiting colonialism and apartheid are clear. When faced with a serious breach of an obligation arising under a peremptory norm, all States have the duty not to recognise this situation as lawful and have the duty not to aid or assist the maintenance of this situation. Further, all States must co-operate to bring this situation to an end. If a State fails to fulfil these duties, axiomatically it commits an internationally wrongful act. If a State aids or assists another State in maintaining that unlawful situation, knowing it to be unlawful, then it becomes complicit in its commission and itself commits an internationally wrongful act.

States cannot evade these obligations through the act of combination. They cannot claim that the proper route for the discharge of these obligations is combined action through an intergovernmental organisation and that if it fails to act then their individual obligations of cooperation and abstention are extinguished. That is, States cannot evade their international obligations by hiding behind the independent personality of an international organisation of which they are members.

Moreover, like States, intergovernmental organisations themselves bear responsibility for their actions under international law. Obligations *erga omnes* generated by a breach of a peremptory norm of international law are imposed on the international community as a whole and are thus imposed equally on intergovernmental organisations as well as States. As the International Court of Justice stated in the *Legal consequences of the construction of a wall in occupied Palestinian territory* advisory opinion, the United Nations bears a special responsibility for the resolution of the Israel-Palestine conflict.

While both States and intergovernmental organisations have a degree of discretion in determining how they may implement their duties of cooperation and abstention, the authors of this study agree with Professor Dugard's suggestion that the parameters of these duties might best be delineated by seeking advice from the International Court of Justice. Accordingly we respectfully suggest that, in accordance with Article 96 of the Charter of the United Nations and pursuant to Article 65 of the Statute of the International Court of Justice, an advisory opinion be urgently requested on the following question:

> Do the policies and practices of Israel within the Occupied Palestinian Territories violate the norms prohibiting apartheid and colonialism; and, if so, what are the legal consequences arising from Israel's policies and practices, considering the rules and principles of international law, including the International Convention on the Elimination of all forms of Racial

Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly Resolution 1514 (1960), the Fourth Geneva Convention of 1949, and other relevant Security Council and General Assembly resolutions? □

Chapter I
The Question and Its Framework:
Sources of Law and Key Concepts

A. Framing the Question under International Law

In his 29 January 2007 report as UN Special Rapporteur on the human rights situation in the Palestinian territories occupied by Israel (hereafter 'OPT') since 1967, John Dugard raised a fundamental question for the United Nations General Assembly:

> The international community has identified three regimes as inimical to human rights - colonialism, apartheid and foreign occupation. Israel is clearly in military occupation of the OPT. At the same time, elements of the occupation constitute forms of colonialism and of apartheid, which are contrary to international law. What are the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid for the occupied people, the occupying Power and third States? It is suggested that this question might appropriately be put to the International Court of Justice for a further advisory opinion.[1]

This report considers whether that the UN General Assembly has grounds for requesting the International Court of Justice (ICJ) to issue such an advisory opinion. It further considers what implications a finding of colonialism or apartheid may have for the international community.

The ICJ has, in the past, ruled on the question of a regime's legality: notably, regarding South Africa's occupation of Namibia. In the last of four advisory opinions issued between 1950 and 1971,[2] the Court addressed the legality of South Africa's continued presence in Namibia (in violation of a UN Security Council resolution calling for its withdrawal) and was effectively charged with adjudicating on the overall nature of the South African regime in Namibia. Having considered South Africa's policy of establishing and enforcing apartheid in Namibia—that is, 'distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin [in] denial of fundamental human rights [and in] flagrant violation of the purposes and principles of the Charter'[3] —the Court concluded that,

> the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory.[4]

The Court recently dealt with some aspects of Israel's practices as an Occupying Power in its 2004 advisory opinion, *Legal consequences of the construction of a wall in Occupied Palestinian Territory*.[5] In this case, however, the Court was asked to rule on one particular action undertaken within Israel's regime in the OPT, rather than the nature of the regime itself. A request from the

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[1] A/HRC/4/17, 29 January 2007, 3.

[2] *International Status of South West Africa,* Advisory Opinion, 11 July 1950; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa,* Advisory Opinion, 7 June 1955; *Admissibility of Hearings of Petitioners by the Committee on South West Africa,* Advisory Opinion, 1 July 1956; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21 June 1971.

[3] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21 June 1971, at para. 131.

[4] Ibid, at para. 133.

[5] *Legality of the Construction of a Wall in the Occupied Palestinian Territories,* Advisory Opinion, ICJ Rep, 2004, 136. All documents of the International Court of Justice and the Permanent Court of International Justice cited in this report are available online at www.icj-cij.org.

General Assembly to the Court for a further advisory opinion as to whether Israel's prolonged occupation of the OPT has assumed characteristics that breach the international legal prohibitions on colonialism and apartheid would require the Court to opine on the legality and legal implications of Israel's continuing occupation of the OPT.

Belligerent occupation in itself is not an unlawful situation. It is acknowledged and accepted as a possible consequence of armed conflict. However, international humanitarian law—especially as set forth in the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land (henceforth 'the Hague Regulations') and the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War (henceforth 'Fourth Geneva Convention')—presupposed that occupation is a temporary state of affairs that will naturally draw to a close after the cessation of hostilities or at the latest upon the conclusion of a peace agreement. Any other outcome is precluded by the norms of international law that prohibit the annexation or acquisition of territory as a result of the use of force. The legal nature of a belligerent occupation that has lasted four decades therefore must come into question and call for a review of the intentions of the Occupying Power.

Such a review must move beyond previous analyses of Israel's occupation of the Palestinian territories that have tended toward a 'habitual focus on specific actions undertaken within the occupation, as distinct from the nature of the occupation as a normative regime'.[6] The Special Rapporteur's comments impel a more holistic legal approach to assess the cumulative effect of four decades of belligerent occupation by Israel. In particular, this situation is examined through the lenses of two elements of international law—the prohibitions of colonialism and apartheid—to ascertain whether the occupation is unlawful on these grounds.

B. Scope of the Study

This report considers whether Israel's belligerent occupation of the OPT since June 1967 contains elements of colonialism and apartheid and is accordingly illegal on those grounds.[7] This approach guides the report's scope in two ways: (1) it does not address questions of individual criminal responsibility or culpability for the practices of apartheid; and (2) evidence is confined to Israeli practices within the OPT and to the period after the 1967 war during which those territories came under military occupation. Engaging in colonial practice is not a crime attracting individual criminal responsibility under international law but is exclusively a matter concerning the responsibility of States for internationally wrongful acts. This study's findings of colonialism and apartheid do not affect claims that Israel's occupation is unlawful on other grounds.

1. State versus Individual Responsibility

This study makes no attempt to discover factual evidence that would tie specific individuals to criminal offences that arise under the rubric of apartheid. This would require demonstrating that specific facts are present that constitute the conduct of a criminal offence (the *actus reus*) and also, crucially, that the accused acted with the requisite mental state (the *mens rea*) which renders that conduct criminal. The *mens rea* is an element beyond the simple demonstration that, as a matter of fact, a breach of the law has occurred,[8] and must be proved in relation to every individual act alleged

[6] Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law.* 551 at 552.

[7] Although this report is concerned with the legality of Israel's practices in the OPT, the obligation of an Occupying Power to withdraw from occupied territory is not dependent on a finding of illegality. The UN Security Council has called on Occupying Powers to withdraw from the OPT without declaring their presence illegal: for example, regarding Israel's occupation of the OPT (SC Res. 242 of 22 November 1967 and SC Res. 338 of 22 October 1973), Iraq's occupation of Kuwait (SC Res. 660 of 2 August 1990) and Indonesia's occupation of East Timor (SC Res. 384 of 22 December 1975).

[8] For a discussion of the *mens rea* required under the Rome Statute of the International Criminal Court in order that an accused may be convicted of the crime of apartheid see, for example, R. S. Lee (ed.), *The International*

to be criminal. That project would require more than demonstrating that Israel's practices in its administration of the OPT constitute the crime of apartheid. There is a fundamental difference between establishing that a rule of international law has been breached,—which may, in certain circumstances, render an individual liable to prosecution—and establishing that an international crime has been committed.

Rather, those practices that are identified as constituting the crime of apartheid in the Apartheid Convention are used here to structure an assessment of whether Israel's acts, policies and practices in the OPT constitute a breach of the peremptory norm prohibiting apartheid, which as a result gives rise to State responsibility. State responsibility is neither criminal nor civil as these are conceived in domestic legal systems. At its core, a finding of State responsibility simply records that the delinquent State has committed a breach of general international law that binds all States or of a specific legal obligation which binds two or more States. If it were found that Israel's practices amount to apartheid, then individual criminal responsibility could arise consequentially. This is consonant with the approach adopted by the South African Truth and Reconciliation Commission regarding the imposition of criminal responsibility imposed on individuals for acts which amounted to the crime against humanity of apartheid.

It is generally recognised that the prohibitions of apartheid and racial discrimination have peremptory status. A peremptory norm of general international law, or *ius cogens* rule, is defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties as a rule which is 'accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole. An international wrongful act which amounts to a serious breach of an obligation arising under a peremptory norm imposes on all States remedial duties which do not arise in relation to other internationally wrongful acts. Thus the International Law Commission in its commentary regarding its 2001 *Articles on the Responsibility of States for Internationally Wrongful Acts*,[9] which codified the rules of international law on State responsibility,[10] referred expressly to Article 53 of the 1969 Vienna Convention on the Law of Treaties, and noted that

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Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Ardsley, NY|: Transnational Publishers, 2001), pp.105-106. It should be recalled that Israel is not a party to the Statute of the International Criminal Court, and that its practice is therefore only illustrative of the need for *mens rea* in the commission of the crime of apartheid.

[9] 2001 International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Article 40: 'This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of international law. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.'

[10] The 2001 Articles were approved, without vote, by the General Assembly in resolution 56/83 (12 December 2001), operative paragraph 3 of which provided: '*Takes note* of the articles on the responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.' This followed the recommendation of the International Law Commission that the General Assembly take note of the Articles and subsequently decide whether to convene a diplomatic conference with a view to conclude a convention on State responsibility—see International Law Commission, *Report on the work of its Fifty-Third session*, UN Doc.A/56/10 (2001), , 38-41 and 42, paras.61-67 and 72-73; and also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (Cambridge: Cambridge University Press, 2002), pp. 58-60. In 2004, the General Assembly reconsidered this matter, and decided to defer its decision—see J. Crawford and S. Olleson, 'The continuing debate on a UN Convention on State Responsibility' (2005) 54 *International and Comparative Law Quarterly* 959. The General Assembly has since adopted resolution 62/61 (8 January 2008), UN Doc.A/RES/62/61, in which it, once again, commended the Articles to the attention of States 'without prejudice to the question of their future adoption or other appropriate action' (operative paragraph 1), and included on the provisional agenda of its sixty-fifth session consideration of whether a convention should be adopted, or other appropriate action be taken, on the basis of the Articles (operative paragraph 4). See also D. Caron, 'The ILC

> there also seems to be widespread agreement with other examples listed in the Commission's commentary to Article 53, viz, prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among governments as to the peremptory character of these prohibitions at the Vienna Conference.

The remedies available to all States for the breach of a peremptory norm of international law under the law of State responsibility include: immediate cessation of the unlawful act if it is continuing; making assurances and guarantees of non-repetition if circumstances so require; satisfaction; and full reparation for material and moral damage caused by the internationally wrongful act.[11] Further, Article 41 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts imposes additional duties on all States when they are faced with a serious breach of an obligation arising under a peremptory norm of international law. The legal consequences for third States faced with such a situation are considered in detail in Chapter 6.

2. Scope of Empirical Evidence

The scope of Israeli practices considered in this report was confined from the outset in two ways. First, reflecting the present concern with the legality of Israel's occupation, it was confined to reviewing Israeli law and practices in the Gaza Strip, East Jerusalem and the West Bank, territories that Israel occupied in June 1967 and that lie beyond the ceasefire lines delineated in Israel's 1949 Armistice Agreements with Egypt and Jordan. Israeli policy in the Golan Heights, although also captured and occupied by Israel in 1967, was excluded from this study because the Golan was not a part of Mandate Palestine and so fell outside the scope of the Special Rapporteur's 2007 report to which this study responds. Israeli law and State practices inside the 1949 ceasefire lines were also excluded because the present concern is with the legality of Israel's occupation and accordingly with Israel's practices in territories of Mandate Palestine that are internationally recognised as being held under belligerent occupation.

This study found, however, that geographical exclusions did not operate neatly. For example, it was found that Israeli policy is to extend Israeli Basic Law and other civil law to Jewish settlers in the OPT. The High Court of the State of Israel also hears cases from Palestinians living in the OPT. Hence Israeli Basic Law and relevant civil law, as well as High Court decisions, are discussed where relevant.

Evidence is further confined to Israeli laws, policies and practices imposed after the June 1967 war when Israel's military occupation of the OPT began, with references to earlier history only to the extent necessary to clarify essential legal questions. This is not to imply that events and policy statements prior to 1967 are not relevant to a test of colonialism and apartheid, but only reflects concern that history and its historiography not distract from consideration of Israeli policies and practices in light of relevant international human rights and humanitarian law. Data and analysis pertaining to the post-1967 period is indeed considered here to be sufficient to test for regimes of colonialism and apartheid, drawing on relevant instruments of international law.

Empirical evidence in this study is assembled from United Nations organs, human rights organisations and other reputable authorities that have documented and analysed Israeli practices and policies in the OPT from the perspective of human rights law and international humanitarian law.

Articles on State responsibility: the paradoxical relationship between form and authority' (2002) 96 *American Journal of International Law* 857.

[11] See Articles 30, 31, 34 and 41 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts: for commentary, see C. Tams, 'Do serious breaches give rise to any specific obligations of the responsible State?' (2002) 13 *European Journal of International Law* 1161.

C. International Law in Occupied Territory

Determining whether Israel's practices in the OPT breach the prohibitions of colonialism and apartheid is made here within the legal framework regulating situations of belligerent occupation provided by international humanitarian law and relevant human rights law. International laws and norms relevant to a situation of belligerent occupation include laws on the use of force, international humanitarian law, international human rights law, and international criminal law, in addition to commentary and case law regarding the application of international law in occupied territories.

The primary legal framework regulating a situation of belligerent occupation is *international humanitarian law* (known also as the laws of armed conflict or the laws of war). Especially important here are those laws regulating the relations of an Occupying Power with the inhabitants of occupied territory: especially, the 1907 Hague Regulations and the 1949 Fourth Geneva Convention of 1949. Here it is useful to consider the meaning of 'belligerent occupation' and to outline the general protections provided by international humanitarian law. It is important also to clarify that the application of international humanitarian law to a particular context does not displace the application of human rights law.

International human rights law, including prohibitions of colonialism and apartheid, is also applicable in situations of belligerent occupation, as discussed below. The prohibition of colonialism is expressed most directly in the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples (1960). The prohibition of apartheid was introduced in the International Convention on the Elimination of All Forms of Racial Discrimination (1963), as affirmed by the Convention on the Suppression and Punishment of the Crime of Apartheid (1973). Discussed in more detail in Chapters 4 and 5, these instruments are also outlined below to clarify their configuration within human rights law.

1. International Humanitarian Law

The underlying normative framework of international law regulating belligerent occupation, and thus applicable to the OPT, is contained in the 1907 Hague Regulations and the Fourth Geneva Convention of 1949. The Hague Regulations are annexed to the 1907 Hague Convention IV respecting the Laws and Customs of War on Land, to which Israel is not a party, but they are recognised as forming part of customary international law.[12] In the *Beth El* case (1978), Justice Witkon of the Israeli High Court of Justice agreed that the Hague Regulations 1907 formed a part of customary international law and was therefore enforceable in the domestic courts of Israel.[13]

Israel became a party to the Fourth Geneva Convention on 6 July 1951. After the June 1967 War, Israel took the position that the Fourth Geneva Convention was not applicable as a matter of law to the West Bank, East Jerusalem and Gaza, employing the 'missing reversioner' and other arguments examined in Chapter II. Israel is also not a party to Protocol I Additional to the Geneva Conventions (1977), which expanded the definition of an international armed conflict and codified a number of fundamental principles governing the conduct of hostilities. Nonetheless, the UN Security Council, the UN General Assembly and the High Contracting Parties to the Convention have consistently affirmed its applicability[14] and in 2004, the International Court of Justice unanimously affirmed its

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[12] In the *Beth El* case (1978): see *Ayyub v. Minister of Defence* (1978) 33(2) P.D. 113 (English summary in (1979) 9 *Israel Yearbook of Human Rights* 337).

see *Ayyub v. Minister of Defence* (1978) 33(2) P.D. 113 (English summary in (1979) 9 *Israel Yearbook of Human Rights* 337).

[13] *Ayyub v. Minister of Defence* (1978) 33 (2) P.D. 113 (English summary in 9 *Isr YHR* (1979) 337).

[14] See S.C. Resolution 237 of 14 June 1967; S.C. Resolution 271 of 15 September 1969; and S.C. Resolution 446 of 22 March 1979. For General Assembly resolutions, see, for example, G.A. Resolution 56/60 of 10 December 2001 and G.A. Resolution 58/97 and 9 December 2003. See also Conference of the High Contracting Parties to the Fourth Geneva Convention: Declaration (5 December 2001) available at:

applicability in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion. Israel is also bound by the provisions of the Protocol I of 1977 that are established as customary international law, as has been recognised and applied by the Israeli High Court of Justice. Hence the general definition and legal meaning of belligerent occupation is discussed here for reference.

a. Defining 'Belligerent Occupation'

Belligerent occupation has been described as 'a transitional period following invasion and preceding the cessation of hostilities' which 'imposes more onerous duties on an Occupying Power than on a party to an international armed conflict'.[15] Determining the start of an occupation is essentially a question of fact,[16] which must be distinguished from invasion:

> Invasion is the marching or riding of troops—or the flying of military aircraft—into enemy country. Occupation is invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent from the fact that an occupant sets up some kind of administration, whereas the mere invader does not.[17]

This distinction flows from the Hague Regulations, which has the status of customary international law[18] and provides a definition of occupation upon which, on the whole, the Fourth Geneva Convention relies:

> 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.[19]

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http://domino.un.org/UNISPAL.NSF/fd807e46661e3689852570d00069e918/8fc4f064b9be5bad85256c1400722951!OpenDocument.

15. *Prosecutor v Naletilic and Martinovic*, Case No.IT-98-34-T (2003), 73, para.214, available at: www.un.org/icty/naletilic/trialc/judgement/nal-tj030(2003), www.un.org/icty/naletilic/trialc/judgement/nal-tj030331-e.pdf.

16. See A. McNair and A.D. Watts, *The Legal Effects of War* (Cambridge: Cambridge University Press, 1966), pp. 377-378; and G. Schwarzenberger, *International law as Applied by International Courts and Tribunals. Vol. II: The Law of Armed Conflict* (London: Stevens & Sons, 1968), p. 324.

17. L. Oppenheim, *International law: a treatise. Vol. II: Disputes, war and neutrality* (London: Longman, 1952), 7th edn by H. Lauterpacht), p. 434: see also *Re Lepore*, 13 *Annual Digest of Public International Law* Cases 354 (Supreme Military Tribunal, Italy: 1946) at 355; *Disability pension case*, 90 *International Law Reports* 400 (Federal Social Court, F. R. Germany: 1985) at 403; and G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press, 1957), pp. 28-29. See also below on the notion of effective control of occupied territory.

18. See *Prosecutor* v. *Naletilic and Martinovic*, available at: www.un.org/icty/naletilic/trialc/judgement/nal-tj030331-e.pdf, 73, para.215. The customary nature of the Hague Regulations was declared by the International Criminal Tribunal at Nuremberg in the *Trial of German Major War Criminals*, Cmd. 6964 (1946) 65. The customary status of the Regulations has since been affirmed by various other courts: see, for example, *In re Krupp* (US Military Tribunal at Nuremberg), 15 *Annual Digest of Public International Law Cases* 620, 622 (the Annual Digest was subsequently retitled International Law Reports, which is now the title applied to the series as a whole); *R. v Finta* (Canadian High Court of Justice), 82 *International Law Reports* 425 at 439; *Affo v IDF Commander in the West Bank* (Israel High Court), 83 *International Law Reports* 122 at 163; *Polyukhovich* v. *Commonwealth of Australia* (Australian High Court), 91 *International Law Reports* 1 at 123. See also T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), pp. 38-40.

19. The Fourth Geneva Convention comes into operation in relation to the civilian population earlier than the provisions of Section III of the Hague Regulations which deal with belligerent occupation. Article 6 of Geneva Convention IV provides that it applies 'from the outset of any conflict or occupation mentioned in Article 2'. The International Committee of the Red Cross' commentary to Article 6 states that this language was employed

> 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Thus, in 1949, the US Military Tribunal at Nuremberg ruled that

> an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organised resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.[20]

b. General Provisions of the Fourth Geneva Convention

The Fourth Geneva Convention is supplementary to Section II and III of the 1907 Hague Regulations[21] and is predominantly geared toward ensuring the protection of civilians. While human rights law applies without discrimination to all people in a territory, the provisions of the Fourth Geneva Convention apply only to those individuals who qualify as 'protected persons', specified in Article 6 as civilians 'who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals', excluding nationals of neutral or co-belligerent States that maintain diplomatic relations with the Occupying Power.

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to indicate that the Convention 'became applicable as soon as the first acts of violence were committed...Mere frontier incidents may make the Convention applicable, for they may be the beginning of a more widespread conflict. The Convention should be applied as soon as troops are in foreign territory and in contact with the civilian population.' Accordingly, the term 'occupation' in Article 6 bears a wider meaning than in Article 42 of the Hague regulations: 'So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of Article 42 ... The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Convention in its dealings with the civilians it meets.' J. Pictet (ed.), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), pp. 59-60. See also G. Mettraux, *International Crimes and the* ad hoc *Tribunals* (Oxford: Oxford University Press, 2005), pp. 64-71; and International Criminal Tribunal for the former Yugoslavia *Prosecutor v Naletilic and Martinovic*, 74-75, paras. 219-221, available at: www.un.org/icty/naletilic/trialc/judgement/nal-tj030331-e.pdf.

20. *Trial of Wilhelm List and others* (the *Hostages* trial), VIII *Law Reports of Trials of War Criminals* 34 (1949) at 55-56. As Benvenisti notes, however, although an occupant has the legal duty to establish an administration in territory it occupies, today this 'is the rare exception rather than the rule': see Eyal Benvenisti, *The international law of occupation* (Princeton: Princeton University Press, 1993), pp. 4-5: also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2005), p. 276, para.11(3)(1); *Prosecutor v Tadić*, Case No.IT-94-1-T (trial judgment, 7 May 1997), 204-205, para.584, available at: www.un.org/icty/tadic/trialc2/judgement/tad-tsj70507JT2-e.pdf; and *Prosecutor v Blaškić*, Case No. IT-95-14-T (trial judgment 3 March 2000), p. 51, para.149, available at: www.un.org/icty/blaskic/trialc1/judgement/bla-tj000303e.pdf. Thus, in the *Armed activities on the territory of the Congo* case, Judge Kooijmans noted in his separate opinion: 'Occupants feel more and more inclined to make use of arrangements where authority is said to be exercised by transitional governments or rebel movements or where the occupant simply refrains from establishing an administrative system': *Armed activities on the territory of the Congo case* (Democratic Republic of the Congo v Uganda), ICJ Rep, 2005, 168, Separate opinion of Judge Kooijmans, 306, p.317, para.41.

21 *Wall Advisory Opinion*, ICJ Rep, 2004, p. 172, para. 89. Section III concerns 'military authority of the territory of the hostile state' and is largely concerned with provisions aimed at preserving the institutions and structure of the state.

Although this study does not comprehensively review Israel's practices under the Fourth Geneva Convention, it is the scale of Israel's violations of the Fourth Geneva Convention that suggests different normative regimes in the OPT. In this respect, several of its protections have particular relevance to this report.

Article 49(6), for example, is especially relevant as it prohibits the transfer of the occupied power's population into occupied territory.[22] Article 53 prohibits destruction by the Occupying Power of real or personal property: 'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations'.[23] Both of these provisions are relevant to Israeli policies to establish Jewish civilian settlements in the OPT.

Article 27 presupposes a general right of movement for the civilian population, although this may be subject to restrictions made necessary by circumstances of war time.[24] Article 27 also ensures a range of rights regarding culture and family: 'Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs'. The authoritative commentary of the International Committee of the Red Cross states that, 'the obligation to respect family rights, already expressed in Article 46 of the Hague Regulations, is intended to safeguard marriage ties and that community of parents and children with constitutes a family, 'the natural and fundamental group unit of society'.[25] This protection implies the right of family members to reside together in the same household or location.

Article 27 also addresses the issue of discrimination, stipulating that 'all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion'. The same article provides guarantees for humane treatment and protection against acts or threats of violence, including torture. Article 33 prohibits collective punishments and all measures of intimidation or terrorism.

Other protections require that the Occupying Power ensure adequate sustenance to protected persons, including water, and access to health care. Articles 55-56, 59 and 60 stipulate the obligation of the Occupying Power to ensure the adequate provision of these necessities including allowing in relief supplies. Articles 65-68 and Articles 71-78 provide for due process, penal standards and protections in cases of assigned residence or internment (i.e., administrative detention).

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[22] Article 49(6) states, 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'

[23] The ICRC commentary to the Fourth Geneva Convention observes that the extension of protection to public property and to goods owned collectively reinforces the rules already stipulated in the Hague Regulations, Article 46 and 56, according to which private property and that of municipalities and of institutions dedicated to charity, religion or education, the arts and sciences, must be respected; see J. Pictet (ed.), *Commentary to 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), Commentary to Article 53, p. 301.

[24] The authoritative commentary on the Fourth Geneva Convention by the International Committee of the Red Cross notes that: 'So far as the local population is concerned, the freedom of movement of civilians of enemy nationality may certainly be restricted, or even temporarily suppressed, if circumstances so require. That right is not, therefore, included among the other absolute rights laid down in the Convention, but that in no way means that it is suspended in a general manner. Quite the contrary: the regulations concerning occupation and those concerning civilian aliens in the territory of a Party to the conflict are based on the idea of personal freedom of civilians remaining in general unimpaired. The right is therefore a relative one which the Party to the conflict or the Occupying Power may restrict or even suspend within the limits laid down by the Convention.' Commentary to Article 27, pp. 201-202.

[25] Pictet, *Commentary to Convention* IV, Commentary to Article 27, pp. 202-203.

2. Human Rights Law

While relations of the Occupying Power with the inhabitants of occupied territory are regulated by international humanitarian law, in recent years it has become increasingly recognised that additionally an Occupying Power must also afford human rights guarantees to the population of territories under its control. This study accordingly cites human rights law extensively. As successive Israeli governments have rejected the application of human rights law to the OPT (although the High Court has sometimes acknowledged it),[26] this approach requires some substantiation.

Some States, such as the United States and Israel, still adhere to the traditional view that human rights law and international humanitarian law are mutually exclusive because of their conditions for application and the sphere of protection they afford.[27] For instance, in 1998 the UN Human Rights Committee noted that Israel's representative had made the argument that,

> Humanitarian law in armed conflicts had to be distinguished from human rights law. Under human rights regimes, the purpose was to protect the individual from loss of life and liberty and from cruel treatment or oppression by the State, inflicted on him either as a citizen or as a person temporally subject to the jurisdiction of the State in question. Humanitarian law in armed conflicts, on the other hand, was designed to balance the needs of humanity against the nature of warfare. His Government believed that the latter situation was much more pertinent to the case of the occupied territories.[28]

Very simply, the traditional argument was that while human rights law applies during peace time, international humanitarian law alone applies once an armed conflict exists. Human rights law was also seen as applying within the national territory of a given State, whereas international humanitarian law was seen as applying extra-territorially as it regulated what States could do outside their own territory in wartime. Moreover, human rights law was seen as comprising a body of obligations that citizens could claim from their own government, whereas international humanitarian law was seen as principally imposing obligations on governments in their treatment of non-nationals—that is, concerning a different destination of obligation.

In recent decades, this traditional view has become inaccurate and inadequate. This is because human rights were recognised to be owed to non-nationals who are within a State's territory and therefore subject to its jurisdiction, while international humanitarian law also regulates the conduct of hostilities in a non-international armed conflict (as common Article 3 to the four Geneva Conventions of 1949 and 1977 Additional Protocol II attest). Moreover, as the International Committee of the Red Cross' study of customary international humanitarian law demonstrates, regulation of different types of conflict has converged, as many of the customary rules applicable in international armed conflicts are equally applicable in non-international conflicts.[29]

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[26] Israel's Supreme Court acting as the High Court of Justice has also recognised this, although in equivocal terms. See HCJ 7957/04 Mara'abe v. Prime Minister of Israel, 21 June 2005, translated from the original Hebrew in (2006) 45 *International Legal Materials* 202, 215, para. 27. ('…we shall assume – without deciding the matter – that the international conventions on human rights apply in the area.')

27. See F. Hampson and I. Salama, *Working paper on the relationship between human rights law and international humanitarian law* (E/CN.4/Sub.2/2005/14 of 21 June 2005), 17, paras. 69-70. For the United States' position, see also Human Rights Committee, *Consideration of reports submitted under Article 40 of the Covenant. Concluding observations: United States of America*, CCPR/C/USA/CO/3/Rev.1 (18 December 2006), pp. 2-3, para.10, and U.S. Department of Defense, *Working Group Report on detainee interrogations in the global war on terrorism: assessment of legal, historical, policy and operational considerations* (6 March 2003), p. 6, available at, www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf. For a statement of the Israeli position see, for example, Human Rights Committee, *Summary record of the 1675th meeting* (CCPR/C/SR.1675 of 21 July 1998), statement of Mr. Schoffmann (Israel), para. 23.

28. Human Rights Committee, *Summary record*, statement of Mr. Schoffmann (Israel), para.23.

29. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 vols. (Cambridge: Cambridge University Press, 2005). For commentaries on the use of human rights law in this study, see F. Hampson, 'Other areas of customary law in relation to the Study', in Elizabeth Wilmshurst and

Hence international humanitarian law is neither an autonomous nor a comprehensive legal regime.[30] As early as the late 1960s, United Nations bodies affirmed that some substantive human rights remained relevant during an international armed conflict.[31] In Resolution 237 (14 June 1967) on the situation in the Middle East, the Security Council noted that 'essential and inalienable human rights should be respected even during the vicissitudes of war'. In Resolution 2675 of 9 December 1970, entitled 'Basic principles for the protection of civilian populations in armed conflicts', the General Assembly affirmed that 'Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict'.[32]

By the mid-1990s, it was generally accepted that both human rights instruments and international humanitarian law were relevant in the regulation of non-international armed conflict. Still, the doctrine that both could also be applicable during an international armed conflict was only emerging.[33] The first authoritative ruling on this question was in 1996, when the ICJ considered whether the International Covenant on Civil and Political Rights was applicable during an international armed conflict. In the *Legality of the threat or use of nuclear weapons* advisory opinion, the Court ruled:

> the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then

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Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2007), p. 58 *et seq*; and also H. Krieger, 'A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC customary law study' (2006) 11 *Journal of Conflict and Security Law* 265. See also Noam Lubell, 'Challenges in applying human rights law to armed conflict' (2005) 860 *International Review of the Red Cross* 737 at 747.

30. For a partial enumeration of *lacunae* in the legal régime of occupation, see G. von Glahn, 'The protection of human rights in time of armed conflicts' (1971) 1 *Israel Yearbook on Human Rights* 208 at 212-213.

31. For contemporary commentary see, for instance, GIAD Draper, 'The relationship between the human rights regime and the law of armed conflicts' (1971) 1 *Israel Yearbook on Human Rights* 191, and von Glahn, *Human rights*.

[32] GA Resolution 2675 (XXV) of 9 December 1970, 'Basic principles for the protection of civilian populations in armed conflicts', operative paragraph 1.

33. See, for instance, H.S. Burgos, 'The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tensions, or public emergency, with special reference to war crimes and political crimes', in F. Kalshoven and Y. Sandoz (eds.), *Implementation of International Humanitarian Law* (Doredrecht: Martinus Nijhoff, 1989), p. 1; C. M. Cerna, '*Human rights in armed conflict: implementation of international humanitarian norms by regional intergovernmental human rights bodies'*, in Kalshoven and Sandoz, p. 31; Y. Dinstein, 'Human rights in armed conflict: international humanitarian law', in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984) Vol. II, p. 345; L. Doswald-Beck and S. Vite, 'International humanitarian law and human rights law' (1993) 293 *International Review of the Red Cross* 94; A. Eide, 'The laws of war and human rights—divergences and convergences', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (The Hague: ICRC, 1984) p. 675; F. Hampson, 'Human rights and humanitarian law in internal conflicts', in A. Meyer (ed.), *Armed Conflict and the New Law* (London: British Institute of International and Comparative Law, 1989), p. 55; P.H. Kooijmans, 'In the shadowland between civil war and civil strife: some reflections on the standard-setting process', in A. Delissen and G. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of Frits Kalshoven* (Dordrecht: Martinus Nijhoff, 1991), p. 225; T. Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius, 1987); AH Robertson, 'Humanitarian law and human rights', in Swinarski, *op cit*, 793; and D Schindler, 'Human rights and humanitarian law: interrelationship of the laws' (1982) 31 *American University Law Review* 935.

> falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[34]

This opinion legally entrenched the idea of a normative relationship between international humanitarian and human rights law in international armed conflict.[35] It did not provide a completely candid or transparent account of that relationship but nevertheless contradicted the traditional idea that these two branches of law are mutually exclusive because of their conditions for application and the sphere of protection they afford.

In the *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, the Court reaffirmed this earlier approach:

> the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[36]

This ruling was reaffirmed in the *Armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)* case,[37] where the International Court of Justice, concluding that Uganda was the Occupying Power in Ituri, (in the Democratic Republic of the Congo), asserted clearly that Uganda was therefore under an obligation according to Article 43 of the Hague Regulations of 1907, 'to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not

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34. *Legality of the threat or use of nuclear weapons* advisory opinion, ICJ Rep, 1996 (1), 226 at 240, para.25. The earlier ruling by the European Court of Human Rights which addressed aspects of the applicability of human rights norms in an international armed conflict, delivered in *Loizidou v Turkey, preliminary objections judgment* (23 March 1995), Series A, No.310 at 23-24, paras. 62-64, is more restricted than that of the International Court in the *Nuclear weapons* advisory opinion. In *Loizidou*, the European Court addressed only the extra-territorial applicability of the European Convention on Human Rights where a State party exercises effective control over foreign territory. It ruled (24, para.62): 'Bearing in mind the object and purpose of the Convention, the responsibilities of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set forth in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.'

35. It could also be seen as counter-intuitive, as international humanitarian law, the law regulating armed conflict, is a much older branch of international law than the protection of human rights. Robertson, however, observed that this apparent anomaly disappears when the issue is considered analytically. Human rights are the basic rights of everyone in all places at all times, whereas humanitarian law ascribes rights to specific categories of persons, in essence those who fall within the categories of protected persons enumerated in the 1949 Geneva Conventions, in the specific circumstance of an armed conflict. Accordingly, human rights provisions constitute the norms of general application and only in exceptional circumstances do the norms of international humanitarian law apply. See Robertson, 'Humanitarian law and human rights', pp. 797-798: see also R. Wilde, 'Triggering State obligations extraterritorially: the spatial test in certain human rights treaties' (2007) 40 *Israel Law Review* 503, but compare M. J. Dennis, 'Application of human rights treaties extraterritorially in times of armed conflict and military occupation' (2005) 99 *American Journal of International Law* 119, and his 'Non-application of civil and political rights treaties extraterritorially during times of international armed conflict', (2007) 40 *Israel Law Review* 453.

36. *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, ICJ Rep, 2004, 136, at 178, para.106.

37 *Congo* case, para 216.

to tolerate such violence by any third party'[38] The Court further considered that the following instruments in the fields of international humanitarian law and international human rights law were applicable, as relevant, to that instance of belligerent occupation:

- Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention (18 October 1907). (Neither the DRC nor Uganda are parties to the Convention but the Court reiterates that 'the provisions of the Hague Regulations have become part of customary law'[39] and as such are binding on both Parties).
- Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949).
- International Covenant on Civil and Political Rights (19 December 1966).
- Protocol Additional to the Geneva Conventions (12 August 1949) and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977).
- African Charter on Human and Peoples' Rights (27 June 1981).
- Convention on the Rights of the Child (20 November 1989).
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000).'[40]

Some commentators have noted that the Court omitted reference to *lex specialis* (a legal doctrine which holds that law concerning a specific subject, such as the law of armed conflict, is not overridden by a more general law, such as general human rights law):

> [The Court] thus concluded [in the Consequences of a wall advisory opinion] that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.[41]

Prud'homme claims that this omission amounts not simply to 'a jurisprudential retreat from the principle of *lex specialis*' by the Court but rather that it has 'completely abandoned the theory of *lex specialis*'.[42] This could reflect contemporary doubt about the ability of the *lex specialis* doctrine to provide a coherent and principled solution to potential conflicts between norms and, specifically, to determine the relationship between human rights and international humanitarian law in an international armed conflict.[43] As the doctrine's application is dependent on context rather than axiological principle, it is arguably unable to provide clear and unequivocal solutions to potential norm conflicts in international law. This is because the legal system on the whole lacks hierarchical structure and the relationships between both sources of law and their substantive norms remain undefined:

> the application of *lex specialis* faces difficulties when we need to determine the relationship between two different normative orders or rules deriving from different areas of law, such as

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[38] *Congo* case, para 178.

[39] *Wall* Advisory Opinion, I.C.J. Reports (2004), p. 172, para. 89.

[40] *Congo* case, para 217.

41 *Congo* case, pp. 242-243, para.216, and see 242-245, paras.215-221.

42. N Prud'homme, 'Lex specialis: oversimplifying a more complex and multifaceted relationship?' (2007) 40 Israel Law Review 355 at 385.

43. See, for instance, O. Ben-Naftali O and Y. Shany, 'Living in denial: the application of human rights in the Occupied Territories', (2003) 37 *Israel Law Review* 17; Hampson, *Other areas*, 66-68; Prud'Homme, 'Lex specialis'; W. A. Schabas, 'Lex specialis? Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of jus ad bellum' (2007) 40 *Israel Law Review* 592; and more generally, J. Kammerhofer, *Unearthing structural uncertainty through neo-Kelsenian consistency: conflict of norms in international law* (2005), available at: www.esil-sedi.eu/english/pdf/Kammerhofer.pdf; and A. Lindroos, 'Addressing norm conflicts in a fragmented legal system: the doctrine of lex specialis' (2005) 74 *Nordic Journal of International Law* 27.

> environmental norms and trade norms ... If two specialised norms stand side by side, the *lex specialis* maxim cannot be applied, given its inability to establish whether environmental protection is more special than human rights law, the law of the sea, or trade law.
>
> As the maxim is a mechanic principle without a clear content it does not provide guidance in determining what is general and what is special. This is the second difficulty faced in the application of *lex specialis* to different normative orders. Giving priority to a special norm within the system of unclear norm relations in which a decision cannot rely on such relations, the decision actually relies on political or other considerations ... Basing a decision only on a juridical logic such as *lex specialis* is rarely possible in the international legal system...
>
> Thirdly, lex specialis is in some sense a contextual principle. It is difficult to use when determining conflicts between two normative orders *in abstracto*, and is, instead, more suited to the determination of relations between two norms in a concrete case.[44]

Moreover, contemporary doctrine has expanded the traditional denotation of the *lex specialis* principle beyond that of a mere tool to be employed to solve potential conflict between substantive norms. As is apparent from the International Court's ruling in the *Threat or use of nuclear weapons* advisory opinion, it may be used as an interpretative device, where the content of the 'general' rule is determined in the light of the implications of the more 'specialised' rule:

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[45]

As Schabas usefully notes, however, human rights and international humanitarian law norms do not necessarily conflict or differ in their substantive content. Recourse to *lex specialis* is superfluous when there is no such conflict. Schabas claims that the fundamental compatibility of both normative systems was demonstrated in the *Consequence of a wall* advisory opinion and the *Armed activities (Congo v Uganda)* case. Human rights and international humanitarian law can be complementary as each can fill lacunae in the other, as some issues are more clearly regulated by one regime rather than the other.[46]

Further, in *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, the Human Rights Committee did not rely on the *lex specialis* maxim to determine the respective application of human rights and international humanitarian law in international armed conflicts. Rather, the Committee indicated that the issue depended on convergence or parallel application:

> … the Covenant [on Civil and Political Rights] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.[47]

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44. Lindroos, *Addressing norm conflicts*, pp. 41-42.

45. *Legality of the threat or use of nuclear weapons* advisory opinion, ICJ Rep, 1996(1), 226 at 240, para.25.

46. Schabas, *Belt and suspenders?*, pp. 596-597: see also Hampson, *Other areas*, pp. 63-65; and A. Roberts, 'Transformative military occupation: applying the laws of war and human rights' (2006) 100 *American Journal of International Law* 580 at 594.

47. Adopted 26 May 2004, UN Doc.CCPR/C/21/Rev.1/Add.13; General Comment 29, adopted 31 August 2001, dealt with states of emergency, UN Doc.CCPR/C/21/Rev.1/Add.11. This approach is a trend evident in recent doctrine: for instance, see D. Kretzmer, 'Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?' (2004) 16 *European Journal of International Law* 171; Prud'Homme, *Lex specialis*; Roberts, *Transformative military occupation*; and Schabas, *Belt or suspenders?*. It reflects a renewed interest in doctrines of systemic interpretation derived from Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties: see C. McLachlan, 'The principle of systemic integration and Article 31(3)(c) of the Vienna

These considerations are apposite to mapping the relationship between human rights and international humanitarian law. A more restricted view is appropriate to the issue in hand, namely the assessment of Israeli practices in the OPT in the light of international standards prohibiting racial discrimination, colonialism and apartheid. As Israel can only exercise jurisdiction within these territories in its capacity as a belligerent occupant, the over-arching framework of the law of occupation must determine the governing normative context within which other rules of international law are applied. Although Roberts argues that one should be cautious in asserting uncritically that human rights instruments should be applied in occupied territory,[48] it may safely be claimed that core prohibitions on racial discrimination and apartheid, for example, do apply by virtue of their status as *ius cogens* norms.[49]

The ICJ has considered Israel's duty to apply concurrently human rights and international humanitarian law in the OPT in the *Consequences of a wall* advisory opinion, where it re-affirmed its earlier ruling in the *Threat or use of nuclear weapons* advisory opinion that human rights conventions continue to apply in time of armed conflict (subject to any derogations made by States parties using mechanisms such as Article 4 of the International Covenant on Civil and Political Rights).[50] The ICJ then considered the extra-territorial application within the OPT of the principal human rights instruments to which Israel is a party—namely the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child.[51] In finding that the ICCPR applied extra-territorially, the ICJ followed the settled view of the Human Rights Committee that this principle was confirmed by the *travaux préparatoires* of Article 2.1 of the Covenant.[52] Article 2.1 provides:

> Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In this ruling, the ICJ noted, but rejected, Israel's consistent claim made before the Human Rights Committee that it is under no legal obligation to apply the ICCPR in the OPT.[53]

In contrast, the ICJ observed that the ICESCR contains no provision regulating the scope of its application. While noting that this Covenant dealt with rights that are 'essentially territorial', the ICJ continued that 'it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction'. Accordingly, it rejected Israel's claim, made before the Committee on Economic, Social and Cultural Rights, that it was under no legal obligation to apply the ICESCR in the OPT. It further ruled that Israel 'is under an

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Convention' (2005) 54 *International and Comparative Law Quarterly* 279; also C. Borgen, 'Resolving treaty conflicts' (2005) 37 *George Washington International Law Review* 573.

[48] See Roberts, *Transformative occupation*, pp. 599-600: for example, although it may be accepted in principle that an occupant is bound to apply the International Convention on Civil and Political Rights in occupied territory, does this entail that the occupant has the obligation to facilitate the exercise of the right to vote by protected persons present in the territory?

[49] See Hans-Peter Gasser, 'Protection of the civilian population', in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), p. 209 at p. 255, para. 547(4).

50. *Wall* advisory opinion, ICJ Rep, 2004, 177-178, paras. 105-106.

51. See *Consequences of a wall* advisory opinion, ICJ Rep, 2004, 177-181, paras. 102-113. Israel ratified both International Covenants and the Children's Convention on 3 October 1991: see ICJ Rep, 2004, 177, para. 103.

52. See, for example, Human Rights Committee, *Consideration of Reports submitted by States parties under Article 40 of the Covenant. Concluding observations: Israel*, CCPR/C/79/Add.93 (18 August 1998), para. 10. For a contrary interpretation of the *travaux préparatoires*, see Dennis, 'Application of human rights treaties', 123-124 and 122-127 generally, and his *Non-application of civil and political rights*, pp. 474-477.

53. *Wall* advisory opinion, ICJ Rep, 2004, 179-180, paras. 109-111.

obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities'.[54]

Similarly, in the case of *Loizidou v Turkey*, which addressed the scope of Turkey's extraterritorial responsibility to implement and respect the European Convention on Human Rights in Northern Cyprus, the European Court of Human Rights held that:

> the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[55]

It is clear therefore that international courts have conclusively negated the position on the extra-territorial application of human rights treaties during armed conflict that Israel had expounded before, as noted earlier.

Hampson and Salama have considered whether Israel is entitled to rely on the principle of persistent objection to claim that the applicability of international humanitarian law precludes that of human rights law in armed conflict. (This principle provides that a State may contract out of a customary rule as it is being formed by claiming that it is not bound by the emerging rule.[56]) Hampson and Salama doubt whether Israel can rely on this principle because Israel's objection does not appear to be sufficiently consistent: Israel has neither made reservations to this effect nor objected to general comments by the Committee that have dealt with the applicability of human rights law in time of armed conflict.[57] The ICJ had ruled that Israel's view was contrary to the preponderant interpretation of the extra-territoriality of the Covenants. The question was not the existence of Israel's obligations under the Covenants, but rather the extent of those obligations.

Accordingly, international consensus is that the framework of the law of occupation cannot preclude the parallel application of human rights law. It may be that the *lex specialis* rule determines the interpretation of a given rule in specific circumstances—as, for instance, when the question of what amounts to an arbitrary deprivation of life must be assessed in the light of the *lex specialis* of international humanitarian law—but frequently human rights and humanitarian law rules do not conflict or differ in their content. The prohibitions on racial discrimination and apartheid, however, have the status of *ius cogens* norms from which no derogation is allowed and so will pre-empt any conflicting interpretation or application of any norm of international law, including norms of humanitarian law.

To conclude, Israel's rejection of the applicability of human rights law in the OPT has been authoritatively rejected by the International Court of Justice and by the wider international

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54. *Wall* advisory opinion, ICJ Rep, 2004, 180-181, para.112: compare Dennis, 127-128.

[55] *Loizidou v Turkey* (App no 15318/89 of 18 December 1996), 36 *International Legal Materials* (1997) 440 at 453, para. 52.

[56] On the principle of persistent objection, see *Fisheries (United Kingdom v Norway)*case, ICJ Rep, 1951, 116 at 131 and 138-139; International Law Association, *Final report of the Committee on the formation of customary (general) international law* (London: ILA, Report of the Sixty-Ninth Conference, 2000) p. 712; M. Mendelson, 'The formation of customary international law' (1999) 272 *Receuil des Cours* 158 at 227-244: and compare J. Charney, 'The persistent objector rule and the development of customary international law' (1985) 56 *British Yearbook of International Law* 1; and T. Stein, 'The approach of a different drummer: the principle of persistent objector in international law' (1985) 26 *Harvard Journal of International Law* 457.

57. Hampson and Salama, p. 17, para.70; see also Hampson, *Other areas*, pp. 68-72. One may also wonder whether a claim based on persistent objection can be structural as opposed to substantive.

community. Israel cannot claim that human rights law, including the prohibition of apartheid, is irrelevant to its administration of the OPT. While international humanitarian law, and in particular the law of belligerent occupation, provides the primary legal framework to assess the legality of the conduct of that occupation, this does not preclude the application of other rules of international law, such as human rights law. Indeed, international humanitarian law itself mandates that its application must consider relevant norms in other areas of international law, including the prohibitions on apartheid and colonialism.[58]

Hence this study considers that international human rights law and humanitarian law both apply in situations of belligerent occupation. International human rights law applicable to Israel's actions as the Occupying Power in the OPT is set out primarily in the Universal Declaration of Human Rights, the ICCPR and the ICESCR, both of which Israel has ratified. In sum, the following instruments are also applicable and shall be referred to throughout the study:

- Convention on the Prevention and Punishment of the Crime of Genocide (1948)[59]
- Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)
- Convention on the Elimination of All Forms of Racial Discrimination (1965) [60]
- Convention on the Elimination of All Forms of Discrimination Against Women (1979) [61]
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) [62]
- Convention on the Rights of the Child (1989) [63]
- Convention on the Suppression and Punishment of the Crime of Apartheid (1973)
- Rome Statute of the International Criminal Court (1998)

3. Prohibition of Colonialism in International Law

Whether Israel's belligerent occupation of the West Bank and Gaza constitutes a colonial project has attracted relatively little attention from the perspective of international law. This neglect may stem from several causes. It may reflect impressions that colonialism was a practice restricted to domination by white European powers of non-white, non-European territories and thus is not as obviously applicable in the Israeli-Palestinian context as it was to, say, French and British rule in Africa.[64] It could reflect an assumption that colonialism has become an obsolete concern for

[58] See for example Articles 72 and 75 (c) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I), (1977), entered into force 7 December 1978, 1125 U.N.T.S. 3.

[59] Ratified by Israel on 9 March 1950.

[60] Ratified by Israel on 3 January 1979.

[61] Ratified by Israel on 3 October 1991.

[62] Ratified by Israel on 3 October 1991.

[63] Ratified by Israel on 3 October 1991.

[64] As noted by Berman, 'Many contemporary disputes involving assertions of self-determination pose exceptionally 'hard cases': unusual competing claims of arguably non-European peoples (Palestine), areas where the indigenous people constitutes an electoral minority (New Caledonia), etc.': Nathanial Berman, 'Sovereignty in Abeyance: Self-Determination and International Law' (1988-1989) 7 *Wisconsin International Law Journal* 51 at 59.

[64] On contemporary discussion of 'colonialism' in the present day, see, for example, Nadav Carmel-Katz 'Colonialism to Racism' (1981) 10 *Journal of Palestine Studies* 4 170-178; See John Strawson, 'Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination' (2001-2002) 20 *Penn State International Law Review* 363.

international law since the decolonization of African and Asian States in the 1960s and 1970s.[65] It may even reflect acceptance that Israel's establishment in 1948 resulted from a struggle for Jewish self-determination against the British colonial power, a narrative that casts Israel as a decolonized rather than a colonizing State and precludes consideration of Israel as an agent of colonialism (as discussed later).[66]

Nevertheless, as UN Special Rapporteur John Dugard noted, some elements of Israel's occupation—for example, the unlawful transfer of settlers into occupied territory, discriminatory policies of the Occupying Power on the basis of ethnicity and religion, appropriation of natural resources, 'de-development' of the Palestinian economy and forced dependence on the Israeli economy, and especially denial of the Palestinian people's right to self-determination—prima facie suggest a contemporary manifestation of colonialism. The study thus seeks to appraise whether Israel's policies and practices in the OPT constitute a substantive practice of colonialism.

Typically, the term 'colonialism' has been used to refer to the domination of non-European peoples by European powers in the sixteenth through early twentieth centuries,[67] expressed in de facto and de jure seizure of land, denial of indigenous self-governance, and the domination, subjugation and exploitation of such lands and their peoples for the enrichment and greater hegemony of the colonising State. European powers characteristically acquired territory through conquest, treaties of cession, and 'protection' or the occupation of lands deemed or claimed to be terra nullius.[68] Colonial rule then emerged from the coloniser's claim to be the territory's legitimate sovereign or to hold exclusive trade rights relative to other European powers and ultimately control the territory's foreign policy and to redirect its domestic economy to serve the coloniser's interest.. Policies of the metropol sometimes included formal policies to settle their own population in the colonised territory but in most cases they merely implanted smaller populations of administrators to serve colonial bureaucracies.[69]

Prohibitions on colonialism emerged gradually while much of the world was still under European domination in the nineteenth and early twentieth centuries. Mégret points out that nascent

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, 363; Geremy Forman and Alexandre Kedar, 'Colonialism, Colonization, and Land Law in Mandate Palestine: The Zor al-Zarqa and Barrat Qisarya Land Disputes in Historical Perspective' (2003) 4 *Theoretical Inquiries* 491; Robert Home, 'Colonial and Postcolonial Land Law in Israel/Palestine' (2003) 13 *Social & Legal Studies* 3, 291; Ralph Wilde, 'The Post-Colonial Use of International Territorial Administration and Issues of Legitimacy' (2005) 99 *Proceedings of the American Society of International Law* 38.

[65] Leonard Barnes offers another explanation of simple distance: since '[f]ormulations of human rights naturally tend to reflect the major frustrations of those who made them', the architects of international law are at a far remove from the oppressed of a colony, of territories where 'economic subordination entails political disability; where political disability may bring with it severe restrictions upon civil liberty and an exceptional widening of the legal meaning of 'sedition' (such restrictions being at their most severe when the metropolitan authorities regard the native culture as backward or inferior); and where official anxiety about sedition and allied offences lead to judicial and police practices which in the metropolitan country would be regarded as unusually harsh.' see 'The Rights of Dependent Peoples' in *Human Rights: Comments and Interpretations* (UNESCO, Paris, 25 July 1948) UNESCO/PHS/3 (rev.) p 253.

[66] See John Strawson, 'Reflections on Edward Said', at 376.

[67] See J. T. Gathii, 'Imperialism, Colonialism and International Law' (2007) 54 *Buffalo Law Review* 1013 at 1014.

[68] J. A. Andrews, 'The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century' (1978) 94 *Law Quarterly Review* 408 at 410. *Terra nullius* refers to territory devoid of government and under no sovereignty: see John Dugard, *International Law: A South African Perspective* (Cape Town: Juta & Co. 2001), pp. 119-120.

[69] 'One can speak of colonization when there is, and by the very fact that there is, *occupation with domination*; when there is, and by the very fact that there is, emigration with legislation': R. Maunier, *Sociologue coloniale (I), Introduction a l'etude du contact des races* (Paris: Domat-Montchrestien, 1932) p. 37, quoted in M. Rodinson, *Israel: A Colonial-Settler State?* (New York: Monad Press, 1973), p. 92: emphasis in Rodinson.

humanitarian norms at this time were designed exclusively for European enjoyment; their origins trace to the 1859 Battle of Solferino, which was 'a very European battle'.[70] Limiting the scope of military campaigns outside of Europe made little sense while non-European peoples and their territories continued to exist, for Europeans, in a 'twilight world' of unfixed international legal personality open to colonial domination.[71] Regardless of these origins, norms related to armed conflict in Europe eventually consolidated an understanding that military occupation was a temporary regime qualitatively distinct from the annexation of territory. In the mid-twentieth century, facing a scale of indigenous resistance that exhausted European energies and funds for sustaining colonial empires, these norms crystallised as a sweeping prohibition against conquest and foreign domination through the endorsement of the right of peoples to self-determination.[72]

Although self-determination in international relations lexicon first emerged in 1919 in the aftermath of the First World War,[73] it did not mature as a legal norm in customary international law until decolonization, when nascent norms against colonialism expressed the principle of self-determination as a rejection of 'alien subjugation, domination and exploitation'. In 1960, these norms were codified in the UN General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples[74] (henceforth, the Declaration), which comprises the basis for this study and is discussed in more detail in Chapter 4.[75] Although the Declaration is not binding per se, it has acquired the status of a customary rule of international law over time.[76] It has also been described as making 'a significant contribution to developing the concept of the right of self-determination, representing as it does the most definitive statement of condemnation of colonialism by the international community'.[77]

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[70] F. Mégret, 'From 'Savages' to 'Unlawful Combatants': A Post-Colonial Look at International Humanitarian Law's 'Other', in A. Orford (ed.), *International Law and its 'Others'* (Cambridge: Cambridge University Press 2006) 265 at 270.

[71] A. Anghie, *Sovereignty, Imperialism and the Making of International Law* (Cambridge: Cambridge University Press, 2005), p. 79.

[72] Under Article 1(2) of the UN Charter, self-determination is characterised in the English text as a 'principle' and not a right. This is also the case with the Chinese, Spanish, and Russian texts. In the French text, the term is *droit d'auto-détermination.* According to Article 111 of the UN Charter all five texts are authentic. Article 33 (3) of the Vienna Convention on the Law of Treaties 1969 provides that the terms of the treaty are presumed to have the same meaning in each authentic text. It is therefore arguable that the texts must be reconciled if possible, to achieve a meaning that makes sense in each authentic text. In 1945, self-determination was not a binding legal right but a general principle. It was only later within the context of the human rights movement and decolonization that self-determination was recognised as a right under customary international law. See R Falk, 'Self-Determination under International Law: The Coherence of Doctrine versus the Incoherence of Experience', in W. Danspeckgruber (ed.), *The Self-Determination of Peoples: Community, Nation and State in an Interdependent World* (Boulder, CO: Lynne Rienner, 2002), pp. 31-66, 41.

[73] President Woodrow Wilson's articulation of self-determination in his Fourteen Points speech before the United States Congress was in response to the Bolsheviks' pronouncement in support of self-determination. See Derek Heater, *National Self-Determination: Woodrow Wilson and His Legacy* (London: MacMillan, 1994), pp. 36-37.

[74] See GA Res. 1514 (XV), 14 Dec. 1960.

[75] This resolution was adopted unopposed by all the colonial powers, which chose to abstain rather than vote against it: see Umozurike Oji Umozurike, *Self-Determination in International Law* (Connecticut: Archon Books, 1972), p. 73.

[76] See G.I. Tunkin, *Droit International Public: Problèmes Théoriques* (Paris: A. Pédone, 1965), p. 101. See also Christos Theodoropoulos, *Colonialism and General International Law: The Contemporary Theory of National Sovereignty and Self-Determination* (New Horizon, 1989).

[77] Frank Abdullah, 'The Right to Decolonization', in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects* (Dordrecht: Martinus Nijhoff Publishing, in association with UNESCO, Paris, 1991), p. 1209.

The Declaration opens with statements affirming the 'passionate yearning for freedom of all dependent peoples' and further affirms that 'the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace'. Article 1 then holds that

> The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

Article 4 calls for an end to armed repression of colonized peoples and Article 5 calls for granting complete independence to such peoples

> Immediate steps shall be taken, in Trust and Non-Self-Governing Territories *or all other territories which have not yet attained independence*, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.[78]

In referring to 'all other territories which have not yet attained independence', Article 5 ensures that the Declaration's provisions apply not only to Trust and Non-Self-Governing Territories generally but also to any other territory that has 'not yet attained independence', which would include those territories that had previously been placed under a League of Nations mandate,[79] such as Palestine which had 'reached a stage of development where [its] existence as [an] independent nation … [was] provisionally recognized' in the League of Nations Covenant in 1919. This was given expression in the British Mandate for Palestine that had been prepared by the Council of the League of Nations in 1922. As Crawford notes, '[l]egally the reason why the Palestinians have the right of self-determination now was that they had it as of 1922 under the mandate for Palestine'. In its advisory opinion on *Namibia*, the ICJ declared that

> the subsequent development of international law in regard to non self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not yet attained a full measure of self-government' (Article 73). Thus it clearly embraced territories under a colonial régime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'.[80]

The representative of the United States clarified the goal of the Declaration as applying to all such territories irrespective of their geographic location or legal status when he stated that,

> The Charter [of the United Nations] declares in effect that on every nation in possession of *foreign territories*, there rests the responsibility to assist the peoples of these areas 'in the progressive development of their free political institutions' so that ultimately they can validly choose for themselves their permanent political status.[81]

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[78] Emphasis added.

[79] See James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in Philip Alston (ed.) *People's Rights* (Oxford: Oxford University Press, 2001), p. 14.

[80] 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, 31, para. 52.

[81] Majorie M. Whiteman, 5 *Digest of International Law* (Washington D.C.: Department of State Publication, 1965), p. 82, emphasis added, parenthesis in original. The use of the term 'foreign territories' in the passage just

Colonialism can thus be distinguished from other forms of foreign domination (such as prolonged belligerent occupation) by the dominant power's open claim to sovereignty or assuming such authority over a territory's foreign and domestic policy as to allow the people of the territory only nominal sovereignty (such as 'indirect rule' by Britain in colonial Africa). The language of the chapeau of the Declaration, in the first paragraph regarding self-determination and in Article 5 (which emphasizes that 'all power' should be transferred to dependent peoples so that they can enjoy 'complete independence and freedom') stresses the link between a dependent people and their human rights, self-determination and sovereignty over their territory. The same concern was reiterated by the General Assembly in Resolution 2649 (30 November 1970), which recognised 'the importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights'. A finding of colonialism could thus be made for any territory where practices of the colonial power extend not just to the appropriation of land and natural resources but also to denying—and demonstrating an intention permanently to deny—the peoples of that territory their right to self-determination.[82]

The Preamble to the Declaration expresses a special concern with territorial integrity, to ensure that the self-determination of a people can be meaningfully expressed. It affirms that 'all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory' and later reiterates that 'the integrity of their national territory shall be respected'. Article 6 further emphasises that 'any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.

The Declaration's broad condemnation of 'colonialism in all its forms and manifestations' would include incremental colonization of territory through civilian settlement, including in occupied territory. Article 49 (6) of the Fourth Geneva Convention prohibits an Occupying Power from transferring its own population into the territory it occupies precisely 'to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order to, as they claimed, to colonize those territories'.[83]

As discussed in Chapter III, the Israeli Foreign Ministry argues that Article 49(6) of the Fourth Geneva Convention is not violated by Jewish settlement in the OPT because it reflects voluntary population movement rather than forced transfer.[84] This argument is irrelevant because Article 49(6) does not specify that the 'transfer' need to be forced. Thus. on 18 September 1967, the then legal adviser to the Israeli Foreign Ministry, Theodor Meron, advised the Israeli government that: "The prohibition [contained in Article 49(6)]…is categorical and not conditional upon the motives for the transfer or its objectives. Its purpose is to prevent settlement in occupied territory of citizens of the occupying state".[85] Further, the US State Department Legal Adviser similarly noted in a legal opinion

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quoted is significant because it can be applied to territories that are not a part of the metropolitan State for the purposes of a State's municipal law, to territories which are geographically separate, and to those which are contiguous to it but do not belong to it.

[82] On definitions of colonialism, see Ronald J. Hovarth, 'A Definition of Colonialism' (1972) 13 *Current Anthropology* 45 at 46-47; Robert E. Gorelick, 'Apartheid and Colonialism' (1986) 19 *Comparative and International Law Journal of Southern Africa* 70 at 71.

[83] Jean S. Pictet, *Commentary, IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), p. 283.

[84] Foreign Ministry of Israel, 'Israeli Settlements and International Law', available at http://www.mfa.gov.il/mfa/peace%20process/guide%20to%20the%20peace%20process/israeli%20settlements%20and%20international%20law.

[85] A scan of the original Hebrew text of this opinion is available at: http://southjerusalem.com/settlement-and-occupation-historical-documents/, and a complete English translation on the website of the Sir Joseph Hotung

prepared in 1978 on the legality of Israeli settlements in occupied territory: 'Paragraph 6 appears to apply by its terms to any transfer by an occupying power of parts of its civilian population, whatever the objective and whether involuntary or voluntary. It seems clearly to reach such involvements of the occupying power as determining the location of settlements, making land available and financing of settlements, as well as other kinds of assistance and participation in their creation'.[86] This prohibition therefore includes population movement that is encouraged although not forced by a government: for example, through State incentives designed to attract mass civilian settlement into the territory for the purposes of creating 'facts on the ground' that will facilitate annexation.

The provision regarding 'transfer' in Article 49(6) does not clearly apply to cases where a civilian population moves into a territory without government incentives or involvement as a result of social pressures such as land shortages, a process sometimes called 'settler colonialism'. Because the Declaration condemns 'colonialism in all its forms and manifestations', it is immaterial to a finding of colonialism whether Jewish settlements in the OPT represent population 'transfer' in the sense suggested by Article 49(6) of the Fourth Geneva Convention or represents settler colonialism. .

This category of settler colonialism[87] was extensively debated by the anti-apartheid movement in South Africa under the label, 'colonialism of a special type'. That it may be distinguished from other kinds of colonialism was illustrated by, amongst others, the South African experience. First, the settler society effectively indigenises: it makes its own claim to self-determination in the territory it has seized, holding that the land is its own by right of settlement. Second, settler independence movements commonly assume the mantle of a decolonisation struggle, a move that concomitantly denies the legitimacy of any anti-colonial claim by the people it has displaced. Where this is successful, settler colonies are recognised as independent States, their colonial origins are expunged from international law and discourse. By the 1940s, Jewish-Zionist nationalism in Palestine was being expressed as an anti-colonial struggle against Britain, a campaign that concomitantly rejected Palestinian Arab rights to the land. Its success was reflected by the UN General Assembly when it recommended the partition of Palestine into a Jewish State and an Arab State (in Resolution 181 of 1947) and admitted Israel as a member State in 1949.

Partly because of the history of settler-colonial State formation, the Declaration does not consider that a State may be practicing colonialism within its own borders. The words 'geographically separate' were used in UN General Assembly Resolution 1541 to allay the fears of States that the prohibition of colonialism would apply to formerly independent peoples within their borders.[88] As Israel has been

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Programme in Law, Human Rights and Peace Building in the Middle East (School of Oriental and African Studies, London) at: http://www.soas.ac.uk/lawpeacemideast/resources/48485.pdf.

[86] See United States: Letter of the State Department Legal Adviser Concerning the Legality of Israeli Settlements in the Occupied Territories, 21 April 1978, in 17 *International Legal Materials* (1978), p. 777 at p. 779.

[87] See, for example, Caroline Elkins and Susan Pedersen, *Settler Colonialism in the Twentieth Century: Projects, Practices, Legacies* (Routledge, 2005) and Annie Combes, *Rethinking Settler Colonialism: History and Memory in Australia, New Zealand, Canada, and South Africa* (Manchester University Press, 2006).

[88] This reflects the so-called 'Belgian thesis' which would have extended the concept of non-self-governing territories to include disenfranchised indigenous peoples living within the borders of independent states, especially if the race, language and culture of these peoples differed from those of the dominant population. See J. L. Kunz, 'Chapter XI of the United Nations Charter in action' (1954) 48 *American Journal of International Law* 109 at 109; and Patrick Thornberry, 'Self-determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 *International and Comparative Law Quarterly* 874. The rights of such peoples were eventually codified in the International Labour Organisation's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted on 7 June 1989, entered into force on 5 September 1991), which recognises that groups living in such states still experience enduring conditions of alienation, marginalisation, and discrimination. That their dilemma results from colonisation is built into the definition in Article 1(b): 'Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who,

admitted to the United Nations as an independent State (tacitly although not explicitly within its 1949 ceasefire lines), for the purposes of this study it is assumed that the Declaration is not legally applicable within those lines. The 1949 ceasefire lines delineate areas beyond which Israel cannot claim legal title, and it is legally responsible for any Israeli settlement in the OPT.

Settler colonialism is also distinguished by a third trait: a pattern of advancing civilian settlement across borders, reflecting the drive for land and resources as well as military attempts to resolve the insecurity that regularly emerged along settler frontiers.[89] In South Africa (as in North America), indigenous title was extinguished not through outright conquest but through an incremental advance of civilian settlement.[90] Thus Jewish settlement in the West Bank is more analogous to settler colonialism than, for example, the implantation of European colonies in Africa and south Asia.

The Declaration might still be argued to be inapplicable to Israeli practices in the OPT on other grounds. First, the term 'colonialism' might be considered inapplicable to territory contiguous with the dominating State, being associated only with overseas or otherwise distant lands.[91] This point has no substance, as the Declaration makes no reference to geographic distance.[92] The phrase 'geographically separate' in General Assembly resolution 1541 indicates only that a colony is beyond the boundaries of the administering State.[93] East Timor, South-West Africa (Namibia), and Western Sahara were all colonised by powers territorially adjacent to them and the UN listed them all as Non-Self-Governing territories.[94]

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irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions'.

[89] Literature on the 'frontier' logic of expansion includes M. Legassick, 'The frontier tradition in South African historiography,' in S. Marks and A. Atmore (eds), *Economy and society in pre-industrial South Africa (*London: Longman, 1980).

[90] The term developed in United States federal law to explain the juridical redefinition of Native Americans ('Indian nations) from foreign powers to domestic entities was 'domestic dependent nations': see judgment by Chief Justice Marshall in *Cherokee Nation* v. *Georgia* (30 U.S. (5 Pet.) 1 (1831).

[91] The definition of a non-self-governing territory as being 'geographically separate' and 'ethnically and/or culturally' distinct from the metropolitan power has been referred to by scholars as the 'salt-water theory' of colonialism: see Rupert Emerson, 'Colonialism' (1969) 4 *Journal of Contemporary History* 3 (defining colonialism as the imposition of white rule on alien peoples inhabiting lands separated by salt water from the imperial centre); and H.K. Weeseling, *Imperialism and Colonialism: Essays on the History of European Expansion* (London: Greenwood Press, 1997), preface, pp. ix-x. The salt-water theory is principally a political doctrine rather than a legal concept and is a highly problematic term in international law, the result of a political bargain: see Lee C. Bucheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978), p. 18 (describing the theory as a valiant, misguided and unconvincing attempt to limit the scope of self-determination by reading into the principle an arbitrary limitation.) See also Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine of the United Nations* (The Hague: Martinus Nijhoff, 1982), p. 15. After the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the United States representative called the Soviet Union and its satellites, 'the largest colonial empire which has ever existed in history': see Whiteman, p. 82.

[92] The Bandung final communiqué, upon which the *Declaration on Colonialism* is based, does not stipulate the colonialism only applies to territories separated from the colonial powers by salt-water: see Section D.1(a- d) of the Final Communiqué of the Asian-African Conference, Bandung, 24 April 1955.

[93] The Bandung final communiqué, upon which the *Declaration on Colonialism* is based, does not stipulate the colonialism only applies to territories separated from the colonial powers by salt-water.

[94] Namibia and East Timor have since become independent . The eleventh edition of *The Encyclopedia Britannica*, published at the height of British imperialism, notably did not define 'colony' as a territory that is separated by salt-water or any other geographical feature, but only as 'a term most commonly used to denote a settlement of the subjects of a sovereign State in lands beyond its boundaries, owing no allegiance to any foreign power, and retaining a greater or less degree of dependence on the mother country': *The Encyclopedia Britannica* (Cambridge: At the University Press, 1910), p. 716.

In calling for Israel to withdraw from 'territories occupied in the recent conflict' (namely, the 1967 Six-Day War), Security Council Resolution 242 (1967) affirmed that Israel is not the sovereign in the West Bank and Gaza Strip.[95] In reviewing the route of Israel's Wall,[96] the ICJ further confirmed that Israel is an Occupying Power in the OPT and is obliged to administer the OPT in accordance with the Fourth Geneva Convention.[97] It is a cardinal principle of international humanitarian law that sovereignty can never be vested in an Occupying Power. Moreover, in 1993, Israel agreed to maintain the territorial integrity of the OPT in signing the Declaration of Principles on Interim Self-Government Arrangements, Article 4 of which confirmed that '[t]he two sides view the West Bank and the Gaza Strip as a single territorial unit'. Israel's actions in the OPT may accordingly come under review for violations under terms of the Declaration if, as a foreign power, Israel appears to be engaging in actions that dismember the territory with the aim of permanent annexation.

Moreover, it may be argued that the conflict does not replicate the unequal relations associated with colonialism because it is fundamentally a conflict between 'two peoples in one land'. This view may be dismissed on the ground that the conflict is fundamentally characterised, in terms of international law, by a denial of the Palestinian peoples' right to self-determination. It will be recalled that UN General Assembly Resolution 2649 condemned 'those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa and Palestine'.[98] Given this coupling of the Palestinian cause with calls for decolonisation (reiterated in numerous other resolutions), Alain Pellet argues that, 'there is no doubt that the Palestinian people can claim the benefits of a very comprehensive legal regime applicable to colonial peoples'.[99]

The Declaration and related instruments indicate that an Occupying Power can become a colonial power if it practices policies associated with colonialism; that is, (1) if it attempts to annex the territory that it is occupying or administers it in a way that denies its people the right of self-

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[95] Security Council Resolution 242 (22 November 1967). The resolution calls for 'the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles: (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict', '(ii) Termination of all claims or states of belligerency.' The English version omits the definite article regarding 'territories', leaving Israel with a loophole to claim that some withdrawal is adequate. The other official language translations retained the phrasing that would indicate all territories must be evacuated. The French version, for example, calls for '(i) *Retrait des forces armées israéliennes des territoires occupés lors du récent conflit.*' International law prohibits the acquisition of territory through the threat or use of force, and holds that any such attempted acquisition is legally invalid. Security Council Resolution 242 reiterates this point in the context of the OPT. On the interpretation of resolution 242, see O. M. Dajani, 'Forty years without resolve: tracing the influence of Security Council resolution 242 on the Middle East Peace Process' (2007) 37 *Journal of Palestine Studies* 24; A. J. Goldberg, 'United Nations Security Council resolution 242 and the prospects for peace in the Middle East' 12 (1973) *Columbia Journal of Transnational Law* 187; M. Lynk, 'Conceived in law: the legal foundations of resolution 242' (2007) 37 *Journal of Palestine Studies* 7; J. McHugo, 'Resolution 242: a legal appraisal of the right-wing Israeli interpretation of the withdrawal phase with reference to the conflict between Israel and the Palestinians' (2002) 51 *International and Comparative Law Quarterly* 851; Musa Muzzawi, *Palestine and the Law: Guidelines for the Resolution of the Arab-Israel Conflict* (Reading: Ithaca Press, 1997), pp. 200-1 (reproducing the text in English as well as in French, Russian, Chinese, and Spanish); and S. Rosenne, 'On multi-lingual interpretation' (1971) 6 *Israel Law Review* 360.

[96] Israeli authorities sometimes refer to this construction as the 'security fence'. The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) calls it the 'separation barrier'. Others have called it the 'annexation Wall' or even the 'apartheid Wall'. For part of its route, it is a concrete wall, while for the rest of the route it is an impassable system of fences with flanking ditches and security strips. As the ICJ called it a 'wall' rather than a 'fence', this usage is followed here. The term is often uppercased, to distinguish it from other walls as a unique and controversial geographic feature, and it is treated so here.

[97] *Wall* advisory opinion, ICJ Rep, 2004, 173-177, paras. 90-101.

[98] UN General Assembly Resolution 2649 (XXV), 30 November 1970.

[99] Alain Pellet, 'The Destruction of Troy Will Not Take Place', in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories* (Oxford, Clarendon Press, 1992), p. 183.

determination; (2) it assumes permanent sovereignty over natural resources; and (3) if it transfers its own population into the territory it occupies with apparent intent to colonise it. Once an Occupying Power does these things, the occupation itself could become unlawful on grounds of colonialism, with the attendant consequences under international law.[100]

Whether prolonged occupation alters the obligations of an Occupying Power is a question addressed at length in Chapter II. Here it is relevant to note that prolonged occupation per se does not equate with colonialism. For instance, when South Africa refused to withdraw from South West Africa (today Namibia) after decades of occupation, the UN Security Council declared its presence there 'illegal' but this was not on grounds of colonialism.[101] Rather, a prolonged belligerent occupation must acquire the characteristics of colonialism—especially through an open claim to sovereignty or through practices that have the effect of permanently denying the people's right to self-determination, as discussed earlier—in order to be unlawful on that basis.

Concluding that an occupation has acquired the attributes of colonialism has important legal consequences. First, an Occupying Power found to be practicing colonialism is required to withdraw its administration from the territory it is holding under colonial rule. Operative paragraph 5 of the Declaration provides that "immediate steps shall be taken in...all other territories that have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom". This is a requirement of the right to self-determination under customary international law. Given the Declaration's concern with territorial integrity, the Occupying Power is also obliged not to fragment, divide or dismember the occupied territory prior to its withdrawal from that territory. Second, a finding that an occupied population is also under colonial domination lends support to the claim that this population has a right to resist the foreign occupation and colonial domination 'in pursuit of the exercise of [its] right to self-determination.'[102] This resistance must be exercised in accordance with the established rules and principles of international humanitarian and human rights law, and the people pursuing self-determination is 'entitled to seek and to receive support in accordance with the purposes and principles of the [UN] Charter'.[103]

4. The Prohibition of Apartheid in International Law

The first international instrument expressly to prohibit apartheid was the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD), adopted in 1965.[104] ICERD is a multilateral human rights treaty that seeks to eliminate all forms and manifestations of racial discrimination and, as its chapeau states, 'build an international community free from all forms of racial segregation and racial discrimination'. Its preamble affirms that parties to the Convention are '[a]larmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, *such as policies of apartheid*,

[100] See Article 1 (4) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I): also Orna Ben-Naftali, Aeyal M. Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law* at 551-614.

[101] UN Security Council Resolution 276 of 30 January 1970.

[102] UN Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 of 24 October 1970.

[103] Declaration of Principles of International Law concerning Friendly Relations.

[104] International Conventions on the Elimination of All Forms of Racial Discrimination (1965), entered into force 4 January 1969, 660 UNTS195.

segregation or separation'.[105] Article 3 then specifies the obligation of States parties to the Convention to oppose apartheid:

> States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Including a prohibition of apartheid in ICERD was an exception to the practice of the drafters not to refer to specific forms of discrimination in the treaty. This was done because apartheid differed from other forms of racial discrimination 'in that it was the official policy of a State Member of the United Nations'.[106]

The International Convention on the Suppression and Punishment of the Crime of Apartheid (hereafter Apartheid Convention) was adopted shortly after ICERD to provide a universal instrument that would make 'it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid'.[107] The Apartheid Convention is thus intended to complement the requirements of Article 3 of ICERD, as its chapeau suggests in referring to Article 3. The Apartheid Convention further declares that apartheid is a crime against humanity and provides a definition of that crime in Article 2. It consequently imposes obligations on States parties to adopt legislative measures to suppress, discourage and punish the crime of apartheid and makes the offence an international crime which is subject to universal jurisdiction.[108] Thus the Apartheid Convention supplements the general prohibition of apartheid in ICERD by providing a detailed definition of the crime and by giving several examples of practices amounting to apartheid when committed 'for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'.[109] Subsequent instruments elaborate the meaning of apartheid and define what constitute the crime of apartheid. The formulation used in the Apartheid Convention is very similar to that of the Rome Statute of the International Criminal Court. The Convention defines the crime of apartheid in Article 2 as 'inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them', while the Rome Statute codifies apartheid crimes as certain inhumane acts 'committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group and committed with the intention of maintaining that regime' (Article 7(2)(h)). Both instruments emphasise the systematic, institutionalized, and oppressive character of the discrimination involved in apartheid, reflecting the original reasoning for including it in ICERD as a distinct form of racial discrimination. The analysis in Chapter IV of this report draws primarily on the formulation in the Apartheid Convention and is informed also by the codification in the Rome Statute and by reference to the apartheid practices of South Africa, which provide some indication as to what the international community has sought to prohibit.

The customary status of the prohibition of apartheid is indicated by its configuration within general United Nations efforts aimed at the eradication of racial discrimination more generally The practice of apartheid has been condemned in numerous United Nations resolutions and other international treaties, and reaffirmed as constituting a crime against humanity in the Rome Statute of the International Criminal Court (1998). As a particularly pernicious manifestation of racial discrimination, the practice of apartheid is contrary to fundamental guiding principles of international law including the protection of human rights and the self-determination of all peoples. Article 55 of

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[105] Emphasis added.

[106] UN Doc. A/C.3//SR.1313, cited in David Keane, *Caste-based Discrimination in International Human Rights Law*, (Aldershot: Ashgate, 2007), p. 190.

[107] Convention on the Suppression and Punishment of the Crime of Apartheid (1973), entered into force 18 July 1976 (1015 U.N.T.S. 243).

[108] See Articles 4 and 5 of the Declaration.

[109] See Article 2 of the Declaration.

the United Nations Charter lays the foundation, when it requires Member States to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.[110] Equally important is Article 2 of the Universal Declaration of Human Rights (1948) which states that 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[111] The subsequent adoption of ICERD was the more concerted effort under international law to address racial discrimination, including the particular practice of apartheid. State parties to the Convention on the Elimination of Discrimination Against Women emphasise that 'the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women'.[112] At the time of writing,, there are 173 States parties to ICERD[113] and 185 States parties to the Convention on the Elimination of Discrimination Against Women,[114] demonstrating near-universal support and legal commitment to the elimination of racial discrimination and the prohibition of apartheid.

Although this report is not concerned with the question of individual criminal responsibility for the crime of apartheid, establishing that apartheid is considered an international offence affirms the seriousness with which it is viewed under international law and affirms the international community's commitment to its eradication. The United Nations General Assembly first referred to apartheid as a crime against humanity in Resolution 2202 (1966),[115] a statement that was reiterated by the 1968 Proclamation of Tehran by the International Conference on Human Rights.[116] The enunciation of apartheid as a crime against humanity in the Apartheid Convention supplemented the general prohibition in ICERD and was followed by inclusion of the crime of apartheid in Additional Protocol I to the 1949 Geneva Conventions (1977)[117] and the Rome Statute of the International Criminal Court (1998).[118]

Although the majority of States accept the prohibition in ICERD, fewer have ratified the Apartheid Convention, given the heighted political disagreement at the time it was created and due to concerns that the convention was seen as seeking to 'extend international criminal jurisdiction in a broad and ill-defined manner'.[119] Currently, 107 States are parties to the Apartheid Convention.[120] A majority of

[110] Charter of the United Nations, entered into force 24 October 1945 (59 Stat. 1031, T.S. 993), 3 Bevans 1153.

[111] Universal Declaration of Human Rights (1948), G.A. res. 217A (III), U.N. Doc A/810 at 71.

[112] Convention on the Elimination of Discrimination Against Women (1979), entered into force 3 September 1981 (1249 U.N.T.S. 13), *Preamble*.

[113] Website of the United Nations Treaty Collection: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=319&chapter=4&lang=en.

[114] Website of the United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=326&chapter=4&lang=en.

[115] Resolution 2202 (XXI) of 16 December 1966, *The policies of apartheid of Government of the Republic of South Africa*, paragraph 1.

[116] *Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran on 13 May 1968* (U.N. Doc. A/CONF.32/41) at 3 (1968), paragraph 7. See also the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968), Article 1, which considers crimes against humanity to include 'inhuman acts resulting from the policy of apartheid'.

[117] Article 85(4)(c), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1977), entered into force 7 December 1978, 1125 U.N.T.S. 3.

[118] Article 7(1)(j), Rome Statute of the International Criminal Court (1998), U.N. Doc. A/CONF.183/9, entered into force 1 July 2002, 2187 U.N.T.S. 90.

[119] Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, *Human Rights and World Public Order* (New Haven/London: Yale University Press, 1980), p. 545.

States (168) have ratified Additional Protocol I to the Geneva Conventions of 1949,[121] and an ever-increasing number of States, currently standing at 108, have become parties to the Rome Statute of the International Criminal Court, which gives the Court jurisdiction over the crime of apartheid.[122] There is no demonstrable hostility to the apartheid provisions by non-States parties to the treaties, and several non-parties to the Apartheid Convention have ratified the latter instruments (for example, the United Kingdom and South Africa). The movement of the international crime of apartheid towards customary international law[123] reinforces the fact that the prohibition itself is clearly a rule of customary law.

The prohibition of apartheid can also be considered a norm of *jus cogens* which creates obligations *erga omnes*.[124] The International Law Commission has viewed the prohibition of apartheid as a peremptory norm of general international law and contended that the practice of apartheid would amount to 'a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being'.[125] The Commission noted that a general agreement is shared by States as to the peremptory character of the prohibition on apartheid and other norms at the Vienna Conference on the Law of Treaties and how apartheid has been prohibited by a treaty admitting of no exception.[126] With regard to the concept of *erga omnes* obligations, the International Court of Justice identified these in the *Barcelona Traction* case:

> '…an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights concerned, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[127]

The Court has stated that such an obligation would arise, for example, 'from the principles and rules concerning the basic rights of the human person, including protection from slavery and from racial discrimination.'[128] If the prohibition of racial discrimination is to be considered a rule of *jus*

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[120] Website of the United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&id=325&chapter=4&lang=en#Participants.

[121] Website of the International Committee of the Red Cross, http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf.

[122] Website of the International Criminal Court, http://www.icc-cpi.int/about.html.

[123] See Antonio Cassese, *International Criminal Law*, (Oxford: Oxford University Press, 2008), p. 25.

[124] Doctrine affirms that there is a conceptual connection between the two categories of obligations *erga omnes* and *ius cogens* norms, but does not conclusively affirm their coincidence: see, for instance, A. de Hoogh, *Obligations erga omnes and international crimes* (Kluwer: The Hague: 1996), pp. 53-56, 91; and M. Ragazzi, *The concept of international obligations erga omnes* (Clarendon Press: Oxford: 1997) Chapter Three, pp. 182 and 190; also I. Scobbie I, 'Unchart(er)ed waters?: consequences of the advisory opinion on the Legal consequences of the construction of a wall in the Occupied Palestinian Territory for the responsibility of the UN for Palestine' (2005) 16 European Journal of International Law 941 at 949-952. De Hoogh underlines that obligations *erga omnes* are essentially connected with the remedies available to all States following a breach of international law, whereas the notion of *ius cogens* norms places emphasis on their substantive content: see de Hoogh, *Obligations erga omnes, p.* 53: compare Ragazzi, *Obligations erga omnes*, p. 203 et seq.

[125] See *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Yearbook of the International Law Commission* (2001) Vol. II, part two, pp. 112-113.

[126] *Ibid.*, p. 112.

[127] Case Concerning the Barcelona Traction, Light and Power Company, Limited *second phase, final judgment* (*Belgium* v. *Spain*), ICJ Rep, 1970, 3 at 32, paragraphs 33-34.

[128] Case Concerning the Barcelona Traction, Light and Power Company, Limited *second phase, final judgment* (*Belgium* v. *Spain*), ICJ Rep. 1970, 32, paragraphs 33-34.

cogens,[129] then it follows that the prohibition of apartheid, which addresses a particularly severe form of racial discrimination, is even more so a rule of *jus cogens* entailing obligations *erga omnes*— that is, obligations owed to the international community as a whole.

5. The legal authority of an ICJ Advisory Opinion

The function of an advisory opinion by the ICJ is to provide legal advice to international organisations. States cannot request an advisory opinion: this power is reserved to United Nations organs and bodies which have been authorised to do so under Article 96 of the UN Charter.[130] Formally, advisory opinions of the International Court are not binding, but they nevertheless have normative force as they constitute an authoritative statement of international law in relation to the question posed.

Lauterpacht, a distinguished judge of the International Court, observed that, 'the fact of the absence of formally binding force does not exhaust the actual significance of an advisory opinion'.[131] Thirlway, a former Principal Legal Secretary of the Court, stressed that, while an advisory opinion is advisory rather than determinative, a State found by the International Court to have a particular obligation under international law 'would be in a weak position if it seeks to argue that the considered opinion of the Court does not represent a correct view of the law'.[132] Similarly, Judge Gros of the International Court has observed that 'when the Court gives an advisory opinion on a question of law it states the law', and while 'it is possible for the body which sought the opinion not to follow it in its action...that body is aware that no position adopted contrary to the Court's pronouncement will have any effectiveness whatsoever in the legal sphere'.[133] This view was echoed in the *Wall* advisory opinion itself, as Judge Koroma stated in his separate opinion: 'The Court's findings are based on the authoritative rules of international law and are of an *erga omnes* character. … [as] States are bound by those rules and have an interest in their observance, all States are subject to these findings'. [134] In her separate opinion in *Wall*, Judge Higgins further held (after citing a passage from the *Namibia* advisory opinion regarding a Security Council resolution condemning South Africa's illegal presence in that country) that '[a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence'.

Two additional points regarding the *Wall* opinion are relevant here. First, earlier ICJ advisory opinions regarding South-West Africa (later Namibia) when it was occupied by South Africa, suggest

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[129] See, for example, *United States (Third) Restatement of the Foreign Relations Law* (1986), Section 702, note 11.

[130]Article 96 provides: '1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question; 2.Other organs of the United Nations and specialized agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.'

[131] H. Lauterpacht, 'The Security Council and the jurisdiction of the International Court of Justice', in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht. Vol. V: Disputes, War and Neutrality* (Cambridge: Cambridge University Press, 2004), p. 224 at p. 228.

[132] HWA Thirlway, 'The International Court of Justice', in M. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2006), pp. 582-583: see also S. Rosenne, *The Law and Practice of the International Court, 1920-1996* (The Hague: Martinus Nijhoff 1997), pp. 1754-1759.

133.*Western Sahara* advisory opinion, ICJ Reports 1975, 12, declaration of Judge Gros, 69 at 73, para.6: see also E. Hambro, 'The authority of the advisory opinions of the International Court of Justice' (1954) 3 *International and Comparative Law Quarterly* 2 at17 and 5; and André Gros, 'Concerning the Advisory Role of the International Court of Justice,' in Friedman, Henkin and Lissitzyn (eds.), *Transnational Law in a Changing Society: Essays in Honour of Philip C. Jessup* (New York: Columbia University Press, 1972), p. 315. See further, the opinion expressed by Blaine Sloane, a former director of the UN General Legal Division, in 'Advisory Jurisdiction of the International Court of Justice' (1950) 38 *California Law Review* 830 at 855.

134. *Wall* advisory opinion, separate opinion of Judge Koroma, ICJ Rep, 2004, 204 at 205-206, para. 8.

the weight to be accorded to the *Wall* opinion. In 1956, in his separate opinion appended to the *Admissibility of hearings of petitioners by the Committee on South West Africa* advisory opinion, Judge Lauterpacht noted that the earlier advisory opinion on the *International status of South West Africa* (1950) [135] had been accepted and approved by the General Assembly. Consequently:

> Whatever may be its binding force as part of international law---a question upon which the Court need not express a view---it is the law recognized by the United Nations. It continues to be so although the Government of South Africa has declined to accept it as binding upon it and although it has acted in disregard of the international obligations as declared by the Court in that Opinion.[136]

Similarly, on 2 August 2004 when the General Assembly formally acknowledged its receipt of the *Wall* advisory opinion, it also demanded that 'Israel, the occupying Power, comply with its legal obligations as mentioned in the advisory opinion'.[137] Thus the will of the United Nations regarding the obligations incumbent upon Israel were understood as international law applicable to Israel.

Secondly, important aspects of the *Wall* opinion were later re-affirmed by the ICJ in its contentious *Armed activities on the territory of the Congo* judgment—in particular, the relationship between human rights and humanitarian law and the extra-territorial applicability of international human rights instruments. [138] This judgment illustrates that, in advisory opinions, the International Court states the law authoritatively. Thus reliance may confidently be placed upon the findings of the Court in the *Wall* opinion, despite the fact that Israel, like South Africa, has chosen not to act in conformity with the opinion's rulings.

D. **Conclusion**

This chapter has introduced the fundamental legal conceptions that structure this study and determine its principal themes. If the OPT remain occupied by Israel—an issue examined in some detail in Chapter 3—then they are territories over which Israel does not possess sovereignty but only a temporary right of administration. The corollary to this right is that legal obligations are imposed on Israel regarding the conduct of that administration. Primarily, Israel must abide by the relevant rules of the law of armed conflict—principally the relevant provisions of the Hague Regulations and the Fourth Geneva Convention—in its administration of the territories. Secondly, these provisions are supplemented by international human rights law.

This study's findings of colonialism and apartheid do not affect claims that Israel's occupation is unlawful on other grounds.[139] Rather, it tests for two fundamental regimes identified by Professor Dugard in his January 2007 report on the human rights situation in the OPT as contrary to the international law of human rights, namely colonialism and apartheid. These constitute egregious violations of elementary human rights, the right to self-determination and the prohibition on racial discrimination. Colonialism denies the right to self-determination because it prevents, and aims to prevent, a people from exercising freely its right to determine its own future through its own political institutions. Apartheid is an aggravated form of racial discrimination because it manifests as an

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[135] *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 128.

[136] *Admissibility of hearings of petitioners by the Committee on South West Africa* advisory opinion, ICJ Rep, 1956, 23, separate opinion of Judge Lauterpacht, 35 at 46-47.

[137] See UN General Assembly resolution ES-10/15, 2 August 2004, operative paragraph 2.

[138] *Democratic Republic of the Congo* v. *Uganda*, ICJ Rep, 2005, 168: see the Court's discussion of belligerent occupation at 227-231, paras. 167-180, especially at 229-230, para. 172. At 231, paras. 178-180, without express reference to the *Wall* opinion, the Court reaffirmed the applicability of human rights and international humanitarian law to occupied territory, and in 242-243, para. 216 expressly relied on its rulings in the *Wall* opinion on the inter-relationship between human rights and humanitarian law and on the extra-territorial applicability of international human rights instruments.

[139] See, for example, Ben-Neftali et al.

institutionalised regime of systematic oppression and domination of one racial group over another racial group(s). The rules of international law violated by colonialism and apartheid are peremptory: the duty not to practice either regime is an obligation owed to the international community as a whole. All States have an interest in ensuring that these rules are respected. Faced with their violation, all States have the duty to co-operate to end their violation; all States have the duty not to recognise the illegal situation arising from their violation; and all States have the duty not to render aid or assistance to the delinquent State which might maintain that illegal situation.

The next Chapter applies the relatively abstract account of the fundamental concepts and themes examined in this Chapter to the OPT. In particular, it examines whether the Palestinian people possess the right to self-determination, the international legal status of the OPT, and the application of Israeli law in the OPT. The question of colonialism is then explored in Chapter III and of apartheid in Chapter IV.

Chapter II
The Legal Context in the Occupied Palestinian Territories

A. Introduction

'[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation,' noted the International Court of Justice (ICJ) in 1971.[140] This chapter establishes the context—the basic legal principles, facts, policies and practices in the Occupied Palestinian Territories (OPT)—that must guide the interpretation of the Apartheid Convention and the Declaration on the Granting of Independence to Colonial Countries and Peoples (discussed in Chapter I.C). Broadly, legal principles and facts include the legal status of the Palestinians and their territories, and the consequent legal obligations and authority of Israel under international law. Policies and practices include Israeli civil and military laws that operate in the OPT.

The following sections address these issues in several respects. First, the meaning and significance of the right to self-determination in international law is clarified and the right of the Palestinian people to self-determination is assessed. Second, arguments about the current status of West Bank, East Jerusalem and the Gaza Strip in international law are reviewed to assess whether all remain under belligerent occupation by Israel. This discussion examines the 'missing reversioner' argument, Israel's separate treatment of East Jerusalem, and the legal implications of Israel's 'disengagement' from the Gaza Strip in 2005. Whether the Oslo Accords have altered the status of the OPT is also examined, particularly in light of Article 47 of the Fourth Geneva Convention, which addresses 'special agreements' between local authorities and the occupying power, and Article 7, concerning 'special agreements' that can adversely affect the rights of protected persons. Arguments that the prolonged nature of an occupation loosens legal restrictions on the occupying power are also considered.

On this foundation, the study then reviews the general operation of Israeli laws in the OPT, with special attention to the different treatment accorded by Israeli law to Jewish settlers and Palestinians living in the OPT. The discrimination that this system entails is briefly noted, anticipating discussion of underlying regimes in Chapters III and IV.

B. The Palestinian People's Right to Self-Determination

1. The Question of Palestinian Statehood

This study does not adopt a position on the international legal status of the OPT, over which the Palestinian people is not yet effectively exercising sovereignty, apart from categorising these territories as remaining under belligerent occupation (as discussed later). The precise legal status of 'Palestine' regarding statehood remains controversial. The 1945 Pact of the League of Arab States contained an annex on Palestine that declared:

> At the end of the last Great War, Palestine, together with the other Arab States, was separated from the Ottoman Empire. She became independent, not belonging to any other State.
>
> The Treaty of Lausanne proclaimed that her fate should be decided by the parties concerned in Palestine.

[140] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Advisory Opinion of 21 June 1971, ICJ Reports, 1971, 16 at 31, para. 53. All documents of the International Court of Justice cited in this report are available at: www.icj-cij.org.

> Even though Palestine was not able to control her own destiny, it was on the basis of the recognition of her independence that the Covenant of the League of Nations determined a system of government for her.
>
> Her existence and her independence among the nations can, therefore, no more be questioned *de jure* than the independence of any of the other Arab States.
>
> Even though the outward signs of this independence have remained veiled as a result of force majeure, it is not fitting that this should be an obstacle to the participation of Palestine in the work of the League.
>
> Therefore, the States signatory to the Pact of the Arab League consider that in view of Palestine's special circumstances, the Council of the League should designate an Arab delegate from Palestine to participate in its work until this country enjoys actual independence.

Palestine formally became a member of the League of Arab States on 9 September 1976. Subsequently, during a 15 November 1988 meeting in Algiers, the Palestine National Council declared the existence of the State of Palestine.[141] The General Assembly then acknowledged that it was 'aware' of this declaration and affirmed 'the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967'.[142] In the same resolution, the General Assembly decided to re-designate the Palestine Liberation Organisation (PLO) observer mission to the UN as 'Palestine' without, however, changing its status or admitting 'Palestine' to full UN membership.

On the basis of the Algiers Declaration, approximately 100 States have recognised Palestinian statehood. Nonetheless, in the *Wall* advisory opinion, the ICJ treated Palestine's statehood as not yet established:

> that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for al1 in the region.[143]

More recently, on 22 January 2009, the Palestinian Authority (PA)[144] lodged a declaration under Article 12(3) of the Statute of the International Criminal Court (ICC), indicating recognition by the 'Government of Palestine' of the jurisdiction of the ICC in relation to 'acts committed on the territory of Palestine since 1 July 2002'.[145] Article 12(3) refers to declarations made by States which are not parties to the Statute. In April 2009, when the final text of this report was established, the Office of the Prosecutor was considering whether this declaration meets the requirements of Article 12(3), and had not issued its opinion.

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[141] See Annex III to UN Doc.A/43/827 (18 November 1988), *Letter dated 18 November 1988 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General*.

[142] UN Doc.A/RES/43/177 (15 December 1988), operative para.2.

[143] *Legal consequences of the construction of a wall in occupied Palestinian territory*, ICJ Advisory Opinion of 9 July 2004, ICJ Rep, 2004, 136 at 201, para.162.

[144] The 'Palestinian Interim Self-Government Authority' was established in Article 1 of the Declaration of Principles on Interim Self-Government Arrangements, signed by the PLO and the Government of Israeli on 13 September 1993.

[145] Letter submitted by the Minister of Justice of Palestinian National Authority to the Registrar of the International Criminal Court, *Declaration recognizing the Jurisdiction of the International Criminal Court*, 22 January 2009.

Thus international legal practice and doctrine remains divided over the legal consequences of the Algiers Declaration and whether Palestine fulfils the requirements of statehood.[146] Examination of this topic is tangential to this study, however, because it is clear that the Palestinian territories are occupied and consequently that the Palestinian population is not effectively exercising sovereign rights or its right to self-determination, as established in the next two sections. If Israel is engaged in colonial or apartheid practices in the OPT, this would amount to a systematic denial of the right of the Palestinian population to self-determination, irrespective of the controversial issue of Palestinian statehood.

2. The Right to Self-Determination in International Law

The ICJ has declared that self-determination is 'one of the essential principles of contemporary international law'.[147] In the *Wall* advisory opinion, [148] the ICJ affirmed that self-determination is a right *erga omnes*, whose realisation all UN member States, as well as all States parties to the International Covenants on human rights, have the duty to promote.[149] The International Law Commission has concluded that self-determination also has *jus cogens* status and is peremptory—States cannot derogate from its exigencies in their international relations.[150]

Like many legal concepts, the right to self-determination designates a core content and an associated, yet integral, bundle of rights and duties. The core content is clear: it entitles peoples to 'determine their political status and freely pursue their economic, social and cultural development'.[151] Otherwise,

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[146]See, for instance, F.A. Boyle, 'Creation of the State of Palestine' (1990) 1 *European Journal of International Law* 301; J. Crawford, 'The creation of the State of Palestine: too much too soon?' (1990) 1 *European Journal of International Law* 307; J. Crawford, *The creation of States in international law* (Oxford: Clarendon Press, 2006, 2nd Ed.), pp. 435-442 and R.E. Lapidoth and N.K. Calvo-Goller, 'Les éléments constitutives de l'État et la déclaration du Conseil National Palestinien du 15 novembre 1988' (1992) 96 *Revue générale du droit international public* 777.

[147] *East Timor* case (*Portugal* v. *Australia*), ICJ Rep, 1995, 90 at 102, para. 29.

148 *Wall Advisory Opinion*, ICJ Rep, 2004, 171-172, para.88; see also 199, paras. 155-156.

[149] By virtue of General Assembly resolution 2625 (XXV) (24 October 1970). In the *Nicaragua* case, the International Court ruled that resolution 2625 expressed rules of customary international law – see *Military and paramilitary activities in and against Nicaragua case: merits judgment* (*Nicaragua* v. *United States*), ICJ Rep, 1986, 14 at 99-100, para. 188, see also *Wall Advisory Opinion*, ICJ Rep, 2004, 171, para. 87.

[150] International Law Commission, *Report of the work of its 53rd session*, UN Doc.A/56/10, *Commentary to Article 40* of its *2001 Articles on Responsibility of States for Internationally Wrongful Acts*, *ibid* 282 at 284, para. 5, available at: http://www.un.org/law/ilc/reports/2001/english/chp4.pdf.; and also J. Crawford, *The International Law Commission's Articles on State responsibility: introduction, text and commentaries* (Cambridge: Cambridge University Press, 2002), pp. 246-247. Doctrine affirms that there is a conceptual connection between the two categories of obligations *erga omnes* and *jus cogens* norms, but does not conclusively affirm their coincidence. See, for instance, A. de Hoogh, *Obligations erga omnes and international crimes* (The Hague: Kluwer, 1996), pp. 53-56, 91; and M. Ragazzi, *The concept of international obligations erga omnes* (Oxford: Clarendon Press, 1997), Chapter Three, pp. 182 and 190. See also I. Scobbie, 'Unchart(er)ed waters?: consequences of the advisory opinion on the Legal consequences of the construction of a wall in the Occupied Palestinian Territory for the responsibility of the UN for Palestine' (2005) 16 *European Journal of International Law* 941, 949-952. De Hoogh underlines that obligations *erga omnes* are essentially connected with the remedies available to all States following a breach of international law, whereas the notion of *ius cogens* norms places emphasis on their substantive content. See de Hoogh, *Obligations erga omnes*, p. 53; compare Ragazzi, *Concept of international obligations erga omnes*, p. 203 *et seq*.

[151] This formulation was employed in operative paragraph 2 of General Assembly resolution 1514 (XV) (15 December 1960), the *Declaration on the granting of independence to colonial countries and peoples*, which consolidated the references to self-determination contained in Articles 1(2) and 55 of the United Nations Charter. For an overview of this principle, and its development, see K. Doehring, *Self-determination*, in B. Simma (ed.), *The Charter of the United Nations: a commentary* (Oxford: Oxford UP, 2002, 2nd Ed.), p. 47 *et seq*.

self-determination may have several political outcomes, as enumerated in the General Assembly's *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations* (1970)[152]:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

The classic formulation of the right to self-determination reflects these possible outcomes by emphasising *process*: that is, the right of a people to determine freely its political status. Drew has pointed out that, to have meaning, a process must also have *substance*:

> … the right to a process does not exhaust the content of the right of self-determination under international law. To confer on a people the right of 'free choice' in the absence of more substantive entitlements—to territory, natural resources, etc—would simply be meaningless. Clearly, the right of self-determination cannot be exercised in a substantive vacuum. This is both explicit and implicit in the law. For example, implicit in any recognition of a people's right to self-determination is recognition of the legitimacy of that people's claim to a particular territory and/or set of resources...[T]he following can be deduced as a non-exhaustive list of the substantive entitlements conferred on a people by virtue of the law of self-determination...: (a) the right to exist—demographically and territorially—as a people; (b) the right to territorial integrity; (c) the right to permanent sovereignty over natural resources; (d) the right to cultural integrity and development; and (e) the right to economic and social development.[153]

Most important to questions of substance is *territory* over which the right to self-determination may be exercised by establishing sovereignty. As Drew underlines:

> Despite its text book characterization as part of human rights law, the law of self-determination has always been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be 'human rights'.[154]

On the one hand, this principle raises the question of territorial integrity that, for example, comprises a core concern of the *Declaration on the granting of independence to colonial countries and peoples*. In the *East Timor* case[155] proceedings, Portugal further described the relationship between the people and the territory as a 'principle of individuality': i.e., the territory that forms the basis of a people's right to self-determination is legally distinct from any other territory and is entitled to territorial integrity, forming a single unit which must not be dismembered, [156] particularly by a belligerent occupant:

> If an occupant controlled only part of a state and that part was not considered to be a distinct unit entitled to self-determination, the occupant would not be entitled to effect the secession of the occupied area (as in Northern Cyprus). Similar considerations imply that the occupant

[152] This Declaration, contained in General Assembly Resolution 2625 (XXV), 24 October 1970, is recognised as an authoritative interpretation of the fundamental legal principles contained in the UN Charter.

[153] C. Drew, 'The East Timor story: international law on trial' (2001) 12 *European Journal of International Law* 651 at 663, paragraph break suppressed and notes omitted. For a similar affirmation of the substantive core content of self-determination, see A. Orakhelashvili, 'The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions' (2005) 16 *European Journal of International Law* 59 at 64.

[154] Drew, 'East Timor', 663.

[155] *East Timor* case (*Portugal* v. *Australia*), ICJ Rep, 1995, 90.

[156] On the territorial integrity of self-determination units, albeit within the context of decolonisation, see, e.g., A. Cassese, *Self-determination of peoples: a legal reappraisal* (Cambridge: Cambridge University Press, 1995), pp. 72 and 78-79.

> would not be entitled to establish a new government in such a region even if its inhabitants supported such an act.[157]

Further,

> … un territoire qui constitue l'assise du droit d'un peuple á disposer de lui même...ne peut changer de statut juridique que par un acte d'autodétermination de ce peuple. La Résolution 1541 du 17 décembre 1960 de l'Assemblée générale précise bien cette norme.[158]

On the other hand, in accordance with the inter-temporal rule (a structural principle of international law sometimes expressed in the Latin maxim *tempus regit factum*), the substantive content of self-determination may be understood to change over time.[159] This principle has arisen particularly in relation to conflicts tracing to former League of Nations mandates.

Although Article 22 of the League of Nations Charter (which established the mandate system) did not use the term 'self-determination', it described the mandate system as providing 'tutelage' to peoples unprepared for independent statehood. [160] The Charter calls the duty to provide such tutelage 'a sacred trust of civilization':

> To those colonies and territories which as a consequence of the late War have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern

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[157] E. Benvenisti, *The international law of occupation* (Princeton: Princeton University Press, 1993), p. 183. See also A. Roberts, 'The end of occupation: Iraq 2004' (2005) 54 *International and Comparative Law Quarterly* 27 at 28-29; and M. Sassòli, *Article 43 of the Hague Regulations and peace operations in the twenty-first century*, 14, available at: http://www.ihlresearch.org/ihl/pdfs/sassoli.pdf, In the separate opinion he appended to the *Wall Advisory Opinion*, Judge Koroma expressed this point more bluntly: 'Under the régime of occupation, the division or partition of an occupied territory by the occupying Power is illegal', ICJ Rep, 2004, 204 at 205, para. 4.

[158] 'A territory that constitutes the basis of the right of a people themselves to dispose cannot change in juridical status except by an act of self-determination by that people': *East Timor* Pleadings, Portuguese Memorial (18 November 1991), 195, para. 7.01, emphasis in quotation suppressed. See also *Wall Advisory Opinion* Pleadings, League of Arab States Written Statement, 62, para. 8.2 and 76, para. 8.28.

[159] This principle provides that while the criteria for the existence of a right are determined by the law in force at the time it was created or vested, its substantive content does not remain fixed but is dynamic and evolves in accord with developments in the legal system. See, for instance, Judge Huber in the *Island of Palmas* case (United States/Netherlands, 1928), 2 *Reports of International Arbitral Awards* (1927-28) 829 at 845; also 4 *Annual Digest of Public International Law Cases* 3 at 4; and 22 *American Journal of International Law* (1928) 867 at 883; *South West Africa: second phase* cases (*Ethiopia* v. *South Africa*; *Liberia* v. *South Africa*), ICJ Rep, 1966, 6, dissenting opinion of Judge Tanaka, 250 at 293-294; *Namibia Advisory Opinion*, ICJ Rep, 1971, 31-32, paras. 52-53; *Western Sahara Advisory Opinion*, ICJ Rep, 1975, 12, separate opinion of Judge de Castro, 127 at 168-171; and *Aegean Sea continental shelf* case, ICJ Rep, 1978, 3 at 29-32, paras.71-76. For commentary see T. Georgopoulos, 'Le droit intertemporel et les dispositions conventionnelles évolutives: quelle thérapie contre la vieillesse des traités?'(2004) 108 *Revue générale de droit international public* 123; R. Higgins, 'Some observations on the inter-temporal rule in international law', in J. Makarczyk (ed.), *Theory of international law at the threshold of the 21st century: essays in honour of Krzysztof Skubuszewski* (The Hague: Kluwer, 1996), p. 173; R.Y. Jennings and A.D. Watts, *Oppenheim's international law* (London: Longman, 1992, 9th ed.), p. 1281, §633.11; H. Lauterpacht , *The function of law in the international community* (Oxford: Clarendon Press, 1933), pp. 283-25; and S. Rosenne, *Developments in the law of treaties* (Cambridge: Cambridge University Press, 1989), pp. 76-80.

[160] Although the final text of Article 22 of the League of Nations Covenant did not use the term 'self-determination', it was included in earlier drafts: see e.g. President Wilson's Third Draft presented to the Paris Peace Conference on 20 January 1919, in DH Miller, *The Drafting of the Covenant, Volume Two* (London: G.P. Putnam's Sons, 1928), p. 103. ('... in the future government of these peoples and territories the rule of self-determination, or consent of the governed to their form of government, shall be fairly and reasonably applied, and all policies of administration or economic development be based primarily upon the well-considered interests of the people themselves'.)

> world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.[161]

In its 1971 *Namibia* advisory opinion, the ICJ ruled that the 'sacred trust' was to facilitate self-determination:[162]

> 52. ...the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not yet attained a full measure of self-government' (Art. 73). Thus it clearly embraced territories under a colonial regime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'...
>
> 53. ...viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain; as elsewhere, the corpus iuris gentium has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.[163]

3. The Right of the Palestinian People to Self-Determination

The right of the Palestinian people to self-determination has been affirmed in numerous international instruments and confirmed by the ICJ.[164] In the *Wall* advisory opinion, the ICJ observed:

> As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a 'Palestinian people' is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, lsraeli Prime Minister. In that correspondence, the President of the PLO recognized 'the right of the State of Israel to exist in peace and security' and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, 'the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people'. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its 'legitimate rights' (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-

[161] See Article 22, Covenant of the League of Nations, (1920) 1 *League of Nations Official Journal* 9.

[162] *Namibia Advisory Opinion*, ICJ Rep, 1971, 16 at 31, para. 53; reaffirmed in *Wall Advisory Opinion*, ICJ Rep, 2004, 171-172, para. 88.

[163] *Namibia Advisory Opinion*, ICJ Rep, 1971, 31-32, paras. 52-53.

[164] For a collection of documents on the Palestine question in international law that bear on self-determination, among other things, see M. Cherif Bassiouni (ed.), *Documents on the Arab-Israeli Conflict* (New York: Transnational Publishers, 2005).

> determination, as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).[165]

The question then is to identify the 'objective existence' of this right regarding the character of the 'people' that holds the right to self-determination and the territorial unit for its expression. The substance of both has changed since the principle of self-determination was vested in the population(s) of Palestine as a whole, when the British Mandate was created in 1922.[166]

The Mandate for Palestine was a Class A Mandate,[167] defined by Article 22 of the League of Nations Covenant as territories that had previously formed part of the Ottoman Empire and that had 'reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone'. The British Colonial Secretary clarified its view of this provision as the self-determination of Palestine:

> His Majesty's Government conceived it as of the essence of such a mandate as the Palestine mandate, an A mandate, and of Article 22 of the Covenant, that Palestine should be developed, not as a British colony permanently under British rule, but as a self-governing State or States with the right of autonomous evolution.[168]

In the Balfour Declaration of 1917, the British Government had also authorised a 'national home for the Jewish people' in Palestine, with the qualifier, 'it being clearly understood that nothing shall be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine'. The League of Nations incorporated this Jewish national home project into the Palestine Mandate in 1922 with the same qualifier, [169] providing that the Zionist Organisation would function as the 'Jewish agency' which would cooperate with the Mandate authorities to facilitate Jewish immigration, naturalisation, and development of the country and making English, Arabic and Hebrew the official languages. Article 15 of the Mandate further stated that 'No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language'. Still, the Zionist Organisation interpreted 'Jewish national home' to mean the eventual formation of a Jewish state in Palestine. The implications of this policy for the Palestinian Arabs, which led to rising violence, forced the British Government to issue a 1939 White Paper clarifying that Britain envisaged a bi-national solution in a single unitary state with both Arabs and Jews would share power in such a way that their essential interests would be secured.[170] This model was supported also by the recommendations of the 1946 Anglo-American Committee of Enquiry and the 1948 draft UN Trusteeship Agreement. The 1937 Peel Partition Plan[171] and the 1947 UN Partition Plan[172]

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[165] *Wall Advisory Opinion*, ICJ Rep, 2004, 136 at 182-183, para. 118. This was a unanimous ruling by the Court. Although one judge found that the Court should have exercised its discretion and refused to accede to the request for an advisory opinion, and thus dissented from the Court's formal conclusions, he nonetheless expressly affirmed that the Palestinian people possesses the right to self-determination, see Declaration of Judge Buergenthal, ICJ Rep, 2004, 240 at 241, para. 4.

[166] The Mandate entered into force in 1923.

[167] See *Wall Advisory Opinion*, ICJ Rep, 2004, 165, para. 70.

[168] See the statement dated 5 August 1937 by Mr. Ormsby-Gore, the Colonial Secretary, at the League of Nations, Permanent Mandates Commission, Minutes of the Thirty-Second (Extraordinary) Session devoted to Palestine, held at Geneva from 30 July 30 to 18 August 18 1937, including the Report of the Commission to the Council, Official No. C.330.M.222 1937. VI, p. 87.

[169] The Council of the League of Nation, Palestine Mandate, 24 July 1922.

[170] See Palestine: Statement of Policy, Presented by the Secretary of State for the Colonies to Parliament by Command of His Majesty, (1 May 1939), Cmd. 6019; Report of the Anglo-American Committee of Enquiry regarding the problems of European Jewry and Palestine, Miscellaneous No. 8 (1946), Lausanne, 20 April, 1946 (London: H.M.S.O. Cmd. 6808); and Draft Trusteeship Agreement for Palestine, U.N. Doc. A/C.1/277, 20 April 1948.

[171] Palestine Royal Commission Report, July 1937, Cmd. 5479.

recommended partition and formation of a 'Jewish state' and an 'Arab state', thus proposing Palestine's division into two self-determination units serving two distinct peoples.

During the war between Zionist and Arab forces in 1947-48, Israel was declared an independent Jewish state in 78 percent of Mandate Palestine. The Palestinian Arab population's right of self-determination was left without expression and was effectively submerged as an international concern, displaced by concerns for the return of 'Arab refugees'.[173] It resurfaced only toward the end of the 1960s, with the rise of the Palestine Liberation Organisation (PLO) and the linking of the rights of the Palestinian people to national liberation struggles in Africa.

In 1969, the UN General Assembly recognised the 'inalienable rights' of 'the people of Palestine', implying by reference to 'refugees' and 'other inhabitants of the occupied territories' that this people was a people distinct from the population of Mandate Palestine as a whole, which now included Jewish citizens of Israel.[174] In November 1970, the General Assembly passed a resolution affirming 'the legitimacy of the struggle of peoples under colonial and alien domination recognized as being entitled to the right of self-determination to restore to them that right by any means at their disposal'[175] and condemning 'those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa and Palestine.'[176] A week later, the General Assembly passed another resolution recognising that 'the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations'.[177] In 1973, the General Assembly passed Resolution 3070 declaring that both the Palestinian people and the peoples of southern Africa had a right to engage in armed struggle in pursuit of their right of self-determination.[178]

Thus, since 1967, the 'Palestinian people' has come to mean the Arab population of Mandate Palestine that has not been incorporated into Israel through citizenship, although no sectarian or ethnic identity has been formally ascribed (and the nationality of Palestinian citizens of Israel remains a subject of some tension).[179] In 1975, the General Assembly expressed its grave concern that no

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[172] General Assembly Resolution 181, (II), 29 November 1947. The Arab states opposed the Partition Plan and demanded independence in a single unitary state. One of their objections, among others, was that they did not think that a Palestinian state in the area allocated to it in the Plan would be viable. See the Official Records of the Second Session of the General Assembly, Ad Hoc Committee on the Palestinian Question, 25 September – 25 November 1947, UN Doc. A/AC. 14/32 and Add. 1, 11 November 1947.

[173] The 1948 war led to a fundamental change in the demographic composition of Palestine. See Janet L. Abu-Lughod, 'The Demographic Transformation of Palestine' in Ibrahim Abu Lughod (ed.), *The Transformation of Palestine: Essays on the Origin and Development of the Arab-Israeli Conflict* (Evanston: Northwestern University Press, 1987, 2nd Ed.), pp. 139-163. The literature on the 1948 war is vast: for example, see Walid Khalidi, *Why did the Palestinians leave? An examination of the Zionist version of the exodus of 1948* (London: Arab Information Centre, 1963); Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949* (Cambridge: Cambridge University Press, 1987); Eugene L. Rogan and Avi Shlaim (eds.), *The War for Palestine: Rewriting the History of 1948* (Cambridge: Cambridge University Press, 2007, second edition).

174 General Assembly Resolution 2535 (XXIV),10 December 1969, *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Part B, operative para. 1.

[175] See UN General Assembly Resolution 2649 (XXV), 30 November 1970.

[176] General Assembly Resolution 2649, ibid, operative para. 5.

[177].General Assembly Resolution 2672 (XXV),8 December 1970, *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Part C, operative para. 1.

[178] General Assembly Resolution A/3070, (XXVIII), 30 November 1973, '*reaffirms* the legitimacy of the peoples' struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle.'

[179] A recent example is the reaction of Palestinian citizens of Israel to then Israeli Foreign Minister Tipi Livni's comment, 'Once a Palestinian state is established, I can come to the Palestinian citizens, whom we call Israeli Arabs, and say to them 'you are citizens with equal rights, but the national solution for you is elsewhere.'‘

progress had been made toward 'the exercise by the Palestinian people of its inalienable rights in Palestine, including the right to self-determination without external interference and the right to national independence and sovereignty.'[180] It also expressed concern that the Palestinians had not been able 'to return to their homes and property from which they have been displaced and uprooted.'[181] It then established a Committee on the Exercise of the Inalienable Rights of the Palestinian People to assist them in exercising their right of self-determination.[182] The General Assembly has repeatedly reaffirmed the right of the Palestinian people to 'self-determination, national independence, territorial integrity, and national unity and sovereignty without external interference.'[183]

The territorial scope of the Palestinian self-determination unit has also altered. As ratified by the League of Nations in July 1922, the Mandate for Palestine included within its territorial scope land east of the River Jordan. As the Balfour Declaration had also authorised a 'Jewish national home' in Palestine, this complicated British plans to grant part of the territory to Arab allies from World War I. In September 1922, the British government excluded Transjordan from all the provisions dealing with Jewish settlement.[184] Although, technically, only one Mandate existed, Britain thus adopted separate administrative regimes for the two territories, administering the part west of the Jordan as 'Palestine' and the part east of the Jordan as 'Transjordan'. Transfer of authority proceeded incrementally and culminated in the independence of Transjordan as a separate state under Hashemite rule.[185] Expressly relying on this Agreement, in *Jawdat Badawi Sha'ban v Commissioner for Migration and Statistics*, the Supreme Court of Palestine ruled:

> Trans-Jordan has a government entirely independent of Palestine—the laws of Palestine are not applicable in Trans-Jordan nor are their laws applicable here. Moreover, although the High Commissioner of Palestine is also High Commissioner for Trans-Jordan, Trans-Jordan has an entirely independent government under the rule of an Amir and apart from certain reserved matters the High Commissioner cannot interfere with the government of Trans-Jordan—at the most he can advise from time to time. His Britannic Majesty has entered into agreements with His Highness the Amir of Trans-Jordan in which the existence of an independent government in Trans-Jordan under the rule of the Amir has been specifically recognised (see Agreement dated 20.2.28). It is clear there from that Trans-Jordan exercises its powers of legislation and administration through its own constitutional government which is entirely separate and independent from that of Palestine.[186]

Quoted in *Ha'aretz*, 'Livni: National aspirations of Israel's Arabs can be met by Palestinian homeland', 11 December 2008.

[180] General Assembly Resolution 3376 (XXV), 10 November 1975.

[181] Ibid.

[182] Ibid, operative para. 3.

[183] See, e.g., General Assembly Resolution 33/24 of 29 November 1978, and General Assembly Resolution 36/9 of 28 October 1981.

[184] See the statement by Lord Balfour to the League of Nations, 16 September 1922, regarding Article 25 of the Mandate for Palestine in 3 *League of Nations Official Journal*, November 1922, pp. 1188-1189; also the memorandum by Lord Balfour to the Council of the League of Nations revoking specific articles pertaining to the Jewish national home from the Mandate for Transjordan in 3 *League of Nations Official Journal*, November (1922), pp. 1390-1391.

[185.] Incremental steps included the 22 March 1946 Treaty of Alliance between the United Kingdom and Transjordan (146 BFSP 461 and UKTS No32, 1946) and the 20 February 1928 Agreement between the United Kingdom and Transjordan respecting the Administration of the Latter (128 BFSP 273 and UKTS No7, 1930). On the separation of Palestine and Transjordan, see Crawford *Creation of States*, pp. 423-424.

[186] *Jawdat Badawi Sha'ban* v. *Commissioner for Migration and Statistics* (1945) (Supreme Court of Palestine sitting as the High Court of Justice, 14 December 1945), 12 *Law Reports of Palestine* 551 at 553.

This process culminated in the independence of Transjordan as a result of the 22 March 1946 Treaty of Alliance between the United Kingdom and Transjordan.[187] As Crawford observes, the effect of this separation is that issues of self-determination in respect of 'Palestine properly so called, that is the area west of the 1922 line' must be considered on their own. The territory which became Transjordan is irrelevant in this equation.[188] This is in accordance with the principle of *uti possidetis iuris* which is associated with the decolonisation process, and thus the exercise of the right of self-determination. In the *Case concerning the frontier dispute (Burkina-Faso/Mali)*, the International Court ruled:

> 23. ...The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term...
>
> 24. The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the territory of an independent State, or one which was under protectorate, but had retained its international personality. There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*.[189]

As a result of the administrative separation of Palestine and Transjordan, the *uti possidetis* rule excludes any consideration that the territory to the east of the River Jordan is relevant to the question of the self-determination of the Palestinian Arab population. The operation of *uti possidetis* may also be seen in both the granting of independence to Jordan in 1946 and the delineation of its boundary with Israel in Article 3 of the 1994 Israel-Jordan Peace Treaty.

Nevertheless, some sources have argued that the ultimate sovereign of the West Bank is properly the Hashemite Kingdom of Jordan, based on Jordan's administration of the West Bank, including East Jerusalem, from 1948 until 1967.[190] In this view, self-determination for Palestinians in the West Bank should be expressed ultimately through adoption of Jordanian citizenship and accession of West Bank land to Jordanian sovereignty. For example, for example, a former legal advisor to the Israeli Foreign Ministry stated:

> Since Israel seized the West Bank from the Kingdom of Jordan in the 1967 Six-Day War, this territory has essentially been disputed land with the claimants being Israel, Jordan, and the

[187] 6 *United Nations Treaty Series* 74 (subsequently replaced by the 15 March 1948 Treaty of Alliance between the United Kingdom and Transjordan, 77 United Nations Treaty Series 994). On the separation of Palestine and Transjordan, see Crawford, *Creation of States*, pp. 423-424.

[188] Crawford, *Creation of States*, p. 424.

[189] *Case concerning the frontier dispute (Burkina-Faso/Mali)*, ICJ Rep, 1986, 554 at 556, paras. 23-24; see generally 565-567, paras. 20-25. This judgment was delivered by a Chamber of the International Court, comprising Judges Bedjaoui, Lachs and Ruda, with Judges *ad hoc* Luchaire and Abi-Saab. Under Article 27 of the Statute of the International Court, a judgment given by a Chamber of the Court 'shall be considered as rendered by the Court'.

[190] See, e.g., the arguments advanced by Julius Stone, *Israel and Palestine: Assault on the Law of Nations* (Baltimore: Johns Hopkins University Press, 1981). In a speech before the UN General Assembly on 2 December 1980, Yehuda Z. Blum, Israel's Permanent Representative to the United Nations said that the claims of the Palestinians to establish a state in the West Bank and Gaza Strip were unfounded. He said that the Palestinians had already achieved self-determination in their own state, namely Jordan. See General Assembly Official Records, XXXVth session, Plenary Meetings, 77th meeting, 1318, paras. 108–13.

> Palestinians. Its ultimate status and boundaries will require negotiation between the parties, according to Security Council Resolutions 242 and 338.[191]

After the end of hostilities in 1949, Jordan did adopt a policy to incorporate the West Bank. On 24 April 1950, the Jordanian House of Assembly promulgated a resolution which provided in part:

> in accordance with the right of self-determination...the Jordan Parliament, representing both banks, decides...
>
> 1. Approval is granted to complete unity between the two banks of the Jordan, the Eastern and the Western, and their amalgamation in one single State...
>
> 2. Arab rights in Palestine shall be protected. These rights shall be defended with all possible legal means and this unity shall in no way be connected with the final settlement of Palestine's just case within the limits of national hopes, Arab cooperation and international justice.

After the Six-Day War in 1967, the United States gave assurances to King Hussein of Jordan that it did not envisage that Jordan would be confined to the East Bank and was prepared to support the accession of the West Bank to Jordan 'with minor boundary rectifications'.[192] Reflecting this so-called 'Jordan option', Israel's stance between 1967 and 1988 was to ignore calls by West Bank Arabs for a separate existence, preferring instead to deal with Jordan.[193]

On the other hand, the Political Committee of the Arab League declared that Jordan's annexation of the West Bank violated its resolution of 12 April 1950, which had prohibited the annexation of any part of Palestine. A compromise was reached between the League and Jordan, and on 31 May 1950 Jordan declared that the annexation was without prejudice to the final settlement of the Palestine issue.[194] Only the United Kingdom and Pakistan formally recognised Jordan's annexation of the West Bank (not including Jerusalem)[195] and Jordan formally renounced its claim to sovereignty over the

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[191] R. Sabel, *The ICJ opinion on the separation barrier: designating the entire West Bank as 'Palestinian territory'* (Jerusalem: Jerusalem Center for Public Affairs, October 2005), available at: www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=254&PID=0&IID=893.

[192] See *Foreign Relations of the United States, 1964-68: Vol. XIX, Arab-Israeli crisis and war, 1967* (Washington DC: US Government Printing Office, 2004) [hereinafter XIX FRUS 1964-68], Doc. 506, *Telegram from the Department of State to the Embassy in Israel, 30 November 1967*, 998; and Doc. 501, *Telegram from the Mission to the United Nations to the Department of State, 4 November 1967*, 981 at 982-983.

[193] See XIX FRUS 1964-68, Doc. 448, *Memorandum of conversation, 24 October 1967*, 944 at 946; Doc. 491, *Telegram from the Mission to the United Nations to the Department of State, 26 October 1967*, 953 at 955; and Doc. 494, *Memorandum from the President's Special Counsel (McPherson) to President Johnston, 31 October 1967*, 961. Gerson notes that Israel did not contest the lawfulness of Jordan's control over the West Bank, as shown by its calls for a peace treaty which contained border modifications: see A. Gerson, *Israel, the West Bank and international law* (London: Cass, 1978), p. 80. In contrast, Blum claims that the 'non-prejudice clause' in the 1949 Israel-Jordan Armistice Agreement froze the parties' rights and claims to the territory of the West Bank. As long as this remained in force, no unilateral act could alter the rights of either party, thus Jordan's purported annexation of the West Bank lacked any legal effect—see Y.Z. Blum, 'The missing reversioner: reflections on the status of Judea and Samaria' (1968)3 *Israel Law Review* 279 at 288. The Israel-Jordan Armistice Agreement terminated, at the latest, with the outbreak of the Six-Day War in 1967—see R. Sabel, 'The International Court of Justice's decision on the separation barrier and the green line' (2005) 38 *Israel Law Review* 316 at 324.

[194] For a dossier of the relevant documents, see M. Whiteman (ed.), 2 *Digest of International Law* (Washington DC: Dept of State, 1963) 1163-1168.

[195] For the United Kingdom's statement of recognition, see 474 HC Deb (5th Ser) cols.1137-1139 (27 April 1950), reproduced in Whiteman, 2 *Digest of International Law*, 1167-1168. A scanned copy of the statement is available at: http://upload.wikimedia.org/wikipedia/en/9/91/UKrecognizesIsraelJordan.pdf.

West Bank in 1988.[196] In the 1994 Israel-Jordan Peace Treaty, the boundary employed was the Mandate boundary, as amended in 1922 when Palestine and Transjordan were constituted as separate administrative units. Article 3 provided, in part:

> 1. The international boundary between Jordan and Israel is delimited with reference to the boundary definition under the Mandate as is shown in Annex I (a), on the mapping materials attached thereto and coordinates specified therein.
>
> 2. The boundary, as set out in Annex I (a), is the permanent, secure and recognized international boundary between Jordan and Israel, without prejudice to the status of any territories that came under Israeli military government control in 1967.[197]

The West Bank, including East Jerusalem, and the Gaza Strip have thus become the self-determination unit for the Palestinian people. In its written submissions to the ICJ during the *Wall* advisory opinion process, Palestine referred to these territories as 'the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination'.[198] Israel and the PLO have agreed that the West Bank and Gaza Strip form 'a single territorial unit' whose integrity is to be preserved pending the conclusion of permanent status negotiations.[199] The UN General Assembly, in one of its latest pronouncements concerning the territorial dismemberment of the West Bank by the construction of the Wall, stressed 'the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the OPT, including East Jerusalem.'[200] Similarly, following Israel's 'Operation Cast Lead' in the Gaza Strip in December 2008-January 2009, the Security Council stressed that the Gaza Strip constitutes an 'integral part' of the self-determination unit comprised of the Palestinian territory occupied in 1967.[201] The Wye River Memorandum and the Sharm el-Sheikh Memorandum contain provisions prohibiting 'any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement.'[202] Israel's High Court of Justice, also relying on the Israeli-Palestinian Interim Agreement, has affirmed Israel's recognition of the unity of the West Bank and Gaza as a single territorial unit.[203] The ICJ's finding that the Interim Agreement

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[196] This was announced by King Hussein in his 31 July 1988 *Address to the Nation*, reproduced at www.kinghussein.gov.jo/88_july31.html and (1988) 27 *International Legal Materials* 1637. See also 'Jordan: Statement Concerning Disengagement from the West Bank and Palestinian Self-Determination', Address by His Majesty King Hussein to the Nation, 31 July 1988, (1988) 27 *International Legal Materials* 1637 at 1637-1645.

[197] Treaty of Peace between the Hashemite Kingdom of Jordan and the State of Israel, 26 October 1994, 2042 United Nations Treaty Series 35325, reproduced as UN Doc. A/50/73 and S/1995/83 (27 January 1995); and also United Nations Treaty Series, reproduced at: www.kinghussein.gov.jo/peacetreaty.html, and (1995) 34 *International Legal Materials* 43.

[198] See, e.g., *Wall Advisory Opinion* Pleadings, Palestine Written Statement, 239, para. 548 and 240, para. 549.

[199] See the 1993 Declaration of Principles on Interim Self-Government Arrangements, Article IV; and the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Article XI.1. For commentary, see R. Shehadeh, *From occupation to Interim Accords: Israel and the Palestinian Territories* (London: Kluwer, 1997), pp. 35-37. The question of Jerusalem is, of course, a matter reserved for the permanent status negotiations: see the Agreed Minutes to the Declaration of Principles on Interim Self-Government Arrangements, Understanding in relation to Article IV; and 1995 Interim Agreement, Articles XVII.1 and XXXI.5.

[200] GA Resolution 62/146, 18 December 2007.

[201] Security Council Resolution 1860, 8 January 2009.

[202] See Article V of the Israel-Palestine Liberation Organisation: Wye River Memorandum, 23 October 1998, (1998) 37 *International Legal Materials*, 1251, at 1255; and Article 8.10, Israel-Palestine Liberation Organisation: The Sharm El-Sheikh Memorandum, 4 September-. 1999, 38 *International Legal Materials*, 1465 at 1468.

[203] *Ajuri* v. *IDF Commander*, HCJ 7015/02, 3 September 2002, (2002) *Israel Law Review* 1, opinion of President Barak at 17-18, para. 22. Lein noted, *inter alia*, that Israel incorporated the Interim Agreement in its entirety into its military legislation in both the West Bank and Gaza Strip, and that this legislation has not been revoked: see Y. Lein, *One big prison: freedom of movement to and from the Gaza Strip on the eve of the Disengagement*

affirmed the Palestinian people's right to self-determination[204] thus records the status and integrity of the West Bank and Gaza as the territorial self-determination unit upon which the Palestinian people is entitled to exercise the right to self-determination.

C. Legal Status of the Occupied Palestinian Territories

The Government of Israel has consistently challenged the status of the Palestinian territories as occupied, referring to them as 'administered' or 'disputed' territories. (Within Israel, this controversy is often elided entirely by calling the West Bank 'Judea and Samaria' and Israeli legal scholarship often employs this term.)[205] For example, a former legal advisor to the Israeli Foreign Ministry has stated:

> Since Israel seized the West Bank from the Kingdom of Jordan in the 1967 Six-Day War, this territory has essentially been disputed land with the claimants being Israel, Jordan, and the Palestinians. Its ultimate status and boundaries will require negotiation between the parties, according to Security Council Resolutions 242 and 338.[206]

Several reasons are proffered for arguing that the Palestinian territories are not occupied. One is that the West Bank and Gaza Strip lacked legitimate sovereigns when Israel seized them during the 1967 war—the 'missing reversioner' argument—and thus the law of occupation does not apply. Israel has further claimed to annex East Jerusalem and thus remove it permanently from the regime of occupation. Other arguments tacitly accept that the Palestinian territories were under belligerent occupation but assert that their status has recently changed. In particular, the Oslo Accords are sometimes argued to have altered the status of the territories, a claim explored here through careful reference to the terms of the Fourth Geneva Convention regarding such agreements. Also, Israel's unilateral 'disengagement' and withdrawal of settlements from the Gaza Strip in 2005 is frequently argued to have terminated Israel's status as occupying power there. Although the international community has rejected these arguments, the legal basis for doing so here must be established.

1. The 'Missing Reversioner' Argument

Although Israeli military legislation initially accepted the Fourth Geneva Convention as *lex specialis* in the OPT, and therefore that the West Bank and Gaza were occupied territories,[207] it was not long after the 1967 war that this position was reneged upon and the 'missing reversioner' argument gained currency in Israeli legal and political circles.[208] In essence, this argument contends that Israel does not have the status of belligerent occupant in the territories seized in the Six-Day War because neither Jordan nor Egypt were the displaced legitimate sovereigns over these territories in terms of Article 43

Plan (Jerusalem: B'Tselem/HaMoked, 2005), 20-21, available at: www.hamoked.org.il/items/12800_eng.pdf,

[204] *Wall Advisory Opinion*, ICJ Rep, 2004, 182-183, para. 118.

[205] Judea and Samaria are names associated in Jewish tradition with Jewish kingdoms or regions located in territory now in West Bank.

[206] R. Sabel, 'The ICJ opinion on the separation barrier: designating the entire West Bank as 'Palestinian territory'' (Jeruselem: Jerusalem Center for Public Affairs, October 2005), available at: www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=254&PID=0&IID=893.

[207] Article 35 of Israeli Military Proclamation No. 3, June 1967, stated that Israeli military courts in the occupied territory 'must apply the provisions of the [Fourth] Geneva Convention ... In case of conflict between this Order and the said Convention, the Convention shall prevail.'

[208] See Blum, 'Missing Reversioner', and M. Shamgar, 'The observance of international law in the administered territories' (1971) 1 *Israel Yearbook on Human Rights* 262 at 263-266. See also Gerson, *Israel, the West Bank, and International Law* pp. 76-82; and G. Gorenberg, *The accidental empire: Israel and the birth of the settlements, 1967-1977* (New York: Times Books, 2006), p. 101.

of the Hague Regulations. (Notably, this argument contradicts arguments about ultimate Jordanian sovereignty discussed in the previous section.) According to the argument, as Jordan and Egypt had invaded the territory of Mandate Palestine in 1948 in order to eradicate Israel, they had used force unlawfully in contravention of Article 2(4) of the United Nations Charter.[209] Because they had unlawfully acquired control over the territories, Blum claims that Jordan, and by extension Egypt, were entitled at most to claim the status of belligerent occupants.[210] As the purpose of the law of belligerent occupation is to recognise the occupant's rights and obligations of governance while safeguarding the reversionary rights of the ousted sovereign, where the latter did not exist (because there is no ousted sovereign) only those rules intended to safeguard the humanitarian rights of the population apply.[211]

In particular, Israel claimed that because the OPT did not constitute territories of a High Contracting Party to the Fourth Geneva Convention, the situation did not fall within the terms of Article 2 of the Convention which provides, in part:

> ...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

In this view, Israel is in lawful control of the territories as a result of measures taken in self-defence, to which no other State could show better title. Accordingly, Blum contends, Israel's possession of the territories was 'virtually indistinguishable from an absolute title...valid *erga omnes*'.[212]

The 'missing reversioner' argument was rejected by the ICJ in the *Wall* advisory opinion. The ICJ ruled that the Convention applied to any armed conflict between High Contracting Parties and that it was irrelevant whether territory occupied during that conflict was under their sovereignty. This interpretation was based on textual exegesis, the drafting history of the Fourth Geneva Convention, the practice of parties to the Convention, the views of the ICRC, General Assembly and Security Council, and also that of Israel's High Court of Justice.[213] This was a unanimous finding by the Court, as the sole dissenting judge, Judge Buergenthal, expressly concurred in this ruling.[214] This conclusion had also been foreshadowed in the September 1967 memorandum of the then legal advisor to the

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[209] Article 2(4) provides, 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'.

[210] Blum, 'Missing Reversioner', pp. 288, 292-293.; also Gerson, *Israel, the West Bank, and International Law,* pp. 78-79 (although Gerson thinks that Jordan may have been more than a belligerent occupant in the West Bank, inventing the category of trustee-occupant in the process); and Shamgar, 'Administered territories' at 265-266.

[211] Blum, *Missing Reversioner*, pp. 293-294.

[212] Blum, *Missing Reversioner*, 294. See also Blum's *Secure boundaries and Middle East peace in the light of international law and practice* (Jerusalem: Hebrew University, 1971), pp. 90-91; Gerson, *Israel, the West Bank, and International Law,* 80-81; E. Rostow, 'Palestinian self-determination: possible futures for the unallocated territories of the Palestine Mandate' (1978-79) 5 *Yale Studies in World Public Order* 147 at 160-161; and S.M. Schwebel, 'What weight to conquest?' (1970) 64 *American Journal of International Law* 64, republished in Schwebel, *Justice in international law* (Cambridge: Grotius/Cambridge University Press: 1994), p. 521, and in M. Shaw (ed.), *Title to territory* (Aldershot: Ashgate, 2005), p. 393. Compare R.Y. Jennings and A.D. Watts, *Oppenheim's international law Vol. I: Peace* (London: Longmans, 1992, 9th Ed.), p. 704 n.8; and R.A. Falk and B.H. Weston, 'The relevance of international law to Palestinian rights in the West Bank and Gaza: in legal defence of the intifada' (1991) 32 *Harvard International Law Journal* 129 at 138-144.

[213] *Wall Advisory Opinion*, ICJ Rep, 2004, 173-177, paras. 90-101.

[214] Declaration of Judge Buergenthal, ICJ Rep, 2004, 240, para. 2.

Israeli Foreign Ministry, Theodor Meron, which noted that the international community had rejected Israel's claim that the territories were not occupied.[215]

Further, as Gerson notes, Israel did not contest the lawfulness of Jordan's control of the West Bank[216] and clearly sought to conclude a peace treaty after the Six-Day War which would have returned the West Bank to Jordan, albeit with modified borders. Jordanian repossession of the West Bank was the premise of the diplomatic negotiations and exchanges which preceded the adoption of Security Council resolution 242. This surely amounts to an implicit recognition by Israel that Jordan possessed title to the West Bank, thus negating the contention at the core of the missing reversioner argument and the rationale for claiming that the Fourth Geneva Convention is inapplicable.

2. East Jerusalem: status as occupied territory

Israel holds that East Jerusalem, the eastern part of the city held under Jordanian rule between 1948 and 1967, has been annexed permanently to Israel and is no longer occupied territory. This claim was initiated in Amendment 11 to the Law and Administrative Ordinance of 1948, passed by the Knesset on 27 June 1967, which held that the 'law, jurisdiction and administration' of the Israeli state shall extend to any area of Eretz Israel designated by order of the government. The following day, the Israeli authorities used this amendment to place East Jerusalem, including its Old City, under Israeli judicial and administrative control. On the same day, by virtue of a municipal order, the Israeli Ministry of Interior extended the boundaries of the Jerusalem Municipality over that same area, incorporating the territory and the population of occupied East Jerusalem into the municipal and administrative spheres of its government. The East Jerusalem Municipality was ordered to cease operations on 29 June 1967 and Israel completed its annexation under the banner of integration of services. In 1980, Israel confirmed Jerusalem's status as the capital of Israel through a Basic Law.[217]

Thus, much as France did in Algeria,[218] Israel absorbed East Jerusalem into its own territory and has proceeded to exercise sovereignty there. The intended permanence of this consolidation is clear from development planning since 1967, including an integrated ring of Jewish neighbourhoods and

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[215] See Gorenberg, *Accidental Empire*, pp. 101-102. Gorenberg provides a fragmented account of Meron's opinion (pp. 99-102). A scan of the original Hebrew text of this opinion is available on Gorenberg's website at: http://southjerusalem.com/settlement-and-occupation-historical-documents/, and a complete English translation on that of the Sir Joseph Hotung Programme in Law, Human Rights and Peace Building in the Middle East (School of Oriental and African Studies, London) at: http://www.soas.ac.uk/lawpeacemideast/resources/48485.pdf.

[216] Gerson, *Israel, the West Bank, and International Law*, p. 80. Israel also recognised that Egypt had some interest in Gaza by virtue of Article 2 of the Egypt-Israel Treaty of Peace, 26 March 1979, 1136 United Nations Treaty Series 17813 (registered by Egypt) and 1138 United Nations Treaty Series 17855 (treaty and annexes, registered by Israel) and *ibid* 17856 (agreed minutes, registered by Israel); also reproduced in (1979) 18 International Legal Materials 362. Article 2 provides, 'The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine...without prejudice to the issue of the status of the Gaza Strip. The Parties recognize this boundary as inviolable. Each will respect the territorial integrity of the other, including their territorial waters and airspace'.

[217] Israel: Basic Law: Jerusalem, Capital of Israel. Passed by the Knesset on the 17th Av, 5740 (30th July, 1980) and published in *Sefer Ha-Chukkim* No. 980 of the 23rd Av, 5740 (5th August, 1980), p. 186; the Bill and an Explanatory Note were published in *Hatza'ot Chok* No. 1464 of 5740, p. 287; and the official English translation in 21 Laws of the State of Israel 75, and also M. Medzini (ed.), *Israel's foreign relations: selected documents, 1947-1974* (Jerusalem: Ministry for Foreign Affairs, 1976), Vol. I, p. 245.

[218] After overthrowing the constitutional monarchy in 1848 and passing a new Constitution in November of that year, the colony of Algeria was declared to be an integral part of the metropolitan territory of France.

settlements surrounding the city and highways and a light rail system that connect Jewish settlements in occupied East Jerusalem to West Jerusalem.[219]

Israel's claim to sovereignty over the territory of East Jerusalem is invalid[220] on several counts and has not been recognised as legitimate by the international community. First, as Israel gained control to East Jerusalem through the use of force, its claim to permanent annexation amounts to conquest.[221] The right of conquest has long been rendered defunct in public international law by the emergence of the prohibition on the acquisition of territory through the threat or use of force, an intrinsic corollary of the prohibition on the use of force under Article 2(4) of the UN Charter, established as a peremptory norm of *jus cogens*.[222]

Second, Israel's annexation of Jerusalem dismembers the West Bank by dividing East Jerusalem from the rest of Palestinian occupied territory. As discussed in Chapter I, the Declaration on the Granting of Independence to Colonial Countries and Peoples[223] and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States emphasise the principle of territorial inviolability of territory under foreign domination.

Third, international humanitarian law proscribes any alteration in the status of an occupied territory by the Occupying Power, in whom sovereignty can never vest. For example, Article 47 of the Fourth Geneva Convention prohibits the deprivation of the rights of the occupied population 'by any annexation by the [Occupying Power] of the whole or part of the occupied territory'. The authoritative commentary on the Fourth Geneva Convention confirms that 'occupation as a result of war, while representing actual possession to all appearances, cannot imply any right whatsoever to dispose of territory'.[224]

In summary, Israel's annexation of East Jerusalem is *prima facie* unlawful under international law, does not affect that territory's status under international law, and does not impinge upon the application of *jus in bello* to protect the local population. The UN Security Council has supported this view, through several resolutions such as Resolution 252 of 1968, which declared that 'all legislative and administrative measures and actions taken by Israel which purport to alter the status of Jerusalem … are invalid and cannot change that status.'[225] By breaching its obligation not to alter the status of an

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[219] See Al-Haq, *40 Years after the Unlawful Annexation of East Jerusalem: Consolidation of the Illegal Situation Continues Through the Construction of the Jerusalem Light Rail* (28 June 2007), available at: http://www.alhaq.org/etemplate.php?id=326.

[220] See Security Council Resolution 298 (25 September 1971), quoted in *Wall* advisory opinion, ICJ Rep, 2004, 166, para. 75.

[221] The preamble to Security Council Resolution 267 (3 July 1969) on the status of the Old City of Jerusalem reaffirms 'the established principle that acquisition of territory by military conquest is inadmissible'.

[222] International Law Commission (ILC), 'Draft Articles on the Law of Treaties, with Commentaries' *ILC Yearbook 1966* Vol. II, p. 247. See also *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, Judgment, ICJ (1986), para. 190. For a detailed exposition of the emergence and consolidation of the illegality of territorial acquisition through the use of force, see I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), p. 217; S. Korman, *The right of conquest: the acquisition of territory by force in international law and practice* (Oxford: Clarendon Press, 1996); and with specific reference to the June 1967 hostilities, I. Sagay, 'International Law Relating to Occupied Territory: Can Territory be Acquired by Military Conquest under Modern International Law' (1972) 28 *Revue Egyptienne de Droit International* at 56-64.

[223] UN General Assembly Resolution 1514, paragraph 6 of which states, 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'

[224] J. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 275.

[225] UN Security Council Resolutions 252, 21 May 1968 and 267, 3 July 1969. See also UN Security Council Resolution 298, 25 September 1971 ('all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and

occupied territory, Israel has gone beyond what is permitted of an Occupying Power to the extent that it has effectively unlawfully colonised East Jerusalem and is preventing the exercise of self-determination by its population.

3. Legal Implications of the Oslo Accords

It could be argued that the Oslo Accords alter the legal framework of Israeli practices by terminating the condition of belligerent occupation, at least in Area A of the West Bank where nominal authority was officially handed over to Palestinian Authority. This argument is rejected below on four grounds: (1) Article 47 of the Fourth Geneva Convention prohibits any change of status in occupied territory concluded through negotiations between the occupying power and local authorities under occupation; (2) the agreements do not fall under the status of special agreements; (3) the prohibition on a change of status is not obviated by the status of the PLO as a signatory; and (4) the substance of the Oslo Accords allocated negligible genuine territorial jurisdiction to the Palestinian Authority and their implementation has not improved conditions for the population under occupation.[226]

a. The Oslo Accords: basic provisions

As used here, the term 'Oslo Accords' refers to the formal agreements that resulted from direct talks between the Israeli government and the PLO, formalised first as the Declaration of Principles on Interim Self-Government Arrangements (1993) and elaborated in the Interim Agreement on the West Bank and Gaza Strip (1995).[227] The Accords created a Palestinian Interim Self-Government Authority —styled 'the Council' in the agreement but generally called the Palestinian Authority (PA)[228]—that was to hold executive, legislative and judicial authority.[229] In addition, the Accords stipulated three territorial categories or jurisdictional zones in the West Bank (excluding East Jerusalem, upon which a determination was deferred to 'permanent status' negotiations), known as Areas A, B, and C. In Area A, amounting to approximately 2 percent of the West Bank at the time under the 1995 Interim Agreement, and encompassing six of the major Palestinian cities, the 'Council' was to be vested with

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legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status'); UN Security Council Resolution 476, 30 June 1980; UN Security Resolution 478, 20 August 1980. It is notable that these denunciations of Israel's attempts to alter the status of East Jerusalem were mirrored by the language of UN resolutions rejecting South Africa's endeavours to grant independence to certain Bantustan territories as similarly 'invalid'. See, for example, UN General Assembly Resolution 31/6A (1976).

[226] Shehadeh, *From Occupation to Interim Accords*, p. 15; O. Dajani, 'Stalled between seasons: the international legal status of Palestine during the Interim Period' (1997-98) 26 *Denver Journal of International Law and Policy* 27 at 65-69. Even in those areas designated A in the Oslo Accords, which have the highest concentration of Palestinian population, Israel retains responsibility for Israeli citizens. Moreover, Israel retains territorial jurisdiction over areas B and C, including its settlements, infrastructure and external relations: see Declaration of Principles, Article VIII, Public Order and Safety; Annex II, Agreement Minutes to the Declaration of Principles on Interim Self-Government; Interim Agreement, chapter II, Article XII (1) and Chapter III, Article XVII (1-2).

[227] The Oslo Accords comprise: The Declaration of Principles on Interim Self-Government Arrangements, September 1993, (1993) 32 *International Legal Materials* 1525; the Gaza-Jericho Agreement, May 1994, (1994) 33 *International Legal Materials* 622; The Interim Agreement on the West Bank and the Gaza Strip, September 1995, (1995) 36 *International Legal Materials* 551; Protocol on Redeployment in Hebron, January 1997, (1997) 36 *International Legal Materials* 650 ; Wye River Memorandum, October 1998, (1998) 37 *International Legal Materials* 1251, and the Sharm El-Sheikh Memorandum, September 1999, (1999) 38 *International Legal Materials* 1465. The latter two documents were focused on securing the compliance of the parties to implement prior agreements. These accords were preceded by Letters of Mutual Recognition in 1993.These agreements are sometimes termed collectively as the 'Oslo Accords', 'Oslo' or 'the Oslo process'.

[228] This interim governing authority is officially called the Palestinian National Authority (PNA) but is commonly referred to as the Palestinian Authority (PA).

[229] Interim Agreement, Chapter 3, Article XVII (3).

exclusive authority over the internal affairs of the Palestinian population: e.g., the provision of health, education, policing, and other municipal services. Even within Area A, however, Israel retained pre-eminent authority over its citizens, including settlers, thus maintaining overall territorial jurisdiction.[230]

Within Area B, encompassing many Palestinian villages and towns and approximately 26 percent of the West Bank, the Palestinian Authority was vested with the same functional authorities, including public order of Palestinians,[231] but Israel retained overriding responsibility for security and for protection of, and law enforcement against, Israelis.[232] In Area C, comprising approximately 72 percent[233] of the West Bank, and composed of Israeli settlements, major road networks, military installations and largely unpopulated areas such as the Jordan Valley, Israel retained full authority and responsibility.[234]

A different formulation was used in the Gaza Strip and Jericho, although stipulations were similar. The Palestinian Authority was responsible for the population and territory within the Gaza Strip and Jericho except for settlements and military installations. Israel retained overriding jurisdiction for internal and external security, for Israeli citizens throughout the Gaza Strip, and public order of settlements.[235] In both the West Bank and Gaza Strip, the PLO was prohibited from entering into agreements that amounted to foreign relations.[236]

The Accords also stipulated that through time Israel was to transfer to the Palestinian Authority jurisdiction over portions of Area C, with the exception of Israeli settlements and military areas. These matters, along with others—such as the status of Jerusalem, Palestinian refugees, final borders, and water management—were to be negotiated as part of the permanent agreement and were excluded from Palestinian jurisdiction in the interim period.[237] Israel also retained overriding authority to 'exercise its powers and responsibilities with regard to internal security and public order, as well as with regard to other powers and responsibilities not transferred'.[238]

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[230] Declaration of Principles, Article VIII, Public Order and Safety; Annex II, Agreement Minutes to the Declaration of Principles on Interim Self-Government; Interim Agreement, chapter II, Article XII (1) and Chapter. III, Article XVII (1-2).

[231] Interim Agreements, Chapter 2, Article XIII, para 2; However, movement of Palestinian policemen in certain areas of Area B required approval and coordination by Israel. See Chapter II, Article 8 (4-5).

[232] Interim Agreements, Chapter 2, Article 12 (1).

[233] The proportions of the West Bank cited above as constituting Areas A, B and C respectively derive from the 1995 *Interim Agreement on the West Bank and the Gaza Strip*. Those boundaries were to be gradually redrawn but have been frozen since the 1999 *Sharm el Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations* at 17 percent, 24 percent and 59 percent respectively.

[234] Interim Agreement, Chapter 2, Article XI, Land, para. 3. In addition, a special formulation for control was crafted for Hebron, dividing it into areas categorised as 'H-1' and 'H-2', due to the presence of Jewish settlers in the heart of the Palestinian populated Old City of Hebron. The Palestinian Authority was to exercise all civil powers and responsibility over the Palestinian population in both sectors; however, in H-2, the location of the concentration of settlers, Israel would retain responsibility for public order and security. See the Protocol Concerning the Redeployment in Hebron (1997). Like Hebron, a different formulation was used in the Gaza Strip, although it was effectively divided under areas of Palestinian authority and areas of Israeli authority, comprising Israeli settlements and military areas. See Article 5, Gaza-Jericho Agreement (1994). As in the West Bank, control of air space and borders remained effectively under Israeli control, although the Palestinian Authority was allowed to establish a nominal presence at the crossing with Egypt.

[235] Article 5(1-3), Gaza-Jericho Agreement (1994).

[236] See J Singer, 'Aspects of foreign relations under the Israeli-Palestinian Agreements on interim self-government arrangements for the West Bank and Gaza' (1994) 26 *Israel Law Review* 268 at 269-273.

[237] Interim Agreement, Article XVII (1); Interim Agreement, Chapter 2, Article XI (2).

[238] Interim Agreement, Annex III, Article 4(4).

The Interim Agreement provided that, in the future when authority is transferred from Areas C to the PA, the PA would often remain obliged to cooperate with, provide data on, or secure Israeli permission regarding matters such as changes to the Palestinian population registry,[239] the issuing of travel documents[240], land registration,[241] transportation or exploration of fuel,[242] water[243] telecommunications and use of the electromagnetic sphere,[244] or electrical infrastructural development, nature reserves[245], and archaeology.[246] Joint Committees established under the Accords enabled Israel to exercise a veto, thereby maintaining the *status quo*.[247] Israel also retained an overriding veto of legislation passed by the PA.[248]

b. Status of the Palestine Liberation Organisation as a Signatory

The 1995 Interim Agreement was signed by Israel and the Palestine Liberation Organisation. However, by the terms of the agreement Israel did not transfer authority to the PLO but created a temporary regime—a Palestinian Interim Self-Government Authority—pending the outcome of the final-status negotiations (as noted, called the Palestinian 'Council' in the Agreement):[249]

> Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred. [250]

Crawford comments that the Oslo instruments 'are remarkably unforthcoming on issues of status, no doubt because of fundamental disagreements between the parties'.[251] Singer, former Legal Advisor to the Israeli Ministry of Foreign Affairs, has stated that, under the Declaration of Principles and thus throughout the interim period, 'the Palestinian Council will not be independent or sovereign in nature'. Rather, 'the military government will continue to be the source of authority for the Palestinian Council and the powers and responsibilities exercised by it in the West Bank and Gaza Strip'.[252] This

[239] Interim Agreement, Annex III, Appendix I, Article 28(4).

[240] Ibid., Article 28 (10).

[241] Ibid., Article 22(4)(b).

[242] Ibid., Article 15(5)(b)(2).

[243] Ibid., Article 40.

[244] Ibid., Article 36(b)(6) and (c)(2).

[245] Ibid., Article 25(4-7).

[246] Ibid., Article 15(5)(b)(2).

[247] See, for example, the stipulations of Article 40 of Appendix I of Annex III, Protocol Concerning Civil Affairs of the Interim Agreement on 'Water and Sewage'and the Joint Water Committee, or Article 22(4) (b) thereof on the Professional Joint Committee to deal with land issues.

[248] This provision stipulated that draft legislation must be submitted to Israel for review and could be abrogated on grounds that it deemed to amend or abrogate existing military orders, which exceeds the jurisdiction of the Council or which is otherwise inconsistent with the Declaration of Principles or the interim agreements. See Interim Agreement, Chapter 3, Article XVIII (4-5).

[249] Article I(2) of the Interim Agreement provides: 'Pending the inauguration of the Council, the powers and responsibilities transferred to the Council shall be exercised by the Palestinian Authority established in accordance with the Gaza-Jericho Agreement, which shall also have all the rights, liabilities and obligations to be assumed by the Council in this regard. Accordingly, the term 'Council' throughout this Agreement shall, pending the inauguration of the Council, be construed as meaning the Palestinian Authority.'

[250]On the status and powers of the Palestinian National Authority under the Interim Agreement, see Dajani, 'Stalled between seasons', at 60-74.

[251] Crawford, *Creation of States*, p. 433.

[252] J. Singer, 'The Declaration of Principles on Interim Self-Government Arrangements: some legal aspects'

arrangement did not alter the condition of belligerent occupation. As Bruderlein notes, although the PA took over most of the responsibility for public services in the Gaza Strip under the Oslo agreements,

> The Oslo Agreements were never intended to determine the ultimate legal responsibilities of Israel towards the Palestinian population in the [occupied Palestinian territories]. They remained silent on this issue, leaving the question for the negotiation of the final status agreement. As a result, if the transfer of administrative responsibilities to the Palestinian Authority narrowed the scope of duties of Israel as the Occupying Power, it did not extinguish Israel's responsibilities towards the Palestinian people.[253]

Although other commentators agree that the PA is not sovereign, they claim that source of authority of the Israeli military administration is purely formal. Eyal Benvenisti, for example, argues that 'the myth of continuity of the Israeli military administration' through the agency of the Palestinian Authority is 'a myth both parties, each for its own reasons, sought to maintain'.[254] He claims that the parties' agreed position did not reflect realities on the ground because, initially under the 1994 Gaza-Jericho Agreement, control over the civilian population in the Gaza and Jericho areas was entrusted to the PA, and therefore Israel was no longer responsible for maintaining public order and civil life. Accordingly, in those areas, the Israeli occupation had ended as 'the test for effective control is not the military strength of the foreign army which is situated outside the borders...What matters is the extent of that power's effective control of civilian life *within* the occupied area'.[255] Following the conclusion of the Interim Agreement, in relation to Areas A and B designated in the Agreement,[256] Dinstein advanced a similar argument. He claims that, to the extent that Israel relinquished 'territorial jurisdiction with the functions of government' to the PA 'and that these functions are exercised in effect by the Palestinians', Israel's occupation of these areas terminated and it was no longer responsible.[257]

This argument is not compelling. Although the PA's competence and jurisdiction in these areas was cast in terms of territorial jurisdiction, Dajani notes that, in effect, 'it governs a population, rather than a territory'.[258] He points out that the PA's limited competence in some areas is counterbalanced by Israel's continued control over settlements which, in the West Bank, 'are scattered between Palestinian population centers'. The areas formally under the jurisdiction of the PA are not contiguous: 'Palestinians residing within them consequently remain subject to Israeli controls on

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(1994) 1 *Justice* 4 at 6, available at: www.intjewishlawyers.org/html/justice.asp.

[253] C. Bruderlein, *Legal aspects of Israel's disengagement plan under international humanitarian law*, p. 6, available at: www.ihlresearch.org/opt/pdfs/briefing3466.pdf.

[254] E. Benvenisti, 'The status of the Palestinian Authority', in E. Cotran and C. Mallat (eds.), *The Arab-Israeli Accords: legal perspectives* (London: CIMEL/Kluwer, 1996) p. 53: see also his 'Responsibility for the protection of human rights under the Interim Israeli-Palestinian Agreements' (1994) 28 *Israel Law Review* 297. Benvenisti's analysis is based on the terms of the 1994 Cairo Agreement on the Gaza Strip and Jericho Area: the thrust of his argument is equally applicable to the situation established under the Interim Agreement, which superceded the Gaza-Jericho Agreement—see Article 31(2) of the Interim Agreement.

[255] Benvenisti, 'Status of the Palestinian Authority', pp. 56-57, emphasis in original; see pp. 53-57 generally; also Benvenisti, *Human rights*, pp. 307-309.

[256] For a detailed analysis of the provisions of the Interim Agreement regulating the competence and jurisdiction of the Palestinian National Authority in Areas A and B, see Dajani, 'Stalled between seasons', pp. 61-69. Dajani estimates (p. 63) that the residual area of Area C covered 35-40% of Gaza and 70% of the West Bank. Under the terms of the Agreement, this included all settlements, areas that Israel considered to be of strategic importance, and unpopulated areas, over which Israel was to retain territorial jurisdiction while the Palestinian National Authority assumed limited functional and personal jurisdiction over Palestinians only.

[257] Y. Dinstein, 'The international legal status of the West Bank and the Gaza Strip—1998' (1998) 28 *Israel Yearbook on Human Rights* 37 at 45.

[258] Dajani, 'Stalled between seasons' p. 69; see also Crawford, *Creation of States*, pp. 443-444.

movement between towns and cities in the West Bank, as well as between the West Bank and Gaza Strip'.[259]

Further, Israel retained exclusive personal jurisdiction in criminal matters over Israelis, even regarding offences committed in Areas A and B where, moreover, Palestinian civil jurisdiction over Israelis was seriously circumscribed,[260] and in practice has proven to be non-existent. Also, in Area B, although the PA was to 'assume responsibility for public order for Palestinians', 'Israel shall have the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism'.[261] This retention of jurisdiction and, *a fortiori*, security competence, denies the PA full control of public order and civil life in these areas. Accordingly, even if a purely factual test for the termination of occupation is employed, its requirements are not fulfilled. Under the terms of the Interim Agreement, these Areas remained occupied. Consequently, the PA may best be seen as an institution to which the occupant has devolved limited administrative competence. The drafters of the Fourth Geneva Convention had envisaged that this could occur during a prolonged occupation, without terminating that occupation.[262] Crawford aptly describes it as 'an interim local government body with restricted powers'.[263]

For purposes of this study, question remains regarding the significance of an 'interim local government body' and other provisions of the Oslo Accords for findings on colonialism or apartheid. The following sections address the implications of the Oslo Accords in three stages: first, reviewing the inviolability of rights provided under the Fourth Geneva Convention arising under Articles 7, 8 and 47; second, confirming whether the Oslo Accords fall within the scope of Articles 7, 8 and 47; and finally, in light of these articles, assessing whether provisions of the Oslo Accords could serve to absolve Israel from responsibility under international law vis-à-vis the occupied population.

c. Inviolability of Rights under the Fourth Geneva Convention

World War II demonstrated that belligerent governments, particularly those whose territory was occupied, would conclude agreements with the occupying power often to the detriment of their own prisoners of war or civilian populations.[264] These arrangements were 'represented to those concerned as an advantage, but in the majority of cases involved drawbacks which were sometimes very serious.'[265]

The drafters of the Fourth Geneva Convention recognised that in situations of occupation, the occupied authority or its population was in a highly asymmetrical relationship with the Occupying Power and in a vulnerable position. The drafters were informed by events during World War II, when Occupying Powers intervened in occupied territories in various ways: for instance, by changing the constitution, dissolving the existing State, or creating new political or military organisations or political entities.[266] Occupying Powers also annexed territory or took actions in anticipation of

[259] Dajani, 'Stalled between seasons', p. 64.

[260] See Interim Agreement, Article XVII and Annex IV (Protocol concerning legal matters).

[261] Interim Agreement, Article 13(2)(a)

[262] See Pictet, *Commentary to Geneva Convention IV*, pp. 62-63, and 272-276. As Dajani observes, there is a presumption against the creation of a new State on a territory under belligerent occupation: see his 'Stalled between seasons', pp. 77-78. These are generally seen as puppet States which lack independence. Dajani argues that separation between the PLO and Palestinian Authority preserves Palestinian negotiators' independence from Israel, and thus avoids the application of this presumption (pp. 90-91). See also Crawford, *Creation of States*, pp. 78-83 and 156-157; and K. Marek, *Identity and continuity of States in public international law* (Geneva: Droz, 1968, 2nd Ed.), pp. 110-120.

[263] Crawford, *Creation of States*, 444: see also Dajani, 'Stalled between seasons', 67.

[264] Pictet, *Commentary to Geneva Convention IV*, p. 69

[265] Ibid., pp. 69-70.

[266] Ibid., p. 273.

annexing such territory.[267] In some instances, the authorities of the occupied territory, having come under pressure from the occupying power, concluded agreements prejudicial to protected persons.[268] These agreements included banning provision of humanitarian assistance, refusing to accept the supervision of a Protecting Power, or 'tolerating' the deportation or forced enlistment of protected persons.[269]

The drafters thus made the principal concern of the Fourth Geneva Convention the protection of 'protected persons'—people 'who at any given moment and in any manner whatsoever, find themselves, in cases of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.[270] Recognising that protected persons could come under immense pressure to forfeit their rights under the Fourth Geneva Convention, the drafters addressed this problem specifically in Article 8:

> protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention and by the special agreements referred to in the foregoing Article, if such there be.

The drafters also wanted to ensure that states could not take 'refuge behind the will of the protected persons' to justify their failure to comply with the provisions of the Convention[271] and that an individual's acquiescence to renounce rights did not 'open a breach which others in much greater numbers might have cause of regret.'[272] In this spirit, the drafters further emphasised the 'cardinal importance' of the non-derogability of the Convention's protections.[273] Article 47 states:

> Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

In sum, Articles 8 and 47 affirm that belligerents cannot conclude agreements which derogate from or deny to protected persons the safeguards of the Fourth Geneva Convention. Nor can any renunciation of rights by protected persons have legal effect.

d. The Oslo Accords as Special Agreements

The drafters of the 1949 Geneva Conventions included provisions in all four Conventions to preserve their protections even where 'special agreements' might be required. In the Fourth Geneva Convention, this provision is detailed in Article 7:

> In addition to the agreements expressly provided for in Articles 11, 14, 15, 17, 36, 108, 109, 132, 133 and 149, the High Contracting Parties may conclude other special agreements for all

[267] Ibid., p. 275.

[268] Ibid., pp. 274-275.

[269] Ibid., p. 275

[270] Article 4, Fourth Geneva Convention. This provision extends to all who are not of the nationality of the occupying state (although with some exceptions as discussed later): see Pictet, *Commentary to Geneva Convention IV*, p. 46, n. 4. The commentary notes that those not considered to be protected persons in situations of occupation include nationals of a state not party to the convention, nationals of a co-belligerent state, so long as the state has normal diplomatic representation in the occupying state, or persons who enjoy protection under the three other Conventions.

[271] Pictet, *Commentary to Geneva Convention IV*, p. 76.

[272] Ibid., p. 75.

[273] Ibid.

> matters concerning which they may deem suitable to make separate provision. No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.

In the same article, the drafters acknowledged that the provisions of the Convention might be supplanted by 'more favourable measures' that improve the status and conditions of protected persons:

> Protected persons shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken in regard to them by one or other of the Parties to the conflict.

The Oslo Accords could be considered a series of special agreements concluded by Israel and the PLO. Several questions arise from this possibility: whether these special agreements fall within the limitations imposed by Article 47 regarding agreements with local authorities; whether the special agreements could be understood as 'more favourable measures' that obviate application of the Fourth Geneva Convention; and whether provisions of the Oslo Accords could in any way exonerate Israel from responsibility under international law for alleged policies of colonialism or apartheid.

The PLO leadership was permitted to reside in the OPT only after July 1994. The agreements signed after the PLO leadership took up residence in the occupied territory would presumably fall within the scope of Article 47 and possibly also Article 8. However, when the first in this series of agreements, the Declaration of Principles (1993),[274] was signed, the PLO was based outside the OPT. Consequently, the PLO was not, at least initially, within the scope of Article 8 and the definition of 'protected persons' or unequivocally within the definition of 'authorities of the occupied territory' employed in Article 47. Thus the Declaration of Principles—which outlined the areas of responsibilities between the two parties and established the framework for future negotiations—could arguably constitute special agreements for purposes of the Convention.

The status of the PLO leadership regarding Article 47 must be considered for its recognised role as 'sole legitimate representative of the Palestinian people' as well as changing conditions faced by its leadership. The PLO, although its top leadership was in exile until 1994, represented Palestinians residing both outside and inside occupied territory and was considered to be the national authority for negotiations with Israel.[275] However, the PLO's attempt to accede to the Geneva Conventions in 1989 in the name of the State of Palestine had been declined by Switzerland on the basis that the question of Palestine's status as a state remained unsettled.[276] Thus the PLO could not sign the Oslo Accords in the capacity of a High Contracting Party of the Geneva Conventions. After the PLO assumed residence in the OPT, it continued to negotiate and sign agreements on issues affecting the Palestinian protected persons and the occupied territory, although the Palestinian Authority is responsible for the implementation of these agreements.[277] Once the Palestinian Authority was established, the PLO

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[274] As noted earlier, the Declaration of Principles established a framework for limited Palestinian interim rule pending a permanent status agreement to end the occupation and the issues under conflict. The subsequent series of agreements elaborated upon the transitional arrangements set out in the Declaration of Principles.

[275] In the Madrid talks, launched in 1991, and subsequently in the Oslo talks, the PLO was considered to be the legitimate representative of the Palestinian people. The Palestinian negotiation team, devoid of members of the PLO because they were barred from participating by Israel and the US, took its direction from the PLO based in Tunis. See, for example, Shehadeh, *From Occupation to Interim Accords*, p. 120; and also Hanan Ashrawi, *This Side of Peace: A Personal Account* (New York: Touchstone, 1995), pp. 116, 147, and 199.

[276] Although the PLO did not formally accede to the Conventions, Switzerland considered its unilateral undertaking to be valid: see *Wall Advisory Opinion*, ICJ Rep, 2004, 173, para.91.

[277] Dajani, 'Stalled between seasons', p. 71, maintains that the PLO does not have legal authority over the decisions of the PA that relate to local governance of the Palestinians in the OPT. While that is true, the PLO negotiated the framework for the creation of the PA and its powers. He also notes that while the PA has responsibility for municipal affairs within the OPT, it lacks the legal competence to make decisions regarding

negotiated subsequent agreements with Israel relating to the implementation of the Oslo framework. Hence, the PLO, rather than the Palestinian Authority, acted as the local authority in the occupied territories for purposes of Articles 7 and 47.[278] Yet the PLO itself could not be considered clearly to fall under the status of protected persons while its institutional existence and indeed part of its leadership remained transnational.

In light of this lack of clarity, one may turn instead to examine the content and context of those Accords. The Commentary to Article 47 notes that 'agreements concluded with the authorities of the occupied territory represent a more subtle means by which the Occupying Power may try to free itself from the obligations incumbent on it under occupation law'. This underscores the need for emphasis on substance (e.g., obligations of the Occupying Power) in order to safeguard the protections of the Conventions, rather than a focus on form.[279] The Commentary to Article 7 also emphasises substance over form, such as special agreements that are part of wider arrangements (such as armistice agreements).[280] Applying this principle to the Oslo Accords indicates that actual conditions must be taken into account. For example, it could be argued that, should the Oslo Accords serve to institute the establishment of a Palestinian state in the context of a two-state solution, this outcome would go beyond 'special agreements' by constituting 'more favourable measures', as noted in Article 7, which could ultimately relieve the Palestinian population of its status as 'protected persons' under the Fourth Geneva Convention. Indeed, the establishment of a Palestinian state in the West Bank, including East Jerusalem, and Gaza Strip would normally be considered to terminate application of the Fourth Geneva Convention.

Emphasising substance, however, the question would be whether a two-state solution, as actually implemented, would constitute 'more favourable measures' and truly fulfil the Palestinian right to self-determination and end the occupation of the OPT in its entirety. Article 2(d) of the Apartheid Convention and the history of South African Homelands (Bantustans) raise the question of whether establishing an 'independent' state (homeland) for the Palestinian people in only part of the OPT could be corollary to the racial enclave policy for which apartheid South Africa was notorious. Nominal independence in the Homelands was presented by the South African government as expressing and satisfying the right to self-determination of black Africans. Yet the international community determined that the Bantustans were tools of *apartheid* and denied them recognition on this basis. The criteria for determining when occupation has ended therefore cannot consist solely of claims by the Israeli government and the Palestinian Authority (as local authorities under occupation) that Palestinians have assumed sovereignty in a nominally independent State. Whether nominal statehood improves the condition of protected persons and fulfils the right to self-determination must be determined. In order to conform with Article 47, any agreement that leads to the creation of a Palestinian state must not merely perpetuate Israeli occupation under another guise.

As the purpose of the Fourth Geneva Convention is to ensure the protection and well-being of civilians in time of war and occupation, any agreement that implicates the non-derogable provisions of the Convention should be considered as falling within the scope of Articles 7, 8 and 47. The Oslo Accords tacitly presupposed the continued applicability of the Fourth Geneva Convention as they did not change the status of the OPT as occupied territory but rather expressly contemplated a transitional or interim period which would culminate in an agreement leading to a permanent settlement.[281] Given

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the ultimate status of the Palestinians within the OPT which, under the Oslo Accords¸ was to be addressed in the permanent status negotiations.

[278] Had the Accords provided for the Palestinian Authority to assume negotiations with Israel as the authorities of the occupied territories, then those agreements would clearly fall within the scope of the Convention: see Dajani, 'Stalled between seasons', pp. 69-74, for a discussion of the relationship between the Palestinian Authority and PLO during the 1990s.

[279] Pictet, *Commentary to Geneva Convention IV*, p. 274.

[280] Ibid., pp. 67-68.

[281] See Article I, Aim of Negotiations and Article V, Transitional Period and Permanent Status Negotiations, Declaration of Principles.

the manner in which authority was transferred, as discussed below, it is clear that the territory remained occupied throughout this interim period and to date. This study of whether Israeli is practicing colonialism or apartheid in the OPT is therefore based on the assumption that the territories retain their 'occupied' status under international law.

e. Implications of the Accords for Protections of the Fourth Geneva Convention

The Oslo Accords conveyed putative legality to legal and administrative arrangements that Israel had established over the preceding twenty-four years in violation of the laws of occupation.[282] For example, retaining jurisdiction in Area C enabled Israel to perpetuate settlement expansion, including by land expropriation or requisitions in violation of the Hague Regulations; destruction of private Palestinian property in violation of Article 53 of the Fourth Geneva Convention; and the continued transfer of its population in violation of Article 49(6). The Interim Agreement explicitly recognised the land rights of Israeli companies and settlers within the occupied territory.[283] Similarly, retaining overriding responsibility for security effectively enabled Israel to continue its practices in violation of the Palestinian rights to life, to freedom from arbitrary detention, to freedom of movement, etc. The provisions on infrastructure and water infrastructure and allocation also reaffirmed discriminatory allotments in favour of Israeli settlers and settlements, pending a final status agreement (as discussed in Chapter III).[284]

In sum, the Oslo Accords ratified mechanisms of control and discrimination that Israel had instituted within the OPT prior to 1993. As the provisions of these Accords constitute 'special agreements' under Article 7 of the Fourth Geneva Convention , and 'agreements between the authorities of the occupying territory and the Occupying Power' under Article 47, questions arise as to their legal implications. Article 7 stipulates that no special agreements shall adversely effect the situation of the protected persons, nor restrict the rights which the Convention confers upon them. Article 7 thus prohibits a belligerent from contracting out of its obligations owed to protected persons;[285] Article 8 prohibits a protected person from renouncing the protections of the Convention; and Article 47 reaffirms these two articles and the non-derogability of the Convention's provisions in cases in which the Occupying Power has annexed territory, implemented changes to institutions or the government of occupied territory, or entered into agreements with the authorities of the occupied territory.

Before the Oslo Accords, Israel implemented policies and undertook practices which contravened the protections of the Fourth Geneva Convention, many of which are relevant to a study on practices of colonialism and apartheid. These include Israel's establishment of settlements and its restrictions on land planning and development; Israel's measures related to resource allocation and sufficiency of supplies particularly of water; its restrictions on movement and other forms of collective punishment which are largely directed towards the Palestinian population as a whole; and its use of torture and administrative detention. The Oslo Accords do not contain provisions which *prima facia* amount to violations of the Convention, but they do recognise those unlawful prior practices and, through the allocation of jurisdiction and authorities, enable or ratify a continuation of such violations.

Article 7, in conjunction with Article 47 and Article 8, renders null and void those provisions of the Accords that ratify past violations of the Convention. The fact the PLO signed the Oslo Accords and in effect recognised Israeli practices which contravene the Fourth Geneva Convention is irrelevant in terms of Israel's obligations. Israel cannot exonerate or exculpate itself from responsibility for these policies and practices by relying on the PLO's ratification of the Oslo Accords.

In summary, the Accords, or at least provisions of them, fall within the scope of Article 47 and 7. They articulate two distinct phases, an interim stage and a final agreement, with most provisions of

[282] Shehadeh, *From Occupation to Interim Accords*, p. 157.

[283] Interim Agreement, Annex III, Article 22(3).

[284] Interim Agreement, Annex III, Article 40(5).

[285] Pictet, *Commentary to Geneva Convention IV*, p. 70.

the Accords stipulating arrangements for an interim phase.[286] This, as shown above, reflected a continued occupation, the removal of the Israeli military from the immediate presence of Palestinian populated areas notwithstanding. The provisions of the Oslo Accords, particularly those of the interim phase, reflect what was anticipated in the commentary to the Fourth Geneva Convention: that an Occupying Power would enter into an agreement in order to divest itself of responsibilities owed to the population.[287]

Finally, the protections provided by the Geneva Conventions are for the primary benefit of the protected persons, not the Occupying Power. As the ICJ noted in finding that the Fourth Geneva Convention is *de jure* applicable to the territory Israel occupied in 1967, 'the intention of the drafters of the Fourth Geneva Convention [is] to protect civilians who find themselves, in whatever way, in the hands of the occupying Power.'[288] The Court went on to note that the Conference of Government experts convened by the ICRC after World War II recommended that 'these Conventions be applicable to any armed conflict 'whether it is or is not recognized as a state of war by the parties' and 'in cases of occupation of territories in the absence of any state of war''[289], underscoring the emphasis on the protection of civilians. The commentary to Article 7 also stresses this point, noting that by restricting states' sovereign right to enter into agreements with other belligerents, Article 7 represents a 'landmark in the progressive renunciation by States of their sovereign rights in favour of the individual and the higher juridical order.'[290]

Thus, in light of the emphasis on and intent of the Conventions to safeguard protected persons and the 'special agreements' or provisions included in the Oslo Accords, these agreements must be viewed as falling within the scope of Article 7 and 47. Less important is that the PLO is a non-state actor and was thus not permitted to accede to the Convention. It considered, and unilaterally expressed, itself bound by Conventions. Moreover, the fact that the PLO was not recognised by Israel and that its leadership was prohibited from locating itself into the OPT prior to 1994 should not diminish its status as that of the authority of the occupied territory. Thus, although the first two agreements were signed when the PLO was still situated outside of the occupied territory, this should not negate the applicability of Articles 7, 8 or 47.

The Oslo Accords, accordingly, did not alter the status of the OPT under international law. The law of occupation, and in particular the protections embodied in the Fourth Geneva Convention, continue to supply the fundamental legal framework which determines Israel's rights and duties as occupant in its administration of the territories. Nor did the 'Roadmap', as approved by Security Council resolution 1515 (2003)—which as the ICJ noted in its *Wall* advisory opinion, 'represents the most recent of efforts to initiate negotiations' to bring the conflict to an end[291]— alter the status of the Palestinian territories as occupied.[292] Indeed, the preamble to the 'Roadmap' explicitly acknowledges that the

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[286] Provisions related to permanent status agreement are very few, namely listing the issues to be addressed during permanent status talks, the timing of the talks and the caveat that arrangements reached during the interim period will not impact final status: see Article I and Article V (2)-(4) of the Declaration of Principles. The Declaration of Principles and the subsequent agreements recognize these phases. It states that 'the two parties agree that the outcome of permanent status negotiations should not be prejudiced or pre-empted by agreements reached for the interim period. See Article V (4), Declaration of Principles.

[287] This is not to say that the authors of the Oslo Accords did not intend to conclude a permanent status agreement eventually. Whatever the intent, the provisions of the Accords aimed at divesting Israel from or limiting its responsibility over the Palestinian population.

[288] *Wall Advisory Opinion*, ICJ Rep, 2004, 174 -175, para 95.

[289] *Wall Advisory Opinion*, ICJ Rep, 2004, 175 , para 96.

[290] Pictet, *Commentary to Geneva Convention IV*, p. 71.

[291] *Wall Advisory Opinion*, ICJ Rep, 2004, 201, para. 162.

[292] See 'A performance-based roadmap to a permanent two-state solution to the Israeli-Palestinian conflict' annexed to a letter dated 7 May 2003 from the Secretary-General addressed to the President of the Security Council, UN doc. S/2003/529, 7 May 2003. For Israel's fourteen reservations see 'Israel's Response to the Road Map, 25 May, 2003, available at: http://www.knesset.gov.il/process/docs/roadmap_response_eng.htm. In

territory is occupied when it states that a settlement negotiated between the parties 'will resolve the Israel-Palestinian conflict, and end the occupation that began in 1967'.

Some also argue that Israel's 'disengagement' from the Gaza Strip in 2005 terminated the regime of occupation there. As shall be shown in the next section, this is not the case.

4. Continuing occupation of the Gaza Strip

In August-September 2005, Israel evacuated its settlements and withdrew its land forces from the Gaza Strip. This was in accordance with its Revised Disengagement Plan of 6 June 2004,[293] whose implementation was intended to ensure that:

> In any future permanent status arrangement, there will be no Israeli towns and villages in the Gaza Strip. On the other hand, it is clear that in the West Bank, there are areas which will be part of the State of Israel, including major Israeli population centers, cities, towns and villages, security areas and other places of special interest to Israel.[294]

Israel then claimed that it no longer had permanently stationed forces in the territory,[295]

> From this point on, the full responsibility for events occurring in the Gaza Strip and for thwarting terror attacks against Israeli targets will be in the hands of the Palestinian Authority and its apparatuses.[296]

On 12 September 2005, IDF Chief of Southern Command Major-General Dan Harel issued a decree ending military rule in Gaza by annulling the 6 June 1967 proclamation that originally instituted military rule.[297] Subsequently, the Israeli Security Cabinet attempted to further the claim that the Gaza Strip was not occupied territory by declaring it a 'hostile territory' on 19 September 2007.

The view that Israel had relinquished control and responsibility regarding the Gaza Strip and its population was endorsed by Israel's High Court of Justice in its January 2008 decision in *Jaber al Bassouini Ahmed et al v. Prime Minister and Minister of Defence*, in which the petitioners challenged Israel's restrictions on the supply of electricity and gas to the territory. In this decision, the Court relied on the Government of Israel's assertion that it was no longer in effective control of the Gaza Strip and thus no longer held it under occupation. The Court ruled:

> … since September 2005, Israel no longer has effective control over the events in the Gaza Strip. The military government that had applied to that area was annulled in a government

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light of the temporal stipulation – a final and comprehensive settlement of the Israel-Palestinian conflict in 2005 – as mentioned in the Roadmap, the Quartet (the EU, the UN, Russia and the US) launched the Annapolis process on 27 November 2007 to restart the moribund peace negotiations. On 16 December 2008, the Security Council declared its support for the negotiations initiated at Annapolis and 'its commitment to the irreversibility of the bilateral negotiations'. See Security Council resolution 1850, 16 December 2008.

[293] See 'The Cabinet Resolution Regarding the Disengagement Plan: Addendum A - Revised Disengagement Plan – Main Principles' and 'Addendum B – Format of the Preparatory Work for the Revised Disengagement Plan' (6 June 2004), available at: www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm.

[294] Revised Disengagement Plan, Section 1 (*Political and Security Implications*), Principle Three. In his separate opinion appended to the *Wall Advisory Opinion*, Judge Elaraby stated that the Disengagement Plan's claim that parts of the West Bank would become 'part of the State of Israel' was relevant in assessing the legality of the wall, as this demonstrated a clear intent to annex those areas in breach of international law. See the separate opinion of Judge Elaraby, ICJ Rep (2004), 246 at 253-254, para. 2.5.

[295] Revised Disengagement Plan, Section 2.A (*Main Elements: The Process*), Article 3(1), *The Gaza Strip*.

[296] IDF Spokesman, *Declaration regarding end of military rule in Gaza Strip* (12 September 2005), available at: http://www.mfa.gov.il/MFA/Government/Communiques/2005/Exit+of+IDF+Forces+from+the+Gaza+Strip+completed+12-Sep-2005.htm.

[297] IDF, *Declaration regarding end of military rule in Gaza Strip* (12 September 2005).

> decision, and Israeli soldiers are not in the area on a permanent basis, nor are they managing affairs there. In such circumstances, the State of Israel does not have a general duty to look after the welfare of the residents of the Strip or to maintain public order within the Gaza Strip pursuant to the entirety of the Law of Belligerent Occupation in International Law. Nor does Israel have effective capability, in its present status, to enforce order and manage civilian life in the Gaza Strip. In the circumstances which have been created, the main duties of the State of Israel relating to the residents of the Gaza Strip are derived from the situation of armed conflict that exists between it and the Hamas organization controlling the Gaza Strip; these duties also stem from the extent of the State of Israel's control over the border crossings between it and the Gaza Strip, as well as from the relations which has been created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the area, as a result of which the Gaza Strip has now become almost completely dependent upon supply of electricity by Israel.[298]

Similarly, some commentators have contrasted the degree of physical control exercised by Israel and by the Palestinian Authority (or Hamas) within the territorial confines of the Gaza Strip to conclude that Israel is no longer the occupant.[299] This view is rooted in the traditional law of land warfare and essentially asserts that:

> some form of military presence on land remains a necessary condition for an occupation, i.e. a military occupation cannot be solely imposed by the control of the national airspace by a foreign air force...or of the national seashore by a foreign navy. The law of occupation belongs historically to the law of land warfare which requires, at its core, a land-based security presence.[300]

Because the Gaza Strip is part of a self-determination unit, it must be questioned whether a unilateral assertion about its status by one party to the conflict is sufficient. An impartial determination, through the application of international law, would seem necessary, as observing the right to self-determination is an obligation owed to the international community as a whole. At the conference that adopted the 1977 Additional Protocols to the 1949 Geneva Conventions, the majority of participating States agreed that international humanitarian law could not be isolated and autonomous but had to operate in the context of general international law. International humanitarian law must adapt to conform with the principle expounded by the ICJ in the *Namibia* advisory opinion[301] that 'an

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[298] *Jaber al Bassouini Ahmed et al* v. *Prime Minister and Minister of Defense*, HCJ 9132/07, delivered 30 January 2008, opinion of President Beinisch, para. 12, available at: www.adalah.org/eng/gaza%20report.html. For commentary, see Y. Shany, 'The law applicable to non-occupied Gaza', paper delivered at the *Complementing IHL: exploring the need for additional norms to govern contemporary conflict situations* conference (Jerusalem, 1-3 June 2008), available at: http://law.huji.ac.il/upload/Shany_The_Law_Applicable_to_gaza.pdf.

[299] For instance, Y. Shany, 'Faraway, so close: the legal status of Gaza after Israel's disengagement' (2006) 8 *Yearbook of International Humanitarian Law* 369, and his 'Binary law meets complex reality: the occupation of Gaza debate' (2008) 41 *Israel Law Review* 68. See also Bruderlein, *Legal aspects of Israel's disengagement plan*; E. Benvenisti, 'The law on the unilateral termination of occupation', in A. Zimmermannand, T. Giegerich (eds.), *Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel* (forthcoming, 2009); A. Bockel, 'Le retrait israelien de Gaza et ses consequences sur le droit international' (2005) 51 *Annuaire francais de droit international* 16; M.S. Kaliser, 'A modern day exodus: international human rights law and international humanitarian law implications of Israel's withdrawal from the Gaza Strip' (2007) 17 *Indiana International and Comparative Law Review* 187; M. Mari, 'The Israeli disengagement from the Gaza Strip: an end of the occupation?'(2005) 8 *Yearbook of International Humanitarian Law* 356; and I. Scobbie, 'An intimate disengagement: Israel's withdrawal from Gaza, the law of occupation and of self-determination' (2004-2005) 11 *Yearbook of Islamic and Middle Eastern Law* 3, reprinted in V. Kattan (ed.), *The Palestine question in international law* (London: British Institute of International and Comparative Law, 2008) p. 637.

[300] Bruderlein, *Legal aspects of Israel's disengagement plan*, p. 9.

[301] See Y. Sandoz *et al* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), pp. 51-52.

international instrument has to be interpreted and applied within the overall framework of the entire legal system prevailing at the time of the interpretation'.[302] It therefore appears inadequate, if not illegitimate, to consider the question of the status of the Gaza Strip only within the narrow and essentially bilateral confines of the law of armed conflict.

Before the implementation of the Revised Disengagement Plan, the Gaza Strip manifestly was territory occupied by Israel. Anticipating Israel's implementation of the Revised Disengagement Plan, the Canadian Government's International Development Research Centre commissioned a report—the Aronson Report[303]—to examine the implications of disengagement. The Aronson Report noted that when then-Prime Minister Sharon initially announced the unilateral withdrawal plan in April 2004, one declared objective was to end Israel's role and responsibility as the occupying power in Gaza. In particular, the original plan provided that 'no permanent Israeli civilian or military presence' would remain in the evacuated areas and accordingly there would 'be no basis for the claim that the Gaza Strip is occupied territory'.[304] This express reference to Gaza as 'occupied territory' was deleted in the 6 June 2004 Revised Disengagement Plan, however, which was approved by the Cabinet. The Revised Disengagement Plan provides only that:

> The completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians within the Gaza Strip.

The meaning of Principle Six is intentionally ambiguous: it refers to the termination of Israel's responsibility for the population of the Gaza Strip, but says nothing about the status of the territory itself.

The Aronson Report argues that one of the reasons for this deletion was that the Israeli Cabinet had received legal advice to the effect that any claim regarding the end of occupation could not be maintained while Israel remained in control of the Philadelphi corridor (the Salah al Din border road), essentially a buffer zone along the Egypt/Gaza border, and arguably also ports and airports. Retaining control of these areas was seen as enough to give Israel *de facto* control over the territory and thus maintain the occupation.[305] In the event, Israel reached an agreement with Egypt which took over security functions in the Philadelphi Corridor.[306]

Still, in accordance the Revised Disengagement Plan,[307] Israel remains in effective control of Gaza's airspace and maritime zones:

> despite the withdrawal of its troops and citizens from Gaza and the formal abrogation of military rule, Israel continues to exercise considerable influence over life in the Gaza Strip: the IDF controls the airspace and territorial waters of Gaza; it governs the passage of persons and goods into Gaza from Israel (and the West Bank) and indirectly monitors passage in the Rafah crossing between Gaza and Egypt. In addition, Israel has not yet surrendered to the

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[302] *Namibia Advisory Opinion*, ICJ Rep (1971), 16 at 31, para. 53.

[303] A 'lightly edited version' of this report has been published as G. Aronson, 'Issues arising from the implementation of Israel's disengagement from the Gaza Strip' (2005) 34 *Journal of Palestine Studies* 49.

[304] Available at: http://electronicintifada.net/bytopic/historicaldocuments/264.shtml; and also www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm.

[305] Aronson, 'Issues arising' 49-50. See also S. Roy, 'Praying with their eyes closed: reflections on the disengagement from Gaza' (2005) 34 *Journal of Palestine Studies* 64 at 70.

[306] For an account of the basic principles of the Israel-Egypt 'military arrangement' on the deployment of Egyptian border guards on the Egyptian side of the corridor, see the Israeli Cabinet Communique of 28 August 2005, available at: www.mfa.gov.il/MFA/Government/Communiques/2005/Cabinet+Communique+28-Aug-2005.htm.

[307] Sub-section One.1 of Section 3 (Security Situation following the Relocation) provides: 'The State of Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.'

> Palestinian Authority the Strip's population registration records and has not yet agreed to the opening of Gaza's seaport and airport.[308]

In December 2004, Shavit Matias, deputy to Israel's Attorney-General for international law, argued that Israel's control over sea and air ports did not affect the territory's status:

> When we quit Philadelphi, even if the Palestinians don't yet have a port or airport, the responsibility will no longer be ours. The area will not be considered occupied territory. When the Palestinians have a crossing to Egypt and additional options for transferring merchandise, even if there is no port yet, we have no responsibility.[309]

Commentators are divided on the accuracy of claims like this. Some, such as Aronson, argue that because Israel retains a 'security envelope' around the Gaza Strip, controlling who and what goes in and out of the territory, disengagement did not terminate occupation.[310] Israel controls and monitors what goods are allowed into and out of Gaza and collects duties and VAT, based on Israel's rates, on behalf of the Palestinian Authority'.[311] Passage through the Rafah crossing between the Gaza Strip and Egypt is regulated by an agreement concluded between Israel and the Palestinian Authority, subject to an annexed statement of principles, and under the supervision of the European Union Border Assistance Mission.[312]

In contrast stand the views of, for example, Bruderlein, Shany, and the Israeli High Court, which emphasise the nature of effective control, as derived from the traditional law of land warfare.[313] This latter view is rather formalistic. The issue is not one of creating an occupation, which as a practical matter would appear to require the use of ground forces to create and maintain control,[314] but rather of determining whether an existing occupation has been terminated. Termination of occupation could well involve considerations other than the formalistic assertion that occupation ends when the occupant withdraws from a territory, whether voluntarily or by force of arms. As Roberts counsels:

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[308] Shany, 'Faraway, so close', p. 373. For more detail, see Gisha–Legal Center for Freedom of Movement, *Disengaged occupiers: the legal status of Gaza* (Tel Aviv: Gisha, 2007), Chapter 3.

[309] See Aronson, 'Issues arising' 51.

[310] Aronson, 'Issues arising' 51-53. See also Gisha–Legal Center for Freedom of Movement, *Disengaged occupiers*, and Scobbie, 'Intimate disengagement'.

[311] Gisha–Legal Center for Freedom of Movement, *Disengaged occupiers*, 54-55.

[312] The instruments dealing with the Rafah crossing include: the Israel-PA Agreement on Movement and Access, annexed Agreed Principles for Rafah Crossing (15 November 2005) and Agreed Arrangement on the European Union Border Assistance Mission at the Rafah Crossing Point on the Gaza-Egyptian Border (23 November 2005, concluded at the invitation of Israel and the Palestinian Authority): available at: www.nad-plo.org/listing.php?view=palisraeli_roadagree; and at: www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm. See also the EU Council press release 15011/05 (Presse 322) which gives an account of the mission of the Border Assistance Mission, available at: http://register.consilium.eu.int/pdf/en/05/st15/st15011.en05.pdf.

[313] See Bruderlein, *Legal aspects of Israel's disengagement plan*; Shany, 'Faraway, so close'; and *Jaber al Bassouini Ahmed et al* v. *Prime Minister and Minister of Defense* HCJ 9132/07, opinion of President Beinisch, para. 12.

[314] Von Glahn raises the hypothesis of an occupation being created through control of a territory's airspace: 'Since international law does not contain a rule prescribing the military arm through which an effective belligerent occupation is to be exercised, it might be theoretically possible to maintain necessary control through the occupant's air force alone'. Nevertheless he comments that the practical problems which would arise in this type of occupation 'would seem to rule out such an experiment'. See G. von Glahn, *The occupation of enemy territory: a commentary on the law and practice of belligerent occupation* (Minneapolis: University of Minnesota Press, 1957), pp. 28-29.

> the withdrawal of occupying forces is not the sole criterion of the ending of an occupation; and the occupant has not necessarily withdrawn at the end of all occupations.[315]

By what criteria should an occupation be deemed to have ended? In the governing legal instruments, the conditions required to end an occupation are not as clearly delineated as those which determine whether and when an occupation has been established. As von Glahn comments, 'most books on international law make little mention of the intricate and numerous problems arising at the end of...military occupation'.[316] Traditionally, the test for the termination of an occupation was seen as a simple question of fact: 'Occupation comes to an end when an occupant withdraws from a territory, or is driven out of it':[317]

> the moment the invader voluntarily evacuates [occupied] territory, or is driven away by a levée en masse, or by troops of the other belligerent, or of his ally, the former condition of things ipso facto revives. The territory and individuals affected are at once, so far as International Law is concerned, considered again to be under the sway of their legitimate sovereign. For all events of international importance taking place on such territory the legitimate sovereign is again responsible towards third States, whereas during the period of occupation the occupant was responsible.[318]

This test has become anachronistic. For one thing, it is inadequate for addressing contemporary practices: for instance, it does not account for termination of an occupation under the auspices of the Security Council, as occurred in Iraq.[319] For another, it reflects a century-old view of the nature of warfare set out in the 1907 Hague Regulations, when the occupation of territory depended on the physical presence of troops on the ground. Apart from dropping bombs from balloons,[320] aerial warfare did not then exist, nor did remote surveillance technology. In contemporary conditions the importance of air power was stressed by Major General Amos Yadlin, an Israeli air force officer, in 2004 after he became head of Israeli military intelligence. He stated:

> Our vision of air control zeroes in on the notion of control. We're looking at how you control a city or a territory from the air when it's no longer legitimate to hold or occupy that territory on the ground.[321]

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[315] A. Roberts, 'The End of Occupation: Iraq 2004' (2005) 54 *International and Comparative Law Quarterly* 27 at 28.

[316] Von Glahn, *Occupation of enemy territory*, p. 257.

[317] L. Oppenheim, *International law: a treatise. Vol. II: Disputes, war and neutrality* (London: Longmans, 1952, 7th edition by H. Lauterpacht), p. 436. See also W. Heintschel von Heinegg, 'Factors in war to peace transitions' (2003-2004) 27 *Harvard Journal of Law and Public Policy* 843 at 845—'The end of an occupation is a question of fact. It will be brought about by any loss of authority over the territory in question'.

[318] Oppenheim-Lauterpacht, *International Law*, p. 618.

[319] See Security Council resolution 1546 (8 June 2004), reproduced (2004) 43 *International Legal Materials* 1459; and also A. Carcano, 'End of occupation in 2004? The status of the multinational force in Iraq after the transfer of sovereignty to the interim Iraqi government' (2006) 11 *Journal of Conflict and Security Law* 41; C. McCarthy, 'The paradox of the international law of military operations: sovereignty and the reformation of Iraq' (2005) 10 *Journal of Conflict and Security Law* 43; and Roberts, 'End of occupation', n.155. For critical accounts of the conduct of the occupation of Iraq, see E. Afsha, 'Limits and limitations of power: the continued relevance of occupation law' (2006) 7 *German Law Journal* 563, available at: www.germanlawjournal.com; and G. H. Fox, 'The occupation of Iraq' (2005) 36 *Georgetown Journal of International Law* 195.

[320] On the same day, 18 October 1907, that the Hague Peace Conference adopted its various conventions, it also promulgated Declaration XIV prohibiting the Discharge of Projectiles and Explosives from Balloons. This prohibited 'the discharge of projectiles and explosives from balloons or by other new methods of a similar nature'. Although technically still in force, this Declaration has few parties and has been rendered obsolete by subsequent practice.

[321] Quoted in D. Li, 'The Gaza Strip as laboratory: notes in the wake of disengagement' (2006) 35 *Journal of Palestine Studies* 38 at 48.

In the circumstances of Gaza, to consider only Israel's withdrawal of ground troops in isolation is to ignore the wider normative and practical context. During the drafting of the Geneva Conventions, the view was expressed that in prolonged occupations there could be a gradual transfer of powers to the administrative departments of the occupied power without altering the fact of occupation.[322]

Otherwise, it is possible that, even within the narrow confines of the law of armed conflict, Israel's redeployment of permanent troops outside the borders of the Gaza Strip has not, in itself, terminated occupation. Benvenisti points out that Article 42 of the Hague Regulations is ambiguous as to whether the test of control it embodies is that of actual or potential control of the territory concerned.[323] Similarly Bruderlein cites the *Tsemel* case, heard before the Israeli High Court, which held that occupation forces do not need to be in actual control of all the territory and population, but simply have the potential capability to do so.[324] This ruling is in accordance with the decision in the post-World War II *List* case and also with the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the *List* case, the US Military Tribunal at Nuremberg, when considering the effect of resistance to occupation, ruled:

> While it is true that the partisans were able to control sections of these countries [Greece, Yugoslavia and Norway] at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and did not deprive the German Armed Forces of its status of an occupant.[325]

The view that effective occupation could lie in the capacity to assert control was also affirmed by the ICTY in *Prosecutor v Naletilic and Martinovic* where it ruled that one of the guidelines to determine whether an occupation was established was whether 'the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt'.[326] Although Benvenisti concludes that, even employing the more stringent potential control test, the Gaza Strip is no longer occupied,[327] other factors must cast doubt on this.

Airspace and the territorial sea form part of a State's territory. As envisaged in the Disengagement Plan, Israel is manifestly exercising governmental authority in these areas of Gaza. As a result, when we take into account the view that territory may be controlled from the air, it is clear that Israel's withdrawal of land forces did not terminate occupation. This view is reinforced when we consider the ease with which Israeli land forces have re-entered Gaza on numerous occasions since 'disengagement': for example, in June 2006 in 'Operation Summer Rain' and in December 2008-January 2009 during 'Operation Cast Lead'. To use the *List* formula, Israel has demonstrated that it

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322. See Pictet, *Commentary to Geneva Convention IV*, pp. 62-63; for the *travaux*, see *Final record of the Diplomatic Conference of Geneva of 1949* (Berne: Federal Political Department, 1949), Vol.II A, pp. 623-625, 775-776 and 815-816, and Vol. II B, pp. 386-388. See also Section III.3.c-d above on agreements made under Article 47 of the Fourth Geneva Convention, but compare Y. Dinstein, 'The international legal status'.

323 See Benvenisti, 'Unilateral termination', especially text to n.10, and text following n. 17.

324 See Bruderlein, *Legal aspects of Israel's disengagement plan*, p. 9 n. 14. *Tsemel* v. *Minister of Defence*, HCJ 102/82, 37(3) Piskei Din 365; also cited employing a more extended quotation in Y. Lein, *One big prison: freedom of movement to and from the Gaza Strip on the eve of the Disengagement Plan* (Jerusalem: B'Tselem/HaMoked, 2005), pp. 73-74, available at: www.hamoked.org.il/items/12800_eng.pdf. *Tsemel* is summarised in (1983) 13 *Israel Yearbook on Human Rights* 360: see 362-363 in particular.

325 See *Trial of Wilhelm List and others* (the *Hostages* trial), VIII *Law Reports of Trials of War Criminals* 34 (1949), 55-56, quotation at 56.

326 *Prosecutor* v. *Naletilic and Martinovic, Case No.IT-98-34-T* (trial judgment, 31 March 2003), available at: www.un.org/icty/naletilic/trialc/judgement/nal-tj030331-e.pdf, 74, para. 217. In support of this ruling, the Trial Chamber cited as authority the United Kingdom's *Manual of military law of war on land*, Part III, paras. 502 and 506 (1958); the United States' *The law of land warfare: Field manual No.27-10*, Chapter 6, para. 356 (1956); and the New Zealand Defence Force's, *Interim law of armed conflict manual*, paras. 1302(2), 1302(3) and 1302(5) (1992).

327 Benvenisti, 'Unilateral termination', text to n.33.

'could at any time [it] desired assume physical control of any part of the country'. These factors indicate that Israel did not relinquish control of Gaza in August 2005, but simply withdrew, or redeployed, the most visible aspect of its control—the stationing of troops within Gaza.

This, however, is a transactional analysis, detached from the wider context of international law. Disengagement concerns a possible change in the international status of territory. Hence the principle of self-determination must play a significant role in the legal appraisal of disengagement, particularly in evaluating the implications for third States and international organisations.

Israel and the PLO have agreed that the West Bank and Gaza Strip form 'a single territorial unit' whose integrity is to be preserved pending the conclusion of permanent status negotiations.[328] Relying on the Interim Agreement, the Israeli High Court of Justice has affirmed Israel's recognition of the unity of the West Bank and Gaza as a single territorial unit.[329] Therefore, Gaza alone cannot exercise a right of self-determination because that right belongs to the Palestinian population of the territorial self-determination unit as a whole, which comprises the West Bank (including East Jerusalem) as well as the Gaza Strip. Moreover, Israel's control over Gaza in relation to the transfer of goods, the levying of duties and VAT, and the control of the fuel and electricity supply would appear to deny the population the economic aspects of self-determination, as Gaza is unable to exercise 'the right freely to determine, without external interference, [its] political status and to pursue [its] economic, social and cultural development'.[330]

If it is correct to conclude that Israel's unilateral attempt to change the international status of the Gaza Strip is in breach of the Palestinian people's right to self-determination, then other States have a duty not to endorse the result Israel seeks to achieve. Even if self-determination is regarded only as an obligation *erga omnes*, as opposed to a *jus cogens* norm, then its breach entails a duty of non-recognition for third States.[331] Further, in its commentary on Article 6 of the Fourth Geneva Convention regarding the conditions under which the Convention ceases to apply, the ICRC indicated that where a termination of occupation involves a change in the international status of the occupied territory:

> The Convention could only cease to apply as the result of a political act, such as the annexation of the territory or its incorporation in a federation, and then only if the political act in question had been recognized and accepted by the community of States; if it were not so recognized and accepted, the provisions of the Convention must continue to be applied.[332]

Non-recognition of any change in the status of the Gaza Strip is thus doubly mandated.

5. Israeli Settlements in the OPT

Article 49(6) of the Fourth Geneva Convention declares that '[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'. [333] The commentary to the

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[328] See Declaration of Principles, Article IV; and Interim Agreement, Article XI.1; for commentary, see Shehadeh, *From occupation to Interim Accords*, pp. 35-37. The question of Jerusalem is, of course, a matter reserved for the permanent status negotiations: see the Agreed Minutes to the Declaration of Principles on Interim Self-Government Arrangements, Understanding in relation to Article IV; and 1995 Interim Agreement, Articles XVII.1 and XXXI.5.

[329] *Ajuri* v. *IDF Commander*, HCJ 7015/02 (3 September 2002), [2002] *Isr LR* 1, opinion of President Barak, 17-18, para. 22. See also Y. Lein, *One Big Prison*, pp. 20-21, who notes, *inter alia*, that Israel incorporated the Interim Agreement in its entirety into its military legislation in both the West Bank and Gaza, and that this legislation has not been revoked.

[330] General Assembly Resolution 2625.

[331] *Wall* Advisory Opinion, ICJ Rep (2004, 200, para. 159.

[332] Pictet, *Commentary to Geneva Convention IV*, p. 63.

[333]For the avoidance of any doubt, even according to the highly controversial ruling of the ICJ in the Advisory Opinion on the Wall, about the cessation of the applicability of the Fourth Geneva Convention after the general

Convention affirms that this clause was intended 'to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.' [334] Prohibition of the transfer of settlers to occupied territory was confirmed as an international crime in 1998 by its inclusion as Article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court as the war crime of 'transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.' [335]

a. Status of settlements under international humanitarian law

The establishment of Jewish settlements[336] in the OPT started immediately after the 1967 war[337] and was formally declared a government agenda in 1977.[338] The violations of Palestinian rights inherent in this practice derive from a discriminatory policy to channel resources (land, water) and financial and legal privileges to Jewish settlers at the expense and dispossession of the Palestinian residents.[339] A fundamental tenet of the international law of belligerent occupation, resting on the pillar that occupation is intended to be only a temporary situation, is that the occupying power is prohibited from altering the status of an occupied territory. By contrast, the aim of the settlements in the OPT is to

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close of military operations, Article 49(6) survives the one year time limit on application of certain provisions in the Convention in occupied territory laid down in Article 6(3), See A. Imseis, 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ Advisory Opinion on the Wall' (2005) 99 *American Journal of International Law* 102 at 106.

[334] Pictet, *Commentary to Geneva Convention IV*, p. 276.

[335] On the difference between Article 49(6) of the Fourth Geneva Convention and Article 8(2)(b)(viii) of the Rome Statute see D. Kretzmer, 'Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: The Advisory Opinion: The Light Treatment of International Humanitarian Law' 99 *American Journal of International Law* 88 at 91. Kretzmer takes a view that the broadening of Article 49(6) in the Rome Statute by the addition the words 'directly or indirectly', indicates that not all measures taken to bring about a transfer are included in Article 49(6) itself; See also the *Wall* advisory opinion, para. 135.

[336] Settlements are defined as organised communities of Israeli civilians established on land in the OPT with the approval and direct or indirect support of the Israeli government. Apart from a few exceptions in East Jerusalem, residence in these communities is not open to Palestinians but only to Israeli citizens and to persons of Jewish descent entitled to Israeli citizenship or residency under Israel's Law of Return. There are 149 settlements in the West Bank, excluding settlement 'outposts,' which are established, generally by ideological or religious Israeli settlers, without the authorisation of the government of Israel, and of which there are now over 100 in the West Bank

[337]Between 1967 and 1979, Israel established altogether 133 settlements in the Arab occupied territories, including 79 in the West Bank and seven in the Gaza Strip. See the report of the Security Council Commission established under Resolution 446 (1979), available at: http://domino.un.org/UNISPAL.NSF/2f86ce183126001f85256cef0073ccce/9785bb5ef44772dd85256436006c9c85!OpenDocument

[338]The government of Menachem Begin government, which came to power in 1977, regarded settlement of Jews in all parts of the historic land of Israel as a fundamental part of its policy. See C. Jackson, 'Israeli West Bank Settlements, the Reagan Administration's Policy towards the Middle East and International Law' 79 *American Society of International Law Proceedings* 217 at 226.

[339] See Al-Haq, *The Israeli Settlements from the Perspective of International Law* (2000), available at: http://www.alhaq.org/pdfs/The%20Israeli%20Settlements%20from%20the%20Perspective%20of%20International%20Law.pdf. See also B'Tselem, *Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects* **(**March 1997), available at: http://www.btselem.org/Download/199703_Settlements_Eng.rtf.

create facts that will predetermine the outcome of any political negotiations by making Israeli withdrawal from the settled parts of the territories unfeasible.[340]

Although Israel is party to the Geneva Conventions, it disputes the applicability *de jure* of the Fourth Geneva Convention in the OPT, on several grounds that have been rejected by the ICJ, as discussed previously. Nonetheless, Israel argues that even if the Convention applies, its actions are not in breach of Article 49(6). The Israeli government, in defending the legality of the settlements, attempts to argue that Article 49(6) only prohibits *forcible* transfer of the population of the occupying power into occupied territory, and consequently does not concern *voluntary* or induced migration.[341]On this basis, Israel concludes, the settlements in the OPT are not illegal. However, nowhere does the relevant provision restrict its scope to forced population movement. Indeed, it specifically uses the unqualified term 'transfer' as opposed to 'forcible transfer' as found in Article 49(1), which prohibits the forcible transfer of protected persons *from* occupied territory. To this end, the ICJ has confirmed that Article 49(6) 'prohibits not only deportations or forced transfers of population…but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory'.[342] Accordingly, the ICJ resolutely concluded that 'the Israeli settlements in the OPT (including East Jerusalem) have been established in breach of international law'.[343] Similar conclusions have been reached by the UN Security Council[344] and General Assembly,[345] the High Contracting Parties to the Geneva Conventions,[346] the authoritative ICRC study on customary international humanitarian law,[347] as well as the majority of legal scholars.[348]

b. Legal status of the settlers

As discussed above, Israel cannot invoke international law to authorise Jewish settlement in the OPT. Nor can it cast responsibility on the settlers themselves. Under international humanitarian law, responsibility for breaching the prohibition for transferring part of the occupant's civilian population into the territory under occupation is on the occupying power and not upon the individuals transferred.

Some provisions of international humanitarian law apply to all individuals in occupied territories without distinction (see Articles 13-26 of the Fourth Geneva Convention). The duties and powers of the military commander differ, however, in relation to 'protected persons', as this group is defined in Article 4, and to others who are not protected. Israeli settlers do not come within the definition of

[340] See D. Kretzmer, *The occupation of justice: the Supreme Court of Israel and the Occupied Territories* (Albany: SUNY Press, 2002). See also Gorenberg, *Accidental Empire*.

[341] Israel Ministry of Foreign Affairs, 'Israeli Settlements and International Law,' May 2001, available at: http://tinyurl.com/2jlgb3.

[342] See *Wall Advisory Opinion*, para. 120.

[343] Ibid.

[344] See, for example, Resolution 465 (1980) in which the Security Council 'Determines that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity and that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East'. See also Security Council Resolutions 446, 452, and 471.

[345] General Assembly Resolution 62/108 of 10 January 2008 is one of dozens of resolutions to this effect.

[346] See *Declaration of the High Contracting Parties to the Fourth Geneva Convention*, 5 December 2001. The High Contracting Parties are those States which have ratified and are bound by the Geneva Conventions.

[347] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge: Cambridge University Press, 2005), p. 457.

[348]See, for example, Kretzmer 'The Light Treatment' at 89.

'protected persons' as they are nationals of the occupying power. Palestinians does fall into the category of protected persons as they are 'in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.[349] Yet the trend of the Israeli High Court in such cases is to impede Palestinian rights for the benefit of Jewish settlers[350] by disregarding the fact that the very existence of the settlers impedes public order and civil life and constitutes a breach of the laws of occupation.[351]

Such disregard for the special protection granted to protected persons is incompatible with the object and purpose of international humanitarian law,[352] in particular, in enabling the infringement of protected persons' rights in favour of the occupying power's nationals.[353] The *lex specialis* norms of international humanitarian law[354] hold that the rights of protected persons cannot generally be restricted, and that any exceptional restriction may only be in accordance with the limitation clauses in the relevant provisions.

These basic principles have been distorted by Israel's High Court of Justice, enabling the military commander to infringe upon Palestinian rights for the benefit of the settlers. First, the High Court determined that the military commander's general authority set out in Article 43 of the Hague Regulations is not restricted to the persons protected under international humanitarian law. Rather, it is a general authority, covering any person present in the territory held under belligerent occupation:

> Indeed, in exercising his authority pursuant to the law of belligerent occupation, the military commander must 'ensure the public order and safety.' In this framework, he must consider, on the one hand, considerations of state security, security of the army, and the personal security of all who are present in the area. On the other hand, he must consider the human rights of the local Arab population'[355]

Second, the High Court has refused to consider whether settlements are illegal under international law, holding that such an issue is political, and thus not justiciable, but rather a matter for the executive to decide. The High Court has further held that the rights of protected persons in the OPT are not absolute, but relative: 'They can be restricted …. Some of the limitations stem from the need to take rights of other people into account. Some of the limitations stem from the public interest …'[356]

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[349] See *Mara'abe et al* v. *The Prime Minister of Israel et al*, HCJ 7957/04, para. 18.

[350] See *Hess* v. *Commander of the IDF Forces in the West Bank*, HCJ 10356/02, 58 (3) P.D. 443. For an extensive overview of this trend see Kretzmer, *The Occupation of Justice*.

[351] See O Ben-Naftali, A.M. Gross and K. Michaeli, 'Illegal occupation: framing the occupied Palestinian territory', (2005) 23 *Berkeley Journal of International Law* 551 at 596 and Kretzmer, '*The Occupation of Justice*'.

[352] See Articles 30–31 of the Vienna Convention on the Laws of Treaties, (1969), 1155 UNTS 331.

[353] See Articles 43, 48, 49, 55 of the Hague Regulations and para. 88 of the *Wall Advisory Opinion*. See also Benvenisti, *The International Law of Occupation*, p. 6, and 'Illegal Occupation', p. 21–36, A. Roberts, 'What Is a Military Occupation?' (1984) 55 *British Yearbook of International Law* 249 at 293-295; A. Wilson, 'The Laws of War in Occupied Territories' (1933) 18 *Transactions Grotious Society* 17 at 38.

[354] Compare with articles 13-26 of the Fourth Geneva Convention which apply humanitarian norms to every individual happens to be in the cccupied territory. For comprehensive discussion on the *lex specialis* doctrine applied by the ICJ, see O. Ben-Naftali and Y. Shany, 'Living in denial: the application of human rights in the Occupied Territories' (2003-04) 37 *Israel Law Review* at 17-118. For general discussion of the interplay between international humanitarian and human rights law, see F. Hampson and I. Salama, 'Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law', *UN Sub-Commission on the Promotion and Protection of Human Rights*, E/CN.4/Sub.2/2005/14, 21 June 2005.

[355] *Mara'abe* case, para. 28.

[356] Ibid., para. 25.

By confirming that the Military Commander must take into account considerations that are prohibited by the laws of occupation, the High Court legitimised the military commander's deviation from his authority and duties under international humanitarian law.

According to the objects and purposes of the laws of occupation, the military commander must act in the best interest of the local population except where prevented from doing so by military necessity. Thus, Article 43 cannot afford settlers status equal to that afforded to protected persons under international humanitarian law. They enjoy, at most, the protection accorded to aliens in occupied territories (section II of the Fourth Geneva Convention). The rights of the settlers are to be tied to, and limited by, the specific obligations included in the humanitarian law of military occupation, which restrict the permissible actions of the occupying power[357] and prohibit any attempts to change the nature of the occupied territory, either *de jure* or *de facto* through the creation of permanent 'facts on the ground'.

c. The jurisprudence of Israel's High Court regarding settlements

Long before the occupation of the West Bank and Gaza Strip began, the Israeli courts had adopted the dualist common law approach to the enforcement of international law in domestic courts.[358] Rules of customary international law are regarded as part of the domestic law and as such are applied in domestic courts unless they contradict an act of parliament. Rules contained in treaties must be explicitly incorporated into domestic law by an act of parliament in order to apply and be applied by domestic courts. The laws of occupation prohibiting the establishment of civilian settlements in occupied territory, having acquired customary law status, are thus theoretically enforceable in Israeli courts.

Israel's High Court of Justice has considered petitions submitted by Palestinians regarding the legality of Israeli actions in the OPT,[359] but has avoided dealing with the lawfulness of the settlements, ruling that general arguments relating to the legality of settlements are not justiciable.[360] Moreover, the High Court has refused to regard the Fourth Geneva Convention as part of customary international law[361] and thus has exempted itself from expressing its opinion regarding the application of Article 49(6). While the High Court has thereby refrained from providing the state with explicit legitimisation for the settlement policy and from confirming its compatibility with the Fourth Geneva Convention,[362] its decisions have, however, effectively supported the settlement project on various grounds.

The principles that have guided the High Court in these questions were first established in 1972 in the *Helou* case[363] regarding Rafah, an area separating the Gaza Strip from the Egyptian Sinai. In this case, the High Court ruled that it was necessary for the purposes of security to evict the Bedouin inhabitants from their places of residence, even though the same land on which they were living was designated for Jewish settlement. In the decision, Judge Witkon stated:

> Clearly the fact that these same lands are in part or in full designated for Jewish settlement does not deny the security nature of the entire operation. The stated security considerations as

[357] See H. Krieger, 'A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11(2) *Journal of Conflict and Security Law*, 265-291 at 284

[358] See R. Lapidot, 'Public International Law', in *Forty Years of Israeli Law* (Jerusalem: Harry Sacher institute for legislative research and comparative law, 1990), p. 807.

[359] For discussion over the Supreme Court jurisdiction to examine the legality of the Israeli army in the OPT see Kretzmer, *The Occupation of Justice*, Chapter One: Jurisdiction, Justiciability and Substantive Norms, pp. 19-29.

[360] See *Bargil* v. *Government of Israel*, HCJ 4481/91, 47 (4) PD 210, 216.

[361] See, for example, *Ayyub* v. *Minister of Defense*, HCJ 606/78, (1978) 33 (2) PD 113.

[362] See Kretzmer, *The Occupation of Justice*, p. 44.

[363] *Abu Helou and others* v. *Government of Israel*, HCJ 302/72, (1972) 27(2) PD 169.

> reviewed and detailed in my honourable colleague's opinion, were not refuted, or imaginary, nor meant to camouflage other considerations. General Tal stated himself that the entire area (or part of it) is designated to be settled by Jews, which in this case constitutes a security measure.[364]

This opinion paved the way for the establishment of settlements under the guise of military or security needs. In 1978, in the *Beit El* case,[365] private land was requisitioned from Palestinian landowners on the pretext of military necessity and then consigned to civilian Jewish settlement in accordance with the Israeli military's strategic regional defence plan.[366] In this case, the High Court rejected the distinction between the needs of the occupying army and general security interests:

> … in our opinion, these distinctions hold no merit. As I have just stated, the current state is a state of combat, and the occupying power is responsible for ensuring public order in the occupied territory. It must also address the dangers presented from within the territory to itself and to the [occupying] state. The fighting nowadays has taken the form of sabotage actions, and even those who consider these actions (which affect innocent civilians), a form of guerrilla war-fare, admit that the occupying power is authorized, and even obligated to take all necessary measures to prevent them. The military aspect and the security aspect are therefore one and the same.[367]

These two decisions provided the Israeli authorities with the legal basis for including political and other state interests in military considerations. Benvenisti has pointed out that this broad view of security imperatives paved the way for a policy of implanting settlements in ways incompatible with the occupying power's fundamental duty not to use the occupation as a means of acquiring territory by force.[368]

In 1979, however, in the *Elon Moreh* case,[369] the High Court deviated from the *Beit El* decision by confining 'military needs' to needs based on a rational, military-strategic analysis of the dangers faced by the state, and the measures needed to counter them, rather than ideological goals or outlook: 'the military needs in that article cannot include, according to any reasonable interpretation, the national security needs in their wide meaning'.[370] The factual record revealed that, under pressure from the militant Gush Emunim settlers' movement, the government, rather than the military authorities, had initiated establishment of the settlement. The High Court was convinced that, even if the military supported the decision for military reasons, the dominant consideration had been political. Therefore, the High Court held that the requisition order was invalid since the military cannot take such action on political grounds and, under international customary law, land in occupied territory can be requisitioned only for military needs.[371]

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[364] Ibid., at 181, unofficial translation.

[365] *Ayyub* v. *Minister of Defense*, HCJ 606/78, (1978) 33 (2) PD 113 (*Beit El* case).

[366] See the *Beit El* case. The court has also rejected the argument that the establishment of a civilian settlement can not be regarded as temporary use of the land accepting the governments' statement that the settlement will exist only as long as the army holds the land, subject to international negotiations which will determine the fate of the settlements. (This decision must be considered in its immediate political context: see p. 116-117 of the judgment.)

[367] The *Beit El* case, p. 117. (unofficial translation)

[368] Benvenisti, *Occupation*, p. 3.

[369] *Dweikat* v. *Israel*, HCJ 390/79, 34(1) P.D. 1 (hereinafter the *Elon Moreh* case).

[370] *Elon Moreh* case, p. 17. For analysis of the atmosphere enabled the court to give this decision, see Kretzmer, *The Occupation of Justice*, pp. 88-89.

[371] This decision was surprisingly especially because in the *Matityahu* case decision (*Amira* v. *Minister of Defence* case 34 (1) PD 90), issued in 1979, the court dismissed a petition in which an affidavit given by a General Reserves to support the petition refuted the security arguments for the settlement. The court found the affidavit unconvincing. The court also dismissed the argument that the requisition order was invalid since the

The High Court added:

> The decision to establish a permanent settlement which is designed to stand forever – even longer than the period of the military government which was established in Judea and Samaria – faces a legal obstacle which it cannot defeat. Since the military government cannot create in its territory facts for its military needs that are designed to exist even after the military regime ceases in that territory, when it is still impossible to know the fate of the territory after the end of the military regime, it is a *prima facie* contradiction, also shown by the evidence in this case, that the determining consideration that motivated the political echelon in deciding to establish the settlement was not a military consideration.[372]

On one hand, this decision rejected the claim that the military requisition of private land for the establishment of permanent settlements could be lawful. On the other, the High Court did not address the illegality of the settlements themselves under international law and so enabled the continuation of the settlement activity on land not considered or acknowledged as private. Indeed, following this case the Israeli authorities pursued an intensive policy aimed at defining and gaining control over 'state lands' on which civilian settlements were subsequently built.[373] Following the *Elon Moreh* decision, the Israeli Cabinet decided that all uncultivated rural land in the OPT would be declared 'state land'.[374] According to the Drobles Plan of 1978, which formed the basis for the settlement policy developed by the then Likud Government:

> state land and uncultivated land must be seized immediately in order to settle the areas between the concentrations of minority population and around them, with the object of reducing to the minimum the possibility for the development of another Arab state in these regions.[375]

Two later High Court decisions dealt with the steps taken to declare land as state land and other aspects of the settlement policy, such as planning decisions, the building of roads, and the expropriation of land for that purpose. In the *Al-Naazer* case in 1981,[376] the High Court held that 'local residents have no special rights in public property and the occupying power has a duty to protect such property against intrusion'. Moreover, the High Court held that, when doubt arises whether property is public or private, the presumption shall be that the property is public until ownership has been established.[377] In the *Ayreib* case,[378] the High Court held that the petitioner, who claimed rights in land that had been declared state land and who argued that the use of that land to build a new Jewish settlement was incompatible with the duty of an occupying power to administer

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decision to make the order had been made by the cabinet committee on security rather than the military authorities.

[372] *Elon Moreh* case, p. 22 (unofficial translation).

[373] See B'Tselem, *Land Grab*, (Jerusalem: B'Tselem, 2002).

[374] This was possible due to the fact that no comprehensive registration of land ownership existed for the West Bank or Gaza in 1967. See Kretzmer, *The Occupation of Justice*, p. 90 and references there.

[375] See Kretzmer, *The Occupation of Justice*, p. 90 and references there to *Master Plan for the Development of Settlements in Judea and Samaria*, 1979-1983, prepared by Matityahu Drobles. See also Al-Haq, *The Israeli Settlements from the Perspective of International Law* (Ramallah: Al-Haq, 2000), p.41. For more details on the content of the Drobles plan, see *Israeli Settlements in Gaza and the West Bank (Including Jerusalem) Their Nature and Purpose, Prepared for, and under the guidance of the Committee on the Exercise of the Inalienable Rights of the Palestinian People*, 31/12/1982 available at: http://domino.un.org/UNISPAL.NSF/c25aba03f1e079db85256cf40073bfe6/b795b2d7fe86da4885256b5a00666d70!OpenDocument.

[376] *Al-Naazer* v. *Commander of Judea and Samaria* (1981) 36 (1) PD 701.

[377] See criticism on this presumption in A Casesse, 'Powers and Duties of an Occupant' at 437-8.

[378] *Ayreib* v. *Appeals Committee* , HCJ 277/84, 40(2) P.D. 57 at 69.

public property as a usufructuary, lacked the standing or right to question the use of public land. The High Court also found it unnecessary to consider the fate of the land after the end of the occupation.

In both of these decisions, the High Court did not consider the actual intentions of the authorities as a factor in determining the legality of their acts, as it did in the *Elon Moreh* case. As Kretzmer points out, 'the most glaring feature of these decisions is their total detachment from the context of the government's land-use policy on the West Bank. Public lands are not regarded as land reserves that are first and foremost available for use of the local population; they are regarded as land reserves that serve Israeli interests (as perceived by those in power).'[379] Kretzmer concludes that 'article 55 is cited to legitimize this system of gaining control over state lands; it is ignored when the argument is made that the very same article limits the use that may be made of such lands'.[380]

The planning and building of roads and highways in the occupied territories is intimately connected with settlement policy, having the purpose of integrating the West Bank settlements into Israel and enhancing accessibility between the two.[381] In the *Tabeeb* case,[382] the High Court dealt with expropriation of land for a highway. The expropriation was carried out under a Jordanian law that remained in force in 1967 regarding the acquisition of land for public purposes. The High Court assumed that the military authorities would not have gone to the trouble and expense of planning the highways if there was no military interest in them and so concluded, with no solid basis, that military considerations were the dominant factor in planning the roads network. This decision is contrary to the *Elon Moreh* judgment, in which the onus was set on the military authorities to prove that taking of private property was required for military needs.

In the *Ja'amait Iscan* case,[383] land in the Atarot area that had been purchased by a Palestinian cooperative (for the construction of a housing estate for teachers) was expropriated for the Atarot highway interchange.[384] The petitioners argued that the highway network had been planned in the interests of Israel and not in the interests of the residents of the West Bank, and that this expropriation was therefore an unlawful use of power by a belligerent occupant. The petitioners added that Israel, as a belligerent occupant whose rule is by its very nature temporary, may not plan and construct projects that have long-term effects. In reply, the authorities argued that the highway system was being built for the benefit of West Bank residents. They argued that the position that existed at the beginning of the occupation could not be frozen and that it was the duty of the military government to further the interests of the local population in all walks of life, including transportation. In this decision, Justice Barak set the formula for military actions:

> The Hague Regulations revolve around two main axes: one – ensuring the legitimate security interests of the occupier in territory held under belligerent occupation; the other – ensuring the needs of the civilian population in the territory held under belligerent occupation.[385]

In this case, too, the High Court was convinced that the planning was for the good of the local population:

> As we have seen, military rule must perform as a proper government authority, [it is] obligated to attend the needs of the local population and public life, and therefore it is granted

[379] Kretzmer, *The Occupation of Justice*, p. 93.

[380] Kretzmer, *The Occupation of Justice*, p. 94.

[381] See Kretzmer, *The Occupation of Justice*, pp. 70-71.

[382] *Tabeeb* v. *Minister of Defense*, HCJ, 202/81, PD. 36(2), 622.

[383] *Jami'at Iscan Al-Moa`limin al-Mahdudat al-Masauliyeh, Communal Society Registered at the Judea and Samaria Area Headquarters* v. *The Commander of IDF Forces in the Judea and Samaria Area*, HCJ 393/82, 37(4) P.D. 785.

[384] This interchange connects the Tel-Aviv, Jerusalem and Ma'ale Adumim (a large Jewish-Israeli urban settlement in the West Bank between Jerusalem and Jericho) highways together.

[385] See *Jami'at Iscan Al-Moa`limin* 794.

> ruling authority. While executing this authority, consideration must be given to the fact that we are dealing with prolonged military rule and with major population changes. Under these circumstances the Military Commander is authorised to make basic investments and to undertake long-term planning for the benefit of the local population ... Therefore it is clear that there is no wrongdoing in the preparation of the national highway system plan: the transportation needs of the local population have increased; the condition of the roads cannot be frozen. The Military Commander was thus authorised to prepare a road plan that accounts for current and future developments. Indeed, the roads will remain even following the end of military rule, but this is irrelevant. Drawing up these plans does not constitute a blurring between military rule and ordinary government. Furthermore the fact that the plan was drawn up in cooperation with Israel does not disqualify it, provided it was [drawn up] for the benefit of the local population.[386]

In sum, the High Court's jurisprudence on settlements is defined by a number of key points: it has avoided ruling on the legality of the settlements; rejected arguments based on the prohibition of settler population transfer as customary law; held general petitions against the settlement policy to be non-justiciable; and accepted that a civilian settlement can serve military goals and can be temporary.

The High Court has provided a framework of legality, within Israeli law, for Israel's settlement activity. Two groups of people now live in the West Bank: Jewish settlers, who are not protected persons for the purposes of the Fourth Geneva Convention but who enjoy privileges on the basis of their identity as Jews—both Jewish-Israeli citizens and Jews entitled to citizenship under the Law of Return—and Palestinians, who are protected persons but who are often deprived of basic rights in spite of that status.

6. Prolonged occupation

The previous section indicates that the High Court has sometimes held that special conditions obtain in cases of 'prolonged military government'. The fundamental postulate of the regime of belligerent occupation is that it is a temporary state of affairs during which the occupant is prohibited from annexing the occupied territory. The occupant is vested only with temporary powers of administration and does not possess sovereignty over the territory.[387] As noted previously, the principal rules of international law regulating the conduct of occupation are contained in the Hague Regulations, and the Fourth Geneva Convention. It is universally accepted that the provisions of the Hague Regulations are not simply conventional but also form part of the corpus of customary international law.[388]

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[386] *Jami'at Iscan Al-Moa`limin*, para. 36 (unofficial translation).

[387] See *Ottoman debt* arbitration (1925) 3 *Annual Digest of Public International Law Cases* 472 (1925-26); and also Benvenisti, *Occupation*, pp. 3-6; G.H. Hackworth, *Digest of international law* (Washington DC, Department of State: 1940), pp. 145-146; A. McNair and A.D. Watts, *The legal effects of war* (Cambridge UP: Cambridge: 1966, 4th Ed.), pp. 363-369; L. Oppenheim, *International law: a treatise. Vol.II: Disputes, war and neutrality* (Longmans: London: 1952, 7th edition by H. Lauterpacht), pp. 436-438; G. Schwarzenberger, *International law as applied by international courts and tribunals. Vol.II: The law of armed conflict* (Stevens: London: 1968), pp. 166-173; and UK Ministry of Defence, *The manual of the law of armed conflict* (Oxford UP: Oxford: 2004) 278-279, paras. 11(9)–11(11).

[388] The customary nature of the Hague Regulations was declared by the International Criminal Tribunal at Nuremberg in the *Trial of German major war criminals*, Cmd. 6964 (1946) 65. The customary status of the Regulations has since been affirmed by various other courts, see, e.g., *In re Krupp* (US Military Tribunal at Nuremberg), 15 *Annual Digest* 620, 622; *R* v. *Finta* (Canadian High Court of Justice), 82 *International Law Reports* 425, 439; *Affo* v. *IDF Commander in the West Bank* (Israel High Court), 83 *International Law Reports* 122, 163; *Polyukhovich* v. *Commonwealth of Australia* (Australian High Court), 91 *International Law Reports* 1, 123. See also T. Meron, *Human rights and humanitarian norms as customary law* (Clarendon Press: Oxford: 1989), pp. 38-40; and J. Pictet (ed.), *Commentary to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC: Geneva: 1958), p. 614. As the Geneva Conventions have been ratified by all States, it can be claimed that their provisions represent general international law and not simply treaty commitments between the parties thereto. This does not mean that the provisions of the Geneva Conventions

Accordingly, as Israel's High Court has recognised, although Israel is not a party to the Fourth Hague Convention to which the Hague Regulations are annexed, the Regulations nevertheless regulate Israel's activities in the OPT by virtue of their customary status. [389]

In the law of armed conflict, the question of 'prolonged occupation' is absent from the governing international instruments, and the notion has been little discussed in commentaries.[390] Israel's High Court has however referred to the question in a number of decisions.[391] While Roberts cautions that

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have customary status: on the relationship between customary and conventional sources in international humanitarian law see, for example, G. H. Aldrich, 'Customary international humanitarian law---an interpretation on behalf of the International Committee of the Red Cross' (2005) 76 *British Yearbook of International Law* 503; M. Bothe, 'Customary international humanitarian law: some reflections on the ICRC study' (2005) 8 *Yearbook of International Humanitarian Law* 143; Y. Dinstein, 'The ICRC customary international law study' (2006) 36 *Israel Yearbook on Human Rights* 1; J. M. Henckaerts, 'Customary international humanitarian law---a rejoinder to Judge Aldrich' (2005) 76 *British Yearbook of International Law* 525 and his 'The ICRC customary international humanitarian law study---a rejoinder to Professor Dinstein' (2007) 37 *Israel Yearbook on Human Rights* 259; J. M. Henckaerts and L. Doswald-Beck, *Customary international humanitarian law. Vol. I: Rules* (Cambridge UP: Cambridge 2005), Introduction; W.H. Parks, 'The ICRC customary law study: a preliminary assessment' (2005) 99 *Proceedings of the American Society of International Law* 208; and I. Scobbie, 'The approach to customary international law in the Study', in E. Wilmshurst and S. Breau (eds.), *Perspectives on the ICRC Study on customary international humanitarian law* (Cambridge UP: Cambridge: 2007), p. 15. On the claim that the Geneva Conventions have achieved universal ratification, see J. A. Lavoyer, *A Milestone for International Humanitarian Law* (22 August 2006), available at: www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-220906?opendocument.

[389] An overview of the consolidation of the Hague Regulations into customary international law was given by Acting President Shamgar of the Israel High Court in *Bassil Abu Aita et al* v. *The Regional Commander of Judea and Samaria and Staff Officer in charge of matters of customs and excise*, HCJ 69/81 (5 April 1983), 37(2) Piskei Din 197 at 251-252, para. 19(b) (original Hebrew text), 7 *Selected Judgments of the Supreme Court of Israel* 1 (1983-87) 46-47, para.19(b) (English translation), 63-64, para.19(d) (English translation available at www.http:elyon1.court.gov.il/files_eng/81/690/000/z01/81000690.z01.pdf). Hereinafter, this case will be cited as *Abu Aita*. Extracts from Shamgar's opinion in *Abu Aita* are provided at 13 *Israel Yearbook on Human Rights* (1983) 348.

[390] See Benvenisti, *Occupation*, pp. 144-148; A. Cassese, 'Powers and duties of an occupant in relation to land and natural resources', in E. Playfair (ed.), *International law and the administration of occupied territories* (Clarendon Press: Oxford: 1992), pp. 426-427; Y. Dinstein, 'The international law of occupation and human rights'(1978) 8 *Israel Yearbook on Human Rights* 104 at 112-114, and his 'Legislation under Article 43 of the Hague Regulations: belligerent occupation and peacebuilding' (2004) 8 *Harvard Program on Humanitarian Policy and Conflict Research, Occasional Paper No.1* available at: www.hpcr.org/pdfs/OccasionalPaper1.pdf; R. Falk, 'Some legal reflections on prolonged Israeli occupation of Gaza and the West Bank'(1989) 2 *Journal of Refugee Studies* 40; G. von Glahn, 'Taxation under belligerent occupation', in Playfair, *op cit*, p. 349; C. Greenwood, *The administration of occupied territory in international law*, in Playfair, *op cit*, p. 263; A. Roberts, 'Prolonged military occupation: the Israeli-occupied territories since 1967'(1990) 84 *American Journal of International Law* 44; E. Schwenk, 'Legislative power of the military occupant under Article 43, Hague Regulations' (1944-45) 54 *Yale Law Journal* 393 at 401; and M. Sassoli, 'Legislation and maintenance of public order and civil life by occupying powers' (2005) 16 *European Journal of International Law* 661 at 679-680.

[391] Israel's High Court fulfils two broad functions. As the High Court it serves as a court of appeal from the decisions of lower courts, and as the High Court of Justice it acts as a court of first and last instance in petitions for the review of governmental actions, including actions taken in the Occupied Territories: see, for example, Benvenisti, *Occupation*, pp. 118-123; Y. Dotan, 'Judicial rhetoric, government lawyers, and human rights: the case of the Israeli High Court of Justice during the intifada'(1999) 33 *Law and Society Review* 319 at 322-324; and D. Kretzmer, 'The occupation of justice', 10-11. The principal judgments of the High Court relevant to prolonged occupation include *Christian Society for the Holy Places v Minister of Defence et al*, HC 337/71, 2 *Israel Yearbook on Human Rights* 354 (1972), and 52 *International Law Reports* 512; *Electric Corporation for Jerusalem District Ltd* v. *Minister of Defence et al*, HC 256/72, 5 *Israel Yearbook on Human Rights* 381 (1975) [hereinafter *Electricity Company No.1*]; *Jerusalem District Electricity Co Ltd* v. *Minister of Energy and Infrastructure and Commander of the Judea and Samaria Region*, HC 351/80, 11 *Israel Yearbook on Human Rights* 354 (1981) [hereinafter *Electricity Company No.2*]; *Ja'amait Iscan Al-Moa`limin* v. *IDF Commander in*

attempting to define the notion of prolonged occupation 'is likely to be a pointless quest',[392] it raises two legal issues in particular—the effect of Article 6 of the Fourth Geneva Convention; and, more importantly, the exercise of the occupant's legislative competence over the occupied territory under Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention. Depending on the way in which this legislative competence is exercised, consequential issues may arise as to whether the occupant has annexed the occupied territory, whether de jure or de facto, and thus whether the situation may be categorised as colonialism.

A recurring theme in commentaries on the law of belligerent occupation is that both the Hague Regulations and the Fourth Geneva Convention envisaged that an occupation would be of short duration.[393] The drafters did not conceive that an occupation could last for decades and, as a result, it has been claimed that their provisions are inadequate to regulate a prolonged occupation:

> Considering the complexity of modern occupations, such as those during World War I and II in which large areas were occupied for long periods of time, raising a multitude of legal questions about the rights and duties of occupants in particular situations and the legal effects of the occupant's actions after the war, the rules laid down in the landmark codes of the 1863-1914 period and expounded in the literature and in military manuals seem fragmentary indeed and inadequate to guide occupation practices. But it must be considered that they were developed in a relatively peaceful period in which no major wars occurred and in which belligerent occupations were generally of short duration so that occupants were not forced to assume the full governmental burdens which had rested on the displaced sovereign. Consequently, while general principles were evolved, few specific rules developed because of a lack of factual situations requiring application of specific rules often enough to permit their growth into law.[394]

The implications of the doctrine of prolonged occupation developed by the Israel High Court are discussed in section C.6(b) of this chapter, and Chapter III.B(3).

a. Article 6 of the Fourth Geneva Convention

Article 6 of the Fourth Geneva Convention provides that the Convention's general application shall cease in occupied territory one year after the close of military operations, although specified articles will continue to bind the occupying power. In the *Wall* advisory opinion, the ICJ ruled that as 'the military operations leading to the occupation of the West Bank in 1967 ended a long time ago',

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Judea and Samaria, (1982) 37(4) Piskei Din 785, discussed *in extenso* in Kretzmer (above), pp. 69-71 and partially reported in translation as '*A Cooperative Society Lawfully Registered in the Judea and Samaria Region* v. *Commander of IDF Forces in the Judea and Samaria Region et al*, HC 393/82' (1984) 14 *Israel Yearbook on Human Rights* 301; *Abu Aita, op cit.*; *Dwadin et al* .v *Commander of the IDF Forces in the West Bank*, HC 4154/91, 25 *Israel Yearbook on Human Rights* (1985) 333; *Economic Corporation for Jerusalem Ltd* v. *Commander of IDF Forces in the Judea and Samaria Region et al*, HC 5808/93, 30 *Israel Yearbook on Human Rights* 322 (2000); and *Na-ale—an Association for the Settlement of employees of the Israeli Aircraft Industry in Samaria* v. *the Supreme Planning Committee of the Judea and Samaria Area, the Sub-Committee for Mining and Quarrying et al*, HC 9717/03, *International Law in Domestic Courts* database, ILDC 70 (IL 2004), also summarised as *Na'ale* v. *Planning Council for the Judea and Samaria Region et al*, 37 *Israel Yearbook on Human Rights* (2007) at 332.

[392] Roberts, 'Prolonged occupation' at 47.

[393] See, e.g., O. Ben-Naftali, 'A la recherche du temps perdu': rethinking Article 6 of the Fourth Geneva Convention in the light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory advisory opinion' (2005) 38 *Israel Law Review* 211 at 215 and 218; Ben-Naftali et al, 'Illegal occupation' at 596; Benvenisti, *Occupation*, p. 144; D.A. Graber, *The development of the law of belligerent occupation 1863-1914: a historical survey* (New York: Columbia UP, 1949), p. 290-291; and Roberts, 'Prolonged occupation' at 47.

[394] Graber, *Historical survey*, p. 290-291.

Article 6 fell to be applied.[395] It appears, however, that the Court misinterpreted the phrase 'the general close of military operations' contained in Article 6 as referring to 'the military operations *leading to the occupation.*' Indeed, according to the preparatory Conference of the Fourth Geneva Convention, 'the general conclusion of military operations means when the last shot has been fired'.[396] This is clearly not the case in the OPT, where the armed conflict and military operations continue.

On this basis, the ruling has been criticised by scholars,[397] and does not correspond to official Israeli policy regarding the existence of an armed conflict in the OPT. In the *Targeted Killings* case,[398] President Emeritus Barak presumed that 'between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip...a continuous situation of armed conflict has existed since the first *intifada'*.[399] Relying on the views of Professor Antonio Cassese, he held that the situation amounted to an international armed conflict,[400] arguing that 'the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict'.[401] President Emeritus Barak thus emphatically rejected the respondents' plea that it was difficult to classify the nature of the conflict, ruling:

> for years the starting point of the Supreme Court—and also of the State's counsel before the Supreme Court—is that the armed conflict is of an international character. In this judgment we continue to rule on the basis of that view.[402]

Consequently, given the contours of the Israeli-Palestinian conflict, it appears that the International Court erred when it ruled that Article 6 of the Fourth Geneva Convention fell to be applied in the OPT.

b. Legislative competence of the occupant

Commentators recognise that circumstances may require that changes be made in the administration of occupied territory during a prolonged occupation in the interests of its population[403] although, as Dinstein observes, this makes it 'imperative to guard the inhabitants from the bear's hug of the occupant'.[404] A further complicating factor is that the need for change may partly arise as a result of the occupant's own policies.[405]

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[395] *Wall Advisory Opinion*, ICJ Rep (2004), p. 185, para. 125; pp. 185-187, paras. 125-126.

[396] Final Record of the Diplomatic Conference of Geneva of 1949, vol. II A, p. 815.

[397] See, for example, Imseis, 'Critical Reflections' at105-109.

[398] *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment* v. *(i) the Government of Israel, (ii) the Prime Minister of Israel, (iii) the Minister of Defence, (iv) the Israel Defense Forces, (iv) the Chief of the General Staff of the Israel Defense Forces, (v) Shurat HaDin—Israel Law Center et al*, judgment of 13 December 2006 (the *Targeted Killings* case). An official English translation of this judgment is available on the Israel Supreme Court's website at: http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

[399] *Targeted Killings* case, opinion of President Emeritus Barak, para.16.

[400] *Targeted Killings* case, opinion of President Emeritus Barak, para.18.

[401] *Targeted Killings* case, opinion of President Emeritus Barak, para.21.

[402] *Targeted Killings* case, opinion of President Emeritus Barak, para.21.

[403] See, for example, Benvenisti, *Occupation*, pp. 147-148; Dinstein, 'Occupation and Human Rights' at 112 and 'Article 43' at 8; Roberts, 'Prolonged occupation' at 52; Sassoli, 'Legislation' at 679; and Schwenk, 'Legislative Power under Article 43' at 401.

[404] Dinstein, 'Occupation and Human Rights' at 113.

[405] Benvenisti, *Occupation*, p. 147.

Under general international law, the legitimacy of legislative changes introduced by an occupant falls to be determined by reference to Article 43 of the Hague Regulations, which has been augmented by Article 64 of the Fourth Geneva Convention. Article 43 of the Hague Regulations provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting , unless absolutely prevented, the laws in force in the country.[406]

This is the standard English translation of the authoritative French text.[407] It is, however, accepted that to render the key phrase 'l'ordre et la vie publics' as 'public order and safety' is unsatisfactory.[408] Following Schwenk, this phrase is better translated as 'public order and civil life' to import the idea that 'la vie publique' should be conceived broadly to refer to 'the whole social, commercial and economic life of the country'.[409]

Article 64 of the Fourth Geneva Convention, which is seen as 'a more precise and detailed [expression of] the terms of Article 43 of the Hague Regulations',[410] provides:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Although the first paragraph of Article 64 refers expressly to penal law, it is accepted that the legislative power conferred on the occupant by virtue of the second paragraph 64(2) is a general competence. This competence is, nevertheless, circumscribed. The occupant may only adopt new measures which are 'essential' in relation to the issues enumerated in paragraph 2—namely, in order

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[406] On the interpretation of Article 43, see Y. Dinstein, *Article 43*; G. von Glahn, *Occupation of enemy territory*, Chapter Eight, and also his *Taxation*, 347-350; Greenwood, 'Administration of Occupied Territory'); E. Playfair, 'Playing on principle? Israel's justification for its administrative acts in the occupied West Bank', in Playfair, *Administration of occupied territories*, pp. 207-215; Kretzmer, *Occupation of justice*, Chapter IV; M. Qupty, 'The application of international law in the Occupied Territories as reflected in the judgments of the High Court of Justice in Israel', in Playfair, *op cit*, pp. 92-98; Schwarzenberger, *Armed conflict*, pp. 191-207; Schwenk, 'Legislative Power under Article 43'; Sassoli, 'Legislation'; and J. Stone, *Legal controls of international conflict* (Maitland: Sydney: 1959, Rev. Ed.), pp. 698-699.

[407] The French text reads: 'L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.'

[408] See Benvenisti, *Occupation*, p. 7; Dinstein, *Article 43*, 2; von Glahn, 'Taxation', 348; Greenwood, 'Administration of Occupied Territory', 246; Playfair, *Principle*, p. 207; Sassoli, 'Legislation' at 663-664; Schwarzenberger, *Armed conflict*, p. 180; and Schwenk, 'Legislative Power under Article 43', p. 393 n. 1 and 398. This misinterpretation was noted in the pivotal first case dealing with the implications of prolonged occupation decided by Israel's High Court, *Christian Society for the Holy Places* v. *Minister of Defence and others*: see 52 *International Law Reports* 512, opinion of Deputy President Sussman at 513-514. This passage does not appear in the summary of the case provided at 2 *Israel Yearbook on Human Rights* (1972) 354.

[409] See Schwenk, 'Legislative Power under Article 43', 393 n.1 and 398; and also Greenwood, 'Administration of Occupied Territory' at 246; and Sassoli, 'Legislation' at 663-664.

[410] Pictet, *Commentary to Geneva Convention IV*, p. 335.

that the occupant may fulfil its obligations under the Convention; for the orderly government of the territory; and to ensure its own security interests principally within the occupied territory.[411]

Schwarzenberger claims that by adopting this enumeration 'the Conference of 1949 took it for granted that it had not extended the traditional scope of occupation legislation'.[412] Others argue, however, that Article 64(2) attenuates the restrictions on the occupant's legislative competence imposed by Article 43 of the Hague Regulations.[413] The determination of which is the better view need not detain us. Israeli courts have rarely referred to Article 64[414] and the most authoritative ruling on its import was delivered by the High Court in *Abu Aita*. In rejecting a plea that Article 64 prohibited the creation of new criminal offences by the occupant, Acting President Shamgar ruled that the Fourth Geneva Convention could not be pleaded before the Court, but even if this had been possible, the plea would not have succeeded. Article 64 permitted new criminal legislation aimed at maintaining the orderly government of the territory:

> In view of the recognized interpretation, this concept is parallel to the provisions regarding the permitted purposes of legislation arising under Article 43 [of the Hague Regulations].[415]

Accordingly, for present purposes, we may conclude that Article 64 of the Fourth Geneva Convention does not alter the basic rule regarding Israel's legislative competence as occupant, although it provides further specification regarding the legitimate aims of that legislation.

c. Limitations upon the legislative competence of the occupant

By virtue of Article 43 of the Hague Regulations, as occupant, Israel's legislative competence is restricted to the adoption of measures 'in his power' which are aimed at restoring and ensuring public order and civil life, but it must respect 'unless absolutely prevented' the law which was in force in the Palestinian territories at the time the occupation was established. The gloss placed on this provision by Article 64 of the Fourth Geneva Convention is that any new measures must only be those 'necessary' to enable the occupant to fulfil its obligations under the Convention, 'to maintain the orderly government of the territory', and to ensure the occupant's security. Nevertheless, these new measures 'must not in any circumstances serve as a means of oppressing the population'.[416]

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[411] For commentaries on Article 64, see Ben-Naftali et al, 'Illegal occupation', at 594; Benvenisti, *Occupation*, pp. 100-105; Dinstein, *Article 43*, pp. 5-8; Pictet, *Commentary*, pp. 334-336; Sassoli, 'Legislation' at 669-670; and Schwarzenberger, *Armed conflict*, 193-195. See also T. Ferraro, 'Enforcement of occupation law in domestic courts: issues and opportunities' (2008) 41 *Israel Law Review* 331.There is a presumption against measures adopted by the occupant having extra-territorial effect. In 1970, an Israeli military court sitting in Ramallah ruled that Article 64 only conferred extra-territorial legislative competence on the occupant in relation to 'classical' security offences, namely, those offences whose prevention was 'necessary in order to preserve the physical security of the Occupying Power and its forces'—see *Military Prosecutor* v. *Akrash Nazimi Bakir*, 48 *International Law Reports* 478 at 483-484 (nd).

[412] Schwarzenberger, *Armed conflict*, p. 194.

[413] For example, Ben-Naftali et al, 'Illegal occupation'at 594; Benvenisti, *Occupation*, pp. 100-105; and Sassoli, 'Legislation' at 670.

[414] There is a handful of cases decided in the early days of the occupation in which military courts relied upon Article 64, principally to provide the basis for their jurisdiction, see *Military Prosecutor* v. *Halil Muhamad Mahmud Halil Bakhis and others* (Israeli military court sitting in Ramallah, 10 June 1968) 47 *International Law Reports* 484 at 485-486; *Military Prosecutor* v. *Zuhadi Salah Hassin Zuhad* (Israeli military court sitting in Bethlehem, 11 August 1968) 47 *International Law Reports* 490 at 490-491 and 498; *Military Prosecutor* v. *Akrash Nazimi Bakir* (Israeli military court sitting in Ramallah, 5 March 1970) 48 *International Law Reports* 478 at 481-484; and *Military Prosecutor* v. *Mohammad Samikh Amin Ibrahim Al Nassar* (Israeli military court sitting in Schechm, 26 August 1969) 48 *International Law Reports* 486 at 489.

[415] *Abu Aita*, 324/107/147, para.54.

[416] Pictet, *Commentary to Geneva Convention IV*, p. 337.

Article 43 places the occupant under duties which must be balanced: the duty to 'restore and ensure...public order and civil life' has to be weighed against the duty to respect 'unless absolutely prevented, the laws in force in the country'. The latter recognises that the occupant possesses legislative power over the territory. The parameters of this power are flexible and open to interpretation, particularly because 'this provision sets more of a guideline than a clear rule'.[417] Further, the duty to ensure public order and civil life 'is not a definite and certain concept, but a notion depending on the circumstances of the particular case'.[418] It is clear, however, that:

> international law does not recognize a general legislative competence in the belligerent occupant. Changes in the law of the territory will be contrary to international law unless they are required for the legitimate needs of the occupation.[419]

There is doctrinal consensus that private law is generally 'immune from interference on the part of the occupant'. Laws that concern 'family life, inheritance, property, debts and contracts, commercial and business activities, and so forth' are normally not suspended or altered by an occupant.[420]

A further limitation inherent in the occupant's legislative competence arises from the temporary—if at times prolonged—nature of occupation as a legal institution. The occupant's powers are limited to the period of occupation, as it does not possess sovereign rights over the territory. Changes that it may legitimately introduce must be commensurate with the transitional and temporary nature of occupation.[421] Further, as Schwenk emphasises, there are two distinct vectors to this legislative competence:

> While the occupant can *restore* public order and civil life only when they have been disrupted, he may legislate to *ensure* them in the absence of any disturbance. Hence the terms 'restoration' and 'ensurance' are used alternatively rather than jointly...
>
> Thus it follows that, when public order and civil life have remained undisturbed, the validity of legislation under Article 43 depends on whether or not the legislating occupant was motivated by a desire to ensure them.[422]

The duty to respect existing laws 'unless absolutely prevented' has never been interpreted literally, as some flexibility must be accorded to the occupant in the exercise of its administrative functions.[423] This phrase has been interpreted to import a criterion of necessity as a justification for an exercise of the occupant's legislative competence,[424] but it is accepted that this is wider than military necessity:[425]

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[417] Playfair, *Principle*, p. 207: see also Sassoli, 'Legislation' at 673-674; and Schwenk, 'Legislative Power under Article 43' at 399-400.

[418] Schwenk, 'Legislative Power under Article 43' at 399.

[419] Greenwood, 'Administration of Occupied Territory' at 247,

[420] Von Glahn, *Occupation of enemy territory*, p. 99.

[421] Sassoli, 'Legislation' at 673.

[422] Schwenk, 'Legislative Power under Article 43', at 398-399.

[423] See, for example, Dinstein, *Article 43*, p. 4 and 'Occupation and human rights' at 112; E.H. Feilchenfeld, *The international economic law of belligerent occupation* (Washington: Carnegie Endowment for International Peace: 1942), p. 89; Kretzmer, *The Occupation of Justice*, p. 63; and Schwarzenberger, *Armed conflict*, 193.

[424] For example, see Dinstein, *Article 43*, pp. 4-5; H.P. Gasser, *Protection of the civilian population*, in D. Fleck (ed.), *The handbook of humanitarian law in armed conflicts* (Oxford: Oxford University Press, 1995), p. 256; Sassoli, 'Legislation' at 670; and Schwenk, 'Legislative Power under Article 43' at 401.

[425] For instance, von Glahn, *Occupation of enemy territory*, pp. 96-97; and Schwenk, 'Legislative Power under Article 43' at 399-402.

> The restoration of public order and civil life aims primarily, if not exclusively, at the interest of the population. Hence, a construction which confines the term 'empêchement absolu' to the military interest of the occupant seems too narrow, if not actually incorrect.[426]

Accordingly, a balance must be drawn in observing this limitation. While the occupant is entitled to take its security interests into account, commentators recognise that legislative changes may be needed to protect or promote the interests of the population, particularly during prolonged occupations. Dinstein cautions, however, that an occupant's interest for the welfare of the population is not above suspicion as '[p]rofessed humanitarian motives of the Occupying Power may serve as a ruse for a hidden agenda'. Accordingly, whether there is a real necessity for each new enactment must be examined,[427] and the occupant is not entitled to assume a general duty to update the law lest this 'effectively grant the occupant almost all the powers a modern sovereign government would wield'.[428]

During an occupation, the entity which decides whether legislation is necessary to restore or ensure civil life is the occupant.[429] Dinstein suggests that an appropriate test to decide whether an occupant's concern for the welfare of the inhabitants of occupied territory is lawful in the terms of Article 43 hinges on whether it has the same concern for its own population. If the occupant enacts legislation in the occupied territory which is parallel (although not necessarily identical) to legislation adopted in its home territory, then Dinstein claims that this has a presumptive legitimacy. Should this not be the case, then the occupant's professed concern for the welfare of the occupied territory 'deserves to be disbelieved'.[430] This test, expressly adopted by Israel's High Court in the *Abu Aita* case,[431] is inadequate: an occupant may not amend the law of occupied territory 'merely to make it accord with [its] own legal conceptions'.[432] Simply because the occupant has adopted a measure in its home territory does not mean that it is necessary to do so in territory it occupies. This has obvious dangers:

> In practice the standard implicit in the test may be abused by an occupant interested in a gradual extension of its laws to the occupied territory under a strategy of creeping annexation...It may not introduce changes simply on the ground that it is 'upgrading' the local institutions to the level obtaining in the occupant's own country and that it is in the interest of the local population.[433]

Finally, an occupant is incompetent to adopt any measure that breaches international law. To an extent, this restriction is apparent on the face of Article 64(2) of the Fourth Geneva Convention,

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[426] Schwenk, 'Legislative Power under Article 43' at 400: see also Sassoli, 'Legislation' at 673.

[427] Dinstein, *Article 43*, p. 8.

[428] Benvenisti, *Occupation*, p. 147: see also Dinstein, *Article 43*, pp. 9-10; and also '*In re Krupp and others* (United States Military Tribunal at Nuremberg, 30 June 1948)', 15 *International Law Reports* 620 at 623: 'The occupying power is forbidden from imposing any new concept of law upon the occupied territory unless such provision is justified by the requirements of public order and safety'.

[429] See *Muhammad Amin Al-Ja'bari* v. *Ahmad Ya'qub 'Abd Al-Karim Al-Awini* (Jordan, Court of Appeal of Ramallah, 17 June 1968), 42 *International Law Reports* 484 at 486: see also Ferraro, *Enforcement of occupation law*, pp. 349-350, but compare Benvenisti's plea for more inclusive decision-making, *Occupation*, pp. 147-148, and see also Dinstein, 'Occupation and human rights' at 113.

[430] Dinstein, *Article 43*, pp. 9-10, and also 'Occupation and human rights' at 112: see also *Christian Society for the Holy Places, Minister of Defence and others*, 52 *International Law Reports* 512, dissenting opinion of Cohn J, 518 at 520; and T. Meron, 'Applicability of multilateral conventions to occupied territories' (1978) 72 *American Journal of International Law* 542, 548-550.

[431] *Abu Aita*, opinion of Acting President Shamgar, 314-315/98-99/135-136, para.50.e: see also 13 *Israel Yearbook on Human Rights* (1983) 348, 357: but compare *Economic Corporation for Jerusalem Ltd* v. *Commander of IDF Forces in the Judea and Samaria Region et al* (2000) 30 *Israel Yearbook on Human Rights* 322, 324.

[432] Pictet, *Commentary to Geneva Convention IV*, 336; see also Roberts, 'Prolonged occupation' at 94; and Sassoli, 'Legislation' at 677.

[433] Meron, 'Applicability of Multilateral conventions' at 550.

which permits the occupant to adopt provisions 'which are essential to enable the Occupying Power to fulfil its obligations under the present Convention'. Dinstein claims that, by extension, this provision allows the occupant to implement other obligations derived from customary and conventional international law. Thus, for example, in *Tabib*, the High Court ruled:

> The question [whether an absolute prevention exists] is one of the preferable and convenient means for achieving the purpose as stated at the beginning of Article 43, namely, ensuring 'public order'—a term that I propose to interpret as meaning the existence of an administration safeguarding civil rights and concerned about the maximal welfare of the population.
>
> If the achievement of this purpose requires a deviation from the existing laws, there is not only a right but, indeed, a duty to deviate from them.[434]

Yet, as Kretzmer contends, expressly relying on the terms of Article 43 of the Hague Regulations, '[a]ny measure prohibited by international law is not in the occupant's power'.[435] It is self-evident that an occupant may not purport to use its legitimate powers conferred by the regime of occupation to pursue an end that is unlawful. [436]

Israel has asserted,[437] however, that a prolonged occupation *per se* modifies the obligations imposed by Article 43 of the Hague Regulations. The High Court has repeatedly relied on the claim that where an occupation is prolonged, the occupant is empowered to employ measures of a nature which would not be permissible during a short-term occupation.[438] This view was expounded in detail by Acting President Shamgar in *Abu Aita*. The premise of this claim is that:

> The needs of any area, whether under military government or otherwise, will naturally change over the course of time, along with attendant economic developments...The length of time that a military government continues may affect the nature of the needs involved, and the urgency to effect adjustment and reorganization may increase as more and more time elapses. The argument...that there is no foundation for the idea that the duration of military government affects the character of the duties and the extent of the powers of military government [is] irreconcilable with the character of the duties and powers vested in it by Article 43. It is true that this article contains no rules as to adjustment or reclassification bound up with, or conditional upon the time element, but the effect of the time dimension is implicit in the wording, according to which there is a duty to ensure, as far as possible, order and public life,

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[434] *Tabib et al* v. *(a) Minister of Defence, (b) Military Governor of Tulkarem*, (1983) 13 *Israel Yearbook on Human Rights* 364, opinion of Justice Shilo at 366.

[435] Dinstein, *Article 43*, p. 6; Kretzmer, *Occupation of justice*, p. 60: see also Sassoli, 'Legislation' at 674 and 676-677.

[436] The High Court's interpretation of Article 43 has been criticised on the ground that it attenuates unduly the restrictions placed on legislative competence, substituting administrative convenience for the criterion of necessity: see, for example, Kretzmer, *Occupation of justice*, pp. 57-72; Playfair, *Principle*, p. 211 *et seq*; Qupty, 'Judgments' at 91-97; and Sassoli, 'Legislation' at 674: 'The practice of Israeli courts concerning legislation in the Israeli occupied territories is...very permissive'. On the other hand, Cassese sees some merit in the approach adopted by the High Court: see his 'Powers and duties' at 423-427: see also J. Singer, 'Aspects of foreign relations under the Israeli-Palestinian Agreements on interim self-government arrangements for the West Bank and Gaza' (1994) 26 *Israel Law Review* 268 275-277. Singer's exegesis of Article 43 ignores the point that only factual authority, but not sovereignty, passes to the occupant.

[437] See von Glahn, 'Taxation' at 345-346.

[438] See, for example, *A Cooperative Society Lawfully Registered in the Judea and Samaria Region* v. *Commander of IDF Forces in the Judea and Samaria Region et al* (1984) 14 *Israel Yearbook on Human Rights* 301, 307-308, and as *Ja'amait Ascan*, Kretzmer, *Occupation of justice*, p. 70; *Dwadin et al* v. *Commander of IDF Forces in the West Bank* (1985) 25 *Israel Yearbook on Human Rights* 333, 334; *Economic Corporation for Jerusalem Ltd* v. *Commander of IDF Forces in the Judea and Samaria Region et al* (2000) 30 *Israel Yearbook on Human Rights* 322, 324; and *Na'ale* v. *The Supreme Planning Committee of the Judea and Samaria Area et al* (IL 2004) ILDC 70 para. 6 and 37 *Israel Yearbook on Human Rights* 332 (2007) at 333.

> which patently means order and life at all times, and not only on a single occasion. The element of time is also decisively involved in the question of whether it is absolutely impossible to continue acting in accordance with existing law, or whether it is essential to adapt that law to new realities...It follows that the time element is a factor affecting the scope of the powers, whether we regard military needs, or whether we regard the needs of the territory, or maintain equilibrium between them.[439]

Relying on Graber,[440] Acting President Shamgar claimed that the Hague Regulations were too inadequate and fragmentary to guide the occupant and implied that, during a prolonged occupation, the occupant assumes sovereign powers of legislation:

> a lengthy military occupation, which would be required to find solutions for a wide range of day-to-day problems, similar to those an ordinary government would encounter, is likely not to find answers to its questions in the provisions of the Regulations.[441]

Further, in his interpretation of the phrase 'as far as possible' employed in Article 48 of the Regulations, and the presumption that it bears the same meaning in Article 43, Shamgar flatly asserted that 'there is no logic in applying the same criterion to a newly established military government and to a military government that has administered a territory with all the problems of civil administration, for ten years or more'.[442]

To depart from the terms of Article 43 in a manner which effectively effaces the limitations it places upon the occupant's legislative competence conflicts with the view expressed by the United States Military Tribunal at Nuremberg in the *IG Farben* case. Although the Tribunal recognised that there were uncertainties in the law of armed conflict, it held that these did not arise in relation to the basic principles of the law of occupation contained in the Hague Regulations: 'We cannot read obliterating uncertainty into these provisions and phrases of international law having to do with the conduct of the military occupant towards inhabitants of occupied territory.'[443]

Yet the Israeli High Court has done precisely this by employing the doctrine of prolonged occupation to buttress an interpretation of the Hague Regulations that obliterated the restraints placed upon the occupant by Article 55. In *Na'ale*, two settlements in the West Bank, somewhat paradoxically, lodged an objection to a permit allowing the opening of a quarry. The petitioners argued that this would breach Article 55 of the Hague Regulations, which provides that an occupant is only the 'administrator and usufructuary' of publicly owned buildings and estates located in occupied territory. This places on the occupant the duty to 'safeguard the capital of these properties, and administer them in accordance with the rules of usufruct'.[444] The petitioners argued that quarrying consumed the property and thus breached the duty of usufruct. The High Court rejected this plea, ruling:

> even if quarrying cannot be considered as usufructing, no prohibition of such a kind of use applies in cases where an activity is done for the benefit of the local population or local needs.[445]

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[439] *Abu Aita*, opinion of Acting President Shamgar, 313/97/133-134, para. 50(e): see also 309/94-95/128-129, para. 50(c).

[440] Graber, *Historical survey*, pp. 290-291.

[441] *Abu Aita*, opinion of Acting President Shamgar, 273/65-66/89, para.25.g.

[442] *Abu Aita*, opinion of Acting President Shamgar, 268/61/ 83, para.24.c.

[443] *In re Krauch and others (IG Farben trial)*, (US Military Tribunal at Nuremberg, 29 July 1948), 15 *International Law Reports* 668 at 677.

[444] For commentary on Article 55, see I. Scobbie, 'Natural resources and belligerent occupation: mutation through permanent sovereignty', in S. Bowen (ed.), *Human rights, self-determination and political change in the occupied Palestinian territories* (Kluwer: The Hague: 1997), pp. 232-234; see pp. 238-242 for an account of Israel's exploitation of hydrocarbon resources in occupied Sinai and the Gulf of Suez.

[445] *Na'ale* v. *The Supreme Planning Committee of the Judea and Samaria Area et al*, ILDC 70 (IL 2004) and 37 *Israel Yearbook on Human Rights* 332 (2007), quotation at 333.

This ruling is manifestly incorrect: its effacement of Article 55 also entails a clear breach of Article 43 because this ruling validates a measure which violates international law.

While recognising that prolonged occupations occur frequently, Roberts cautions against treating them as a special category. To do so might suggest that the law of occupation ceases to apply with its full vigour through the passage of time,[446] and it has been claimed that there are few meaningful guidelines to determine what may constitute a legitimate deviation from the 'normal' rules of occupation during a prolonged occupation.[447] Nevertheless, the Israeli High Court has repeatedly claimed that, where an occupation is prolonged, the occupant may introduce measures which would otherwise not be allowed. It has employed this doctrine effectively to remove the limitations placed on Israel's legislative competence, *qua* occupant, by virtue of Article 43 of the Hague Regulations. This is not merely in blatant disregard of the strictures imposed by Article 43, and thus in clear breach of international law, but it also conflicts with the decision of the US Military Tribunal at Nuremberg in *IG Farben*.[448] It has been rejected by commentators.[449] This doctrine has been employed to, amongst other things, efface the legally mandated separation of the Israeli and Palestinian economies, as will be discussed in Chapter III.B(3).

D. Application of Israeli Law in the Occupied Palestinian Territories

As noted earlier, Article 43 of the Hague Regulations provides that an Occupying Power must uphold the existing law in occupied territory as far as possible:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[450]

When Israel occupied the West Bank, including East Jerusalem, and the Gaza Strip, the Israeli Military Commander assumed all legislative powers. In East Jerusalem, the law in force until 1967 was annulled and Israeli civil law imposed, but the Military Commander retained legislative powers in the rest of the West Bank and the Gaza Strip.[451] These powers have been expressed through military proclamations, regulations, orders, and decrees. As years passed, Israel gave a very wide interpretation to the limited exception in Article 43 of the Hague Regulations that permits the Occupying Power to alter local legislation.[452] As the situation in the Gaza Strip is treated elsewhere in this report, this section will focus on questions of law in the West Bank by way of illustration.

Law in the West Bank, a product of numerous historical governments and occupiers (each of which maintained some of the law in force before its arrival, annulled some legislation and added to it) is a legal patchwork, consisting of Ottoman, British, Jordanian, and now Israeli military legislation. Over four decades of occupation Israeli military decrees have further annulled, amended, and supplemented Ottoman, Mandatory and Jordanian legislation. All the legal systems contributing to the law of the

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[446] Roberts, 'Prolonged occupation' at 51.

[447] Benvenisti, *Occupation*, pp. 144-145.

[448] In *re Krauch and others (I.G. Farben) trial*, (US Military Tribunal at Nuremberg, 29 July 1948), 15 *International Law Reports* 668 at 677.

[449] See, for example, Cassese, *Powers and duties*, pp. 419-420; von Glahn, 'Taxation' at 345-347, 373; and Greenwood, 'Administration of Occupied Territory' at 263.

[450] Regulation 43 of *the Hague Convention Respecting the Laws and Customs of War on Land Including Regulations Respecting the Laws and Customs of War on Land (the Hague 1907)*; see also Article 64 of *the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.*

[451] See Military Proclamation No. 2, *Concerning Regulation and Authority of the Judiciary (the West Bank Area)*, 7 June 1967, equivalent Military Proclamation for the Gaza Strip and Northern Sinai.

[452] See the decisions of the High Court of Justice in the *Christian Society for Holy Places* and *Abu Aita* cases.

West Bank have territorial application: i.e., they apply to a geographic area. (Exceptions principally deal with family law and succession and are applied on a personal basis depending on the individual's formal/nominal religious affiliation.[453])

In theory, the law in force in the West Bank is different from the law in force in Israel. The law applying to Israeli citizens (Jewish settlers) residing in the OPT is in theory different from the law applying to Israeli citizens residing within Israel's recognised borders and territories annexed to Israel by Israeli state law (that is, East Jerusalem and the Golan Heights). Moreover, in theory, the same law applies to Israelis in the West Bank as applies to any other person in that territory, including Palestinians and foreigners. In reality, through military and Knesset legislation, the Military Commander and the Israeli legislature have created legal segregation in many legal fields, such that a different body of law is applied to Israelis and Palestinians living in the same territory. The following discussion addresses how they operate in the West Bank through:

- The application of Israeli civil legislation to settlement areas;
- The extraterritorial application of Israeli civil legislation to Israeli settlers in the OPT, including Israel's Basic Laws;
- The personal application of Israeli military legislation to Palestinians.

The outcome of all these techniques is the same: one legal system applies to Palestinians in the West Bank and another to Jewish settlers.

1. Israeli Laws governing settlements and settlers

a. Application of Israeli civil legislation to settlement areas

The first technique by which laws are applied differently to Israelis and Palestinians living in the West Bank has been to incorporate elements of Israeli civil legislation into military orders dealing with the Jewish-Israeli municipal authorities (settlements) and their application to Israelis residing in the West Bank. This can be termed 'channelling', with the Israeli Military Commander serving as a channel for the application of Israeli domestic legislation to the OPT by virtue of his office and the decrees he issues. Channelling allows a number of Israeli laws to apply to the settlements and their annexed zones of territory, with necessary modifications that are mainly procedural and institutional.

Most Israeli laws channelled into the West Bank law regulate the status and authority of governmental institutions within the boundaries of the settlements. For example, such channelling enables the Israeli Ministry of Environmental Protection to exercise its powers with respect to factory pollution in the settlements; grants the Israeli Ministry of Education authority over schools within the boundaries of the settlements; grants the Israeli Ministry of Health authority over medical facilities, and so forth. Thus channelling creates *de facto* Israeli enclaves within the boundaries of the West Bank (and previously also within the Gaza Strip).

In particular, two military orders have authorised the Military Commander to regulate the management of municipal local councils[454] and regional (Jewish) councils[455] in the West Bank. Regulations of local councils provide that dozens of Israeli laws are applied within the boundaries of

[453] The Ottoman Mejelle and also the 'Constitution of the Mandate' – the King's Order-In-Council – applied the laws of personal status (among which are the laws of marriage and divorce, child adoption, faith conversion and inheritance) in a personal manner to the members of the different denominations, so that the religious law of each member applied to him. This arrangement is therefore an arrangement of personal application of the law, rather than territorial application.

[454] Military Order No. 892, *Order Concerning Administration of Regional Councils (Settlements)*, 1 March 1981.

[455] Military Order No. 783, *Order Concerning Administration of Regional Councils (Judea and Samaria)*, 25 March 1979.

the settlements.[456] Israeli rabbinical tribunals and local affairs courts have also been established within the boundaries of the settlements to deal exclusively with litigation between Jewish settlers. For political reasons, the occupying authorities have refrained from applying Israeli law in its entirety to the local councils; hence channelling has resulted in a partial rather than comprehensive application of Israeli law to the settlements.[457] Nonetheless, this system creates legal 'enclaves' or 'islands' within the West Bank where laws apply that differ from those applying in the rest of the West Bank.[458] This violates the principle of equality before the law, which constitutes the foundation of any modern legal system and is relevant to a review under the international legal prohibition on apartheid.[459] Moreover, by conflating law in the settlements with law in Israel, channelling has the effect of creating a Jewish-Israeli society that is integrated legally, socially, and economically across the Green Line.[460]

b. Extraterritorial application of Israeli civil legislation to Israeli settlers

The second technique by which different laws are applied to Israelis and Palestinians in the West Bank is primary legislation enacted by the Knesset that applies extraterritorially to individual Israelis residing or located in the West Bank. This category includes legislation authorising the Israeli executive to promulgate secondary legislation in the form of regulations and decrees that also apply to Israeli individuals in the West Bank. As noted earlier, this practice contradicts the norm that law should apply equally to all individuals within a territory.

The most important law in this regard is the Extension of Emergency Regulations Law 1977,[461] which authorises Israeli criminal courts to judge Israelis suspected of committing criminal offences in the West Bank according to the penal code and criminal procedure of the State of Israel. Section 2 provides:

> a. In addition to the provisions of any law, the court in Israel shall have authority to deliberate, according to the law in force in Israel, a person located in Israel for his act or omission occurring in the Area [the West Bank] and also an Israeli for his act or omission occurring in the territory of the Palestinian Council, all in case the act or omission would have been offences had they occurred within the jurisdiction of the courts in Israel.
>
> […]
>
> c. This Regulation does not apply to a person who at the time of the act or the omission was a resident of the Area or a resident of the territories of the Palestinian Council, who is not an Israeli.[462]

This law therefore applies Israeli criminal law extraterritorially on a personal basis to Israelis in the West Bank, and to tourists and non-residents, with respect to offences they are alleged to have

[456] Section 140(B) of the Local Councils Regulations grants the holders of Israeli statutory powers to act also within the boundaries of the local councils in the West Bank and in accordance with Israeli law. The Appendices to the Regulations include a list of Israeli laws to be applied as aforesaid in the following fields: welfare laws, family laws, statistics laws, education laws, heath laws, labour laws, agricultural laws, apartment buildings laws, environmental laws, consumer, industry and trade laws, communications law.

[457] Amnon Rubinstein & Barak Medinah, The Constitutional Law of the State of Israel (5th Ed.), 1996, at p. 1181 (Hebrew).

[458] *Educational Enterprises* v. *Roth Yosef, Supervisor of Jewish Settlements in the Civilian Administration*, HCJ 10104/04 S.A.L. (unpublished; judgment dated 14 April 2006).

[459] Rubinstein & Medinah, op. cit., at p. 1182.

[460] E. Benvenisti, *The International Law of Occupation* (1993), at p. 135.

[461] *The Extension of Power of Emergency Regulations Law (Judea and Samaria and the Gaza Strip – Adjudication of Offences and Legal Aid), 1977* [last amendment: August 6, 2003], LSI 1977, at p. 48.

[462] Ibid., section 2.

committed in the West Bank, except for the territories designated by the Oslo Accords for jurisdiction by the Palestinian Authority ('Area A').

In addition, the Extension of Emergency Regulations Law applies a long list of Israeli laws to Israelis residing in the West Bank. Section 6(b) to the 1884 Addendum to the Law, extends the application of the laws detailed in the Regulations also to residents of the West Bank who are not Israeli citizens but who are entitled to immigrate to Israel by virtue of the 1950 Law of Return;[463] that is, to Jews. Thus law is applied differently to Palestinians not only in respect to Israeli citizens in the West Bank but also to Jews who are not citizens but who are located in the occupied territory. Although the criminal prosecution of Israelis under military law (which applies to Palestinians) is theoretically possible, the express policy of the Attorney-General is not to do so.[464]

This legal duality creates striking disparities of treatment. For example, a Palestinian arrested in the West Bank on suspicion of manslaughter may be detained for up to eight days before being brought before a military judge in a military court, where the pre-charge detention may be extended indefinitely. Being subject to military criminal legislation, such a prisoner can face a maximum penalty of a life sentence.[465] By contrast, an Israeli settler arrested on the same grounds must be brought, within 24 hours, before a civilian judge in a civilian court for charges and faces a penalty of up to 20 years imprisonment.[466]

Since 1967, the Knesset has enacted other laws that apply extraterritorially on an individual basis to Israeli citizens residing in the West Bank (and before disengagement, to settlers in the Gaza Strip). These include provisions regarding taxation, oversight of products and services, and the census. The rationale for this personal application was the special link created between the state and its citizens located in territory under its control. This reasoning is also the foundation for applying Israeli Basic Laws to Israelis residing in unlawful settlements in the occupied territories. In the *Gaza Coast* case in 2005, the High Court reasoned as follows:

> We are of the opinion that the Basic Laws grant rights to every Israeli settler in the vacated area. This application is personal. It derives from the control of the State of Israel over the vacated area. It is the outcome of the concept that the State's Basic Laws regarding human rights apply to Israelis located outside of the State but in an area under its control by way of belligerent occupation. [467]

The outcome of the extraterritorial application of Israeli legislation on a personal basis, combined with the enclave law as described above, is that a settler lives within the framework of the West Bank law only in a very partial way:

> A resident of Ma'ale Adumim, for instance, is supposedly subject to the Military Government and to the local Jordanian law, but in fact he lives according to the laws of Israel both with respect to his personal law and with respect to the local municipality wherein he lives. The

[463] The Law of Return 5710-1950 provides that an *oleh* immigration visa be issued automatically to any Jew who wants one as well as to Jews in several categories, facilitating the use of this law to grant special rights and privileges, such as citizenship, to Jews exclusively. A substantive amendment in 1970 allowed *oleh* status to be extended to various family relations of Jews immigrating to Israel, including non-Jewish relatives, but the proportion of non-Jews affected by this change remains small.

[464] Rubinstein & Medinah, *op. cit.*, at p. 1182, Fn. 39.

[465] See Sections 51A and 78 of the Decree Respecting Security Directives (No. 378).

[466] The *Criminal Procedure Law (Enforcement powers – Arrests), 1996*, provides in Section 29(a) that an arrest by a Police officer stands for only 24 hours. Section 298 of the *Penal Law, 1977* provides a maximum sentence of twenty years of incarceration for the manslaughter offence.

[467] *The Regional Council of Gaza Coast et al.* v. *The State of Israel et al*., HCJ 1661/05, *Israel Law Review* 59(2) 481, 9 June 2005.

> Military Government is nothing more than a symbol, through which Israeli law and governance operate.[468]

In the *Gaza Coast* case, the High Court dealt with the constitutionality of the law authorising the evacuation of settlers from the Gaza Strip and their compensation, and did not deal with the applicability of the Basic Laws in terms of protecting Palestinians. According to the High Court, the Jewish settlers in the occupied territories enjoy the protection of Israeli Basic Laws[469] while the Palestinians do not:

> In our opinion, the Basic Laws grant rights to every Israeli settler in the area to be evacuated. This jurisdiction is personal. It is derived from the State of Israel's control over the area to be evacuated. It is the fruit of a view by which the state's Basic Laws regarding human rights apply to Israelis found outside the state, who are in an area under its control by way of belligerent occupation. In light of this conclusion, there is no need to take a stand on the territorial applicability of the Basic Laws and there is no need to examine the question if they grant rights to non-Israelis in occupied territories or to Israelis who are not in territories held by Israel. This question raise problems that we do not have to deal with; and we will leave them open for further consideration.[470]

However, as the High Court cannot legally strike down any law unless it is incompatible with the Basic Laws,[471] in the *No Compensation Law* case[472] the petitioners argued explicitly that a law affecting Palestinians (an amendment to the torts law denying Palestinians in the OPT the right to legal remedies for injury sustained due to the actions of Israeli occupying forces) was unconstitutional because it was incompatible with the Basic Law: Human Dignity and Liberty—which, they argued, does apply to the Palestinians in the occupied territories. The petitioners argued first, that while the Basic Law: Freedom of Occupation applies to every Israeli citizen and resident, the Basic Law: Human Dignity and Liberty applies to every person. When the applicability of a Basic Law was intended to be limited, the limitation was explicit (for example, Article 6(b) of the law regarding the right of a citizen to enter Israel).

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[468] Amnon Rubinstein, 'The Changing Status of the Held Territories' (1986) 11 *Eyunei Mishpat* 439, translation from Hebrew.

[469] The Basic Laws of Israel are key component of Israel's constitutional law. These laws deal with the formation and role of the principal state's institutions, and the relations between the state's authorities. Some of them also protect civil rights. The main two basic laws that enshrine basic human rights are the Basic Law: Human Dignity and Liberty (which anchor the right to life, body, dignity, property, liberty, privacy, and the right to leave and enter the country and the Basic Law: Freedom of Occupation, which anchor the right of every person to freely chose his occupation. As apparent, several cardinal human rights are missing from these two Basic Laws such as the rights to equality, freedom of expression and opinion, freedom of religion, freedom of association and assembly, and others (despite this fact, the Israeli High Court has interpreted the right to dignity as including the right to equality and other cardinal rights). While these laws were originally meant to be draft chapters of a future Israeli constitution, they are already used on a daily basis by the courts as a formal constitution. Israel currently functions according to both material constitutional law, based upon cases and precedents (unwritten constitution), and the provisions of these formal statutes. As of today, the Basic Laws do not cover all constitutional issues, and there is no deadline set for the completion of the process of merging them into one comprehensive constitution. Generally speaking, these laws have precedence over regular legislations and they give the courts the authority to disqualify later legislation that contradicts them. The Basic Law: Himan Dignity and Liberty does not apply retroactively, thus preventing the constitutional challenges to any earlier legislation even if it contradicts the basic law. See Amnon Rubinstein & Barak Medinah, *The Constitutional Law of the State of Israel*, (5th Ed.), 1996, at p. 1181 (Hebrew) and C.A. *6821/93, United Bank Mizrachi* v. *Migdal*, 49(4) P.D. 221.

[470] See the *Gaza Coast* case, para. 80 and the *Mara'abe* case, para. 21.

[471] See the *United Bank Mizrachi* v. *Migdal* case.

[472] *Adalah v. The Minister of Defense*, HCJ 8276/05 (judgment dated 12 December 2006, translation by Adalah).

They argued secondly that the Basic Law expressly applies to every governmental authority and requires them to respect the rights set forth in Article 11 of the law.[473] According to this article, every soldier carries in his kit bag not only the principles of Israeli administrative law, but also the Basic Law, and is required to respect the rights enshrined therein. Therefore, the Basic Law applies any time that a governmental authority infringes the fundamental right of any person. At a minimum, the Basic Law applies in every area under Israeli control. Any other conclusion, the petitioners argued, would lead to a constitutional apartheid regime, whereby an Israeli in the OPT is entitled to the protection of his fundamental rights while a Palestinian is denied such protection.

However, in the *No Compensation Law* case the Court circumvented the question of the applicability of the Basic Laws to OPT Palestinians by stating that the rights that were infringed were granted by Israeli law that is not applicable extraterritorially.[474] The same issue came before the High Court in relation to a petition challenging the constitutionality of the 2003 Citizenship and Entry Into Israel Law (the *Family Unification* case). This law prohibits the granting of residency or citizenship status to Palestinians from the West Bank and Gaza Strip who are married to Israeli citizens, who are, in the overwhelming majority of such instances, Palestinian citizens of Israel. Thus, the law bans family unification in Israel. In this case, the Court similarly refused to apply the protection of the Basic Laws to the Palestinians. President Barak's minority opinion focused on the constitutional rights of the Israeli citizen to equality and family life and not on the rights of the 'foreigner' (i.e., the OPT Palestinian) spouse.[475]

To sum up the High Court's position on this issue: in the occupied territories where Israel exercises effective control, Israeli settlers are granted the protection of the Basic Laws while the Palestinians are not, despite the provision of Article 11 of the Basic Law: Human Dignity and Liberty. In relation to the Palestinians, former High Court President Aharon Barak stated: 'Judea, Samaria, and the Gaza Region are not a state and are not democratic. Israeli control over them is by belligerent occupation. Israeli control did not arise from the choice of the local residents, but as the result of combat actions'.[476]

c. Discrimination in the adjudication of rights

The refusal of the High Court to rule on the legality of the settlements (discussed in section C(5)(c) of this chapter), combined with its rulings that Palestinians do not enjoy legal protections accorded to Israeli settlers, has led it to render judgments that cumulatively have dissolved the special protection accorded to the protected persons and thus the distinction between rights of Palestinians under occupation and rights of settlers. In effect, this approach has turned the tables to protect the interests of settlers over those of the local population. The most illustrative decision is the *Hess* case, in which the High Court authorised the Israeli army to seize Palestinian land and destroy structures in Hebron owned by Palestinians for the purpose of allowing Jewish settlers safe access to the Cave of the Patriarchs (Machpela Cave). Justice Procaccia wrote:

> Alongside the area commander's responsibility for safeguarding the safety of the military force under his command, he must ensure the well being, safety and welfare of the residents of the area. This duty of his applies to all residents, without distinction by identity – Jew, Arab, or foreigner. The question of the legality of various populations' settlement activity in the area is not the issue put forth for our decision in this case. From the very fact that they have settled in the area is derived the area commander's duty to preserve their lives and their

[473] It should be noted that in the *Gaza Coast* case, the court did not address Article 11 at all.

[474] Justice Gronis dissented from this opinion: see Ibid., paras. 2-3 of his opinion.

[475] See Adalah, et al. v. Minister of Interior et al, HCJ 7052/03, (judgment of 14 May 2006), available at: http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.htm.

[476] Aharon Barak, *Shofet be-Hevra Demoqratit* [*A Judge in a Democratic Society*] (University of Haifa Press, Keter, Nevo, 2004), 147.

> human rights. This sits well with the humanitarian aspect of the military force's responsibility in belligerent occupation.[477]

The High Court added:

> …the worshippers who wish to go to the Machpela Cave by foot on Sabbaths and festivals wish to realize a constitutional right of freedom of worship in a holy place. This right is of special importance and weight on the scale of constitutional rights.[478]

It further determined:

> In the framework of his responsibility for the well being of the residents of the area, the commander must also work diligently to provide proper defence to the constitutional human rights of the local residents, subject to the limitations posed by the conditions and factual circumstances on the ground . . . included in these protected constitutional rights are freedom of movement, religion, and worship, and property rights. The commander of the area must use his authority to preserve the public safety and order in the area, while protecting human rights.[479]

In its rhetoric, the High Court regarded the Palestinians' rights as equal to Jewish settlers' rights, requiring that opposing interests be balanced.[480] The High Court then permitted, in principle and in practice, a violation of Palestinian rights for the benefit of the settlers.

Another example is the case of *Rachel's Tomb*,[481] in which the petitioners challenged the legality of a military order requisitioning land near Bethlehem to construct a bypass road and protective wall for Jewish worshippers wishing to go from Jerusalem to the site of Rachel's Tomb. The petitioners argued that the order did not properly balance the rights of the worshippers with the property rights of the occupied population and the Palestinian right to freedom of movement within Bethlehem, both of which were violated by the order. In addition, the petitioners argued that the state of Israel was motivated by improper considerations in making the order, whose purpose, they argued, was not to ensure the rights and security of the worshippers but effectively to annex Rachel's tomb to Jerusalem. The petitioners did not deny the rights of Israeli worshippers to have access to Rachel's tomb. Therefore, the High Court's deliberations were restricted to whether the order provided a proper balance between the worshippers' freedom of worship on the one hand and the petitioners' freedom of movement and property rights on the other.

The High Court concluded that the dispute was between constitutional rights of equal standing and importance and that the required balance is horizontal, allowing coexistence of all of these rights. In its deliberation, the High Court did not distinguish between the rights of the Palestinians and the rights of the Jewish worshippers[482] or draw any distinction between the different sources of the rights and special protections given to the petitioners under international humanitarian law. As in the *Hess* case, Israeli 'security' imperatives were recognised by the High Court without question as justifying the infringement of Palestinians' fundamental rights.

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[477] *Hess* case, para. 14, at p. 460.

[478] *Hess* case, para. 19, at p. 465.

[479] *Hess* case, para. 14, p. 461.

[480] The *Hess* decision was prior to the *Gaza Coast* decision, so it cannot be considered as setting new ruling on the issue of the applicability of the Basic Laws to Palestinians in the OPT.

[481] *Bethlehem Municipality* v. *State of Israel*, HCJ 1890/03, 3 February 2005, available in English at: http://elyon1.court.gov.il/files_eng/03/900/018/N24/03018900.n24.pdf.

[482] Unlike *Hess*, this decision came after the *Gaza Coast* case; however, the court did not address the applicability of Basic Law to the Palestinians, as they would be applicable through the administrative law doctrine.

In the *Mara'abe* case, Palestinian petitioners challenged the legality of the route of the Wall surrounding the Alfei Menashe settlement, which created a sealed enclave of Palestinian villages. The state claimed that the specific route was chosen for security reasons, to protect the life and safety of the settlers. The High Court accepted this argument, relying on its interpretation of Article 43 of the Hague Regulations. It concluded that, even if the Military Commander

> acted in a manner that conflicted the law of belligerent occupation at the time he agreed to the establishment of this or that settlement – and that issue is not before us, and we shall express no opinion on it – that does not release him from his duty according to the law of belligerent occupation itself, to preserve the lives, safety, and dignity of every one of the Israeli settlers. The ensuring of the safety of Israelis present in the area is cast upon the shoulders of the military commander.[483]

This specific petition was accepted and the route of the Wall in the area in question was found to be disproportionate, leading the Court to order its re-routing. However, in its conclusion the Court again balanced security needs against the rights of the Palestinians while refusing to rule directly on the legality of the settlements. Ultimately, claims regarding protection of settlers were transformed into a judicial determination that a barrier constructed to incorporate the settlements into Israel is legal.

> We have reached the conclusion that the considerations behind the determined route are security considerations. It is not a political consideration which lies behind the fence route at the Alfei Menashe enclave, rather the need to protect the well being and security of the Israelis (those in Israel and those living in Alfei Menashe, as well as those wishing to travel from Alfei Menashe to Israel and those wishing to travel from Israel to Alfei Menashe).

The High Court's interpretation of Article 43 as allowing protection of the settlers through defence of the settlements disturbs and distorts the delicate balance between military concerns and humanitarian concerns that is basic to Article 43 of the Hague Regulations. In this sense, the *Mara'abe* judgment follows the *Hess* precedent[484] in which the fundamental distinction between protected persons in the OPT and nationals of the occupying power was conspicuously missing. Although the *Hess* judgment included a comprehensive analysis of the conflicting considerations and rights, the High Court's balancing approach disregarded the condition of occupation and treated the situation as if it were a democratic society in which all individuals, Palestinians and Israeli settlers, have the same rights and duties.

This fiction characterises the situation in the occupied territories. The 'basic structure remains in place: the freedom of Jewish settlers to live in the OPT safely and travel freely is apparently hardly ever challenged, resulting in a regime that regulates people and their movements on the basis of ethnicity.'[485] The result is that 'the Palestinians have been denied most of the rights accorded to people under occupation'[486] while settlers are protected in assuming authority over Palestinian land. As the settler population has reached almost a half-million, this trend has created systematic segregation and discrimination throughout the West Bank (as it did formerly in the Gaza Strip).

The High Court's latest stamp of legality for practices contrary to international law was extended to bypass roads for Palestinians. Road 443 is a main artery in the West Bank, built on Palestinian land as part of the Atarot interchange.[487] Until the beginning of the second *intifada*, it was used by tens of thousands of Palestinian villagers to connect them to their neighbouring villages and to the city of

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[483] *Mara'abe*, para. 20.

[484] *Hess* at 460-461.

[485] See Gross, 'The Structure of Occupation', p. 57.

[486] Ibid. p, 33. See generally Kretzmer, *The Occupation of Justice* and Ben-Naftali et al, 'Illegal occupation'.

[487] See *Jami'at Iscan el-Moa`limin*.

Ramallah. Since the end of 2000, the army has prevented Palestinians from using it, limiting its use exclusively to Israelis. To meet Palestinian transportation needs, the Minister of Defence ordered the creation of an alternative road network, known as 'Fabric of Life Roads', built on Palestinian land confiscated for this purpose. The case is pending, but the High Court has asked the Defence Ministry to provide it with information on progress in constructing the 'Fabric of Life Roads' rather than stop or query their construction,[488] effectively endorsing the military authorities' decision to build it.

In routinely ignoring the facts, the rule of the law, and its own role in checking the actions of the military authorities, the High Court has effectively approved discriminatory practices in its adjudication of rights.

2. Application of Military Legislation to Palestinians

In the following chapters, reviewing Israel's laws and practices in relation to the international legal prohibitions on colonialism and apartheid, this study will make reference, where relevant, to military legislation introduced by Israel in the OPT. Military orders, particularly those detailing criminal offences and periods of detention, are directed at Palestinians and are enforced by military courts established by Israel in the OPT.

a. Military Legislation applying to Palestinians

In the first three months of Israel's occupation, over 100 pieces of military legislation were enacted in the West Bank. On the first full day of the occupation, Military Proclamation No. 2[489] vested all legislative, executive and judicial powers in the Israeli Military Commander. To date, the military authorities have issued over 2,500 military orders altering pre-existing laws, the majority of which are directed at Palestinians. This matrix of military legislation regulates and controls everything from alcohol taxes[490] to control of natural resources[491] to which fruit and vegetables can be grown by Palestinians.[492] Even where they do not formally discriminate between Palestinians and Jewish settlers, they do in practice, effect and, apparently, intent.[493]

The most significant military orders that relate to 'security' are Military Order No. 378,[494] concerning criminal offences and detention, and Military Order No. 1229,[495] which allows for 'administrative'

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[488] *The Association for Civil Rights in Israel et al* v. *Minister of Defence et al*, HCJ 2150/07.

[489] Military Proclamation No. 2, *Concerning Regulation and Authority of the Judiciary*, 7 June 1967.

[490] Military Order No. 38, *Order Concerning Alcoholic Beverages*, 4 July 1967.

[491] See, *inter alia*, Military Order No. 92, *Order Concerning Jurisdiction Over Water Regulations*, 15 August 1967.

[492] See, for example, Military Order No. 474, *Order Concerning Amending the Law for the Preservation of Trees and Plants*, 26 July 1972; Military Order No. 1039, *Order Concerning Control over the Planting of Fruit Trees*, 5 January 1983, Military Order No. 1147, *Order Concerning Supervision over Fruit Trees and Vegetables*, 30 July 1985.

[493] According to the Association for Civil Rights in Israel, 'In the same territorial area and under the same administration live two populations who are subject to two separate and contrasting legal systems and infrastructure. One population has full civil rights while the other is deprived of those rights. […] The settlers' lives, although they live in an area under military rule, are in almost every respect the same as those of Israeli citizens living in Israel.' Association for Civil Rights in Israel, *The State of Human Rights in Israel and the Occupied Territories, 2008 Report* (Jerusalem: ACRI, 2008), p. 17.

[494] Military Order No. 378, *Order Concerning Security Provisions*, 20 April 1970.

[495] Military Order No. 1229, *Order Concerning Administrative Detention (Provisional Regulations)*, 17 March 1988. Due to numbering inconsistencies among Israeli military orders, Military Order No. 1229 is alternatively referred to as Military Order No. 1226, depending on whether it was issued individually or in a bound volume by the Israeli authorities.

detention without charge or trial for protracted periods. Military Order No. 378 details a wide variety of 'security'-related offences and contains draconian detention and sentencing provisions. Article 78, for example, allows the Israeli military to detain Palestinians for up to eight days before being brought before a military judge, for up to 188 days before being charged with an offence, and for up to two years between being charged and brought to trial. The supervisor of an interrogation may also prohibit a Palestinian from seeing a lawyer for 15 days upon being detained.[496] This period may be extended by the military judicial authorities to up to 90 days if deemed necessary for security or for 'the good of the interrogation.' [497]

Other military legislation deals with specific contexts as they arise. Military Order No. 1500,[498] for example, was issued in April 2002 to provide for mass detention of Palestinians during military incursions in the West Bank. This order gave every Israeli soldier in the territory the authority to arrest Palestinians without providing a reason and without authorisation of a superior officer. It also allowed the occupying army to detain Palestinians for 18 days without bringing them before a judge.

In relation to procedures for prosecuting minors, the principal piece of relevant legislation is Military Order No. 132, [499] which defines Palestinians aged 15 or under as minors and only those individuals aged 11 or under as a child. Thus, Palestinians aged 16 -17 are legally defined by Israel as adults (while in Israel an individual must be 18 years old to legally qualify as an adult). Although defining them as minors, Military Order No. 132 essentially provides that Palestinians aged 12-15 be treated under the same procedures as adults in the military legal system. Consequently, a Palestinian from the age of 12 is subject to prosecution under Israeli military legislation, including Military Order No. 378, under which they face, for example, sentences of up to ten years imprisonment for throwing a stone at a stationary object such as the Wall, and twenty years for throwing a stone at a moving vehicle.[500] Similarly, they are subject to a prison sentence of ten years for participating in a protest march or an unauthorised political meeting in contravention of Military Order No. 101.[501]

A recent example of military legislation applying personally to Palestinians is the 'Seam Zone Permit Regime' (described in more detail in Chapter IV Part II.F), which establishes a special bureaucracy for processing applications for entry permits to the 'closed' Seam Zone. The system exempts Israelis from the prohibition to enter the Seam Zone and from the need to acquire a permit, and thus applies only to Palestinians residing in the West Bank and not to Jewish settlers.

Furthermore, routinely and ostensibly to tackle existing or expected disruptions of public order, the Military Commander issues orders declaring a certain area to be a 'closed military zone,' or 'closed area.' Varying degrees of restrictions are imposed on such areas: e.g., complete closure and limiting access to Israeli military forces only; entry only by Jewish-Israelis and other Jews granted the privileges of Jewish-Israelis; or entry permitted to Palestinians but only with a permit from the Israeli authorities.[502] Discriminatory implementation of closed area orders that are ostensibly non-discriminatory is also commonplace. For example, Military Order No. 146[503] declared the Latroun/Ayalon area of the West Bank to be a closed area in 1967. This military order has not been

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[496] Military Order No. 378, Article 78C(c)(1).

[497] Military Order No. 378, Articles 78C(c)(2), 78D (b)(3), and 78D(b)(4).

[498] Military Order No. 1500, *Order Concerning Detention in Time of Combat (Temporary Order)*, April 2002.

[499] Military Order No. 132, *Order Concerning Adjudication of Juvenile Offenders*, 24 September 1967.

[500] Military Order No. 378, Article 53A (2) and (3).

[501] Military Order No. 101, *Order Concerning Prohibition of Incitement and Hostile Propaganda*, 27 August 1967, which states that, 'It is forbidden to conduct a protest march or meeting (grouping of ten or more where the subject concerns or is related to politics) without permission from the Military Commander. It is also forbidden to raise flags or other symbols, to distribute or publish a political article and pictures with political connotations.'

[502] Military Order No. 151, *Order Concerning Closed Areas (Jordan Valley)*, 1 November 1967.

[503] Military Order No. 146, *Order Concerning Closed Areas*, 23 October 1967.

amended or cancelled and the Israeli military authorities recently confirmed that it still applies.[504] Palestinian residents, who were forcibly transferred from this zone and whose villages there were destroyed, continue to be denied access to the area and to their land, yet Israelis are free to enter the area, in violation of the military order, to visit Canada Park, a recreational park that has since been established in the closed area by the Jewish National Fund.

The military legislation described above pertains to the West Bank. The military legislative system in the West Bank was mirrored by a similar system in the Gaza Strip from 1967 until Israel's 'disengagement' from the territory in 2005, with identical versions of most important and non-area-specific military orders being issued by the military commander in the Gaza Strip concomitant to those of his counterpart in the West Bank. Although the military orders for the Gaza Strip have been repealed since 2005, Israel retains authority over matters relating to administration of justice in Gaza through different tools, such as the extension of Israeli civil and criminal law over Palestinians in Gaza.[505]

b. Enforcement by military courts

Military laws are enforced through a military court system that has become 'an institutional centrepiece of the Israeli state's apparatus of control over Palestinians in the West Bank and Gaza.'[506] The military courts were established even before the Six-Day War ended, by Military Proclamation No. 3, *Concerning Security Provisions* in the West Bank and an equivalent proclamation in the Gaza Strip. Both proclamations outlined the jurisdiction of the military courts and details of procedure. These proclamations were replaced in 1970 by Military Order No. 378, *Order Concerning Security Provisions*, in the West Bank, and a parallel order for the Gaza Strip, Military Order No. 300, which expanded the jurisdiction of the military courts to cover a very broad range of security charges. Since 2005, military law has no longer applied in Gaza and the Israeli military court system remains in place only in the West Bank (excluding East Jerusalem), where Military Order No. 378 continues to be the primary piece of legislation regulating most of the military court process.

The military court system in the OPT is represented by Israel as necessary for prosecuting security-related offences. In reality, the system extends to govern regular criminal offenses and distinctly non-security related offences such as traffic violations. As Jewish settlers in the OPT fall under the personal and extraterritorial jurisdiction of Israeli civil law and civil courts, the military court system is also defined by its discriminatory application to Palestinian civilians.

Article 64 of Fourth Geneva Convention permits an occupying power to establish military courts in the territory it occupies, but such courts must adhere to several standards. They must be 'set up in accordance with the recognised principles governing the administration of justice';[507] they may only be used to enforce penal provisions legally promulgated by the occupying power under Article 64; and they must not be used 'as an instrument of political or racial persecution'.[508] A brief discussion can address features of the Israeli military court system in the OPT in relation to these three standards.

Regarding the first standard, Israel's military court system in the OPT does not comply with international standards regarding due process and the administration of justice. For example, regarding a defendant's right to be notified of the charges against him promptly and in a language he

[504] See John Reynolds, *Where Villages Stood: Israel's Continuing Violations of International Law in Occupied Latroun, 1967-2007* (Ramallah: Al-Haq, 2007), pp. 39 and 87.

[505] See, for example, Criminal Procedure (Enforcement Powers – Detention) (Non-Resident Detainees Suspected of Security Offence) (Temporary Provision) Bill 5765-2005.

[506] Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (Berkeley: University of California Press, 2005), p.2.

[507] Pictet, *Commentary to Geneva Convention IV*, p. 340.

[508] Pictet, *Commentary to Geneva Convention IV*, p. 340.

understands,[509] a Palestinian defendant and his lawyer will be informed of the charges being brought only at the first hearing, after the indictment has already been filed with the military court. They are required to respond immediately, with no time to study evidence. Indictments, like all documents in the military courts, are written and presented to the courts only in Hebrew, a language the defendant and his counsel often do not understand. The Israeli military court system also allows lengthy detention periods before and between trial sessions and restricts the families of defendants and detainees from attending court hearings. Decisions of the military courts are not published.[510] I

Israel's military court system also makes no presumption of innocence: the system has no established procedures to ensure that the burden of proof lies with the prosecution to prove guilt, thus shifting the burden to the defence. The independence and impartiality of the military courts is also questionable. All of the judges are serving Israeli army officers, of whom many are without legal qualifications or any judicial background.[511]

The result has been mass incarceration, with over a half-million Palestinians detained by Israel between 1967 and 2005[512] and more than 150,000 Palestinians prosecuted in the military courts since 1990 alone.[513] Only in 0.29 percent of the 9,123 cases concluded in the military courts in 2006 was the defendant found not guilty.[514] Only 1.42 percent of those cases went through a full evidentiary stage, consisting of the presentation of evidence and interrogation of witnesses.[515]

Indeed, of those convicted by the Israeli military courts, approximately 95-97 percent were convicted as the result of plea bargains.[516] This figure may reflect several factors. The high rate of plea bargains suggests that Palestinian defendants and their lawyers lack trust in the military judicial system. Evidence of torture during interrogation, reviewed in Chapter IV of this report, supports claims that prosecutions are often based on confessions or incriminating statements, which are procured through threats or physical measures during interrogation. Moreover, failure to plea bargain usually brings a more severe penalty. Whatever the factors contributing to these plea bargains, the rate of convictions indicate that due process is not functioning: detention hearings last on average three minutes and four seconds.[517]

On the second standard, Article 64 of the Fourth Geneva Convention allows military courts to prosecute only those infringements of penal laws that are enacted as essential to the welfare and rights of the local civilian population or to the absolute military needs or security of the occupying power. The Israeli military court system exceeds these limitations in two ways. First, military law extends to

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[509] Article 71 of the Fourth Geneva Convention states: 'Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them.' Article 14(3) of the International Covenant on Civil and Political Rights similarly entitles an individual accused of a crime to be 'informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.'

[510] For a detailed technical analysis of the incompatibility with international legal standards of numerous individual aspects of the Israeli military court system, see generally Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Tel Aviv: Yesh Din, 2007).

[511] Paul Hunt, *Justice? The Military Court System in the Israeli-Occupied Territories* (Ramallah: Al-Haq, 1987), pp. 3-4 and 34-38.

[512] Figures from the Palestinian Ministry of Prisoners and Ex-Detainees, quoted in Al-Haq, *Waiting for Justice* (Ramallah: Al-Haq, 2005), p. 258.

[513] Yesh Din, *Backyard Proceedings*, p. 19.

[514] Ibid, p. 10.

[515] Ibid, p. 119.

[516] Hajjar, *Courting Conflict*, p. 3. See also Yesh Din, *Backyard Proceedings*, p. 120.

[517] Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Tel Aviv, Yesh Din, 2007), p. 61.

issues unrelated to the rights of the Palestinians or the security of the Occupying Power: for example, tax evasion, unauthorised building, traffic violations, and other minor offences.[518] From 2002-2006, the Military Prosecution filed more than 43,000 indictments to the courts, only a third of which were for offences defined as 'security-related' and only 1 percent of which involved defendants charged with intentionally causing death.[519]

Second, military orders issued by Israel have changed existing laws in the OPT to an extent that greatly exceeds the legislative competence of the occupying power (as described above). Disregard for restricting changes to the local laws was indeed formalised in 1967, when Military Order (No. 130), *Concerning Interpretations* provided that Israeli military orders 'supersede any law [i.e. any law effective in the territory on the eve of the occupation], even if the former does not explicitly nullify the latter'.[520] Thus, the military courts system's 'ever-increasing jurisdiction has allowed it to try Palestinians for a range of offences, quite unrelated to national security questions; these include tax evasion, unauthorised building, and other minor offences.'[521] As noted above, administrative offences (such as traffic violations) are also prosecuted by the military courts. From 2002-2006, the Military Prosecution filed more than 43,000 indictments to the courts, only a third of which were for offences defined as 'security-related' and only 1 percent of which involved defendants charged with intentionally causing death.[522] In prosecuting such a broad range of offences, the Israeli military courts in the OPT contravene the rules of international humanitarian law.

Most significantly for the purposes of this study, the primary *raison d'être* of the military court system is to buttress Israeli domination over the institutions and local population of the occupied territory. If established in an occupied territory, military courts should apply equally to all civilians in that territory. In practice, there is no evidence of Jewish civilians[523] in the OPT being tried in military courts under military legislation. Instead, when Israeli settlers are prosecuted for offences committed in the OPT, this is done under Israeli civil law, in a civil court in Israel. As a result, a Palestinian and a Jewish settler who commit the same offence in the same territory will be tried in a different court,

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[518] Kathleen Cavanaugh, 'The Israeli Military Court System in the West Bank And Gaza' (2007) 12 *Journal of Conflict and Security Law* 197.

[519] Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Tel Aviv, Yesh Din, 2007), pp. 9 and 36.

[520] Military Order No. 130, *Order Concerning Interpretations* (27 September 1967).

[521] Kathleen Cavanaugh, 'The Israeli Military Court System In The West Bank And Gaza' (2007) 12 *Journal of Conflict and Security Law* 197.

[522] Yesh Din, *Backyard Proceedings*, pp. 9 and 36.

[523] Israeli army members accused of offences are processed and may be tried through military judicial proceedings in military courts, under the Military Justice Law 5715-1955. On this, Cavanaugh notes that 'the experience of the IDF in the military justice system shifts the narrative from questions related to fair trial, which accompanies the discourse of Palestinians in the Court system, to one of impunity.' See Cavanaugh, 'The Israeli Military Court System'.

under different penal laws,[524] with different procedures,[525] and will invariably receive different sentences.[526]

Further discriminatory attributes of the military court system relate to children and to 'administrative detention.' Different definitions of 'minor' and 'children' and their impact on sentencing were discussed earlier.[527] In addition, the Israeli military has not established in the OPT any special juvenile court (as exists for minors in Israel); accordingly, Palestinian minors (defined by the Occupying Power as those 12-15) are tried in the regular military courts, under the same procedure as adults. Regarding administrative detention, the military courts function as a tool to legitimise arbitrary arrest and detention without charge, with Palestinians often interned for periods of years. The discriminatory ways in which this practice is applied in the OPT is examined further in Chapter IV(II)(D)(3).

Finally, the scope of military law and the jurisdiction of the military courts is sufficiently broad to allow prosecution of Palestinians for political and cultural expression and association, movement to certain areas, various forms of non-violent protest, and failure to carry appropriate identification papers.[528] On the basis of this expansive mandate, the Occupying Power can use the military courts in the OPT to suppress dissent and persecute Palestinians for political activity, rendering the Israeli military courts precisely the 'instrument of political or racial persecution' that the parameters of international humanitarian law seek to prevent.

E. Conclusion

This chapter has established the framework of international and Israeli law operating in the OPT, in light of which the applicability of international instruments regarding colonialism and apartheid must be considered. Three principle framing facts have been determined. First, the Palestinian people have the right to self-determination and the principles and instruments of international law relevant to self-determination are applicable. Second, the Palestinian population in the West Bank, including East Jerusalem, and the Gaza Strip are protected persons under the terms of the Fourth Geneva Convention, as these territories remain under belligerent occupation. Third, the Fourth Geneva Convention and the Hague Regulations apply generally to Israel's obligations as an Occupying Power and these obligations are not altered by the prolonged nature of Israel's occupation.

Given these three factors, Israel's laws in the OPT manifest *prima facie* as violations of international humanitarian law, both in violating specific prohibitions not to alter the laws in force, and by enforcing a dual and discriminatory legal regime on Jewish and Palestinian residents of the OPT. Israeli policy is to grant to Jewish settlers the protections of Israeli civil law and Basic Laws, under

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[524] While Israeli civil law applies to Jewish-Israelis being prosecuted in civil courts, the military courts enforce Israeli military legislation against Palestinians, as well as sometimes the1945 Defence (Emergency) Regulations (despite the fact that these regulations were repealed by the British upon termination of the Mandate), and the pre-existing criminal law which applied in the territory before occupation (i.e., Jordanian criminal law in the case of the West Bank).

[525] With different criminal procedures applying in Israel and the OPT, the Israeli High Court of Justice has even rejected arguments that the substantial Israeli domestic law of criminal procedure should apply to suspects arrested in the West Bank under military orders who are detained in Israel. See *Abed Al-Rachman Al Hamed* v. *General Security Services*, HCJ 1622/96.

[526] Although not applicable in the legal system applying inside Israel, the death penalty is provided for in the military laws governing the OPT. See Military Order No. 378, *Order Concerning Security Provisions*, Article 51(a).

[527] Here it is also worth noting that in contrast with basic human rights principles as well as Israeli criminal law, the military courts sentence Palestinians according to their age at the time of sentencing, as opposed to their age at the time the alleged offence was committed. With military trials routinely delayed, a Palestinian child, for instance, who is alleged to have committed an offence when under the age of 16, but turns 16 by the time of his sentencing, will be sentenced as an adult rather than as a minor.

[528] Hunt, *Justice?,* p. 7.

the jurisdiction of Israeli civil courts, while administering Palestinians living in the same territory under military law and military courts whose procedures violate international standards for the administration of justice. As a consequence of this system, Jewish residents of the OPT enjoy freedom of movement, civil protections, and services that Palestinians are denied, while Palestinians are deprived of the protections accorded to protected persons by international humanitarian law. Administered and enforced by the state's military and having gained the imprimatur of Israel's High Court of Justice, this dual system appears to reflect a policy by the State of Israel to sustain two parallel societies in the OPT, one Jewish-Israeli and the other Palestinian, and to accord these two groups very different rights and protections in the same territory.

The question here is whether this legal system is adequately understood as entailing discrete violations of international humanitarian law, or whether it operates on such a comprehensive scale that it may suggest broader illegitimate regimes, notably colonialism and apartheid. The next two chapters address that question: first, by identifying specific criteria by which regimes of colonialism and apartheid can be identified; and second, by conducting an empirical review of Israeli policies and practices according to those criteria, to establish whether Israel's belligerent occupation of the OPT has obtained the character of colonialism or apartheid.

Chapter III

Review of Israeli Practices relative to the Prohibition of Colonialism

A. Introduction

This Chapter considers whether Israel's exercise of control over the occupied Palestinian territories has exceeded the limits of authority permitted by international law to an Occupying Power, to the extent that Israel is not merely occupying but also colonising the OPT.

As discussed in Chapter I, colonialism can be distinguished from other forms of foreign domination (such as prolonged belligerent occupation or other kinds of hegemony resulting in dependency) by an open claim to sovereignty by the dominant power or where a dominant power adopts measures that deliberately deny the people of the territory the full exercise of their sovereignty. The prohibition of colonialism draws on several principles of international law, especially the right of peoples to self-determination and the prohibition of annexation.

The primary instrument dealing with the prohibition of colonialism in international law is the 1960 *Declaration on the Granting of Independence to Colonial Peoples and Territories.*[529] The Declaration rejects all forms of colonial domination on grounds that it violates fundamental norms of human rights and is a threat to international peace and security. It mentions the damaging effects of colonialism on 'international economic co-operation', expresses concern for 'the social, cultural and economic development of dependent peoples', and affirms the right of peoples to 'freely pursue their economic, social and cultural development' and 'freely dispose of their natural wealth and resources'. It stresses that 'inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence'.[530] The Declaration also expresses a special concern for 'territorial integrity', mentioning it in three instances including operative paragraphs 4 and 6. These concerns reflect corollary rights and entitlements associated with self-determination, as discussed in Chapter I: '(a) the right to exist—demographically and territorially—as a people; (b) the right to territorial integrity; (c) the right to permanent sovereignty over natural resources; (d) the right to cultural integrity and development; and (e) the right to economic and social development'.[531]

Formal annexation of occupied territory in violation of the rights of its indigenous population is prima facie a form of colonialism. To prevent this happening under the guise of occupation, the drafters of the Fourth Geneva Convention adopted Article 49(6), which prohibits the deportation or transfer by the Occupying Power of parts of its own civilian population into the territory it occupies. The rationale for this provision was:

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[529] Declaration on the Granting of Independence to Colonial Countries and Peoples, Adopted by General Assembly resolution 1514 (XV) of 14 December 1960. In the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, ICJ Rep, 1971, 16, the International Court of Justice ruled that the Declaration was an important stage in the development of the law relating to non-self-governing territories at 31, para. 52.

[530] The trusteeship system, as established in the United Nations Charter, contradicts this injunction. Article 76(a) of the United Nations Charter cites the objective the trusteeship system as being 'to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement'.

[531] C. Drew, 'The East Timor story: international law on trial' (2001) 12 *European Journal of International Law* 65. For a similar affirmation of the substantive core content of self-determination, see A. Orakhelashvili, 'The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions' (2005) 16 *European Journal of International Law* 59 at 64.

> to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political or racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.[532]

This chapter section draws on the Declaration, the Fourth Geneva Convention and international law regarding self-determination in identifying the following practices as indicating that a belligerent occupation has obtained the character of a colonial regime, contrary to international law:

> (1) violating the territorial integrity of occupied territory;
>
> (2) depriving the people of an occupied territory of the capacity for self-governance, by replacing their legal and political mechanisms;
>
> (3) integrating the economy of the occupied territory into that of the occupant to an extent that inhibits the autonomy of the occupied territory;
>
> (4) depriving the population under occupation of permanent sovereignty over its natural resources; and
>
> (5) cultural domination, which further threatens the identity of the people of an occupied territory and thus its capacity to express its right to self-determination.

As specific actions and policies associated with these practices also come under review in Chapter IV, which considers Israeli practices in light of the Apartheid Convention, discussion of practices in this chapter is confined here to central points, with cross-references to the later detailed discussion as appropriate.

B. Review of Israel's Practices in the OPT relative to Colonialism

1. Violations of Territorial Integrity

A common colonial practice was to create or redraw political boundaries without regard to pre-existing social, legal or political practice. The Declaration accordingly emphases the importance of 'territorial integrity' since the right of peoples to self-determination requires a coherent and viable national territory for its expression. The Declaration's chapeau expresses a conviction 'that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory'. Article 4 then directs that 'the integrity of [all peoples'] national territory shall be respected'. Article 6 emphasises that 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.

As established earlier (see Chapter II.C), the territory designated in international law for Palestinian self-determination consists of the West Bank (including East Jerusalem) and the Gaza Strip. Israeli policy has fragmented this territory by dividing Palestinian areas of the West Bank into separate enclaves, connected by transportation points controlled by Israel (see Chapter IV.G(3)(a)). According to the UN Office for the Coordination of Humanitarian Affairs, more than 38 percent of the West Bank has been reserved for Israeli settlements and outposts, closed nature reserves, and closed military zones and are off-limits to Palestinian use. More than one-fifth of the West Bank has been declared a closed military zone. Approximately 10,122 hectares of agricultural land has been annexed to the settlements and Palestinians are banned from using or entering this land.[533] Since Israel signed the Oslo Accord in 1995, Jewish settlements in the West Bank have more than doubled in population

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[532] J. Pictet (ed.), *Commentary to Geneva Convention IV relative to the Protection of Civilian Persons in time of War* (ICRC: Geneva: 1958) *Commentary to Article 49*, 283.

[533] UN OCHA, 'The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank,' (July 2007), p. 40.

to 270,000, according to a survey commissioned by the Israeli Defence Ministry.[534] According to Israel's Central Bureau of Statistics, the settler population in East Jerusalem at the end of 2008 has increased by 193,700, while the overall growth rate of the settlement population (excluding East Jerusalem) was at 4.7 percent compared to 1.6 percent for the Israeli population in general. This rate of growth supports statements of Israeli government leaders to the effect that Israel intends the majority of these settlements to be annexed permanently to Israel.

Related policies stifle Palestinian economic and social development. Although the Oslo Accords accorded planning powers to the Palestinian Authority (PA) in most of the Gaza Strip and in Areas A and B in the West Bank, Israel retained full formal control over planning in Area C, which constitutes about 60 percent of the West Bank.[535] Area B (26 percent of the West Bank) is partitioned by Israeli settlement blocs over which Palestinians have no planning authority, and which break up the territorial contiguity necessary to planning transportation and communications grids, agricultural management and other regional issues.[536] Israel's policy of denying construction permits in the West Bank and its policies of home and structural demolitions stifle Palestinian land use and planning in favour of settlement expansion and bypass road construction.[537]

A further measure undermining the territorial integrity of the OPT is Israel's construction of major highways integrating Israeli towns and cities with settlement blocs in the West Bank. This highway grid has profoundly altered the political geography of the West Bank. Prior to 1967, principal roads in the West Bank ran North-South along the highland spine, linking the principal cities of Jenin, Nablus, Ramallah, Jerusalem, Bethlehem and Hebron, with access roads running laterally away to smaller towns and villages and to the Mediterranean coast.[538] Central State planning of the current highway grid is indicated by the *Settlement Master Plan for 1983-1986*, which proposed a need for special roads to service planned Jewish settlements and 'bypass the Arab population centres.'[539] In 1984, Israel's *Road Plan Number 50* shifted the West Bank's road system to a more east-west approach in order to integrate it into the Israeli road system for the benefit of Jewish-Israeli settlers. An attempt at a judicial challenge was unsuccessful[540] and the road network in the West Bank, primarily if not always exclusively for settler use, continued to expand. By 1993, 400 kilometres of such roads had

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[534] Cited in Uri Blau, 'Secret Israeli Database Reveals Full Extent of Israeli Settlement' *Ha'aretz* (1February 2009), available at: http://www.haaretz.com/hasen/spages/1060043.html.

[535] Under the 1995 Israeli-Palestinian *Interim Agreement on the West Bank and the Gaza Strip (Oslo II)*, Area A (full Palestinian civil and security control) accounted for 2 percent of the territory of the West Bank, Area B (Palestinian civil and Israeli security control) for 26 percent, and Area C (full Israeli civil and security control) for 72 percent. Those boundaries were to be gradually redrawn but have been frozen since the 1999 *Sharm el Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations* at 17 percent, 24 percent and 59 percent respectively.

[536] Btselem, *Land Grab* 85-90.

[537] See for example Amnesty International, *Unlawful homes for Israeli Settlers, demolitions for Palestinians, Amnesty* (31 March 2008), available at: http://www.amnesty.org/en/news-and-updates/feature-stories/unlawful-homes-israeli-settlers-demolitions-palestinians-20080331; and *Amnesty International, Palestinian Homes Demolished without Warning* (11 March 2008), available at: http://www.amnesty.org/en/news-and-updates/news/palestinian-homes-demolished-without-warning-20080311. See also B'Tselem reports on Israeli's policy of home demolitions, available at: http://www.btselem.org/english/publications/Index.asp?TF=06.

[538] Al-Haq, 'Law in the Service of Man, 'Israeli Proposed Road Plan for the West Bank, A question for the International Court of Justice', 30 November 1984, at http://domino.un.org/UNISPAL.nsf/c25aba03f1e079db85256cf40073bfe6/8ad0157015a6c53885256982005703ab!OpenDocument.

[539] Israeli Ministry of Agriculture and Settlement Division of the World Zionist Organization, *Master Plan For Settlement of Samaria and Judea, Plan for Development of the Area for 1983-1986* (Jerusalem, 1983), p. 27 (Hebrew), cited in B'Tselem, *Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank* (B'Tselem, Jerusalem, 2004), p. 6.

[540] See Al-Haq, *The Israeli Proposed Road Plan for the West Bank: A Question for the International Court of Justice?* (Ramallah: Al-Haq, 1984).

been built.[541] With the Oslo agreements, plans for a further 650 kilometres of roads were swiftly formulated[542]and Israel spent US$600 million on bypass roads in 1995 alone.[543] By July 2008, Palestinian travel was restricted on 430 kilometres of West Bank roads and banned entirely on 137 kilometres.[544]

In sum, Israel's publicly funded settlement policy goes beyond isolated infractions of Israel's obligations under the Fourth Geneva Convention to suggest a State strategy to annex significant portions of West Bank territory permanently to Israel, thus permanently obstructing the Palestinian people's exercise of the right to self-determination. This policy of precluding the possibility of an independent Palestinian State that can enjoy territorial integrity is in clear violation of the Declaration on Colonialism.

2. Supplanting Institutions of Governance

Law has functioned as a principal apparatus of control for colonial powers, who supplant pre-existing legal systems with their own laws or special laws that codify their domination over the territory.[545] Hence international humanitarian law limits modifications that the occupant may make to the existing legal system in occupied territory partly for this reason, in order to ensure that military occupation is temporary: 'the occupier is not the territorial sovereign. He cannot legislate for the occupied people as he does within his own frontiers'.[546] As discussed in Chapter Two, this premise underpins Article 43 of the Hague Regulations, one of the pillars on which the law of belligerent occupation rests, which provides that the Occupying Power 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'[547]

Thus, an Occupying Power is barred from 'extending its own legislation over the occupied territory or from acting as a sovereign legislator',[548] except where absolutely prevented. Article 64 of the Fourth Geneva Convention gives expression, in a more detailed form, to the parameters of this exception, which can be elucidated as allowing the Occupying Power to take legislative measures only when these are essential to the welfare and rights of the local civilian population or to the absolute bona fide

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[541] Al-Haq, *Discrimination Is Real: Discriminatory Israeli Policies in Israel, The Occupied Territories and Occupied East Jerusalem*, Draft Paper Presented to the World Conference Against Racism, Durban, South Africa, 28 August – 7 September 2001, 24.

[542] Samira Shah, 'On the Road to Apartheid: The Bypass Road Network in the West Bank' (1997-1998) 29 *Columbia Human Rights Law Review* 221, 222.

[543] Foundation for Middle East Peace, *Report on Israeli Settlement in the Occupied Territories*, May 1996, 3.

[544] B'tselem, *Statistics: Restrictions on Movement*: available at: http://www.btselem.org/English/Freedom_of_Movement/Statistics.asp, accessed 21 September 2008.

[545] See Robert Home, 'An 'Irreversible Conquest'? Colonial and Postcolonial Land Law in Israel/Palestine' (2003) 12(3) *Social and Legal Studies* 292.

[546] Alain Pellet, 'The Destruction of Troy Will Not Take Place', in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories* (Oxford, Clarendon Press, 1992), p. 201.

[547] The original and binding French text of Article 43 reads: *'L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigeur dans le pays'*. The phrase 'public order and safety' was a mistranslation of the French *'l'ordre et la vie publics'* which, when correctly translated, refers to 'public order and life', implying a broader obligation not to interfere with a country's existing institutions. The original and binding language of the Convention was French. See Edmund Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1945) 54 *Yale Law Journal* 393 n.1.

[548] Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 *European Journal of International Law* 661.

military needs or security of the Occupying Power. These two exceptions have been held to be of a 'strictly limitative nature',[549] with the occupying authorities precluded from abrogating or suspending the laws of the occupied territory for any other reason, particularly in order to make it accord with their own legal conceptions.

a. Altering the laws in place in the occupied territory

Measures taken by Israel in the OPT since 1967 have gone far beyond these permissible boundaries under the law of occupation. In the West Bank (and until 2005 in the Gaza Strip), pre-existing local laws and standards have been widely changed, modified and overridden through the imposition of thousands of military orders by the Occupying Power. This matrix of military legislation regulates and controls everything from alcohol taxes[550] to control of natural resources[551] to which fruit and vegetables may be grown by Palestinians.[552] Neither the intent nor impact of such wide-ranging legislation is convincingly explained by military necessity.

Military legislation in the West Bank was mirrored by a similar system in the Gaza Strip until Israel's 'disengagement' from the territory in 2005. While the Gaza Strip remains under belligerent occupation, as discussed in Chapter II, the Palestinian authorities now have autonomous authority over domestic security and civil law within the limits imposed by Israel. Israel presented the unilateral disengagement as serving to 'dispel claims regarding Israel's responsibility for the Palestinians in the Gaza Strip'[553] and the jurisdiction of Israeli military orders in Gaza was repealed. Nonetheless, the 2006 Criminal Procedure Law[554] allows Israel to incarcerate Palestinians from the Gaza Strip suspected of criminal offences in detention facilities in Israel and to prosecute them in Israeli civil courts.

East Jerusalem was effectively absorbed into Israel within a number of weeks of the start of the occupation[555] and as such is subject to the Israeli legal system in its entirety. The entire fabric of laws applicable in East Jerusalem has thus been transformed, as discussed in more detail in Chapter IV.

b. Extraterritorial application of Israeli civil law to Jews in the OPT

Israel applies its domestic law to Jewish settlers in the OPT, rather than the local law that was in force in the territory prior to the occupation. This practice cannot be considered in the category of capitulations, such as European privileges in the Ottoman Empire,[556] because the OPT lack a

[549] Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Vol 4*, (ICRC, Geneva, 1952), p. 336.

[550] Military Order No. 38, *Order Concerning Alcoholic Beverages*, 4 July 1967.

[551] See, inter alia, Military Order No. 92, *Order Concerning Jurisdiction Over Water Regulations*, 15 August 1967.

[552] See, for example, Military Order No. 474, *Order Concerning Amending the Law for the Preservation of Trees and Plants*, 26 July 1972; Military Order No. 1039, *Order Concerning Control over the Planting of Fruit Trees*, 5 January 1983, Military Order No. 1147, *Order Concerning Supervision over Fruit Trees and Vegetables*, 30 July 1985.

[553] Israeli Ministry of Foreign Affairs, *The Disengagement Plan – General Outline*, 18 April 2004, Article 1(vi); *Revised Disengagement Plan*, 6 June 2004, Article 1(vi).

[554] Criminal Procedure (Enforcement Powers – Detention) (Detainees Suspected of Security Offences) (Temporary Provision) Law 5765-2006. The original bill provided that it should apply solely to non-residents of the State of Israel.

[555] For more on the colonial nature of the territorial annexation of East Jerusalem, see Section 5 below.

[556] On capitulations, see Edwin Pears, 'Turkish Capitulations and the status of British and other foreign subjects residing in Turkey' (1905) 21 *Law Quarterly Review* at 408-425; Lucius Ellsworth Thayer, 'The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States' (1923) 17 *American*

sovereign government that could grant even token imprimatur of a legitimate sovereign agreement. The practice is accordingly in violation of Article 43 of the Hague Regulations.

Jurisdiction over offences and civil matters in relation to Jewish settlers rests with the Israeli civil courts inside Israel, in contravention of Article 64(2) of the Fourth Geneva Convention.[557] The Israeli Supreme Court has extended its jurisdiction over the actions of the Israeli occupying forces and authorities in the OPT, sitting in such cases as the 'High Court of Justice' (a practice stemming from a policy decision in 1967 by Meir Shamgar, then Israeli Attorney-General). The High Court subsequently ruled in 1972[558] that it 'had the power to judicially review any military activity taken beyond the borders of the Israeli democracy'.[559]

Although an Occupying Power is permitted under Article 66 of Fourth Geneva Convention to establish military courts in an occupied territory, such courts must be 'set up in accordance with the recognised principles governing the administration of justice', must not be used 'as an instrument of political or racial persecution',[560] and may only be used to enforce penal provisions legally promulgated by the Occupying Power under Article 64(2). That Israel's military court system in the OPT is incompatible with fundamental international standards regarding due process and the administration of justice is well documented.[561] Fair trial deficiencies are apparent regarding the right to prepare an effective defence,[562] the right to a presumption of innocence,[563] the right to examine

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Journal of International Law at 207-233; Norman Bentwich, 'The Abrogation of the Turkish Capitulations' (1923) 5 *Journal of Comparative Legislation and International Law* at 182-188; and Norman Bentwich, 'End of the Capitulatory System' (1933) 14 *The British Yearbook of International Law* at 89-100.

[557] See Section III.D.6 above for a detailed discussion of the authority of Israeli legal institutions over Jewish settlers.

[558] See Christian Society for *Holy Places* v *Minister of Defence* et al, HC 337/71, 2 *Israel Yearbook on Human Rights* 354 (1972) and 52 *International Law Reports* 512. In this case, the Court was asked to adjudicate on military activity in the OPT and gave a ruling on the merits without raising the question of jurisdiction. This expansion of the Court's territorial jurisdiction has remained in effect since then.

[559] Michael Sfard, 'The Human Rights Lawyer's Existential Dilemma' 38 (2005) *Israel Law Review* 154.

[560] Jean Pictet, p. 340.

[561] See, for example, Kathleen Cavanaugh, 'The Israeli Military Court System In The West Bank And Gaza' (2007) 12 *Journal of Conflict and Security Law* 197; Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Tel Aviv, Ramallah, 2007); Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (Berkeley, University of California Press, 2005); Al-Haq and Gaza Centre for Rights and Law, *Justice? The Military Court System in the Israeli-Occupied Territories* (Ramallah: Al-Haq, 1987). In his 2007 Mission report on Israel and the OPT, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, reported that the military courts 'have an appearance of a potential lack of independence and impartiality, which on its own brings into question the fairness of trials': see *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Addendum: Mission to Israel, including visit to the Occupied Palestinian Territory*, UN Doc. A/HRC/6/17/Add.4, 16 November 2007, para 29.

[562] Lawyers appearing in the military courts have consistent difficulties meeting with their clients on account of the fact that they are normally detained in prison facilities inside Israel rather than in the OPT. The military courts are also defined by a lack of adequate facilities for taking confidential instructions; by the availability of court documents only in Hebrew; and by the provision of incomplete prosecution material. See Yesh Din, *Backyard Proceedings*, pp. 100-125. In practice, lawyers commonly take instructions from their clients minutes before the hearing in the military court and plea bargains are entered into to avoid harsher sentences.

[563] Article 9 of Military Order No. 378 stipulates that the Israeli law of evidence applies to proceedings in the military courts and therefore provides for the presumption of innocence. Practice, however, suggests a presumption of guilt, acquittals were obtained in just 0.29% of cases in the military courts in 2006. See Yesh Din, *Backyard Proceedings*, p.59.

witnesses,[564] and the right to prompt notice of criminal charges.[565] The military courts apply military legislation imposed in violation of international humanitarian law as described above, and are used as an apparatus of domination by the occupation to persecute Palestinians for 'political' activity.

The personal scope of application of several Israeli laws includes all Jewish settlers in the OPT, whether they are Israeli citizens or not. A 1984 extension to the Emergency Legislation clarified that,

> For the purposes of the enactments enumerated in the Schedule, the expression 'resident in Israel' or any other expression occurring in those enactments denoting residence, living or having one's abode in Israel shall be regarded as including also a person who lives in a zone and is an Israeli national or is entitled to immigrate to Israel under the Law of Return, 5710-1950, and who would come within the scope of such expression if he lived in Israel.

As only Jews and the immediate family members of Jews, even if not Jewish, are entitled to immigrate to Israel under the Law of Return, this law was openly discriminatory in conveying Israel's civil law to Jewish settlers on grounds of their Jewish identity. Laws applicable to Jews in the OPT relating to military service, the Income Tax Ordinance, the Election Law,[566] the Population Registry, and the National Insurance Law are covered by this provision.[567] When Israel created local authorities for its settlements in the West Bank, it did not use existing Jordanian law to do so but rather established regional and local councils by Military Orders No. 783 and 892. Settlement councils assumed powers and functions significantly different to local municipal councils in the West Bank but almost identical to the local and regional councils inside Israel.[568]

Particularly significant to the question of colonialism is Israeli legislation that formalises direct Israeli government responsibility for encouraging growth of settlements in the OPT. For example, in 1988 Israel extended the provisions of the Development Towns and Areas Law[569] to settlements in the OPT, thus conveying a broad range of special State benefits to settlers. Benefits under this law include special grants and concessions to investment in the settlement; permanent exemption from real estate taxes and employers' taxes; a grant to cover costs of moving into the settlement; loans for purchasing apartments and for rent and utilities, which convert into a grant after three years' residence in the settlement; free education from kindergarten through university; scholarships for technical education and a special budget for children's extracurricular activities; and preferential allocations of professional training through the Ministry of Labour and Welfare. All these benefits are provided by a

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[564] Full evidentiary trials entailing adequate examination and cross-examination of witnesses were conducted in just 1.42% of cases concluded in the military courts in 2006. See Yesh Din, *Backyard Proceedings*, p.119.

[565] Indictments containing the charges against a defendant are given to his/her lawyer only on the day of the hearing to determine whether the accused remains in detention until the end of the proceedings. See See Yesh Din, *Backyard Proceedings*, pp. 92-99.

[566] Article 147 of the Election Law, consolidated version, 1969, grants settlers the right to vote, while Article 6 denies the same right to Israeli citizens residing outside the 'geographic boundaries' of Israel. See further discussion in Chapter.

[567] *Amendment and Extension of the Validity of the Emergency Regulations (Judea and Samaria, the Gaza Strip, Sinai and South Sinai –Jurisdiction and Legal Assistance)*, 5744-1984, Section 6.B(b). It should also be noted that in *Regional Council Gaza Beach* v. *The Knesset*, (HCJ 1661/05), para. 78-80, the High Court of Justice affirmed the applicability of the Israeli Basic Law to Jewish settlers in the OPT. The same law empowers the Minister of Justice to add other laws and regulations to this list, with the approval of the Knesset's Constitution, Law and Justice Committee.

[568] See Military Order No. 783, *Order Concerning Administration of Regional Councils*, 25 March 1979, and Military Order No. 892, *Order Concerning Administration of Regional Councils (Settlements)*, 1 March 1981. It has been noted that the powers and responsibilities of the local councils established under Military Order No. 892, for example, 'are identical to the powers and responsibilities of ordinary Israeli municipalities, since the Order is a copy of the Israeli Municipal Ordinances (with some alterations'. See Meron Benvenisti, *Israeli Rule in the West Bank: Legal and Administrative Aspects* (Jerusalem, West Bank Data Base Project, 1983), p. 9.

[569] Development Towns and Areas Law, 5748-1988, Section 3(E).

government ministry, under the oversight of the Finance Ministry and the Economics and Planning Ministry. Administration is monitored and directed by a 'Ministers Committee' which includes the Ministers of Finance, Economics and Planning, Energy and Infrastructure, Defence, Building and Housing, Health, Education and Culture, Agriculture, Labour and Welfare, Interior, and Industry and Trade. Thus the Development Towns and Areas Law illustrates the extent of Israeli State involvement in a project of land annexation in the OPT.

c. Subjecting the local population to foreign administration

Article 43 of the Hague Regulations requires that an Occupying Power sustain the local institutions administering public order and safety in the occupied territory (assuming they are operating in accordance with local law) 'unless absolutely prevented'.[570] The 'unless absolutely prevented' exception is construed narrowly to prevent an Occupying Power from imposing its own preferred model of governance or from exercising any hint of sovereignty.[571] The Occupying Power's prerogative 'does not extend to the reconstruction of the fundamental institutions of the occupied area'.[572]

Although a belligerent occupant, Israel has extended the 'jurisdiction and administration' of the State of Israel to East Jerusalem (see Chapter II.C(2)). At the same time, Israel established and charged a military government with the administration of security and civil matters in the rest of the OPT. This administrative separation of East Jerusalem from the rest of the OPT raises two principal questions: may the Occupying Power create different geographical units of administration? Further, is it lawful for the Occupying Power to integrate the administration of all or part of the occupied territory with the administration of its own State? Both answers must be negative.

That Israel's detaching East Jerusalem from the OPT is illegal is indicated by the international response to legislative measures taken by Germany during the First World War to divide occupied Belgium into two separate administrative districts (one Flemish and the other French-speaking), which 'were unanimously considered to be illegal'.[573] The illegality of partition is compounded in Israel's case by the norm preventing any acquisition of sovereignty through occupation or the use of force. Even the Israeli High Court, albeit in relation to the administration of the rest of the West Bank, has acknowledged that an Occupying Power is required to administer occupied territory as a distinct entity, detached from its own territory.[574]

Regarding the rest of the OPT, the Israeli military administration replaced the Jordanian and Egyptian institutions that operated prior to 1967. Military administrations were created to govern the West Bank and the Gaza Strip. In the West Bank, for example, occupied by Israeli forces on 6 June 1967, an order was issued by the West Bank Area Commander before the Six-Day War had even ended, stating that:

> All powers of government, legislation, appointment, and administration in relation to the area or its inhabitants shall henceforth be vested in me alone and shall only be exercised by me or by persons appointed by me for that purpose or acting on my behalf.[575]

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[570] Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers'.

[571] In addition, Article 47 of the Fourth Geneva Convention provides that the occupied population shall not be deprived of any of the benefits of the Convention by any change introduced into the institutions or government of an occupied territory.

[572] Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961), p. 767.

[573] Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers'.

[574] See *Teacher's Housing Cooperative Society* v. *The Military Commander of the Judea and Samaria Region*, H.C.J. 393/82.

[575] Military Proclamation No. 2, *Concerning Regulation of Authority and the Judiciary*, 7 June 1967.

Israel claimed that it had to transfer administrative powers to a military government because the West Bank had only a local administration and lacked a central government. However, Israel imposed a similar system in the Gaza Strip, which already had its own centralised legislative, executive and judicial branches, autonomous of the Egyptian government.

The military governments of the two territories were both administered by a military arm, which was entrusted with ensuring security, and a civilian arm, which exercised administrative powers. These arms had little autonomy to make decisions separately on matters relating to their respective mandates, and were largely fused together. Further, the interdependence between the military governments for the West Bank and Gaza Strip and the government of Israel itself cannot be overstated: the OPT, excluding East Jerusalem which had been incorporated to Israel, effectively fell under the administration of Israel's Ministry of Defence.

In 1981, the military commander of the Israeli forces in the West Bank declared the creation of a Civil Administration in the West Bank.[576] This step institutionalised the separation of military and civil functions in the military government, elevated the status of a large number of military orders from the status of temporary security enactments to the level of permanent laws,[577] and enabled the Civil Administration to regulate and control daily social and economic life in the West Bank. It was seen as 'a unilateral declaration of a constitutional change … a change in the legal status of the territories it purports to legislate for'.[578] The Civil Administration continues to function as an arm of the military government dealing with civil affairs in the West Bank, under the ultimate control of the Ministry of Defence.[579]

Thus Israel has profoundly altered the systems of administrative governance in the OPT, and has done so in a manner which is effectively preventing the Palestinians from developing their own political institutions with genuine authority, thereby preventing their exercise of self-determination. It is useful to keep in mind Roberts' observation in 1990, that the law of occupation has provided the basis for denying the inhabitants of the OPT normal political activity and has effectively kept them permanently under Israeli control as second-class citizens or worse. From this perspective, the longer the occupation lasts, the more the situation becomes akin to colonialism.[580]

d. Preventing the local population from exercising political authority

Decisions concerning the OPT are ostensibly made by the military government but, as noted above, are best understood as being 'in the hands of Israeli cabinet ministers and government sub-committees'[581] who are also charged with building the settlements and managing related issues of land and resources. Palestinians have no say in these decisions.

Even at the local level, the Palestinians are not assisted in developing free political institutions, but are actively obstructed from doing so. Between 1967 and 1980, for instance, municipal elections in the

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[576] Military Order No. 947, *Order Concerning Establishment of a Civil Administration*, 8 November 1981.

[577] Jonathan Kuttab and Raja Shehadeh, *Civilian Administration in the West Bank: Analysis of Israeli Military Government Order No. 947* (Ramallah, Al-Haq, 1982), p.14.

[578] Above, p. 8.

[579] It is notable that not long more than a month before the Civil Administration was created, an official Ministry of Defence spokesperson announced that this new administration would be under the direct control of the Minister for Defence. See J. Singer, 'The Establishment of a Civilian Administration in the Areas Administered by Israel' (1982) 12 *Israeli Yearbook on Human Rights* 278.

580 A. Roberts, 'Prolonged military occupation: the Israeli-occupied territories since 1967' (1990) 84 *American Journal of International Law*, 44, 98.

[581] M. Rishmawi, 'Administrative Detention in International Law: the Case of the Israeli-Occupied West Bank and Gaza' (1989) 5 *Palestine Y Int L* at 267.

OPT were cancelled by the Occupying Power several times.[582] In 1976, the Israeli government allowed elections but found that PLO candidates had swept the mayoralties. In 1982 and 1982, the Civil Administration dismissed the majority of the West Bank's elected local councils and mayors and transferred authority over West Bank municipalities to Palestinian 'village leagues', whose assigned role was to enforce Palestinian cooperation with Israeli authorities rather than develop Palestinian political institutions.[583]

The Oslo Accords in the mid-1990s and the creation of the Palestinian National Authority ostensibly granted a degree of autonomy to Palestinians in the OPT, excluding East Jerusalem, but since Israel never relinquished its control over the OPT the Oslo Accords failed to provide an effective Palestinian government. Local decision-making is impeded through several methods, including legal and administrative barriers to planning and development, restrictions on external trade, freedom of movement, and the detention and imprisonment of Palestinian policy-makers (as detailed in Chapter IV). Although it was agreed in the initial Declaration of Principles that 'the Civil Administration will be dissolved, and the Israeli military government will be withdrawn',[584] this did not happen, and thus led to the provision in the subsequent Interim Agreement that 'Israel shall continue to exercise powers and responsibilities'[585] not transferred to the Palestinian National Authority.

By contrast, Jewish settlers in the OPT have been allowed to participate in high-level decision-making bodies, such as the Higher Planning Council, which determines land-use planning in the West Bank. Jewish-Israeli settlers also enjoy the democratic privilege of voting for representatives in the Knesset who can represent their concerns to the State of Israel, whose ministries administer the settlements, agriculture, industry, natural resources and infrastructure in the OPT.

The Occupying Power's military and administrative system therefore remains supreme, and many of the pre-Oslo military orders remain in force. Indeed, the Oslo Accords did not repeal or revoke any Israeli military orders but merely provided that they be reviewed jointly by both sides,[586] which itself did not happen in practice. Thus, the unlawful Israeli-imposed amendments to the pre-existing local laws were retained and cannot be changed without Israeli approval. As a result, between 1967 and 1993, Palestinians were forbidden 'to conduct a protest march or meeting (grouping of ten or more where the subject concerns or is related to politics) without permission from the Military Commander'. They were also 'forbidden to raise flags or other symbols, to distribute or publish a political article and pictures with political connotations'.[587]

The Oslo Accords loosened or eliminated some of these restrictions on symbolic expression but tightened Israel's control in substantive policy areas. Of particular significance is that, through a consensus provision in the joint committee system, Israel holds an effective veto over any law enacted by the Palestinian Legislative Council (PLC).[588] Moreover, the Accords did not eliminate Israel's capacity or willingness to undermine Palestinian self-governance through military means. For example, after the elections in January 2006, the Israeli air force bombed the Palestinian Interior Ministry, Foreign Ministry and Finance Ministry. Arrests of numerous ministers and parliamentarians, and revocation of others' IDs, have prevented them from carrying out their governmental duties. Fifty elected members of the Palestinian Legislative Council, more than one third of the total membership,

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[582] See, for example, Military Order No. 80, *Order Concerning Extension of Period of Service of the Local Administrative Authorities*, 2 August 1967.

[583] See histories of this period in M. Tessler, *A History of the Israeli-Palestinian Conflict* (Bloomington, IN: Indiana University Press, 1994), pp. 548-549.

[584] Article VII, *Declaration of Principles on Interim Self-Government Arrangements (Oslo I)*, 1993

[585] Article I, *Interim Agreement on the West Bank and the Gaza Strip (Oslo II)*, 1995.

[586] Article IX, *Declaration of Principles on Interim Self-Government Arrangements (Oslo I)*, 1993.

[587] Military Order No. 101, Order Concerning Prohibition of Incitement and Hostile Propaganda, 27 August 1967.

[588] Article XVIII, .*Interim Agreement on the West Bank and the Gaza Strip (Oslo II)*, 1995.

were being detained by Israel by 2008.[589] These arrests have paralysed the PLC's ability to meet quorums and therefore to convene or function in its constitutional capacity.

More than twenty-five years ago, Palestinian legal scholars asserted that Israel was acting as a 'sovereign government exercising complete legislative, administrative, and judicial authority over the [West Bank] and its inhabitants and instituting major changes in the West Bank economy, demography, and institutions'.[590] Although the Oslo Accords transferred some authority to the PA,[591] power was transferred in areas of Israel's choosing. The degree of autonomy transferred to Palestinians cannot challenge Israel's overall demographic, economic, cultural and, perhaps most significantly, territorial domination. In effect, Israel relieved itself of the responsibility for administration and governance of certain Palestinian populations while retaining full control over the settlement areas and general control over the OPT as a whole, in a manner which clearly contravenes provisions in the Declaration.

3. Economic Integration

With the development of the prohibition of colonialism, States holding foreign territory in trust, such as under a League of Nations mandate, were strictly obliged to maintain or keep separate that territory from its own.592 This prohibition aimed both to forestall attempts by the administering State to annex the dependent territory, and to ensure the maintenance of the territorial integrity of the self-determination unit. Since self-determination also has an economic component, the administering State was to ensure the economic integrity of the self-determination unit, by maintaining its distinct economic features and structure.

Similar obligations regarding occupied territory are intended to ensure separate political and economic existence.[593] An Occupying Power does not acquire sovereignty over the territory it occupies and is prohibited from annexing it. In keeping with this principle, the Occupying Power, is merely a 'de facto administrator'[594] and does not have the authority to extend its domestic legislation to the occupied territory.[595] As noted previously, an Occupying Power's authority to make changes to the laws in force is limited to legitimate security concerns and maintaining the public life of the local population.[596] Moreover, the Occupying Power is under an obligation to create an administration that is separate and distinct from that of its own territory.[597]

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[589] As of 20 May 2008, statistics from Addameer.

[590] Kuttab and Shehadeh, *Civilian administration*, p. 10.

[591] For evidence of Israel's main objectives in formulating the idea of Palestinian autonomy as an interim arrangement, see Aryeh Shalev, *The Autonomy-Problems and Possible Solutions*, Paper No. 8, Centre for Strategic Studies (Tel Aviv, Tel Aviv Univeristy, January 1980), p. 55, summarised in Raja Shehadeh, *From Occupation to Interim Accords* (Brill, The Hague, 1997), p.15.

[592] General Assembly resolution 2625 (XXV) (24 October 1970), *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations*, expressly provides that, under the UN Charter, the territory of a non-self-governing territory has 'a status separate and distinct from the territory of the State administering it'.

[593] J. Pictet (ed.), *Commentary to Geneva Convention IV*, above fn.23, 273, para 2.

[594] Ibid.

[595]UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford UP: Oxford: 2004), p. 284 para.11.25; see Articles 47-49, 51-52, 55-56 of the 1907 Hague Regulations.

[596] C. Greenwood, 'The Administration of Occupied Territory', in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories* (Clarendon Press: Oxford: 1992), p.241. While other authorities such as Schwenk and Dinstein view Article 43 as providing the Occupying Power with greater leeway to amend legislation in force, all agree that the law cannot be amended for the purpose of benefiting the Occupying Power: see Yoram Dinstein, *Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, Occassional Paper Series, Program on Humanitarian Policy and Conflict Research (Fall 2004),

The Occupying Power's use of property situated in the occupied territory is also limited. Article 55 of the 1907 Hague Regulations provides:

> The occupying state shall be regarded only as an administrator and usufructuary of public buildings, real estate, forests, agricultural estates belonging to the hostile state and situation in occupied territory. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.

The principle of usufruct permits the Occupying Power to enjoy the fruits of another's property, including selling crops and timber, leasing it to others, but the occupant is prohibited from substantially altering the fundamental character of the property or destroying it.[598] The occupant must respect the 'substance or capital of publicly owned immovable property.' [599] Hence, the Occupying Power may not exploit immovable property 'beyond normal use', sell the property or otherwise dispose of it or, for example, cut more timber than was cut prior to occupation. [600] The Occupying Power does not gain title to public immoveable property and thus cannot dispose of it at will. Private property, whether moveable or immoveable, cannot be confiscated,[601] although it can be requisitioned and used temporarily by the Occupying Power. Nor can it be sold, even if the proceeds of the sale were given to the rightful owner at the end of the war. [602]

Different types of property – public and private, movable and immovable – entail different treatment under the 1907 Hague Regulations, as these have been interpreted in litigation arising principally out of World Wars I and II. The governing principle is that 'under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear.'[603] Thus an Occupying Power is allowed to seize or appropriate only property required to fulfil the needs of the occupying army or to defray the costs of administering the occupation of the local population.[604] The Occupying Power is prohibited from taking property for commercial purposes, whether to fulfil the Occupying Power's domestic needs or benefit its own economy.[605] It is also forbidden to remove from the

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available at: http://www.hpcr.org/pdfs/OccasionalPaper1.pdf; and E. Schwenk, 'Legislative Power of the Military Occupant Under Article 43, Hague Regulations' (1944-1945) 54 *Yale Law Journal* 393.

[597] C. Greenwood, 'The Administration of Occupied Territory', pp. 260 and 265. Although the obligation to create a separate administrative regime persists, Judge Kooijmans has observed that many Occupying Powers have not created a formal administration; see Separate Opinion Kooijmans, *Armed Activities on the Territory of the Congo* case (*Democratic Republic of the Congo* v. *Uganda*) ICJ Rep, 2005, 306 at 316-317, paras. 40-41.

[598] See Iain Scobbie, 'Natural Resources and Belligerent Occupation: Mutation through Permanent Sovereignty', in S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories* (Kluwer: The Hague: 1997), pp. 233-234.

[599] Ibid.

[600] Gerhard Von Glahn, *The occupation of enemy territory: a commentary on the law and practice of belligerent occupation* (University of Minnesota Press: Minneapolis, 1957), pp. 176-178.

[601] This is provided by Article 46 of the 1907 Hague Regulations, save for the exception of private property, which falls into the category of *munitions de guerre* by virtue of Article 53.

[602] Von Glahn, *The Occupation of enemy territory*, p. 186.

[603] *In Re Krupp*, (US Military Tribunal, Nuremberg, 30 June 1948), 15 *International Law Reports* 620 at 622, see 622-625 generally: see also *Trial of the Major War Criminals (In re Goering and others),* (International Military Tribunal, Nuremberg, 1 October 1946), 13 *International Law Reports* 203 at 214-216; *In Re Flick*, (US Military Tribunal, Nuremberg, 22 December 1947), 14 *International Law Reports* 266 at 271; *In Re Krauch (IG Farben trial),* (US Military Tribunal, Nuremberg, 29 July 1948) 15 *International Law Reports* 668 at 672-678; and *N.V. De Bataafsche Petroleum Maatschappij and others v. The War Damage Commission, (Singapore Oil Stocks Case),* 23 *International Law Reports* 810.

[604] See Articles 52 and 53, 1907 Hague Regulations.

[605] See, for example, E. Cummings, 'Oil Resources in Occupied Arab Territories under the Law of Belligerent Occupation' (1974) 9 *Journal of International Law and Economics* 533 at 574-78; US Department of State,

occupied territory any private or public property and to merge that property into its domestic economy.[606] The economy of the occupied territory is to be kept intact, except for the carefully defined permissions afforded the Occupying Power.[607] Otherwise, as Benvenisti has pointed out, economic integration may simply act as an incentive for the occupation to continue.[608]

a. Israeli practices breaching the prohibition on economic integration

Simultaneously with establishing settlements in the OPT, Israel undertook a policy to integrate the economies of the West Bank and Gaza Strip into the State of Israel.[609] This policy included a range of measures designed to appropriate natural resources, redirect Palestinian labour to foster economic dependence on Israel, and integrate the capital markets.[610]

The Israeli government has designated many West Bank settlement blocs as National Priority Areas, authorised to receive financial incentives—tax breaks, grants, and reduced fees—administered through Israeli government ministries.[611] Israel has historically allocated larger proportions of financial resources to the Israeli local settlements authorities situated in the Occupied Palestinian Territories than those situated in Israel.[612] The economic and civil integration of settlements into Israel was achieved by extending Israeli customs and policing services to areas of the West Bank, as if they were in Israel.[613] In 1967, Israel issued Military Order 31, which designated the West Bank as a distinct customs zone, but later that year Military Order 103 eliminated all tariffs and customs duties on goods entering the West Bank from Israel.[614]

In his opinion in the *Christian Society for the Holy Places* judgment, Deputy President Sussman relied upon the prolonged nature of the occupation to rule that the occupant has a duty to adapt the law to respond to changing needs in economic and social matters. He concluded that the occupant has the duty to legislate for the welfare of the local population, a view that Kretzmer terms the 'benevolent occupant' approach:[615]

'The Laws of War: Legal Regulation of Use of Force', in 1979 *Digest of United States Practice in International Law* at 920-922; and E. Feilchenfeld, *The International Economic Law of Occupation* (Rumford Press: Washington: 1942), pp. 34-36.

606 Cummings, p. 155, citing I. Vasarhelyi, *Restitution in International Law* (1964); and Greenwood, p. 251.

607 *In Re Krupp*, 154 *International Law Reports* at 622-623. The laws of usufruct permit the occupier to continue the reasonable exploitation of already operating oil wells, but do not permit the development and exploitation of new oil fields: see U.S. Dept of State *Memorandum of law on Israel's right to develop new oil fields in Sinai and the Gulf of Suez of 1 October 1976* 16 ILM 733 (1977) 734; and Scobbie, 'Natural Resources', 239-240.

608 Benvenisti, *Occupation*, p. 144.

609 Geoffrey Aronson, *Israel, Palestinians and the Intifada* (Kegan Paul International and Institute for Palestine Studies, 1990), pp.14-19, 24-28; also Sarah Roy, *The Gaza Strip: The Political Economy of De-Development* (Washington, DC: Institute for Palestine Studies, 1995), 147-150.

610 Roy, Ibid., p. 147

611 Btselem, Land Grab, p. 73-76.

612 Btselem, Land Grab, p. 77-84.

613 The Knesset adopted a *Law for extending the validity of emergency regulations (Judea and Samaria and the Gaza Strip – Jurisdiction in crimes and legal aid)* 2002 on 26 June 2002 and subsequently extended it until 30 June 2012. This law was published in the Israeli 'Law Book' No. 1853 Page No. 458 on 27 June 2002; חוק להארכת תוקפן של תקנות שעת חירום (יהודה והשומרון וחבל עזה - שיפוט בעבירות ועזרה משפטית), התשס'ב-2002.

614 Military Order 103 of 1967.

615 See David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, (New York: SUNY, 2002), pp. 58-59.

> In inquiring whether the legislative measures of an Occupying Power are at one with the provisions of Article 43, considerable importance attaches to the question of the motives of the legislator. Has he legislated in order to advance his own interests or out of a desire to care for the well-being of the civil population, 'la vie publique' of which Article 43 speaks? All agree that any legislative measure not concerned with the welfare of the inhabitants is invalid and goes beyond the authority of the Occupant.[616]

The distinction Sussman drew between interests of the occupant and of the local population reflects the fundamental principle of the law of occupation: that the occupant is only in temporary administrative control of the territory and is not its sovereign. The territories involved—the occupied territory and the occupant's home territory—are to be treated as separate entities. While this onus of separation is implicit in prohibitions against annexing occupied territory, it is also expressed in rules governing regulation of the economy of occupied territory

In judgments hinging on its doctrine of prolonged occupation, Israel's High Court has upheld measures that systematically efface the principle of the separateness of the occupied Palestinian territories. By including settlers within the category of inhabitants whose welfare the occupant must promote, the High Court endorsed an obliteration of the distinction between lawful and unlawful inhabitants. In *Electricity Company No.1*, the Court simply asserted that 'the residents of Kiryat Arba must be regarded as having been added to the local population and they are also entitled to a regular supply of electricity'.[617] Similarly, in *Economic Corporation for Jerusalem*, the Court held that in assessing changes during a prolonged occupation for the purpose of applying Article 43, a relevant 'new reality' was the existence of settlements.[618] In doing so, the Court thus conferred apparent legitimacy upon a situation unlawful in itself.

The Court has also undermined the temporary nature of occupation by upholding changes made within the OPT which will subsist after the end of occupation, such as the construction of road systems linking the West Bank, and settlements, to metropolitan Israel,[619] and the integration of

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[616] *Christian Society for the Holy Places* v *Minister of Defence and others*, 52 *International Law Reports* 512, opinion of Deputy President Sussman at 515: see also '*A Cooperative Society Lawfully Registered in the Judea and Samaria Region* v *Commander of the IDF Forces in the Judea and Samaria Region et al*' (1984) 14 *Israel Yearbook on Human Rights* 301, opinion of Justice Barak at 304, and as *Ja'amait Ascan*, Kretzmer, *Occupation of justice*, p. 69: 'The military commander may not consider the national, economic or social interests of his own country, unless they have implications for his security interest or the interests of the local population'.

[617] *Electricity Corporation for Jerusalem District Ltd* v. *Minister of Defence et al*, as discussed in Kretzmer, *Occupation of justice*, p. 65: this aspect of the judgment is not noted in the summary contained in 5 *Israel Yearbook on Human Right*s (1975) 381. Settlers are not protected persons for the purposes of the Fourth Geneva Convention because they are nationals of the Occupying Power: see Article 4.

[618] *Economic Corporation for Jerusalem Ltd* v *Commander of the IDF Forces in the Judea and Samaria Region et al*, 30 *Israel Yearbook on Human Rights* (2000) 322 at 324. This is an even more marked feature in proceedings which pit the interests of the indigenous population against those of settlers, such as cases involving the confiscation of privately owned land in order to ensure the security of Jewish worshippers within the West Bank: see, for example, *Hass* v *IDF Commander in the West Bank* (the Machpela Cave case), HCJ 10356/02 (4 March 2004) (2004) *Israel Law Reports* 53 (this case was joined with HCJ 10497/02, Hebron Municipality *v* IDF Commander in Judaea and Samaria); Bethlehem Municipality *v* the State of Israel *(Rachel's Tomb case)*, HCJ 1890/03 (3 February 2005), available at: http://elyon1.court.gov.il/files_eng/03/900/018/n24/03018900.n24.pdf; also those dealing with the route of the barrier wall in the West Bank: for example, *Beit Sourik Village Council* v. *Government of Israel and Commander of the IDF Forces in the West Bank* (HCJ 2056/04, 30 June 2004, 43 ILM 1099 (2004) and *Mara'abe and others* v. *The Prime Minister of Israel and others* (HCJ 7857/04, 15 September 2005, 45 ILM 202 (2006). These judgments are also available in English on the website of the Israeli Supreme Court, http://elyon1.court.gov.il/eng/home/index.html.

[619] See '*A Cooperative Society Lawfully Registered in the Judea and Samaria* region v. *Commander of the IDF Forces in the Judea and Samaria Region et al*' (1984) 14 *Israel Yearbook on Human Rights* 301 and as *Ja'amait Ascan*, Kretzmer, *Occupation of justice*, pp. 69-70; and compare '*Tabib et al* v. *(a) Minister of Defence and (b) Military Governor of Tulkarem*' (1983) 13 *Israel Yearbook on Human Rights* 364.

Palestinian electricity infrastructure to that of Israel.[620] Water supplies have also been made dependent upon Mekorot, Israel's national water company. Although in the *Elon Moreh* case, Justice Landau ruled that an occupant could not create facts (in this case a settlement) for its military purposes that were intended from the outset to last beyond the termination of military rule,[621] this test was soon reformulated by Justice Cahan in *Electricity Company No.2* to provide:

> generally, in the absence of special circumstances, the Commander of the region should not introduce in an occupied area modifications which, even if they do not alter the existing law, would have a far-reaching and prolonged impact on it, far beyond the period when the military administration will be terminated one way or another, save for actions undertaken for the benefit of the inhabitants of the area.[622]

While in that case Justice Cahan held that there was insufficient reason to divest the Jerusalem District Electricity Company of its concession to supply electricity within the West Bank in favour of the Israel Electricity Corporation, this had occurred in relation to the supply of electricity to Hebron by virtue of the *Electricity Company No.1* case.

In *Cooperative Society*, Justice Barak affirmed Sussman's views regarding the changing needs of the population of occupied territory expressed in *Christian Society for the Holy Places*, but found that the occupant's authority extended 'to taking all measures necessary to ensure growth, change and development'.[623] The Court considered objections to a plan to build highways connecting towns in the West Bank with Jerusalem. During the proceedings the respondents had conceded that the roads would benefit residents of Israel and ease travel between Israel and the West Bank, but also argued that many West Bank residents travelled to work in Israel.[624] Affirming the Court's rulings in the *Electricity Company* cases on the legitimacy of the creation of permanent changes in occupied territory, Barak formulated the governing rule as:

> Long-term fundamental investments in an occupied area bringing about permanent changes that may last beyond the period of the military administration are permitted if required for the benefit of the local population—provided there is nothing in these investments that might introduce an essential modification in the basic institutions of the area.[625]

Further, in order to carry out 'fundamental investments and long-range projects for the benefit of the local population [...] the military administration is entitled to cooperate with the Occupying State'.[626] Kretzmer commented on this approach thus:

> The notion of 'public benefit' is intimately connected to political objectives and interests. The model applied by Justice Barak is reminiscent of a colonial model of governors who know what is best for the natives. Development is assumed beneficial and large highways must be for the public good, as must improved connections between the Occupied Territories and Israel itself. There is, however, nothing inherently good about development the adverse consequences of which may override benefits. It is quite true that people may opt for development despite its adverse consequences, but should a temporary regime make this

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[620] See '*Electricity Corporation for Jerusalem District, Ltd* v. *Minister of Defence et al*' (1975) 5 *Israel Yearbook on Human Rights* 381; and compare '*Jerusalem District Electricity Co Ltd* v. *Minister of Energy and Infrastructure and Commander of the Judea and Samaria Region*' (1981) 11 *Israel Yearbook on Human Rights* 354. See also *Jaber al Bassiouni Ahmed et al* v. *The Prime Minister and Minister of Defence* (HC 9132/07, 30 January 2008), unofficial English translation available at: www.adalah.org/eng/gaza%20report.html.

[621] '*Dweikat* v. *Government of Israel*', (1979) 9 *Israel Yearbook on Human Rights* 345 at 350.

[622] '*Jerusalem District Electricity Co Ltd, at* 357.

[623] '*A Cooperative Society*, at 308-309.

[624] Kretzmer, *Occupation of justice*, p. 68.

[625] *A Cooperative Society*, at 310.

[626] Ibid., at 313.

> irrevocable decision? Moreover, is improving connections between the West Bank and Israel necessarily for the good of the West Bank residents, on the not unreasonable assumption that many of these residents would prefer to break those connections?[627]

b. Example of economic integration: value added tax

The integration of the OPT's economy into that of Israel is perhaps best revealed in the measures that gave rise to the proceedings in *Bassil Abu Aita et al v The Regional Commander of Judea and Samaria and Staff Officer in charge of matters of customs and excise.*[628] The immediate cause was the introduction of value-added tax (VAT) into the occupied Palestinian territories. Notably, Feilchenfeld rejects the claim that an occupant may create a customs union between its territory and occupied territory because 'this almost invariably would be an intrinsic measure of complete annexation which a mere occupant has no right to effect'.[629] In essence, the economy of occupied territory must be kept separate from that of the occupant as 'the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort':

> The economy of the belligerently occupied territory is to be kept intact, except for carefully defined permissions given to the occupying authority—permissions which all refer to the army of occupation. Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their country's allies, so must the economic assets of the occupied territory not be used in such a manner.[630]

The post-World War II tribunals may have been influenced to some degree in their strictures against economic convergence by the *Austro-German customs union* advisory opinion.[631] In this opinion, the Permanent Court of International Justice ruled that Austria's independence would be compromised if it lost its 'sole right of decision in all matters economic, political, financial or other'.[632] Axiomatically, if an occupant were to merge the economy of occupied territory with its own, then the latter would lose its independence. It would no longer be sovereign but effectively be annexed, contrary to the fundamental purpose of the law of occupation.

In his opinion in *Abu Aita*, Justice Shamgar started from the proposition that the removal or continued maintenance of customs barriers between an occupant's territory and the territories it occupies was a matter to be decided by the military government of the occupied territories. Its decision could not be contested provided its action caused no significant damage to the economy of the occupied territories.[633] It had been decided at the start of the occupation that 'the two economies would not be separated' because the economy of the occupied territories was 'umbilically tied to the economy of Israel'.[634] This integration was effected by the removal of the customs barriers between the occupied

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[627] Kretzmer, *Occupation of justice*, p. 70, note omitted.

[628] *Bassil Abu Aita et al* v. *The Regional Commander of Judea and Samaria and Staff Officer in charge of matters of customs and excise*, HC 69/81 (5 April 1983), 37(2) Piskei Din 197 (original Hebrew text), 7 Selected Judgments of the Supreme Court of Israel 1 (1983-87) (English translation) available at: http://elyon1.court.gov.il/files_eng/81/690/000/z01/81000690.z01.pdf (English translation**).** Extracts from Shamgar's opinion in *Abu Aita* are provided at (1983) 13 *Israel Yearbook on Human Rights* 348.

[629] Ernst Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington: Columbia University Press, 1942) p. 83.

[630] *In re Krupp*, (US Military Tribunal at Nuremberg, 30 June 1948), 15 *International Law Reports* 620 at 622-623: compare *In re Krauch and others (IG Farben trial)*, (US Military Tribunal at Nuremberg, 29 July 1948), 15 *International Law Reports* 668 at 674.

[631] *Customs regime between Germany and Austria (Protocol of March 19th, 1931)* advisory opinion, PCIJ, Ser.A/B, No.41 (1931).

[632] *Austro-German customs union* advisory opinion, PCIJ, Ser.A/B, No. 41 (1931) 45.

[633] *Abu Aita*, 223/23/31, para. 7.

[634] *Abu Aita*, 321/104/143, para. 52©.

territories and Israel and the introduction of uniform rates of indirect taxes.[635]

Invoking the prolonged occupation argument, that changing circumstances in occupied territory justify the introduction of new measures by the occupant in order that it may fulfil its obligation under Article 43 of the Hague Regulations to ensure civil life, Shamgar asserted that freezing the tax regime as it existed at the start of the occupation could, through time, be detrimental to the economy of occupied territory by preventing its development and adjustment to changes in the world and regional economy, as well as to changes in the economy of the occupant.[636] He ruled that the proposed legislative change did adequately balance the welfare of the population of the occupied territories and Israel's security:

> military government has a clear and direct interest in avoiding any disruptions in the regional economy and *inter alia* it will do all it possibly can to prevent as far as possible reduction in trade or increase in unemployment. To cut off existing markets, especially those created during the period of military government, has a direct effect on incomes and therefore upon the standard of living; unemployment is a fermenting and unsettling factor from the standpoint of security and both these phenomena are among those the military government tries to avoid in so far as possible; at least a military government that aspires to the good of the public in the territory, and the good of the security interests of the occupier in so far as possible and practicable.[637]

In addition, Shamgar employed the parallel application argument, that because VAT had been introduced in Israel as well as in the occupied territories, this was a reasonable use of the powers granted to Israel by Article 43 of the Hague Regulations.[638]

As Kretzmer has observed, there is generally a strong connection between steps taken by the military authorities in the occupied territories and the political agenda of the Israeli government.[639] Israel's association agreement with the European Economic Communities had made its introduction of VAT vital as a consequence of the removal of customs barriers between Israel and European Economic Community (EEC) member States, and this has 'had direct repercussions in the territories':

> Economic integration—as a compelling motive for introducing the tax—was obviously a dominant factor in all decisions having implications on the economic relations between Israel and the territories.[640]

Shamgar viewed the only alternative as being to separate the economies of the occupied territories and Israel, but to this he claimed, would breach Israel's duties under Article 43 as it 'would impede the possibility of a return to orderly life and prevent the effective observance of the duty regarding the assurance of 'la vie publique'. Having accepted that a value added tax must be introduced in Israel, 'the wheel could not have been turned back without affecting the proper fulfilment of the duties deriving from Article 43'. Shamgar concluded that the integration of the economies required that strict attention be paid to parallel fiscal and economic developments: 'The method of tackling economic problems in Israel cannot, it seems, stop at the old pre-1967 borders which today are open for passage of people and trade'.[641]

Although Shamgar paid lip service to the autonomy of the military authorities in economic matters, this is difficult to reconcile with the fact that the introduction of VAT was driven by Israel's own economic policy. The military authorities simply 'served as proxies for the implementation of

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[635] *Abu Aita*, 222/22/29, para.7.

[636] *Abu Aita*, 272-273/64-65/88, para.25e.

[637] *Abu Aita*, 314/98/135, para.50e.

[638] *Abu Aita*, 314-315/98-99/135-136, para,50e.

[639] Kretzmer, *Occupation of justice*, p. 64.

[640] *Abu Aita*, 317/101/138, para.51.

[641] *Abu Aita*, 321/105/143-144, para.52(c).

economic policies decided upon by the Israeli body-politic'.[642] It seems impossible to justify this by reference to the test that innovation within occupied territory should be determined by the interests of its population and not those of the occupant, all the more so when the rationale for its necessity was the earlier unlawful act of the integration of the economies. This was simply a case of compounding illegality under the guise of benevolence.

When one also takes into account the creation of water and electricity dependence—whose consequences gave rise to events leading to *Jaber al Bassouini Ahmed et al v The Prime Minister and Minister of Defence*[643]—and the weight given to the interests of settlers unconnected with the administration of the occupied territories in determining policy, it seems clear that the interests of the Palestinian population of the OPT have been systematically subordinated to Israel's domestic concerns. This rejects the rationale of the law of occupation, as it amounts to a de facto annexation, denying Palestinian interests their proper weight in the formulation of policy and certainly blocking Palestinian participation in policy-making. Although this situation has developed and persisted under the mantle of occupation, it is pointedly akin to colonialist behaviour as prohibited under international law.

4. Violation of permanent sovereignty over natural resources

The right to self-determination entails substantive entitlements including the right of a people to permanent sovereignty over their natural resources:[644] that is, 'the right of a State or a people to dispose freely of its natural resources and wealth within the limits of national jurisdiction.'[645] It also entails the right to prospect, explore, develop, and market such natural resources; the right to use its natural resources to promote national development; the right to conserve and manage natural resources pursuant to national environmental policies; the right to regulate foreign investment; and the right to an equitable share in trans-boundary resources.[646] This right to freely use and exploit their natural resources for their own end constitutes an inherent right of a people and is a principle of customary international law.[647] The exploitation or plundering of marine, water, and other natural resources of colonial and non-self-governing territories by foreign States or other economic interests

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[642] Benvenisti, *Occupation*, p. 143.

[643] HC 9132/07, delivered 30 January 2008, available at: www.adalah.org/eng/gaza%20report.html.

[644] See General Assembly resolution 1803 (XVI) (14 December 1962), *Declaration of Permanent Sovereignty over Natural Resources*; General Assembly resolution 3201 (S.VI) (1 May 1974), *Declaration on the Establishment of a New International Economic Order*; and General Assembly resolution 3281 (XXIX) (12 December 1974), *Charter of Economic Rights and Duties of States*. Similarly, General Assembly resolution 3295 (XXIX) (13 December 1974), Part IV, operative paragraph 8, and General Assembly resolution 57/132 (25 February 2003), *Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories*, both affirmed the right of permanent sovereignty over natural resources of non-self-governing territories, while the preamble of the United Nations Council for Namibia's, *Decree No. 1 for the Protection of Natural Resources of Namibia*, adopted 27 September 174, noted that its aim was to secure 'for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs'. Permanent sovereignty over natural resources is also expressly identified as an aspect of the right of self-determination in Article 1(2) of the International Covenant on Civil and Political Rights (1976) and Article 1 (2) of the International Covenant on Economic, Social and Cultural Rights (1976). See also C. Drew, 'The East Timor Story: International Law on Trial' (2001) 12 *European Journal of International Law* 651 at 663-664; Alexander Orakhelashvili, 'The Impact of Peremptory Norms', pp. 52-53; and N. Schrijver, *Sovereignty over natural resources: balancing rights and duties* (Cambridge: Cambridge UP, 1997), Chapter 5.

[645] Schrijver, *Sovereignty over Natural Resources*, 260.

[646] Ibid., pp. 264-278.

[647] Ibid. The International Court of Justice recently affirmed the customary nature of this principle in the *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, ICJ Rep, 2005, 168 at 251-252, para 244.

violates this substantive right.[648] As a corollary, blocking or frustrating the exploitation and development of a people's natural resources also entails a violation of permanent sovereignty over natural resources.

a. The Right to Water

Water is essential to human life and accordingly subject to numerous concerns regarding human rights and international humanitarian law, The human right to water amounts to a collective right under common Article 1(2) of the International Covenant on Civil and Political Rights and the International Covenant On Economic, Social and Cultural Rights, where permanent sovereignty over natural resources is affirmed as constituting an element of the right to self-determination. Scholarly consensus is that an autonomous individual right to water does not exist in customary international law.[649] Nonetheless, while there is an absence of express references to water as a human right in general human rights treaties,[650] it is an implicit right in the international bill of rights since its is fundamentally essential to the enjoyment of expressly enumerated rights,[651] and is increasingly a matter of concern and attention for scholars, organisations, and States. As clarified in General Comment No.15 (2002) of the Committee on Economic, Social and Cultural Rights on the right to water:[652]

> Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living 'including adequate food, clothing and housing'. The use of the word 'including' indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognized that water is a human right contained in article 11, paragraph 1, (see

[648] Affirmed General Assembly resolution 48/46 (10 December 1992) and General Assembly resolution 49/40 (9 December 1994).

[649].See for example, A. Hardberger, 'Life, liberty, and the pursuit of water: evaluating water as a human right and the duties and obligations it creates' (2005) 4 *Northwestern Journal of International Human Rights* 331 at 332-333, 337-338, 340 and 345; and J. Scanlon, A. Cassar and N. Nemes, *Water as a human right?* (Cambridge: IUCN Environmental Policy and Law Paper No.51, 2004), p.12.

[650].In contrast, Article 14(2)(h) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women requires States parties to take all appropriate measures to eliminate discrimination against women in rural areas and to ensure them the right to adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications. Article 24(2)(c) of the 1989 Convention on the Rights of the Child includes, in its enumeration of the elements of the child's right to health, the duty of States parties 'to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution'.

[651].See UN Economic and Social Council, Commission on Human Rights, *Economic, social and cultural rights: relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation. Final report of the Special Rapporteur, El Hadji Guissé*, E/CN.4/Sub.2/2004/20 (14 July 2004), 8-10, paras.23-24 and 29; Amy Hardberger, Life, 'Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates' 4 *Northwestern Journal of International Human Rights* 331 at 337-338 and 345; S. C. McCaffrey, 'A human right to water: domestic and international implications' (1992) 5 *Georgia International Environmental Law Review* 1 at 1 and 10-12; M.A. Salman and Siobhan McInerney-Lankford, *The human right to water : legal and policy dimensions* (Washington, Word Bank, 2004), pp. 56-60 ; and John Scanlon et al, *Water as a Human Right?*, pp. 4-5 and 18-20.

[652].General Comment No.15, *The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11 (20 January 2003). For an account of the Committee's role and competence to issue General Comments, see Salman and McInerney-Lankford, pp. 33-53.

> General Comment No. 6 (1995)). The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1). The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.[653]

The Committee observed that although the Covenant promotes the progressive realisation of rights as is dependent on available resources, it also imposes various obligations which have an immediate effect. In the case of the right to water, one core obligation immediately incumbent upon States is that this right must be exercised without discrimination of any kind.[654] While the broad duty on States parties to realise the right to water is essentially one of due diligence, the General Comment states that its core obligations are non-derogable and no justification may be made for non-compliance.[655]

In delineating the contours of the right, General Comment 15 identifies three types of obligation incumbent upon States parties, namely, the obligations to respect, protect and fulfil.[656] Thus:

> The obligation to *respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.[657]

A State's obligation to protect requires it to prevent third parties from interfering 'in any way' with the enjoyment of the right to water, and includes the duty to adopt legislative and other measures to restrain third parties 'from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural resources, wells and other water distribution systems'.[658] Further, States parties 'should refrain at all times' from imposing embargoes or other measures that prevent the supply of water or of goods and services essential to secure the right to water, and, 'Water should never be used as an instrument of political and economic pressure'.[659]

The prohibition of discrimination regarding water allocation is also consistent with the broader doctrine of reasonable and equitable use of shared water resources derived from customary international water law and codified in the 1966 Helsinki Rules on the Uses of Waters of International Rivers and the 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses. In *Case concerning the Gabcikovo-Nagymoros project*, the ICJ assumed that the doctrine of reasonable and equitable share formed part of customary international law.[660] These instruments deal with surface and not groundwater (aquifer) resources and Israel is not a party to the 1997 Convention. Nevertheless, in adopting the draft of the 1997 Convention which it presented to the

[653] Ibid., para. 3: notes omitted.

[654] Ibid., p. 8, para. 17, and in greater detail pp. 12-13, para. 37.

[655] Ibid., p. 13, para. 40.

[656] Ibid., pp. 9-11, paras. 20-29.

[657] Ibid., p. 9, para. 21, emphasis in original.

[658] Ibid., para. 23.

[659] Ibid., pp. 11-12, para. 32.

[660] *Case concerning the Gabcikovo-Nagymoros project (Hungary/Slovakia)*, ICJ Rep, 1997, 7 at 56, para 85. Although this judgment was delivered before the 1997 UN Watercourses Convention entered into force, the Court cited it with approval in its finding that Hungary had been deprived 'of its right to an equitable and reasonable share of the natural resources of the Danube'.

General Assembly, the International Law Commission simultaneously adopted a *Resolution on confined transboundary groundwater*, operative paragraph 2 of which provided:

> *Commends* States to be guided by the principles contained in the draft articles on the law of the non-navigational uses of international watercourses, where appropriate, in regulating transboundary groundwater.[661]

In August 2008, the Commission adopted draft Articles on the law of transboundary aquifers. Article 4, in part, provides that:

> Aquifer States shall utilize a transboundary aquifer or aquifer system according to the principle of equitable and reasonable utilization.[662]

In its comments on an earlier draft of these Articles, Israel stated that this principle had 'gained the recognition of States'.[663] Accordingly, whether surface or groundwater, international watercourses such as those shared by Israel and the Palestinians must be divided fairly and reasonably between the two parties.[664]

Thus, as the Occupying Power, Israel has legal obligations relating to water in the OPT under the principles of public international law. International humanitarian law does not significantly address the question of how water resources should be shared between the conflict parties,[665] but under the Hague Regulations the permissible use of an occupied territory's natural resources by the Occupying Power are limited to the needs of the occupying army, and may not exceed past usage levels. It is therefore unlawful for Israel to use water resources in the OPT to supply the Israeli settler population (unlawfully present in occupied territory) or the civilian population of Israel. Even if it does so, then it remains obliged to abide by principles of non-discrimination and equity under human rights and international water law in order to avoid compounding an already existing illegality.

b. Water Rights and Allocations in the OPT

Mandate Palestine is a relatively arid region where water sources are scarce and increasingly costly to develop. Hence it is a matter of elevated concern in this study that Israel appears to have violated the principle of permanent sovereignty over natural resources in relation to water resources in the OPT.

The territory of Mandate Palestine has three main sources of natural fresh water. The Mountain Aquifer extends under both sides of the Green Line, including most of the West Bank and much of

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[661] Available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/8_3_1994_resolution.pdf.

[662] Available at: http://daccessdds.un.org/doc/UNDOC/LTD/G08/615/84/PDF/G0861584.pdf?OpenElement. For commentary on these draft Articles, see International Law Commission, *Fifth report on shared natural resources: transboundary aquifers*, UN Doc.A/CN.4/591 (21 February 2008), available at: http://daccessdds.un.org/doc/UNDOC/GEN/N08/249/11/PDF/N0824911.pdf?OpenElement.

[663] See International Law Commission, *Shared natural resources: comments and observations by Governments on the draft articles on the law of transboundary aquifers*, UN Doc.A/CN.4/595 (26 March 2008) 24, para.103, available at: http://daccessdds.un.org/doc/UNDOC/GEN/N08/284/80/PDF/N0828480.pdf?OpenElement.

[664] An assessment as to the constitution of 'fairly and reasonably' is to be based on a number of criteria, such as the social and economic needs of the watercourse States concerned, the population dependent on the watercourse in each watercourse State and the effects of the use or uses of the watercourses in one watercourse State on other watercourse States. For a full enumeration of these criteria, see Article 6, UN Convention on the Law of Non-Navigational Uses of International Watercourses.

[665] Birgit Schlutter, 'Water Rights in the West Bank and in Gaza' (2005) 18 *Leiden Journal of International Law* 3 at 621-644, 622.

central Israel.[666] It is divided into Northern, Eastern and Western aquifers radiating from the 'spine' of the West Bank highlands. The Jordan River Basin is a surface-water system shared with Jordan, Syria and Lebanon. The Golan Heights comprises a major water shed that feeds this system and is the principal source feeding Lake Tiberius, the single largest source for Israel's National Water Carrier. Along the coastal plain, the Coastal Aquifer is a smaller source and the only natural source for the Gaza Strip.[667]

Upon the start of the occupation, Israel issued several military orders that integrated the water system of the OPT into the Israeli system denying Palestinian control over this resource. First, Military Order No. 92 (15 August 1967) vested all authority over water in the OPT in the Israeli military authorities and prohibited any individual from establishing, owning or administering a water institution (wells, or processing plants) without a new permit, which could be denied without explanation.[668] Second, Israel declared the lower Jordan River a closed military zone, denying Palestinians direct access to it, while existing Palestinian pumps and irrigation ditches tapping the Jordan were destroyed.[669] Third, Israel established new regulations for other districts that consistently curbed Palestinian access to water and, in some cases, vested the military commander with the power to appoint local water authority members or change the composition of the local water authority.[670] Israel has also reduced water supply to the Coastal aquifer by diverting water runoff from reaching its natural destination, reducing access by Palestinians in Gaza.[671]

In 1982, Israel placed the water supply system of the West Bank and Gaza under the control of the Israel's national water company, Mekorot, thereby fully integrating Palestinian water into the Israeli system and situating it under Israeli control.[672] Mekorot still supplies an estimated 54 percent of all

[666] The Mountain Aquifer is itself divided into three sub-aquifers, each of which contains a recharge area, from which water flows, and a storage area, in which water is collected. The Western Aquifer is by far the most significant in terms of the amount of water supplied. The majority of its recharge area is situated in the West Bank, while the majority of its storage area is located inside Israel. The water of Northern Aquifer and the Eastern Aquifer is located almost entirely in the West Bank. The division of the water of the Mountain Aquifer system between Israel, the settlements and Palestinians will be examined below.

[667] See, for example, Oxfam, *Assessment Report Gaza, September 2006* (16 October 2006): available at: http://www.reliefweb.int/rw/RWFiles2006.nsf/FilesByRWDocUnidFilename/AMMF-6VCH9B-oxfam-opt-30sep.pdf/$File/oxfam-opt-30sep.pdf.

[668] Military Order No. 92, Order Concerning Jurisdiction over Water Regulations, 15 August 1967, and Military Order No. 158, Order Concerning Amendment to Supervision over Water Law of 19 November 1967, as cited in Center for Housing Rights and Evictions (COHRE) and Badil, Resource Center for Palestinian Residency and Refugee Rights, *Ruling Palestine: A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine*, (May 2005), p. 91, available at: http://www.cohre.org/store/attachments/COHRE%20Ruling%20Palestine%20Report.pdf.

[669] *Report of the Secretary-General prepared in pursuance of General Assembly decision 39/442,*A/40/381, E/1985/105, 17 June 1985.

[670] See Military Order 484 Concerning Water Works Authority (Bethlehem, Beit Jala and Beit Sahour) of 15 September 1972, establishing a water authority and specifying its functions and jurisdiction; this order was subsequently amended and then superseded by Military Order 1376, Order Concerning the Water and Sewage Authority (Bethlehem, Beit Jala and Beit Sahour) of 24 July 1991 which also made projects and functions of this authority subject to the Israeli authority in-charge and granted him authority to assume control if he felt it was not meeting its responsibilities, as cited in and COHRE and Badil, *Ruling Palestine, A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine* (Badil and COHRE, 2005), 91.

[671] COHRE, Hostage to Politics: the Impact of Sanctions and the Blockade on the human right to water and sanitation in Gaza, (23 January 2008), p. 5, available at http://www.cohre.org/store/attachments/COHRE%20Report%20-%20Hostage%20to%20Politics.pdf.

[672] COHRE and Badil, *Ruling Palestine* , 91.

water to Palestinians in the West Bank[673] although it reduces Palestinian supply by 15–25 percent during the summer in order to meet consumption needs in Israel and the settlements.[674] The Palestine Water Authority must purchase water from Mekorot, which is delivered through 25 connection points; this control enables Israel to cut water supplies to Palestinians as was threatened in 2006 in the Bethlehem area.[675]

These policies reveal a pattern of discrimination in which Palestinians are systematically disadvantaged. In the West Bank, some 215,000 Palestinians now live in over 200 communities that are not connected to a running water network.[676] As a result, they are forced to rely on harvesting rainwater and water purchased from expensive, privately owned water tankers. The *Bertini Report* notes that such water tankers 'are subject to extensive restrictions on movement imposed by checkpoints and roadblocks throughout the West Bank. In some cases, water tankers are not permitted access to villages for several days.'[677] By contrast, all 149 Jewish-Israeli settlements established in the OPT with the approval and support of the Israeli government are connected to a running water network. Israel's superior pumping capacity also enables it to exercise control of water resources emanating from across the Western Aquifer Basis, which runs under both Israel and the West Bank. This helps to maintain the 'skewed' water distribution with an average of 363 mcm (million cubic metres) for Israel and 22 mcm for Palestinians.[678]

c. Impact of the Oslo Accords on Water Allocation and Control

Under the 1995 Israeli-PLO interim agreement, partial responsibility for water allocation passed to the Palestinian Water Authority.[679] Although the Oslo Accords included measures that would supposedly make access to water more equitable, in effect they consolidated Israeli control over water in the OPT, through several measures.

First, Oslo II ensured that Israel would continue to regulate the water supply.[680] Shares would remain unchanged: the Israeli population would continue to consume 87 percent of the two underground

[673] UN General Assembly, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, UN Doc. A/61/500/Add.1, 8 June 2007, §29.

[674] Palestinian Hydrology Group, *Water for Life, Continued Israeli Assault on Palestinian Water, Sanitation and Hygiene During the Intifada* (PHG, Ramallah, 2006), p. 13. The remainder is supplied by the statutory Palestinian Water Authority, by water departments of Palestinian municipalities and village councils and by independent public bodies such as the Jerusalem Water Undertaking.

[675] Ibid.

[676] See UN General Assembly, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, UN Doc. A/61/500/Add.1, 8 June 2007, §.30.

[677] Catherine Bertini, 'Personal Humanitarian Envoy of the UN Secretary-General' *OPT Mission Report*, August 2002, §45.

[678] Ibid.

[679] See *The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* (Oslo II), 1995, Annex III, Protocol Concerning Civil Affairs, Article 40. One of the primary ways through which the Israeli authorities maintain control of Palestinian water resources is by virtue of their effective veto in the Joint Water Committee established by Water Committee. See, for example, Clemens Messerschmid, *Hegemony and Counter-Hegemony over Shared Aquifers: The Palestinian Experience*, presented at the Third International Workshop on Hydro-Hegemony, London School of Economics, May 2007.

[680] Jan Selby, 'Dressing up Domination as Cooperation: The Case of Israeli-Palestinian Water Relations' (2003) 29 *Review of International Studies* 121,131. See also Birgit Schlutter, 'Water Rights in the West Bank and in Gaza' at 621-644.

water aquifers of the West Bank while Palestinians would continue to consume 13 percent.[681] Palestinians remained purchasers of water and confronted discriminatory pricing which favoured Israeli settlers, who benefit from highly subsidized rates.[682]

The following table shows the division of water from the three sub-aquifers comprising the Mountain Aquifer as provided for in the Interim Agreement and in effect as of 2000:[683]

Division/Aquifer	**Israel (incl. settlements)**		**Palestinian Authority**	
	m^3	Proportion	m^3	Proportion
West	350	94%	22	6%
North	105	70%	45	30%
East	40	37%	67	63%
Total	**495**	**79%**	**134**	**21%**

Second, the Interim Agreement established a Joint-Water Committee (JWC), composed of equal numbers of Israeli and Palestinians, whose decisions were to be made by consensus.[684] Supposedly a positive reform for Palestinians, the consensus provision enables either side to veto any proposal including alterations to the *status quo ante*.[685] In this role, Israel has agreed only to those proposed Palestinian water projects that draw from the small Eastern Aquifer, while vetoing projects which would draw from the major Western Aquifer and approving Palestinian development projects from the Eastern Aquifer only if the Palestinians agree to Israeli demands to construct new and enlarged water supplies systems for its settlements.[686] Concomitantly, Israel conducts water projects that serve the settlements even when the Palestinian side, exercising its right of veto through the JWC, votes against such proposals.[687] As a result, water allocations continue disproportionately to favour Jewish settlers and to serve the growth and consolidation of settlements while stunting Palestinian agriculture.

Third, although the Palestinian Water Authority has technical authority over West Bank wells, regulatory authority and ultimate control over supply and allocations reside with Israel. Decisions about allocation to Israeli settlers or Palestinian villages are still made by the Israeli Civil Administration.[688] Military orders (enacted prior to Oslo) allow the Israeli military authorities to veto even those water projects approved by the JWC. Palestinian permits for digging wells for agriculture use are routinely denied,[689] although permits are sometimes given for expanding existing wells for

[681] Figures derived form Israel and the PLO Interim Agreement, Annex III, Appendix 1, Schedule 10.

[682] Jan Selby, 'Domination as cooperation', p. 132.

[683] See B'Tselem, *Thirsty for a Solution: Resolving the Water Crisis in the West Bank in the Occupied Territories and its Resolution in the Final-Status Agreement* (Jerusalem, B'Tselem, 2000), p. 30, based on The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), 1995, Annex III, Schedule 10, *Data Concerning Aquifers*.

[684] Israel and the PLO, Interim Agreement on the West Bank and Gaza Strip (Washington DC, 28 September 1995), Annex III, Appendix 1, Article 40(13,14).

[685] Israel and the PLO Interim Agreement, Annex III, Appendix 1, Schedule 8 (1.b) as cited in Selby, p. 15

[686] Selby, 'Domination as cooperation', p. 135.

[687] Ibid., p. 137.

[688] Mark Zeitoun, *Power and Water in the Middle East,: the Hidden Politics of the Palestinian-Israeli Water Conflict* (I.B. Tauris, London 2008), pp. 51-52.

[689] Ibid.; also Btselem, *Thirsty for A solution*, p. 42: available at: http://www.btselem.org/Download/200007_Thirsty_for_a_Solution_Eng.doc.

domestic use.[690] In some parts of the West Bank, such as the southern Hebron Hills, permits are denied even for building cisterns.[691]

In the Gaza Strip, water demand still far outweighs the recharge rate of the Gaza Aquifer. Over-extraction by the Occupying Power has caused a deterioration of water quality, including high levels of salination from sea water intrusion. The partial natural replenishment of the Gaza Aquifer by the Wadi Gaza (flowing from the Hebron Hills in the West Bank) has been halted by Israel's construction of an earthen verge in between, diverting the natural run-off and further entrenching separation of the Gaza Strip from the West Bank. By January 2008, 40 percent of the houses in the Gaza Strip had no running water.[692]

Israel's general blockage of supplies is also preventing Palestinians from accessing and managing what water they have. In 2008, the Coastal Municipal Water Authority, the authority responsible for the water wells and infrastructure, was struggling to maintain wells and sewage pumping stations due to lack of supplies and fuel necessary to operating the system.[693] Water infrastructure projects, funded by the international community, have been put on hold for lack of spare parts, valves and waste-water pumps.[694]

Far from meeting Palestinian needs, Israel's water policy in the OPT is causing 'de-development' in the OPT. A United Nations study found that daily Palestinian consumption per capita in the West Bank and Gaza Strip in the late 1980s was 139 litres and 172 litres respectively.[695] In 2006, the total per capita daily water consumption for domestic, urban and industrial use by Palestinians in the West Bank and Gaza Strip was 60.5 litres[696] and 88 litres[697] respectively.

By comparison, per capita consumption by Israeli settlers in the West Bank is 274 litres; in the Gaza Strip, prior to their removal, it was 584 litres.[698] Discrimination in water consumption is not limited to domestic, urban and industrial use. While up to 14 percent of the OPT's GDP is derived from agriculture, 90 percent of Palestinian farms are forced to rely on rain-fed methods due to their lack of access to water. In the 1990s, areas irrigated by Israeli settlers were, per capita, thirteen times larger than the areas Palestinians were able to irrigate in the West Bank.[699] Israeli settlements in the Jordan Valley are particularly dependent on intensive irrigation for agriculture. When they had a settler population of approximately 5,000, these settlements were found to 'consume an equivalent of 75 percent of the water that the entire West Bank Palestinian population of approximately two million consumes for domestic and urban uses.'[700] In the Gaza Strip, prior to Israel's 'disengagement',

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[690] COHRE, *Hostage to Politics*, p. 91.

[691] Amnesty International, *Unlawful Homes*, p. 76.

[692] Ibid., p. 2.

[693] COHRE, *Hostage to Politics*, p. 10.

[694] Ibid., p. 4; also OCHA, *Special Focus, The closure of the Gaza Strip: The economic and Humanitarian Consequences*, available at: http://www.ochaopt.org/documents/Gaza_Special_Focus_December_2007.pdf.

[695] See UN Committee on the Exercise of the Inalienable Rights of the Palestinian People, *Water Resources of the Occupied Palestinian Territory* (New York: United Nations, 1992), Table 6: Estimates of the total and per capita annual water consumption in the occupied Palestinian territory and Israel, mid-1980s.

[696] B'Tselem, *Thirsty for a Solution*, 2006. Figure is exclusive of the East Jerusalem area of the West Bank.

[697] Ibid., p. 54. The World Health Organisation's recommended minimum quantity for basic consumption is 100 litres (p. 57).

[698] Ibid., p. 56.

[699] See Foundation for Middle East Peace, *The Socio-Economic Impact of Settlements on Land, Water, and the Palestinian Economy*, Vol. SR No. 5, July 1998.

[700] Note by the Secretary-General, *Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab*

unlawful exploitation, unequal extraction and discriminatory distribution of water resources in favour of settlers were similarly salient features. At one point Palestinians in Gaza were paying up to twenty times more for water than Israeli settlers.[701]

d. Impact of the Wall on Palestinian access to water

Israel's construction of the Wall in the West Bank suggests Israel's intent to annex Palestinian water sources permanently since 70 percent of the Western Aquifer recharge area is located in this 'seam zone' between the Wall and the Green Line.[702] The impact on Palestinian access to water has been immense:

> The construction of the barrier has closed off the access of Palestinians to 95 per cent of their own water resources (630 million m³ of 670 million m³ annually) by destroying 403 wells and 1,327 cisterns. It has cut off access of owners to 136 wells providing 44.1 million m³ of water annually. The barrier has closed 46 springs (23 million m³/year) and 906 dunums of underground water (99 per cent of underground West Bank water). Consequently, over 7,000 Palestinian agriculture-dependent families have lost their livelihood in a region where water resources are scarce and increasingly costly to develop. The latest barrier route will isolate another 62 springs and 134 wells in the 'seam zone'.[703]

That the Wall indeed is designed to capture water resources is suggested by its route, which is very similar to former Israeli water commissioner Menachem Cator's 'red line,' drawn at the request of the government in 1977 to delineate the areas of the West Bank from which Israel could withdraw without having to relinquish its control over key water sources used to supply Israel and the settlements.[704] The Wall will help annex to Israel major Israeli settlements in the OPT that are strategically located over key water resources for the purposes of control. The major settlements of Ariel and Emmanuel in the northern West Bank, for example, sit directly over the Western Aquifer

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population in the occupied Syrian Golan, A/61/67, E/2006/13 (3 May 2006), 12-13, para.47. This statistic is drawn from a B'Tselem report which notes that these settlements had an approximate population of 5000, compared to a Palestinian population of two million—see B'Tselem, *Land grab: Israel's settlement policy in the West Bank* (B'Tselem: Jerusalem: 2002), p.95. See also Note by the Secretary-General, *Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan*, A/62/75, E/2007/13 (3 May 2007), p.12, para. 40-41; Note by the Secretary-General, *Report of the Special Committee to investigate Israeli practices affecting the human rights of the Palestinian people and other Arabs of the Occupied Territories*, A/61/500/Add.1 (8 June 2007), 10, paras. 29-30; Office for the Coordination of Humanitarian Affairs, *The humanitarian impact on Palestinians of Israeli settlements and other infrastructure in the West Bank* (July 2007) 114, available at: http://www.ochaopt.org/documents/TheHumanitarianImpactOfIsraeliInfrastructureTheWestBank_full.pdf ; the World Bank, *Two years after London: restarting Palestinian economic recovery* (24 September 2007), pp. 22-23, para. 64, available at: http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/AHLCMainReportfinalSept18&cover.pdf ; B'Tselem, *Thirsty for a solution: the water crisis in the Occupied Territories and its resolution in the final-status agreement* (Jerusalem: B'Tselem, 2000), especially Chapters 3-5.

[701] COHRE, *Hostage to politics*, pp. 5-6.

[702] Palestine Monitor, *Fact Sheet: Water*, available at: http://palestinemonitor.org/spip/spip.php?article14.

[703] UN Economic and Social Council, *Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population of in the occupied Syrian Golan*, UN Doc. A/62/75-E/2007/13, 3 May 2007, §. 40.

[704] See David Arsenault and Jamie Green, 'The Effects of the Separation Barrier on the Viability of a Future Palestinian State,' in Israel/Palestine Centre for Research and Information, *Second Israeli-Palestine International Conference on Water for Life in the Middle East* (Atalya, Turkey, 10-14 October 2004), available at: http://www.ipcri.org/watconf/papers/daniel.pdf.

and the Israeli government has indicated that these settlements will be annexed permanently to Israel. Permanent acquisition of the land and water resources of these areas would constitute annexation and thus a practice of colonialism.

The measures taken by Israel, in law and in practice, regarding division, distribution and accessibility to water in the OPT indicate a pattern of denying human rights and exploiting the occupied territory for the benefit of the Occupying Power. Israel's water policies discriminate acutely in favour of Israeli settlers, and violate not just the Palestinian population's right to water, but a plethora of other rights including the rights to health, to an adequate standard of living, and, most significantly for this section of the study, to permanent sovereignty over natural resources.

5. Suppression of Palestinian Culture

'Culture' eludes simple definition and is not easily codified, as its most valued elements may be experienced by people as intangible. A collective experience of cultural destruction and loss is nonetheless, for colonised peoples, a hallmark of the colonial experience. Most international law and norms relating to culture are either vague—the Declaration mentions 'cultural rights' but does not specify what they are—or relate to very specific practices like language and material culture such as art and religious sites.[705] As a comprehensive discussion of this complicated field is beyond the scope of this study, this section will only touch on these concerns where they appear to correlate to a colonial project in the OPT. Under The Hague Regulations and customary international law, cultural property is singled out for protection during military occupation, such that its destruction, damage or threat is outlawed save under conditions of military necessity.[706] Similarly, an Occupying Power is expected 'to respect and safeguard cultural properties within the territory under occupation and prevent any misappropriation, theft, or vandalism directed against such properties.'[707]

Israel's military manuals include a ban on using cultural buildings of various kinds for military operations and place strict limitations on the use of places of cultural significance where their damage or destruction are likely as a result. Nonetheless, Israeli practice in the OPT displays a consistent lack of regard for cultural property. In particular, the protection and upkeep of religious buildings such as mosques,[708] churches and cemeteries have fallen under the complex web of Israeli military orders relating to land and its ownership. For example, the maintenance and construction of buildings in East Jerusalem and Area C of the West Bank requires a valid permit issued by an Israeli official acting as the registrar of lands and where the complicated and opaque procedures are not complied with, structures are often destroyed by the Israeli army or requisitioned for 'military purposes'.[709]

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[705] The most explicit statement on culture as an individual right expressed in Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (1966). Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries addresses cultural rights as collective rights by codifying a package of cultural rights associated with culturally distinct peoples living in post-colonial and other independent States.

[706] The Hague Regulations, Articles 27 and 56. Much of the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict is now regarded as customary as discussed in J. M. Henckaerts and L. Doswald-Back, *Customary International Humanitarian Law, vol 1: Rules* (Cambridge: Cambridge University Press, 2005), pp. 127-135.

[707] Howard M. Hensal, 'The Protection of Cultural Objects During Armed Conflicts', in Howard M. Hensal (ed.), *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Ashgate, 2007), pp. 39-104, 83.

[708] Perhaps the most prominent case over archaeology is Israel's recent excavations at the Haram al-Sharif/Temple Mount in Jerusalem. Both Palestinians and Israelis have accused the other of removing and/or damaging precious relics. See P. Reynolds, 'In Jerusalem Archaeology is Politics', BBC News (9 February 2007).

[709] See for example, Military Order No. 25, Order *Concerning Transactions in Property, and Related Laws*, 18 June 1967.

In an ironic use of provisions for respecting cultural heritage, amendments to the Jordanian Antiquities Law have enabled Israeli officials to categorise large tracts of land in the OPT as 'archaeological' in nature and to prohibit landholders from building on lands without a special permit.[710] No proof or documentary evidence is required for such decisions. As this land is often turned over to Jewish settlers,[711] the declaration of heritage sites manifests as being less for their historical preservation than for their transfer to Jewish authority. Moreover, such sites are valued and protected by Israel primarily for their Jewish and Hebrew history, rather than their Islamic, Christian, Palestinian, and Arabic history.

Israeli has also engaged in the renaming of towns, cities and regions in the OPT in a project to redesign and Hebraize the cognitive map of the region.[712] Discriminatory linguistic policies were first applied extensively within the Green Line after Israel's establishment and were carried over into the OPT after 1967.[713]

Shortly after the West Bank was occupied in 1967, all printing, publishing and distribution of any material was brought under the purview of a designated person under the Military Commander. Military Order No. 50 requires a permit not only in relation to material produced within the OPT, but any materials brought from outside.[714] Further, under Military Order No. 107, the military issued a list of banned publications, including works on Arabic grammar, and histories of the Crusades and Arab nationalism.[715] Education that provides knowledge and training in cultural expression is also routinely impeded by various administrative and military measures of the Occupying Power.[716] These practices damage the Palestinian knowledge base for new generations hoping to participate in Palestinian political, economic and cultural life.

Palestinian cultural associations, often of a charitable nature, have also been closed down through vague references to 'terrorism' or 'public safety'.[717] Such closures hasten the erosion of the cultural life of the Palestinian people.

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[710] Raja Shehadeh, *The law of the land: settlements and land issues under Israeli military occupation* (1993), p. 86.

[711] For an example of this, see Shehadeh, *The law of the land*, p. 87.

[712] Meron Benvenisti, *Sacred Landscape: The Buried History of the Holy Land since 1948* (University of California Press, 2000), Chapter 3.

[713] On the situation inside Israel in particular, see Y. Suleiman, *A War of Words: Language and Conflict in the Middle East* (Cambridge: Cambridge University Press, 2004), Chapter 5.

[714] Military Order No. 50, *Order Concerning the Bringing and Distribution of Newspapers in the West Bank*, 11 June 1967.

[715] Military Order No. 107, *Order Concerning the Use of School Books*, 26 August 1967.

[716] At one point Israel controlled the admission and tenure of all primary, secondary and tertiary pupils and instructors, under Military Order No. 854, *Order Concerning the Law of Education no.16 for the Year 1964* (Amendment) (Judea and Samaria) (854), 1980. Although control over the education system was transferred to the Palestinian Authority in 1994, the military orders discussed are still in force and can be used by the Occupying Power at any time.

[717] For example in occupied Jerusalem alone 80 associations of a political, cultural, media, social or economic nature have been closed on the grounds of 'public safety'. See *Human Rights Bulletin for Jerusalem*, Vol 2(1), February 2008, p.4. In relation to the recent closure and property destruction and appropriation of charities and orphanages in Hebron on the basis of alleged links to Hamas, see Al-Haq, 'Defence for Children International et al' 24 April 2008, *NGO statement on closure of Islamic Charities in Hebron*, available at: http://www.dci-pal.org/english/display.cfm?DocId=740&CategoryId=1. See also 'Thousands Protest in Hebron against Charity Closures', *Ha'Aretz* (27 March 2008), available at: http://www.haaretz.com/hasen/spages/969278.html.

C. The Principle of Good Faith and the Duty not to Frustrate

The Oslo Agreements afforded Israel jurisdiction over the OPT in many ways, including the Jewish settlements and connecting roads in the West Bank and Gaza. Nevertheless, Israel is obliged to act in good faith and exercise its jurisdiction in a manner that does not defeat the object and purpose of pursuing negotiations to reach agreement on the permanent status of the OPT.

Israel's continuing activities, particularly in relation to its control over the land, economy, and natural resources of the occupied Palestinian territories, breach its good-faith duty not to frustrate negotiations on permanent status issues or to pre-empt their outcome. These actions demonstrate an intention by Israel to consolidate its hold on the occupied Palestinian territories in order to perpetuate the denial of the exercise of self-determination on the part of the Palestinian population, in a manner which constitutes colonialism as prohibited under international law.

This is clearly the case with East Jerusalem, which Israel has annexed. This measure breaches not only the law of occupation, which prohibits annexation, but also the more general prohibition of the annexation of territory acquired through the use of force, which has peremptory status. The measure has denied East Jerusalem's indigenous population the free expression of its right to self-determination by denying the opportunity to decide its political status and freely pursue its economic, social and cultural development. Thus it is a flagrant breach of the prohibition of colonialism.

A broader expression of Israel's colonial intent is its settlement policy in the West Bank. In the Revised Disengagement Plan of 6 June 2004, Israel claimed that, although implementation of this Plan would divest Israel of any continued responsibility for Gaza, in contrast:

> it is clear that in the West Bank, there are areas *which will be part of the State of Israel*, including major Israeli population centers, cities, towns and villages, security areas and other places of special interest to Israel.[718]

Israel's self-proclaimed intention to annex areas of the West Bank could not be clearer. It is manifestly analogous to the:

> practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political or racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.[719]

The colonial nature of this enterprise is evidenced not merely by the physical fact of settlement but also the by associated legal regime that extends Israeli civil law and Basic Law extra-territorially to West Bank settlers on a personal basis, rather than subjecting them to the local law. As noted above, instituting separate legal regimes to govern settlers and the indigenous population is one characteristic of colonialism.

Furthermore, the fact of prolonged occupation has been employed to justify legislative action that surpasses the limits of Israel's authority as prescribed by Article 43 of the Hague Regulations. On occasion, this authority has been used to effect changes that should be expected to endure beyond the end of occupation, such as the construction of infrastructure integrating Israel and the occupied territories: for example, the highway, electricity and water grids. Justice Barak stated the rule governing the legitimacy of these measures in the following terms:

> Long-term fundamental investments in an occupied area bringing about permanent changes that may last beyond the period of the military administration are permitted if required for the benefit of the local population—provided there is nothing in these investments that might introduce an essential modification in the basic institutions of the area.[720]

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[718] Revised Disengagement Plan, Section 1 (*Political and Security Implications*), Principle Three, emphasis added.

[719] Pictet, Convention IV, *Commentary to Article 49*, p. 283.

[720] *A Cooperative Society Lawfully Registered in the Judea and Samaria region* v. *Commander of the IDF*

In response, Professor Kretzmer has commented that this 'public benefit' approach was: 'intimately connected to political objectives and interests. The model applied by Justice Barak is reminiscent of a colonial model of governors who know what is best for the natives'.[721]

On other occasions, the 'prolonged occupation' doctrine has been employed to support changes in the legal system of the occupied territories that mirror Israeli legal conceptions. The most far-reaching such change was the integration of the two economies through the assimilation of tax regimes and the eradication of customs barriers between Israel and the occupied territories. As President Shamgar observed in *Abu Aita*:

> Economic integration—as a compelling motive for introducing the tax—was obviously a dominant factor in all decisions having implications on the economic relations between Israel and the territories.[722]

Moreover, these measures were not taken for the benefit of the occupied territories per se, but were rather determined by Israel's own economic interests, namely, its association agreement with the European Communities:

> Israel's association with the Common Market made its introduction especially important as a side effect of the removal of customs barriers between the members of the EEC and Israel, a matter which understandably had direct repercussions in the territories. The integration of Israel into the EEC and the reduction of customs duties that followed in its steps automatically obligated, the existing political and economic situation, the imposition of the tax, which was present in all the countries of the Market, and the changing of customs duties.[723]

Only if Israel intends to continue to consolidate its control of the OPT would the economic benefits arising under the association agreement need to be secured in this manner. As Benvenisti observes, economic integration may simply act as an incentive for the occupation to continue.[724] In any event, Israel's policy breaches the requirement that an Occupying Power keep separate its own economy from that of territory it occupies.

Further, Israel's policy of integrating the two economies indicates an intention to annex the territory as part of a policy of colonialism. As Feilchenfeld concludes, an occupant may not create a customs union between its territory and occupied territory because 'this almost invariably would be an intrinsic measure of complete annexation which a mere occupant has no right to effect'.[725] Imposing an economic policy that serves the interests of the occupying State yet denies the population of the occupied territory the exercise of the right to determine and pursue, without external interference, its own economic development is in itself, under contemporary international law, a denial of self-determination, and constitutes colonialism.

In tandem with these practices of annexation and economic integration, other Israeli practices in the OPT also constitute elements of colonialism. A characteristic feature of colonialism is the exploitation of the natural resources for the benefit of the colonising power. Apart from the exploitation of land for agriculture and industry, Israel exploits the water resources of the OPT for the benefit of its home population and for the benefit of its settlements. Not only does this policy breach the legal restrictions placed on Occupying Powers in their use of the natural resources of occupied territory (which are only to be exploited for the use of the occupying forces), it also breaches the principle of permanent sovereignty over natural resources. This is a major component of the economic aspect of self-

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Forces in the Judea and Samaria Region et al' (1984) 14 *Israel Yearbook on Human Rights* 301 at 310.

[721] Kretzmer, *Occupation of justice*, p. 70.

[722] *Abu Aita*, 317/101/138, para. 51.

[723] Ibid., para. 51.

[724] Benvenisti, *Occupation*, p. 144.

[725] Feilchenfeld, p. 83.

determination. Thus, by denying the occupied population the right freely to determine the use of its essential natural resources, Israel also denies it the enjoyment of this element of self-determination. In this regard, the route chosen for the West Bank Wall can only be evidence of a colonial intent. It not only enfolds settlements, to secure the control of land, but also follows the 'red line' and thus delineates the areas of the West Bank from which Israel might withdraw or cede control without having to relinquish the key water resources used to supply Israel and the settlements.

As the dominant power, Israel has the political and military force to determine the outcome of the permanent status negotiations and thus the eventual political status of the occupied Palestinian territories. Its efforts to maintain control over territory and natural resources for its own benefit evince a disinclination to fulfil its good faith obligation not to frustrate or pre-empt the outcome of these negotiations. It thus fails in its duty to promote the realisation of the Palestinian people's right to self-determination: on the contrary, its practices impede this process. This conscious denial of the right to self-determination constitutes the implementation of a colonial policy.

C. Conclusion

This Chapter has demonstrated that Israel's practices in the occupied Palestinian territories constitute colonialism. Although international law provides no single decisive definition of colonialism, for the purposes of this study it is understood that a situation may be classified as colonial when the acts of a State have the cumulative outcome that it annexes or otherwise unlawfully retains control over territory and thus denies the indigenous population the exercise of its right to self-determination. This Chapter has reviewed five issues that are not only unlawful in themselves but that, taken together, makes evident Israel's colonial domination of the OPT: violations of the territorial integrity of occupied territory; depriving the population of occupied territory of the capacity for self-governance; integration of the economy of occupied territory into that of the occupant; breach of the principle of permanent sovereignty over natural resources in relation to the occupied territory; and cultural domination.

Israel's purported annexation of East Jerusalem is manifestly an act of colonial intent. This is unlawful in itself as annexation breaches the principle underpinning the law of occupation that this is only a temporary situation that does not act to vest sovereignty in the Occupying Power, but annexation also breaches the legal prohibition on the acquisition of territory through the use of force. This prohibition has peremptory status as it is a corollary of the prohibition on the use of force in international relations enshrined in Article 2.4 of the UN Charter. The same may also be said of Israel's acquisition of territory for the purposes of the construction of settlements, the Wall, and roads whose use is denied to Palestinians in the West Bank. By these acts, Israel has violated the territorial integrity of the OPT.

The physical control exercised over these areas is complemented by the administration that Israel exercises over the OPT which prevents its protected population from freely exercising political authority over that territory. This determination is unaffected by the conclusion of the Oslo Accords and the creation of the Palestinian National Authority and Legislative Council. The devolution of power to these institutions has only been partial, and Israel retains ultimate control. By preventing the free expression of the Palestinian population's political will, Israel has violated that population's right to self-determination.

The law of self-determination further requires a State administering a non-self-governing territory to keep that territory separate from its own in order to prevent its annexation. Similarly, it is also required to keep their economies separate. In addition, this is mandated by the law of occupation. Israel has consciously integrated the economies of the OPT within its own in breach of its obligations under international law. In particular, the creation of the customs union between Israel and the OPT is a measure of prohibited annexation. By virtue of the structural economic measures it has imposed on the OPT, Israel has violated the Palestinian population's right of self-determination and its duties as an occupant.

The economic dimension of self-determination is also expressed in the right of permanent sovereignty over natural resources, which entitles a people to dispose freely of its natural wealth and resources within the limits of its national jurisdiction. Israel's settlement policy and the construction of the road network and the Wall have deprived the Palestinian population of the control and development of 38 percent of West Bank land. It has also implemented a water management and allocation system that favours settlers to the detriment of the Palestinian population. Not only is this contrary to the lawful use of natural resources in time of occupation, which is limited to the needs of the occupying army, but it is also contrary to international water law as the allocation employed is both unjust and inequitable. Moreover, it is significant that the route of the Wall is similar to the 'red line' that delineates those areas of the West Bank from which Israel can withdraw without relinquishing its control over key water resources that are used to supply Israel and the settlements. By its treatment of the natural resources of the OPT, Israel has breached the economic dimension of self-determination, the right of permanent sovereignty over natural resources.

Finally, self-determination also has a cultural component: a people entitled to exercise the right of self-determination has the right freely to determine its cultural development. Israel practices privilege the language of the occupier, while hampering the educational and cultural development of the Palestinian population. This is the last issue that makes Israel's denial of the right to self-determination in the OPT comprehensive.

In his January 2007 report on the human rights situation in the occupied Palestinian territories, Professor Dugard suggested that elements of the occupation were, at the very least, redolent of colonialism. This study has demonstrated that the implementation of a colonial policy by Israel has not been piecemeal but is systematic and comprehensive, as the exercise of the Palestinian population's right to self-determination has been frustrated in all of its principal modes of expression.

Chapter IV

Review of Israeli Practices relative to the Prohibition of Apartheid

PART I: INTERPRETATION AND THE CHAPEAU OF ARTICLE 2

(I) A. Prohibitions of Apartheid in International Law

To assess whether the State of Israel is practising apartheid in the occupied Palestinian Territory (OPT), this report draws principally on the definition of apartheid contained in the International Convention on the Suppression and Punishment of the Crime of Apartheid (hereafter, Apartheid Convention).[726] Chapter I outlined the Convention's history and its relationship to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), confirmed that the prohibition of apartheid is a customary *jus cogens* norm creating obligations *erga omnes*, and established that, having ratified ICERD, Israel is obliged under Article 3 to 'prevent, prohibit and eradicate' racial segregation and apartheid in territories under its jurisdiction.

The definition of apartheid in the Apartheid Convention is contained in Article 2 and reads in full as follows:

> For the purpose of the present Convention, the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:
>
> (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
>
> (i) By murder of members of a racial group or groups;
>
> (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
>
> (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
>
> (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
>
> (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
>
> d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
>
> (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

[726] Convention on the Suppression and Punishment of the Crime of Apartheid (1973), entered into force 18 July 1976, 1015 U.N.T.S. 243.

> (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

This chapter addresses in two parts the general components of this definition: the chapeau (first main paragraph), which establishes the purpose for which acts of apartheid are practiced, and the list of 'inhuman acts' that follows. Part I addresses four general objections that might be raised in applying the terms of the chapeau to Israel's regime of occupation in the OPT: that Jews and Palestinians are not racial groups and so their relations cannot be understood within the ambit of apartheid; that Israeli domination of Palestinians is not on the basis of race but rather citizenship; that Israeli's practices are not 'committed for the purpose of establishing and maintaining domination' over Palestinians but are calculated only to defend Israel from a security threat; and that the Apartheid Convention cannot be applied outside of southern Africa. Part I also offers an overview of apartheid in southern Africa as a framework for later comparative discussion of specific practices. Part II then conducts a categorical survey of Israel's practices in light of the six categories of acts cited in the Apartheid Convention.

(I) B. Race and Racial Discrimination in International Law

The Apartheid Convention defines apartheid as a system of domination and oppression by 'one racial group over any other racial group or groups'. The Rome Statute of the International Criminal Court also defines apartheid as 'an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups'.[727] This language could be interpreted to indicate that Jews and Palestinians must first be identified as 'racial groups' in order to test for a regime of apartheid. Since the question of race is especially sensitive in this context for historical reasons, it must be approached here with due care.

Until recently, international human rights law did not define race or clarify by what criteria groups should be understood as racial groups, ethnic groups or national groups. The United Nations Charter (1945), the Universal Declaration of Human Rights (1948) and ICERD all prohibit discrimination on the basis of race as well as other identities, but none defines 'race' itself. In Article 1(1), ICERD lists 'race' is one of several group identities that can be a basis for 'racial discrimination':

> the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on *race, colour, descent, or national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. [Emphasis added]

Thus, ICERD provides a broad construction of the term 'racial' to encompass a wide range of group categories against which discrimination is prohibited. The Apartheid Convention invokes ICERD in its preamble and defines apartheid to 'include similar policies and practices of racial segregation and discrimination as practised in southern Africa'. This reference to ICERD can be understood as indicating that the Apartheid Convention may be interpreted as applying to a system of institutionalised domination and oppression by one racial group over another in a broad sense and need not be limited to a narrow construction of 'race'.

This interpretation is supported by changing meanings and usages of the term 'race'. The term 'race' was once considered an acceptable synonym for 'people' or 'nation'.[728] In the late-nineteenth century, race was developed as an off-shoot of European colonial discourse as a pseudo-scientific way to categorise the human species. Since the mid-twentieth century, when both these usages were finally discredited, races have become understood as identities that are socially constructed in each local

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[727] *Elements of Crimes*, ICC-ASP/1/3(part II-B), entered into force 9 September 2002, Article 7(1)(j), Element 4.

[728] Argentine nationalist Jose Ingenieros reflected this general usage when he wrote in 1915 that, 'to say nation, is to say race; national unity is not equivalent to political unity, but to spiritual and social unity, to national unity': 'La formación de una raza argentina' (1915) 11 *Revista de Filsofía* at 146.

setting and the term 'race' has fallen out of common use, except where speaking of racial discrimination. Contemporary theory of race now understands racial discrimination as resulting from 'racial formation', in which a dominant group constructs a subordinate population as one racial category for the purpose of ensuring its political marginalisation and economic subordination.[729] Regarding groups that in earlier eras were called 'races', the term 'race' has been replaced by terms considered more scientifically and socially 'correct', such as 'ethnicity' or 'nationality': thus Serbs, Bosnians, and Roma are now called ethnicities or nationalities rather than 'races'.[730]

A change in terminology by itself does not necessarily ameliorate racial discrimination. The switch to a term like 'ethnicity' may even be made principally to disguise or deny persistent discrimination.[731] Consequently, whether groups are functioning socially as 'racial groups' (in the sense of imposing or being subjected to racial discrimination) cannot be determined reliably by whether they are called 'races' in the local setting but must be determined by observing whether relations between the groups reproduce the practices of domination and oppression associated with racial discrimination.

(I) B.1. The Politics of Racial Terminology in South Africa

Practices in apartheid South Africa illustrate the need to approach racial identity as a social construction and also how the labels for group identities can be interchangeable and even manipulated. Superficially, the racial system constructed by the apartheid government was clinical and definitive. The Population Registration Act 30 of 1950 classified South Africans as 'white', 'Coloured' or 'Native.'[732] Proclamation 46 of 1959 further divided the 'Coloured' group into 'Cape Coloured', 'Cape Malay', 'Griqua', 'Indian', 'Chinese', 'other Asiatic' and 'other Coloured'. The consequences of classification were immense, as it determined the daily reality of each person's life. So-called 'petty apartheid' was the strict segregation of these groups in public facilities and space, such as South Africa's beaches, according to race. The Reservation of Separate Amenities Act 49 of 1953 required the provision of separate buildings, services and conveniences for the different racial groups.[733] By the end of the 1950s, the use of all public facilities, from stations and post offices, to park benches and public toilets, was strictly controlled according to the race of the person wishing to use the particular facility. Signs indicated which seat, or entrance, or cubicle, or beach was reserved for the use of this or that particular racial group. The system generated peculiar special arrangements: for example, black nursemaids were allowed on a 'whites only' beach if they were tending white children.

At a practical level, various pseudo-scientific 'tests' were used to determine a person's race:

> Fingernails have been examined. Combs have been pulled through people's hair: if the comb is halted by tight curls, the person is more likely to be classified Coloured than white. In July

[729] See especially Michael Omi and Howard Winant, Racial Formation in the United States: From the 1960s to the 1990s' (New York: Routledge, 1994); also the collected studies in Paul Spickard (ed.), *Race and Nation: Ethnic Systems in the Modern World* (New York: Routledge, 2005).

[730] Recognition that race was a concept in flux inspired UNESCO to solicit essays in 1950, 1951, 1965 and 1967, issued in 1969 as *Four Statements on the Race Question* (COM.69/II.27/A, available at: http://unesdoc.unesco.org/images/0012/001229/122962eo.pdf. See David Keane, *Caste-based discrimination in international law* (Ashgate, 2007), pp.162-168. On evolving concepts of race and ethnicity, see also Michael Omi and Howard Winant, *Racial Formation in the United States: From the 1960s to the 1980s* (Routledge, 1986); Kenan Malik, *The Meaning of Race: Race, History, and Culture in Western Society* (New York University Press, 1996); and works by Anthony D. Smith, especially his classic, *The Ethnic Origin of Nations* (Blackwell1986).

[731] See Virginia Tilley, 'Mestizaje and the 'Ethnicization of Race in Latin America', in Paul Spickard (ed.), *Race and Nation: Ethnic systems in the Modern World* (New York and London: Routledge, 2005).

[732] The term 'Native' was later changed to 'Bantu' and later still to 'black'.

[733] Roger Omond, *The Apartheid Handbook – Second Edition* (Harmondsworth: Penguin Books, 1986), , p. 53.

> 1983 an abandoned baby, named Lise Venter by hospital staff, was found near Pretoria. To classify her by race, as the Population Registration Act demands, a strand of her hair was examined by the Pretoria police laboratory: she was then classified Coloured.[734]

Yet the registry system and its identity tests laboured to administer a population with a full spectrum of physical features and pseudo-scientific methods generated endemic social confusion. Members of an extended family could be classified as belonging to different races. Parents classified as black could be told their children were coloured and must therefore live in a separate area. Children of the same parents might be given different classifications. Couples of different race groups (who had married before such unions were declared illegal) could find their children assigned indiscriminately to several other groups. A Race Classification Board took the final decision on disputed cases. Applications for changes in categories resulted in so-called 'chameleons', who were formally authorised to have changed racial identity.

South African tests to determine an individual's race did not solely use physical indicators, however, but included 'general acceptance' and 'repute'. Definitions of the racial groups in the Population Registration Act of 1950 included both 'appearance' and social 'acceptance':

> A White person is one who is in appearance obviously white – and not generally accepted as Coloured – or who is generally accepted as White – and is not obviously Non-White, provided that a person shall not be classified as a White person if one of his natural parents has been classified as a Coloured person or a Bantu ... A Bantu is a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa.

That the term 'race' might be replaced by 'ethnicity' to obscure ongoing policies of racial discrimination was illustrated by 'Grand Apartheid' in South Africa. Apartheid was incontestably a racial system, but in the 1970s the apartheid government tried to deny this, affirming that the black population was actually divided into various 'ethnic' groups that properly constituted separate nations —Zulu, Xhosa, Venda, Tswana, Sotho, and so forth— which were defined by the white government according to various linguistic, cultural, historical and geographic criteria.[735] This switch in terminology served two functions. First, it supported the white government's claims that South Africa did not have a 'black' African majority, as the white population was larger than any one black ethnic group. Second, it supported the apartheid government's argument that each black ethnic 'nation' would properly exercise its right to self-determination in a titular Homeland, also defined and delineated by the white government, thus allowing white (actually, Afrikaner) self-determination to be exercised in the rest of South Africa.[736] The African National Congress always rejected this ploy, insisting that linguistic and cultural differences among the black population must not be politicised and that black political unity must be maintained to combat racial domination and oppression.

(I) B.2. Interpreting Identity: The International Criminal Tribunals

The inherent difficulty of adjudicating group identities confronted the International Criminal Tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR). Even legal classification on identity documents—particularly relevant in the case of the Rwandan genocide—was found to be not entirely reliable.

The ICTR, in the seminal *Akayesu* case, attempted to establish meanings for national, ethnical, racial or religious identities, as these are listed in Article 2 of its Statute (based on the 1948 Genocide Convention). The Tribunal held that a national group is 'a collection of people who are perceived to

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[734] Omond, *The Apartheid Handbook*, p. 26.

[735] See discussion of the Population Registration Act in Part I.D(1), and Part II.G(2)(a), below.

[736] See discussion and description in TRC Report, Vol. 2, Ch. 5: see also discussion of Article 2(d) in section II.G(2)(a) of this chapter.

share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.'[737] An ethnic group was defined as 'a group whose members share a common language and culture'.[738] A religious group is one whose members 'share the same religion, denomination or mode of worship.'[739] A racial group is one that shares 'hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.'[740] (Regarding the category of national groups, the ICTR drew on an earlier ICJ case involving nationality,[741] but in social usage, the term 'nationality' may also refer to groups without States, such as nationalities in the former Soviet Union, or identities retained through generations, as, for example, the origins of immigrant populations. ICERD uses 'national origin' which suggests this wider meaning.[742])

The Tribunals recognised that none of these categories could be externally determined with any reliability. Rather, local *perceptions* of group identities were a determinative factor in identifying protected groups. Even where identities were codified in legislation and identity cards, [743] the ICTR Trial Chamber found that what mattered principally was whether the victims *considered* themselves as belonging to one of the protected groups, or whether the perpetrator *considered* them as belonging to one of the protected groups.[744] A 2005 ICTY judgment summarised this line of jurisprudence as follows:

> In accordance with the case-law of the Tribunal, a national, ethnical, racial or religious group is identified by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its *perceived* national, ethnical, racial or religious characteristics.[745]

The ICTR observed that, for all these identities, the protected group should be 'stable and permanent': membership is normally acquired by birth and is continuous, immutable, and not usually challengeable by its members.[746] This seemingly 'primordial' quality—that is, the identity is perceived to be passed down through generations and therefore to be mostly immutable in group members—is thus the common denominator of identities based on race, colour, descent, and national and ethnic origin: that is, the groups cited by ICERD as being targets of racial discrimination.

In conclusion, determining whether any group is a 'racial group' in the sense provided by the Apartheid Convention must begin from four premises. First, changing notions of race after the mid-twentieth century have mostly purged the term 'race' from social discourse even where racial

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[737] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998, Akayesu Trial Judgment, para. 511.

[738] Ibid, paras. 512.

[739] Ibid, para. 514.

[740] Ibid, para 513.

[741] The ICTR cited the *Nottebohm case: second phase judgment* (Liechtenstein v. Guatemala) 1955, ICJ Reps, 4.

[742]The United States Census, for example, groups 'race' and 'national-origin' as one category and specifies that these are self-identifications rather than externally determined: 2000 Census of Population and Housing: Profiles of General Demographic Characteristics (May 2001), available at: http://www.census.gov/prod/cen2000/dp1/2kh00.pdf.

[743] *Prosecutor v. Rutaganda*, paras. 400-1. See also the objective approach followed by the ICTR Trial Chamber in *Akayesu*, at para. 702.

[744] As the ICTR Trial Chamber made clear in *Prosecutor v. Rutaganda*, either the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, or the victim may perceive himself as belonging to the said group. See para. 56.

[745] *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, Case No. IT-02-60-T, Trial Judgement (TC), 17 January 2005, para. 667, emphasis added.

[746] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998, para. 511.

discrimination continues. Second, the group identities of ICERD—'race, colour, descent, or national or ethnic origin'—are all understood in international law to be identities normally acquired at birth and retained throughout a person's lifetime. Third, no absolute, measurable, and consistent criteria exist for distinguishing one of these identities from another, as the labels are frequently interchangeable and their use may be politicised. Fourth, racial identities are locally constructed: they emerge from economic and political relations in particular settings and do not necessarily hold for individuals across world regions.

Accordingly, the question for this study is not whether Jews and Palestinians are 'races' in the older (discredited) sense but whether Jews and Palestinians in the OPT comprise 'racial groups' in their local relation to each other, in the sense of the Apartheid Convention: that is, groups in a relationship of domination, for which membership is understood to be acquired by birth and thus is experienced as immutable and incontestable for their members.

(I) B.3. Race and Identity in the Occupied Palestinian Territories

Group identities are in all cases complicated, but the full complexities of Jewish and Palestinian identities need not be explored here. In this section, Jewish and Palestinian identities are reviewed briefly for their various permutations of meaning to determine whether they correlate with the common element of perceived immutability that underwrites the group identities cited in ICERD.

(I) B.3.a. Jewish Identity under the Terms of ICERD

Today, Jews are not normally called a 'race'. Indeed, it is a common observation that Jews come from 'all races' in the sense of the old colour categories (black, white, Asian, and so forth). Like many groups we now call 'ethnic', Jews were called a 'race' up to the early twentieth century and some early Zionist thinkers, like Max Nordau,[747] commonly used the term 'race' in speaking of Jews and Jewish interests in Palestine. The Memorandum of Association of the Jewish National Fund (JNF) in Article 2(c) cites one objective of the JNF as being to 'benefit, directly or indirectly, those of Jewish race or descendency'. When the term 'race' fell into disrepute around the middle of the twentieth century, it was especially discredited regarding Jews (after its dreadful deployment in Nazi Germany) and now is avoided as a term for Jews—except, notably, in references to racial discrimination against Jews (anti-Semitism).

As discussed earlier, a change in label by itself is not meaningful regarding constructions of identity that involve racial discrimination. Testing for the existence of such constructions must consider rather whether the groups are understood locally to be identities acquired at birth and perceived as immutable, on the basis of which they have been constructed as being in a relationship involving domination and oppression.

'Who is a Jew' is an age-old and even Talmudic question that remains highly contested in Israel (as elsewhere), particularly around questions of conversion.[748] 'Jewish' is certainly a religious identity in the sense that Judaism is a religious faith and anyone can convert to Judaism if willing and able to follow the required procedures. Yet religious criteria are inadequate to defining 'Jewish', in several ways. First, Halakhah law [749]as well as social norms provide that Jewish identity is conveyed from

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[747] See also Max Nordau, Address to the First Zionist Congress, 29 August 1897, available at: http://www.mideastweb.org/nordau1897.htm.

[748] Most debates about conversion are between the Jewish religious movements and are pursued through the religious courts and other channels, but see, e.g., *Tais Rodriguez-Tushbeim v Minister of Interior and Director of the Population Register, Ministry of Interior* (HCJ 2597/99) and *Tamara Makrina and others v Minister of Interior and Director of the Population Register, Ministry of Interior* (HCJ 2859/99), decided 31 March 2005.

[749] See Tractate Kiddushin 68b. Talmudic debates were not greatly concerned with the question of Jewish identity but the terms for conversion were of serious concern.

mother to child: hence most Jews today are considered Jewish because they have a Jewish mother. Jews have indeed long been subjected to anti-Semitic attack, extending to pogroms and genocide, precisely because Jewish identity is seated notionally in bodies and bloodlines as well as faith.[750] This importance of ancestry or descent to Jewish identity is codified in Israel's Law of Return:

> For the purposes of this Law, 'Jew' means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.'751

Moreover, 'Jewish' is not a religious identity for those people who acquired Jewish identity at birth but do not practice or share Jewish religious faith, as they are secular or atheist. These people see themselves, and are seen by their communities, as Jewish solely on the basis of their Jewish descent.[752]

Second, in the late nineteenth century, the Zionist movement conceptualized 'Jewish' as a national identity: that is, as a people or nation which has the right to self-determination in Palestine and that since 1948 has expressed this right through the State of Israel (as discussed in the next section). At the same time, the majority of Jews continue to live outside Israel, where in their home countries they are commonly understood as a 'religious group' or an 'ethnic group'.[753] Thus 'Jewish' may be an identity based on religion, descent, and/or national or ethnic origin depending on the context.

The importance of ancestry to Jewish identity supports the core Zionist claim that Jews have the right to self-determination and sovereignty in modern Palestine by virtue of this ancestry. Israel's Declaration of Independence states this claim plainly in affirming that all Jews today trace their lineal ancestry to an earlier national life in Palestine and so have an inalienable right to 'return' there:[754]

> ERETZ-ISRAEL [(Hebrew) - the Land of Israel] was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books.
>
> After being forcibly exiled from their land, the people kept faith with it throughout their Dispersion and never ceased to pray and hope for their return to it and for the restoration in it of their political freedom.
>
> Impelled by this historic and traditional attachment, Jews strove in every successive generation to re-establish themselves in their ancient homeland. In recent decades they returned in their masses. […]

The phrase 'attained to statehood' in this statement constitutes a claim that Jewish life in Palestine in antiquity was genuine national sovereignty and that all Jews today share this ancestral national origin. Its practical implication is that all others, who by virtue of their different descent are not Jews, do not possess a similar privileged right to a national life in Israel based on their ancestry. This nationalist

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[750] The Nuremberg Laws of Nazi Germany, for example, defined 'Jew' as anyone descended from three Jewish grandparents or from two Jewish grandparents if that person was also active in a Jewish religious community.

[751] Law of Return (Amendment No. 2) 5730-1970.

[752] Arguments within Jewish communities about what behaviour is requisite to being Jewish sometimes reference who is 'really Jewish': see for example, Noah Efron, *Real Jews: Secular versus Ultra-Orthodox: The Struggle for Jewish Identity in Israel* (Basic Books, 2003).

[753] Literature on Jewish nationalist (Zionist) discourse is very wide reflecting its many currents: major architects include Teodor Herzl (*The Jewish State*, first published in Vienna in 1896), Vladimir Jabotinsky, Alan Ginsberg (Ahad Ha'am), David Ben Gurion, Yehuda Magness, Martin Buber, and many other political leaders and philosophers.

[754] See Israel's Declaration of the Establishment of the State of Israel, May 14, 1948 available at: http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm.

dimension of Jewish identity is further expressed in Israeli law and doctrine establishing Israel as a 'Jewish state', as discussed next.

(I) B.3(b) Jewish National Identity: Israel as a Jewish State

Israeli Basic Law establishes Israel as the state of the Jewish people. Israeli Basic Law: Knesset[755] describes Israel as 'the state of the Jewish people'. Basic Law: Human Dignity and Liberty[756] and Basic Law: Freedom of Occupation[757] both specify concerns with 'the values of the State of Israel as a Jewish and democratic state'. The 1952 World Zionist Organisation–Jewish Agency (Status) Law,[758] whose importance is discussed below, also specifies that Israel is the state of the Jewish people:

> 1. The State of Israel regards itself as the creation of the entire Jewish people, and its gates are open, in accordance with its laws, to every Jew wishing to immigrate to it.

That these provisions are not merely symbolic formulas but establish a basis in Israeli law for racial discrimination is clarified by other Israeli laws that build from the same premise of Jewish statehood. For example, Basic Law: Israel Lands[759] provides that ownership of real property held by the State of Israel, the Development Authority and the Jewish National Fund must not be transferred but held in perpetuity for the benefit of the Jewish people. About 93 percent of land inside Israel falls into this category and cannot be leased by non-Jewish citizens of Israel.[760] This law applies to any land in the OPT that is declared 'state land'. Article 1 of the State Property Law of 1951[761] provides that land becomes state land in any area 'in which the law of the State of Israel applies'. As all Jewish settlements in the OPT are ostensibly built on state land (although this is only partly true, as discussed in I.C.5(c)) and large areas of the West Bank have been declared state lands and closed to Palestinian use, this places much of the West Bank under the authority of an Israeli state institution that is legally bound to administer state land for the benefit of the Jewish people.

Similar discrimination is authorised by the 1952 Status Law, cited earlier, which confirms the Jewish Agency and World Zionist Organisation (hereafter JA-WZO) as the 'authorised agencies' of the state to administer Jewish national affairs in Israel and in the OPT.[762] Their authority is detailed in a 'Covenant' that provides for a Co-ordinating Board—composed half of Government and half of Jewish Agency members—and grants them broad authority to serve the Jewish people, including:

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[755] Passed by the Knesset on the 12th Adar Bet, 5752 (17th March, 1992) and published in Sefer Ha-Chukkim No. 1391 of the 20th Adar Bet, 5752 (25th March, 1992); the Bill and an Explanatory Note were published in Hatza'ot Chok, No. 2086 of 5752, p. 60.

[756] Passed by the Knesset on 12 Adar 5752 (17th March 1992) and amended on 21 Adar, 5754 (9th March, 1994). Amended law published in Sefer Ha-Chukkim No. 1454 of the 27th Adar 5754 (10th March, 1994), p. 90; the Bill and an Explanatory Note were published in Hatza'ot Chok No. 2250 of 5754, p. 289.

[757] Passed by the Knesset on the 22nd Shevat, 5718 (12th February, 1958) and published in Sefer Ha-Chukkim No, 244 of the 30th Shevat, 5718 (20th February. 1958). p. 69; the Bill was published in Hatza'ot Chok No, 180 of 5714, p. 18.

[758] 7 *Israel Laws* 3 (1952).

[759] Passed by the Knesset on the 24th Tammuz, 5720 (19th July, 1960) and published in Sefer Ha-Chukkim No. 312 of the 5th Av, 5720 (29th July, 1960), p. 56 ; the Bill and an Explanatory Note were published in Hatza'ot Chok No. 413 of 5720, p. 34.

[760] Israel Land Administration., 'General Information: Background', available at: http://www.mmi.gov.il/Envelope/indexeng.asp?page=/static/eng/f_general.html.

[761] State Property Law (5711-1951), passed by the Knesset on the 30th Shevat, 5711 (6th February, 1951) and published in *Sefer Ha-Chukkim* No.68 of the 9th Adar Alef 5711 (15th February, 1951); the Bill and an Explanatory Note were published in *Hatza'ot Chok* No.54 of the 2nd Cheshvan, 5711 (13th October, 1930), p. 12.

[762] The Status Law was amended in 1975 to restructure this relationship: see World Zionist Organisation–Jewish Agency for Israel (Status) (Amendment) Law, 5736–1975.

> The organising of immigration abroad and the transfer of immigrants and their property to Israel; co-operation in the absorption of immigrants in Israel; youth immigration; agricultural settlement in Israel; the acquisition and amelioration of land in Israel by the institutions of the Zionist Organisation, the Keren Kayemeth Leisrael [Jewish National Fund] and the Keren Hayesod [United Jewish Appeal]; participation in the establishment and the expansion of development enterprises in Israel; the encouragement of private capital investments in Israel; assistance to cultural enterprises and institutions of higher learning in Israel; the mobilisation of resources for financing these activities; the co-ordination of the activities in Israel of Jewish institutions and organisations acting within the limits of these functions by means of public funds.[763]

A principle task of the JA-WZO, as expressed in the Status Law, is to work actively to build and maintain a Jewish majority in Israel:

> … 5. The mission of gathering in the exiles, which is the central task of the State of Israel and the Zionist Movement in our days, requires constant efforts by the Jewish people in the Diaspora; the State of Israel, therefore, expects the cooperation of all Jews, as individuals and groups, in building up the State and assisting the immigration to it of the masses of the people, and regards the unity of all sections of Jewry as necessary for this purpose.[764]

This imperative was reaffirmed in the WZO's operational platform, expressed in 2004 as the Jerusalem Programme, which reads:

> Zionism, the national liberation movement of the Jewish people, brought about the establishment of the State of Israel, and views a Jewish, Zionist, democratic and secure State of Israel to be the expression of the common responsibility of the Jewish people for its continuity and future. The foundations of Zionism are:
>
> - The unity of the Jewish people, its bond to its historic homeland Eretz Yisrael, and the centrality of the State of Israel and Jerusalem, its capital, in the life of the nation;
> - Aliyah to Israel from all countries and the effective integration of all immigrants into Israeli Society.
> - Strengthening Israel as a Jewish, Zionist and democratic state and shaping it as an exemplary society with a unique moral and spiritual character, marked by mutual respect for the multi-faceted Jewish people, rooted in the vision of the prophets, striving for peace and contributing to the betterment of the world.
> - Ensuring the future and the distinctiveness of the Jewish people by furthering Jewish, Hebrew and Zionist education, fostering spiritual and cultural values and teaching Hebrew as the national language;
> - Nurturing mutual Jewish responsibility, defending the rights of Jews as individuals and as a nation, representing the national Zionist interests of the Jewish people, and struggling against all manifestations of anti-Semitism;
> - Settling the country as an expression of practical Zionism.

[763] Covenant Between the Government of Israel and The Zionist Executive called also the Executive of the Jewish Agency, signed 26 July 1954.

[764] World Zionist Organisation - Jewish Agency (Status) Law, 5713-1952

Relevant to the present study is that, in 1978, the head of the JA/WZO Settlement Department, Mattityahu Drobles,[765] declared that the entire West Bank is an integral part of the Land of Israel and proposed a 'master plan' for settling Jews in the territory to consolidate this status.[766] From this time, the JA-WZO extended its mandate into the OPT to serve Jewish-national interests according to the terms of the Covenant. Legal restrictions require that the Jewish Agency operates inside Israel and the World Zionist Organisation in the OPT, but this division of geographic ambit operates structure the partnership between the two agencies in building infrastructure that completes the fusion of the OPT into Israel: for example, by jointly building settlements that straddle the green line around the West Bank and the highway system that integrates Israeli cities and towns with West Bank Jewish settlements. Thus Jewish settlements in the OPT, built on 'state land' managed for Jewish-national interests by the Israel Lands Authority, are planned and established by institutions that are authorised by the State of Israel to serve the Jewish nation exclusively.

The Status Law is linked to a second body of Israeli law and jurisprudence that distinguishes between citizenship (in Hebrew, *ezrahut*) and nationality (*le'um*). Other states have made this distinction: for example, in the former Soviet Union, Soviet citizens were also divided by nationalities although all nationalities had juridically equal standing. In Israel, by contrast, only one nationality has standing or rights and only one is associated with the state. According to Israel's High Court, Israel is indeed not the state of the 'Israeli nation' but of the 'Jewish nation'.[767] Collective rights are reserved to Jewish nationality. For instance, the 1950 Law of Return[768] serves the 'ingathering' mission cited above by allowing any Jew to immigrate to Israel and, through the Citizenship Law, to gain immediate citizenship. No other national group has a comparable right or any other collective right.

This legal formulation and privileging of Jewish nationality shapes Israeli policy in the OPT in several ways. First, it has contributed to determining the demography of the OPT. About 1.8 million of the Palestinians now living in the OPT are refugees who fled or were expelled from homes inside Israel in 1948, yet are not allowed to return to Israel and obtain Israeli citizenship because they are not Jews. Second, it has contributed to the construction of Jewish settlements in the OPT. As noted above, the Israel Lands Authority and the JA-WZO are authorised by Israeli State law to administer 'state lands' and property in the OPT in the interests of Jews only. As later discussion clarifies, Israel extends the services of these institutions—and Israeli civil law and protections—to Jews in the OPT whether or not they are Israeli citizens, on grounds of their Jewish identity.

Since much of Israel's presence in the West Bank involves the operations of the Jewish-national institutions, Israeli military policy to ensure the security of these agencies and their work—particularly the construction and security of Jewish settlements—could be seen to have the purpose and effect of securing Jewish-national interests in the OPT and accordingly dominating the Palestinian population in the OPT on the basis of race. Whether Israeli state doctrine and law operates in the OPT to discriminate against Palestinians in ways consistent with the definition of apartheid in Article 2 of the Apartheid Convention is the subject of this study.

Thus, Israeli law constructs Jewish identity as a national identity: that is, as a people which holds national rights to self-determination and sovereignty in historic Palestine. Israeli law does not

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[765] As the Jewish Agency and World Zionist Organisation operate in tandem, particularly in the Settlement Department which shares one office, Drobles is sometimes listed as head of one or the other. The distinction is essentially meaningless.

[766] World Zionist Organisation Department for Rural Settlement, 'Master Plan for the Development of Settlement in Judea & Samaria 1979–1983, October 1978; available as U.N. Doc. S./13582 Annex (22 October 1979).

[767] *George Rafael Tamarin v. State of Israel*, 20 January 1972, in Decisions of the Supreme court of Israel (Jerusalem: Supreme Court, 1972), vol. 25, pt. 1, 197 (in Hebrew).See also Roselle Tekiner, 'On the Inequality of Israeli Citizens,' *Without Prejudice* Vol. 1, No. 1 (1988), 9-48.

[768] Law of Return 5710-1950, 10 March 1970.

recognise any other national identity and rejects comparable rights to any other population resident in the territory of Mandate Palestine. Israeli law does not explicitly construct Palestinians as a distinct racial group, but formulating Jewish identity and rights in Israeli law and doctrine as being based on a shared ancestry tracing a national life in antiquity constructs all other groups—including Palestinian Arabs—as lacking any right to a national life in Palestine by virtue of their different ancestry. This formulation fits the concerns of ICERD by according different rights to groups on the basis of identities that are understood to be acquired at birth and are experienced as mostly immutable for group members.

(I) B.3(c). Palestinian Identity under the terms of ICERD

'Palestinian' is experienced by Palestinians primarily as a national identity, associated with present residence or family origins in the territory of Mandate Palestine. During the British Mandate, 'Palestinian' was a citizenship and Palestinians held Palestine passports, although Palestine was not then an independent State.[769] As millions of Palestinians remain stateless and millions more have obtained the citizenship of third states, Palestinian national identity is thus associated with 'national origin' (rather than nationality in the sense of citizenship). Today Palestinian Arabs, wherever they reside,[770] draw strongly on ideas of family origins and the frustrated need and desire for an independent national life in Palestine. By proposing Palestinian indigeneity in Palestine as the core of Palestinian identity, Palestinian nationalism directly challenges the Zionist claim of *terra nullius* in Palestine and a prior and pre-eminent Jewish claim to indigeneity in Palestine.

Palestinian national identity is nested within the larger national identity of 'Arab'. The Charter of the Palestine Liberation Organisation (PLO), composed in 1968, affirms the importance of Arab identity in Article 1:

> Palestine is the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland, and the Palestinian people are an integral part of the Arab nation.

The PLO's 1988 Declaration of Independence reiterated this view, invoking Arab nationalism and pan-Arab solidarity:

> The State of Palestine is an Arab state, an integral and indivisible part of the Arab nation, at one with that nation in heritage and civilisation, with it also in its aspiration for liberation, progress, democracy and unity. The State of Palestine affirms its obligation to abide by the Charter of the League of Arab States, whereby the coordination of the Arab states with each other shall be strengthened.[771]

In this conception, the Palestinian nation is still part of the larger pan-Arab nation but it is the Palestinian people that holds the right to self-determination.

Within the territory which formed Mandate Palestine , Palestinian identity is an ethnic identity in being distinguished by local customs and the Arabic language.[772] Millions of Palestinians living elsewhere do not necessarily share these customs, however, though they may celebrate them

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[769] See, for example, Mutaz Qafisheh, *A Legal Examination of Palestinian Nationality under the British Rule*, unpublished doctoral thesis (No. 745), University of Geneva, Institut Universitaire de Hautes Etudes Internationales (Geneva, 2007).

[770] The Palestinian population totals some nine to ten million people, of whom about 3.9 million live in the OPT, about 1.3 million live in Israel, and about 1.8 million live as refugees in Jordan, Syria, and Lebanon.

[771] Palestinian Declaration of Independence, *Algiers, November 15, 1988*: reproduced in Yehuda Lukacs, *The Israeli-Palestinian Conflict – a documentary record 1967-1990 (Cambridge: Cambridge University Press, 1992).*

[772] On Palestinian national identity, see especially Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (Columbia, 1997).

symbolically as part of Palestinian nationalist expression, so ethnicity in the sense of customs and language is not a consistent factor in Palestinian identity.

Religion is not a marker of Palestinian identity, due to the population's mixed confessional composition.[773] The PLO Charter affirms a non-discriminatory view of religion:

> Article 16: The liberation of Palestine, from a spiritual point of view, will provide the Holy Land with an atmosphere of safety and tranquility, which in turn will safeguard the country's religious sanctuaries and guarantee freedom of worship and of visit to all, without discrimination of race, colour, language, or religion. Accordingly, the people of Palestine look to all spiritual forces in the world for support.

In this vein, the PLO Charter specifies that those Jews 'who had normally resided in Palestine until the beginning of the Zionist invasion' are considered Palestinians. Nonetheless, Israeli policy and doctrine has constructed Palestinian identity as a religious identity to the extent that Palestinians are understood not to be Jewish. treat Palestinian Arabs fundamentally through their identity as non-Jews (understood in religious, national and ethnic terms) who must, on this basis, be excluded from Jewish settlements and adjacent lands in the OPT. Israel's translation of this doctrine into specific policies and practices in the OPT is examined in Part II of this chapter.

In conclusion, Jewish and Palestinian are group identities that are understood to be acquired at birth, in which membership is seen as continuous, immutable and not usually challengeable. On the basis of the two groups' perceptions of themselves as distinct, third parties including the British Mandate authorities and the UN Committee on the Elimination of Racial Discrimination have treated them as such. Further, 'Jewish' functions in Israel-Palestine as a group identity in which ideas about descent, nation, religion, and ethnicity combine to support doctrines, promoted by the State and embedded in Israeli law, which hold that lineal Jewish descent from antiquity justifies extending special rights and privileges to Jews in historic Palestine, denying the rights of non-Jewish Palestinians. Thus Jewish and Palestinian identities, as they operate in the OPT in relation to each other, fit the concerns of ICERD regarding racial discrimination and function as 'racial groups' for the purpose of the definition of apartheid.

(I) B.4. Inadmissibility of Discrimination based on Citizenship

It may be argued that Israel cannot be held responsible for apartheid, whether under ICERD or the Apartheid Convention, because Palestinians under occupation are treated differently from Jewish settlers in the same territory not because Jews and Palestinians are locally constructed as racial groups but only because they are not Israeli citizens. In Article 1(2), ICERD provides that 'this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens'. *Ex facie*, Israel could rely on Article 1(2) to justify any 'distinctions, exclusions, restrictions or preferences' it makes in favour of its own citizens in the OPT.

It is submitted here that such a claimed justification would be in breach of Israel's duty to apply ICERD in good faith, which is codified in Article 2(6) of the Vienna Convention of the Law of Treaties.[774] Such a claimed justification would amount to an abuse of right on the part of Israel.[775]

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[773] A survey in 1944 found that about 8 percent of the population of Palestine was Christian, although other sources put the proportion higher: see Table I: 'Population of Palestine by Religions' in *A Survey of Palestine: Prepared in December 1945 and January 1946 for the information of the Anglo-American Committee of Inquiry*, Volume I, p. 141; reprinted by the Institute for Palestine Studies (Washington, DC, 1991).

[774] Article 2(6), which is a codification of pre-existing custom, provides: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

[775] On the doctrines of good faith and the related matter of abuse of right (*abus de droit*) see, for example, B. Cheng, *General principles of law as applied by international courts and tribunals* (London: Stevens, 1953), pp. 106-160; H. Lauterpacht, *The function of law in the international community* (Clarendon Press: Oxford: 1933),

The rule in Article 1(2) must be construed, in the words of CERD 'so as to avoid undermining the basic prohibition of discrimination'.[776] The Committee adds:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.[777]

As Keane has observed, '[s]uch distinctions cannot, however, be made on the grounds of race, colour, descent, or national or ethnic origin'.[778]

The legitimacy of an occupant differentiating between its citizens and non-citizens to the benefit of the former within occupied territory accordingly must be determined by reference to the law of belligerent occupation.[779] Only by virtue of being an occupant is Israel entitled to exercise jurisdiction in the OPT. By virtue of that same jurisdiction, Israel is also bound to apply ICERD. This intrusion of specific context allows for the operation of the *lex specialis* principle in its second interpretative form: the 'general' law embodied in ICERD falls to be interpreted in the light of the 'special' law contained in the regime of belligerent occupation.

The fundamental premise of the law of belligerent occupation is the protection of the territory's civilian population who are not nationals of the occupying power—that is, 'protected persons' within the meaning of Article 4 of the Fourth Geneva Convention. This obligation arises from the occupant's primary duty under Article 43 of the Hague Regulations to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.[780] In passing, Gasser notes that an occupant should not observe provisions of the law in force in occupied territory which are incompatible with international humanitarian law binding upon the occupying power, expressly giving as an example

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pp. 286-306; V. Paul, 'The abuse of rights and bona fides in international law' (1977) 28 *Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht* 107; G. Schwarzenberger, 'The fundamental principles of international law' (1956) 87 *Recueil des cours* at 290-326; G. Taylor, 'The content of the rule against the abuse of rights in international law' (1972–73) 46 *British Yearbook of International Law* 323; H. Thirlway, 'The law and procedure of the International Court of Justice 1960-1989 Part One' (1989) 60 *British Yearbook of International Law* 4 at 7-49; and G. White, 'The principle of good faith', in V. Lowe V and C. Warbrick (eds.), *The United Nations and the principles of international law: essays in memory of Michael Akehurst* (London: Routledge, 1994).

[776] Committee on the Elimination of Racial Discrimination, *General Comment No. 30: Discrimination Against Non-Citizens*, 1 October 2004, paragraph 2.

[777] Ibid, paragraph 5.

[778] David Keane, *Caste-based Discrimination in International Human Rights Law* (Ashgate: Aldershot, 2007), p. 183.

[779] In the alternative, it may be argued that this approach is mandated by Article 31.3.c of the Vienna Convention on the Law of Treaties which requires treaties to be interpreted in good faith, taking into account 'any relevant rules of international law'. On this, see C. McLachlan, 'The principle of systemic integration and Article 31(3) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279.

[780] For exegeses of Article 43 see, for example, Y. Dinstein Y, *Legislation under Article 43 of the Hague Regulations: belligerent occupation and peacebuilding*, available at: www.hpcr.org/pdfs/OccasionalPaper1.pdf; G. von Glahn, *The occupation of enemy territory: a commentary on the law and practice of belligerent occupation* (Minnesota: University of Minnesota Press, 1957), pp. 94-105; C. Greenwood, 'The administration of occupied territory in international law', in E. Playfair (ed.), *International law and and the administration of occupied territory* (Oxford: Clarendon Press, 1992), p. 241; M. Sassòli, *Article 43 of the Hague Regulations and peace operations in the twenty-first century*, available at: www.ihlresearch.org/ihl/pdfs/sassoli.pdf; G. Schwarzenberger, *International law as applied by international courts and tribunals. Vol.II: The law of armed conflict* (London: Stevens, 1968), pp. 191-210; and E. Schwenk, 'Legislative power of the military occupant under Article 43, Hague Regulations' (1944–45) 54 *Yale Law Journal* 393.

'openly discriminatory measures'.[781] If an occupant should not apply existing laws of this nature then, it follows, he should not introduce them.

Leaving that consideration to one side, under Article 43 of the Hague Regulations, the occupying power may enact measures for the security of its forces within the territory (or suspend existing law if its application would prejudice their security) and for any other personnel required to fulfil its duty to maintain public order. This is a strict requirement:

> the occupying authorities may not enact provisions other than those *directly* justified by considerations of military security or public order.[782]

This requirement precludes the occupant's introducing measures that differentiate between its citizens present in occupied territory who are not members of its forces or administration of occupation and civilians who are not its citizens (and therefore protected persons), to the benefit of the former. This would be an *ultra vires* act, in breach of the scope of the occupant's legislative powers under Article 43 of the Hague Regulations. The limitations imposed by this Article on the occupant's legislative powers thus trump the provision in Article 1(2) of ICERD.

This consideration applies *a fortiori* to any measures favouring settlers who are present in the OPT illegally, in breach of Article 49(6) of the Fourth Geneva Convention.[783] Any attempt to justify measures favouring settlers (*qua* Israeli citizens) on the basis of Article 1(2) of ICERD could only be an abuse of right (*abus de droit*).[784] Acting to consolidate the presence of settlers is not simply the pursuit of an improper purpose, it is the pursuit of an illegal purpose, and moreover one pursued knowingly from the start of the settlement process. In September 1967, legal counsel to the Israeli Foreign Ministry, Theodore Meron, advised the Israeli government that the creation of settlements in the occupied territories would breach the prohibition contained in Article 49 of the Fourth Geneva Convention, which, moreover, was:

> categorical and is not conditioned on the motives or purposes of the transfer, and is aimed at preventing colonization of conquered territory by citizens of the conquering State.[785]

Finally, the argument that discriminatory treatment of Palestinians in the OPT is not racially motivated but is based purely on citizenship is tautological. Under Israeli law, Palestinian refugees from within the Green Line and living in the OPT would not be prevented from returning to Israel and obtaining Israeli citizenship if they were Jews. CERD has expressed concern precisely with the case of long-term residents who are denied citizenship on the grounds of their race, ethnicity or descent group, as noted earlier. Regarding 'access to citizenship', CERD recommends that States:

> [r]ecognise that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality;[786]

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781 Hans-Peter Gasser, 'Protection of the civilian population', in Dieter Fleck (ed.), *The handbook of humanitarian law in armed conflicts* (Oxford: Oxford University Press, 1995), p. 255, para. 547(4).

782 Gasser, *Civilian population*, p. 256, para. 548(2), emphasis added.

783 The illegality of settlements, and thus of the presence of settlers, was a unanimous finding of the International Court in the *Consequences of a wall* advisory opinion: see the opinion of the Court, ICJ Rep, 2004, 183, para.120, and the Declaration of Judge Buergenthal, 244, para.9.

784 'A State or person acts in bad faith where it abuses its rights—by pursuing an improper purpose, taking an account of an irrelevant factor, or acting unreasonably—and does so knowing that it is abusing its rights': Taylor, *Abuse of rights*, p. 333.

785 See G. Gorenberg, *The accidental empire: Israel and the birth of the settlements, 1967-1977* (New York: Henry Holt, 2006), pp. 99-102: quotation from Meron's opinion at 101.

786 Ibid, paragraph 14,

Deprivation of citizenship arises in the present study in the context of Article 2(c) of the Apartheid Convention concerning the 'right to a nationality'. [787]

Finally, it is significant to the question of citizenship that the Apartheid Convention defines the crime of apartheid in reference to 'southern Africa' and not only South Africa. This inclusive terminology reflected the practice of South Africa in extending apartheid practices into South West Africa (now Namibia), which South Africa had held under a League of Nations mandate and refused to relinquish after World War II. Thus through the 1960s, when the United Nations bodies condemned South Africa for extending its doctrine of apartheid into South West Africa,[788] and in 1973, when the Apartheid Convention was adopted with language referring to 'southern Africa', South West Africa was not officially annexed to South Africa and its population did not hold South African citizenship. UN condemnation of South Africa for apartheid practices outside its sovereign territory and in respect to non-citizens is a legal precedent for applying the Apartheid Convention to Israel's practices in the OPT, where Israel similarly exercises jurisdiction but not sovereignty.

(I) B.5. Domination as the Purpose of Policy

As noted in Part I(A) of this chapter, both the Apartheid Convention and the Rome Statute define acts of apartheid as being committed, respectively, for the purpose of or with the intention of maintaining domination and systematic oppression by one racial group over another. It could be argued that Israeli practices are not intended to maintain a relation of Jewish domination over Palestinians in the OPT, comparable, for instance, to white dominion over blacks in South Africa, but are only temporary measures to keep order, imposed on Israel by circumstances of conflict, until a peace agreement removes the need for domination. In other words, domination might not be the 'purpose' of Israeli policy, but only the means to an end, which is not domination but ultimately the exclusion of Palestinians from Israeli authority and responsibility. According to this argument, any system of domination over the Palestinians as a group in the interim is only to defend Israel from an exogenous security threat.

'Interim' measures of domination, irrespective of their ultimate goal, still constitute domination as prohibited by the international legal definition of apartheid. The 'Grand Apartheid' strategy in South Africa reflected this formulation. After the 1960s, the apartheid regime in South Africa sought to resolve the political problems arising from its policy of racial domination by establishing black Homelands and forcibly transferring the black population out of white areas into the Homeland territories where, it was proposed, black 'nations' would become self-governing and ultimately independent (see Section G.2 in this chapter). This goal of ultimate exclusion, which would supposedly end long-term domination, was not held by international law to absolve the apartheid government of its international responsibility for eliminating its system of racial domination.

This precedent indicates that Article 2 the Apartheid Convention is not concerned with any potential ultimate goals of a policy of domination and oppression. Rather, it is concerned with inhuman acts committed for the purpose of establishing or maintaining a system of domination and oppression by one racial group over another. Part II of this chapter will review Israel's practices in the OPT to assess whether the inhuman acts prohibited by the Apartheid Convention are being committed, and, if so, whether in isolation or as part of a system of domination over Palestinians in the OPT.

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[787] Ibid, paragraph 14,

[788] For example, GA Res. 2074 (XX) of 17 December 1965 and GA Resolution 2145 (XXI) Question of South West Africa (1966).

(I) C. Application of the Apartheid Convention outside southern Africa

The Apartheid Convention takes its inspiration from apartheid South Africa not only in adopting the term 'apartheid' but in defining the 'crime of apartheid' in the chapeau of Article 2 as 'similar policies and practices of racial segregation and discrimination as practiced in southern Africa'. This phrasing clearly indicates that the Apartheid Convention can be applied outside southern Africa, but it could also be interpreted to indicate that apartheid in southern Africa provides the precise and unique template or model by which all other potential regimes are to be tested for apartheid.

This interpretation would be incorrect. Because an occurrence of apartheid outside of southern Africa will inevitably present unique features, reflecting local histories and social particularities, limiting the Apartheid Convention's application too closely to practices of the South Africa apartheid regime could effectively exclude any other case from qualifying as a 'crime of apartheid'. Acts in potential violation of international law are correctly measured against the provisions of the legal instruments drafted to address them; other cases where their violation occurred are illustrative. This interpretation of apartheid is supported by the Committee on the Elimination of Racial Discrimination, which observed in General Comment 19, paragraph 1:

> The Committee on the Elimination of Racial Discrimination calls the attention of States parties to the wording of article 3, by which States parties undertake to prevent, prohibit and eradicate all practices of racial segregation and apartheid in territories under their jurisdiction. The reference to apartheid may have been directed exclusively to South Africa, but the article as adopted prohibits all forms of racial segregation in all countries.[789]

Clark also contends that 'the Convention is drafted in such a way as not to apply solely to the South African case, although South Africa is mentioned as an example'.[790] The prevailing view of international legal scholars is that while the Convention was drafted specifically with southern Africa in mind, it is clearly universal in character and not confined to the practice of apartheid as seen in southern Africa.[791] During the drafting of the Apartheid Convention, state representatives admitted that its terms could apply beyond the geographical limits of southern Africa.[792] In the words of the Cypriot delegate: "When drafting and adopting such an international convention, it must be remembered that it would become part of the body of international law and might last beyond the time when *apartheid* was being practiced in South Africa.'[793]

That the drafters of the Apartheid Convention intended that it supply a self-standing and universal human rights instrument can be read literally in Article I:

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[789] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 19: Racial segregation and apartheid (Art. 3)*, 18 August 1995.

[790] Roger S. Clark, 'Apartheid', *in* M. Cherif Bassiouni, *International Criminal Law*, Volume I, 1999, 643, pp. 643-644.

[791] See, for example, Ilias Bantekas and Susan Nash, *International Criminal Law*, Second Edition, (Cavendish, 2003), pp. 121-122.

[792] See the statement by Mr. Wiggins (United States of America), UN General Assembly, Official Records, 28th Session, 1973, 3rd and 4th Committees, 2003rd meeting, 22 October 1973, Agenda Item 53, Draft Convention on the Suppression and Punishment of the Crime of *Apartheid* (*continued*) (A/9003 and Corr.1, chaps XXIII, sect. A.2, A/9095 and Add.1), p. 142, para. 36. ("Article I would be open to very broad interpretations going beyond both the intentions of its drafters and the geographical limits of southern Africa."). See also the statement by Mr. Petherbridge (Australia) at p. 143, para. 4. ("…the concept of apartheid was being widened to such an extent that it could be applicable to areas other than South Africa.") The additional words "as practised in southern Africa" inserted into Article 2 was first suggested by Mrs. Warzazi (Morocco) at the 2005th meeting, 24 October 1973, p. 150, para. 12.

[793] See the statement by Mr. Papademas (Cyprus), ibid, pp. 142-143, para. 39.

> The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid *and similar policies and practices of racial segregation and discrimination*, as defined in Article 2 of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security. [emphasis added]

Reference to practices by the South African apartheid regime nonetheless proved useful to this study by providing some indication of what the international community sought to prohibit in adopting the Apartheid Convention. Reference to South Africa is therefore treated here as a comparative case useful to illuminating possible practices that fall within the ambit of the Apartheid Convention. Some differences in doctrine and practice distinguish the two cases: for instance, apartheid in South Africa entailed the legislation of racial micro-differences in ways not seen in Israeli discourse and the adjudication of group identities was accomplished differently. Other features, such as laws that provide privileged access to land by one group to the exclusion of others, are similar.

(II) D. Apartheid in South Africa: Legislative Foundations

Apartheid in South Africa established the State as the state of the white population exclusively by prohibiting black South Africans from having any voice in its governance. The policy of *apartheid* (Afrikaans for 'separateness', sometimes discussed as 'separate development') was adopted by the white Afrikaner nationalists who came to power in South Africa with the election victory of the National Party in 1948. Apartheid was designed Black South Africans were to be granted 'self-government' over a number of isolated and ethnically based 'homelands', while the rest of the country was to remain the exclusive preserve of white South Africans. Mokgethi Motlhabi points out that:

> Although the word 'apartheid' means (race) separation, it is often distinguished by Afrikaner writers from segregation, which has always been the norm of race relations in South Africa and was guaranteed by a pass system for Africans, first introduced by the British in 1809. For the Afrikaner segregation, as opposed to apartheid, did not go far enough. It still offered Black people some hope, according to them, that through education and adequate assimilation of Western civilization they could become equals of whites and finally have a share in the government of the country. Apartheid not only did away with such 'false hopes', but went further to 'retribalize' black people by emphasizing their ethnic differences, separating them residentially on this basis. As a result of this policy, most of the Africans would be resettled in their supposed homelands, visiting 'white South Africa' only as 'migrant' workers.[794]

Soon after coming to power',[795] the National Party introduced a series of apartheid laws[796] in order to implement its vision of a white South Africa serviced by black migrant workers. The three legislative foundations underpinning the apartheid system were the Population Registration Act 30 of 1950, the Group Areas Act 41 of 1950, and the Pass Laws, which included several acts. Even though other legislation was to follow (discussed below), these statutes formed the bedrock of the apartheid state and sparked the Defiance Campaign of 1952, which in turn resulted in the arrest of thousands of South Africans who had taken part in the campaign and the banning of many of their leaders.[797]

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[794] Mokgethi Motlhabi, *The Theory and Practice of black Resistance to Apartheid – A Social-Ethical Analysis* (Johannesburg: Skotaville Publishers, 1984), p. *xvii*.

[795] The National Party came to power in 1948 under the leadership of Dr. D. F. Malan. In 1954 Malan was succeeded as leader of the National Party by J. G. Strijdom, who in 1958 was replaced by Dr. H. F. Verwoerd. These three Afrikaner nationalist leaders are generally regarded as the prime architects of the policy of apartheid.

[796] Described by Brian Bunting in his book, *The Rise of the South African Reich* (Harmondsworth: Penguin, 1964) as 'South Africa's Nuremberg Laws.'

[797] Roger Omond, *The Apartheid Handbook*, p. 16.

Sporadic violence and protests continued throughout the 1950s, culminating in the Sharpeville massacre of 1960 when police shot dead 69 people who were protesting against the infamous pass laws. A state of emergency was declared and the Unlawful Organisations Act was passed, outlawing the African National Congress (ANC) and the Pan Africanist Congress (PAC). In terms of this Act, those found guilty of furthering the aims of either of these two organisations could be convicted and sentenced to up to ten years imprisonment. Both the ANC and the PAC went underground and took up arms against the apartheid government. Dan O'Meara paints the following portrait of apartheid South Africa during the 1960s:

> This was perhaps the bleakest period in South Africa's dismal history. The relentless, paranoid witch hunt for perceived enemies, the morally-blind and fanatical implementation of the smallest details of apartheid, the Mother Grundy censorship, and the imposition of fundamentalist Calvinist values on the broader society, all conspired to reinforce the most mean-spirited, petty-minded and ignorant parochial philistinism in public and intellectual life. These were years when Black Beauty was banned as subversive literature; when 'swimming on Sundays' was condemned as a moral outrage; when prominent theologians could seriously claim that the devastating drought of 1966 was God's punishment for the fact that white women had adopted the miniskirt; when the whole society thrilled to salacious (and frequent) newspaper reports of the prosecution under the Immorality Act of pro-apartheid Dutch Reformed Church clerics, and thousands of other white males, who had slept with black women.[798]

The Black Consciousness movement, led by Steve Biko, emerged in the late 1960s and contributed to the Soweto uprising which began on 16 June 1976. The uprising started as a protest by schoolchildren against the compulsory use of Afrikaans as a medium of instruction in African schools, before retaliatory state repression engulfed the entire country in a wave of violent anti-apartheid protests. Hundreds of protesters were killed and imprisoned, and many others fled into exile. Violence and unrest continued throughout the 1980s, during which the apartheid regime declared successive states of emergency and ultimately adopted a 'total strategy' to resist what it called a 'total onslaught' from anti-apartheid forces.

Finally, facing ungovernable mass protests and a failing national economy, in 1991 the last white nationalist President of South Africa, W. A. de Klerk, announced the unbanning of the anti-apartheid political movements, and the release of their leaders, including Nelson Mandela, the leader of the ANC. The formal edifice of apartheid ended with the passing of South Africa's Interim Constitution of 1994, which paved the way for the country's first democratic election and the inauguration of Nelson Mandela as South Africa's first black president on 10 May 1995.

The apartheid legal system did not emerge fully formed when the Nationalist Party came to power in South Africa in 1948. It was preceded by almost three hundred years of colonial oppression, which dispossessed black South Africans of their land, their rights, their political systems and authority, and their human dignity. Key segregation laws that established the legal foundation for apartheid were indeed passed long before the Nationalist Party took power in 1948.[799] The most significant of these were the Natives Land Act, No 27 of 1913 and the Natives (Urban Areas) Act of 1923. The 1913 Act made it illegal for blacks to purchase or lease land from whites except in reserves and thus restricted black occupancy to less than 8 percent of South Africa's land.[800] In the Apartheid era, the reserves were converted into Bantustans (Bantu Homelands) and several were later declared 'independent' states within South Africa.[801]

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[798] Dan O'Meara, *Forty Lost Years – The Apartheid State and the Politics of the National Party 1948-1994* (Randburg: Ravan Press, 1996), p. 110.

[799] TRC Report, Vol. 1, CAP 2, para 6.

[800] The Cape was the only province excluded from the Act as a result of the existing black franchise rights that were enshrined in the South Africa Act.

[801] The Native Land Act was repealed by the Abolition of Racially Based Land Measures Act (No. 108) of 1991.

The Natives (Urban Areas) Act of 1923 laid the foundations for residential segregation in urban areas. The Act divided South Africa into 'prescribed' (urban) and 'non-prescribed' (rural) areas, and strictly controlled the movement of black males between the two. Each local authority was made responsible for the blacks in its area and 'Native advisory boards' were set up to regulate the inflow of black workers and to order the removal of 'surplus' blacks (those not employed). As a result, towns became almost exclusively white. Only domestic workers were allowed to live in towns. The 1923 Act was superseded by the Native (Urban Areas) Consolidation Act No 25 of 1945, which was repealed by the Abolition of Influx Control Act No 68 of 1986.

After 1948, the legal system underpinning apartheid evolved to meet changing conditions and rising resistance and came to penetrate every aspect of South African life, until its eventual demise with the emergence of a democratic South Africa in 1994. Segregation was systematically formalized by the National Party through a complex amalgam of legislation.[802] The legal foundations of the system were the Population Registration Act 30 of 1950, the Group Areas Act 41 of 1950 and the Pass Laws. The Population Registration Act of 1950 established that all South Africans must be categorised on the basis of race and carry at all times a card that stipulated their racial group. The Group Areas Act of 1950 partitioned the country into different geographic areas allocated to each racial group. The Pass Laws then restricted people to their assigned area by restricting or prohibiting their entering any area not assigned to their group. Resistance to this system was ruthlessly suppressed.

A fuller picture of the statutes passed by the apartheid Parliament, here in chronological order, demonstrates the breadth of legalization for discriminating on the basis of race:

- The Suppression of Communism Act of 1950 banned the South African Communist Party as well as any other party that the government chose to label as 'communist'. It made membership in the SACP punishable by up to ten years imprisonment.
- The Riotous Assemblies Act of 1956 prohibited disorderly gatherings.
- The Unlawful Organisations Act of 1960 outlawed organisations that were deemed threatening to the government.
- The Sabotage Act was passed 1962, the General Law Amendment Act in 1966, the Terrorism Act in 1967 and the Internal Security Act in 1976.
- The Bantu Authorities Act of 1951 created separate government structures for blacks. It was the first piece of legislation established to support the government's plan of separate development in the Bantustans.
- The Prevention of Illegal Squatting Act of 1951 allowed the government to demolish black shack-land slums.
- The Native Building Workers Act and Native Services Levy of 1951 forced white employers to pay for the construction of housing for black workers recognized as legal residents in 'white' cities.
- The Reservation of Separate Amenities Act of 1953 prohibited people of different races from using the same public amenities, such as restaurants, public swimming pools, and restrooms
- The Bantu Education Act of 1953 crafted a separate and inferior didactic scheme for African students under the aegis of the Department of 'Bantu' Education.
- The Bantu Urban Areas Act of 1954 curtailed black migration to cities.
- The Mines and Work Act of 1956 formalised racial discrimination in employment
- The Promotion of Black Self-Government Act of 1958 entrenched the NP's policy of separate development. It set up separate territorial governments in the 'homelands', designated lands for

[802] TRC Report, Vol. 1, CAP 2, paras. 22-24

black people where they could have a vote. The map of South Africa thus had a white centre with a cluster of black states along its borders.

- The Bantu Investment Corporation Act of 1959 set up a mechanism to transfer capital to the homelands in order to create employment there.
- The Extension of University Education Act of 1959 created separate and ultimately inferior universities for blacks, coloureds and Indians. Under this act, existing universities were not permitted to enrol new black students.
- The Physical Planning and Utilisation of Resources Act of 1967 allowed the government to stop industrial development that employed black labour in 'white' areas and redirect such development to homeland border areas.
- The Black Homeland Citizenship Act of 1970 changed the status of the inhabitants of the black Homelands so that they were no longer citizens of South Africa.
- The Afrikaans Medium Decree of 1974 required the use of Afrikaans and English on a fifty-fifty basis in high schools outside the homelands.

Select examples of this legislation will be discussed where relevant throughout the following review of specific practices of apartheid South Africa below, which is intended to inform and provide historical precedent for the review of Israel's practices in the OPT vis-à-vis the individual acts of apartheid detailed in Article 2 of the Apartheid Convention.

PART II: REVIEW OF ISRAELI PRACTICES IN THE OPT

(II) A. Introduction

This chapter now reviews Israel's practices in the OPT as they relate to the definition of apartheid as formulated in Article 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid (henceforth 'Apartheid Convention'). With the Apartheid Convention as a guiding framework, this chapter also takes account of the definition of apartheid drawn from Articles 7(1) and (2) of the Rome Statute, along with the acts of racial discrimination prohibited by Article 5 of ICERD. The latter provides an array of conventional norms by which Israel is bound, and which may fall within the prohibition of apartheid when committed as part of an institutionalised system of racial discrimination and oppression by a dominant racial group. The specific acts criminalised in the Apartheid Convention and the Rome Statute (murder, torture, etc) and prohibited by ICERD do not define the practice of apartheid; but, rather, are its most severe manifestations.

Each practice defined by the Apartheid Convention as an act of apartheid when part of an overall system of racial domination is addressed here in three parts: (1) the meaning of the provision of the Apartheid Convention and corresponding provisions of ICERD and the Rome Statute; (2) a short review of relevant laws, policies, and practices in apartheid South Africa; and (3) a discussion of relevant Israeli practices in the OPT. As commentary on the Apartheid Convention is scant, discussion of the provisions' meaning is drawn principally from international human rights and humanitarian law. Discussion of apartheid practices and policies in South Africa draws principally from the 1998 report of South Africa's Truth and Reconciliation Commission (TRC), which provides a concise and authoritative assessment. Discussion of Israeli practices and policies and their impact draws from reports and findings of the United Nations and other international organisations, jurisprudence of international and domestic courts including the Supreme Court of Israel, scholars of international law, and Palestinian and Israeli human rights organisations.

(II) B. Article 2(a)(i) – Denial of Right to Life by Murder of Members of a Racial Group

B.1. *Interpretation*

The formulation of Article 2(a)(i) of the Apartheid Convention is drawn from Article 2 of the Genocide Convention. However, the relevant provision of the Genocide Convention speaks of 'killing' rather than 'murder'. This distinction is not insignificant. The formulation in the Genocide Convention does not seem to distinguish between the taking of life sanctioned by law, such as the death penalty, and killings perpetrated beyond the law. The limitation in Article 2(a)(i) of the Apartheid Convention to the category of 'murder' is thus narrower.

The South African apartheid regime practiced the death penalty, which was often used against opponents of apartheid, particularly for security-related offences. To the extent that such taking of life was sanctioned by South African law, and carried out in accordance with due process standards, it would not amount to 'murder' prohibited in this section. The Apartheid Convention's prohibition rather relates – where the requisite intention has been established – to state sanctioned extra-judicial killings of individuals. Such killing also falls under the prohibition in Article 5(b) of ICERD of racial discrimination in the enjoyment of "the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution." The crime against humanity of murder as defined by Article 7(2)(h) of the Rome Statute of the International Criminal Court amounts to an inhumane act of apartheid when perpetrated in the context of an institutionalized regime of systematic oppression and domination by one racial group over another.

(II) B.2. *Practices in apartheid South Africa*

Death became a core weapon used by Apartheid South Africa to secure white domination over blacks by eliminating its opponents and bringing the rest into submission. 'Denial of right to life by murder' included judicial killings that violated due process and extrajudicial killings such as shooting of demonstrators (such as at Sekhukhune, Pondoland, Sharpeville, and Soweto), murder of detainees in jail and detention facilities, and targeted assassinations by security agents and hit squads.

The TRC took the view that use of the death penalty during apartheid was integral to maintaining the apartheid system. Between 1960 and 1994, over 2,500 people were hanged in South Africa.[803] Of these, only one white person – John Harris – was executed for political crimes (bombing) within this 34-year period.[804] Hanging of apartheid's opponents was almost a daily occurrence: during 'the Christmas rush of 1988', 28 people were hanged in one week.[805] It emerged before the TRC that 95 per cent of those hanged were black. All of the condemned were sentenced by white (male) judges.

Beyond sanctioned capital punishment, the TRC concluded that the apartheid state sanctioned murder of its opponents.[806] Extrajudicial killings and targeted assassinations of members of the liberation movement were common. While statistical data is difficult to ascertain on the exact scale of extrajudicial killings, some indication can be obtained from the amnesty applications before the TRC which included 114 applications for the killing of 889 people.[807] The State Security Council – which sat atop the National Security management System – initially targeted members of groups designated as 'terrorist' operating outside South Africa. These measures also targeted their supporters and hosts in cross-border raids that cost thousands of lives. In the tumultuous 1980s, the SSC agents began to target its enemies within South Africa.[808] The murder of people in detention is well documented (Steve Biko's death in detention perhaps the most publicised).[809]

The TRC Report noted that the state's resort to targeted extrajudicial killings was done with the purpose of suppressing resistance to the apartheid regime. The reason for such recourse was that unexplained deaths were, by law, followed by an inquest which required access to the body of the deceased for examination of the cause of death.[810] While often such inquests relied on the word of the police alone, with very little circumspect interrogation, the inquest forum allowed the victim's families to appoint counsel to cross-examine police and other witnesses.[811] In order to maintain control of the political circumstances, there was effective 'condonation and tolerance of extrajudicial killings, which [led] to a culture of impunity throughout the security forces.'[812]

The TRC identified that a pattern of targeted killings of political opponents and resistance forces was established in which such people were abducted, interrogated, and killed. More insidious was that such persons were held in detention and pressured by various means into providing information on resistance activities. Once information was gleaned from them, they were killed and never returned

[803] TRC Report, Vol. 2, Ch. 3, para. 21.

[804] TRC Report, Vol. 2, Ch. 3, para. 27.

[805] Testimony of Paula McBride, before TRC: see TRC Report, Vol.4, CAP 2, para. 49.

[806] TRC Report, Vol. 1, Ch. 2, para. 80.

[807] TRC Report, Vol. 6, Ch. 3, Ch. 1, p. 192.

[808] TRC Report Vol. 1, Ch. 2, para. 79.

[809] See TRC Report, Vols. 3 and 4.

[810] TRC Report Vol. 2, Chap 3, pp. 205-215.

[811] TRC Report, Vol. 6, Section 5, Chap 2, p. 627.

[812] TRC Report, Vol.6, Section 3, Chap 6, Part 2, p. 509. The Report identifies phrases used in security documents and Parliamentary speeches which implied killing with impunity of resistance members.

home to their families, which resulted in the dual effect of the families not knowing what had happened to their loved ones and with them being labelled with the stigma of being traitors.[813]

One of the challenges faced by the TRC in the amnesty proceedings was that authorisation and command responsibility for extrajudicial killings was often hard to establish, since the rhetoric to kill political opponents was always extant. What is clear from statistical evidence is that a significant number of deaths in detention occurred, which is indicative, in part from requests for amnesty for such killings. The creation of the Civil Co-operation Bureau and Vlakplaas were particular instances indicative of planned and structured elimination of resistance by whatever means.[814] Evident from the requests for amnesty were the means of extrajudicial killings that occurred. These applications were categorised by the TRC as (a) abductions followed by killing (deaths in detention, suicides, accidents and natural causes); (b) assassinations of persons considered to have a high political profile both inside and outside the country; (c) assassinations of individual MK and Azanian People's Liberation Army (APLA) personnel both inside and outside the country, and (d) cross-border raids.[815]

(II) B.3. *Israeli practices in the OPT*

Since 1967, thousands of Palestinians in the OPT have been killed by the Israeli military forces in the name of maintaining Israel's occupation and regime of domination over Palestinians. During the two *intifadas* (1987-1993 and 2000 onwards), more than 6,000 Palestinians have been killed by the Israeli army.[816] One form of these killings, which is analogous to practices in apartheid South Africa, stems from the pattern of excessive use of force against civilian demonstrators protesting Israel practices in the OPT. Such killings form part of a broader policy of suppression of opposition to the Israeli occupation and disregard for Palestinian life.[817] In accordance with the emphasis placed above on the Apartheid Convention's prohibition on state-sanctioned policies of extra-judicial killing, the following discussion focuses on extra-judicial killing of Palestinians, the most severe manifestation of Israel's intent to suppress opposition to the occupation and its practices.

Over the course of the occupation, Israel has engaged in specific forms of killing in the OPT: the extrajudicial, summary or arbitrary execution[818] of Palestinians opposing Israel's regime of occupation and designated for so doing as 'terrorists'. The Israeli authorities routinely contend that such extra-judicial killings are necessary due to difficulties in arresting suspects. However, a common form of

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[813] TRC Report Volume 6, Section 5, Ch 2, p. 624.

[814] TRC Report Vol.6, Section 5, Chap 2, p. 628.

[815] TRC Report Vol.6, Section 5, Chap 2, p. 629.

[816] For statistics on fatalities during the first and second Intifadas see B'Tselem/ Israeli Information Centre for Human Rights in the Occupied Territories: http://www.btselem.org/english/Statistics/Index.asp. According to B'Tselem, the number of Israelis killed by Palestinians during the second Intifada from 29 September 2000 to 30 September 2008 is 490 Israeli civilians and 90 Israeli security forces personnel. See also the Palestinian Centre for Human Rights–Gaza (PCHR), 'Statistics related to Al Aqsa Intifada: 29 September, 2000: updated 27 August, 2008', available at: http://www.pchrgaza.org/alaqsaintifada.html.

[817] Palestinian demonstrations against the Wall in the West Bank, for example, are consistently met .1 with excessive and disproportionate use of force by Israeli forces. The village of Ni'lin is one case in point. See, for example, Al-Haq, *Right To Life of Palestinian Children Disregarded in Ni'lin as Israel's Policy of Wilful Killing of Civilians Continues* (7 August 2008), available at: http://www.alhaq.org/template.php?id=387 .

[818] 'Extrajudicial, summary and arbitrary executions are legal terms used to describe killings which have taken place in circumstances which contravene international law. See Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions available at: http://www.unhchr.ch/executions/questionnaire.

killing witnessed in the OPT is the summary execution of Palestinians already under the control of Israeli agents, who were killed rather than arrested or provided with medical treatment.[819]

In the early 1990s, the Israeli army and the Border Police established undercover military units in which soldiers were disguised as Arab civilians (known in Hebrew as *Mista'arvim*). Their official mission was to capture 'wanted' Palestinians. However, many 'wanted' Palestinians who were supposed to be arrested were in fact assassinated.[820] These units operated in conjunction with the General Security Services (GSS or ISA), and made use of intelligence information.[821] Israel traditionally denied that these undercover units were assassination squads.[822]

Israel altered its official policy regarding targeted assassinations following the outbreak of the second *intifada* in September 2000.[823] The Israeli political establishment gave the army 'a broader license to liquidate Palestinian terrorists' and allowed the army 'to act against known terrorists even if they are not on the verge of committing a major attack.'[824] This policy was reportedly sanctioned by then Attorney-General, Elyakim Rubinstein,[825] and marked the beginning of a period in which Palestinians suspected of engaging in resistance activities or opposing the regime are extra-judicially executed as part of Israel's official security policy.

Assassinations are carried out using guns fired by snipers, missiles fired from combat aircrafts, ground to ground missiles, tank-fire and explosive devices planted in cars and public telephone booths. To date, the killings have been carried out under circumstances that suggest a disregard for the lives of innocent bystanders. They also often occur even when the targeted person could have been arrested by the Israeli army.[826]

One such 'targeted killing' was that of Salah Mustafa Muhammad Shehadeh, suspected leader of the Izz ad-Din al-Qassem Brigade, the military wing of Hamas. On 22 July 2002, the Israeli army targeted the building in which Shehadeh was staying, using a one-ton bomb dropped by an F-16 plane in a densely populated neighbourhood of Gaza City. Fifteen people were killed, including Shehadeh, his wife and nine children. Fifty others were injured as a result of the disproportionate attack.[827] Other

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[819] For details of four separate incidents of such extrajudicial and summary executions in the same area in a short period of time, see Al-Haq, *Intervention to Diplomatic Representatives Regarding the Extrajudicial Executions of Palestinians in the Jenin Area* (9 May 2007), available at: http://www.alhaq.org/etemplate.php?id=312

[820] See B'Tselem, *Activity of the Undercover Units in the Occupied Territories* (May 1992), available at: http://www.btselem.org/Download/199205_Undercover_Units_Eng.doc; also Middle East Watch, *A License to Kill: Israeli Undercover Operations Against 'Wanted' and Masked Palestinians* (July 1993).

[821] Ibid.

[822] Ibid., p. 90.

[823] For historical background for the outbreak of the second Intifada, see Baruch Kimmerling, *Politicide – Ariel Sharon's War Against the Palestinians* (London & New York: Verso, 2003), pp. 129-138; also *Lies about Peace, Barak and Sharon War against the Palestinians.*

[824] Amos Harel and Aluf Benn, 'Kitchen cabinet okays expansion of liquidation list,' *Ha'aretz*, 4 July 2001.

[825] See Gideon Alon, 'Rubinstein backs IDF's policy of 'targeted killings'', *Ha'aretz* (2 December 2001) (Hebrew): '…The Attorney General added that the term 'liquidations' damages Israel's image and that it is preferable to use the phrase 'targeted killings' to describe the policy. The hits are carried out according to detailed orders, published by the military prosecutor's office, and in accordance with international law, Rubinstein said.'

[826] Ibid, pp. 11-12.

[827] See *Matar v. Dichter*, a federal class action lawsuit brought by the Centre for Constitutional Rights (CCR) and the Palestinian Centre for Human Rights – Gaza against the former Director of Israel's GSS, Avi Dichter, charging Dichter with war crimes, extra-judicial killing and other gross human rights violations for his participation in the aerial bombing of a Gaza residential neighbourhood. The suit charges that Dichter provided the necessary intelligence and gave final approval to drop a one-ton bomb on an apartment building in the

targets have included militants and political leaders belonging to different Palestinian political parties and factions. Hundreds of Palestinian have been killed by targeted assassination since September 2000, with hundreds more non-targeted civilian bystanders killed in the process.

The Israeli Military Advocate General's office opens investigations into the killings of Palestinians in the OPT only in exceptional cases.[828] At the beginning of the second *intifada*, the Israeli High Court of Justice refused to consider the legality of Israel's assassinations policy, stating in response to a petition that, 'the choice of means of war employed by respondents… is not among the subjects in which this court will see fit to intervene.'[829] However, following a petition filed in January 2002, the High Court accepted to hear a challenge to the legality of the assassinations policy.[830] In its December 2006 judgment, the Court dismissed the petition, ruling that it cannot be determined that 'targeted killings' are always legal or always illegal: 'All depends upon the question of whether the standards of customary international law regarding international armed conflict allow that preventative strike or not.'[831]

The Court's decision hinged on the definition of civilians and combatants under international humanitarian law and how 'taking direct part in hostilities' is construed. In this regard the Court applied a broad and vague interpretation of the phrase:

> (T)he 'direct' character of the part taken should not be narrowed merely to the person committing the physical act of attack; those who have sent him, as well, take 'a direct part'. The same goes for the person who decided upon the act and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities.[832]

This interpretation corresponds with the Israeli political establishment's position that all Palestinians involved in military resistance to the Israeli occupation are legitimate targets for targeted killings, including members of the Palestinian political and spiritual leadership.[833] Sheikh Ahmad Yassin and

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middle of the night, which killed fifteen persons and injured over 150 others. Legal documents available at: http://ccrjustice.org/ourcases/current-cases/matar-v.-dichter.

[828] Human Rights Watch, 'Promoting Impunity – The Israeli Military's Failure to Investigate Wrongdoing' (June 2005). See also H.C. 9594/03, *B'Tselem, et al. v. The Military Judge Advocate General et al.* (still pending), in which B'Tselem and the Association for Civil Rights in Israel (ACRI) demanded the initiation of criminal investigations in all cases of Israeli soldiers killing Palestinian civilians not involved in hostilities. See also Hala Khoury-Bisharat, 'Israel and the Cultural of Impunity,' *Adalah Newsletter*, Vol. 37 (June 2007), available at: http://www.adalah.org/newsletter/eng/jun07/ar1.pdf.

[829] H.C. 5872/01, *MK Mohamad Barakeh v. Prime Minister Ariel Sharon*, PD 46 (3), 1, dismissed 29 January 2001.

[830] The petition was filed to the Supreme Court on 24 January 2002 by PCATI and LAW. See, H.C. 769/02, *The Public Committee against Torture in Israel v. The Government of Israel*, available at: http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

[831] Paragraph 60 of the judgment.

[832] Paragraph 37 of the judgment. For a different position see, Expert Opinion by Antonio Cassese, 'On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law', available at: http://www.stoptorture.org.il. Some scholars have opined that this part of the court's decision is adequately supported in the existing literature: see, for example, William J Fenrick, 'The *Targeted Killings* Judgment and the Scope of Direct Participation in Hostilities' (2007) 4 *Journal of International Criminal Justice* 2 at 332-338.

[833] The Israeli leadership and army do not distinguish between Palestinian attacks on soldiers and settlements and Palestinian attacks on civilians. The Israeli Chief of Staff has declared that all members of Hamas are legitimate targets for assassinations. See Amos Harael, 'The IDF presents moral arguments for assassinations,' *Haaretz* (5 September 2003) (Hebrew), available at: http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=337186.

Abd el-Aziz Rantissi are among the more prominent political and spiritual leaders of Hamas extra-judicially executed by Israel in recent years.[834]

While the main significance of the court's judgment could be the attempt to transform the focus of the judicial review from policy to individual actions,[835] the actions of the political leadership and the Israeli military in depriving 'wanted' Palestinians of their right to life has not been outlawed by the Courts. As in apartheid South Africa, extrajudicial killings by Israeli forces are sanctioned by the executive branch of the state, and constitute an integral part of an institutionalised system designed to eliminate dissent or resistance to the regime in order to maintain domination by one racial group over another.

(II) C. Article 2(a)(ii) – Denial of Right to Life and Liberty of Person by Subjection to Torture or to Cruel, Inhuman or Degrading Treatment or Punishment

(II) C.1. *Interpretation*

The formal prohibition on the use of torture or cruel, inhuman or degrading treatment is possibly the least contested component of the international human rights regime. Such conduct is prohibited by a number of different international and regional human rights texts and is outlawed even during times of war.[836] Article 5 of the Universal Declaration of Human Rights states that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Similar – if not identical – phrases can be found in Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and other regional human rights instruments. Furthermore, 144 states have ratified that UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). Hence the language of Article 2(a)(ii) of the Apartheid Convention reflects a similar prohibition on torture or cruel, inhuman or degrading treatment or punishment, but shifts the focus from the level of the individual to that of the group. While not making explicit reference to torture or cruel, inhuman or degrading treatment or punishment, Article 5(b) of ICERD prohibits racial discrimination in the enjoyment of "the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution."

Legal academics and practitioners generally agree that the prohibition is both absolute and non-derogable. As Lord Bingham of the House of Lords recently stated, '[t]here can be few issues on which international legal opinion is more clear than on the condemnation of torture. Offenders have been recognised as the 'common enemies of mankind''[837] Some have gone a step further by suggesting that the prohibition on torture is in fact part of customary international law and a *jus cogens* norm. In *Delalic*, the ICTY (Trial Chamber II) stated that the definition of Torture contained in the UN CAT was 'representative of customary international law'.[838]

Recent events at a global level – most notably the 'war on terror' – have brought these rogue practices back into the limelight and courts have had to grapple with alleged violations of what was hitherto

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[834] See BBC News, 'Israel's 'targeted killings', (17 April 2004), available at: http://news.bbc.co.uk/1/hi/world/middle_east/3556809.stm.

[835] Ben Naftali, 'A Judgment in the Shadow of International Criminal Law' (2007) 5 *Journal of International Criminal Justice* 322.

[836] All four Geneva Conventions prohibit the use of torture. See also Article 2(2) of the UN Convention Against Torture.

[837] *A (FC) and others (FC) (Appellants) v. Secretary of State for International Peace Operations*, 255.

[838] *The Prosecutor v. Zejnil Delalic, Zdravko Mucic* (a/k/a/ "Pavo"), *Hazim Delic, Esad Landzo* (a/k/a "Zenga") Case No. IT-96-21-T, 16 November 1998, para. 459.

widely considered a settled area of human rights law.[839] The violation of the prohibition on torture or cruel, inhuman or degrading treatment – like the crime of 'apartheid' – is an *international crime*.[840] Hence the International Criminal Court could – if the Rome Statute's jurisdictional provisions are satisfied – exercise criminal jurisdiction over individuals responsible for torture committed as a crime against humanity (on a widespread or systematic basis). It has been posited that States can exercise universal jurisdiction over such violations.[841] In addition to constituting a crime against humanity in itself under the Rome Statute, torture can also amount to the crime against humanity of apartheid according to Article 7(1)(f) where "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime". The focus of the Apartheid Convention's prohibition of the denial of the right to life and liberty of a person by their subjection to torture or to cruel, inhuman or degrading treatment or punishment is similarly linked to a concern with racial oppression; that is, the prohibition in Article 2(a)(ii) of the Convention is focused on instances of torture or cruel treatment or punishment connected with an overall apartheid policy of racial oppression.

(II) C.2. *Practices in Apartheid South Africa*

Torture of detainees and other abuses associated with detention were the main forms of violation reported to the TRC Commission. Torture with police impunity was indeed found to be the cornerstone of the detention system, as 'extracting information, statements and confessions, often regardless of whether true or not' allowed the state 'to secure a successful prosecution and neutralisation of yet another opponent of the apartheid system'.[842] The TRC estimated that as many as 20,000 detainees were tortured in detention in the Eastern Cape alone. Nationally, it would be more than a hundred thousand.[843] The TRC concluded that it was the policy of the Department of Prisons to use cruel, degrading and inhuman forms of punishment on prisoners including caning, 'spare' diet, leg irons and solitary confinement.[844]

The TRC investigation revealed widespread torture of detainees by the security agencies in all the Provinces.[845] The most frequently reported perpetrator was the security police.[846] Detention was routinely accompanied by torture and sometimes led to death.[847] Statements made to the Commission revealed routine assault and torture of detainees by police. Beatings were the most frequently mentioned violation, but electric shocks were also common and allegations of poisoning were made. Some detainees returned home blind and/or deaf, some mentally ill. Some of those jailed after sentencing were also mistreated.[848] Prisons, as an institution of the state — together with the police,

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[839] See further *A (FC) v. Secretary of State for the Home Department* (2005) UKHL 71, *Public Committee Against Torture in Israel v. Government of Israel,* Supreme Court of Israel, 1999 H.C. 5100/94 and *U.S. Department of Justice, Memorandum from Jay Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President,* August 1, 2002.

[840] Cryer et al., *An Introduction to International Criminal Law and Procedure* at 295.

[841] Ibid.

[842] Max Coleman (ed.), *Crime Against Humanity; Analysing the Repression of the Apartheid State,* Human Rights Committee of South Africa, Part A(3): 'The Detention Weapon'. Available at: http://www.sahistory.org.za/pages/library-resources/online%20books/crime-humanity/detention%20weapon.htm.

[843] TRC Report, Vol.4, Ch. 7, para. 14 . See entire volume for figures from other provinces.

[844] TRC Report, Vol.4, Ch. 7, para. 67.

[845] See generally TRC Report, Vol.3.

[846] TRC Report Vol.2, Ch. 7, para. 28.

[847] TRC Report, Vol.4 Ch. 7, para. 13; see Appendix to Ch. 7, 'Death in Detention'.

[848] TRC Report, Vol.3, CAP 2, para. 15.

the judiciary and the security apparatus — were an integral part of the chain of oppression of those who resisted apartheid.[849]

(II) C.3. *Israeli practices in the OPT*

Since the OPT came under Israeli military rule in 1967, Israel has employed a policy of arresting and imprisoning Palestinians on a massive scale. In one count, at least 650,000 Palestinians, constituting around 20 percent of the total Palestinian population of the OPT and close to 40 percent of the male population, have been imprisoned at some time by the Occupying Power.[850] Between the beginning of the second intifada in September 2000 and February 2007, approximately 45,000 Palestinians were imprisoned[851]. In February 2009, B'Tselem reported 7,940 Palestinians were being held in Israeli prisons, 548 of whom were in administrative detention (without trial). Because arrest and imprisonment are often accompanied by torture and abuse used to extract confessions and gain information about resistance activities, it is arguable that a primary purpose of this policy is to suppress resistance to the occupation and cement Israel's domination over the Palestinian population in the OPT.[852] Mass imprisonment has also severely impacted the Palestinian community and families of prisoners in the OPT.[853]

As noted by the UN Committee Against Torture in its Concluding Observations on Israel from 2001, the absolute prohibition on torture in international law has not been incorporated into Israeli law.[854] In 1999, the Israeli High Court of Justice held certain methods of interrogation to be illegal, but allowed the use of pressure and discomfort for the purpose of extracting information from interrogees.[855] The High Court also indicated that agents of the General Security Services (GSS, also referred to as the Israel Security Agency, or ISA), who used torture in extreme circumstances on so-called 'ticking bombs,'[856]

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[849] TRC Report, Vol.4 CAP 7, para 1 and Human Rights Committee (1998), p. 55.

[850] Addameer, Prisoners' Support and Human Rights Association, 'Political Detention'. Available at: http://www.addameer.org/detention/background.html.

[851] The Palestinian Central Bureau of Statistics, 'Press Release on the Occasion of Palestinian Prisoners Day', 14 April 2007. Available at: http://www.pcbs.pna.org/Portals/_pcbs/PressRelease/e-Prisoners_Day2007.pdf.

[852] See, e.g., Lisa Hajjar, 'International Humanitarian Law and 'Wars on Terror': A comparative analysis of Israeli and American doctrines and policies,' *Journal of Palestine Studies*, vol. XXXVI, no. 1 (Autumn 2006), pp. 21-42.

[853] See, for example, testimonies gathered by HaMoked – Centre for the Defence of the Individual and B'Tselem: The Israeli Information Centre for Human Rights in the Occupied Territories, in 'Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees', May 2007.

[854] Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.57.44,paras.47-53.En?Opendocument. Israel ratified the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 3 October 1991. It has placed two reservations to the Convention: '1. In accordance with Article 28 of the Convention, the State of Israel hereby declares that it does not recognise the competence of the Committee provided for in Article 20; 2. In accordance with paragraph 2 of article 30, the State of Israel hereby declares that it does not consider itself bound by paragraph 1 of that article.' Israel has not signed the Optional Protocol to the Convention.

[855] H.C. 5100/94, *The Public Committee Against Torture in Israel v. The Government of Israel*, 53(4) P.D. 817.

[856] The term 'ticking bomb' is used to describe individuals who present an immediate physical threat to the security of the State of Israel or who hold information about such a threat, and refers to the race against time to prevent the threat from materializing. Proponents of the use torture to extract information from 'ticking bombs' justify their stance on the potentially great loss of life that could result from such a threat. See generally, The Public Committee Against Torture in Israel, 'Ticking Bombs: Testimonies of torture victims in Israel', May 2007, available at: http://www.stoptorture.org.il/files/140[1].pdf. See also, Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House', *Columbia Law Review*, Vol. 105 (6), October 2005, p. 1714, and David Luban, 'Liberalism, Torture and the Ticking Bomb', *Virginia Law Review*, Vol. 91, October 2005, p. 1140. However, Israel regularly perpetrates torture in situations that do not comply with the problematic 'ticking bomb' scenario. See, e.g., The Public Committee Against Torture in Israel, 'Ticking Bombs', pp. 10-11. The

could avoid prosecution on the basis of the 'necessity defence' set forth in article 34K of Israel's Penal Law.[857]

Thus, the High Court has left a legal ambiguity regarding torture which has allowed for its continued use by the state and the GSS in the case of 'security' prisoners and detainees, the overwhelming majority of whom are Palestinians. According to statistics obtained from the Israel Prison Service, as of 6 November 2006, from a total 9,498 'security prisoners,' only 12 were Jewish.[858] The Court also failed to define precisely the circumstances in which the necessity defence is available, leaving scope for a broad interpretation by the GSS and a concomitant continuation of torture and other cruel, inhuman or degrading treatment or punishment.[859]

Following the High Court's 1999 ruling and the outbreak of the second *intifada* in 2000, Israel has continued various practices including physical coercion that violate international law, notably the CAT and the ICCPR, against the many thousands of Palestinian prisoners incarcerated in its prisons and detention centres. Many of these practices were identified as subjects of concern by the UN Committee Against Torture in 2001,[860] the UN Human Rights Committee in 2003,[861] and the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism in November 2007.[862] According to the Public Committee Against Torture

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report submitted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, to the UN Human Rights Council on 28 November 2007, Addendum (A/HRC/6/17/Add.1) stated that, 'The Special Rapporteur was shocked by the unconvincing and vague illustrations by the ISA of when such ''ticking bomb' scenarios may be applicable. He was troubled by the process by which individual interrogators would seek approval from the Director of the ISA for the application of special interrogation techniques, potentially rendering this as a policy rather than a case-by-case, ex post facto, defence in respect of wrongful conduct.' Available at: http://domino.un.org/unispal.nsf/eed216406b50bf6485256ce10072f637/5f8dd0dc16603dd5852573aa0056d736!OpenDocument.

[857] Article 34K of the Penal Law, entitled 'Necessity', stipulates that, 'A person will not bear criminal liability for committing an act that was immediately necessary for the purpose of saving the life, liberty, body or property, either of himself or his fellow person, from a real danger of serious harm, due to the conditions prevalent at the time the act was committed, there being no alternative means for avoiding the harm.'

[858] Letter from the Israel Prison Service to Adalah, dated 6 November 2006.

[859] See LAW – The Palestinian Society for the Protection of Human Rights and the Environment, The Public Committee Against Torture in Israel (PCATI), and The World Organisation Against Torture (OMCT), 'Comments on Issues relating to Palestinian Detainees in the Third Periodic Report of the State of Israel Concerning the Implementation of the International Covenant on Civil and Political Rights', September 2002, pp. 13-24, available at: http://www.stoptorture.org.il/files/comments.pdf. The UN Human Rights Committee stated its concern that, 'interrogation techniques incompatible with article 7 of the Covenant are still reported frequently to be resorted to and the 'necessity defence' argument, which is not recognized under the Covenant, is often invoked and retained as a justification for ISA actions in the course of investigations', and recommended that Israel review its recourse to this argument. See, Concluding Observations of the Human Rights Committee: Israel, 21 August 2003 (CCPR/CO/78/ISR), para. 18, available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?Opendocument.

[860] *Conclusions and Recommendations of the Committee against Torture: Israel*, 23 November 2001, CAT/C/XXVII/Concl.5.

[861] *Concluding observations of the Human Rights Committee*: Israel, 21 August 2003, CCPR/CO/78/ISR. Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument.

[862] *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Addendum,* Mission to Israel, Including Visit to Occupied Palestinian Territory, A/HRC/6/17/Add.4, 16 November 2007. Available at: http://domino.un.org/unispal.nsf/c25aba03f1e079db85256cf40073bfe6/7ad9a5183461be7e852573aa0058b5ba!OpenDocument.

in Israel (PCATI), torture in Israel is 'carried out in an orderly and institutional fashion.'[863] On 2 December 2008, Israeli human rights organisations filed a contempt of court motion to the High Court of Justice against Israel for its policy of granting GSS investigators à priori permission to practice torture in fundamental violation of the Court's 1999 decision.[864] The organisation submitted, inter alia, that, '[t]he contempt involved is particularly egregious, consistent and systematic and is enshrined in directives and procedures', in particular the 'necessity interrogation procedure'.

In March 2009, nearly 8,000 Palestinian political prisoners were in detention in the Israeli prison system, classified by the Israeli prison services as security prisoners and detainees. This number included approximately 550 in administrative detention and others who were detained *incommunicado*, as well as around 400 children.[865] Under Israeli law, an individual is considered to be an adult at the age of 18, whereas under Israeli Military Order No. 132, Palestinians in the OPT are considered by Israel to be adults at the age of 16. Thus, Palestinian juveniles are afforded the same harsh treatment and receive the same punishment as adult prisoners. This discrepancy has been raised as a matter of concern by the UN Committee Against Torture[866] as well as by the UN Committee on the Rights of the Child.[867]

The practice of torture and other forms of ill-treatment is most widespread during the arrest and interrogation of Palestinians by the Israeli military forces and Border Police.[868] Particularly harsh interrogation methods are used by the GSS to obtain information and confessions. Between July 2005 and January 2006, 49 percent of the Palestinians detained for interrogation by the GSS reported being beaten during the stages preceding interrogation, 33 percent being held in painful bindings, 34 percent being subjected to curses and humiliation, 23 percent being denied basic needs, and 67 percent reported being exposed to at least one of the above abuses.[869] During interrogation by the GSS, 68 percent of Palestinian prisoners reported being held in isolation during all or most of the interrogation period, 88 percent being held in solitary confinement and experiencing sensory deprivation during all or most of the interrogation period, 45 percent being deprived of sleep, 73 percent being given poor-quality food, 96 percent being cuffed for protracted periods in the painful *shabah* position (in which the detainee's hands and feet are tightly bound to a chair or low stool), 29 percent being subjected to a naked body search, and 73 percent to insults and other humiliations.[870] The conditions of confinement in Israeli prisons also give rise to concerns of ill treatment that can amount to torture, including cramped and unhygienic living spaces and medical neglect. Israeli law permits the imposition of separate, harsher conditions of confinement on 'security' detainees as compared to ordinary criminal

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[863] PCATI, 'Back to a Routine of Torture: Torture and Ill-treatment of Palestinian Detainees during Arrest Detention and Interrogation,' September 2001-April 2003, p. 12. Available at: http://www.stoptorture.org.il/files/back%20to%20routine.pdf.

[864] For more information, see PCATI, 'PCATI, ACRI, HaMoked filed a contempt of court motion to the High Court of Justice' 2 December 2008, available at: http://www.stoptorture.org.il/en/node/1332.

[865] See B'Tselem: The Israeli Information Centre for Human Rights in the Occupied Territories, at http://www.btselem.org/English/Statistics/Detainees_and_Prisoners.asp, and http://www.btselem.org/English/Statistics/Minors_in_Custody.asp.

[866] UN Committee Against Torture, *Conclusions and recommendations*: *Israel* (25 September 2002), A/57/44,paras.47-53, para. D(6)(d). Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.57.44,paras.47-53.En?Opendocument.

[867] *Concluding Observations of the Committee on the Rights of the Child*: Israel, 9 October 2002, CRC/C/15/Add.195., Article 62 (a). Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.195.En?Opendocument.

[868] See, e.g., PCATI, 'No Defense: Soldier violence against Palestinian detainees', June 2008. Available at: http://www.stoptorture.org.il/files/No_Defense_Eng.pdf.

[869] B'Tselem, Centre for the Defence of the Individual, 'Absolute Prohibition: The torture and ill-treatment of Palestinian detainees,' July 2007, p. 38, available at: http://www.btselem.org/Download/200705_Utterly_Forbidden_eng.pdf.

[870] Ibid., pp. 63.

detainees simply because they are alleged to have committed offences defined as security offences.[871] These discriminatory conditions violate the fundamental rights of Palestinian detainees.

By contrast, the handful of Israeli Jewish prisoners who are classified as 'security' prisoners, have been permitted to exercise numerous rights, including conjugal visits. For example, prisoner Yigal Amir, who was convicted in 1996 of murdering Prime Minister Yitzhak Rabin for ideological reasons, has since fathered a son in prison and has been allowed open visits with his family and phone calls. Similarly, Jewish-Israeli prisoner Ami Popper, who was convicted in 1990 of murdering seven Palestinian labourers and wounding 11 others, was married in prison in 1993 and fathered his first child in prison in 1995. He has since fathered another two children. He has also been granted leave to take furloughs from prison. No Palestinian security prisoner has been awarded such privileges.[872]

As documented by the Public Committee Against Torture in Israel, a number of Palestinian detainees have been subjected to a form of psychological torture by the GSS, in the form of the arrest and exploitation of innocent family members of the detainees under interrogation, for the purpose of applying additional pressure to force a confession or obtain information.[873] In some cases the GSS has informed prisoners, either falsely or accurately, that their relatives are also being tortured.

Certain provisions within Israeli law facilitate the practice of torture at the stages of detention, interrogation and imprisonment. In some cases 'security' detainees are subject to a different set of laws and regulations governing criminal procedures during detention, with the result that individuals can be detained, deprived of their liberty, isolated from the outside world and interrogated by the GSS for up to three weeks, prior to being brought before a court. These harsher laws *de facto* apply almost exclusively to Palestinians, and virtually no Jewish prisoners or detainees are subjected to them.[874] Thus within the criminal justice system Israel has effectively created a distinct track for Palestinian detainees that operates in parallel with but separately from the 'ordinary' criminal track. The former is characterised by the systematic denial of due process rights and other basic rights and safeguards, for the purpose of maintaining a system of control and domination over OPT Palestinians.

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[871] Regulation 22 of the Criminal Procedure (Enforcement Powers – Detentions) Law (Enforcement Powers – Detention) (Conditions of Detention) – 1997. On the basis of this regulation security detainees are also not entitled to a daily walk in the open air or to use the telephone, even to call their attorney. Criminal detainees, by contrast, are permitted a daily hour-long walk in the open air and are allowed to make a daily telephone call to their attorneys, as well as daily calls to their family and friends. Criminal detainees are provided with a bed, while security detainees are provided a thin mattress and blankets; criminal detainees, but not security detainees are provided newspapers, books, TVs, radios a razor and mirror, an electric kettle, wall light, fan and heater. Some of the discriminatory conditions are hygiene-related: for example, the cells of security detainees do not contain a basin, and while criminal detainees' cells must be sanitized and disinfected annually and provided with detergents, this is not the case for security detainees.

[872] See, e.g., Prisoners' Petition 609/08, *Walid Daka v. the Israel Prison Service* (Nazareth District Court) (case pending). This political prisoner – a Palestinian citizen of Israel – is the first Palestinian to seek conjugal rights.

[873] For more information, see PCATI, 'Family Matters, Using Family Members to Pressure Detainees', April 2008. Available at: http://www.stoptorture.org.il/files/Fmily%20Matters%20full%20report%20eng.pdf. On 16 April 2008, PCATI and a number of other Israeli and Palestinian human rights organizations filed a petition to the Supreme Court of Israel to demand that the use of family members as means of exhorting pressure on suspects during interrogations by state authorities be absolutely prohibited. See H.C. 3533/08, *Maisoun Suweti, et al. v. The General Security Services, et al.* (case pending).

[874] The Criminal Procedure (Detainees Suspected of Security Offenses) Law 2006, for example, allows 'security' detainees to be detained for 96 hours without any judicial oversight (in ordinary criminal cases, suspects may be detained for a period of 24 hours or 48 hours), to have their detention extended in their absence, not to be told of the court's decision to lengthen their arrest, and to be denied access to legal counsel for a period of 21 days. The law was specifically enacted to provide Israel with greater powers to handle Palestinians from Gaza after the unilateral 'disengagement' and the dismantling of the Israeli military court system there in 2005. The law seeks to allow security suspects to be interrogated far from the purview of the courts, thereby fostering conditions conducive for detainees to be tortured and exposed to unlawful interrogation methods. See H.C. 2028/08, *The Public Committee Against Torture in Israel, et al., v. The Minister of Justice, et al.* (petition withdrawn 24 March 2009),

No criminal investigation has been opened and no prosecutions have been brought against alleged Israeli perpetrators of torture and ill treatment. The inspector who investigates complaints of torture and ill-treatment against GSS interrogators is an employee of the GSS and therefore, in practice, the GSS is a self-regulating body. In this regard, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism raised his concerns 'about the ability of the inspector, as an employee of the Israeli Security Agency, to act truly independently from the Agency and thus vigorously investigate allegations of ill-treatment or torture.'[875] According to data provided in Israel's Fourth Periodic Report on the implementation of the CAT, in 2002-2005, the GSS inspector initiated some 386 examinations, of which only four resulted in disciplinary measures and not one in prosecution.[876]

The impunity that was effectively afforded by the High Court's 1999 decision (discussed earlier) was further consolidated in the General Security Service Law (2002), which specifies that a GSS employee 'shall *not* bear criminal or civil responsibility for any act or omission performed in good faith and reasonably by him within the scope and in performance of his function.'[877] The lack of an effective mechanism to enforce CAT and Israel's failure to ratify the Optional Protocol to CAT mandating independent visits to prisons have also contributed to a culture of impunity. The practice of torture and ill-treatment is also facilitated by the recently amended Criminal Procedure (Interrogation of Suspects) Law (Amendment No. 4) 2008, which exempts the GSS and the police from making audio and video documentation of their interrogations of suspects in security offences (section 7), as well as the prison authorities' policy of restricting the access of prisoners and detainees to legal counsel, often with the acquiescence of other state authorities and the courts.

Thus Israeli State institutions provide protection to torturers. As noted, the High Court remains reluctant to enforce international standards prohibiting torture and ill-treatment. The State Prosecutor's Office perfunctorily rejects complaints of torture, relying exclusively on internal GSS investigations, and the Attorney-General unquestioningly accepts the 'ticking bomb' and 'necessity defence' claims presented by the GSS. The result is that the policy of state-sanctioned torture against Palestinians continues unabated.

(II) D. Article 2(a)(iii) – Denial of Right to Liberty of Person by Arbitrary Arrest and Illegal Imprisonment of Members of a Racial Group

(II) D.1. *Interpretation*

Article 9 of the Universal Declaration of Human Rights declares that, 'No one shall be subjected to arbitrary arrest, detention or exile.' Article 9 of the ICCPR reiterates this prohibition on arbitrary arrest and states further that 'no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'. The ICCPR's Human Rights Committee has posited that detention be classified as arbitrary if it continues beyond the period for which a State can provide appropriate justification.[878] The deprivation of liberty permitted by law must not be 'manifestly *unproportional*, unjust or *unpredictable*, and [that] the specific manner in which an arrest

[875] Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, to the UN Human Rights Council, Addendum, Mission to Israel, including visit to Occupied Palestinian Territory, 16 November 2007 (A/HRC/6/17/Add.4).

[876] The State of Israel, 4th Periodic Report Concerning the Implementation of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, October 2006, para. 46 (CAT/C/ISR/4): available at: http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.ISR.4.doc.

[877] Emphasis added. An official translation of the law into English is available at: http://www.justice.gov.il/NR/rdonlyres/C7E5F996-458F-4910-B343-776C5A9495F8/0/GeneralSecurityServicesLawedited.doc.

[878] *Baban* v. *Australia*, Communication No. 1014/2001, Views adopted August 6, 2003, UN Doc. CCPR/C/78/D/1014/2001.

is made must not be *discriminatory* and must be able to be deemed *appropriate* and *proportional* in view of the circumstances of the case'.[879]

Article 2(a)(iii) of the Apartheid Convention includes among 'inhuman acts' contributing to the crime of apartheid the denial of the right to liberty of person, 'by arbitrary arrest and illegal imprisonment of the members of a racial group or groups'. The term 'arbitrary arrest' mirrors the language of general human rights instruments.[880] The Apartheid Convention cites the denial of liberty by 'illegal' (rather than arbitrary) imprisonment. This is unusual, because international human rights law typically speaks of 'arbitrary arrest or detention' with 'arbitrary' as the delineator of both arrest and imprisonment.

Uncertainty may therefore arise in the interpretation of 'illegal' – illegal by what system of law?[881] Had the Apartheid Convention referred to arbitrary (rather than illegal) detention, it would have more clearly invoked international standards. It is unclear why the drafters of the Convention did not do this. The lack of any specific reference to the wording of this particular provision in the *travaux préparatoires*[882] strongly suggests that it was a careless oversight rather than a carefully deliberated limitation. Inferring the intent of the provision as being in accordance with international standards would keep it in line with the overall aim of the Convention. Moreover, the ambiguity of the wording of Article 2(a)(iii) is rectified by its corresponding provision in Article 7(2)(h) of the Rome Statute, which defines the crime of apartheid as inhumane acts[883] committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over another, one such act being, under Article7(1)(e), 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'.[884] The stipulations of the Rome Statute are widely accepted as an improvement on the Apartheid Convention, and the ratification of the Statute by 108 States, with no demonstrable hostility to the apartheid provisions by non-States parties, attests to the customary nature of the crime of apartheid. Thus the inhumane act in question here, which amounts to the crime of apartheid if committed for the purposes of racial domination and oppression, can be construed as a deprivation of liberty by arbitrary arrest and detention in violation of the principles of international law.

One manifestation of such arbitrary detention is administrative detention or internment, which entails the imprisonment of individuals without charge or trial by administrative rather than judicial procedure. As a concept it is intended to be an exceptional emergency measure, preventive rather than punitive in disposition, but has historically been used to imprison opponents of repressive regimes.[885]

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[879] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (Arlington: N.P. Engel, 1993), at 173.

[880] See, for example, Article 9, International Covenant on Civil and Political Rights.

[881] For example, the most egregious arbitrary arrests and detention in South Africa came pursuant to the Pass Laws, which although inherently discriminatory, were legitimate under the prevailing domestic legal system. The same is true for Palestinians arbitrarily arrested and detained for being in a certain area without the required permit, or for constituting a 'security threat' without any evidence being openly presented against them, measures which are taken in the OPT in accordance with relevant Israeli military legislation and thus, according to Israel, are not 'illegal'.

[882] UN General Assembly, Official Records, 28th Session (1973), Third Committee, Agenda Item 53, pp. 138-170.

[883] As noted previously, the definition found in Article 2 of the Apartheid Convention refers to 'inhuman acts', while the Rome Statute speaks of 'inhumane acts' of apartheid.

[884] The Apartheid Convention refers to 'inhuman acts', but the Rome Statute refers to '*inhumane* acts'.

[885] Administrative detention has its origins in the measures adopted by the British authorities during the Boer Wars in South Africa at the end of the 19th century. The use of internment was a prominent feature of British oppression in Northern Ireland, where 1,874 Republicans were detained without charge or trial between 1971 and 1975. During the same period, 107 Loyalists were detained under the policy of internment. [Statistics from CAIN Archive, *Conflict and Politics in Northern Ireland (1968 to the Present)*, http://cain.ulst.ac.uk].

The use of the term 'illegal' in respect of the Apartheid Convention also brings the right of judicial review into the equation, such as contained in Article 8 of the UDHR and other human rights instruments. In the *Barayagwiza* case, the ICTR confirmed the established nature of the right to judicial review in respect of the lawfulness of detention.[886]

(II) D.2. *Practices in Apartheid South Africa*

In apartheid South Africa, detention of political activists was a primary means of repression.[887] With the introduction of detention without trial in the 1960s, it became one of the main tools of control under apartheid.[888] In the 1980s, detention was used also as 'a preventive measure (as in 1986, where it affected whole communities), or as a deliberate form of intimidation'.[889] The TRC has estimated that some 80,000 South Africans were detained without trial between 1960 and 1990, including about 10,000 women and about 15,000 children under the age of 18. Up to 80 percent of these detainees were eventually released without charge and barely 4 percent of whom were ever convicted of any crime.[890] In addition to constituting a human rights violation in itself, 'detention without trial allowed for the abuse of those held in custody.'[891]

The first of the security laws introduced by the National Party was the Suppression of Communism Act of 1950. This Act was extremely broad in its scope, being aimed not only at the suppression of Communism as a narrowly defined political ideology, but also at the suppression of any doctrine 'which aims at bringing about any political, industrial, social or economic change within the Union by the promotion of disturbances or disorder, by unlawful acts or omissions or by means which include the promotion of disturbance or disorder, or such acts or omissions or threats.'[892] This scope embraced any doctrine of anti-racism that threatened white supremacy in South African governance.

After many amendments and extensions, the Suppression of Communism Act was replaced by the Internal Security Act 79 of 1976, [893] which was also amended and extended as the struggle against apartheid intensified. This latter Act provided for preventative detention for periods of twelve months. These periods of detention could be successive and indefinite. The Act gave discretion to the Minister of Justice to detain any person on the basis of 'security' or 'public order,' without defining the parameters of those terms. The subjective nature of this vested discretion enabled the Minister, without due process or justification, to declare that someone should be detained, without the existence of objective factors to warrant such detention. It enabled the Minister to label someone as a threat to public order, whether or not any verifiable factors existed as to whether they indeed constituted such a threat. The effect of this discretion was to render the application of the law capricious and unpredictable. Criticism of such discretion is that it should never be widely construed. Contemporary principles of administrative and constitutional law preclude the arbitrary exercise of discretion, without due consideration. In fact modern constitutionalism suggests that the concept of an unfettered discretion, such as that afforded the Minister under the Internal Security Act, is anathema to the principle of legality.[894]

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[886] *Prosecutor* v. *Barayagwiza*, Case No. ICTR-97-19. Appeals Chamber, Decision (3 November 1999), para. 88.

[887] TRC Report, Vol.2, Ch. 7, para. 28.

[888] TRC Report, Vol.4, Ch. 7, para 22.

[889] TRC Report, Vol.4, CAP 7, para 13.

[890] Human Rights Committee (1998), p. 55; TRC Report, Vol. 2, Ch. 3, para. 91.

[891] TRC Report, Vol.6, at 619.

[892] The Suppression of Communism Act, No. 44 of 1950 (originally introduced as the Unlawful Organisations Bill), approved on 26 June, entry into force on 17 July 1950.

[893] Amending the Suppression of Communism Act 44 of 1950.

[894] Cora Hoexter *Administrative Law in South Africa* (Cape Town: Juta, 2007),, at 45-46.

The apartheid regime also made frequent use of detention without trial in order to silence its opponents. In terms of the Criminal Procedure Act of 1965, potential state witnesses in political trials could be detained without trial for a period of up to 180 days. An even more draconian provision was put into effect by the Terrorism Act 83 of 1967, which allowed for indefinite detention without trial of those suspected of being 'terrorists'. Detainees could be held until they had replied 'satisfactorily' to all questions put to them under interrogation. The Terrorism Act placed the onus on the accused to prove his innocence, rather than on the prosecution to prove his guilt. The Act provided for a minimum sentence of five years upon conviction, and courts of law were prohibited from pronouncing upon the validity of any detention order, or ordering the release of any particular detainee, while such detainee was still being interrogated or awaiting charges to be brought against him.[895] Under the 1976 Internal Security Amendment Act in South Africa, the Minister of Justice was 'given a completely subjective discretion to detain a person'[896] when satisfied that the person may endanger the 'security of the State' or the 'maintenance of public order,' terms which were not defined anywhere in the Act.

The apartheid regime also made use of banning and banishment to silence its opponents. Many organisations and individuals were affected. Individuals who were banned might be ordered to resign from political organisations, prohibited from attending gatherings, confined to certain magisterial districts, or subjected to house arrest.[897] Banishment orders were used to isolate political opponents in remote rural areas in order to stifle their opposition to the apartheid system. Motlhabi points out that certain banning orders were drafted effectively to banish the person concerned.[898]

(II) D.3. *Israeli practices in the OPT*

The deprivation of the liberty of Palestinians in the OPT manifests itself through Israel's widespread use of 'administrative detention' against political opponents of the occupation and the use of military courts to try Palestinian civilians, including children. (The use of military courts as a tool of mass and often arbitrary detention of OPT Palestinians was described in Chapter Three, section D.2.)

a. Administrative Detention in the OPT

Under the Israeli military regime in the OPT, executive power is vested in the armed forces, who thus have authority to issue administrative detention orders. Israel bases such authority on the British Mandate Government of Palestine's Defence (Emergency) Regulations, 1945,[899] According to Regulation 108, a Military Area Commander was entitled to detain any person if he was of the opinion that it was 'necessary or expedient to make the order for securing the public safety … the maintenance of public order or the suppression of mutiny, rebellion or riot.' These regulations, as amended in 1946, did not oblige the commander to limit the duration of such an order, restrict his discretion, or prescribe rules of evidence.

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[895] Mokgethi Motlhabi, *The Theory and Practice of Black Resistance to Apartheid – A Social-Ethical Analysis* (Johannesburg: Skotaville Publishers, 1984), at 28-31.

[896] John Dugard, *Human Rights and the South African Legal Order* (Princeton University Press, New Jersey, 1978), p. 122.

[897] Mokgethi Motlhabi, *The Theory and Practice of Black Resistance to Apartheid – A Social-Ethical Analysis* (Johannesburg: Skotaville Publishers, 1984), at 32-33.

[898] Mokgethi Motlhabi ,*Theory and Practice of Black Resistance to Apartheid – A Social-Ethical Analysis* (Johannesburg: Skotaville Publishers, 1984) at 33.

[899] Israel has used these Regulations even though they were formally repealed by the British immediately prior to the termination of the mandate by the Palestine (Revocations) Order-in-Council, 1948, and the Jordanian Constitution overturned them in the West Bank in May 1948.The Defence (Emergency) Regulations were thus not 'the laws in force in the country' at the time Israel occupied the West Bank and Gaza Strip, as required under Article 43 of the Hague Regulations to be valid. Israel therefore has been applying these laws illegally in the OPT.

Despite the apparent revocation of the Defence (Emergency) Regulations, and despite much legal debate as to their validity in the State of Israel after its creation in 1948, the Regulations were used to institute administrative detention (primarily against Palestinian citizens of Israel) inside Israel until the passing of the Emergency Powers Law (Detention) of 1979.

Following Israel's occupation of the remaining Palestinian territory in 1967, administrative detention was also effected in the OPT on the basis of the Defence (Emergency) Regulations. This was the case until 1970, when Israel enacted its own laws relating to administrative detention by virtue of Military Order No. 378 (Order Concerning Security Provisions), Article 87 of which stipulated:

> [the Israeli] military commander, or anybody to whom he delegates his authority in his capacity, may issue an order determining that an individual be detained in whatever place of detention specified by the order.

The provisions of Military Order No. 378 pertaining to administrative detention have been amended a number of times, most significantly by Military Order No. 1229 in 1988,[900] which expanded the Israeli army's authority to hold Palestinians in administrative detention and curtailed the rights of detainees. Under this legislation, military commanders are authorised to issue orders detaining individuals for up to six months[901] without charge or trial. Such orders can be renewed indefinitely, as the military legislation does not impose any maximum cumulative period of administrative detention.

In the case of some Palestinians, administrative detention orders are issued as soon as they are arrested, while in other cases, the individual will undergo prolonged interrogation before an administrative detention order is issued.[902] A person detained by way of administrative detention is to be brought before the Military Court of Administrative Detention within 96 hours of the start of his administrative detention. In this review proceeding, held *in camera*, the military judge may confirm, set aside or shorten the administrative detention order. The procedures for additional review and appeals processes, which have been amended and re-amended numerous times, will be discussed below.

Although the Israeli authorities have claimed that they use the policy of administrative detention as a preventative rather than as a punitive measure, and only against 'those whose activities are considered hostile and constitute a continuous threat to security and public safety,'[903] in practice this has proved to be far from the case. During the first 13 years of the occupation, the Israeli authorities consistently resorted to the administrative detention of Palestinian residents of the West Bank and Gaza Strip in lieu of providing them with formal charges and fair trials. By 1970, there were 1,131 Palestinians incarcerated under administrative detention orders.[904] In response to strong international pressure, Israel began to phase out the use of administrative detention in 1980, the last administrative detainee of the time being released in 1982. On 4 August 1985, the Israeli cabinet announced that it was

[900] Military Order No. 1229 relates to the West Bank, its equivalent being Military Order No. 941 in the Gaza Strip. Due to numbering inconsistencies among Israeli military orders, Military Order No. 1229 is alternatively referred to as Military Order No. 1226, depending on whether it was issued individually or in a bound volume by the Israeli authorities. Military legislation and military courts are no longer used by Israel in the Gaza Strip since the 2005 'disengagement', although arrests and detention of Palestinians from Gaza continue to be carried out under civil criminal legislation.

[901] Between 1989 and 1991, the maximum length of single administrative detention orders was increased to 12 months under Military Order No. 1281.

[902] Suggesting that in such cases administrative detention is used as a punitive measure when the Israeli authorities fail to elicit any information or evidence in order to bring the individual to trial.

[903] From a public letter issued on 9 June 1989 by the Director of Human Rights and International Relations Department at the Israeli Ministry of Justice. Cited in Al-Haq, *A Nation Under Siege* (Al-Haq, Ramallah, 1990), p. 286.

[904] Emma Playfair, *Administrative Detention in the Occupied West Bank* (Ramallah: Al-Haq, 1986), p.4.

reintroducing administrative detention. Approximately 316 Palestinians were administratively detained by Israel between August 1985 and 9 December 1987.[905]

Of the over 50,000 Palestinians arrested during the height of the first *intifada* between December 1987 and December 1989, over 10,000 were placed under administrative detention.[906] Military Order No. 1229, issued in March 1988, granted any Israeli military commander the authority to issue an administrative detention order. Thus, what was originally codified as an exceptional measure was by this stage being used as a common standard of detention.

In the wake of the outbreak of the second *intifada* in 2000, the Israeli military authorities once again increased their use of administrative detention vis-à-vis Palestinians, most notably to punish them for their political opinions, including non-violent political activities. From September 2000 to September 2002, cases involving the administrative detention of Palestinians increased from less than 100 to 1,860.[907] Between 2004 and 2006, a total of 8,150 administrative detention orders were issued by Israeli military commanders in the OPT.[908] By March 2009, 550 Palestinians were being held in administrative detention, including eight elected members of the Palestinian Legislative Council[909] and six children.[910] It is apparent that, as was the case in South Africa, administrative detention has frequently been used by Israel to silence opponents and suppress dissent. Some administrative detainees have been interned for continuous periods of up to six years.

Another relevant piece of newly-enacted legislation is the Internment of Unlawful Combatants Law (2008), which provides for the indefinite administrative detention of 'foreign' (that is, non-Israeli) nationals. The law effectively creates a third category of person, 'unlawful combatants', contrary to the distinction in international humanitarian law between combatants and civilians. The law allows a person suspected of being an 'unlawful combatant' to be held for up to 14 days without judicial review. If the detention order is approved by a court, the law allows the administrative detention of individuals for indefinite periods, or until such a time that 'hostilities against Israel have come to an end', and mandates judicial review of the detention only once every six months. The Supreme Court upheld the original law, enacted in 2002, on 11 June 2008.[911] On 28 July 2008, the Knesset amended the law, adding even harsher provisions that include the extension of the period in which the detainee is denied access to legal counsel from 7 to up to 21 days.

b. Incompatibility of Israel's Practice with International Law

Administrative detention is permitted under international law in very limited circumstances. With regard to international humanitarian law, Article 78 of the Fourth Geneva Convention does permit an occupying power to use internment, but only 'for imperative reasons of security.' It is untenable that imperative reasons of security demand that thousands of Palestinians be detained without charge, trial

[905] Al-Haq, *Punishing A Nation* (Ramallah: Al-Haq, 1988), p.148.

[906] Al-Haq, *A Nation Under Siege* (Ramallah: Al-Haq, 1990), p. 285.

[907] Unpublished statistics from Al-Haq database.

[908] Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Yesh Din, Tel Aviv, 2007), p. 54. This figure comprises 'initial' administrative detention orders plus extension orders.

[909] Statistics from Addameer, Prisoners' Support and Human Rights Association, 31 March 2009..

[910] See http://www.btselem.org/English/Statistics/Minors_in_Custody.asp. As discussed in Chapter Three, the generally accepted definition of a child under Article 1 of the Convention on the Rights of the Child is "every human being below the age of 18 years', with which Israel complies in relation to Israeli children. In contrast, Palestinians in the OPT aged 16 or more are legally categorised as adults, with Military Order No. 132, *Order Pertaining to Juvenile Delinquents*, defining an individual aged 14-15 as a 'young adult', and one aged 12-13 as a 'juvenile'. Israel does not accept the applicability of the Convention on the Right of the Child in the OPT.

[911] See Crim. App. 6659/06, *A. v. The State of Israel*, available in English at: http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.

or the right to have their imprisonment reviewed by an impartial body.[912] In the realm of international human rights law, Article 9 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the rights of detainees to seek a judicial review to determine the lawfulness of their detention[913] and of those arrested or detained to be informed of the reasons for arrest and detention, as well as implicitly prohibiting indefinite detention. It may be argued these and other related rights are to be upheld even in time of emergency. According to the UN Human Rights Committee:

> Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. […] In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.[914].

The Committee is of the view that administrative detention is unlawful where it amounts to arbitrary detention, or where it violates basic due process rights if information of the reasons for detention is not given, or if adequate judicial review of the detention is not available.[915]

b (i). The arbitrary nature of Israeli administrative detention

Under Military Order No. 1229, military commanders are empowered to detain an individual for up to 6 months if they have 'reasonable grounds to presume that the security of the area or public security require the detention'. Noting the arbitrary nature of imprisonment under these terms, as well as their conflict with the standards of international law, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has observed,

> The terms 'security of the area' and 'public security' are not defined, their interpretation being left to military commanders, and thus lack the level of precision required by the principle of legality.[916]

A clear parallel to this policy is the 1976 Internal Security Amendment Act in South Africa, under which the Minister of Justice was 'given a completely subjective discretion to detain a person'[917] when satisfied that the person may endanger the 'security of the State' or the 'maintenance of public order,' terms which were not defined anywhere in the Act, and as noted previously, afforded unfettered discretion to the Minister.

The arbitrary nature of detention policy was supported historically by Zionist movement leaders, many of whom would later become prominent members of the Israeli Knesset, government, and judiciary but who, before the creation of the State of Israel, were themselves administratively detained

[912] Among the violations identified in Article 147 of the Fourth Geneva Convention as grave breaches is wilfully depriving a protected person of the rights of fair and regular trial.

[913] The right to review has recently been affirmed by the US Supreme Court in relation to internees in Guantanamo Bay. Internees being held as 'enemy combatants' were held to be entitled to habeas corpus review. See *Boumediene v. Bush*, 553 U.S. ___ (2008),

[914] United Nations Human Rights Committee, *General Comment No. 29*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, paragraph 16.

[915] See UN Human Rights Committee, *General Comment 8: Article 9*, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994), para. 4

[916] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Mission to Israel, including visit to Occupied Palestinian Territory*, UN Doc. A/HRC/6/17/Add.4, 16 November 2007, §. 25.

[917] John Dugard, *Human Rights and the South African Legal Order* (Princeton University Press, New Jersey, 1978), p. 122.

under the 1945 Defence (Emergency) Regulations and at the time voiced strong opposition to this practice use by the British authorities.[918]

b(ii). Failure to give reasons for administrative detention orders

Under international human rights and humanitarian law, an administrative detainee should be informed promptly of the reasons for his or her detention.[919] In accordance with Article 87 of amended Military Order No. 378, however, administrative detention in the OPT can be based on secret evidence, to which the detainee and his counsel are denied access. Almost all information presented to the court is classified and the review judge reserves the right not to disclose this evidence or even whether evidence exists. Consequently, Palestinians under administrative detention orders can be detained for months, if not years, without ever being informed about the reasons or length of their detention.

b(iii). Lack of Adequate Judicial Review

The Israeli authorities have argued that administrative detention is not an arbitrary form of detention, in part because administrative detention orders are subject to review. Nevertheless, existing review procedures are severely inadequate, and have been amended in the past in a way that undermines a detainee's access to justice. For example, the quasi-judicial review process provided for before the first *intifada* was cancelled in 1988 by Military Order No. 1229, and detainees were allowed to appeal their detention to an advisory board authorised only to make non-binding recommendations. Military Order No. 1229 also cancelled the existing mandatory three-month periodical review of approved administrative detention orders by a military judge.[920] This requirement was re-imposed in 1999 but subsequently revoked again during the second *intifada*. In some circumstances, review procedures of any description have been completely suspended by virtue of Israeli military orders, as was the case during Israel's large-scale incursions in West Bank cities in 2002.[921]

In the case of appeals, Palestinian administrative detainees can submit appeals against their detention order before an appeal judge in an Israeli military court, where a process similar to that at the initial review hearing takes place. However, Israeli military judges make extremely limited use of their powers, generally deferring to the military commander and upholding the detention orders. This is also true of appeals against administrative detention orders in Israel's High Court of Justice. In both instances, the appeal decision can be based on confidential material or 'secret evidence' not provided to the detainee or his lawyer. This places the detainee's counsel in the essentially impossible position of trying to prove to the judge that the order in question is not required for security reasons, without having access to any details of the evidence on which the administrative order is based.

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[918] Knesset Records, Volume 9 (12 May 1951), p. 1807. Quoted in B'Tselem, *Detained Without Trial: Administrative Detention in the Occupied Territories Since the Beginning of the Intifada* (B'Tselem, Jerusalem, 1992), p. 24.

[919] See ICCPR Article 9(2), Additional Protocol I, Article 75 (3); see also Jean-Marie Henckaerts and Louis Doswald-Beck, *Customary International Law – Volume I: Rules* (Cambridge, Cambridge University Press, 2005), p. 344.

[920] The original stipulations of Military Order No. 378 had been liberalised to a certain extent by Military Orders 815 and 876 of 1980, which granted the right to 'judicial review' before a military judge within 96 hours of issuance of a detention order and made detention orders subject to periodic review by a judge at least once every three months.

[921] Military Order No. 1506 effectively precluded any right of review for Palestinians that had been administratively detained during these incursions.

c. Israel's Discriminatory Use of Administrative Detention

Israel's discriminatory use of administrative detention as a measure against Palestinians is indicated by the relatively rare use of this practice against Jewish-Israeli settlers. Only nine Israeli settlers in the OPT have been administratively detained over the course of the occupation.[922] The great difference in legal standards applied in implementing the measure against the two groups further indicates a policy of discriminatory treatment. Regarding the period of internment itself, while Palestinians are typically issued six month administrative detention orders which in many cases are renewed for a number of years, Israeli settlers have more commonly been ordered to forty or sixty days of detention.[923] Further discrepancies arise regarding who can issue administrative detention orders. Israeli regional military commanders throughout the OPT may issued such orders at their own discretion with regard to Palestinians, while orders to detain Israeli settlers must be signed by the Minister of Defence.[924]

Discrimination is further indicated by differential access to the courts. Even when charged with offences related to security in the OPT, Jewish-Israeli settlers are not tried before military courts as are Palestinians. The same is also true regarding the review of an order for detention without trial, which is done in the case of Palestinians by a military judge, whereas for settlers by a civil district court inside Israel. Further, the military has 96 hours following the detention under administrative order of a Palestinian before the military court must conduct the review.[925] The equivalent period for Israeli settlers, being governed by standard Israeli criminal detention procedure, is 24 hours. There are no automatic periodic reviews of administrative detention orders by military courts for Palestinians during their detention, but if an Israeli settler is interned for six months, the order is reviewed by the District Court after three months. Finally, under Article 9(5) of the ICCPR, '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.' After 38 years of occupation during which time tens of thousands of Palestinians were arbitrarily and unlawfully denied their liberty by being placed in administrative detention, Israeli settler Noam Federman in 2005 became the first victim of administrative detention to be awarded damages on the grounds of unlawful imprisonment.[926]

The issue of illegal imprisonment in the Apartheid Convention arises in the context of the denial of the right to liberty for the purposes of sustaining a system of domination and oppression by one racial group over another. In the OPT, illegal imprisonment has manifested itself through the mass administrative detention of Palestinian civilians as an instrument of domination and control, as well as through the internment of specifically targeted persons voicing opposition to the regime. Elected members of the Palestinian Legislative Council have been and continue to be administratively detained to that end, while Israel's use of administrative detention against human rights defenders is a trend that has proliferated in recent years, prompting the UN Special Representative on Human Rights

[922] B'Tselem, *Statistics on Administrative Detention*, available at: http://www.btselem.org/english/Administrative_Detention/Statistics.asp.

[923] See, for example, Amnesty International, *Administrative detention cannot replace proper administration of justice*, 11 August 2005, AI Index: MDE 15/045/2005, regarding the detention of alleged Kach activists Ephraim Hershkowitz and Gilad Shochat.

[924] For example, then Minister of Defence, Shaul Mofaz, ordered the arrest of Neria Ofen, a resident of Yitzhar settlement in the West Bank in relation to attacks against Palestinians in the run-up to the 2005 'disengagement'. See Chris McGreal, 'Sharon delays Gaza withdrawal', *The Guardian*, 10 May 2005.

[925] Amendment No. 43 to Military Order No. 378. In practice this period of detention without judicial review may be even longer if an administrative detention order is signed against a Palestinian after he/she been initially detained under criminal detention procedures, allowing a further 96 hours on top of the initial detention period.

[926] 'Federman awarded damages for false imprisonment', *Jerusalem Post*, 11 October 2005. No damages have been awarded to date.

Defenders to voice her concerns that in the OPT 'administrative detention is being used as a means to deter defenders from carrying out their human rights activities.'[927]

(II) E. Article 2(b) – Imposition on a Racial Group of Living Conditions Calculated to Cause its Physical Destruction in Whole or in Part

In the chapeau of the Apartheid Convention, the States parties observe 'that, in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid constitute a crime under international law'. Article 2(b) of the Apartheid Convention later borrows language from Article 2 of the Genocide Convention, which defines genocide as any of five acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group' including '(c) imposition on the group of living conditions calculated to cause its physical destruction in whole or in part'. The principle of intent is essential to this formulation.[928]

In some cases, treatment of black South Africans under apartheid had devastating effects on people's lives, especially in the immediate aftermath of the first mass population transfers when wretched living conditions resulted in wide-scale suffering and deaths through malnutrition, disease, and higher infant and child mortality. As the South African Truth and Reconciliation Commission confirmed, however, the South African government did not sustain an intentional policy to destroy blacks as a group. Indeed, ensuring that black Africans survived as a population to provide essential cheap labour for white-owned industries and businesses was a central mission of apartheid.

This study does not find sufficient evidence to conclude that Israel has pursued policies and practices intended to impose on the Palestinians 'living conditions calculated to cause its physical destruction in whole or in part'. It is noted that under the regime of military occupation imposed on the OPT since 1967, Palestinians have also experienced thousands of killings by the Israeli military (as described in section II.B, above)[929] as well as generally higher mortality rates due to rising poverty and malnutrition and inadequate medical care. Israel's 'siege' or draconian closure of the Gaza Strip since 2006 has especially created conditions inimical to human life through resulting shortages of potable water, electricity and basic nutrition and inaccessibility of essential medicines and medical care. It is further noted that the Independent Fact Finding Committee on Gaza found that, in 'Operation Cast Lead' in January 2009, Israel's actions satisfied the *actus reus* of the Genocide Convention. [930]

Nonetheless, the Committee on Gaza also recalled that the ICJ has found that a specific intent to destroy a group 'could not be inferred from the siege of a city, deprivation of food and fuel, or from the obstruction of medical and humanitarian assistance'. [931] Israel's policies concerning Palestinians in the OPT suggest a policy of collective punishment, war crimes and crimes against humanity but do not indicate an intention to cause the physical destruction of the Palestinian people.

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[927] Report submitted by the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, Addendum - Mission to Israel and the Occupied Palestinian Territory, E/CN.4/2006/95/Add.3, 10 March 2006, para. 36.

[928] Two forms of intent are required to establish the crime of genocide arising from the act of 'deliberately inflicting conditions of life likely to bring about physical destruction': the intention to inflict harm through the said conditions of life; and the special intention to destroy the relevant group in part or in whole. See G. Verdirame, 'The Genocide Definition in the jurisprudence of the *ad hoc* tribunals' (2000) 49 *International and Comparative Law Quarterly* 578-598; see also William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000).

[929] See discussion in Section B, above.

[930] Independent Fact-Finding Committee on Gaza, Report to the League of Arab States, *No Safe Place* (30 April 2009), p.135, para. 551, citing *Genocide (Bosnia v. Serbia)*, ICJ Reports 118 (327–8): available at: www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pd.

[931] Ibid., p. 129, para. 521.

(II) F. Article 2(c) – Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, …

This provision cites a range of measures that are cited as illustrative and inclusive rather than definitive or exclusive. Although this language indicates that other practices might be considered here, if relevant to preventing 'participation' and 'full development', this study confines its review of Article 2(c) to the measures cited, breaking them down into component provisions, slightly reordered here for purposes of discussion:

1. Denial of the right to freedom of movement
2. Denial of the right to freedom of residence
3. Denial of the right to leave and to return to one's country
4. Denial of the right to a nationality
5. Denial of the right to work
6. Denial of the right to form recognised trade unions
7. Denial of the right to education
8. Denial of the right to freedom of opinion and expression,
9. Denial of the right to freedom of peaceful assembly and association.

According to the Apartheid Convention, 'any' of these measures constitutes an act of apartheid if it is calculated to prevent full development and participation in the political, social, economic and cultural life of the country and committed for the purpose of establishing and maintaining an overall system of domination by one racial group over another. While most of these prohibited acts involve violations of civil and political rights, the language of the article is concerned with their impact on a group's social and cultural development as well as its political and economic development. Thus examining the impact of Israel's policies in terms of Article 2(c) requires considering a range of social indicators. A final section undertakes a portrait or snapshot study of conditions in the Gaza Strip in light of this provision.

While Article 2(c) of the Apartheid Convention forms the basis for this discussion, it is further informed by Article 5 of ICERD. The latter similarly enumerates a list of both civil and political rights as well as economic, social and cultural rights. All of the above-listed rights covered by the Apartheid Convention are also listed in ICERD and therefore must be guaranteed by state parties to all within their jurisdiction without discrimination.

(II) F.1 *Article 2(c)(1): Denial of the Right to Freedom of Movement*

(II) F.1(a) Interpretation

In international law, the right to freedom of movement has what can be termed 'internal' aspects (the right to move freely and to choose one's place of residence within the borders of the country) and 'external' aspects, which include the right to leave one's country and to return to it.[932] Section F(1) will deal with 'internal' freedom of movement in the OPT; F(2) with internal freedom of residence in the OPT; and F(3) with the right to leave and return. The right to freedom of movement is guaranteed by numerous human rights treaties, most notably in Article 12 of the ICCPR. Flowing from the

[932] See John Dugard, *Human Rights and the South African Legal Order* (Princeton, NY: Princeton University Press, 1978), p. 136; see also article 13 of the Universal Declaration of Human Rights; article 12 of the International Covenant on Civil and Political Rights; article 12 of the African Charter on Human and Peoples' Rights.

guarantee contained in Article 5(d)(i) of ICERD that everyone should be enjoy the right to freedom of movement without racial discrimination, the Apartheid Convention condemns any legislative and other measures calculated to deny members of a racial group the right to freedom of movement.

(II) F.1(b) *Denial of Freedom of Movement: practices in apartheid South Africa*

The internal and external aspects of freedom of movement under international law—respectively, the right to move freely and to choose one's place of residence within the borders of a country and the right to leave one's country and to return to it—are equally protected by section 21 of South Africa's final Constitution (which provides inter alia that everyone has the right to leave the Republic and every citizen has the right to enter, to remain in and to reside anywhere in, the Republic). The historical significance of the entrenchment of these rights in the South African Constitution is considerable. Apartheid legislation imposed severe restrictions on all aspects of the freedom of movement.

Denial of the rights to freedom of movement and residence was a core concern of apartheid policy in South Africa, toward whose enforcement the denial of other rights, such as freedom of expression and peaceful assembled, was oriented. In terms of the apartheid master plan, South Africa's economically powerful urban centres were to be the sole preserve of the white race. Africans were only to be allowed access to these areas for the purpose of providing labour to feed these economic engines of white South Africa. 'Surplus' Africans were to be relegated to a number of ethnically defined 'Bantu homelands' which later came to be known, infamously, as 'Bantustans'. In terms of apartheid theory, the African population consisted of ten ethnic groups, each of which was to be granted its own 'homeland'. The plan was to grant independence to each of these 'homelands' over time. The reasoning and philosophy behind this was as follows:

> In keeping with Afrikaner nationalism's stress on the realisation of ethnic identity (volkseie), each of these 'national/ethnic minorities' was to be given the right to realise its divinely ordained national calling in its own 'homeland'. In introducing the Bill, Minister de Wet Nel explained to parliament that this new policy of 'separate freedoms' rested on three principles: 'The first is that God has given a divine task and calling to every People [volk] in the world, which dare not be denied or destroyed by anyone. The second is that every People in the world of whatever race or colour, just like every individual, has the inherent right to live and develop. Every People is entitled to the right of self-preservation. In the third place, it is our deep conviction that the personal and national ideals of every ethnic group can best be developed within its own national community. Only then will other groups feel they are not being endangered… This is the philosophical basis of the policy of Apartheid.[933]

The Native Laws Amendment Act of 1952 and the Natives (Urban Areas) Amendment Act of 1955 put in place the legal mechanisms to restrict the right of access by Africans to 'white areas'. In order to qualify to live in a white area, a black applicant had to qualify under Section 10 of the infamous Bantu (Urban Areas) Consolidation Act. Documentary proof had to be provided by the applicant of uninterrupted residence in the area for at least 10 years, or that the applicant had worked for the same employer for an uninterrupted period of at least 15 years. Those fortunate enough to qualify were known in the jargon of the apartheid bureaucrats as 'Section Tens'. Despite the best efforts of the apartheid bureaucracy, thousands of people desperate for work continued to pour into the cities. In the impoverished homelands to which they were relegated by the apartheid machine there was no work, but in the cities they were regarded as 'illegal', and were liable to be arrested, imprisoned, fined and deported. The main mechanism of control was the hated 'dompas' or reference book, which every African over the age of sixteen was required to carry at all times, in terms of the Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952. A pass included a photograph, details of place of origin, employment record, tax payments, and encounters with the police. It was a

[933] Dan O'Meara *Forty Lost Years – The Apartheid State and the Politics of the National Party 1948-1994* (Randburg: Ravan Press, 1996), p. 73.

criminal offence to be unable to produce a pass when required to do so by the police. No black person could leave a rural for an urban area without a permit from the local authorities. On arrival in an urban area a permit to seek work had to be obtained within 72 hours. Dan O'Meara points out that:

> Until the formal abandonment of influx control in 1986, literally hundreds of thousands of Africans were convicted every year for not having a reference book in their possession. When coupled with the establishment of labour bureaux throughout the country, this enabled the state to begin to control and channel the flow of black labour as required in the various sectors of the economy.[934]

The physical and psychological wounds which this system inflicted on black South Africans are incalculable:

> Subjected to forced removals from the 'black spots', endless pass raids, the mind-numbing racist bureaucracy in the labour bureaux, Africans were constantly reminded who was *baas* [boss] in the land of their forefathers. And as Verwoerd pressed ahead with his planned 'self government' for the 'ethnic homelands', black South Africa was given the news that it was soon to be deprived of even this third-rate citizenship. The baas decreed that as 'temporary sojourners' in a whites-only country, blacks were no longer even considered to be South Africans. They would be given 'separate freedoms' in places many had never seen.[935]

The use of courts of law to enforce a gigantic programme of social engineering meant that the South African legal system became increasingly burdened with the task of enforcing apartheid policy. As David Harrison pointed out in his book written in the early 1980s:

> The courts are daily jammed with offenders. In 1978, 273,000 arrests were made for pass law offences (50,000 more than in 1977), an average of 750 a day. The magistrates work a production line of punishment: a fine here, imprisonment there; 'endorsement out'; 'remanded for identification'; two minutes, rarely more, for a case… No one knows how many 'illegals' are in the cities; in Soweto alone they may be half a million. What is known is that they are the workers who will take any job that is offered for pay well below the recognised rate, just to keep body and soul together, to send a postal order to the family in the homelands, to buy school books and clothes and a better chance for the children.[936]

Speaking of the Black Sash[937] Advice offices in the early 1980s, Harrison points to the bureaucratic nightmare of the apartheid system:

> Here, every day, they are confronted with thirty years of Nationalist government. Here, every day, they witness the toll on family life the system takes, the misery of the contract worker who seeks to have near him the children who are growing up without him; the incomprehension of the wife who asks only to live with the man she legally married; the tears of the young man, a boy really, who does not understand why, since he cannot find work, he is classified as 'idle' and must now leave his parents and be sent to a homeland he has never seen… Here the language is of '10(1)(a) and (b) and (c)', of affidavits to prove employment, of letters to prove residence, of witnesses to prove birth, of certificates to prove existence. The labelled files in the Johannesburg office tell the story of the rows of patient black South Africans who wait: 'Workman's Compensation', 'Name Change', 'Employer's Abuse',

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[934] Ibid., p. 70.

[935] Ibid, p. 111.

[936] David Harrison (1981) 'The White Tribe of Africa' Macmillan South Africa (Publishers) (Pty) Ltd: Johannesburg, p. 252.

[937] The 'Black Sash' was founded in 1955 to protest against the removal of Coloured people from the common voters roll.

> 'Pensions', 'Administration Board', 'Farm Labour', 'Bribery and Corruption', 'Work Permit', 'Endorsed Out'…[938]

(II) F.1(c) Denial of Freedom of Movement: Israeli practices in the OPT

Under military legislation, Jewish Israelis may not enter certain Palestinian towns and cities in the OPT without permission from the Israeli authorities. Otherwise, Jewish Israelis are free to move without constraint throughout the OPT,[939] on roads reserved for their exclusive use. By contrast, the Palestinian population is subject to sweeping and collective measures restricting its movement, including interrelated networks of visible, physical obstacles and invisible, administrative impediments. Adverse impacts on Palestinian rights to health, to livelihood, to education, and to social and cultural activity as a consequence of movement restrictions are significant.

i. Visible Infrastructure: Checkpoints, the Wall and Separate Roads

According to the UN Office for the Coordination of Humanitarian Affairs (OCHA), by September 2008, Israel had established 699 restrictions to physical movement in the West Bank,[940] including checkpoints, roadblocks, trenches, earth mounds, road gates, and other physical barriers. A weekly average of 89 'flying' checkpoints (established temporarily and without warning) were recorded in the West Bank at the same time,[941] further controlling and disrupting Palestinian movement. Most of these checkpoints and barriers to movement are positioned such that they hinder Palestinian movement within the West Bank, rather than between the West Bank and Israel. Palestinians must present the necessary identity card or documentation required by the occupying authorities to cross a given checkpoint. In addition to restricting movement physically, the checkpoints constitute a psychological barrier to movement by imposing humiliating and dehumanising procedures.

As well as serving to *de facto* annex part of the West Bank under the pretext of security, the Wall constitutes the most significant individual barrier to Palestinian movement. The ICJ has already held that "the construction of the wall and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory, with the exception of Israeli citizens and those assimilated thereto.'[942]

More than simply scattered structures of concrete, steel and earth, the barriers to movement erected by Israel in the OPT enforce the growing territorial fragmentation of the OPT, isolating Palestinians from their land and each other while securing Israel's settlement enterprise and ensuring complete segregation between the two groups. This segregation is manifest through the network of separate roads for the exclusive use of Israeli settlers which connects Jewish settlements in the West Bank to each other and to Israel, while 'bypassing' Palestinian population centres. In creating a kind of 'road

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[938] David Harrison (1981) 'The White Tribe of Africa' Macmillan South Africa (Publishers) (Pty) Ltd: Johannesburg, p. 254.

[939] In theory Palestinian citizens of Israel enjoy much, if not all, of the same freedom of movement as Israeli settlers and other Jewish citizens of Israel travelling in the OPT, but in practice Palestinian citizens of Israel experience difficulties, due to racial profiling at checkpoints, for example.

[940] OCHA, *Closure Update, 30 April – 11 September 2008*, p. 4.

[941] *Ibid.* 'Flying' or mobile checkpoints are established at random by Israeli occupying forces for temporary and undefined intervals. They are often deployed on key transit roads during morning and evening peak travelling times. Delays of more than one hour are regularly reported at flying checkpoints and their unpredictable nature renders it difficult for Palestinians to make travel plans. Flying checkpoints are generally redundant in ensuring security, as they are typically set up between two permanent checkpoints, where Palestinian travellers will have already gone through a security check.

[942] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ (2004), para. 134.

apartheid', this segregated highway system goes beyond apartheid practices in South Africa, as the UN Special Rapporteur on the OPT has pointed out.[943]

The notion of a separate road system was first conceived by the Israeli occupying authorities during the surge in settlement activity in the late 1970s. The Israeli *Settlement Master Plan for 1983-1986* discussed the need for special roads to service planned settlements and 'bypass the Arab population centres.'[944] *Road Plan Number 50* served to shift the existing north-south backbone of the West Bank's road system to a more east-west centred approach in order to integrate it into the Israeli road system for the benefit of Jewish-Israeli settlers.[945] Four hundred kilometres of such roads were built by 1993.[946] Under the Oslo Accords, an expanded maze of bypass roads then effected the geopolitical division of the West Bank in order to accommodate the free movement of settlers throughout the West Bank without having to pass through areas administered by Palestinian Authority. At this time, plans for a further 650 kilometres of roads were developed to consolidate this bypass network.[947] Israel demonstrated its commitment to implement such plans by spending US$600 million on bypass roads in 1995 alone.[948] Thus the segregated road system became a reality and continues to be expanded and consolidated.

Palestinian travel is prohibited on roads built for exclusive settler use, without exception.[949] On a second category of roads, Palestinians must obtain special permits to travel and such permits are difficult to obtain. Palestinians who live in villages that can be accessed only by such roads are allowed on them with permits while Palestinian commercial vehicles and public transportation may similarly be permitted to use such roads.[950]

The Israeli military enforces these prohibitions with manned checkpoints and army patrols. In recent years, the occupying forces have also blocked access from nearby Palestinian villages to what have become settler-only roads by means of physical roadblocks. Palestinian vehicles are not merely prevented from travelling on forbidden roads, but are also barred from crossing them in order to access roads upon which they are permitted to travel. In such cases, passengers have to get out of their vehicles, cross the road by foot, and find further transportation on the far side.[951]

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[943] *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, John Dugard, 21 January 2008, UN Doc. A/HRC/7/17, para. 30.

[944] Israeli Ministry of Agriculture and Settlement Division of the World Zionist Organization, *Master Plan For Settlement of Samaria and Judea, Plan for Development of the Area for 1983-1986* (Jerusalem, 1983), p. 27 (in Hebrew), cited in B'Tselem, *Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank* (B'Tselem, Jerusalem, 2004), p. 6.

[945] See Al-Haq , *The Israeli Proposed Road Plan for the West Bank: A Question for the International Court of Justice?* (Al-Haq, Ramallah, 1984).

[946] Al-Haq, *Discrimination Is Real: Discriminatory Israeli Policies in Israel, The Occupied Territories and Occupied East Jerusalem*, Draft Paper Presented to the World Conference Against Racism, Durban, South Africa, 28 August – 7 September 2001, p. 24.

[947] Samira Shah, 'On the Road to Apartheid: The Bypass Road Network in the West Bank' (1997–98) 29 *Columbia Human Rights Law Review* 221 at 222.

[948] Foundation for Middle East Peace, *Report on Israeli Settlement in the Occupied Territories* (May 1996), p. 3.

[949] Implementation by the occupying forces of the prohibition and restrictions described in this section is effected through the prohibition and restriction of the movement of vehicles belonging to Palestinian residents of the West Bank (excluding East Jerusalem), distinguishable from the vehicles of Israelis and Israeli settlers by the colour of their registration plates, as required under Israeli Military Order No. 1251 of 18 August 1988.

[950] B'Tselem, *Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank* (Jerusalem: B'Tselem, August 2007), pp. 16-17.

[951] B'Tselem, *Ground to a Halt: Denial of Palestinians' Freedom of Movement in the West Bank* (Jerusalem: B'Tselem, August 2007), p. 20.

A prominent example of segregation on the highways of the West Bank is Road 443, the only main road in the southern district of Ramallah which dates back to the British Mandate. Until 2000, it was the main thoroughfare for 160,000 local residents, connecting the villages in the area to the city of Ramallah. Since then, the Israeli military has prohibited both pedestrian and vehicular Palestinian travel on the road[952] and permanent physical obstacles have been placed at the exit points of the six Palestinian villages situated adjacent to the road. Use of this central artery has thereby been handed over for the exclusive use of Israelis, principally Israeli settlers commuting to and from Jerusalem.

On 5 March 2008, Israel's High Court of Justice issued a one-paragraph interim decision[953] approving the prohibition of Palestinian travel on Road 443. The decision, described as 'judicial hypocrisy' by Professor David Kretzmer,[954] effectively conveyed judicial approval to the discriminatory system of the separation of roads in the West Bank according to national origin.

The effect of segregating road systems on the basis of national origin goes beyond limiting the movement of the occupied Palestinian population to the appropriation of Palestinian land. For instance, parts of Road 443, built in the 1980s, were constructed on land expropriated from Palestinians by the Israeli military. This expropriation was upheld at the time by the High Court of Justice[955] on the basis that the road was intended primarily for the benefit of the local Palestinian population—the same population which is today prohibited from using the road.

The allocation of Palestinian roads to Israeli-only use has been accompanied by the creation of a separate system of roads for Palestinians. Webs of bridges, tunnels and interchanges, where roads for settlers and roads for Palestinians meet, maintain segregation. Palestinian land continues to be expropriated for this purpose. A recent case was the expropriation of land east of Jerusalem for the purpose of constructing a new road, for Palestinian use, to circumvent the E1 area and the Ma'ale Adumim settlement bloc. The aim is to bar Palestinian access to this area of the West Bank and to render Road 1 an Israeli-only road.[956] The precedent of Road 443, however, demonstrates that even where roads are built in apparent attempts to provide some sort of recompense for violations of Palestinian freedom of movement, these roads may not always remain to the 'benefit' of the local population. With Palestinian access to Road 443 blocked, a new, separate "fabric of life' road was opened in December 2008 by the Israeli authorities, to connect Beit Ur al-Fauqa (one of the Palestinian villages closed off from Road 443) to Ramallah, cutting through Palestinian agricultural land in the process.[957]

The segregated road system has adverse impacts on potential sovereignty, self-determination and territorial contiguity. The settler roads have been used to carve the West Bank up into cantons, and helped to turn Palestinian cities into controlled and encircled enclaves which have no space to expand. This effect is indeed a stated policy of the Israeli authorities, who have indicated their intention to use the bypass road system as a tool to 'reduce the uncontrolled spread of Arab settlement.'[958] Accompanying this physical infrastructure of segregation and restriction is a complementary invisible

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[952] This prohibition has been absolute, applying even in cases of emergency where urgent medical treatment is required. Vehicles delivering goods from Israel or other parts of the West Bank to Palestinian villages in the area are similarly not permitted to use the road anymore.

[953] *The Association for Civil Rights in Israel et al* v. *Minister of Defence et al*, [HCJ] 2150/07.

[954] Ethan Bronner, 'Palestinians Fear Two-Tiered Road System', *New York Times*, 28 March 2008.

[955] *Jama'iat Iscan v. Commander of the IDF in Judea and Samaria*, HCJ 393/82, 37(4) PD 785.

[956] See Al-Haq, *Open Letter to Quartet Members: Israel's Recent Land Confiscations East of Occupied Jerusalem*, 1 November 2007, available at: http://www.alhaq.org/etemplate.php?id=337.

[957] OCHA, *The Humanitarian Monitor*, No. 32 (December 2008), p. 7.

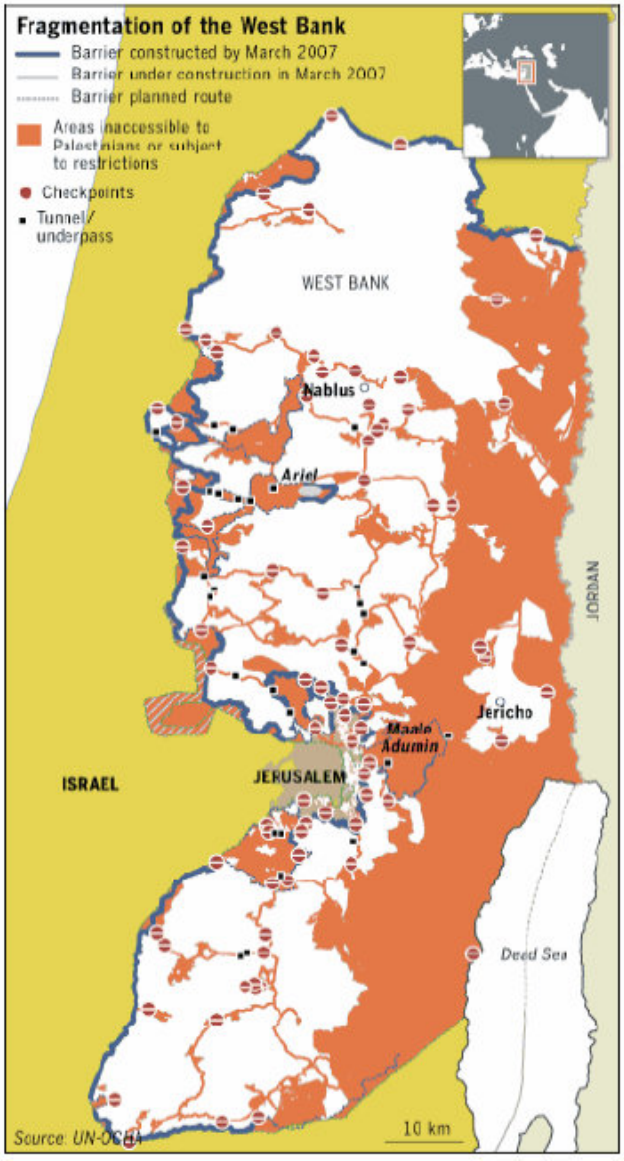
[958] See *supra* note 246, Israeli Ministry of Agriculture and Settlement Division of the World Zionist Organization, *Master Plan For Settlement of Samaria and Judea, Plan for Development of the Area for 1983-1986* (Jerusalem, 1983), p. 27 (in Hebrew), cited in B'Tselem, *Forbidden Roads*, p. 6.

system of administrative restrictions and military dictates that further impedes and controls Palestinian movement.

ii. The Permit Regime

The physical restrictions on Palestinian movement in the OPT are complemented by the closure of certain areas by military orders and by a pervasive permit system that limits movement through certain checkpoints, and confines the occupied population to specific roads and areas of the OPT.

Since the 1990s, Palestinian entry to Israel, to settlement areas in the OPT, and to East Jerusalem from other parts of the OPT has been conditional on acquiring a personal entry permit. In addition, since 2002, Palestinians have been precluded from accessing certain Palestinian areas without Israeli-issued permits. Significantly, Palestinians now require special permits to enter the areas in the 'seam zone' between the Wall and the Green Line, in addition to the Jordan Valley, all of which are integral parts of the West Bank. There are a host of other movement permits required for, *inter alia*, Palestinian public transport vehicles in general, for passenger and commercial vehicles to enter areas such as the seam zone, the Jordan Valley, and the Nablus district, and to leave areas under Israeli military siege. Humanitarian permits are needed for those who want to leave certain areas in order to receive medical care. Permits are also required for Palestinian movement between the West Bank and the Gaza Strip. However, these permits have become virtually impossible to obtain.[959]



Indeed, requests for permits in general are very frequently denied, with the Israeli authorities placing unjustifiably burdensome obligations on applicants to prove that they pose no security risks, as well as *why* they need to go from one place to another inside the West Bank. The granting of a permit is treated as a favour which Israel's District Coordination Office may grant to individual Palestinians in exceptional circumstances, rather than as an administrative formality.

The Jordan Valley, which accounts for over 25 percent of the West Bank and contains some of its most fertile agricultural areas, is another large swathe of Palestinian territory where Palestinian movement and access is significantly curtailed by physical and administrative obstacles to movement. Israeli military legislation in effect since the early days of the occupation designates most of the Jordan Valley as a closed area and stipulates that anyone wishing to enter that area must obtain a permit.[960] At present, Israel controls

[959] For further details on the permit system see, for example, B'Tselem, *Ground to a Halt: Denial of Palestinians' Freedom of Movement in the West Bank* (Jerusalem: B'Tselem, August 2007), p. 24-27.

[960] Military Order No. 151 of 1 November 1967.

the vast majority of the land, to which Palestinians are denied access and use. This denial has been implemented through particularly harsh and recently aggravated movement restrictions.[961] An invisible wall of permits, checkpoints and restricted access roads allows Israel to exert total control over the movement of Palestinians to and from the Jordan Valley.

In the early stages of planning the route of the West Bank Wall, the Israeli government considered building an 'eastern Wall' to run north-south in the eastern hills and separate the highlands from the Jordan Valley.[962] This second wall would have reduced the Palestinian West Bank to highland enclaves entirely surrounded by walls that are passable only through gates guarded by Israeli security forces. Although the plan for the second Wall appears to have been suspended, it has been supplanted by a permit regime which has the same effect. Starting in 2005, entry was restricted to those with official documentation proving residence in the Jordan Valley, after which period entry was contingent upon the possession of an Israeli issued permit. Although these restrictions have eased slightly since 2007, entry remains at the discretion of the occupying forces, and private West Bank-registered vehicles remain prohibited from entering the Jordan Valley. The extent and fragmenting effect of the permit system in the West Bank is illustrated in the map below.[963] No such restrictions are placed on Israeli settlers, who, as noted, use separate roads to travel freely between settlements throughout the West Bank (including the seam zone and the Jordan Valley) and between the West Bank settlements and Israel.

iii. Case Study: The 'Seam Zone'

A particularly egregious example of how visible and invisible restrictions on movement combine can be found in the 'Seam Zone' area between the Wall and the Green Line, along phase A of the Wall. On October 2, 2003, the Military Commander of Israeli military forces in the West Bank declared the Seam Zone to be a closed military zone in which civilians are not allowed.[964] As of June 2007, seventeen Palestinian communities in which 27,520 Palestinians reside have been enclosed within the Seam Zone, physically separated by the Wall from the rest of the West Bank.[965] If this gate and permit regime were extended to all land embraced by the completed Wall, around 60,000 Palestinians living in 42 villages would be trapped inside the Seam Zone.[966] All of these residents are covered by the terms of closure and are required to submit to a rigorous permit regime even to live in their own homes in the Seam Zone.

The same declaration of 2 October 2003 stated that this restriction does not apply to 'Israeli' persons, defined as a 'citizen of the State of Israel, a resident of the State of Israel… and those entitled to immigrate to Israel by virtue of the Law of Return…' As Israel's Law of Return applies only to Jews, the last category meant that Jews who may not be citizens or legal residents of Israel were similarly exempt from the restriction. A system that denies or grants rights to access to territory on the basis of an identity defined as religious, ethnic, or national is a system of racial discrimination.

The Major-General also signed, on the day of the declaration, a general permit exempting three 'types of persons': tourists, who may enter and stay in the Seam Zone 'for any reason'; Palestinians holding

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[961] B'Tselem, *Israel has de facto annexed the Jordan Valley* (13 February 2006).

[962] See Al-Haq, *The Wall in the West Bank: State of Implementation of the International Court of Justice Advisory Opinion* (November 2006), p. 5: available at http://tinyurl.com/alhaq-wall.

[963] Source: OCHA, *Effect of closure and permit regime on Palestinian movement*, November 2006.

[964] Declaration Concerning the Closing of a Zone No. 2/03/S (the Seam Zone), October 2, 2003. This area does not include East Jerusalem, almost all of which lies between the Wall and the Green Line, Palestinian territory already annexed by Israel.

[965] B'Tselem, available at: http://www.btselem.org/english/Separation_Barrier/Statistics.asp. This figure does not include three communities that are presently situated west of the Wall but lie to the east according to the currently approved route.

[966] UN OCHA, 'The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank,' (July 2007), p. 50.

permits to work in Israel; and Palestinians holding permits to work in Israeli settlements, who may enter the Zone only for purposes of work and during work hours.[967] The Major-General also authorised the Head of the Civil Administration of the West Bank to determine rules for Palestinian entry into the Seam Zone.[968]

The Head of the Civil Administration subsequently issued a number of directives providing an intricate bureaucratic mechanism allowing Palestinians to apply for entry permits to the closed zone. Among others, separate forms for special permits were issued for the Palestinian residents of the Seam Zone, for farmers whose lands are in the Seam Zone, for professionals of various vocations, for workers in aid organisations who by virtue of their duties are required to enter the Zone, for business-owners in the Seam Zone, for workers in the Zone and for Palestinians who wish to visit friends and relatives. Fifteen different forms were issued for Palestinians wishing to apply for entry into the Seam Zone[969]. Permits granted to Palestinians are usually limited to certain hours or certain seasons; for example, the Administration grants permits to owners of olive orchards only during the olive harvest season, claiming that there is no need to tend to the orchards between harvests. In addition, passage is prohibited into the Seam Zone (for a Palestinian holding a permit) other than by specified gates, and another procedure is required for entry with a vehicle, again with different forms: e.g., a 'permanent resident application for passage with vehicle' form; a 'permanent resident application for admittance of a new vehicle into the Seam Zone' form; and a 'holder of personal permit application to enter with vehicle' form.[970] Of the sixty-seven gates which line the northernmost 200 kilometres of the Wall, only nineteen are open to Palestinians for use all the year round on a daily basis, while a further nineteen are open seasonally or for one or two days weekly, and twenty-nine are never open to Palestinians.[971] In sum, this permit regime has created four classes of people:

1. Citizens of Israel, residents of Israel and Jews of any nationality or residence, to whom the prohibition to enter and stay in the Zone does not apply.
2. Tourists with leave to stay in Israel, who are granted a general and automatic permit that exempts them from applying for an entry permit.
3. Palestinians working in Israel and in Israeli settlements, who are granted a general permit allowing them to enter or pass through the Seam Zone for work purposes.
4. All other Palestinians, who are prohibited from entering or staying in the Seam Zone (including in their own homes) without a permit.

In November 2003, the Israeli human rights organisation Ha'Moked– the Centre for the Defence of the Individual, petitioned the High Court of Justice to order the cessation of the construction of the Wall where it deviated from the Green Line.[972] The petition, focusing on the legality of the Wall as a physical obstacle, also requested a Court order to cancel the declarations and decrees that compose the

[967] General Permit to Enter and Stay in the Seam Zone (Judea and Samaria), 2003, signed on October 2, 2003 by Major-General Moshe Kaplinsky.

[968] Declaration Concerning the Closing of a Zone, op cit., Section 4.

[969] Directives Concerning a Permit for Permanent Resident of the Seam Zone (Judea and Samaria), 2003; Directives Concerning Permits of Entry to the Seam Zone and Stay therein (Judea and Samaria), 2003, both signed on October 7, 2003 by the Head of the Civil Administration, Brigadier-General Ilan Paz.

[970] Directives Concerning Passageways in the Seam Zone (Judea and Samaria), 2003, signed on October 7, 2003 by the Head of the Civil Administration, Brigadier-General Ilan Paz.

[971] *Ibid.*

[972] HCJ 9961/03 Ha'Moked – Centre for the Protection of the Individual v. The State of Israel et al. (still pending). The principal author of this section represents the petitioner in this petition.

permit regime.[973] On January 2004, the Association for Civil Rights in Israel also petitioned the High Court of Justice to rule on the legality of the permit regime.[974]

Following the submission of these petitions, several amendments were made in the permit regime. The first amendment was to unify the status of 'Israelis' and permanent Palestinian residents of the Seam Zone with that of tourists: i.e., instead of exempting Israelis, a general permit would be granted, exempting them from the need to apply for a permit for entry to the Seam Zone. Palestinian residents of the Zone no longer had to apply actively for special permits but were granted a general permit.[975]

In addition, the general permit no longer included those entitled to enter Israel according to the Law of Return (i.e., Jews who are not citizens of Israel). This deletion was made because 'in any case, they enjoy the status of tourists, and therefore the omission does not change anything for them'.[976] Although proclaimed by the High Court of Justice, this change has not been publicly announced and remains, four years later, unknown in the West Bank: signs at the Separation Wall's crossings still include in the definition of 'Israelis' those entitled to Israeli citizenship according to the Law of Return.

Eventually, the Head of the Civil Administration signed directives providing that Palestinian residents of the Zone are entitled to a 'permanent resident of the Seam Zone certificate', which shall allow them to pass through the gates.[977] Now, in place of applying for a permit, the Palestinian residents of the Seam Zone were required to apply for a 'resident certificate'. For that purpose, two new forms were issued: 'Application for a Permanent Resident of the Seam Zone Certificate Form' and 'Application for the Granting of a New Resident of the Seam Zone Form'.

All these and other amendments[978] did not change the principle: for Palestinians, the Seam Zone is a closed area, except for those who can prove that 'they have any business there', and receive a permit (or permanent resident certificate). However, OCHA has found that only approximately 18 percent of Palestinian land owners or workers who farmed land in the closed zone in the northern West Bank before the construction of the Wall receive permits to access the area today.[979] For Israelis and

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[973] Court order No. 5 requested by the petitioner was: '…[Cancellation of] the Declaration Concerning the Closing of a Zone No. 2/03/S (the Seam Zone), 2003 (hereinafter: 'the Declaration') and… the Orders regarding Security Directives installed by its virtue concerning entry permits to the Seam Zone'.

[974] *The Association for Civil Rights in Israel* v. *The Commander of IDF Forces in Judea and Samaria et al.* (pending), HCJ 639/04.

[975] Declaration Concerning the Closing of a Zone No. 2/03/S (the Seam Zone) (Judea and Samaria), (Amendment No. 1), 2004; General Permit for Entry to the Seam Zone and Stay Therein (Judea and Samaria), (Amendment No. 1), 2004. Both were signed on May 27, 2004 by Major-General Moshe Kaplinsky.

[976] Interview, Military Legal Advisor for Judea and Samaria Bureau [date needed].

[977] Directives Concerning Passageways in the Seam Zone (Judea and Samaria), (Amendment No. 1), 2004; Directives Concerning a Permanent Resident of the Seam Zone Certificate (Judea and Samaria), 2004. Both were signed by Brigadier-General Ilan Paz on June 3, 2004.

[978] Declaration Concerning the Closing of a Zone No. 2/03/S (the Seam Zone) (Judea and Samaria) (Amendment No. 2), 2005; signed on December 13, 2005 by the Commander of IDF Forces in the West Bank, Major-General Yair Naveh. Directives Concerning Permits to Enter the Seam Zone and Stay Therein (Amendment No. 1) (Judea and Samaria), 2005; signed by the Head of the Civil Administration, Brigadier-General Kamil Abu-Rukkun on December 13, 2005. Directives Concerning Passageways in the Seam Zone (Amendment No. 2) (Judea and Samaria), 2005; signed on December 13, 2005 by the Head of the Civil Administration, Brigadier-General Kamil Abu-Rukkun. Declaration Concerning the Closing of a Zone No. 2/03/S (the Seam Zone) (Judea and Samaria) (Extension of Effect and Amendment of Boundaries), 2005; signed on December 27, 2005 by the Commander of IDF Forces in the West Bank, Major-General Yair Naveh, applying the permit regime to the Fence section in phase B (from the village of Sallem going east to Tirat Zvi).

[979] OCHA Special Focus, *The Barrier Gate and Permit Regime Four Years on: the Humanitarian Impact in the Northern West Bank*, November 2007, p. 3. Available at: http://www.ochaopt.org/documents/OCHA_SpecialFocus_BarrierGates_2007_11.pdf.

tourists, the Seam Zone is an open and free area; they require no certificate or document issued by the military authorities or the Civil Administration and can enter the Zone 'for any reason'.

iv. Access to Jerusalem and the Closure of the Gaza Strip

Although Israel's annexation of East Jerusalem has been deemed illegal (as discussed in Chapter 3.C.2), Israel continues to treat East Jerusalem as part of the sovereign territory of the State of Israel. Access to the city for Palestinian residents anywhere in the OPT outside East Jerusalem has, since 1991, been limited to those who obtain personal entry permits similar to those required for Palestinians to enter Israel. The city is now surrounded by checkpoints, isolated from the rest of the OPT.[980]

These restrictions are aggravated by the continued construction of Israeli settlements in East Jerusalem, in defiance of international law and in an attempt to alter the demographic balance of the city. The Wall, which weaves in and out of Palestinian villages, towns and neighbourhoods, blocks even access by Palestinians with Jerusalem residence identity cards to the city. Only five kilometres of the 168 kilometre section of the Wall within the Jerusalem Governorate actually follows the Green Line.[981]

The population in the Gaza Strip also face severe restrictions on movement into and out of the territory. Despite the unilateral Israeli withdrawal of settlers and permanent military posts in 2005, Israel still controls the Gaza Strip's air space, territorial sea and land borders, and closes down the crossings into and out of the Gaza Strip with great frequency. Following the election of Hamas and the capturing of an Israeli soldier in the Gaza Strip in 2006, and more particularly since Hamas' complete takeover of the Gaza Strip in June 2007, a near blanket closure has been imposed on the territory's borders by Israel. Thousands of Palestinians have been stranded in Egypt for lengthy periods, while thousands more have been prevented from leaving the Gaza Strip, including students with scholarships to study abroad and patients with life-threatening conditions requiring urgent medical treatment unavailable in the Gaza Strip.

v. Conclusion

The systematic restrictions on Palestinian movement described above cannot be justified on reasonable security grounds and are unjustifiably sweeping in their application. They reflect a racially discriminatory premise that *all* Palestinians are potential security threats and their freedoms should therefore be curtailed on the basis of their identity as Palestinians. Moreover, Jewish-Israeli settlers living in the OPT remain relatively unaffected, indicating a system of racial discrimination. The World Bank—which has estimated that over 50 percent of the West Bank is now off-limits to Palestinians—has noted that it is 'difficult to reconcile the Israeli use of movement and access restrictions for security purposes [with] their use to expand and protect settlement activity and the relatively unhindered movement of settlers and other Israelis in and out of the West Bank'.[982] In 2007, the UN Committee on the Elimination of Racial Discrimination (CERD) expressed its deep

[980] See, for example, Al-Haq, *Building Walls, Breaking Communities: The Impact of the Annexation Wall on East Jerusalem Palestinians* (Ramallah: Al-Haq, 2005). See also B'Tselem, *Ground to a Halt: Denial of Palestinians' Freedom of Movement in the West Bank* (Jerusalem: B'Tselem, August 2007), p. 63.

[981] UN OCHA, *The Humanitarian Impact of the West Bank Barrier on Palestinian Communities: East Jerusalem*, Update No. 7, June 2007, p. 14.

[982] See World Bank Technical Team, *Movement and Access Restrictions in the West Bank: Uncertainty and Inefficiency in the Palestinian Economy* (May 2007), p. 2.

concern over the "severe restrictions on the freedom of movement in the Occupied Palestinian Territories, targeting a particular national or ethnic group'.[983]

As Israel's restrictions on Palestinian movement have been estimated by the World Bank to render over 50 percent of the West Bank off-limits to Palestinians,[984] they clearly obstruct Palestinians' participation in the political, social, economic and cultural life of the OPT and impede their full development as a group, fitting the concern of Article 2(c).

(II) F.2 *Denial of the Right to Freedom of Residence*

(II) F.2(a) Interpretation

The freedom to choose one's residence, along with freedom of movement, is protected in Article 12 of the ICCPR. Everyone who is lawfully present within a territory under the jurisdiction of a state party to the ICCPR must enjoy the "freedom to choose his residence". The right to choose one's residence must be free from racial discrimination according to Article 5(d)(i) of ICERD. The Human Rights Committee has observed that "the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory".[985] The Apartheid Convention condemns, in Article 2(c), any legislative and other measures calculated to deny members of a racial group the right to freedom of residence.

(II) F.2(b) Practices in apartheid South Africa

Throughout the twentieth century, restrictions on residence and property ownership divided the national territory of South Africa into racial zones, policed by check-points, random document checks and raids on homes. Freedom of movement and residence was therefore severely inhibited and strictly controlled. Issuing a passport, essential to the exercise of the right to leave the country, was a matter of government discretion and was routinely denied to opponents of the regime.[986]

The effect of the pass laws in South Africa was to make people aliens in their own country. Movement of black people was controlled through the Group Areas Act, which designated where black people could live, and the pass system which kept tight control over their movement out of black areas. The State designated places of residence for the labour force in particular, requiring those working as migrant labourers (a classification consequent to their living in the homelands and working outside of them) to live in compounds.[987] Those not permitted to reside and work in townships (by virtue of Section 10 of the Blacks (Urban Areas) Consolidation Act)[988] were relocated to the Bantustans, termed 'homelands,' where they were required to reside, and any travel outside of the homelands was determined by the travel restrictions and pass limitations. Violation of pass laws,

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[983] United Nations Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel*, March 2007, UN Doc. ICERD/C/ISR/CO/13, §. 34. Emphasis added.

[984] *Ibid.*, p. 2.

[985] United Nations Human Rights Committee, *General Comment No. 27*, CCPR/C/21/Rev.1/Add.9 (2 November 1999), para. 7.

[986] Reflecting this history, section 20 of the South African Constitution (1996) guarantees freedom of movement to every person who is lawfully in the national territory. The right to freely choose a place of residence in the national territory—in many human rights instruments, closely associated with the freedom of movement—is covered in section 19.

[987] Evidence of this was especially marked in the mining industry where black mine workers were required, until the late 1980s to reside in mine compounds while White workers were free to choose where they lived.

[988] Blacks (Urban Areas) Consolidation Act, Act No. 25 of 1945.

whether on purpose or accidentally (such as by forgetting one's pass book at home), was the most common reason for the arrest of black people during the apartheid era.

(II) F.2(c) Israeli practices in the OPT

i. Palestinian Residency Rights in Occupied East Jerusalem

In 1948, Zionist forces seized western Jerusalem while the eastern part of the city, held initially by the joint Arab forces, came under Jordanian rule. Between 1948 and 1967, Jerusalem remained divided. In the 1967 War, Israel conquered East Jerusalem and an additional 64 square kilometres of surrounding West Bank land and unilaterally defined this larger area as the expanded Jerusalem municipality. Israel then conducted a census that became the basis for granting permanent residency in the city. The population of East Jerusalem until June 1967 was 75,000 and the total population, including the annexed outlying areas, was 130,000.[989] The number of Palestinian residents of East Jerusalem and the annexed surrounding areas who received permanent residency status by Israel in 1967 was 66,000 and amounted to 25 percent of the population of the 'united city.'[990] Residents of Jerusalem who were not present in East Jerusalem during the census (for example, those studying or travelling abroad) lost their right to reside in East Jerusalem and could regain that right only by applying to the Israeli Ministry of Interior for family unification. More than 60,000 such Palestinians were not allowed to return to their homes in East Jerusalem.[991]

Between 1967 and 2007 a very small number of Palestinian East Jerusalem residents had applied for Israeli citizenship.[992] Instead, by 2007 approximately 253,000 Palestinians held Jerusalem permanent residency ID cards.[993] Most Palestinians had refused to consider Israeli citizenship because it required them to swear allegiance to the State of Israel, implying *de facto* acceptance of the occupation. But after 2007, the number of Palestinian residents of East Jerusalem who applied for Israeli citizenship rose sharply. [994] This rise was attributed to the residents' fear that they may lose their residency status altogether if their neighbourhoods were cut off from the city by the Wall and/or otherwise transferred to Palestinian control under future agreements. [995]

'Permanent' residency status is not permanent. The Entry into Israel Regulations of 1974, which amended the Law of Entry into Israel (1952), specified conditions under which permanent residency

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[989] Memorandum concerning the measures taken by Israel with respect to the City of Jerusalem, Submitted by Ruhi Al-Khatib, 26 August 1967, printed in the *Journal of Palestine Studies* 145, Vol. 37 No. 1 (Autumn 2007) at 95. Ruhi Al-Khatib was the elected Mayor of Jerusalem from 1951 until he was dismissed by the Israeli authorities in 1967.

[990] Israel Central Bureau of Statistics, Press Release, 14 May 2007, 084/2007, 2: available at http://www.cbs.gov.il/hodaot2007n/11_07_084b.doc; Ir Amim website at http://www.ir-amim.org.il/; Maya Coshen, Jerusalem Institute of Israel Studies, *Statistical Yearbook of Jerusalem, 2005*, available at: http://www.jiis.org.il/imageBank/File/shnaton_2006/shnaton_C1005_2005.pdf.

[991] Ruhi Al-Khatib, Memorandum, supra.

[992] The UN High Commission of Refugees, 'Israel: Citizenship Law', available at: http://www.unhcr.org/refworld/topic,4565c2252,4565c25f59,4804c0ddc,0.html

[993] OCHA, June 2007, supra, p. 10.

[994] See Associated Press, 'Israel reports jump in Jerusalem Arabs seeking Israeli citizenship', *Ha'aretz*; 7 November 2007; Shaked, R., 'Thousands of Palestinians apply for Israeli citizenship', *Yedioth Aharanot* (7 November 2007), available at: http://www.ynetnews.com/articles/0,7340,L-3468672,00.html.

[995] Israeli law professor Ruth Lapidot glosses over these difficulties in asserting that, 'Israeli nationality was not imposed on residents of East Jerusalem, but it can be acquired by application on their part': see Ruth Lapidot, 'Jerusalem and the Peace Process' (1994) 28 *Israel Law Review* 2-3 (Spring 1994), available at: http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1994/7/JERUSALEM%20AND%20THE%20PEACE%20PROCESS%20-%20Jul-94.

in Israel would expire.[996] Residency can also be revoked at the discretion of the Israeli Minister of Interior (see 'centre of life' discussion in the next section),[997] but the bases for these decisions are unpublished, unclear, and change frequently.[998]

Under Israeli law, Palestinian residents of East Jerusalem are not subjected to the same restrictions on movement as those imposed on the residents of the rest of the OPT. Those who were granted permanent residency status have the right to live and work in Israel without having to apply for special permits, are entitled to social benefits and health insurance, and have the right to vote in local elections (although few do so, as voting would signal recognition of the present Jerusalem municipality). Unlike citizens of Israel, permanent residents of Jerusalem cannot vote in elections for the Israeli parliament (the Knesset), cannot serve in Israeli public office, including serving as a judge. They can pass their residency status to their children only under certain conditions.

211Israel has taken several measures that suggest a deliberate policy to reduce the number of Palestinians residing in East Jerusalem. Central to this is a measure adopted by the Israeli Ministry of Interior in 1995 regarding a 'centre of life' test for permanent residency in Jerusalem. According to this policy, the Minister will revoke the permanent residency of a Palestinian if his or her 'centre of life' is no longer in East Jerusalem. An absence of seven years or the procurement of residency or citizenship in another country is taken as proof that the resident's centre of life has changed.[999] The burden to prove that East Jerusalem is their 'centre of life' is on the Palestinian residents and the requirements include providing property tax bills, electricity and telephone bills, work certificates, and children's school certificates for the past two to seven years.[1000] Residing in a foreign country for a period greater than three years for purposes other than education is further grounds for revocation.[1001]

Between 1996 and 1999, the Minister of the Interior revoked the permanent-residency rights of hundreds of Palestinians, on the grounds that they lived outside of Israel for extended periods, even if they lived elsewhere in the West Bank or the Gaza Strip. Israeli human rights organisations have dubbed these revocations 'the quiet deportation.'[1002] From 1967 to 2006, the Ministry of Interior revoked the permanent residency status of 8,269 Palestinians.[1003] In 2005, the Ministry of Interior

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[996] Badil, 'Eviction, Restitution and Protection of Palestinian Rights in Jerusalem' (April 1999), p. 17, available at: www.badil.org.

[997] Entry into Israel Law of 1952, Section 11(a).

[998] O. Feller, 'The Ministry: Violations of Human Rights by the Ministry of Interior's Population Registrar' (The Association for Civil Rights in Israel, 2004), pp. 9-10 (Hebrew), available at: http://www.acri.org.il/portal.aspx?id=15.

[999] H.C. 282/88, *Mabrook Awwad v. Yitzhak Shamir and The Minister of Interior*; Administrative Appeal to the Supreme Court 5829/05, *Dari et al v. The Ministry of Interior*; see also Feller, p. 9; Entry to Israel Regulations No. 11 (a) and (c) of 1973.

[1000] Jerusalem Centre for Social and Economic Rights (Fact Sheets, Residency Rights), available at: http://www.jcser.org/english/index.html.

[1001] World Bank Technical Team (2007), Movement and Access Restrictions in the West Bank, p. 11, available at: http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/RafahCorridorMarch07.pdf.

[1002] B'Tselem and Hamoked. 'The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians' (April 1997): available at: http://www.btselem.org/Download/199704_Quiet_Deportation_Eng.doc.

[1003] B'Tselem statistics (August 2008), available at: http://www.btselem.org/english/Jerusalem/Revocation_Statistics.asp. B'Tselem cites the following sources for its statistics: Ministry of the Interior (figures until 1994 are taken from the letter of the attorney Moriah Bakshi, of the legal department of the Ministry of the Interior, to attorney Mahliel Blass, of the Attorney General's Office, in HCJ 7316/75. The figures for 1995 to 1998 were provided to B'Tselem by the Ministry of the Interior on 13 February 2000. Figures for 2003 and 2004 were provided to the Jerusalem Centre for Social and Economic Rights by the Department for Strategic Planning of the Interior Ministry in letters from 16 June and 5 August 2004. B'Tselem did not cite its sources for the 2005 and 2006 figures.

revoked the permanent residency rights of 222 Palestinian residents of East Jerusalem; in 2006 this number increased to 1,363.[1004]

A second measure targets the registration of children. Under Israeli law, a 'non-Jewish' child born in Israel to parents who are permanent residents is entitled to the same legal status as the child's parents.[1005] Therefore, if both the mother and the father are permanent residents of Jerusalem and their child was born in East Jerusalem or Israel, they can register the child at the Ministry of Interior and the child will also become a permanent resident. If the parents register the child before the age of one, registration usually goes smoothly and the parents are not required to present proof that their 'centre of life' is in Jerusalem. However, if the child is not registered before his or her first birthday, the parents are required to submit numerous documents and affidavits, certified by an attorney, proving that their 'centre of life' is in Jerusalem.[1006]

Israeli law is silent regarding the residency status of children of Palestinian permanent residents of East Jerusalem if the child was born outside of Israel, including in areas of the OPT other than East Jerusalem. The Interior Ministry changes its policies frequently regarding the registration of such children and presently makes it difficult for parents to do so. If the child was born in the rest of the West Bank or in the Gaza Strip, the Ministry claims that, according to the Citizenship and Entry into Israel Law (Temporary Order)-2003, the assumption is that the child's 'centre of life' is in those territories and the child will not be registered.[1007] If the child is 14 years old or less, then the Interior Ministry will grant the child 'A5-interim residency' for two years. After the two years, the child will be registered if there is proof that the child's 'centre of life' is in Jerusalem. If the child is over 14 years of age, the child has to apply for family reunification, which is usually denied. Alternatively, the child can apply for temporary visitor permits.[1008]

For children who were, for one reason or another, registered in the West Bank despite the fact their 'centre of life' is in East Jerusalem, the Israeli High Court of Justice has decided that the Ministry should deal with these individuals on a case-by-case basis.[1009] If one of the parents is a Jerusalem permanent resident and the other parent is from the OPT, the law states that the child is entitled to permanent residency status.[1010] In fact, the Ministry of Interior requires that the parents prove that their 'centre of life' is in Jerusalem. During the time that the child is not registered, the child is not entitled to health insurance or social benefits.[1011]

The cumulative effect of Israel's restrictions on Palestinian residence in East Jerusalem is to serve a policy aimed at maintaining a Jewish majority in the city that underpins the State's regime of control.

[1004] Ilan Shahar, 'Interior Ministry increasingly revoking East Jerusalem Arabs' residency permits,' *Haa'retz* (June 24, 2007), available at: http://www.haaretz.com/hasen/spages/874161.html.

[1005] Entry to Israel Regulations of 1974, section 12.

[1006] Interview with Attorney Yutam Ben Hillel, Hamoked, 13 October 2008.

[1007] The Association for Civil Rights in Israel, 'Stateless Persons in Israel', prepared for the US State Department's Human Rights Report, September 2007, available at: http://www.acri.org.il/pdf/USEmbassy.pdf; also B'Tselem and HaMoked 'Forbidden Families: Family Unification and Child Registration in East Jerusalem' (2004, January), p. 26; available at: http://www.btselem.org/Download/200401_Forbidden_Families_Eng.doc; and Feller, p. 20.

[1008] Citizenship and Entry into Israel Law 2005, Article 3A.

[1009] Administrative Appeal 5569/06, *Ministry of Interior v. Eweisat et al.* (Supreme Court).

[1010] Entry to Israel Regulations of 1974, section 12.

[1011] Feller, supra, p. 20.

(ii) Family Unification

(ii)(a) Family Unification in International Law

Customary international law allows a state to deny entry to a foreigner to its territory or to place conditions on the alien's entry.[1012] However, when the foreigner is married to a citizen/ national or a resident of the state then the state cannot arbitrarily interfere with their right to maintain a family life together.[1013]

Article 16(3) of the Universal Declaration of Human Rights describes the family as 'the natural and fundamental group unit of society and is entitled to protection by society and the State.' The International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Israel is a state party, establishes in Article 10(1) that: 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.'

The International Covenant on Civil and Political Rights (ICCPR) also recognises the importance of family rights. Article 2(3) of the ICCPR states that: '(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State; (2) The right of men and women of marriageable age to marry and to found a family shall be recognized.' In addition to the state's obligation to protect the family unit, Article 17 of the ICCPR directs states not to arbitrarily or illegally interfere with the privacy, family, or home of a person. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families is testament to the importance placed on the family under international human rights law.[1014]

While the right to family unification is not expressly stated in international treaties and 'there is no international obligation put on a country to permit aliens to enter its sovereign territory even for the purpose of family unification', there is universal consensus that the right to a shared family life is entitled to protection from the state.[1015] For example, despite giving states broad discretion on issues related to the entry of aliens into the state, the European Court of Human Rights recognizes the right to family life and that protecting this right may require the imposition of positive duties on the state.[1016]

The laws of occupation require states to respect the rights of the family in occupied territory. Article 27 of the Fourth Geneva Convention states that: 'Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.'

Although neither Article 27 nor the ICRC commentary on the Fourth Geneva Convention provide detailed guidance as to what is meant by the term 'family rights,' the requirement that 'family life must be respected as far as possible' has been established as a norm of customary international humanitarian law.[1017] Israel recognises such norms as applicable to its actions.[1018]

[1012] L. Abu Mukh, 'Family Unification of Palestinians in the Occupied Territories: Laws, Regulations and Facts' (May 2007), p. 1: available at: http://cadmus.iue.it/dspace/bitstream/1814/7990/1/CARIM-RR_2007_05.pdf.

[1013] Abu Mukh, 'Family Unification', p.1.

[1014] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, adopted by GA Res 45/158 (1990), entered into force 1 July 2003.

[1015] Abu Mukh, 'Family Unification', p. 1.

[1016] Abu Mukh, 'Family Unification', p. 23.

[1017] Jean-Marie Hankerts and Louise Doswald-Beck, *Customary International Humanitarian Law - Volume 1: Rules* (Cambridge: Cambridge University Press, 2005), p. 379.

[1018] David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002), p. 31.

Furthermore, it is a general principle of international law that any restriction imposed on a person's rights should be proportionate to the end sought. Considering the importance of the rights involved and the existence of alternative means to achieve the designated end, such as in-depth security investigations of each individual applicant, it is clear that the absolute ban on family unification contravenes international humanitarian and human rights law.

(ii)(b) Family Unification for Palestinians in the OPT, excluding East Jerusalem

Three months after its occupation of the West Bank, including East Jerusalem, and the Gaza Strip in June of 1967, Israel conducted a census of the Palestinian population in these areas. New military orders were then passed making the possession of an Israeli-issued identity card a condition for permanent residency in the OPT.[1019] These new orders supplemented the military orders passed in the immediate aftermath of the Six-Day War which declared the OPT closed military zones, making entry and exit subject to the permission of the Regional Military Commander. As a result of these orders, an estimated 325,000 Palestinians[1020] who had fled the fighting or who were outside what became the OPT at the time of the armistice were excluded from returning, causing severe disruption to their family lives.

Shortly after the census, the Israeli authorities instituted a 'family unification' process that was to allow Palestinians registered in the census to apply for the return of family members who, as a result of the military orders, had lost their residency in the OPT. From 1967 through 2000, Israel implemented a rigid 'family unification' policy in the OPT. This policy was neither transparent nor accessible, involved lengthy and expensive bureaucratic procedures and was then repeatedly changed to match perceived political or policy imperatives. In 2000, the outbreak of the second *intifada* was used as a pretext for Israel to cease operating even this flawed 'family unification' process.

In the five years following the Six-Day War, only first degree relatives who became refugees following the war, excluding males aged 16-60, were allowed to return. Of some 140,000 requests for family unification, only 45,000-50,000 people were approved.[1021] From 1973 onwards, when even more stringent criteria were imposed, until 1983, when the policy was re-evaluated and further restricted, approximately 1,000 applications were approved per year, while some 150,000 remained pending. The increased restrictions reduced successful applications from 1984 onwards to a few hundred a year. The reason given for the change in the process was that 'over the years, the type of requests for family unification changed significantly, and deviated from the original objectives of the said policy, dealing instead with families that had been created after the war.'[1022] The 1990s saw quotas set of a few thousand applicants per year through decisions of the Israeli Supreme Court and then the 1995 Israeli-Palestinian Interim Agreement. In the OPT in 2000, Israeli froze the family unification process entirely. In 2007, more than 120,000 applications for family unification in the West Bank, excluding East Jerusalem, and Gaza Strip were still pending.[1023]

Israel's intention to exercise demographic control over all of the territory is further illustrated by its policies relating to child registration. Between 1967 and 1987 children under 16 who were born in the OPT or born abroad to a parent who is a resident of the OPT were allowed to be officially registered as residents.[1024] However, this policy was changed in 1987 per an order issued by the military

[1019] Al-Haq, *Occasional Paper No. 8: The Right to Unite*, (Ramallah: Al-Haq, 1990), p. 3.

[1020] *Ibid.*

[1021] *Ibid.*, p. 4.

[1022] B'Tselem & Hamoked, *Perpetual Limbo: Israel's Freeze on Unification of Palestinian Families in the Occupied Territories* (2006), p. 9, quoting the Response of the State Attorney's Office of 18 November 1992, Section 6 in HCJ 4494/91, *Sarhan et al. v. Commander of IDF Forces in Judea and Samaria et al.*

[1023] B'Tselem, *Human Rights in the Occupied Territories*, 2007 Annual Report, p. 37.

[1024] Abu Mukh, 'Family Unification', p. 6.

commander and children over the age of five were denied registration.[1025] In 1995, the interim peace agreement authorised the Palestinian Authority to register children without Israel's approval as long as one of the child's parents was registered. Nevertheless, between December 2002 and September 2005, Israel refused to recognise the registration of children whose ages were between 5 and 16 who were born abroad.[1026] In September 2005, Israel again decided to accept the registration of children under the age of 16, but those who had already turned 16 continued to encounter difficulties, although they had applied for registration prior to turning age 16.[1027]

Due to the significant obstacles to achieving family unification and the lengthy procedures involved, many families were forced to rely upon repeatedly obtaining short-term visitor permits to stay temporarily in the OPT with their families. These permits were subject to a capricious bureaucracy similar to, or sometimes as part of, the family unification process. However, the grant of these permits was also frozen in 2000. In effect, Palestinians living in the OPT and wishing to form a family where one spouse is not resident of the OPT must forgo the unity of their family or forgo living in his or her homeland.

A policy that deliberately aims to stifle the formation and unity of Palestinian families within the OPT through the systematic denial of the rights to freedom of residence and to return to their country therefore clearly contributes to preventing the full development of Palestinians as a group. Israel's policies in the OPT, far from providing families with the protection and assistance required by international human rights law, in fact prevents specific families from living together and hinders or prevents unification of Palestinian families.

An interpretation that Israel's ban on family reunification serves the purpose of establishing and maintaining racial domination in the OPT is supported by the fact that no such restrictions are placed on Jewish families wishing to reside (unlawfully) in the OPT. On the contrary, Israel's efforts to restrict the ability of Palestinians to unify and form families in the OPT have been paralleled by concerted efforts to transfer Israeli individuals and families into the OPT. This illegal transfer has been achieved primarily through massive government investment in settlement infrastructure and the provision of numerous incentives to encourage Jewish individuals and families to move to the unlawful settlements. Thus, Israel's practices and policy regarding family unification contravenes international human rights law, in that they are clearly discriminatory, and in forming part of an overall system which dominates and subjugates members of the Palestinian population, amounts to acts of apartheid.[1028]

(ii)(c) Family Unification between Palestinian citizens of Israel and Palestinians from the OPT

As East Jerusalem is part of the OPT, its Palestinian residents are 'protected persons'. Since Israel's annexation of East Jerusalem, however, Palestinians living in East Jerusalem were granted permanent residency status and thus like Israeli citizens and Israeli civil laws also apply in their case.

East Jerusalem residents who marry a Palestinian spouse from the OPT and wish to live with their spouses in East Jerusalem have to apply to the Israeli Ministry of Interior for 'family unification.'[1029] Between June 1967 and May 2002, the Ministry of Interior granted family unification and allowed such couples to live in East Jerusalem, albeit after many years of foot dragging and bureaucratic

[1025] Order number 297, 5729-1969, section 11(a) (amended by order no. 1208 of 13 September 1987) as cited in Abu Mukh, 'Family Unification', p. 7.

[1026] A. Ashkar, *Perpetual Limbo: Israel's Freeze on Unification of Palestinian Families in the Occupied Territories* (B'Tselem and Hamoked, July 2006), p. 26; Abu Mukh, 'Family Unification', p. 9;

[1027] Ashkar, ibid., p. 26.

[1028] See also Schocken, A., 'Citizenship law makes Israel an apartheid state,' *Ha'aretz* (29 June 2008).

[1029] *Forbidden Families*, op cit.

delays. Between 1993 and 2002, an estimated 100,000-140,000 residents of the OPT gained status to reside in East Jerusalem and Israel as a result of the family unification process.[1030]

In May 2002, the Israeli government issued Decision No. 1813, which froze the processing of all family unification applications by citizens or residents of Israel and East Jerusalem involving Palestinian spouses from the OPT.[1031] Various statements by government officials made it clear that the freeze was due to the government's fear that Palestinians were achieving a 'creeping right of return' through the family unification process.[1032] The freeze had grave effects, as Palestinian residents of Israel whose spouses were from the OPT had either to leave Israel, in order to live with their spouses, or live in Israel with a spouse who did not have legal status. Unlike some Palestinians who have Israeli citizenship, East Jerusalem residents who decide to move to the OPT risked losing their permanent residency status residents because their 'centre of life' is no longer in Jerusalem.[1033]

In July 2003, the Knesset amended existing legislation, the Citizenship and Entry into Israel Law, by passing a temporary order that extended the government's 2002 freeze on 'family unification' applications involving Palestinian spouses from the OPT. The new law exclusively targeted Palestinian residents of the OPT, leaving the general policy for residency and citizenship status for all other foreign spouses unchanged, including Israeli settlers living in the OPT. Immediately thereafter, in August 2003, Adalah filed a petition to the High Court of Justice challenging the constitutionality of the law. In the petition, Adalah argued that the "law constitutes one of the most extreme measures in a series of governmental actions aimed at undermining the rights of Palestinian citizens of Israel, as well as Palestinians from the OPT."[1034] Before the court, Israel justified Government Decision No. 1813 and the subsequent law by arguing argued that Palestinians who had been granted status in Israel through family unification were increasingly involved in assisting 'terror' organizations. Israel referred to twenty-three individuals (out of thousands of status-receivers) allegedly involved in 'terror', but did not provide details of these cases to the court. Moreover, even if reliable, this figure constitutes a relatively tiny number of people and the Government Decision, and the law upon which it is based, are disproportionate. In May 2006, the High Court rejected the petition in a split 6 to 5 decision, which effectively approved the law.[1035]

By contrast, the UN Committee on the Elimination of Racial Discrimination in its 2007 Concluding Observations on Israel found that "such restriction targeting a particular national or ethnic group in general is not compatible with the Convention, in particular the obligation of the State party to guarantee to everyone equality before the law (Articles 1, 2 and 5).' The Committee thus recommended that Israel "revoke the Citizenship and Entry into Israel Law (Temporary Order), and reconsider its policy with a view to facilitating family reunification on a non-discriminatory basis.'[1036]

Instead, in March 2007 the Knesset passed an amendment to the law (which maintains the ban on family unification where one spouse is a Palestinian from the OPT) by extending the ban to family unification where one spouse is a resident or citizen of Syria, Lebanon, Syria, Iran or Iraq – states all defined by Israeli law as 'enemy states' – and/or an individual defined by the Israeli security forces as residing in an area where activity is occurring that is liable to endanger Israeli security. A Supreme Court petition filed in May 2007 challenging this new law is currently pending.[1037]

[1030] *Forbidden Families*, p. 15.

[1031] *Forbidden Families*, p. 9.

[1032] Forbidden Families, p. 18.

[1033] Regulation 11(c) of the Entry to Israel Regulation – 1974.

[1034] See Adalah, 'The Nationality and Entry into Israel Law', *Special Report: Ban on Family Reunification* (20 December 2008), available at: http://www.adalah.org/eng/famunif.php.

[1035] *Adalah, et.al., v. Minister of Interior, et. al*. (decision delivered 14 May 2006), H.C. 7052/03.

[1036] UN Committee on the Elimination of Racial Discrimination, Concluding Observations: Israel, March 2007, UN Doc. CERD/C/ISR/CO/13, at para. 20.

[1037] *Adalah* v. *The Minister of Interior, et. al.* (case pending), H.C. 830/07.

In this petition, Adalah argued that the law constitutes racial discrimination as it bars certain individuals from family unification solely on the basis of their nationality.[1038] It also prevents Palestinian citizens of Israel from having contact with their families, with members of the Arab nation or with the Palestinian people, in violation of international law.[1039]

Tens of thousands of Palestinian families have been by affected by the ban on family unification since 2002.[1040] In 2004, it was estimated that the ban affected between 16,000 and 24,000 families.[1041] Separating and discriminating against Palestinian citizens of Israel and Palestinian residents of East Jerusalem in such a systematic fashion, using mechanisms that are institutionalised by law and explicitly privilege Israeli Jews over Palestinians, results in the oppression and domination of the former over the latter.

(iii) Conclusion

A group of Israeli policies measures restrict Palestinian rights to freedom of residence. Israel policy is to reduce the number of Palestinians in East Jerusalem by revoking their permanent residency status if they are unable to prove that their centre of life is East Jerusalem. Further, a myriad of restrictions are placed on family unification for Palestinians in the occupied territory and in Israel. These measures often leave Palestinians with few choices but to leave Israel or the OPT or to live illegally there without status. This mirrors, to some degree, the Group Areas Act and the Pass Laws in apartheid South Africa, which severely inhibited and strictly controlled the freedom of residence for black South Africans. As did the apartheid regime in South Africa, Israel justifies these measures under the pretext of 'security'. Contrary to such claims, they are in fact part of an overall regime aimed at preserving demographic superiority of one racial group over the other in certain areas.

(II) F.3 *Denial of the Right to Leave and Return to one's Country*

(II) F.3(a) Interpretation

The right to leave and return to one's country was legally recognised as early as 1215 in the English Magna Carta, which provided that '[i]t shall be lawful to any person, for the future, to go out our Kingdom, and to return, safely and securely, by land or by water'. The right of an individual to return to his country is guaranteed in the International Covenant on Civil and Political Rights (Article 12(4)), and the Universal Declaration of Human Rights (Article 13(2)), which is reflective of customary international law.[1042] The Apartheid Convention prohibits the denial of the right of members of a racial group to leave and return to their country as part of a system of domination and oppression against that group, thus drawing on Article 5(d)(ii) of ICERD, which prohibits racial discrimination in the application of those rights.

The right to return to one's 'own country' applies even if the territory in question is disputed or has changed hands. The law of nationality, a subset of the larger 'law of nations', stipulates that in case of state succession, the newly emerging successor state must allow habitual residents of a territory

[1038] *Ibid*, p. 15.

[1039] *Ibid*, p. 25.

[1040] See, for example, H.C. 4608/02, *Abu Assad, et. al.* v. *The Prime Minister of Israel*, et. al.: available at: http://www.adalah.org/eng/famunif.php#2002_petition, and *Perpetual Limbo*.

[1041] UN OCHA, The Humanitarian Impact of the West Bank Barrier on Palestinian Communities (June 2007), Update #7, p. 4 and 23.

[1042] Article 13 (2) of the Universal Declaration of Human Rights, states, 'Everyone has the right to leave any country, including his own, and return to his country'; Article 12 (4) of the International Convention on Cultural and Political Rights states, 'No one shall be arbitrarily deprived of the right to enter his own country'; Article 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination protects 'the right (of everyone) to leave any country, including one's own, and to return to one's country.'

undergoing change in status or sovereignty to exercise their right to return to their own homes or places of origin, regardless of where they may have been on the actual date of succession.[1043] The right of return does not only apply to those individuals directly expelled and their immediate families, but also to their descendants who have 'maintained close and enduring connections' with the area.[1044]

(II) F.3(b) Practices in apartheid South Africa

The right of black South Africans to leave and return to their country was limited in several ways. The policy that affected millions of black people was the Homelands policy, which unilaterally redefined the country to which black South Africans belonged by partitioning sections of South Africa into titular ethnic states. As discussed in greater detail later (see section II.F.4(b)), The Bantu Homeland Citizenship Act permanently divested black South Africans of their citizenship and purported to eliminate any juridical claim to a right of return.[1045] Millions of black South Africans were forcibly transferred into the Homelands and a cluster of laws restricting freedom of movement, expressed ultimately as visa requirements, then prohibited them from returning to white areas, which were now another 'country'. Access to white South Africa was controlled by the South African Government's Minister of Bantu Administration and Development.

A policy of the apartheid regime that targeted its political opponents was to deny a passport, essential to the exercise of the right to leave the country and a matter of government discretion. Legislation permitted those who were determined to leave the country to apply for an 'exit permit', but exit on this basis essentially led to statelessness.

(II) F.3(c) Israeli practices in the OPT

Contrasting Israeli legislation and practice as it relates to Palestinian refugees, who face draconian barriers to returning to their country of origin, and Jewish immigrants, who can enter Israel freely and qualify for automatic citizenship on grounds of their Jewish identity, provides evidence of discriminatory measures for the purpose of establishing and maintaining domination of one racial group over another.

When the first Arab-Israeli war ended with the signing of an armistice in 1949, some 750,000 Palestinians had become refugees.[1046] In addition, Israel's invasion and occupation of East Jerusalem, the West Bank and the Gaza Strip in June 1967 resulted in some 550,000 Palestinians being displaced, the majority of whom fled or were expelled to Jordan.[1047] By 31 December 2007, the number of people registered with the UN Relief Works Agency as 'Palestine refugees' had increased to over 4.5

[1043] See the International Law Commission's *Articles on Nationality of Natural Persons in Relation to the Succession of States*, which reflected customary international law in 1948.

[1044] UN Human Rights Committee, General Comment 27 (1999), para 21.

[1045] TRC Report, Vol. 2, Ch. 5, para. 23.

[1046] Benny Morris, *Righteous Victims* (Vintage Books, New York, 2001), p. 252. The figure of 750,000 is used as this is the most commonly figure cited for Palestinian Arab displacement in 1948 in the prevailing literature. Statistics for refugee figures have been as high as 935,573 according to UNRWA registrations, to as low as 530,000 according to some Israeli sources. The British Foreign Office estimated the total number of refugees to be 810,000 in February 1949 and then issued a revised estimate of 600,000. The UNCCP Technical Office gave a figure of 760,000. The US Government estimated a total refugee population of 875,000 as of 1953. For further information see *Survey of Palestinian Refugees and Internally Displaced Persons 2002* (Bethlehem: Badil Resource Centre, 2003), p. 25, Note to Table 1.1.

[1047] See Report of the Commissioner-General of UNRWA, Official Records of the General Assembly, Twenty-second session, Supplement No. 13, 1 July 1966 – 30 June 1967, UN doc. A/6713. See also *Survey of Palestinian Refugees*, ibid.

million, some 1.8 million of whom live in the West Bank and Gaza Strip.[1048] The remaining 2.7 million people registered as refugees with the UN remain displaced in the surrounding countries of Lebanon, Syria and Jordan.[1049]

Under human rights law, these refugees, as well as their descendants, have the right to return to their former places of habitual residence. Thus General Assembly Resolution 194 of 1948 stipulated that Palestinian refugees should be permitted 'to return to their homes' at the earliest practicable date:

> … the [Palestinian] refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.[1050]

Israel has failed to comply with this stipulation. Palestinians expelled in 1948 have not been allowed to return to their homes, regain their property, or obtain residency or citizenship in Israel. Palestinian refugees are excluded by Article 3 of the 1952 Citizenship Law from eligibility for Israeli citizenship on grounds that they were not 'in Israel, or in an area which became Israeli territory after the establishment of the State, from the day of the establishment of the State [May 1948] to the day of the coming into force of this Law [April 1952]'. [1051] Only by maintaining continuous residence in Israel from 1948 to 1952 were Palestinians living inside Israel eligible to acquire Israeli citizenship and thus remain in the country. [1052]

Moreover, the great majority of those Palestinians who fled their homes in 1967 have been prevented by Israel from returning to the OPT,[1053] in contravention of Security Council Resolution 237.[1054] Of refugees registered with UNRWA now living in Jordan, Lebanon and Syria, 650,000 originally resided in land now in the OPT. An estimated 90,000 Palestinian residents of the West Bank, including East Jerusalem, were abroad at the time of the 1967 war and were thus not registered in the census conducted thereafter by Israel.[1055] The Israeli authorities refused to consider Palestinians not registered in the census as legal residents of the OPT and employed administrative measures to prevent them from returning.[1056] The UN Committee on the Elimination of Racial Discrimination (CERD) has repeatedly expressed concern on this and called on Israel to "to assure equality in the right to return to one's country'.[1057]

By contrast, the State of Israel actively encourages Jewish immigration to Israel and, since 1967, Jewish residency in Israeli settlements in the OPT. Article 1 of the 1950 Law of Return states that

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[1048] United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Figures as of 31 December 2007, available at http://www.un.org/unrwa/publications/pdf/uif-dec07.pdf.

[1049] Ibid.

[1050] GA Res. 194 (III), 11 December 1948, paragraph 11.

[1051] Nationality (Citizenship) Law 5712-1952, LSI, Vol. XI, p. 50.

[1052] See Victor Kattan, "The Nationality of Denationalized Palestinians", 74 Nordic Journal of International Law (2005), pp. 67-102 at pp. 85-87.

[1053] Only 14,000 were allowed back in to the West Bank by September 1967, when the census was conducted. After that, 'only a trickle of "special cases" were allowed back, perhaps 3,000 in all'. See Benny Morris, p. 329.

[1054] UN Security Council Resolution 237 of 14 June 1967.

[1055] See Badil, *Occasional Bulletin No. 18* (July 2004), p. 3, available at: http://www.badil.org/Publications/Bulletins/Bulletin-18.htm.

[1056] Ibid.

[1057] See, for example, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel*, 70th session, 19 February – 9 March 2007, UN Doc. CERD/C/ISR/CO/13, March 2007, para. 18.

'Every Jew has the right to come to this country as an *oleh'*.[1058] This provision was supplemented by Article 2 of the 1952 Citizenship Law, which bestows automatic Israeli citizenship on any Jew who enters the country under the Law of Return. These laws ensure that Jews do not need to meet the prohibitively restrictive criteria (namely proof of continuous residence from 1948 to 1952) imposed on any Palestinian wishing to return to their country or, since 1967, the OPT.

Finally, as discussed earlier in this chapter, the State of Israel has authorised the Jewish Agency and World Zionist Organisation to act as its 'authorised agencies' to promote Jewish immigration to Israel. This differential treatment further signifies that Israel's state policy is to convey different rights and privileges to Jews and Palestinians in 'returning' to the country. The US State Department has noted that the 1950 Law of Return and the 1952 Citizenship Law are explicitly discriminatory, concluding that they 'confer an advantage on Jews in matters of immigration and citizenship'.[1059]

(II) F.4. *Denial of the Right to a Nationality*

(II) F.4(a) Interpretation

Although still a relatively fluid concept in international law, nationality in its simplest form can 'be deemed to be the political and legal bond that links a person to a given State and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that State.'[1060] Nationality is a basic prerequisite for the exercise of political rights, as well as having an important bearing on the individual's legal capacity. The powers of a State to confer and regulate nationality are therefore circumscribed by its obligations to ensure the full protection of human rights.[1061]

The right to nationality, in this sense, is affirmed in the American Declaration of the Rights of Man (Article 19), the Universal Declaration of Human Rights (Article 15), the Convention on the Reduction of Statelessness (Articles 1 and 10), the International Covenant on Civil and Political Rights (Article 24(3)), the American Convention on Human Rights (Article 20), the Convention on the Rights of the Child (Article 7) and the European Convention on Nationality (Article 4). Protection from racial discrimination in the exercise of one's right to nationality is ensured by Article 5(d)(iii) of ICERD.

Since World War II, 'denationalization' or the unilateral revocation of an individual's citizenship by the State—especially on a mass scale and on discriminatory grounds—has been illegitimate.[1062] Van Panhuys writing in 1959 noted that "strong feelings are aroused … if deprivation of nationality is based on grounds which are generally deemed rejectable, such as racial discrimination. This is particularly true if applied on a large scale.'[1063] Weis has written:

[1058] Law of Return 5710-1950 Passed by the Knesset on the 20th Tammuz, 5710 (5th July, 1950) and published in Sefer Ha-Chukkim No. 51 of the 21st Tammuz, 5710 (5th July. 1950), p. 159; the Bill and an Explanatory Note were published in Hatza'ot Chok No. 48 of the 12th Tammuz, 5710 (27th June, 1950), p. 189. The term *oleh* refers to an individual making *aliyah* (Hebrew: 'going up'), a religious Jewish concept that has been appropriated for Israeli civil law to refer to Jewish immigration to Israel.

[1059] US Department of State, *1983 Country Reports on Human Rights Practices*, p. 1286. It is also evident that '[a]part from its implications for immigration, the Law of Return is used in legislation in import duties in a fashion that discriminates between Jew and Arab'. See John Quigley, 'Apartheid Outside Africa: The Case of Israel' (1991–92) 2 *Indiana International & Comparative Law Review* 221 at 230.

[1060] See Proposed Amendment to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-American Court of Human Rights, 19 January 1984, in Elihu Lauterpacht and C.J. Greenwood (eds.), *International Law Reports* (Cambridge: Grotius Publications, 1989), p. 295, para. 35.

[1061] Ibid., p. 294.

[1062] See Paul Abel, "Denationalization", 5 Modern Law Review (1942), pp. 57-68 (examining the Nazi denationalization decrees of 1941 in the context of contemporary international law).

[1063] V. Panhuys, *The Role of Nationality in International Law* (Leiden: Sijthoff, 1959), p. 163.

> Considering that the principle of non-discrimination may now be regarded as a rule of international law or as a general principle of law, prohibition of discriminatory denationalization may be regarded as a rule of present-day general international law. This certainly applies to discrimination on the ground of race which may be considered as contravening a peremptory norm of international law but also … to discrimination on the other grounds mentioned in the Charter of the United Nations, i.e. sex, language and religion.[1064]

The terms 'nationality' and 'citizenship' are often used interchangeably and loosely by politicians and lawyers to indicate a legal connection between individual and state.[1065] Nationality is essentially a term of international law and denotes that there is a legal connection between the individual and state for external purposes. Citizenship is a term of constitutional law and is best used to describe the status of individuals internally, particularly regarding civil and political rights to which they are entitled.[1066] Normally, an individual's citizenship and nationality are the same: e.g., to refer to 'French' or 'Chinese' nationality—for example, as inscribed on a passport—signifies 'French' or 'Chinese' citizenship (unless 'nationality' is used more loosely in the sense of 'national origin', as discussed in section C.1).

However, as discussed earlier, Israeli law distinguishes between citizenship and nationality in constructing Israel as the state of the Jewish nation and not an 'Israeli nation'. Israeli citizenship may be held by anyone who qualifies under the Citizenship Law and some 1.3 million Palestinians today hold Israeli citizenship. Jewish *nationals*, whose interests are served through parastatal institutions such as the Jewish National Fund and Jewish Agency, then enjoy special privileges authorised also through Israeli Basic Law. These special privileges include exclusive access by Jewish nationals to most of the state's territory, while other national groups holding Israeli citizenship lack comparable privileges. Given the importance of this distinction in Israeli law, which is channelled into the OPT to provide Jewish civilians with comparable privileges, the terms 'nationality' and 'citizenship' will be used in this discussion as appropriate.

(II) F.4(b) Practices in apartheid South Africa

A key device by the apartheid regime in South Africa to ensure racial separation was by depriving black Africans of their South African citizenship. In this policy, black African citizens were forcibly relocated to the so-called Homelands if they were not already living there, where they were to be given the citizenship of those Homelands and stripped of their South African citizenship when those Homelands were declared independent.[1067] As Dr. Mulder, the Minister of Bantu Administration and Development told South Africa's Parliament on 7 February 1978:

> [I]f our policy is taken to its full logical conclusion as far as the black people are concerned, there will be not one black man with South African citizenship…[E]very black man in South Africa will eventually be accommodated in some independent new state in this honourable way and there will no longer be a moral obligation on this Parliament to accommodate these people politically.[1068]

'Denationalisation', as it was termed in apartheid South Africa, required first establishing governments in the Homelands and ultimately declaring them 'independent'. As discussed elsewhere, the Bantu Authorities Act (No 68) of 1951 provided for establishing separate black authorities on

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[1064] P. Weis, *Nationality and Statelessness in International Law* (The Netherlands: Alphen aan den Rijn, 1979), p. 125.

[1065] John Dugard, *International Law: A South African Perspective* (Cape Town: JUTA, 2000), p. 208.

[1066] Weis, *Nationality and Statelessness*, pp. 4-5.

[1067] See John Dugard, 'South Africa's Independent Homelands: An Exercise in Denationalization', 10 *Denver Journal of International Law and Policy* (1980), pp. 11-36.

[1068] 72 House of Assembly Debates, col. 579, 7 February 1978, quoted in Dugard, 'South Africa's Independent Homelands', p. 16.

tribal, territorial, and regional bases. In 1959, the Promotion of Bantu Self-Government Act provided for creating eight national units for African self-government supposedly reflective of African ethnic groupings (Xhosa, Zulu, Ndebele, Swazi, Basotho, Batswana, Bapedi, Venda, and Tsonga). Under the Promotion of Bantu Self-Government Act (No 46) of 1959, each ethnic group had a Commissioner-General who was tasked to develop a homeland that would, in name, ultimately be allowed to govern itself independently without white intervention. In 1970, the Bantu Homelands Citizens Act then compelled all black people to become a citizen of the homeland that responded to their ethnic group, regardless of whether they'd ever lived there or not. Their South African citizenship was then removed when the Homeland was declared 'independent'. The Bantu Homelands Citizens Act was designed to ensure that no black person would eventually qualify for South African citizenship and the right to work or live in South Africa.

In 1972, Zululand and Bophuthatswana were granted self-governing status, while Transkei, which had been self-governing since 1963, was given more autonomy as the model homeland. Transkei was declared 'independent' in 1976 and Bophuthatswana followed in 1977, Venda in 1979, and Ciskei in 1981. Black Africans holding these new citizenships became aliens in South Africa and could only occupy their own homes in the urban areas by special permission of the Minister.[1069]

(II) F.4(c) Israel practices in the OPT

International humanitarian law is concerned with situations in which an Occupying Power has assumed temporary authority over people who 'find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.[1070] Arguably, the Occupying Power therefore has no role or responsibility regarding the nationality (citizenship) of protected persons except to refrain from imposing its own citizenship on them. Nonetheless, this study finds that Israel denies Palestinians living in the OPT the right to nationality, in the sense of citizenship, in two ways.

The first is by prohibiting Palestinian refugees who are now living in the OPT from holding citizenship in Israel, the state that formed in the territory of their birth. Under the British Mandate, Palestinian Arabs held 'Palestinian' citizenship, as did Jews living in Palestine.[1071] This citizenship was effectively extinguished with the dissolution of the Mandate and the formation of Israel in part of Mandate Palestine. As the war of 1947-48 entailed a mass refugee flow of Palestinian Arabs from territory that became the modern State of Israel into what are today the OPT (as well as surrounding states), Palestinian refugees now living in the OPT have the right of return and the right to citizenship in Israel as the successor State in that part of Mandate Palestine where they were formerly habitual residents.[1072]

Yet, as noted earlier (in section F.3(c) on the right to return to one's country), Palestinian refugees from what became the internationally recognized territory of modern Israel are not permitted to return to their homes or obtain citizenship in Israel. This ban is enforced through Israeli laws determining

[1069] TRC Report Vol.2, para 40

[1070] Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 4.

[1071] During the British Mandate of Palestine (1922-1948), no distinction was made in the Palestine Citizenship Order in Council regarding the acquisition of citizenship on grounds of race or religion (*Official Gazette*, 16 September 1925, p. 459). The exception was the preference granted to Jews by Article 7 of the Mandate, which provided that there would be provisions framed in the law "so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine."

[1072] The cause of this refugee flow has been examined through close review of related documentary evidence and oral accounts by Israeli historian Benny Morris and Ilan Pappé to indicate that it resulted from a deliberate programme of ethnic cleansing by Zionist and Israeli forces under the command of Ben Gurion. Different interpretations and claims about this history are beyond the scope of the present study as they do not affect the rights of return for Palestinian refugees or nondiscrimination regarding citizenship provided by international law.

citizenship, which discriminate on the basis of Jewish and non-Jewish identity and which are particularly relevant to the case of residents of Palestine who fled the fighting during the 1947-49 war and after the establishment of the State of Israel (on 14 May 1948) and then attempted to return and obtain citizenship. Under Article 2 of The Citizenship Law (1952)—which provides that, 'Every person who immigrated according to The Law of Return, will be a citizen of Israel'—Jewish residents would acquire citizenship immediately upon return, even if citizenship had been acquired in Mandate Palestine through immigration (and not birth). A Palestinian returnee, however, would have had to reside in Israel continuously from May 1948 to April 1952—that is, through the worst of the fighting—in order to qualify for citizenship. In 1980, The Citizenship Law was amended by adding Section 3A, which somewhat eased the difficult process of acquiring citizenship.1 Yet, Section 3A leaves in force the distinction between the conditions of acquiring citizenship for Jews as compared to non-Jews, even if both candidates for citizenship have a similar history of leaving and re-entering the State.

In *Albadawi* v. *The Military Governor of Galilee-Nazareth, et. al.* and *Abu Ayash* v. *The Military Governor of Galilee-Nazareth, et. al.*, the Supreme Court ruled that if a person left the country voluntarily, that person was not allowed to re-enter Israel and the authorities were allowed to deport him. On the other hand, if s/he had been expelled and returned within a reasonable time, s/he was entitled to residency. The interpretation of leaving voluntarily is greatly disputed, considering the circumstances surrounding the establishment of the State, and its determination is left to the court's discretion.

This treatment violates the principle that habitual residents of a territory that becomes a new state are entitled to acquire citizenship in the successor state.[1073] Israel's intention to discriminate on the basis of race in this regard is expressed by the Law of Return (1950) and the Citizenship Law (1952),[1074] which facilitate the acquisition of Israeli citizenship by Jewish immigrants but deny the right of return and citizenship to Palestinian refugees.

Second, Israel has so far denied the Palestinian people living in the OPT the right to citizenship in a separate state by sustaining the occupation and refusing to withdraw to allow an independent Palestinian state to be established there. Depriving Palestinians of the right to nationality (citizenship) in the OPT, when viewed in light of the commission of other inhuman acts as set out in Article 2 of the Apartheid Convention, points towards the maintenance by Israel of a system of Jewish domination over Palestinians in the OPT.

[1073] The Treaty of Neuilly (1919), the Rumanian Minorities Treaty (1919), the Treaty of Versailles (1919), the Treaty of St. Germaine (1919), the Treaty of Trianon (1920), the Treaty of Sèvres (1920), and the Treaty of Lausanne (1923), all support the view that nationality followed the change of sovereignty so that those persons habitually resident in a territory that became a new state or part of a new state would automatically acquire the nationality of that state. See Articles 39 (Serb-Croat-Slovene nationality), 44 (Greek nationality), 51 and 52 (Bulgarian nationality) of the Neuilly Treaty; Articles 36 (Belgian nationality), 84 (Czechoslovakian nationality), 91 (Polish nationality), 105 (nationality of the Free City of Danzig) and 112 (Danish nationality) of the Versailles Treaty; Articles 64-65 (Austrian nationality), 70-71 (Italian nationality) of the St Germain Treaty; Article 57 (Hungarian nationality) of the Trianon Treaty; Articles 102 (Egyptian nationality), 117 (Cypriot/British nationality); 123 (general), 129 (Palestinian nationality) of the Sèvres Treaty; and Article 30 of the Lausanne Treaty. See both volumes of the *Treaties of Peace 1919-1923* (New York: Carnegie Endowment for International Peace, 1924). Brownlie is of the view that the precedent value of these treaties is considerable due to the uniformity of practice and the importance of the treaties concerned. See Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press 1998), p. 657. An attempt to codify the law of nationality in 1929, for the purposes of international law, concluded that nationality followed the change of sovereignty, unless the persons concerned declined the nationality of the successor state. See Article 18 of the Draft Convention on Nationality prepared in anticipation of the First Conference on the Codification of International Law, The Hague, 1930, Research in International Law, Harvard Law School, 1929, in 29 *American Journal of International Law Special Supplement (*1929) at 15. See also the decision by the Tel Aviv District Court in *A.B v. M.B.* 6 April 1951 (1950) 17 *International Law Reports* at 111.

[1074] Law of Return 5710-1950; Law of Return (Amendment 5714-1954), Law of Return (Amendment No. 2) 5730-1970 and the Citizenship Law 5712-1952.

Thus most Palestinians in the OPT and in refugee camps of surrounding states have been rendered stateless (although some have acquired the citizenship of a third state). Presently, peace negotiations are ostensibly aimed toward a two-state solution that will create a Palestinian state in the OPT and provide Palestinians now resident in the OPT with citizenship in that state. If it is created, however, South Africa's practice of denationalising black citizens by forcibly relocating them to black Homelands suggests a qualification: that Israel would not thus be absolved of its obligation to allow Palestinians who fled homes inside Israel and are now living in the OPT (and abroad) to return to Israel and obtain citizenship in Israel, the successor state governing the territory of their original residence. Otherwise, Israel could be found further to violate the Palestinians' right to nationality.

(II) F.5 *Denial of the Right to Work*

(II) F.5(a) Interpretation

The right to work, as defined by Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), refers to the right of everyone to gain their living by work they freely choose or accept. Under Article 6, a state is required to safeguard this right by providing the necessary tools to achieve steady economic, social and cultural development and full and productive employment. The Apartheid Convention condemns any legislative measures and other measures calculated to deny members of a racial group the right to work. In a similar vein, Article 5(e)(i) of ICERD requires that "[t]he rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration" shall be enjoyed free from racial discrimination.

(II) F.5(b) Practices in apartheid South Africa

In apartheid South Africa, the right to work was restricted through two general methods. First, individuals were restricted to certain kinds of work on the basis of their race, enforced through the Job Reservation Act (1963) and other measures that restricted skilled and higher-paid jobs to whites. Second, pass laws made it impracticable for blacks to apply for work in white areas other than at jobs specifically authorised for them, such as domestic work.

The pass laws were implemented in both an 'inclusionary' and 'exclusionary' fashion so as to afford opportunities for employment to workers classified as resident in the Bantustans or townships while precluding those same workers from accepting particular employment by virtue of their race. The system of job reservation served to restrict such opportunities.[1075]

The employment of foreign labour initially facilitated the use of exploitative labour practices as South African employers needed only to offer foreign workers a better, or comparable, wage in order to lure them to join the workforce.[1076] However, with the prohibition of foreign labour recruitment in the 1970s more reliance was placed on the domestic labour force to fill job vacancies. The net effect of this trend was to eventually lead to an increase in wages, in concert with increased labour militancy against oppressive labour legislation.

South African workers could be broadly categorised as those who were permitted, under Section 10 of the Blacks (Urban Areas) Consolidation Act,[1077] to live and work in towns without permission to do so, and those who fell outside that category. The so-called 'Section 10' workers were those who had been born in a particular urban area, or had worked there continuously for 10 years, or who had worked for successive employers over 15 years. This categorisation created an effective 'urban

[1075] Michael Savage 'The Imposition of Pass Laws on the African Population in South Africa 1916-1984' *African Affairs* (1986) Vol. 85, No. 339, 181-182.

[1076] W.S. Siebert 'Black Trade Unions and the Wage Gap in South Africa *Managerial and Decision Economics* (1987) Vol. 8, No.1, 55 at 56.

[1077] Act No. 25 of 1945.

citizenship' requirement beyond that of national citizenship, and successfully restricted employment opportunities. Workers would be cautious to leave a particular urban area for fear of losing their Section 10 status, creating an insidious dependence by workers on a given city. This meant that where labourers were in abundance in a particular urban area employers were given wider options of exploitation given that workers would rather accept a lower paying job while maintaining their Section 10 status, than opt for the uncertainty of seeking a right of movement outside the designated urban area in search of employment elsewhere.

Those workers falling outside Section 10 designation, but still within the urban areas, were allocated work by the Labour Bureau.[1078] These workers were in the best bargaining position, and also better able to find more suitable work as they were not as restrictively tied to their jobs as were the Section 10 workers. The Reikert Report[1079] suggests that both labourers and Labour Bureaux avoided the strict implementation of the regulations under this legislation, in part because proof of a given status was cumbersome and bureaucratic, and because flouting the legislation had advantages (if only nominally so) for both employers and labourers. Workers desperate for employment would take whatever employment they were able to find, allowing employers and bureaucrats alike to disregard regulatory parameters for enforcement of the labour regulations, but nonetheless having the effect of either restricting movement due to labour contingencies, or to exploit the labour force in the absence of adequate worker mobilisation.

(II) F.5(c) Israeli practices in the OPT

(i) Labour and the Economy in the OPT

In 1967 before the Six-Day War, agriculture in the West Bank and Gaza accounted for 37 percent of the GDP while industry and construction accounted for 13%.[1080] Since 1967, the Palestinian economy has been transformed into a wage sector highly dependent on the Israeli economy as well as foreign aid. Between 1967 and 2000, jobs inside Israel became increasingly important to Palestinian labourers and Palestinians became core workers in Israel's construction industry both within Israel and in the OPT. After the occupation began, Israel initially encouraged Palestinian labourers from the OPT to work in Israel and opened the market in the OPT to Israeli imports and the Israeli market to OPT exports. These measures exposed the local Palestinian economy to market forces that resulted in high differences in wage levels and economic structures between Israel and the OPT. Israel also limited trade from the OPT with Jordan and has not allowed significant public investments in the OPT other than those exclusively serving Jewish settlements.[1081] The first intifada, which began in 1987, caused many Palestinian labourers to return to agriculture in the OPT, but punitive restrictions imposed by the Israeli government—such as closing the checkpoints to Palestinian workers—and employing foreign workers instead of Palestinians resulted in a major loss of jobs and reduced wages. After the Oslo Accords were signed in the early 1990s, the Palestinian economy entered a period of rapid growth and by 1999 real GDP had grown to $4,512 million.[1082]

In 2000, however, after the beginning of the second Intifada, Israel instituted a strict closure policy and GDP fell to $3,557 million.[1083] The economy in the OPT recovered briefly in 2003 but remained

[1078] W.S. Siebert 'Black Trade Unions', at 57-58.

[1079] Reikert Commission, *Report of the Commission of Inquiry into Legislation Affecting the Utilization of Manpower*, RP 32 (Pretoria, 1979), p 234.

[1080] Brian Van Arkadie. 'The Impact of the Israeli Occupation on the Economies of the West Bank and Gaza' (1977) 6 *Journal of Palestine Studies* 2 at 104-105

[1081] Van Arkadie, ibid.

[1082] World Bank, 'West Bank and Gaza: Economic Developments and Prospects', March 2008, available at: http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/WESTBANKGAZAEXTN/0,,contentMDK:21694302~menuPK:294370~pagePK:2865066~piPK:2865079~theSitePK:294365,00.html.

[1083] Ibid.

severely affected by Israeli restrictions on exports and movement. In 2003, 47 percent of Palestinians lived below the poverty line and as many as 600,000 Palestinians could not afford basic needs such as food, clothing and shelter.[1084] With expenditures of less than US $1.50 a day per person, the population as a whole became vulnerable to economic shocks.[1085]

Following the restrictions on Palestinian workers, Israel has sought out cheap foreign migrant labour from countries in Asia and Eastern Europe as a replacement.[1086] Palestinian unemployment rates, which had run about 10 percent before 2000, reached 25 percent by 2003.[1087] The GDP of the OPT fell 6.6 percent between 2005 and 2007, from $4,443 million[1088] to $3,901 million.[1089] In 2005, 53 percent of households were living below the poverty line of $385. In 2006, the number of people living in deep poverty almost doubled to over one million.[1090]

Another negative factor has been the impact of the direct physical damage to Palestinian land, resources and property by Israeli military forces. For example, from June 2006 to May 2007, the Israeli army destroyed around 12,900 dunums of cultivated land, 332 greenhouses and uprooted around 2,775 fruit trees in the West Bank alone.[1091]

The right to work for Palestinians in the OPT has thus been impacted upon greatly by restrictions on labour imposed by Israel's occupation and by damage imposed by Israeli policies on the Palestinian economy as a whole. Among the main factors that continue to depress the Palestinian economy in the OPT are the harsh restrictions on Palestinian mobility, Palestinian labour flow into East Jerusalem and Israel, and the imports and exports of goods.[1092]

(ii) Impact of Movement Restrictions on Palestinian Labour

As a result of the second Intifada and a spike in Israeli security measures, the number of physical obstacles to Palestinian movement in the West Bank has increased from 376 in August 2005 to 699 in the autumn of 2008.[1093] Coupled with a host of other restrictions on movement (including the Wall, restrictions in the Seam Zone, and difficulties for Palestinians to obtain permits, as discussed earlier), farmers are increasingly prevented from accessing their farmland. The effects are devastating since agriculture, fishing and forestry account for 15.1 percent of the Palestinian workforce.[1094] In 2007, 30

[1084] World Bank, 'World Bank Report: Palestinian Economy Remains Stagnant after Four Years of Intifada' (November 2004), available at: http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/wbgaza-4yrassessment.pdf.

[1085] Ibid.

[1086] International Federation for Human Rights & Euro-Mediterranean Human Rights Network, 'Migrant Workers in Israel - A contemporary form of slavery' (June 2003), p. 6, available at: http://www.reliefweb.int/library/documents/2003/fidh-opt-25aug.pdf.

[1087] Ibid.

[1088] Palestinian Central Bureau of Statistics.

[1089] World Bank, *Economic Developments and Prospects*.

[1090] OCHA (2007).

[1091] UN Consolidated Appeals Process. '2007 Mid-Year Review.' Available at: http://www.ochaopt.org/?module=displaysection&section_id=137&format=html.

[1092] World Bank, 'West Bank and Gaza: Economic Update and Potential Outlook' (15 March 2006), available at: http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/WBGEconomicUpdateandPotentialOutlook.pdf

[1093] OCHA, *Closure Update, 30 April – 11 September* (29 September 2008), p. 4, available at: http://domino.un.org/unispal.NSF/2ee9468747556b2d85256cf60060d2a6/7c4076ac8d597e36852574d30059724d!OpenDocument

[1094] Ibid.

out of 57 communities surveyed by the UN in the West Bank did not have direct, regular access to their land:

> Restrictive gate openings and permit allocations are already having a negative impact on agricultural practices and on rural livelihoods. Many farmers cultivate their land infrequently or not at all, or have changed to lower maintenance and lower yield crops. The longer term consequences for these communities are uncertain, as they lose contact with the land on which they depend both for their present livelihood and for their future survival… [In the closed area between the wall and the Green Line] some 70 percent of the almond trees have now died because of lack of regular maintenance. In the past, the land in the closed area produced about 10 tons of almonds. The fresh almonds were worth 5 NIS per kilo and were a valuable asset to the village.[1095]

In 2007, the World Bank estimated that the Separation Wall was costing the Palestinian economy 2-3 percent points of the GDP annually.[1096] The permit system that accompanies the Wall but applies more broadly to restrict Palestinian movement throughout the West Bank is reminiscent of the Pass Laws in apartheid South Africa which made it impracticable for blacks to work in certain white areas of the country. Similarly, like in apartheid South Africa, difficulties in obtaining the necessary permits have compelled many Palestinians to attempt to enter East Jerusalem or Israel illegally in search of work, thus fuelling disregard for labour laws and exposing these workers to arrest, detention and heavy fines.

The system of roads in the West Bank is also designed to restrict movement between cities and villages, it is estimated that over 50 percent of land in the West Bank is inaccessible to Palestinians due to settlements, road blocks and other 'closed' areas.[1097] Many of the main roads are limited to cars with Israeli license plates and as a result Palestinians need to take long, circuitous routes through multiple checkpoints to travel to neighbouring areas. Officials of the World Bank have commented:

> Unsurprisingly, these restrictions make the movement of people and goods more expensive, inefficient and unpredictable and therefore have a particularly chilling effect on economic activity. Beyond the personal hardship, an economy cannot run effectively if there is significant uncertainty about the ability of workers to reach their jobs, of goods reaching their markets, and of entrepreneurs being present to manage their place of business.[1098]

Israel has also suppressed the Gaza fishing industry by restricting how far from the coast the fishermen can fish. In the 1990s, they were allowed to travel 12 nautical miles off shore and were hauling in around 3,000 tons of fish a year; in 2008, they are hauling in less than 500 tons a year.[1099] The Oslo Accords provided that Gaza fishermen could travel 20 nautical miles from the coast but this has not been enforced. In 2008, there have been multiple cases where Israeli army patrol boats have attacked fishing boats, arrested fishermen and in one instance fired a grenade at a fishing boat in the waters of Northern Gaza.[1100] With agricultural exports greatly reduced by Israeli restrictions, the

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[1095] OCHA, 'Three Years Later: The Humanitarian Impact of the Wall since the International Court of Justice Opinion.' *Special Focus* (9 July 2007), available at: http://www.un.org/unrwa/access/ICJ4_Special_Focus_July2007.pdf

[1096] World Bank. 'West Bank and Gaza Investment Climate Assessment' (March 2007), available at: http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/294264-1166008938288/ICA2007.pdf

[1097] World Bank Technical Team, 'Movement and Access Restrictions in the West Bank: Uncertainty and Inefficiency in the Palestinian Economy' (9 May 2007), available at: http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/WestBankrestrictions9Mayfinal.pdf.

[1098] Ibid.

[1099] Palestinian Center for Human Rights, 'Narratives Under Siege (3): Rafah Fishermen's Syndicate' (7 February 2008), available at http://www.pchrgaza.org/Interventions/Narratives%20Under%20Siege%203.pdf.

[1100] OCHA, 'Protection of Civilians Weekly Report No. 275' (27 August – 2 September 2008), available at: http://www.ecoi.net/file_upload/470_1220616240_ocha-opt-protection-of-civilians-weekly-2008-09-02-english.pdf.

impact has been severe. In 2007, a senior U.N. official warned that, 'The Gaza Strip will soon become entirely dependent on foreign aid and face "disastrous consequences' if Gaza remains sealed off'.[1101]

None of the above restrictions on movement and the transportation of goods apply to Israeli Jewish settlers living in the West Bank, who have free access to all goods and uninhibited freedom of movement between the West Bank and Israel related to their work, trade, and social networks. By contrast, Palestinians who formerly comprised a significant part of the workforce can no longer seek employment in East Jerusalem or Israel.

(iii) Restrictions on Access to Jobs in East Jerusalem and Israel

In the year 2000, 146,000 Palestinians were employed in Israel.[1102] By 2007, this number had decreased to 66,806, a third of whom had a Jerusalem ID card or a foreign passport.[1103] In 2005, a daily average of approximately 44,800 Palestinians worked in Israel.[1104] These workers were earning around $405 million a year (around 7 percent of GDI).[1105] After the elections to the Palestinian Legislative Council in 2006, at which time Hamas obtained a majority of seats, labour flows dropped to 25-30,000 per day.[1106] Even prior to the election, the Israeli government adopted a policy to aim to diminish the number of permit-holding Palestinian workers to zero by 2008.[1107]

By 2007, 90.7 percent of the Palestinian labour force worked inside the OPT.[1108] The median monthly wage for Palestinians inside the OPT is much lower, at NIS 1696.2 in the West Bank and NIS 1435.8 in Gaza, compared to the wages of Palestinians inside Israel, which stand at NIS 2677.6 .[1109] In contrast the average monthly salary for Israelis employed in Israel is NIS 8,237.[1110]

The UN Committee on Economic, Social and Cultural Rights expressed concern about the restriction of labour into Israel in its concluding observations of 2003:

> 19. The Committee continues to be gravely concerned about the deplorable living conditions of the Palestinians in the occupied territories, who - as a result of the continuing occupation and subsequent measures of closures, extended curfews, roadblocks and security checkpoints - suffer from impingement of their enjoyment of economic, social and cultural rights enshrined in the Covenant, in particular access to work, land, water, health care, education and food.
>
> 20. The Committee also expresses concern about the rate of unemployment in the occupied territories, which is over 50 per cent as a result of the closures which have prevented Palestinians from working in Israel.

[1101] Ibrahim Barzak, 'U.N. warns on Gaza economy amid blockade', *USA Today* (9 August 2007), http://www.usatoday.com/news/topstories/2007-08-09-3462899240_x.htm.

[1102] World Bank, 'West Bank and Gaza Update' (September 2006), available at: http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/UpdateSept06Eng.pdf.

[1103] Ibid.

[1104] Palestinian Central Bureau of Statistics.

[1105] World Bank, 'West Bank and Gaza: Economic Update and Potential Outlook.' Economic Update and Potential Outlook (15 March 2006).

[1106] Ibid.

[1107] Ibid.

[1108] Palestinian Central Bureau of Statistics, 'Labour Force Survey Report Series' (July-Sept. 2007), available at: http://www.pcbs.gov.ps/DesktopDefault.aspx?tabID=3355&lang=en.

[1109] Ibid.

[1110] Israel Central Bureau of Statistics, July 2007.

> 22. The Committee is concerned about the fact that it is extremely difficult for Palestinians living in the occupied territories and working in Israel to join Israeli trade unions or to establish their own trade unions in Israel. […]
>
> 36. The Committee further recommends that the State party ensure that workers living in the occupied territories are permitted to continue to work in Israel.[1111]

Within the OPT, the Palestinian workers most affected by Israel's closure policy is the sector of the labour force working in East Jerusalem but living elsewhere in the West Bank. An integral part of the West Bank, East Jerusalem was for decades its economic centre. With the tightening of restrictions after the outbreak of the second intifada and the subsequent construction of the Wall, Palestinians living elsewhere in the West Bank need permits to work in East Jerusalem, which in practice are very difficult to obtain. Certain sectors have been particularly impacted by the restrictions from working in East Jerusalem: many teachers in Palestinian schools in Jerusalem can no longer teach and many doctors and nurses working in hospitals in Jerusalem have been forced to leave their positions. According to UN estimates, 95% of Palestinians from elsewhere in the West Bank and 77% from East Jerusalem itself had difficulties reaching their workplace in 2007.[1112]

(iv) Restriction of Imports and Exports

Unemployment is also fostered by restrictions on imports and exports of primary products. Industries that depend on the flow of goods have experienced an increase in transportation costs, resulting in a reduction in profits and efficiency. Agriculture, fishing and forestry currently generate around 25 percent of all Palestinian exports and this sector is directly affected by difficulties in export and the restrictions on free movement of goods.[1113] In 2004, the World Bank examined the effects of such restrictions of trade: 'Closures are a key factor behind today's economic crisis in the West Bank. They have fragmented Palestinian economic space, raised the cost of doing business and eliminated the predictability needed to conduct business.'[1114]

In 2005, imports and exports totalled almost $3.4 billion, accounting for 83 percent of the Palestinian GDP.[1115] Since 2005 and over the last three years, Israel has prohibited the movement of goods through most checkpoints in Gaza other than the Karni crossing; Karni itself was closed for most of 2006 violating the Agreement of Movement and Access. Instead of letting the agreed number of 150-400 trucks through, on average only twenty per day were allowed.[1116] Currently, of the 12 commercial checkpoints to the OPT only one in the West Bank (Jericho) and one in Gaza (Karni) allow for the movement of goods.[1117] Traders' maintenance of a regular delivery schedule is impossible, not to

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[1111] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, UN Doc. E/C.12/1/Add.90 **(**23 April 2003), para. 19.

[1112] UNISPAL, 'The Separation Wall in Jerusalem: Economic Consequences' (28 February 2007), available at: http://domino.un.org/UNISPAL.NSF/3d14c9e5cdaa296d85256cbf005aa3eb/b4a30a68ce68632a852572ce00515a1a!OpenDocument.

[1113] Palestine Central Bureau of Statistics.

[1114] World Bank, 'Four Years– Intifada, Closures and Palestinian Economic Crisis: An Assessment', October 2004, available at: http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/wbgaza-4yrassessment.pdf.

[1115] World Bank, 'West Bank and Gaza: Economic Update and Potential Outlook.' Economic Update and Potential Outlook (15 March 2006).

[1116] World Bank. 'West Bank and Gaza Investment Climate Assessment' (March 2007), available at: http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/294264-1166008938288/ICA2007.pdf.

[1117] 'Palestinian Shippers' Council Sept. 2007.'

mention the damaging of goods during inspection and waiting periods. As a result many buyers have ceased their contracts with Palestinians because of the unreliability of delivery schedules.[1118]

By 2006, exports had declined by 3 percent while imports rose 20%; $581 million in goods were being exported and $3,631 million were being imported. The trade deficit reached 73 percent of GDP. At the United Nations Conference on Trade and Development it was stated that 'Israeli closure policies and the losses of the local production to imports, notably from Israel, accounts for over 55 percent of the Palestinian trade deficit.'[1119]

The impact of these restrictions on the Palestinian population is most evident in the spike in unemployment and the lack of future work opportunities for younger Palestinian generations. Many businesses that rely on the movement of goods have been bankrupted on account of increased costs and inefficiency due to unpredictable delivery schedules, resulting in major job losses.

In 2007 with a total population of around four million people in the OPT and the working age population (15+) standing at two million, only 46.3 percent were active in the labour force.[1120] The unemployment rate in the OPT in 2007 was 23.2%,[1121] contrasting with the 8.3 percent unemployment rate in Israel[1122] and a 12.2 percent average in the Middle East (2006).[1123] Just before Israel's most recent military attacks on the Gaza Strip in December 2008–January 2009, the UN reported that unemployment in the besieged territory had reached 49.1%.[1124] In the immediate aftermath of the attacks, which saw widespread destruction of factories, offices and shops, the Palestinian Central Bureau of Statistics estimated that the unemployment rate will have jumped to more than 60%.[1125]

As a result of Israel's policies, both the West Bank and the Gaza Strip have become increasingly dependent on foreign aid. Israeli restrictions on the Palestinian right to work serve to prevent full participation in the economic life of the OPT and to hinder Palestinian development.

(II) F.6 *Denial of the Right to Form Recognised Trade Unions*

(II) F.6(a) Interpretation

Article 8 of the International Covenant on Economic, Social & Cultural Rights provides that: 'The States Parties... undertake to ensure (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests... The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations; (c) The right of trade unions to function freely subject to no limitations other than those

[1118] B'tselem, *Gaza Prison: Freedom of Movement to and from the Gaza Strip on the Eve of the Disengagement Plan* (March 2005), available at: http://www.btselem.org/Download/200503_Gaza_Prison_English.doc.

[1119] UNCTAD, 'Report on Assistance to the Palestinian People' (July 2007), available at: http://www.unctad.org/en/docs/tdb54d3_en.pdf.

[1120] Palestinian Central Bureau of Statistics, 'Labour Force Survey Report Series' (July-Sept. 2007).

[1121] Ibid.

[1122] CIA World Factbook 2007, available at: https://www.cia.gov/library/publications/the-world-factbook/index.html.

[1123] 'International Labour Organization, 'Global Employment Trends 2007: Global unemployment remains at historic high despite strong economic growth; Modest gains in reducing working poverty' (25 January 2007), available at: http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_081866/index.htm.

[1124] UN Office for the Coordination of Humanitarian Affairs (OCHA), 'Gaza Humanitarian Situation Report: The Impact of the Blockage on the Gaza Strip: A Human Dignity Crisis' (15 December 2008), available at: http://www.ochaopt.org/documents/ocha_opt_gaza_situation_report_2008_12_17_english.pdf.

B. [1125] See Gil Feiler, Doron Peskin, 'Estimates put Gaza damage at $1.5-2 billion', *Yedioth Aharanot* (18 January 2009), available at: http://www.ynetnews.com/articles/0,7340,L-3657045,00.html.

prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.'

Furthering the protection from racial discrimination in one's exercise of "the right to form and join trade unions' enshrined in Article 5(e)(ii) of ICERD, the Apartheid Convention establishes denial of "the right to form recognized trade unions' as an act of apartheid where committed in the context of a system of domination and systematic oppression by one racial group over another.

(II) F.6(b) Practices in apartheid South Africa

During apartheid, black South African trade unions were denied official standing by the government. The Industrial Conciliation Act, formerly the fundamental labour relations law for the White population, defined a 'trade union' as being made up of 'any number of employees in any particular undertaking, industry, trade or occupation'.[1126] However, under the Act, an 'employee' was specifically characterized as 'any person (other than a native) employed';[1127] and therefore black African trade unions were excluded from the Act's domain.[1128] In addition, black Africans were prohibited from representing workers, and the appointment of black Africans as union officers was forbidden.[1129]

Black African unions nevertheless existed. The South African Congress of Trade Unions (SACTU) formed in the 1950s became the leader of the anti-apartheid struggle in the labour movement. The militancy shown by the trade union movement in support of union recognition and higher wages soon translated into political mobilisation against apartheid structures.[1130] Union leaders were consistently arrested and harassed for political campaigning. In 1977 the Apartheid government realized that it had to exert greater control over African trade unions and initiated the Wiehahn Commission to study labour legislation. The commission recommended legalizing black unions to control native labour activists. Black unions were recognized in 1979. The Afrikaner Trade Institute, which represented Afrikaner commercial interests, was forced to negotiate with black labour leaders for the first time in 1980. Nevertheless black unions could not achieve all their most pressing goals and were prevented from conducting themselves professionally until the Apartheid regime fell.

The South African Trade Union Council (later TUCSA) was formed to represent registered trade unions in opposition to the state's interference in the operation of private unions. African unions were not recognised by the state at this time and, until 1962, were not permitted to join TUCSA. The leadership of TUCSA was closely affiliated with government thereby ensuring favourable disposition from the state in favour of white labour unionists, and against black unions. In concert the Industrial Conciliation Act of 1956 and the Native Labour (Settlement of Disputes) Act of 1953 denied any African the right to participate in collective bargaining.[1131]

However, the effect of the 1979 reforms in labour law, following the Wiehahn Commission, encouraged black labour unions to register in the hopes of the apparent legitimation and recognition of black labour unions. While the freedom to organise was now allowed, in practice this was not always so in the workplace where employers sought any means to eradicate unionisation amongst members,

[1126] Act No. 28 of 1956, 1 (xxxviii).

[1127] Act No. 28 of 1956, 1 (xi).

C. [1128] Elizabeth S. Landis, 'South African Apartheid Legislation II: Extension, Enforcement and Perpetuation' (1962) 71 *The Yale Law Journal* 3 at 437-500.

[1129] Act No. 28 of 1956, 21(5), added by Act No. 41 of 1959, 5.

[1130] M. Sutcliffe and P. Wellings P, 'Worker militancy in South Africa: a sociospatial analysis of trade union activism in the manufacturing sector' (1985) 3 *Environment and Planning D: Society and Space* 3 at 357–379.

[1131] Stuart Coupe, 'Divisions of Labour: Racist trade unionism in the iron, steel, engineering and metallurgical industries of post-war South Africa' (1995) 21 *Journal of Southern African Studies* 3 at 451–455.

and where workers were identified to be union members they were often faced with summary dismissal (and therefore not afforded the protection that collective bargaining and fair labour practices would demand). Dismissals also occurred on a large scale where workers were seen to have organised in the workplace. While this served to undermine the trade unions it effectively propelled the trade union movement to increasing militancy and action.

The eventual enactment of the Labour Relations Act 51 of 1982 removed the oversight of the Minister of Manpower in labour disputes and vested that authority in the industrial court alone. Workers were then able to enforce fair labour practices to a greater extent than before, with labour unions using the courts of law to enforce their rights. This mobilisation through the courts, along with frequent strike action, destabilised the regime's reliance on the subservience of union workers, and was likely one of the causes of its impending downfall.

(II) F.6(c) Israeli practices in the OPT

The 1994 Paris Protocol on Economic Relations[1132] calls upon Israel to 'respect any agreement between…a trade union representing Palestinian workers in Israel and ….an organization representing employers in Israel.'

(i) Palestinian Trade Unions under Israeli Civil Administration

Palestinian trade unions existed during the British mandate of Palestine, but primarily represented industrial labourers. Only one in seven Palestinian workers was unionised at that time.[1133] Trade unions in the West Bank flourished under Jordanian administration until King Hussein curbed political reforms in 1957, resulting in a fall in the number of unions. The largest organized labour body at the time was the General Federation of Unions (GFU) with headquarters in Amman, and later in Nablus. The GFU evolved into the Palestinian General Federation of Trade Unions (PGFTU), and its headquarters are still in Nablus.

After the 1967 Six-Day War and initiation of Israel's occupation of the OPT, the Israeli economy underwent rapid growth which increased Israel's demand for cheap labour. The newly occupied Palestinian territory proved valuable for Israel because it contained 'a large pool of unskilled, cheap labour with no political rights.'[1134] To take full advantage of these workers Israel restrained economic development in the OPT, and prevented Palestinian workers from organizing. As a result trade unions were forced to go underground. Initially, Israel did not recognise Palestinian trade unions and attempted to close them down. Union leaders were arrested, abused, exiled, jailed, harassed, and deported. Israeli forces raided union centres, destroyed union files and documents, and closed down union offices. Union leaders and representatives were prevented from meeting. As a result Palestinian unions were greatly weakened, and had no leverage over Israeli employers.

The Israeli government also attempted to prevent workers in the OPT from organizing new unions. For example, the Union of Construction and General Workers in the small village of Ya'abad in the West Bank had only 150 members, but Israeli troops raided its offices twice in the 1970's, destroying archives, posters and publications. The union's leaders were detained and imprisoned several times without charge. In the Gaza Strip, unionisation was banned by the military commander. Under pressured from the International Labour Organization (ILO), Israel agreed to lift the ban on unionization in 1979, but 'insisted that unions could not hold elections or extend their membership to

[1132] Signed by Israel and the PLO as part of the Oslo process, the 1994 Protocol on Economic Relations established a customs union to formalise existing economic relations between Israel and the Palestinians and provide a framework for "interim-period" economic relations between Israel and the Palestinian Authority.

[1133] Nina Sovich, 'Palestinian Trade Unions' (2000) 29 *Journal of Palestine Studies* 4 at 66-79.

[1134] Joost R. Hiltermann, 'Mass Mobilization under Occupation: The Emerging Trade Union Movement in the West Bank', *MERIP Reports*, No. 136/137; and 'West Bank, Gaza, Israel: Marching toward Civil War' (October- December, 1985) at 26-31.

the handful of aging men who had been members before 1967.'[1135] When the Builders and Carpenters Union decided to hold elections in violation of Israeli military orders, many of its members were harassed and beaten.[1136]

The Histadrut, Israel's national trade union, was founded in Palestine in 1920 as a Jewish trade union to promote Jewish workers' rights and employment, as well as the settlement of Jewish immigrants. Before and after the creation of Israel, the Histadrut acquired a number of industrial conglomerates and Israel's largest bank, Bank HaPoalim, and was for a time the largest employer in the country. Thus the Histadrut has played an important role in the building of the Jewish state and functions effectively as a quasi-state institution. It has not worked in the interests of Palestinian labour but has cooperated with the Israeli army to tighten control over the Palestinians in the OPT.[1137] Dues of 11 percent are deducted from Palestinian workers' wages for the national insurance tax, but Palestinians 'did not benefit from most of the rights that this tax is supposed to cover: e.g., unemployment compensation, old-age pension, disability benefits, a monthly child allowance, and vocational training'.[1138] Palestinian workers also pay 1 percent of their wages as membership dues to the Histadrut, although they do not receive the benefits associated with membership.

The Israeli government placed no such restrictions on Israeli unions and unions established by settlers in the West Bank and Gaza Strip. Histadrut strikes are never confronted violently; Jewish union members are never targeted by the Israeli police or military because of their affiliation with specific trade unions.

(ii) Effects of the Oslo Accords

With the signing of the Oslo Accords in the 1990s, Palestinian trade unions gained more freedom to function in the areas that fell under Palestinian Authority control. They lobbied the Palestinian Legislative Council (PLC) to pass laws that benefited workers and labourers. They initiated training courses and hired litigators to take factory owners and employers to court over violations of labour right. Israel, however, did not recognise Palestinian trade unions even though roughly 116,000, or approximately 20 percent of the OPT Palestinian labour force worked in Israel between 1993 and 2000.[1139] Moreover, union leaders were still harassed and trade unions were systematically targeted by raids and closures.

The 1994 Paris Protocol on Economic Relations states that:

> Israel will respect any agreement reached between the Palestinian Authority, or an organization or trade union representing the Palestinians employed in Israel, and an organization representing employees or employers in Israel, concerning contribution to such organization according to any collective agreement.[1140]

Palestinian unionists interpreted this article of the protocol to mean that the Israeli government would allow them to function in Israel. At a minimum, they expected Israel to allow their lawyers to represent union members in Israeli courts. The Israeli government and Histadrut refused to allow this because they considered it as an infringement on their sovereignty. Unable to reach its workers in Israel, the PGFTU agreed to have the Histadrut provide four Palestinian lawyers with Israeli citizenship to represent Palestinian workers in Israeli courts. The Histadrut employs the lawyers,

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[1135] Paul Cossali, 'Gaza's Trade Unions' (1988) 17 *Journal of Palestine Studies* 2 at 194-197.

[1136] Ibid. One union official was ordered to cancel the election's results; when he refused, his son was kidnapped and assaulted by Israeli soldiers.

[1137] Dani Ben Simhon, 'Unmaking of the Histadrut', *Challenge* 88 (November 2004), available at: http://www.workersadvicecentre.org/Challenge88-Histadrut.htm.

[1138] Ibid.

[1139] European Institute for Research on Mediterranean and Euro-Arab Cooperation [citation needed].

[1140] Protocol on Economic Relations between the Government of Israel and the PLO, Paris 29 April 1994.

decides what cases they are allowed to pursue and controls their access to the national labour court, even though the Histadrut is a major employer and, as mentioned previously, participated in the exploitation of Palestinian labourers before Oslo. The Histadrut's *de facto* control over the conditions in which the PGFTU can take legal action strips the latter's negotiating power and violates its right to defend workers from abuses.

In 1994 the PGFTU and the Histadrut began normalization. Problems quickly arose when the Histadrut refused to discuss recompensing Palestinian workers for the 1 percent of their wages that the Histadrut took as dues.[1141] In 1995 they agreed that the PGFTU would receive half of the 1 percent dues that Palestinian workers paid to the Histadrut, but in practice the Histadrut often delayed the monthly payments, further increasing tension and bitterness between the unions. The Histadrut also retained control over when the PGFTU could litigate, rendering the PGFTU powerless to represent its workers in disputes.[1142] Thus even during the Oslo period, Palestinian trade unions never achieved the status that black African trade unions achieved in the 1980s under the Apartheid regime.

(iii) Palestinians Working in Israeli Settlements in the OPT

Trade unions for Jewish Israeli settlers in the OPT are regulated by the Israeli government primarily through the Histadrut, whereas Palestinian trade unions are theoretically regulated by the Palestinian Authority primarily through the PGFTU. Palestinian trade unions, however, are prohibited from functioning in Israeli settlements. The Israeli government's policies, and the settler employers' treatment of Palestinian labourers, have resulted in unfavourable consequences for Palestinian labourers, ranging from unpaid wages to illegal arrests of striking Palestinian workers.

For example, at the Lieberman factory in Mishor Adomim industrial park in the West Bank, Palestinian workers were informed of the Israeli High Court's ruling on 10 October 2007 that required Israeli companies operating in the OPT and employing Palestinian labourers to follow Israeli labour laws.[1143] Palestinian labourers at the Lieberman factory accordingly requested their employer to comply with Israeli standards that provide safer working conditions. He refused their request and they resorted to striking. They also went to the PGFTU's centre in Jericho and asked for advice so that they would not break any laws during their strike. The PGFTU, in turn, supplied them with lawyers that explained their legal rights. The PGFTU also informed the Histadrut. On 14 November 2007, after two days of striking, Israeli police arrived at the Lieberman factory and evicted the Palestinian workers from the industrial park.[1144]

The PGFTU was unable to take action as it is overwhelmed by 'hundreds of cases of clear and severe violations by Israeli employers' of labour rights. These include Palestinian workers being forced to wear distinctive uniforms and yellow arm bands to distinguish them from Israeli workers, not being allowed to eat in the same place as Israeli workers, even dying on the job. According to representatives of the PGFTU:

> But we are restricted. We can't get to job sites to monitor working conditions. In most cases we cannot meet with the lawyers hired by the Histadrut, and in many cases the labourers whose rights have been violated cannot get to the lawyers either. The lawyers assigned to us are not very knowledgeable about the Palestinian workers' situation in the OPT, and many of them are not very experienced. The Histadrut does not allow us to get more lawyers. We may

[1141] The Palestinians estimated the sum owed to them at NIS 1.5 Billion. The Histadrut agreed to give them NIS 8 million when the final agreement was reached.

[1142] Nina Sovich, 'Palestinian Trade Unions' at 66-79.

[1143] See Agence France Presse, *Israel labour law apply to Palestinian workers*, 10 October 2007.

[1144] Sawt Al-'Aamel (The Voice of Labourers), PGFTU journal, January 2008 Edition.

> succeed in a limited amount of cases, but the vast majority never even reaches the court. Our hands are tied.[1145]

Legal action is also very expensive, especially since only Israeli lawyers can represent Palestinians. The vast majority of Palestinian workers, and most small unions, cannot afford continually to hire lawyers to attempt to take their employers to court, especially as the chances of a Palestinian winning a case in an Israeli court are slim.[1146]

Israel's policy of suppressing Palestinian trade unions, as well as carrying out direct military attacks against their property,[1147] has no reasonable security motivation, and serves to obstruct Palestinian development and impede participation in economic life.

(II) F.7. *Denial of the Right to Education*

(II) F.7(a) Interpretation

The right to education, first outlined in the Universal Declaration of Human Rights and subsequently detailed in the International Covenant on Economic, Social and Cultural Rights 1966 (ICECSR), requires a state to provide free compulsory primary education, generally available and accessible secondary education and, based on capacity, equally accessible higher education. The Apartheid Convention condemns any measures calculated to deny members of a racial group the right to education. This echoes Article 5(e)(v) of ICERD, which prohibits racial discrimination with regard to "[t]he right to education and training" As a minimum, under international law, States must not act in a way which negatively impacts on the right to education, particularly through discriminatory practices.

II) F.7(b) Practices in apartheid South Africa

In apartheid South Africa, the Bantu Education Act, Act No 47 of 1953 established a Black Education Department in the Department of Native Affairs, which would compile a curriculum that suited the "nature and requirements of the black people". The author of the legislation, Dr Hendrik Verwoerd (then Minister of Native Affairs, later Prime Minister), stated that its aim was to prevent Africans receiving an education that would lead them to aspire to positions they would not in any event be allowed to hold in South African society. Instead Africans were to receive an education designed to provide them with skills to serve their own people in the homelands or to work in labouring jobs under whites. Later, the Extension of University Education Act, Act 45 of 1959 ended admission of black students to white universities (mainly the universities of Cape Town and Witwatersrand). It created separate tertiary institutions for whites, coloureds, blacks, and Asians.

Under Apartheid the divergence between African education and that of Whites was especially pronounced due to the system that forced all school-going children to learn Afrikaans, the language of the oppressor. Objection to the implementation of this policy is what sparked the 1976 riots in Soweto.[1148] Other precipitant factors included the chronic under-education of Africans through a

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[1145] Interview with Mr. Al-Fuqaya', Board of Trustees of PGFTU, 12 August 2008 at PGFTU offices, Ramallah, West Bank.

[1146] Yoav Dotan, 'Judicial rhetoric, government lawyers, and human rights: The case of the Israeli High Court of Justice during the Intifada' (1999) *Law & Society Review* [citation needed].

[1147] On 7 March 2002 Israeli fighter jets bombed the PGFTU's office in Gaza, destroying it completely. On 5 July 2007 Israeli soldiers raided the PGFTU's offices in Ramallah, destroying PGFTU computers, files and documents. On 28 February 2008 Israeli fighter jets bombed the PGFTU's 'Workers' Folk House' in the Gaza Strip.

[1148] Allister Sparks, *The Mind of South Africa* (New York: Knopf, 1990), p. 301. See also Alfreda A. Sellers Diamond, 'Constitutional Comparisons and Converging Histories: Historical Developments in Equal Educational Opportunity Under the Fourteenth Amendment of the United States Constitution and the New South African Constitution', 26 *Hastings Const. L.Q.* 853, 873 (1999); Eric Berger 'The Right to Education under the South African Constitution' (2003) 103 *Columbia Law Review* 3 at 616.

programme of inculcated subordination. The curriculum lacked education in some of the most fundamental subjects – such as Mathematics and Science – that either gave the skills for further qualification or the ability to be employed in positions that job reservation precluded them from attaining.[1149] The syllabuses taught histories replete with racial segregationist philosophies, such as White superiority and African evil.[1150]

The system of Bantu Education introduced by the National Party eventually began to impede the economic growth of the country, for the need for skilled workers rose as there were no qualified people to fill those job vacancies. Having under-trained black students who could otherwise have filled these posts obstructed the economic development of the country, and necessitated a change in policy which lowered the pass requirements to enable a greater number of pupils to gain automatic entrance into secondary schools. The consequence of this was a dramatic increase in school enrolments, with concomitant space shortages and overcrowding in schools.[1151] Yet the determined policy of shaping the learned curriculum was not swayed by this change, and the policy of separate education persisted while resistance fomented.

(II) F.7(c) Israeli practices in the OPT

Israel has no policy to develop school curricula on the basis of ethnicity, race, or nationality comparable to the system imposed by South Africa's Bantu Education Act. In East Jerusalem, a subsidies and privileges administered through the 'Jewish national institutions' (such as the Jewish Agency) privilege Jewish schools over Palestinian schools through budgets and access to state funds. In the rest of the West Bank, Palestinian children are not allowed to attend Jewish schools in the settlements, but this restriction is part of the general territorial compartmentalisation of the territories on the basis of identity and is not specific to education.

Occupation policy has been to allow Palestinians to establish their own curricula, schools, and universities. Currently, 2,415 primary and secondary schools and 22 universities and technical schools, run by the Palestinian Authority, Hamas, private institutions and Islamic and Christian organisations, serve Palestinians in the West Bank and Gaza.[1152] Enrolment is exceptionally high, comparable to a country like Iceland, which is ranked first in the Human Development Index and had a secondary education enrolment rate of 88 percent in 2005: [1153]

> In spite of the harsh conditions in which schools have had to operate, impressive achievements have been made during the past five years. The education system has experienced massive expansion and attained equitable access, reaching a level of development that by most accounts is comparable with middle-income countries. Enrolment in basic education is universal, and the enrolment rate for secondary education is above 80 percent. These figures put the West Bank & Gaza in the lead in the MENA region. Equally important is the high enrolment rate in tertiary education—above 40 percent for the 18-24 age group—which is high when compared with middle-income countries. The fact that for the first time Palestinian children participated in

[1149] Baruch Hirson, *Year of Fire, Year of Ash - The Soweto Revolt: roots of a revolution* (London: Kallaway, 1979) and Mokubung 0. Nkomo, 'The Contradictions of Bantu Education' (1981) 5 *Harvard Educational Review* at 126-38.

[1150] Harold Wolpe, 'Educational Resistance', in John Lonsdale (ed.), *South Africa in Question* (Cambridge, 1988), p. 202, cited in Janice Love and Peter C. Sederberg 'Black Education and the Dialectics of Transformation in South Africa, 1982-8' (1990) 28 *Journal of Modern African Studies* 2 at 309.

[1151] By way of illustration, secondary school enrollment climbed from 45,598 in 1960 to 122,489 in 1970, to 577,584 in 1980, and to 1,000,249 in 1984: see Baruch Hirson, *Year of Fire, Year of Ash - The Soweto Revolt: roots of a revolution* (London, 1979), pp. 94-99.

[1152] Ministry of Education, Statistics about Palestinian General Education, 2007/08; PCBS, Education Statistics; PCBS Press Release on International Literacy Day, 8 September 2006.

[1153] UNDP Human Development Reports, 'Net Secondary Enrolment rate,' Human Development Index. 2007/2008.

> international tests and scored above the average for MENA countries is another major accomplishment. To the PA's credit, access to basic and secondary education is highly equitable with respect to gender, location, refugee status, and household income. [1154]

Nevertheless, this study finds that racial discrimination is present in the imposition of conditions which impede Palestinian access to schools and education. Though the education system serving the Palestinians is, since 1994 and the creation of the Palestinian Authority, not under Israel's direct control, the Israeli occupying authorities often engage in acts that actively interfere with the exercise of Palestinians' right to education. Three categories of measures are addressed here: attacks on students and closures of schools; the restriction of movement of students and teachers; and student arrests. These measures have the combined result of preventing Palestinian economic and intellectual development, in turn facilitating the continuation of Israel's system of domination and control over the population of the OPT.

(i) School Closures and Attacks

Between 1988 and 1992, the Israeli military closed Birzeit University in the West Bank along with all other Palestinian educational institutions, including schools and kindergartens. The Palestinian community continued to pursue its education by holding classes in homes, offices, churches, mosques and community centres, but the Israeli army often raided these classes and arrested students and teachers attending.[1155]

Since the second Intifada began in September 2000, Palestinian schools and universities have come under military attack. According to the Palestinian Ministry of Education and Higher Education, around 300 schools and eight universities have been shelled, shot at or raided by the Israeli Army between 2000 and 2005.[1156] In the Gaza Strip, 73 educational institutions were partially or totally destroyed between 2000 and 2004.[1157]

These attacks have cost the lives of students as well as permanent disability. There is no shortage of examples, even if taking short sample periods. In March 2003, a twelve-year old girl was hit in the head by a bullet outside Khan Yunis while sitting at her desk, which left her blind.[1158] On 1 June 2004, two ten-year old boys in UNRWA's Al-Umariye Elementary Boys' School in Rafah were hit by a bullet and ricochets from a Israeli tank. [1159] On 7 September 2004, a ten-year old girl sitting at her desk in UNRWA's Elementary C Girl's School in Khan Yunis camp was struck in the head by an Israeli bullet and died.[1160] On 3 October 2004 the Israeli army broke down the walls of three schools in the Gaza Strip in the Jabaliyah refugee camp, while children were still in class, and took over to use them as firing positions for tanks.[1161] On 15 October 2004, the army shot and killed a child sitting in

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[1154] 'West Bank and Gaza Public Expenditure Review. Vol. 1: From Crisis to Greater Fiscal Independence' (February 2007).

[1155] Riham Barghouti and Helen Murray, 'The Struggle for Academic Freedom in Palestine,' Birzeit University Right to Education Campaign (September 2005).

[1156] Helen Murray, 'Education is Freedom' Adalah *Newsletter*, Volume 18 (September 2005).

[1157] Palestinian Centre for Human Rights-Gaza (PCHR) 'Press Release 44/2004,'PCHR-Gaza Report, (16 March 2004).

[1158] UNRWA, 'UNRWA Condemns Rafah School Shooting,' Press Release (June 2004).

[1159] Ibid.

[1160] UNRWA, '10-Year Old Girl Hit in UNRWA Classroom by Israeli Gunfire.' Press Release (7 September 2004).

[1161] 'UN Slams Israeli Raids On Palestinian Schools,' News Report, Geneva (October 2004) [incomplete footnote]

the classroom of a UN-flagged school.[1162] On 12 December 2004 the Israeli army opened fire on a school, wounding seven children under the age of nine.[1163] A month later, on 31 January 2005 the army again opened fire on attacked an elementary school in Rafah, this time killing an eleven-year old and injuring another child in the schoolyard.[1164]

In 2006, the Israeli army disrupted classes in 18 schools in Jenin, Tulkarem, Nablus and Jericho through raids, attacks, and arrests. It also raided the Polytechnic University in Hebron and a girls' school in the village of Anata in the district of Jerusalem.[1165] In June 2006, an F-16 fighter plane bombed the Islamic University in Gaza.[1166] According to the Palestinian Ministry of Higher Education the cost of damages to university properties due to Israeli military attacks amounts to US $7,888,133 from 2000 to 2008.[1167]

For most of 2003, Hebron University and the Palestine Polytechnic University were closed down by Israeli military order, suspending the education of more than 6,000 students for over six months. The practice of closures continues and in April 2008 alone, 14 Hebron-area schools and orphanages, which serve approximately 7,000 Palestinian children and orphans, were threatened with closure by the Israeli army after multiple raids. In July 2008, the Islamic School for Girls in Nablus was shut down after being raided and ransacked based on accusations of an affiliation with Hamas.[1168]

Since September 2000, Israel has arrested and detained almost 6,000 children. In 2007 alone, 700 children were arrested without being provided with any form of education while in prison.[1169] The alleged offenses for which they are imprisoned span from throwing stones at protests over the Separation Wall, to being affiliated with Hamas and inciting protests.

As a result of Israeli Military Order No. 132 which designates Palestinians as adults at the age of 16, Palestinian prisoners incarcerated in Israeli prisons are only required to be provided with education until the age of 15. By contrast, Israeli juvenile prisoners until the age of 18 are given the opportunity to continue their education in Hebrew following the Israeli curriculum in prison, while only a few Palestinian juvenile prisoners under 16 are given this opportunity (though they are often forced to learn in Hebrew, a foreign language of which they have little knowledge). The majority of Palestinian children incarcerated in Israeli prisons and detention centres, however, have no access to classes or educational materials.[1170]

Between 2003 and May 2008, 349 Birzeit University students and around 80 students from An-Najah National University in Nablus were arrested on political grounds, often without been given access to their lawyers or any visitors.[1171] In November 2004, four students from Gaza who were studying at

[1162] UNRWA, 'Israeli Gunfire Hits 11-Year Old Girl Sitting at her Desk in an UNRWA School,' Press Release (12 October 2004).

[1163] Palestine Centre for Human Rights, 'Seven School Children Wounded in a School in Khan Younis,' Press Release (12 December 2004).

[1164] UNRWA Press Release, 'Israeli Gunfire Hits 11-Year Old Girl Sitting at her Desk in an UNRWA School,' 12 October 2004.

[1165] Palestinian Monitoring Group, Negotiations Affairs Department, '12 Assaults on Right to Education in Month of May' (June 2006).

[1166] Right to Education Campaign, 'Right to Education Factsheet,' Birzeit University, 2 June 2008.

[1167] Palestinian Ministry of Higher Education 'The Effect of the Israeli Occupation on the Palestinian Education' (28 September 2000 to 1 October 2007).

[1168] Right to Education Campaign, 'Institutions Raided and Shut Down in Nablus, Including a Girl's School,' Birzeit University, 7 July 2008.

[1169] Seth Freedman. 'Children are Paying the Price of Injustice.' *The Guardian* (17 July 2008), available at: http://www.dci-pal.org/english/display.cfm?DocId=856&CategoryId=31.

[1170] Defence for Children International-Palestine Section, 'Israeli Prison Education - Learning the Lessons of Institutionalized Racism' (August 2001).

[1171] Right to Education Campaign, 'Right to Education Factsheet,' Birzeit University, 2 June 2008.

Birzeit University were arrested and, although no charges were brought against them, they were nevertheless prevented from returning to university to continue their studies.[1172]

All of these measures are claimed to be justified by the Israeli authorities on the pretext of security, yet in practice are indicative of policies of racial oppression. The often violent interference with the right of Palestinian to attend educational institutions has created conditions detrimental to all Palestinians pursuing education in the OPT and effectively constitutes a collective measure impeding access of Palestinians as a group to education. A discriminatory policy of favouring Jewish students in the same territory is evidenced by Israel's establishment and maintenance of separate schools in Jewish settlements that serve Jews exclusively and that are not subjected to military violence, and are supported by government subsidies.

(ii) Restrictions on Movement

The restriction of mobility of Palestinian students is the main obstacle to their exercising their right of education. In 2002, the UN Committee on the Rights of the Child (CRC) highlighted this problem:

> 52. The Committee is concerned about the serious deterioration of access to education of children in the occupied Palestinian territories as a result of the measures imposed by the Israeli Defence Forces, including road closures, curfews and mobility restrictions, and the destruction of school infrastructure.
>
> 53. The Committee recommends that the State party guarantee that every Palestinian child has access to education, in accordance with the Convention. As a first step, the State party should ensure that restrictions on mobility are lifted throughout the occupied Palestinian territories during school hours.[1173]

This recommendation did not lead to improvements, however, and since 2002 the situation has worsened dramatically. An increase in checkpoints presents major obstacles for students attending school. The Qalandiya checkpoint, for example, delays students by about one-to-two hours daily and at most universities around 60 percent of the students have to cross at least one checkpoint to reach university.[1174] A survey at Birzeit University showed that 91 percent of students have missed classes because of delays at checkpoints.[1175] Since the beginning of 2006, thousands of Palestinians with foreign passports, have been denied entry to study and teach in the OPT and as a result 50 percent of these staff members at Birzeit university can no longer teach there.[1176] Since 2004, Palestinians from Gaza have been banned from studying in the West Bank: consequently, the number of students from Gaza studying at Birzeit University fell from 350 in 2000 to thirty-five in 2005 to zero in 2008.[1177] In 2003, 120 students from Jenin were registered: in 2005, none were registered.[1178]

Al-Quds University in Abu Dis was also issued with a military order in 2003 commanding an eight meter-high concrete wall to be built through the campus, confiscating one third of the campus. Although an international campaign was launched and the position of the wall was moved, it still cuts

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[1172] Right to Education Campaign, 'Demand the Return of Gaza Students to Birzeit University,' Birzeit University (24 February 2005).

[1173] UN Committee on the Rights of the Child, 'Concluding Observations of the Committee on the Rights of the Child: Israel, UN Doc. CRC/C/15/Add.195 (9 October 2002), paras. 52-53.

[1174] Right to Education Campaign, 'Right to Education Fact Sheet,', Birzeit University (2 June 2008).

[1175] Ibid.

[1176] Ibid.

[1177] Ibid.

[1178] 'The Right to Education Campaign's Submission to the United Nations Human Rights Council's Universal Periodic Review of Israel' (December 2008).

through the path of 36 percent of the university's students and prevents about 15,740 students from reaching other schools.[1179]

The Wall has also resulted in a shortage of teachers in East Jerusalem, as many live in the West Bank and are unable to obtain permits to enter the city. In July 2007, the English department of the Arab American University of Jenin was nearly closed due to the difficulties in attracting native English-speaking teachers after having existing lost staff members to severe Israeli restrictions on the entry of Palestinians holding foreign passports to the OPT.[1180]

Israeli curfews have created yet another obstacle to education by preventing students from attending classes. In 2006, for example, the Israeli army imposed a curfew in Hebron, thereby preventing students from accessing two schools.[1181] In March 2008, curfews also prevented students in the West Bank towns of Azzun, Al-Funduq and Haja from attending their classes.[1182]

(iii) *Prevention of Palestinian students from studying abroad*

In June 2007 a further clampdown on the mobility of Palestinians by Israel led to the denial of exit permits to approximately 2,000 primary and secondary school pupils and 722 university students from Gaza, preventing the continuation of their studies abroad. Of the 1,100 students wishing to attend universities abroad, only 480 were granted permission by Israel. In May 2008, the visas of seven winners of US Fulbright scholarships were revoked and they were consequently not allowed to leave Gaza, even after a major international campaign was launched on their behalf.[1183]

The severe under-investment in schools and universities in Gaza and the prevention of students from Gaza from travelling to the West Bank or abroad to pursue their studies severely restricts their educational opportunities and significantly limits their ability to reach their academic potential. This near-complete travel ban constitutes a form of collective punishment imposed by Israel on all residents of Gaza and amounts to a systematic form of oppression.

(iv) Discrimination in East Jerusalem

Discrimination against Palestinian students is most visible in East Jerusalem, where public education is provided by Israel. New barriers to education have been created by the Separation Wall, which cuts through the city. As a result, many children and teachers who live on its eastern side and attend schools in East Jerusalem have to walk long distances to reach checkpoints through which they must pass in order to cross to the other side. Hundreds of teachers have faced difficulties in obtaining permits to cross the checkpoints. The same difficulty applies to students and teachers travelling in the opposite direction: the majority of the students who attend schools and universities elsewhere in the West Bank have trouble attending and many have been forced to drop out as a result.

The Jerusalem Education Authority (JEA) in the Jerusalem Municipality, together with the Ministry of Education, is responsible for providing free education to the 79,000 eligible Palestinian Arab school students in East Jerusalem. However, only half of them, around 39,400 students, are actually attending public schools.[1184] The other half are in fact denied access to public schooling because of

[1179] 'Right to Education Factsheet,' Right to Education Campaign, Birzeit University (2 June 2008).

[1180] Ibid.

[1181] '12 Assaults on Right to Education in Month of May.' Palestinian Monitoring Group, Negotiations Affairs Dept. (June 2006).

[1182] 'Israeli Forces Killed 22 Palestinian Students Over Last Week,' Palestinian Ministry of Education and Higher Education, Maan News Agency (March 2008).

[1183] 'Right to Education Factsheet,' Right to Education Campaign, Birzeit University (2 June 2008).

[1184] Ir Amim, 'The Scandal Continues: An Assessment of the Arab-Palestinian Educational System in East Jerusalem in the 2007-2008 School Year' (September 2007).

severe under-funding, a severe lack of classrooms, and other difficulties, and must either pay for expensive private education or attend officially unrecognized schools run by community groups. Around 10 percent of school age Arab children in East Jerusalem do not attend any schools whatever.[1185] The percentage of students that enter high school but drop out stands at around 50 percent, compared to a figure of 7.4 percent of Jewish students in Jerusalem.[1186]

In 2006, for example, only NIS 113 million or 29 percent of the annual JEA budget was allocated to education in East Jerusalem, though 35 percent of school-aged children in Jerusalem are living in East Jerusalem.[1187] This unequal funding can be seen in every aspect of the public school education; in West Jerusalem for example, there is one computer for every ten students, while in East Jerusalem there is one computer for every 26 students.[1188] Thus, in this one area, almost three times as many resources are being spent on Jewish Israeli children in Jerusalem as compared with Palestinian children.

There is currently a shortage of more than 1,500 classrooms in East Jerusalem with the result that Palestinian students are being taught in overcrowded, ill-suited and makeshift rooms, including bathrooms and kitchens that have been converted into classrooms.[1189] The already high shortfall in the number of classrooms is expected to rise as far as 1,883 by 2010. However, despite existing and projected shortages only 50 new classrooms were built in Arab schools in East Jerusalem during 2006. The Ministry of Education argues that one cause of the shortage in classrooms is the refusal of Arab residents of East Jerusalem to sell their land. However, to date approximately 35 percent of the land in East Jerusalem has been confiscated by Israel for the purpose of constructing settlements.[1190] This severe lack of educational infrastructure and facilities constitutes a violation of the Israeli Compulsory Education Law, which requires the state to provide all children between three and 18 years with a place in a public school classroom.

The issue of severe classroom shortages in East Jerusalem was brought before the Supreme Court in 2000.[1191] On 15 February 2001, the Ministry of Education and the Jerusalem Municipality committed before the court to build 245 classrooms in Arab schools in East Jerusalem over a four-year period. The petitioners are still trying to obtain implementation of this decision.

The Compulsory Education Law covers all three- and four-year olds in Israel. However, the law was initially not enforced with regard to children under the age of five because of budgetary shortages. In 1999 an amendment was passed requiring that Israel implement free pre-school education in stages over a period of ten years. In West Jerusalem the law was implemented in numerous neighbourhoods, whereas in East Jerusalem it was only implemented in one neighbourhood, Beit Safafa. As a result, 90 percent of three and four year-old Palestinian children in East Jerusalem are not receiving any preschool education.[1192]

[1185] Ibid.

[1186] The annual yearbooks of the Jerusalem Education Administration, population data of the Jerusalem Institute for Israel Studies; Yuval Wargen, 'Education in East Jerusalem,' The Knesset Research and Information Centre, Jerusalem (16 October 2006).

[1187] Ibid.

[1188] Jonathan Lis, 'Discrimination in Jerusalem: The municipality allocated three times the number of computers to educational institutions in West Jerusalem than it did in East Jerusalem,' *Ha'aretz* (4 April 2005).

[1189] The Association for Civil Rights in Israel, 'East Jerusalem – Facts and Figures' (June 2008).

[1190] Yuval Wargen, 'Education in East Jerusalem'; Ir Amim, 'Inadequacies in the Public Education Infrastructure for Palestinians in East Jerusalem: Overview—September 2006' (September 2006).

[1191] H.C. *5125/00, Shirine Eweida et al.* v. *The Jerusalem Municipality* (unpublished).

[1192] The Association for Civil Rights in Israel, 'East Jerusalem – Facts and Figures' (June 2008).

The end result of all of these discriminatory policies is manifested in the fact that in Jerusalem, 41 times more Jewish students qualify for a matriculation certificate than their Palestinian counterparts.[1193]

This study finds the following on the implementation of the right to education: education is formally segregated in the OPT as part of a larger system of segregation imposed through the division of the territory; Israel does not run schools for Palestinians and does not establish any special curriculum on the basis of their identity; and Israel denies Palestinians the right to education through indirect measures, such as through obstacles to movement, closures of schools, and military attacks on schools and student. Palestinian students are thus denied full enjoyment of their right to education on the basis of membership of a racial group.

(II) F.8. ***Denial of the Right to Freedom of Opinion and Expression***

(II) F.8(a) Interpretation

The right to freedom of opinion and expression is recognised under Article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). The protection from racial discrimination in the exercise of one's right to freedom of opinion and expression that is ensured by Article 5(d)(viii) of ICERD is cemented by the Apartheid Convention's condemnation of measures calculated to deny members of a racial group the right to freedom of opinion and expression.

The right to freedom of expression straddles numerous aspects of a functioning liberal democracy, enveloping the rights to freedom of speech, of the press and of academic inquiry. Although distinct from the fulfilment of other fundamental rights, the enjoyment of freedom of expression is pivotal to freedoms of choice, religion, conscience, association, protest and political identification. This exercise of freedom of expression is most often conceptualised around, but not solely limited to, the freedom of the media, as freedom of expression encompasses 'the freedom to seek, receive and impart information of ideas of all kinds, regardless of frontiers'.[1194]

The right to freedom of expression is not absolute. Article 19(3)(b) of the ICCPR facilitates the restriction of freedom of information "[f]or the protection of national security or of public order (*ordre publique*), or of public health or morals.' In both apartheid South Africa, and Israel, in relation to the OPT, this restriction has been used liberally.

Propaganda for war, as prohibited by Article 20(1) of the ICCPR, and the Declaration on Friendly Relations 1970,[1195] obliges states to refrain from and prohibit all forms of propaganda for wars of aggression.[1196] Article 20(2) of ICCPR further prohibits 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. In General Comment 29 on Article 4 of the ICCPR, the Human Rights Committee highlighted the importance of these provisions by asserting that:

> No declaration of a state of emergency made pursuant to article 4, paragraph 1, may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.[1197]

[1193] Shlomo Swirski and Itai Schurtz, 'Success Rates in the Matriculation Exam, by Locality: 2004-2005,' Adva Centre (August 2006).

[1194] Article 19(2), International Covenant on Civil and Political Rights.

[1195] UNGA Res 2615 (XXV), 24 October 1970, para 3.

[1196] See further Michael Kearney, *The Prohibition of Propaganda for War in International Law* (OUP, 2007).

[1197] General Comment No. 29 States of Emergency, (Article 4), CCPR/C/21/Rev.1/Add.11 (2001) para 13(e). See also International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva, 1983) 440.

These provisions are set in defence of the right to freedom of expression, and are aimed at ensuring not only that expression is not abused to violate other rights, but also at ensuring an environment conducive to the ability of all to engage in a market place of ideas.[1198] The ad hoc tribunals have given significant attention to the impact of propaganda and incitement in the commission of war crimes, crimes against humanity, and genocide in the Former Yugoslavia and Rwanda. In the Nahimana decision the ICTR focused in particular on how the media linked to the Rwandan government acted in violation of the right to freedom of expression, noting that 'the expression charged as incitement to violence was situated, in fact and at the time by its speakers, not as a threat to national security but rather in defence of national security, aligning itself with state power rather than in opposition to it',[1199] while the ICTY is currently hearing a case against the former Serbian Prime Minister Vojislav Seselj who is accused in the indictment of participation in 'war propaganda' through incitement to hatred to violence including aiding and abetting killing of civilians.[1200]

(II) F.8(b) Practices in Apartheid South Africa

Under the South African apartheid regime, the banning of films, books or other 'controversial' materials was used to systemise the wider process of eradicating from public consciousness any dissenting political, social and economic opinions. The first legislative measure introduced to institutionalise censorship was the Publications and Entertainments Act of 1963, which granted the Ministry of the Interior the power to ban 'undesirable' material for a multitude of reasons, including obscenity, moral harmfulness, blasphemy and causing harm to relations among sections of the population. Under this statute, approximately 8,768 publications were prohibited.[1201] This law was repealed and replaced by the Publications Act of 1974, under which 8,898 publications were banned between 1975 and 1982.[1202]

The apartheid regime, by controlling and restricting the right to exercise freedom of expression, was capable of permeating a climate of fear and anxiety into every aspect of social, political, cultural and intellectual life in South African civil society. The list of banned items included any object that carried an ANC symbol, including lighters, buttons and t-shirts. These legislative restrictions created a mechanism for social control designed to suppress creation of a 'black consciousness', thus sustaining the entire apartheid regime.

(II) F.8(c) Israeli practices in the OPT

Israel limits freedom of expression in the OPT through several measures: direct censorship; restrictions on freedom of movement by journalists; wilful intimidation and harassment of journalists; and closure and destruction of Palestinian media outlets.

(i) Suppression of Freedom of Expression: Censorship

Israel limits the exercise of the right to freedom of expression primarily through direct censorship in the OPT and censorship of news published inside Israel about the OPT. Israeli censorship laws remain based upon the 1945 mandatory British Defence (Emergency) Regulations. These regulations are used

[1198] General Comment 11 (Article 20) UN Doc HRI/GEN/1/Rev.1 at 12 (1994).

[1199] *The Prosecutor v Nahimana, Barayagwiza, and Ngeze,* Case no ICTR-99-52-T, Judgment and Sentence (3 December 2003), para 1008.

[1200] *Prosecutor v Vojislav Seselj,* Modified Amended Indictment, Case no IT-03-67, 15 July 2005.

[1201] Gilbert Marcus, 'Borders for Books. South Africa under Apartheid' (AIDA Nederland, April 2008); see also 'Jacobsen's Index of Objectionable Material' (2006) housed at Beacon for Freedom of Expression, http://www.beaconforfreedom.org/about_database/south%20africa.html.

[1202] Ibid.

by the Israeli authorities in both Israel and the OPT, despite the fact that (as noted in Section II.D.3, above) they were repealed by the British authorities prior to the termination of the British Mandate by the Palestine (Revocations) Order-in-Council, 1948, and overturned in the West Bank in May 1948 by the Jordanian Constitution.

Part 8 of the Regulations (Articles 86-101) serves as the legal basis for the institution of censorship. Article 88 (1) allows '[t]he censor [to] prohibit the importation or exportation or the printing of any publication which the importation, exportation, printing or publishing of which, in his opinion, would be or likely to become prejudicial for the defence of Palestine or to the public safety or to public order.'

In 1948, the Press Ordinance, a signed censorship agreement between the Israeli government, the army and newspaper editors and press owners, determined a codified practice of self-censorship to ensure that there would be no breaches of 'state security'. This created a system for the submission of any materials that could involve 'national security' to the military censor for pre-approval prior to publication. [1203] The Editors Committee, an informal forum comprised by the editors and owners of the main Israeli media, met regularly with the prime minister, cabinet members and senior officials, taking a central role in the self-censorship practiced by the Israeli media outlets.[1204] In addition to providing for the existence and function of the Editors Committee, the agreement vested the primary authority for censorship within Israel with the military censor. After Israel's *de facto* annexation of occupied East Jerusalem in 1967 and the extension of Israeli law over the annexed territory, East Jerusalem became subject to the same censorship system as Israel.

Although the role of the military censor for the Hebrew and English speaking media has diminished since the 1948 agreement, restrictions on freedom of expression for the Palestinian media in Israel and occupied East Jerusalem remains. Article 97 of the Defence (Emergency) Regulations grants the censor the power to review materials before publication. Arabic newspapers in Israel and East Jerusalem have historically had this power more readily enforced against them. These outlets must submit two copies of every news article, regardless of the nature of the article, which they intend to print the following day, to the Israeli Government Press Building in Beit Argon. Hebrew and English language newspapers do not face such stringent restrictions, and are only required to submit articles about 'military security' matters.

In terms of the OPT excluding East Jerusalem, the authority of the military censor was further reinforced through an extensive complex of military orders introduced upon Israel's assumption of the status of Occupying Power. Many restrictive provisions of the Defence (Emergency) Regulations were invoked to underpin the formulation of military orders instituting censorship in the OPT. Articles 86-101 of the Regulations were effectively applied to the West Bank and Gaza Strip. Military Order No. 50[1205] forbids the import and distribution of newspapers into the West Bank without obtaining an Israeli military-approved permit, while publishing in the West Bank is restricted by Military Order No. 101,[1206] according to which it is "forbidden … to distribute or publish a political article and pictures with political connotations." Thus, the limitations occur at the point of imparting information, and taken together, "the orders cover most methods of expressing or communicating ideas, giving Israeli military censors restrictive control over all publications which they consider to have any political meaning."[1207]

[1203] See Israeli Ministry of Foreign Affairs, http://www.mfa.gov.il/MFA/Facts%20About%20Israel/Culture/The%20Printed%20Media-%20Israels%20Newspapers

[1204] Lahav, "The Press and National Security," pp. 177-178.

[1205] Military Order No. 50, *Order Concerning Distribution of Newspapers* (11 July 1967).

[1206] Military Order No. 101, *Order Concerning Prohibition of Incitement and Hostile Propaganda* (27 August 1967).

[1207] Virgil Falloon, *Excesssive Secrecy, Lack of Guidelines. A report on Military Censorship in the West Bank* (Ramallah: Al-Haq, Law in the Service of Man, 1985).

In 1989, the Israeli High Court of Justice imposed limitations on the military censor, stating that censorship can only be exercised when it is certain that the publication of the item in question would harm public safety.[1208] With the outbreak of the second *intifada* in 2000, however, the court system became actively involved in, rather than acting as a control mechanism on, the military censor. The Israeli courts began issuing media bans with increasing frequency, granting restrictions of coverage of certain cases upon the petition of the prosecutors or security forces.[1209]

The Israeli press itself has been complicit in the practice of minimal criticism of Israeli policy through self-censoring. An official set of guidelines concerning controversial terminology in relation to the OPT was found in the Nakdi Report.[1210] This included the prohibition of terms such as East Jerusalem from the Israeli media vocabulary. Also direct references to Palestine or the Palestinian territory were removed, with the Israeli media instead preferring to refer to the occupied territory of the West Bank as 'Judea and Samaria'.

(ii) Suppression of Freedom of Expression: Restrictions on Freedom of movement

Israel limits the rights of media personnel to seek information and ideas in the OPT. This right is particularly undermined by certain Israeli measures to restrict freedom of movement.

Journalists operating in the OPT face two major obstacles to freedom of movement: administrative controls regarding the dissemination of press cards, and the pervasive system of checkpoints operated by the Israeli military within the OPT.

The different treatment afforded by Israel to journalists working in Israel versus in the OPT is evident in the annual Press Freedom Index compiled by Reporters Sans Frontières.[1211]

Year	No. of Countries Ranked	Rank for Israel within Israeli territory	Rank for Israel in the OPT
2003	166	44	146
2004	167	36	115
2005	167	47	Not Specified
2006	168	50	135
2007	169	44	103

The Israeli Government Press Office (GPO) controls and regulates the process of obtaining official journalist accreditation to work both in Israel and the OPT. To be eligible for a GPO card, applicants must have accreditation with a recognised media organisation. This is equally applicable to

[1208] Ben-Zvi, Abraham, 'The Limits of Israel's Democracy in the Shadow of Security' (2005) 1 *Taiwan Journal of Democracy* 2 at 8-9.

[1209] See Kurniel, Yuval, 'Balancing the protection of civil liberties during wartime: How the Supreme Court shaped Palestinian freedom of expression during the Second Intifada' (2002) 22 *Government Information Quarterly* at 626-643.

[1210] A paper drafted by the Israeli broadcasting authority, first set down in 1972. The aim was to 'clarify some of the professional rules that govern the work of a newsperson'.

[1211] Reporters Sans Frontières - Reporters Without Borders, *Annual Worldwide Press Freedom Index*: statistics for 2003-2008 are available at http://www.rsf.org/article.php3?id_article=4116.

international and Palestinian media. The GPO has used the issuing of press cards as a bureaucratic measure to restrict the ability of journalists to travel into the OPT to seek information and ideas, with the apparent political intent to reduce coverage of Israeli activities in the OPT.

Since 2001, the Israeli government has revoked the press cards of many Palestinian journalists, thus diminishing their capacity to seek information and ideas. In 2001 the Israeli Government Press Office (GPO) refused to renew press accreditation to Palestinian journalists, on the basis that they posed a 'security threat' to the state of Israel. Following a court case, pursued by the Reuters news agency and Al-Jazeera satellite television network, the High Court ruled in 2004 that the 2001 GPO decision was discriminatory and therefore unconstitutional.[1212] Despite this, the High Court did cede to the government request following this decision to allow the suspension of the issuing of press cards for selected individuals at the request of the General Security Service. GPO press cards must be renewed annually, leaving journalists mindful of the fact that Israel controls both the issuance of the press cards, and the checkpoints.

The denial of press cards to Palestinian journalists, an obstacle generally not faced by Israeli journalists, restricts their ability to move not solely between Israel and the OPT but also to cross the complex intra-territory checkpoints and *ad hoc* roadblocks in the OPT. In addition to the media, the right to freedom of expression and opinion of Palestinian political activists and human rights defenders is also severely curtailed by Israel's imposition of travel bans on such individuals to prevent them from leaving the OPT to carry out their work and express their opinions at conferences, lectures and meetings abroad. Such restrictions are routinely implemented in spite of the weight afforded by the Israeli legal system to the right to freedom of expression, and, especially, to the right to freedom of political expression.[1213] They are clearly designed to suppress dissenting voices from speaking out against Israel's policies in the OPT.

(iv)Intimidation, Harassment, and Targeting of Media Installations and Journalists

Article 52 (2) of Additional Protocol I to the Geneva Conventions states that radio and TV installations may be regarded as legitimate targets only if they are used for military purposes and directly contribute to the war effort. Determining the 'military purpose' of media installations may be politicised, however, where criticism of occupation itself is considered a military threat.

Israeli policy allows targeting of media installations. On 19 January 2002 Israeli troops blew up the Voice of Palestine Radio and Television station offices and studios in Ramallah, accusing it of transmitting provocative material. On 12 December 2007, three media outlets, including the Nablus based TV station Al-Afaq, were forced to stop broadcasting after Israeli troops seized transmission equipment. Closure orders, destruction and damage of property and confiscation of materials result in not only the closing down or obstruction of the media outlet in question but in the intimidation of other outlets and organisations that are critical of Israel, fostering greater self-censorship.

Violent attacks, harassment, and arbitrary arrest and detention of journalists obstruct the pursuit of information and ideas, as they intimidate and deter future reporting. Documented harassment of media personnel in the OPT ranges from confiscation of journalistic material to arbitrary arrest and detention of Palestinian journalists. The case of Mohammed Omer is illustrative. Mr. Omer, a journalist from the Gaza Strip, was stopped by Israeli border authorities when crossing back into the OPT from Jordan on 26 June 2009, after receiving the Martha Gellhorn Prize for Journalism at a ceremony in London. He was detained without being given a reason and subjected to cruel, inhuman and degrading treatment by Israeli security authorities, beaten to the point of unconsciousness and hospitalised with several broken ribs.[1214] The UN Special Rapporteur on the OPT notes that this incident, which he

[1212] *Saif v. Government Press Office*, [HCJ] 5627/02, 25 April 2004.

[1213] See *Entrepreneurship and Publishing Promotion Inc. v. The Broadcasting Authority* [HCJ 606/93] v.48 1(2).

[1214] See, for example, Reuters, 'Gaza reporter: Israeli security officials broke my ribs', *Ha'aretz* (30 June 2008); Mel Frykberg, 'Israelis Assault Award Winning IPS Journalist', *Inter Press Service* (28 June 2008).

finds to be a violation of the right to freedom of expression, "cannot be discounted as an accident or an anomaly involving undisciplined Israeli security personnel", but is rather "part of a broader pattern of Israeli punitive interference with independent journalistic reporting on the occupation".[1215]

In Israeli military operations in the OPT, where Palestinian journalists have been injured or killed where hostilities result in indiscriminate casualties among civilian, specific targeting of journalists constitutes a more serious violation of the law. Some press organisations have interpreted the Israeli military's targeting of press personnel as deliberate where journalists are killed in isolated settings while wearing clothing and helmets clearly identified as 'Press' or 'TV'. In one recent case, Fadel Shana, a Palestinian cameraman working for Reuters was killed by Israeli forces in the Gaza Strip while wearing a blue flak jacket marked with the word 'PRESS', as commonly worn by journalists and standing by his car, which also carried large 'PRESS' and 'TV' markings, in a large exposed area.[1216] Such incidents have led Reporters Sans Frontières to list the Israeli military among its 'Predators of Press Freedom'.[1217]

The net impact of Israeli measures curtailing Palestinian freedom of expression and opinion is to foster a culture of intimidation and to curtail the ability of Palestinians to express themselves and their opinions freely. In apartheid South Africa, such restrictions were understood as a necessary corollary of apartheid, as any system that attempts to engineer comprehensive social control must limit freedom of expression and opinion. Israel's practices show a marked consistency with this pattern.

(II) F.9.*Denial of the Right to Freedom of Peaceful Assembly and Association.*

(II) F.9(a) Interpretation

The rights to freedom of peaceful assembly and association are enshrined in Article 20 of the Universal Declaration of Human Rights and Article 21 of the International Covenant on Civil and Political Rights. These rights are qualified only where restrictions are necessary for public safety, the protection of public health or morals, or the protection of the rights and freedoms of others.[1218] Such restrictions must not be disproportionate, and must entail the least feasible impediment to the exercise of the rights. Otherwise, the right to peaceful assembly and to associate are regarded as the foundation of a democratic society. De Tocqueville states the proposition:

> 'The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society'.[1219]

For those under the jurisdiction of a state party to ICERD, protection from racial discrimination in the exercise of one's right to freedom of peaceful assembly and association is required by Article 5(d)(ix) of the Convention. This provision informs the reference to the right to freedom of peaceful assembly and association in Article 2(c) of the Apartheid Convention.

[1215] *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967*, Professor Richard Falk, UN Doc. A/63/326, 25 September 2008, at paras. 19-20.

[1216] See Al-Haq, *Israeli Military Investigation Sanctions Wilful Killing of Civilians, including Reuters Cameraman, and Demonstrates Complete Disregard for Principle of Precautions in Attack* (20 August 2008), available at: http://www.alhaq.org/etemplate.php?id=388.

[1217] See Reporters Sans Frontières, available at: http://www.rsf.org/article.php3?id_article=26822.

[1218] See Article 21 of the International Covenant on Civil and Political Rights; Article 11(2) of the European Convention on Human Rights; Article 11 of the African Charter on Human and Peoples' Rights.

[1219] See A. De Tocqueville 'Democracy in America', cited in G. A. Beaudoin and E. Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (2nd Ed) (Toronto: Carswell, 1989), p. 235.

(II) F.9(b) Practices in apartheid South Africa

Many of the South African apartheid government's initial laws targeted free association. The most notable was the 1950 Suppression of Communism Act,[1220] which empowered the Minister of Justice to prohibit a particular assembly or any specified person from being present in a particular area for a specified period.[1221] Those who violated the Minister of Justice's prohibitions were subject to harsh penalties. No warrant was required for the authorities to enter premises suspected of harbouring illegal gatherings. To generalise this Act, the apartheid government then passed the 1960 Unlawful Organization Act,[1222] which allowed the Governor-General to declare any organization as illegal and thus granted the apartheid government authority to silence it. The 1956 Riotous Assembly Act[1223] also empowered the ruling regime to prohibit gatherings in a public space or specific individuals from attending public gatherings.

(II) F.9(c) Israeli practices in the OPT

Whereas Israel's policies to suppress free assembly and association of Palestinians in the OPT are comparably extensive, Jewish Israelis in the OPT and Israel are allowed full enjoyment of their right to freedom of association and peaceful assembly. Although most Israeli laws concerning these matters do not specifically target Palestinians in their text, they are rarely applied to settlers or Israeli Jews present in the OPT. When they are applied against Israelis they usually target 'pro-Palestinian' demonstrators and peace activists, or those whom the Occupying Power considers may threaten the 'security' of Israel or its existence as a demographically Jewish state.

Israel's military legislation does not allow public gatherings of more than ten people unless the government receives notice of the gathering and is given the names of the attendees, thus making it even more restrictive in nature than the legislation in apartheid South Africa. Under Military Order No. 101,[1224] "[i]t is forbidden to conduct a protest march or meeting (grouping of ten or more where the subject concerns or is related to politics) without permission from the Military Commander." Even Palestinian schools and universities have not been immune to this ban. Thousands of Palestinians were detained for organising and participating in public gatherings during the second *intifada*. Live ammunition, tear gas, sound bombs, steel coated rubber bullets, and physical violence continue to be used against gatherings of Palestinian civilians, particularly at demonstrations against Israel's illegal construction of the Wall in the West Bank.

Further, the Israeli military authorities have adopted a policy of closing down Palestinian organisations that they deem to be security threats. Israel has also declared most Palestinian political parties to be 'terrorist' organisations, and thus, illegal. Hence any organisation connected directly or indirectly to a political party may be subject to closure, destruction, or even military attack. For example, a recent Israeli military order has targeted a residential area, a school, two medical clinics, and two orphanages in the West Bank city of Hebron for destruction because some of the donors to the charity that built them are allegedly affiliated to Hamas.[1225] In 2007, Israeli authorities shut down dozens of charities and organisations participating in educational, social, cultural and humanitarian activities because of their alleged connections to Hamas. Direct membership of a Palestinian political

[1220] Act No. 44 of 1950, as amended.

[1221] *Ibid.*

[1222] Act No. 34 of 1960.

[1223] Act No. 17 of 1956.

[1224] Military Order No. 101, Order Concerning Prohibition of Incitement and Hostile Propaganda, 27 August 1967.

[1225] Badil, 'Palestinian Civil Society Organizations express grave concern about Israeli closure of Islamic Charitable Society in Hebron' April 24, 2008: available at: http://www.badil.org/Publications/Press/2008/press460-08.htm.

party designated in Israeli law as a 'terrorist' organisation, is a crime that can be punished by detention, house arrest, exile, or a travel ban.

Palestinian organisations and entities in East Jerusalem have been subject to particular repression by the Israeli authorities. In its 2007 *Country Reports on Human Rights Practices*, the US State Department highlighted the closure by Israel of "[p]rominent Palestinian centers in East Jerusalem, such as the Chamber of Commerce and Orient House" as a violation of the Palestinian right to freedom of association.[1226] Such closures are based on affiliation of the organisations concerned with the Palestinian Authority, which Israel prohibits from organising events in East Jerusalem. Events and gatherings in March 2009 to mark the celebration of Jerusalem as the "Capital of Arab Culture 2009" were banned and forcefully dispersed by the Israeli authorities on this basis.[1227]

Discriminatory treatment is suggested by disparities in Israeli responses to Jewish demonstrations and violence in the OPT. For example, Israeli forces regularly open fire on peaceful Palestinian demonstrations against the Wall, [1228] but do not do so in cases of demonstrations by settlers in the West Bank when removing settlement outposts. nor did they do so against Jewish Israeli rioters during the evacuation of settlements from the Gaza Strip in 2005.

Together, Israel's military legislation in the OPT operates to repress the Palestinian right to freedom of peaceful assembly and association, not least in East Jerusalem, is indicative of a widespread policy aimed at suppressing both political opposition against the policies of the Israeli occupation, and the expression of Palestinian cultural identity, in order to preserve Israeli domination in both spheres.

(II) F.10 *Case Study: Impact of Combined Practices in the Gaza Strip*

Article 2(c) of the Apartheid Convention is concerned with measures that exclude members of a racial group from participation in the 'political, social, economic and cultural life of the country'. The paragraph then extends the meaning of this concern by further prohibiting 'the deliberate creation of conditions preventing the full development of such a group', citing measures discussed in sections 1-9 above. If 'full development' is construed to include political, social, economic and cultural development, as the first part of the article suggests, then the concern of Article 2(c) could be interpreted as the holistic impact of such measures on a group including economic and other social effects. A portrait or snapshot of economic and social conditions in the Gaza Strip, where these measures are deliberately practiced by Israel with particular rigour, can therefore indicate that such an impact has emerged.

(a) Overview

Since the victory of the Hamas movement in the 2006 Palestinian legislative elections, and particularly since the Hamas takeover of the Gaza Strip in June 2007, the Israeli government has imposed severe restrictions on the access of goods and services and the movement of people to and

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[1226] See: http://www.state.gov/g/drl/rls/hrrpt/2007/100597.htm.

[1227] See Al-Haq, *A Culture of Repression: Israeli authorities ban Palestinian Cultural Festival in East Jerusalem* (21 March 2009), available at: http://www.alhaq.org/etemplate.php?id=436.

[1228] The West Bank village of Ni'lin is a case in point. On 29 July 2008, fifty children and fifty elderly citizens from Ni'lin planned to march from the village to the Wall in protest of the annexation of their land. Confronted by an Israeli Border Police vehicle, the crowd dispersed and the organisers led the children and elderly to safety. Ahmad Husam Musa, a ten-year-old child, hid in an olive grove. Field reports indicated that a "member of the Israeli Border Police saw Ahmad Musa, left the Border Police vehicle, aimed his rifle and fired a live bullet. Shot from a distance of 50 metres, the bullet entered Ahmad Musa's forehead and exited through the back of his skull." See Al-Haq, *Right To Life of Palestinian Children Disregarded in Ni'lin as Israel's Policy of Wilful Killing of Civilians Continues*, 7 August 2008, available at: http://www.alhaq.org/etemplate.php?id=387.

from the Gaza Strip.[1229] In September 2007, Israel claimed that it was exempted from its legal obligations towards the Palestinians in Gaza as a consequence of 'disengagement' (see discussion in Chapter 2.C (4)).[1230] Israel subsequently declared the Gaza Strip to be a 'hostile entity' and imposed punitive measures on the Palestinian civilian population in order to bring a change in the political regime there.[1231]

On 27 December 2008, the Israeli military launched a far-reaching military offensive against the Gaza Strip which continued for over three weeks until 18 January 2009. In 'Operation Cast Lead', least 1380 Palestinians were killed, of whom 431 were children and 112 women. At least 5,380 people were injured, including 1,872 children and 800 women.[1232] The offensive ended with Israel's announcement of a unilateral ceasefire, and the Israeli forces withdrew three days later. The UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Professor Richard Falk, described Operation Cast Lead as 'a massive assault on a densely populated urbanized setting where the defining reality could not but subject the entire civilian population to an inhumane form of warfare that kills, maims, and inflicts mental harm that is likely to have long-term effects, especially on children that make up more than 50 percent of the Gaza population.'[1233] Further, during these attacks, Israel prohibited Palestinian civilians from leaving Gaza, preventing them from becoming refugees and fleeing out of harms way. According to Professor Falk, "Refugee denial under these circumstances of confined occupation is an instance of 'inhumane acts' during which the entire civilian population of Gaza was subjected to the extreme physical and psychological hazards of modern warfare within a very small overall territory.'[1234]

The closure policy combined with military attacks has had an extremely detrimental impact on the lives and living conditions of Palestinian civilians in Gaza. Although there has been a long-term pattern of de-development[1235] in Gaza due to decades of occupation and intensive Israeli military attacks resulting in massive home demolitions,[1236] killings and injuries,[1237] the recent economic sanctions regime imposed by Israel from mid-June 2007 to March 2008 had been assessed as an unprecedented humanitarian crisis.[1238] It has been argued that the "siege" imposed by Israel on the

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[1229] The access to and from Gaza of people, goods, fuel and electricity is almost completely dependent on Israel, even after the completion of Israel's 'disengagement'.

[1230] See Gisha Legal Centre for Freedom of Movement, 'Disengaged Occupiers – the Legal Status of Gaza,' January 2007, 21-18; available at: http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf.

[1231] See Israel's Security Cabinet's decisions from 5 September 2007 and 19 September 2007.

[1232] See UN Human Rights Council's Combined Special Rapporteur, Human Rights Situation in Palestine and Other Occupied Arab Territories, A/HRC/10/22, 20 March 2009, p. 5, and Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, *Human Rights Situation in Palestine and other Occupied Arab Territories*, 11 February 2009, A/HRC/10/20, p. 7.

[1233] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, *Human Rights Situation in Palestine and other Occupied Arab Territories*, 11 February 2009, UN Doc. A/HRC/10/20, p. 8.

[1234] Ibid, p. 16.

[1235] Sara Roy, *The Gaza Strip: The Political Economy of De-Development*, Institute for Palestine Studies (April 2005).

[1236] HRW, 'Razing Rafah: Mass Home Demolitions in the Gaza Strip,' October 2004, available at http://www.hrw.org/campaigns/gaza/. See also statistics gathered by the Palestinian Centre for Human Rights (PCHR- Gaza), available at http://www.pchrgaza.org/alaqsaintifada.html.

[1237] See statistics gathered by PCHR-Gaza, available at http://www.pchrgaza.org/alaqsaintifada.html. See also statistics gathered by B'Tselem, available at: http://www.btselem.org/english/statistics/Casualties.asp; and UN OCHA's Humanitarian Monitor Reports, issued periodically and available at: http://www.ochaopt.org/.

[1238] 'The Gaza Strip: A Humanitarian Implosion,' March 2008. The coalition responsible for the report is comprised of Amnesty International UK, CARE International UK, Christian Aid, CAFOD, Medecins du Monde UK, Oxfam, Save the Children UK and Trocaire (hereinafter UK Coalition, 2008). The report also gathers many

Gaza Strip since 2007 and the conditions that it has created, as discussed below, amounts to 'cruel, inhuman and degrading treatment' and is a violation of the UN Convention Against Torture (CAT).[1239]

This section is divided into two parts. The first part provides figures concerning a first phase of the siege, predominantly covering the period of June 2007 through 2008. The second part provides information on the siege continuing in 2009 and in particular concerning conditions in Gaza immediately following "Operation Cast Lead".

(b) Initial Phase of the Siege, June 2007–2008

While the Palestinian economy has been in decline since the beginning of the second Intifada in 2000, economic restrictions imposed since the 2006 elections caused a severe collapse. Karni is the vital crossing for the movement of foods and goods to and from the Gaza Strip. Israel closed this crossing in mid-June 2007. Soon thereafter Palestinian human rights organizations petitioned the Israeli Supreme Court demanding the immediate reopening of the crossing, arguing that the denial of essential provisions to residents of Gaza violates their rights to life, health and to an adequate standard of living and amounts to collective punishment. The court stated that it was unconvinced that there was a humanitarian crisis in Gaza and advised the petitioners in October 2007 to withdraw the petition.[1240]

Closure of the Karni crossing heavily impacted the Palestinian economy:

- In September 2000, some 24,000 Palestinians crossed out of Gaza everyday to work in Israel.[1241] In 2008, that figure was zero.
- Unemployment was close to 40 percent in the Gaza Strip in 2007 and was set to rise to 50 percent in 2008.
- More than 75,000 workers out of approximately 110,000 employed by the private sector were laid off because of the impact of the closures, and the majority of private businesses closed down
- Nearly 90 percent of all industrial establishments shut down since mid-June 2007 including the most significant factories at the Karni Industrial Zone.
- Pre-disengagement in June 2005, there were 3,900 factories in Gaza employing 35,000 people; by the end of 2007, there were 195 factories, employing only 1,750 workers.[1242]
- Nearly all public infrastructure and maintenance projects, private construction and ministerial and municipal projects were halted due to the closure of factories and the lack of building materials.[1243]
- In the months before the blockade began in June 2007, around 250 trucks a day entered Gaza through Karni with supplies.[1244] In 2008, other crossings like Kerem Shalom only

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of the recent statistics cited here. It is available at: http://www.oxfam.org.uk/resources/policy/conflict_disasters/downloads/gaza_implosion.pdf.

[1239] The Committee Against Torture will consider this issue in its review of Israel's compliance with CAT in May 2009.

[1240] H.C. 5523/07, *Adalah v. The Prime Minister, et al.* (petition withdrawn October 2007).

[1241] World Bank, 'West Bank and Gaza Update,' September 2006.

[1242] World Bank, 'West Bank and Gaza: Economic Developments and Prospects,' March 2008.

[1243] Ibid.

[1244] UK Coalition (2008), p. 8.

accommodate a maximum of 45 trucks a day. In most cases, this number was barely reached.[1245]

- 95 percent of Gaza's industrial operations are suspended due to the ban on imported raw materials and the block on exports.[1246]

As a consequence of these conditions, poverty in Gaza reached unprecedented levels. In 2007, around eight out of ten households, approximately 1.1 million people, were living below the poverty line of NIS 2,300 (US $594) per month, a sharp rise from 63.1 percent in 2005. Of these, 66.7 percent of households were living in deep poverty on less than NIS 1,837 (US $474) per month.[1247] Eighty percent of families in Gaza in 2007 relied on food aid, compared to 63 percent in 2006.

Poverty was being aggravated by sharp price increases of many items resulting from shortages. In 2007, households were spending approximately 62 percent of their total income on food compared with 37 percent in 2004.[1248] During the period of May-June 2007 alone, prices for wheat flour, baby milk, and rice rose 34%, 30 percent and 20.5 percent respectively.[1249] During the period June-September 2007, the number of households in Gaza earning less than $1.2 per person per day soared from 55 percent to 70 percent.[1250]

In October 2007 the Israeli government began limiting the supply of fuel and electricity to Gaza.[1251] In November 2007, responding to a petition filed by Adalah and Gisha on behalf of 10 Palestinian and Israeli human rights organizations, the Israeli Supreme Court approved the cuts to fuel supplies; by the end of January 2008, the court also sanctioned reductions in the supply of electricity.[1252] The court accepted the state's claim that it is only bound to safeguard 'a minimal humanitarian standard' in Gaza, a term that does not exist in international humanitarian law.

As a result of fuel and electricity restrictions, hospitals were experiencing power cuts lasting for 8-12 hours a day, due to a 60-70 percent shortage reported in the diesel required for hospital power generators.[1253] All of the Gaza Strip, except the Rafah district, was facing a daily electricity outage for an average of eight hours.[1254] As of April 2008, no fuel was available in Gaza on the open market and power cuts of three hours per day were experienced in almost all of the Gaza Strip.[1255] UNRWA stopped its food delivery to 650,000 refugees in Gaza for five days in April 2008 due to a lack of fuel

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[1245] Ibid, p.8.

[1246] World Bank, 'Investing in Palestinian Economic Reform and Development' (17 December 2007).

[1247] UN OCHA Special Focus. 'The closure of the Gaza Strip: The economic and humanitarian consequences' (December 2007), p.2. Hereinafter OCHA, 2007. Statistics in this section are from this source unless noted otherwise. Available at: www.ochaopt.org/documents/Gaza_Special_Focus_December_2007.pdf

[1248] UK Coalition, 2008, p. 4.

[1249] World Food Program Food Security and Market Monitoring Report (9 June 2007).

[1250] UK Coalition (2008), p. 7.

[1251] 63 percent of Gaza's power supply is provided directly by Israel paid for by deductions from Palestinian tax revenues, and 28 percent is produced in Gaza powered by fuel paid for by the European Commission through the Temporary International Mechanism (TIM). All of Gaza's fuel is imported through Israel (OCHA, 2007). Recall that Israel destroyed all six transformers in Gaza's only power plant in June 2006. See B'Tselem, 'Act of Vengeance: Israel's Bombing of the Gaza Power Plant and its Effects', (September 2006), available at: http://www.btselem.org/Download/200609_Act_of_Vengeance_Eng.pdf.

[1252] H.C. 9132/07, *Jaber al-Basyouni Ahmed v. The Prime Minister*. Case documents and the Supreme Court's decisions are available on Adalah's website at: http://www.adalah.org/eng/gaza%20report.html.

[1253] UK Coalition, 2008, p. 8.

[1254] World Health Organization, West Bank and Gaza, 'Health Situation in Gaza,' (3 March 2008).

[1255] UN OCHA, 'Gaza Strip Fuel Situation Report as of 23 April 2008,' available at: http://www.ochaopt.org/documents/Gaza_Strip_Fuel_Situation_Report_as_of_23_April_2008.pdf.

for its trucks.[1256] The Coastal Municipalities Water Utility (CMWU) provides drinking water and removes and treats sewage for the Gaza Strip. Without fuel, electricity and proper maintenance, the network cannot function and thirty-to-forty million litres of sewage goes into the sea everyday because of a lack of fuel to pump or treat human waste.[1257] The CMWU estimates that between 25-30 percent of the population of Gaza did not receive running water in their homes; before the blockade the CMWU was able to distribute water to 100 percent of its beneficiaries.[1258]

Health care has been heavily impacted by the siege. Many specialized and life-saving medical treatments are not available in hospitals in Gaza. Current measures imposed by Israel have prevented a large number of patients with treatment referrals from leaving Gaza for specialized medical care. Excessive delays in obtaining permission to leave the Gaza Strip reduce the patients' possibility of survival.

Rulings delivered by the Israeli Supreme Court in January 2008 involved patients in life-threatening conditions requesting to exit Gaza for medical care. In these cases, the Supreme Court refused to intervene in the state's decision to deny access to healthcare to nine patients on security grounds.[1259] In a previous ruling, delivered on 28 June 2007, the Supreme Court refused to discuss the issue of Israel's legal responsibility towards the Gaza Strip, or the state's position that entry into Israel should be permitted only as a humanitarian gesture. The court limited the discussion to the 'operative common denominator, i.e., to humanitarian aspects'.[1260] The court did question the 'life/limb' distinction (according to which the state argued that a danger to limb constitutes a danger to the 'quality of life' and does not necessitate access to health care outside of Gaza). However, it did not intervene in this issue, deciding that intervention in such cases could 'by the stroke of a pen, expose IDF soldiers and civilians at the Crossing to danger'.[1261] Following this comment, the court refused to intervene in the security prohibition of two patients to whom denial of care would entail the loss of a limb.[1262]

Medical conditions in the Gaza Strip are changing rapidly, but it is relevant here that Israel's closures had brought the medical system to the brink of collapse even before 27 December 2008 and that Israeli authorities were unresponsive to warnings of a growing humanitarian crisis. Physicians for Human Rights-Israel (PHR-I) reported that, since June 2007, it had collected testimonies from least 30 patients seeking urgent medical help who were denied passage by the General Security Service (GSS).[1263] According to GSS policy, patients were being detained at the Erez Crossing and requested to provide information or to act as regular collaborators as a condition for permission to leave the Gaza Strip for medical treatment.[1264] The deliberate withholding of medical care for non-medical

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[1256] UN OCHA, 'ISRAEL-OPT: Food distribution halted, cooking gas running out in Gaza,' IRIN Humanitarian News and Analysis, (28 April 2008), available at: http://www.irinnews.org/Report.aspx?ReportId=77959.

[1257] Ibid, p. 10.

[1258] UK Coalition, 2008, p. 10.

[1259] H.C. 11105/07, *PHR-Israel and 15 Patients v. The Commander of the Israeli Military in Gaza, Chief Commander of the Southern District, et al.* (unpublished decision), and H.C. 559/08, *PHR-Israel and 1 Patient v. The Commander of the Israeli Military in Gaza, Chief Commander of the Southern District, et al* (unpublished decision). See also Physicians for Human Rights-Israel, 'Gaza: No Justice, No Hope for Patients' (2 January 2008), available at: http://www.phr.org.il/phr/article.asp?articleid=538&catid=55&pcat=45&lang=ENG.

[1260] See H.C. 5429/07, *PHR-Israel, et al. v. The Minister of Defence.*

[1261] Ibid.

[1262] Ibid.

[1263] See Physicians for Human Rights-Israel, 'Holding Health to Ransom: GSS Interrogation and Extortion of Palestinian Patients at Erez Crossing' (August 2008), p. 6, available online at: http://www.phr.org.il/phr/files/articlefile_1217866249125.pdf.

1264 Ibid.

reasons constitutes a form of torture, PHR-I argues.[1265] The Israeli authorities denied carrying out such practices at Erez and dismiss them as Palestinian propaganda.[1266] Of patients seeking emergency treatment in hospitals outside Gaza in 2007, 18.5 percent were refused permits to leave.[1267] The proportion of patients given permits to exit Gaza for medical care decreased from 89.3 percent in January 2007 to 64.3 percent in December 2007, an unprecedented low.[1268] While the overall number of patients requesting a permit to pass through Erez crossing increased after June 2007 due to the Rafah crossing (border with Egypt) closure, the percentage of permits that were denied increased from 7 percent in January 2006 to 36 percent in December 2007.[1269] During the period October–December 2007, WHO confirmed the deaths of twenty patients, including 5 children, among people awaiting visas.[1270] The MoH hospitals were working within a declared state of emergency. Palestinian Health Ministry reported that urgently needed drugs (85 items), medical supplies (52 items) and lab reagents (24 items) were out of stock at MoH facilities.[1271]

(c) Aftermath of "Operation Cast Lead"

After Operation Cast Lead, the population in the Gaza Strip was experiencing the following conditions:[1272]

According to OCHA, during the week 4-10 of March 2009, 50,000 people continued to have no running water, and an additional 100,000 received water only every 5-6 days, primarily in the North Gaza district, eastern areas of Khan Younis and Az Zeitoun area of Gaza City. [1273] Access to water for the affected population will remain difficult until spare parts and repair materials are allowed entry into Gaza.[1274] During the week of 11-17 March 2009, nine truckloads carrying supplies for water projects were allowed into Gaza. However, due to restrictions on the entry of other essential materials, including water pipes, the benefit of these supplies is limited.[1275]

[1265] 'PHR-Israel believes that the fact that refusal to collaborate leads to prevention of treatment, may constitute a breach of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as it contributes to physical suffering and may even lead to death, where a person's life could have been saved or his suffering alleviated by receiving treatment'. See Physicians for Human Rights-Israel, 'Holding Health to Ransom,' p. 30.

[1266] Tim McGirk, 'Israelis Blocking Medical Care in Gaza,' *Time Magazine* (25 March 2008), available online at: http://www.time.com/time/world/article/0,8599,1725422,00.html.

[1267] WHO West Bank and Gaza, 'Access to Healthcare for the Palestinian People' (April 2008), pp. 36-37, available online at: http://www.emro.who.int/palestine/reports/monitoring/WHO_special_monitoring/access/access%20to%20health%20services%20(April%202008).pdf.

[1268] Ibid.

[1269] Ibid.

[1270] UK Coalition, 2008, p. 11.

[1271] WHO West Bank and Gaza, 'Health Situation in Gaza', (3 March 2008).

[1272] For regular updates on this information see UN OCHA at www.ochaopt.org, and, for example Al Mezan Centre for Human Rights at www.mezan.org, Palestinian Centre for Human Rights at www.pchrgaza.org

[1273] Ibid.

[1274] Ibid.

[1275] UN Office for the Coordination of Humanitarian Affairs (OCHA), *Protection of Civilians Weekly Report*, 11-17 March 2009. Available online at: http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_2009_03_13_english.pdf.

According to OCHA, during the week of 4-10 March 2009, 90% of the Gaza population was experiencing intermittent power cuts as a result of scheduled power cuts.[1276] The remaining 10% of Gaza's population has remained without electricity, due to damages sustained by the electricity network, since the 27 December 2008 onset of Israeli military operation "Cast Lead'.[1277]During February 2009, the Gaza Power Plant (GPP) was only able to operate at about 80% of its full capacity (65MW out of 80MW), creating an almost 20% electricity deficit throughout the Gaza Strip.[1278] During February 2009, approximately 8.3 million litres of industrial fuel were imported from Israel and used exclusively for the operation of the GPP, an amount that is significantly below the 14 million needed to operate the plant at full capacity.[1279]

OCHA reported that during the week of 11-17 March 2009, nearly 50,000 litres of diesel and 30,000 litres of petrol entered Gaza daily via the Gaza-Egypt tunnels.[1280] Though these supplies have eased the fuel shortage, the amount of fuel reaching Gaza still remains far below the needs of the population.

According to OCHA, the overall levels of humanitarian aid allowed into Gaza remain below what is urgently required.[1281] During the week of 11-17 March 2009, Israeli clearance procedures for access into Gaza by international humanitarian agency personnel continued to be very lengthy, greatly hindering their capacity to provide humanitarian aid and services.[1282]

During February 2009, 324 permit applications were submitted by patients who required medical treatment abroad, of whom only 183 (56.5%) had their permits granted in a timely manner by the Israeli District Coordination Liaison (DCL) office; 109 (33.6%) had their applications delayed; 9 (2.8%) had their application denied and another 23 (7.1%) were interviewed by the ISA and are still awaiting an exit permit.[1283] According to the Palestinian Liaison Officer at Erez, only 258 patients exited during February 2009.[1284]

Many critically needed items (spare parts, construction materials, etc.) remain restricted for entry, preventing reconstruction and recovery efforts, including spare parts for water and wastewater infrastructures.[1285] More than 100 procurement orders of spare parts and consumables needed to repair the Gaza Power Plant have been waiting for clearance to enter Gaza for months, preventing some repair works from taking place and keeping the functioning of the plant at a fragile level.[1286]

During February 2009, a daily average of 127 truckloads of goods entered the Gaza Strip, a figure that is well below the level of imports in May 2007 (475 truckloads), and the level of imports was

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[1276] Ibid.

[1277] Ibid.

[1278] The UN Humanitarian Monitor: Occupied Palestinian Territory, No. 34, February 2009. Available online at: http://www.ochaopt.org/documents/ocha_opt_humanitarian_monitor_2009_02_01_english.pdf.

[1279] Ibid.

[1280] Ibid.

[1281] OCHA, Field Update on Gaza from the Humanitarian Coordinator, 10-16 March 2009. Available at: http://www.ochaopt.org/documents/ocha_opt_gaza_humanitarian_situation_report_2009_03_16_english.pdf.

[1282] UN Office for the Coordination of Humanitarian Affairs (OCHA), *Protection of Civilians Weekly Report* (11-17 March 2009).

[1283] The UN Humanitarian Monitor: Occupied Palestinian Territory, No. 34 (February 2009).

[1284] Ibid.

[1285] UN Office for the Coordination of Humanitarian Affairs (OCHA), *Protection of Civilians Weekly Report* (4-10 March 2009).

[1286] The UN Humanitarian Monitor: Occupied Palestinian Territory, No. 34 (February 2009).

insufficient to meet market needs: over 80% of the truckloads carried food stuffs, to the exclusion of other major essential supplies.[1287] In the same month, Israeli approval was arbitrarily denied for the import of other goods, including some food items (chickpeas and macaroni), recreational kits, stationery, and veterinary drugs.[1288] According to OCHA, the import of goods from Israel, particularly by humanitarian agencies, remains subject to unclear and often inconsistent criteria at the Israeli-controlled crossings.[1289]

Access by farmers to their land in the north and east of the Gaza Strip and east along the border with Israel remains limited. Fishermen remain limited to a territory of three nautical miles from the Gaza shoreline,[1290] despite an agreement reached under the Oslo Accord for fishing grounds extending to 20 nautical miles west of Gaza that was adhered to until June 2007 with Hamas' takeover of Gaza. In June 2007 the fishing ground was cut to six nautical miles, which was halved to three nautical miles after Cast Lead, severely damaging the livelihood of Gaza's 3,000 fishermen and their families.[1291] Israel enforces the three nautical mile-limit by opening fire on Palestinian fishing vessels found in water beyond it.[1292]

Erez Crossing was opened on 23 days during February 2009, allowing only 1,978 people to exit Gaza, the majority of whom were diplomats and international humanitarian staff (730) and Palestinian patients and their accompaniers (505) with valid permits to cross Erez for medical treatment in Israel and the West Bank.[1293] 370 Palestinians carrying permits were allowed to cross Erez to visit their families in Israel, the West Bank and Jordan.[1294] The Rafah Crossing was exceptionally opened on 15 days during February 2009 to allow mainly urgent medical cases to enter Egypt and cross back into Gaza. 2,662 Palestinians, including 590 patients, were allowed to enter Egypt and 1,855 others to return back to Gaza during February 2009. The daily average of people who crossed into Egypt (95) and who entered Gaza (66) constitutes just 31% and 23% of the parallel figures for May 2007, at 310 and 292 respectively.

(II) G. Article 2(d) – Measures designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof

(II) G.1 Creation of separate reserves and ghettos

(II) G.1(a) Interpretation

Reference to 'reserves' or to 'ghettos' is not found elsewhere in international law and there is little national or international jurisprudence clarifying the meaning of these phrases. In general use, the term *reserves*, when speaking of separate treatment of racial groups or peoples, applies generally to areas of land set aside for their exclusive use. Reserves may be used to confine people or provide

[1287] Ibid.

[1288] Ibid.

[1289] UN Office for the Coordination of Humanitarian Affairs (OCHA), *Protection of Civilians Weekly Report*, 18-24 March 2009. Available online at: http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_2009_03_24_english.pdf.

[1290] UN Office for the Coordination of Humanitarian Affairs (OCHA), *Protection of Civilians Weekly Report*, 11-17 March 2009

[1291] UN Office for the Coordination of Humanitarian Affairs (OCHA), *Protection of Civilians Weekly Report*, 18-24 March 2009.

[1292] Ibid.

[1293] The UN Humanitarian Monitor: Occupied Palestinian Territory, No. 34, February 2009.

[1294] Ibid.

them with specific rights such as the reservation system for Native Americans in the US enabled by legislation such as the Indian Appropriations Act of 1851, which became a system to provide autonomy for tribal governance. Reserves may also be established to preserve a particular ecological zone essential to the cultural practices that allow cultural survival of groups.

The special relevance of the term here is specific to South Africa: the 1913 Land Act established that black land ownership would be confined to certain areas of the country that were called black 'Reserves' and the term remained in use when the Apartheid Convention was drafted. Although the term Homelands was then current, the text of the Apartheid Convention as adopted by the UN General Assembly in 1973 omitted any explicit reference to the Homelands (most likely with the intention of denying them any semblance of recognition or legitimacy), referring instead in Article 2(d) to the 'creation of separate reserves and ghettos'.

The term *ghetto* is associated with urban districts characterised by geographic isolation and discrimination[1295] and is in use with regards, for example, Roma communities in Europe.[1296] The most notorious ghetto in modern history was the Warsaw Ghetto, a historically Jewish ghetto where Jews were imprisoned during the Second World War in order to facilitate the execution of the Holocaust. Although urban ghettoes may be formed through voluntary choices, reflecting the propensity of language and ethnic groups and especially immigrant groups to cluster as social networks, the term is commonly associated with vulnerability, poverty, discrimination and marginality relative to a dominant society.

For the purposes of the Apartheid Convention, reference to 'reserves and ghettos' can be taken as referring respectively to rural and urban enclaves to which residence by a racial group is restricted. Article 2 confirms that it is an inhuman act constituent of apartheid to confine a racial group to reserves and ghettoes in order to exclude it from the life of the country.

(II) G.2(a) Practices in Apartheid South Africa

Division of the population in South Africa was orchestrated through legislation that categorised the entire population by racial type and allowed each group the right to live only in its assigned geographic zones. In rural areas, this system became the Homelands policy; in urban areas, it generated black townships, such as Soweto, that functioned as labour reservoirs for white cities.

The use of reserves to exclude blacks from the life of South Africa traces to the Glen Grey Act of 1874 and the Bantu Land Act of 1913,[1297] which established the principle of geographic segregation on the basis of race, and the Native Trust and Land Act of 1936 which further legislated this principle.[1298] Under the National Party, these earlier laws provided the basis for the first major step toward Grand Apartheid, the Group Areas Act 41 of 1950. This Act divided South Africa into

[1295] See for example: Report of the independent expert on minority issues, Addendum, Mission to France, UN Doc. A/HRC/7/23/Add.2 (2008).

[1296] See for example: Consideration of Reports, Comments and Information Submitted by States Parties under Article 9 of the Convention (Slovakia), CERD/C/SR.1655 (2004).

[1297] See James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006), p. 338.

[1298] For example, the Bantu Land Act of 1913 restricted African land ownership to the 'native reserves' and the Native Affairs Act of 1920 established separate administrative structures for Africans with the result that 80 per cent of the country (i.e. the black African population) was confined to 13 per cent of the land. The Native (Urban Areas) Act of 1913 provided for urban segregation and African influx control and the Native Trust and Land Act of 1936 consolidated the reserves, and forbade the transfer to, or lease of land by, other races within these reserves. Meanwhile, Africans were prohibited from acquiring land elsewhere. See John Dugard, *Human Rights and the South African Legal Order* (New Jersey: Princeton University Press, 1978), pp. 78-79. See also, DL Carey Miller and Anne Pope, *Land Title in South Africa* (Cape Town: Juta, 2000), pp. 19-20 and Crawford *supra* note ** at pp. 338-339. The term 'Bantu' was the way in which Africans were described by South African law. See Dugard, ibid, p. 61.

separate areas, each reserved exclusively for the use of a particular racial group, while ensuring that the white group maintained control over the most economically productive areas of the country.[1299] The Prevention of Illegal Squatting Act of 1952 ensured that the separation policy would succeed by empowering the Minister of Native Affairs to remove blacks from public or privately owned land and establish resettlement camps to house these displaced people. The Natives Laws Amendment Act of 1952 also narrowed the category of blacks who had the right of permanent residence in towns to those who had been born in a town and had lived there continuously for not less than 15 years, or who had been employed there continuously for the same period of time, or who had worked continuously for the same employer for at least 10 years.

Implemented from 1954, these Acts authorised the State to uproot black citizens from their homes of generations. Millions of black people were eventually forcibly ejected from 'white' land in terms of these measures, often dumped unceremoniously to 'adapt or die' in remote and primitive 'resettlement areas'. The generally appalling conditions in these 'dumping grounds' regularly produced terrible poverty, disease and crippling infant mortality. The intense human suffering in places such as Dimbaza, Limehill, Soetwater and hundreds of others provoked international outrage and led to charges of genocide against the National Party government.[1300] The policy also resulted in the wholesale destruction of urban communities like Sophiatown (Johannesburg), District Six (Cape Town), Cato Manor and South End in Port Elizabeth, with consequences of immense suffering and huge losses of property and income. With the enactment of the Natives (Prohibition of Interdicts) Act, Act No 64 of 1956, those forcefully removed could not appeal to the courts against their removals.

The notion of self-governing black Homelands did not come to fruition until the 1960s and 1970s[1301] when they were seen as an escape route for a government whose policies of forced removal — and other overt practices of racial segregation and discrimination —had attracted widespread international criticism and condemnation, particularly from the United Nations.[1302] This problem concerned South Africa's Prime Minister, Dr. Verwoed[1303] who, in a 1961 Parliamentary debate, admitted that the Homelands were:

> '… a form of fragmentation which we would not have liked if we were able to avoid it. In light of the pressure being exerted on South Africa there is, however, no doubt that eventually this will have to be done, thereby buying for the white man his freedom and the right to retain domination in what is his country … If the Whites could have continued to rule over everybody, with no danger to themselves, they would certainly have chosen to do so. However, we have to bear in mind the new views in regard to human rights, … the power of the world and world opinion and our desire to preserve ourselves'.[1304]

The ideology underpinning the creation of the Bantu Homelands in South Africa—as well as those which would be subsequently established in Namibia—was most clearly expressed in a 1954

[1299] In 1985, the apartheid government itself estimated that a total of 126,176 families had been forced out of their homes in terms of the Act: Roger Omond, *The Apartheid Handbook*, p. 37.

[1300] Dan O'Meara, *Forty Lost Years – The Apartheid State and the Politics of the National Party 1948-1994* (Randburg: Ravan Press, 1996), p. 69.

[1301] See Nigel Worden, *The Making of Modern South Africa: Conquest, Apartheid, Democracy* (Oxford: Blackwell Publishing, 2007), pp. 81-88 and Miller and Pope, *Land Title*, ibid at p. 23.

[1302] See generally, John Dugard, 'The Legal Effect of United Nations Resolutions on Apartheid', 83 *South African Law Journal* (1963), p. 44.

[1303] See Barbara Rogers, *Divide and Rule: South Africa's Bantustans* (London: International and Defence Aid Fund, 1976), p. 8 (observing that Dr. Verwoerd was very concerned about South Africa's image in the world, and the threat of decolonization in the rest of Africa.)

[1304] 107 House of Assembly Debates, cols. 4191-93, 10 April, 1961, cited in John Dugard, *International Law: A South African Perspective* (Cape Town: Juta, 2000), p. 447.

government report written by an eleven-man commission chaired by Professor F.R. Tomlinson.[1305] The Tomlinson Report, which took almost five years to complete, concluded that:

> '…separate development of the European and Bantu communities should be striven for, as the only direction in which racial conflict may possibly be eliminated, and racial harmony possibly be maintained. The only obvious way out of the dilemma lies in the sustained development of the Bantu Areas on a large scale.'[1306]

'Grand Apartheid' thus reflected, most fundamentally, a strategy by the National Party to escape the political conundrums for white people resulting from South Africa's majority-black demography. It was evident to the Tomlinson Commission that, were they to give into international pressure and form a multiracial society with equal rights for all in a single state, whites would lose control of national politics and ultimately, it was feared, their European cultural life-styles:

> At whatever speed, and in whatever manner the evolutionary process of integration and equalisation between European and Bantu might take place, there can be no doubt as to the ultimate outcome in the political sphere, namely that the control of political power will pass into the hands of the Bantu.
>
> It is possible that European paramountcy might be maintained for some time, by manipulation of the franchise qualifications; but without a doubt the government of the country will eventually be exercised by those elected by the majority of voters. Theoretically, it is possible that the non-Europeans who then constitute the majority of voters, might prefer to have the country ruled by Europeans. Such a supposition appears highly doubtful, and certainly improbable. But, even if such were to be the case, the rulers of a democratic country would have to carry out the will of the majority of the people, which means to say, that the European orientation of our legislation and government will eventually disappear.[1307]

Hence the Tomlinson Commission warned that, if all South Africans were represented in a unified parliamentary democracy, power would pass into the hands of the blacks. Because blacks were not considered capable of maintaining a 'European' democracy, to sustain South Africa as a democracy required excluding blacks from political rights and representation. Yet excluding blacks from equal rights as citizens would undermine and ultimately destroy the 'European' democracy (which only whites could maintain) because it would require measures that were profoundly undemocratic and illiberal. Thus to preserve democracy for white people, some solution had to be found.

The Homelands were the National Party's answer to this dilemma, as well as a way to stave off criticism of its racial policies by the outside world. Apartheid architects like Henrik Vervoerd (first as Education Minister and later as Prime Minister) argued that South Africa was a state with many nationalities, instead of one nation, and that separate development of each nation was mandated, as only disaster could result from multiracialism, multinationalism and multiculturalism.[1308] In 1959, the South African Parliament passed the Promotion of Bantu Self-Government Act which introduced 'national' divisions in the country for particular ethnic groups, which would form the basis for the Homeland system.[1309] The preamble provided:

[1305] See Summary of the Report on the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa (Pretoria: The Government Printer, 1955), hereinafter the 'Tomlinson Commission.'

[1306] Ibid, p. 194.

[1307] See Tomlinson Commission, p. 103.

[1308] See Merle Lipton, 'Independent Bantustans? (1972) 48 *International Affairs* at 1-19.

[1309] Apparently, the name of this Act was changed so as to sound more appealing. There were protests within the National Party that so negative a bill, without some positive compensation, would alienate some domestic opinion and provide foreign critics with ammunition against South Africa: see Gwendolen M. Carter, Thomas Karis and Newell Stultz, *South Africa's Transkei: The Politics of Domestic Colonialism* (London: Heinemann, 1967), pp. 12-13.

> Whereas the Bantu peoples of the Union of South Africa do not constitute a homogenous people, but form separate national units on the basis of language and culture; and whereas it is desirable for the welfare and progress of said peoples to afford recognition to the various national units and to provide for their gradual development within their own areas to self-governing units on the basis of Bantu systems of government …[1310]

The Act established a number of white Commissioners-General to act as agents of the Central Government in the homelands, and set up eight Bantu authorities.[1311] It also completed the process of removing African's civil rights in South Africa with the elimination of the (white) native representatives from the National Assembly.[1312]

Thus the Homelands were designed to remove the demographic threat to racial democracy by tapping into the United Nations principle that every people has the right to self-determination. Grand Apartheid prescribed that whites would exercise this right in the great majority of the country's territory, including in all major towns and cities and 90 percent of its arable land. Black South Africans would do so in ten 'independent' homelands invented and demarcated by the South African government: Transkei, Bophuthatswana, Ciskei, Lebowa, Venda, Gazankulu, Qwaqwa, KaNgwane, KwaNdebele, and KwaZulu.[1313] In 1963, Transkei became the first Homeland to be granted 'self-government' status, although this was primarily a publicity exercise to show to the ICJ that South Africa was sincere about granting the blacks self-determination.[1314] The other Homelands would not be granted 'self-governing' status until the mid 1970s. In 1976, Transkei was granted 'independence' although the UN General Assembly had already called upon its members to refuse recognition to Transkei or to any other homeland.[1315] Three other Homelands were declared independent: Bophutatswana (1977), Venda (1979) and Ciskei (1981).

The reality of Grand Apartheid was that black South Africans (80 per cent of the country's population) were to be confined to a mere 12-13 per cent of the area of South Africa, whilst the whites (20 percent) would rule over the remaining 88 percent of the land.[1316] Moreover, the fact that the Homelands were spread around South Africa in a fragmented horseshoe comprising eighty-one large and 200 smaller blocks of land (see map) led many to argue that they could never form independent and viable sovereign states.

International rejection of the Bantustan system was categorical, on several grounds: that black South Africans' right to self-determination included a right to territorial integrity over the entirety of South Africa; that black South Africans lacked 'the legal capacity to give the consent necessary to any divestiture envisaged by the Bantustan policy';[1317] and because the implementation of the Bantustan policy was reliant on dividing the population along racial lines to be forcibly transferred from their homes into the Bantustans. In 1971, the UN General Assembly denounced the policy 'artificially to divide the African people into 'nations' according to their tribal origins' and justify 'the establishment of non-contiguous Bantu homelands (Bantustans) on that basis' and condemned 'the establishment of Bantu homelands (Bantustans) and the forcible removal of the African people of South Africa and

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[1310] Quoted from Crawford, p. 339.

[1311] See Barbara Rogers, *Divide and Rule: South Africa's Bantustans* (London: International Defence and Aid Fund, 1976), p. 21.

[1312] Ibid.

[1313] There were also two other smaller Bantustans called KwaNdebele and KaNgwane.

[1314] See Carter, Karis and Stultz, *supra* note *** at pp. 12-13.

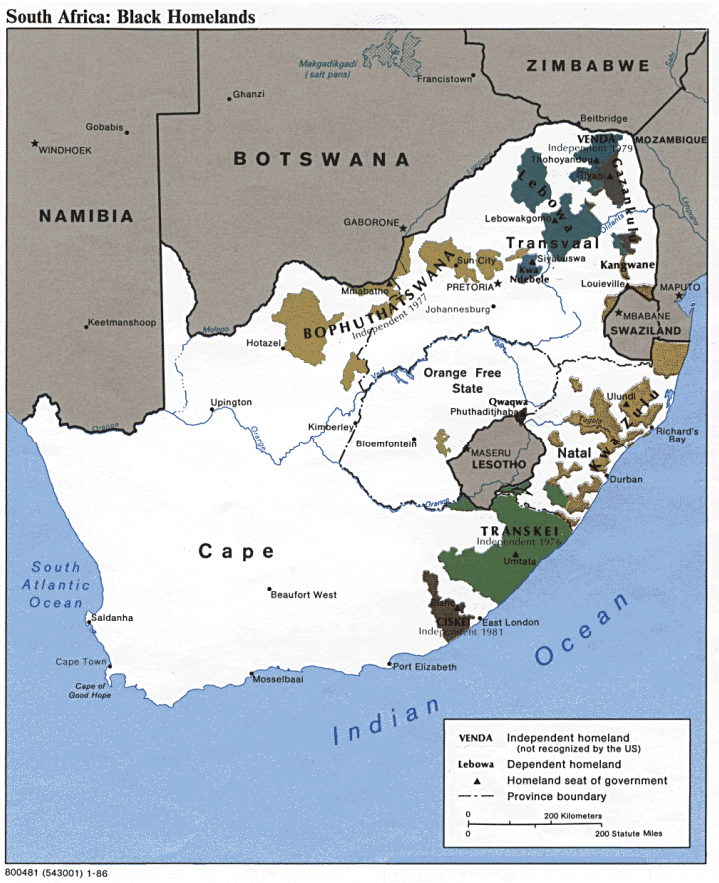
[1315] See GA Res. 3151G, 14 December 1973 and GA Res. 3411D, 28 November 1975.

[1316] Ibid, p. 3.

[1317] Henry J Richardson, Self-Determination, International Law and the South African Bantustan Policy (1978) 17 *Colum J Transnat'l L* 185 at 217.

Namibia to those areas as a violation of their inalienable rights, contrary to the principle of self-determination and prejudicial to territorial integrity of the countries and the unity of their peoples'.[1318]

Two days after the granting of 'independence' to Transkei, the UN General Assembly adopted resolution 31/6A (1976) by 130 votes to none. This resolution condemned 'the establishment of Bantustans as designed to consolidate the inhuman policies of apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights.' It further rejected Transkei's independence as 'invalid', and called upon all governments 'to deny any form of recognition to the so-called independent Transkei.' This call for non-recognition of the Transkei would be endorsed by the UN Security Council in resolutions 402 (1976) and 407 (1977).[1319] Similar resolutions and denunciations were passed by the UN calling on all states not to recognise the 'independence' of Bophuthatswana in 1977, Venda in 1979 and Ciskei in 1981.[1320]



South Africa also attempted to establish Bantustans in Namibia (formerly South West Africa), which it had administered under League of Nations mandate after World War I and refused to relinquish after World War II. In 1964, the Odendaal Commission[1321] recommended that 40.07 per cent of the territory be allocated for non-white homelands, [1322] while allocating to the whites control of 43.22 per cent of the land where nevertheless the majority of the population was black.[1323] In 1968, the South African Government passed the Development of the Self-Government for Native Nations in South-West Africa Act. Black territories were divided into ten blocks: Basterland, Bushmanland, Damaraland, East Caprivi,

[1318] General Assembly Resolution 2775 of 29 November 1971.

[1319] For further reading, see Geoffrey E. Norman, 'The Transkei: South Africa's Illegitimate Child' (1976–77) 12 *New England Law Review* at 585-646; Donald E. deKieffer and David A. Hartquist, 'Transkei: A Legitimate Birth' (1977–78) 13 *New England Law Review* at 428-452; and Geoffrey E. Norman, 'The Transkei Revisited' (1977–78) 13 *New England Law Review* at 792-801. See also, Merrie Faye Watkin, 'Transkei: An Analysis of the Practice of Recognition – Political or Legal?' (1977) 18 *Harvard International Law Journal* at 605-627.

[1320] See John Dugard, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987), pp. 98-108.

[1321] Report of the Commission of Enquiry into South West African Affairs, 1962-63, RP 12 / 1964. For a very useful map of the envisaged ten black 'homelands' for Namibia by the Odendaal Commission, see Kaela, *The Question of Namibia*, p. 80.

[1322] See Dugard, *The Southwest Africa/Namibia Dis*pute, p. 238 (citing UN Monthly Chronicle, June 1964, pp. 33 ff.)

[1323] Ibid, see also, Sagay, *Legal Aspects of the Namibia Dispute*, p. 359. In 1965, the UN General Assembly added its protests to that of the Special Committee of 24. GA Res. 2074 (XX), 17 December 1965.

Hereroland, Kaokoland, Kavangoland, Namaland, Ovamboland and Tswanaland. (Only East Caprivi, Hereroland and Kavangoland were granted self-rule.[1324]) The policy was opposed by the South West Africa People's Organization (SWAPO) and the Democratic Development Co-operative Party (DEMCOP), which demanded independence for the whole of Namibia.[1325]

International rejection of the Bantustan strategy in Namibia was equally strong. The United Nations General Assembly terminated the Mandate of South Africa over Namibia in 1966.[1326] In 1968, the UN General Assembly denounced the black 'self-government' plans as designed to 'destroy the national unity and territorial integrity of Namibia.'[1327] The UN Security Council described the establishment of Bantustans in Namibia as 'contrary to the provisions of the United Nations Charter' and condemned the Native Nations Act as 'a violation of the relevant resolutions of the General Assembly.'[1328] In 1976, the UN Security Council declared that, 'in order that the people of Namibia may be enabled freely to determine their own future, it is imperative that free elections under the supervision and control of the United Nations be held for the whole of Namibia as one political entity.'[1329] In paragraph 11 (c) of that resolution, the Security Council called on the South African Government to abolish the application in Namibia of 'all racially discriminatory Bantustans and homelands.'[1330] Due to international opposition, no Bantustan in Namibia became an 'independent' state. In 1990, Namibia was admitted to the UN as an independent state, its territorial integrity intact.[1331]

II) G.2(b) Practices by Israel in the OPT

Division of the population in the OPT is orchestrated through legislation that categorises the entire population by its identity and allows each group the right to live only in its assigned geographic zones.

Formal plans to divide the West Bank into Jewish and Palestinian zones trace to at least1978, when the parastatal Jewish Agency, responsible for developing and managing Jewish-national assets in Israel,[1332] formally declared that the West Bank was a permanent part of 'Eretz Israel' (the Land of Israel) and presented a 'master plan' for inserting Jewish settlements into the region in order to secure permanent Jewish-Israeli control over its geography.[1333] Known as the 'Drobles Plan', it proposed as a

[1324] See Sagay, *Legal Aspects of the Namibia Dispute*, pp. 363-369 (describing the homelands of Ovamboland, Kavangoland, Damaraland, Hereroland, the Caprivi Strip, Bushmanland, Rehoboth Gebiet and Namaland).

[1325] Ibid, p. 370. SWAPO and DEMCOP called for a boycott of the elections to the Legislative Council of the Ovambo 'homeland' held on 1 and 2 August 1973. As a result only 823 out of 50,000 eligible voters cast their ballots.

[1326] Ibid. See also, GA Res. 2145 (XXI) of 27 October 1966 (where the General Assembly terminated the Mandate of South West Africa and assumed direct responsibility for the Territory until its independence).

[1327] GA Res. 2403 (XXIII) of 16 December 1968.

[1328] SC Res. 264 of 20 March 1969.

[1329] SC Res. 385 of 30 January 1976, para. 7.

[1330] Ibid.

[1331] SC Res. 652, 17 April 1990. See further, Cedric Thornberry, *A Nation is Born: The Inside Story of Namibia's Independence* (Winhoek: MacMillan, 2004), in which the author details the negotiations which led to Nambia's transition to independence.

[1332] The role and authority of the Jewish Agency was confirmed in 1952 by the World Zionist Organisation–Jewish Agency (Status) Law, 5713-1952 and by a 1954 'covenant' that was reaffirmed at the 34th World Zionist Organisation Congress: see 'Covenant Between the Government of Israel and The Zionist Executive called also the Executive of the Jewish Agency', cited in W. Thomas Mallison and Sally V. Mallison, *The Palestine Problem in International Law and World Order* (Longman, 1986), 433.

[1333] 'Master Plan for the Development of Settlement in Judea and Samaria 1979-1983' (October 1978), available as United Nations Document S./13582 (22 October 1979), emphasis in original.

premise that 'a strip of settlements at strategic sites enhances both internal and external security alike, as well as making concrete and realizing our right to Eretz-Israel'. The Plan then detailed how these settlements should be placed 'not only *around* the settlements of the minorities [Palestinians], but also *in between* them' and developed to encourage 'dispersion of the [Jewish] population from the densely populated urban strip of the coastal plain eastward to the presently empty areas of J&S'.[1334] Subsequently, the Jewish Agency developed other master plans for particular settlement blocs, like Rehan, Ariel, and Gush Etzion, in which smaller settlements were established around larger ones to consolidate blocs of land. The language of these plans was explicitly to 'Judaise' the land: that is, increase the Jewish proportion of its population and ensure a strategic geographic dispersal of Jewish settlement.

By the late 1990s, the grid of Jewish settlement had reached its present geographic configuration and had consolidated an integrated system of territory for exclusively Jewish use. Settlement blocs are connected to each other and to Israel through contiguous belts of land, closed zones, and highways that have the cumulative effect of carving Palestinian zones into a series of disarticulated enclaves connected by smaller separate roads, from which passage is controlled by checkpoints staffed by the Israeli military and private Israeli security forces, as dealt with in detail in Section 2F of this chapter.

The UN Office for the Coordination of Humanitarian Affairs published an exhaustive study of the settlement grid in 2007.[1335] Through GIS mapping, the study determined that almost 40 percent of the West Bank is now taken up by Israeli infrastructure, in which settlements, linked by a major highway system to Israel, have geographically fragmented Palestinian communities. Palestinian access to the West Bank road network is restricted by a closure regime consisting of approximately 85 checkpoints, 460 roadblocks and a permit system for Palestinian vehicles noting that:

> Each Palestinian enclave is geographically separated from the other by some form of Israeli infrastructure including settlements, outposts, military areas, nature reserves and the Barrier. However, the Israeli road network is the key delineator in marking the boundaries of the enclaves. The road network functions to provide corridors for travel from Israel, and between settlements in the West Bank, and barriers for Palestinian movement.[1336]

The operation of this system to divide territory into enclaves, which can accurately be understood as being 'reserves and ghettos', is illustrated by the case of Nablus.[1337] A city with a population of 130,000 and the regional hub for some 350,000 Palestinians, Nablus is encircled by 14 Israeli settlements and 26 outposts connected to each other by roads used primarily by settlers that stretch around the city and across Nablus governorate. These roads are in turn linked to ten checkpoints, including seven that encircle the city and through which all Palestinians going in and out of Nablus must cross. According to OCHA, in April 2007, only 10 percent of Nablus buses (22 out of 220) and 7 percent of Nablus taxis (150 out of 2,250) had permits to access and use the checkpoints around Nablus city. Only fifty private Palestinian cars were permitted to use the checkpoints while more than seventy obstacles installed by the Israeli army block the road junctions and physically prevent Palestinian traffic from reaching the roads used primarily by settlers.[1338] The city of Nablus thus constitutes a Palestinian reserve, in the sense noted above insofar as it is a physical area enclosed with the purpose of dividing the population along racial lines. Conversely, Israeli settlements in the West Bank are also physical areas enclosed with the purpose of dividing the population along racial lines. For the purposes of this report, the settlements, if we understand them to be akin to 'reserves and ghettos,' are for the benefit of the dominant racial group, that is, Israeli Jews to the detriment of the Palestinian population. Whereas the 'reserves and ghettos' of the Convention is clearly suggestive of

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[1334] Ibid., emphases and acronym in original.

[1335] UN Office for the Coordination of Humanitarian Affairs (OCHA), *The Humanitarian Impact on Palestinians of Israeli Settlements And Other Infrastructure in the West Bank* (July 2007).

[1336] *Ibid.*, p. 70.

[1337] See OCHA, 'Nablus: A City Encircled', *ibid.*, at p. 89-93.

[1338] *Ibid.*, p. 90.

the Bantustan policy of the illegitimate 'Homelands' promoted by the Apartheid government in South Africa, no such formal practice can be said to exist in the OPT.

Nevertheless, international law prohibits the dismembering of a self-determination unit where this is unilaterally imposed. Indeed, several provisions of the Oslo Accords provide that the West Bank and Gaza Strip form 'a single territorial unit' whose integrity is to be preserved pending the conclusion of permanent status negotiations.[1339] Moreover, Israeli settlement activity is clearly contrary to international law. On 18 September 1967, Theodor Meron, the then Legal Adviser to Israel's Foreign Ministry came to the conclusion that: '…civilian settlement in the administered territories contravenes explicit provisions of the Fourth Geneva Convention'.[1340] Likewise, on 21 April 1978, the State Department's Legal Advisor Herbert J. Hansell concluded that '…the establishment of the civilian settlements in [the occupied] territories is inconsistent with international law'.[1341] This position was most recently affirmed on 9 July 2004, when the International Court of Justice came to the same conclusion in its *Wall* advisory opinion: 'Israeli settlements in the Occupied Palestinian Territory (including in East Jerusalem) have been established in breach of international law'.[1342]

The United Nations rejection of Israel's settlement policy has been equally as categorical as its condemnation of the Bantustans established in Namibia and South Africa. For instance, in resolution 465, the UN Security Council stated that 'Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories constitute a flagrant violation of the Fourth Geneva Convention'.[1343] In the same resolution it deplored the 'continuation and persistence of Israel in pursuing those policies and practices and calls upon the Government and people of Israel to rescind those measures, to dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem'.[1344] It further called upon 'all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories'.[1345]

The EU has also consistently opposed Israel's settlement policy and its member states have voted in favour of several UN Security Council resolutions critical of Israeli settlements.[1346] In 1980, The European Nine (as it was then called) issued its Venice Declaration in which it considered that 'settlements, as well as modifications in population and property in the occupied Arab territories, are illegal under international law'.[1347]

[1339] See the 1993 Declaration of Principles on Interim Self-Government Arrangements, Article IV; and the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Article XI.1. 5.

[1340] A scan of the original Hebrew text of this opinion is available at: http://southjerusalem.com/settlement-and-occupation-historical-documents/, and a complete English translation on the website of the Sir Joseph Hotung Programme in Law, Human Rights and Peace Building in the Middle East (School of Oriental and African Studies, London) at: http://www.soas.ac.uk/lawpeacemideast/resources/48485.pdf.

[1341] See United States: Letter of the State Department Legal Adviser Concerning the Legality of Israeli Settlements in the Occupied Territories, 21 April 1978, in 17 *International Legal Materials* (1978), p. 777 at p. 779.

[1342] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 136 at p. 184, para. 120.

[1343] SC Res. 465, 1 March 1980, operative paragraph 5.

[1344] Ibid, operative paragraph 6.

[1345] Ibid, operative paragraph 7.

[1346] See e.g. SC Res. 446, 22 March 1979; SC Res. 452, 20 July 1979; and SC Res. 471, 5 June 1980.

[1347] See operative paragraph 9 of the Venice European Council Declaration, 13 June, 1980, available at: *ec.europa.eu/external_relations/mepp/docs/venice_declaration_1980_en.pdf (last retrieved 17 May 2009).*

(II) G.3 *Prohibition of mixed marriages*

(II) G.3(a)Practices in apartheid South Africa

In apartheid South Africa, the Prohibition of Mixed Marriages Act 55 of 1949 prohibited marriages between white people and people of other races. The Immorality Amendment Act, Act No 21 of 1950; amended in 1957 (Act 23) further prohibited adultery, attempted adultery or related 'immoral acts' (extra-marital sex) between white and black people and strictly forbade 'unlawful carnal intercourse' as well as 'any immoral or indecent act' between a white person and a member of any other racial group.[1348] Those found guilty of 'unlawful carnal intercourse' or 'any immoral or indecent act' could be sentenced to imprisonment for up to seven years with hard labour and up to ten lashes where the male was under fifty years of age.[1349] In some cases, even a kiss between people of different races could lead to a conviction in terms of the Act.[1350] In order to apprehend persons ostensibly engaged in unlawful carnal intercourse across the racial divide, the South African Police were driven to extreme measures:

> Special Force Order O25A/69 detailed the use of binoculars, tape recorders, cameras and two-way radios to trap offenders. It also spelled out how bed sheets should be felt for warmth and examined for stains. Police were also reported to have examined the private parts of couples and taken people to district surgeons for examination.[1351]

Writing in 1981, David Harrison estimated that since 1950, there had been over ten thousand convictions under the Immorality Act[1352] and commented that 'prosecution has trailed in its wake social disgrace, family break-up and many cases of suicide'.[1353]

(II) G.3(b) *Israeli practices in the OPT*

Israel does not formally prohibit mixed marriages among members of various racial groups either within Israel or in the OPT. Mixed marriages are discouraged in practice only by the absence of civil marriage in Israeli law, which provides under the Family Courts Law of 1995 that religious courts—Rabbinical courts for Jews and Muslim, Christian and Druze courts for Arabs.[1354]— have exclusive jurisdiction in the matters of marriage and divorce.[1355] This arrangement creates hardships for couples from different religious groups or those without religious affiliation who wish to get married, leaving them only with the option of getting married abroad. While these marriages are legally recognised in Israel and can be registered with the Ministry of the Interior, the Rabbinate does not recognise marriages when one of the partners is not Jewish.[1356]

[1348] Roger Omond, *The Apartheid Handbook*, p. 30.

[1349] Ibid., at p. 32.

[1350] Ibid., at p. 33.

[1351] Ibid.

[1352] According to Roger Omond, more than 11,500 people were convicted of contravening the Immorality Act between 1950 and 1980, and more than twice that number were charged. See Roger Omond, *The Apartheid Handbook*, p. 33.

[1353] David Harrison (1981) 'The White Tribe of Africa' Macmillan South Africa (Publishers) (Pty) Ltd: Johannesburg at 172. Roger Omond notes that over the twenty year period prior to the publication of his book in 1986, at least sixteen white men had committed suicide by gassing, hanging, shooting, drowning or taking insecticide after being charged under the Immorality Act: Roger Omond, *The Apartheid Handbook*, pp. 33-34.

[1354] Palestinian Order in Council (POC)-1922, Article 15(a).

[1355] Family Courts Law of 1995, section 3(B1).

[1356] Rabbi and Attorney Kariv, G. (2006, March). 'Religion and State and the Israel Elections,' Israel Religious Action Centre (IRAC), available at: http://rac.org/advocacy/irac/; Rabbi and Attorney Kariv, G. (2006, November). 'Civil Marriage Abroad, IRAC; and Meranda, A. (2008, Feb. 13). 'Knesset votes against civil marriage,' Jewish World, Ynet, available at: http://www.ynetnews.com/articles/0,7340,L-3506428,00.html.

As outlined in Chapter III, Israeli law applies to Israeli settlers in the OPT, and thus entails consequences for any 'mixed' marriage between an Israeli and a Palestinian in the OPT. First, on account of the authority of religious institutions, such a marriage can only take place outside of Israeli jurisdiction. Second, even if allowed to register the marriage with the Israeli Ministry of the Interior, the couple is not allowed by law to live together in Israel or East Jerusalem, as the Citizenship and Entry into Israel Law of 2003 precludes the Palestinian spouse from having any status that would allow them to live in Israel or East Jerusalem for the purposes of family unification. Third, the couple will similarly face both practical and legal obstacles preventing them from living together in the OPT. The Jewish-Israeli spouse is *de jure* barred from entering or living in Area A of the West Bank or the Gaza Strip. The Palestinian spouse is *de facto* barred from living in a Jewish-Israeli settlement due to the restrictions on access and residence by virtue of the permit system in the West Bank and the procedures of the various settlement councils, Jewish agencies and religious institutions that operate the settlements.

The effect of these obstacles is that mixed marriages between Jews and other religious sects in the OPT, while not directly and formally prohibited, are rendered almost impossible in practice, thereby entrenching the division of the population along racial lines.

(II) G.4 *Expropriation of landed property*

(II) G.4(a) Interpretation

Under Article 23(g) of the Hague Regulations, the occupying power is forbidden from destroying or seizing enemy property unless imperative for the 'necessities of war'. Article 55 closely mirrors this near total prohibition on the destruction of 'enemy' property, placing an additional duty on the occupying power to administer public buildings and lands 'in accordance with the rules of usufruct'. To show a breach of the prohibition against land expropriation in Article 2(d) of the Apartheid Convention, however, it is not enough to establish a practice of land expropriation per se: the practice must be established as designed to 'divide the population along racial lines' and to serve 'purposes of establishing and maintaining domination by one racial group of persons over any other racial group of persons'.

(II) G.4(b) *Practices in apartheid South Africa*

In South Africa, deprivation of property ultimately disenfranchised the black population and ensured servitude and was further designed to divide the population along racial lines. The 1913 Land Act disenfranchised in perpetuity those blacks who were able to own property by limiting, and in some instances obliterating, their rights of land ownership except in designated 'black' areas (about 8 percent of the country). Re-designation of urban areas along racial lines was effected through forced removal of blacks from their properties by state expropriation and their relocation to black townships. The effect of expropriation was to leave certain urban areas either derelict or as sites for white buildings.[1357] Black people were allowed the right to acquire land only in designated areas, separate from the settled white areas, and ultimately only in the Bantustans. The comment by Stanford in 1892 rang true during the apartheid regime: '…the labour question is bound up with the land question. The man who has no land and no trade must work for some one else who has.'[1358]

[1357] AJ Christopher *The Atlas of Apartheid* (Routledge, 1994), p. 140.

[1358] *Cape Native Blue Book*, p. 43; cited in H. Corder, *Law and Social Practice in South Africa* (Cape Town: Juta, 1988), p. 285.

(II) G.4(b) Israeli practices in the OPT

Israeli land practices in the OPT rest on a complex system. Under Article 43 of the Hague Regulations,[1359] Israel must respect 'unless absolutely prevented, the laws in force in the country.' Israel has done so, but selectively, retaining vestiges of Jordanian and Ottoman laws where these contribute to restricting Palestinian property development and expanding Jewish settlements. Israel has also relied on the argument of 'military necessity' regarding 'enemy property' as well as 'state lands' and even private property.

Upon assuming authority over the OPT, Israel upheld the Jordanian system of land law (except in East Jerusalem),[1360] although it had rejected Jordan's claim to be the rightful sovereign of the territory between 1948 and 1967.[1361] Jordanian law was infused with earlier Ottoman law regarding land: ultimate title rested in the Sultan (or state), but private and collective land rights were derived through usufruct, as codified partly by tax laws.[1362] Formal land registration was indeed avoided by many smaller cultivators because it incurred additional Ottoman taxes, and was seen as advantageous only with the advent of British and then Jordanian rule. By the time the OPT was occupied in 1967, only around one-third of land was registered. Israel then re-interpreted these untitled lands as 'state lands' in a different sense: as land to which individual users had no registered title and therefore no legal claim.

Yet through reforms to extant land law, combined with military orders,[1363] Israel has ensured *de facto* and *de jure* possession of the majority of Palestinian lands. Such actions do not constitute 'requisition'[1364] or 'expropriation' as allowed in the Hague Regulations but rather *appropriation*, or unlawful expropriation, of Palestinian lands resulting in the annexation-by-proxy of the OPT through Israeli settlers.[1365] The Israeli government's reliance on the argument of 'military necessity', coupled with its active support of settlements, highlights a blurring between public and private interests in

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[1359] The 'Beit-El-Toubas Case' (1979), *Ayyub et al. vs. The Minister of Defence* (HCJ 606/78, 610/78), discsused in I. Lustick, 'Israel and the West Bank after Elon Moreh: The Mechanics of De Facto Annexation' 35 *Middle East Journal* 557.

[1360] As discussed in Chapter Three, Israel claims to annex East Jerusalem on 28 June 1967 through the Law and Administration Order (No. 1), which states that 'the territory of the Land of Israel described in the appendix is hereby proclaimed territory in which the law, jurisdiction and administration of the state apply.' Quoted in COHRE & BADIL, at 71. By applying Israeli law, the Ministry of Finance seized sizeable portions of East Jerusalem for 'public' purposes before handing these over to private Jewish-Israeli developers.

[1361] *Ibid.*, p. 67.

[1362] Raja Shehadeh, *The Law of the Land: Settlements and Land Issues under Israeli Military Occupation* (Jerusalem: Palestinian Academic Society for the Study of International Affairs, 1993), pp. 20-24.

[1363] Centre on Housing Rights and Evictions (COHRE) and BADIL estimate in their 2005 report that 1500 military orders had been issued by 2002 in relation to regulation of the West Bank and none of these have been revoked. Centre on Housing Rights and Evictions (COHRE) & BADIL Resource Centre for Palestinian Residency and Refugee Rights, *Ruling Palestine: A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine*, May 2005, available online at http://www.badil.org/Publications/Monographs/BADIL-COHRE-Israel%20Land%20Regime.pdf, p. 80-81.

[1364] See, for example, Article 52 of the Hague Regulations.

[1365] 'Requisition' in international humanitarian law implies the lawful taking of private property, which strict limitations and limited temporal scope, for the needs of the occupying army. 'Expropriation', as referred to in the Apartheid Convention, is not generally used in the instruments of international humanitarian law, and is primarily examined in international law through the lens of procedural and substantive protections that international investment treaties provide to foreign investors (primarily against nationalisation). Expropriation entails the taking of private property by a state (or its agent) or the transfer of the power of management or control of a company to the state. It can be either lawful or unlawful. Generally, an expropriation is unlawful when it is discriminatory, not for a public purpose, or not accompanied by just compensation: see Donna Arzt, *The Right to Compensation: Basic Principles Under International Law: Compensation as Part of a Comprehensive Solution to the Palestinian Refugee Problem* (Syracuse University, 1999).

land. Use of land, whether termed 'expropriation' or 'appropriation' is only permitted in international humanitarian law when overriding military needs dictate. These needs are inherently public in nature and reflect the transfer of administration from enemy hands to those of the occupiers; private actors are not part of the equation. Yet Israel has consistently drawn on such public sphere arguments to facilitate the discriminatory transfer of land to private individuals, namely Israeli settlers.

At the commencement of the occupation in 1967, the Israeli government immediately froze all pending cases[1366] and implemented new requirements for land registration.[1367] Public inspection of land registers was forbidden and any land transaction required permission from the newly endowed registrar of lands.[1368] Jewish purchase of Palestinian lands was later facilitated through Military Order Nos. 811 and 847, which extended the Jordanian laws' irrevocable power of attorney from five to fifteen years.[1369] Only Israelis were empowered to validate signatures through this process, which avoided informing the land registry and thus public knowledge about the sale of land.[1370] Local Palestinian courts had no jurisdiction over unregistered West Bank lands.[1371]

Since 2002, large areas of 'state land' and Palestinian private land have been seized and/or destroyed for Israel's construction of the Wall.[1372] Although these measures were termed 'temporary',[1373] the ICJ has recognised that the substantial alteration of landed property produces facts on the ground possessing long-term legal significance.[1374] Seizures of private property are illegal and this illegality is increased when such lands are handed over to Israeli settlers, whose presence in the OPT is in breach of Article 49, as discussed earlier.[1375]

The discriminatory purpose of Israel's land and settlement policies in the West Bank was clarified in 1978 by Mattityahu Drobles, then Head of the World Zionist Organisation Department for Rural Settlement, in his 'Master Plan for the Development of Settlement in Judea and Samaria 1979-1983'. Drobles emphasised that the purpose of the Master Plan was demographic engineering in the interest of annexing the West Bank permanently to Israel:

> The civilian presence of Jewish communities is vital for the security of the state…There must not be the slightest doubt regarding our intention to hold the areas of Judea and Samaria for

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[1366] 'The land settlement operations were begun by the British in the early 1920s, and were continued by the Jordanian government. In 1967 they were discontinued by Military Order No. 192, and requests by West Bankers to complete these operations, especially in areas where all the stages except the final registration were completed…were denied.' *Ibid*., pp. 70-71.

[1367] Military Order No. 291, Order Concerning Settlement of Disputes over Land and Water, 19 December 1968.

[1368] Under Military Order No. 25, Order Concerning Transactions in Property, 18 June 1967, Shehadeh, p. 59.

[1369] Military Order No. 811, Order Concerning Amendment to Law of Immovable Property, 23 November 1979. This Order was then amended by Military Order No. 847, Order Concerning Amendment to Law of Immovable Property, 1 June 1980.

[1370] See B'Tselem, *Land Grab: Israel's Settlement Policy in the West Bank, (*May 2002), at 63. In the context of occupation, secret land dealings facilitate land alienation from Palestinians to Jews, as such transactions are seen by other Palestinians as a form of collaboration.

[1371] COHRE and BADIL, p. 100.

[1372] Article 46, Hague Regulations.

[1373] Elin B. Hilwig, *The Barrier in the Occupied Palestinian Territory: Protection of Private Property under International Humanitarian and Human Rights* Law (Nijmegen: Wolf Legal Publishers, 2005), pp. 41-42.

[1374] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136 at para. 121.

[1375] Where it can be shown that 'extensive destruction and appropriation of property…[is] not justified by military necessity and carried out unlawfully and unwantonly' then individuals may be held criminally responsible for such grave breaches of the Fourth Geneva Convention under Article 147.

> ever…The best and most effective way to remove any shred of doubt regarding our intention to hold Judea and Samaria forever is a rapid settlement drive in these areas.[1376]

The Drobles Plan laid out a pragmatic programme of land appropriation:

> State and uncultivated land should be seized immediately for the purpose of settlement in the areas located among and around the population centres with the aim of preventing as much as possible the establishment of another Arab state in these territories. It will be difficult for the [Arab] minority to form a regional connection and political unity when split by Jewish colonies … in light of the current negotiations on the future of the West Bank, we are entitled to compete with time, as in this period everything will be decided on the basis of the facts that we create in these Territories.[1377]

Aside from requirements for proving and maintaining title under Jordanian law, a number of different 'legal' mechanisms were also introduced with the occupation to seize Palestinian lands in support of this settlement drive. One was the 1950 Absentee Property Law which, in conjunction with Military Order No. 58,[1378] characterises an absentee as anyone outside of the territory during the 1967 conflict. Such lands could be seized by the Custodian (acting as part of the Lands Administration in West Jerusalem), who is then permitted to transfer such properties to the Development Authority, which included members of the Jewish National Fund.[1379] This mechanism is essentially immune from review thanks to Article 5 of the Order, which states that:

> Any transaction carried out in good faith between the custodian of absentee property and any other person concerning property which the custodian believed when he entered into the transaction to be absentee property, will not void and will continue to be valid even if it is subsequently proved that the property was not at the time absentee property.[1380]

This provision effectively allows an Israeli acting in 'good faith' to override all existing Palestinian claims to land. 430,000 dunums, along with 11,000 buildings, were seized under this provision in the first few years of the occupation, facilitating their later categorisation as 'state' land.[1381] Thus, the declaration of 'absentee' lands was an important first step in establishing settlements across the West Bank.

In the first decade or so of the occupation, settlements were also built extensively on Palestinian private lands sealed for 'security' reasons or expropriated for 'military purposes'.[1382] In this early stage, settlements were often erected on military bases. Until 1979, the Israeli High Court accepted military arguments for this practice on grounds of 'security', although a clear pattern was emerging between military lands and their later use by (Jewish) civilians. A petition brought by Palestinian landowners in 1979 sought to challenge such definitions and was ultimately successful in its object of distinguishing settlement ownership from 'military necessity'. In the case, *Elon Moreh*, the High Court held that:

[1376] Extract of the Drobles Plan, from Matitiyahu Drobless, *The Settlement in Judea and Samaria – Strategy, Policy and Program* (in Hebrew) (Jerusalem: World Zionist Organization, September 1980), p. 3; quoted in B'Tselem, *Land Grab: Israel's Settlement Policy in the West Bank* (May 2002), p. 14.

[1377] Quoted in Al-Haq, *Discrimination is Real: Discriminatory Israeli Policies in Israel, The Occupied Territories and Occupied East Jerusalem*, Draft Paper presented to the World Conference Against Racism, Durban, South Africa, 28 August – 7 September 2001, p. 21. The Drobles plan went through several versions after its composition in 1978.

[1378] Order Concerning Absentee Property (Private Property), 23 July 1967.

[1379] Shehadeh, pp. 61-63

[1380] Quoted in Al-Haq, *Discrimination is Real*, p. 22.

[1381] B'Tselem, *Land Grab*, p. 59.

[1382] Military Order No. 259, Order Concerning Security Provisions (Closure of Military Training Zones), 13 June 1968, lands seized from Palestinians have often been handed over to settlers. COHRE & BADIL, p. 128.

> The army could not offer *post facto* justifications for land seizures when they were in fact initiated by a pro-settler political group (*Gush Emunim*, or, Bloc of the Faithful);
>
> Security grounds offered by the army needed to be specific and consistent with national security objectives;
>
> Ideological and/or political motivations for the establishment of settlements was distinct from security reasons;
>
> Permanent settlements could not be established on lands temporarily 'requisitioned' for military purposes as per the Hague Regulations.[1383]

In this judgment, the High Court affirmed the application of the Hague Regulations along with its ban on the appropriation of private lands. Effectively, this ruling prevented future military seizures of private land for settler use unless an overriding security need could be proved.[1384]

The Israeli government at the time responded to the High Court by respecting its ruling, but simultaneously sought new methods of land acquisition. An exhaustive land survey was accelerated immediately after the decision, to provide the occupying power with specific data about land holdings, to determine which lands were privately or publicly owned.[1385] Public lands would be the source for most future settlements.[1386] As mentioned above, Israel retained the Jordanian system of tenure yet altered this significantly through military orders. One example was Military Order No. 59, which authorises a designated authority to seize 'enemy' property for state land.[1387] This Order enabled the Israeli government to declare 13 percent of the West Bank as 'state' land, parts of which were used for settlement construction.[1388] Ambiguities and complexities over the definition of 'state' lands—lands that were unregistered or collectively owned—enabled Israel to declare a further 26 percent of the West Bank as 'state' land.[1389] Although this interpretation of 'state lands' eliminated the usufruct ensured by Ottoman law and custom, the appeal mechanisms devised for West Bank lands ensured that such decisions *vis-à-vis* 'public' lands were usually impossible to review. [1390] Palestinians had no standing to sue in Israeli municipal courts over 'public' lands.[1391]

Furthermore, although the High Court had accepted to review private land requisitions, it has refused to hear matters over ownership status.[1392] Thus, for Palestinians whose private land holdings has been

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[1383] Lustick, p. 561.

[1384] It is important to note that although this case radically reduced the expropriation of private lands for settlements, the practice has continued to a lesser extent not via 'military necessity' arguments, but based on the Jordanian Law for the Expropriation of Land for Public Purposes. Lustick cites examples whereby such private Palestinian lands 'were used solely for the benefit of Jewish settlements'. In a later HCJ challenge to this method of appropriation, the Court ruled that such land could not be seized when it was intended for the sole benefit of settlers (*Zoo Haderech*, May 20 1981). *Ibid.*, p. 572 and 576.

[1385] *Ibid.*, p. 568.

[1386] However, it is important to note that bypass road construction since 1994 has often occurred on privately held land through the declaration of 'military necessity'. See B'Tselem, *Land Grab*, p. 50. As in the case of pre-1979 civilian building projects, these roads have largely been created for the benefit of Israeli settlers and their state-sponsored guards, the Israeli occupying forces. The HCJ has upheld the government's justifications of these roads being essential for security in the *Wafa* case, *Wafa et al. v. Minister of Defence et al.*, HCJ 2717/96.

[1387] Order Regarding Government Property (Judea and Samaria), 31 July, 1967.

[1388] B'Tselem, *Land Grab*, p. 53.

[1389] *Ibid.*

[1390] See generally, Shehadeh, Part 1, pp. 11-30.

[1391] Lustick, pp. 568.

[1392] *Ibid.*

categorised as 'public',[1393] the only recourse is to military-appointed administrative tribunals tasked to advise the military commander. The burden of proof in such cases rested on Palestinian owners, who were required to show indisputable title through formal Jordanian title deeds[1394] in costly and complicated proceedings conducted mostly in Hebrew. Given the military tribunals' strict requirements about modes of land use, these formalities proved too onerous for many land owners, who then saw their 'state' lands turned over to settlement construction.

In contrast to rapid growth in Jewish settlements, development in Palestinian zones has been stifled. Zoning and municipality laws for Palestinians are a combination of Jordanian laws and military orders[1395] and municipal boundaries in the OPT were frozen in 1967 despite rapid natural population growth.[1396] Lands outside such zones are typically classified as agricultural lands or nature reserves and any construction on such lands is severely restricted.[1397] Under the Oslo Accords, Palestinian construction was only possible in Areas A and B, about 40 percent of the West Bank.[1398]

The picture in Jerusalem is much the same: it is estimated that between 1967 and 1995, 64,867 new housing units were built in the Municipality, only 8,890 of which for Palestinians.[1399] In addition, despite the pressures of an expanding population, no new Palestinian communities have been established since 1967 in the area.[1400] Where buildings have been constructed without the required permits, thousands of them have been destroyed in a concerted policy to stem development and punish Palestinian land owners through legal, administrative mechanisms. Particularly during periods of heightened unrest, house demolitions are common on 'security' grounds or as collective punishment where a link, often tenuous, is made between the building and an attack. Since 2002, the Israeli authorities have also used the absence of valid permits to destroy many properties during the construction of the Annexation Wall.

This systematic transfer of land from Palestinians to settlers is racially discriminatory in intent and effect because all settlers in the OPT, although usually referenced as 'Israeli', are Jewish. An exclusively Jewish demography in the settlements is secured partly through internal rules developed by the settlement movements and partly through their planning by Jewish-national institutions, whose bylaws and 'Covenant' require that their funds and services benefit only Jews yet which operate as 'authorised agencies' of the State (as discussed in section C.4, above).[1401] The body that approves settlement construction, the Joint Settlement Committee—jointly composed by the Jewish Agency and World Zionist Organisation (WZO)—is comprised of an equal number of relevant Israeli ministers and executive members of the WZO. The Ministry of Agriculture funds the WZO's Settlement Division and, until 1993, it was assisted by staff members from the Jewish Agency's

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[1393] For example, according to a report published in 1950 by the Ad Hoc Committee on the Palestinian Question to the United Nations General Assembly, only eight per cent of West Bank lands could be considered to be 'public lands'. *Ibid*., pp. 569.

[1394] Under the Jordanian Land Settlement Law of 1953.

[1395] For a general overview about town planning and development, see Coon, Chapter 5.

[1396] Military Order No. 194. COHRE and BADIL estimate that permits issued only satisfy 10 percent of the needs of an increasing population. See COHRE & BADIL, p. 120.

[1397] See generally Shehadeh, pp. 84-88. Another way of restricting land use is the classification of land as 'archaeological' through a revision of the Jordanian Antiquities Law. Shehadeh cites examples of lands deemed to have archaeological significance (and hence prohibitions on their development attached) being used later by settlers. *Ibid.*, p. 87.

[1398] COHRE & BADIL, p.121.

[1399] *Ibid*., p.125.

[1400] *Ibid*., p. 127.

[1401] See also Anthony Coon, *Town Planning under Military Occupation* (Aldershot: Dartmoth, 1992) pp. 172-173.

Settlement Department.[1402] A discrete legal sphere for Jewish settlers in the OPT is then secured through the dual legal system, as described in Chapter Three.

(II) H. Article 2(e) - Exploitation of the Labour of the Members of a Racial Group

(II) H.1 Interpretation

Almost all international human rights instruments prohibit slavery, servitude and forced labour.[1403] Convention (No. 29) Concerning Forced Labour of the International Labour Organisation 1930 defines 'forced or compulsory labour' as 'all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[1404] Exploitation is a broader term that can embrace conditions of extreme worker vulnerability, in which people are under-compensated for their work yet have no effective means of redressing poor wages or conditions.

(II) H.2 Practices in apartheid South Africa

The apartheid economy relied on the exploitation of black labour and many apartheid laws, particularly the Pass Laws and Group Areas Act, were designed to serve major industries, in particular the mining industry. The Bantu Laws Amendment Act of 1970 gave effect to the job reservation system, which reserved white collar work for non-blacks and confined employment opportunities of blacks at the lowest wage sectors.[1405]

The aim of the pass laws was largely to control labour, by confining black people's residence to segregated townships (or Bantustans) while securing their availability as low-wage workers to White-owned industries.[1406] All black labourers working outside the black areas (Bantustans) were designated as migrants. The effect of this was

> to use the pass system to balance white needs for security and labour, and additional legislation has been interwoven with it to form a 'daunting legal complex' establishing far reaching controls over African employment, housing, access to land and citizenship rights. Pass laws remain at the very centre of the legal complex, which has undergone continual adjustments as efforts are made to 'reform' the system without altering the existing distribution of power.[1407]

Migrant labourers were not in a position to bargain within the workplace and lacked any trade union representation. The Public Safety Act 3 of 1953 and later the Internal Security Act 74 of 1982 (which limited the rights to freedom of association and movement) effectively prohibited gatherings among workers that could foment dissent or the formation of trade unions. It was not until workers mobilised

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[1402] Although the Jewish Agency had been authorised to develop Jewish-only settlements beyond the Green Line, this role was handed over to the WZO in 1971 once the tax-free status of its US donations faced some obstacles. B'Tselem, *Land Gra*, p. 21.

[1403] P. Sieghart *The International Law of Human Rights* (Oxford Clarendon Press 1983), pp. 226-229.

[1404] Convention (No. 29) Concerning Forced Labour, adopted on 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session, entry into force 1 May 1932, Article 2, paragraph 1.

[1405] M. Legassick and D. Innes, 'Capital Restructuring and Apartheid: A Critique of Constructive Engagement' (1977) 76 *African Affairs* at 448-449; Wolpe 'South Africa: Class, Race and Occupational Structure' Collected Seminar Paper No.12 *The Societies of Southern Africa in the 19th and 20th Centuries*, Vol.2 (Institute of Commonwealth Studies, University of London, 1971), p. 103.

[1406] Owen Crankshaw 'Changes in the Racial Division of Labour during the Apartheid Era' (1996) 22 *Journal of Southern African Studies* 4 at 634.

[1407] Michael Savage 'The Imposition of Pass Laws on the African Population in South Africa 1916-1984' *African Affairs* (1986) Vol. 85, No. 339, 182.

effectively through underground associations that workers' representation was somewhat enabled through enactment of the Labour Relations Act 51 of 1982. This Act offered workers some rights regarding disputes over dismissals but did not relieve the fundamental inequalities that structured the labour sector.

Former nationalist MP and Deputy Minister of Justice, Mines and Planning G. F. Froneman referred to the migrant labour system as integral to the economic structure of apartheid. 'This is, in fact, the entire basis of our policy as far as the white economy is concerned.'[1408] This is echoed by an unequivocal statement by then Prime Minister B. J. Vorster who, in 1968, said 'We need *them* to work for *us*, but the fact that they work for us can never entitle them to claim political rights. Not now, nor in the future . . . under any circumstances.'[1409] The effect of segregated residential and work areas forced family members to live apart. Men were forced to live far away from their families in the Bantustans or the townships.[1410] Women remained with their children, though many living in townships were relied on domestic servant work in the White areas.[1411]

(II) H.3 Israeli practices in the OPT

Israel has no legal system of allotting particular jobs to different racial group. As discussed earlier, however, in regard to the right to work and pass laws, Israeli policies have restructured the Palestinian work force through the suppression of Palestinian industry, export restrictions, and other measures that have increased Palestinian dependency on jobs inside Israel.

Before the first intifada, Israel made extensive use of low-wage Palestinian labour, particularly for agriculture, construction, and other manual labour. Through the mid-1980s, over 100,000 Palestinian workers from the OPT crossed daily into Israel. This 'migrant' system mirrored some of the labour dynamics associated with South Africa's Group Areas Act and the Palestinian work force experienced much of the vulnerability and restrictions that black South African workers experienced under apartheid: low and insecure wages, lack of union representation, often substandard working conditions, employment confined to the lowest-wage jobs, prohibitions on living in the areas of their employment inside Israel, and forced by pass laws to return nightly to the OPT (or stay over illegally inside Israel). Since Palestinian workers were subjected to these conditions because they are not Jewish, the system of migrant Palestinian labour from the OPT constituted a form of labour exploitation on the basis of race (recalling the meaning of 'race' under international law, as discussed at the beginning of this chapter).

After the first intifada, however, Israel raised barriers to Palestinian employment inside Israel and since 1993 the number of Palestinians from the OPT (excluding East Jerusalem) working in Israel has dropped to a few thousand. During closures, this number becomes negligible or nil. For some years after 1993, during closures workers could still evade checkpoints and get over or around barriers to pass illegally into Israel. With the construction of the Wall as a continuous barrier around the West Bank, the number of workers able to enter Israel during closures has dropped to nearly nothing. Since the election of Hamas in January 2006, access by Palestinians in the Gaza Strip to work inside Israel has also dropped to insignificant numbers and now is effectively zero.

[1408] Cited in Godfrey Mwakikagile *Africa and the West* (Nova Publishers, 2000), p. 134.

[1409] Cited by Christopher Heywood in 'Transformation' *A History of South African Literature* (2004) Cambridge University Press, p. 156. [Emphasis added.]

[1410] Ellison Kahn, 'The Pass Laws', in Ellen Hellmann, (ed) Handbook of Race Relations in South Africa (Cape Town: Oxford University Press, 1949) pp. 279-91.

[1411] C. Simkins, 'The distribution of the African population of South Africa by age, sex and region-type: 1960-1980', SALDRU Working Paper No. 32, South African Labour Development Research Unit, Cape Town (January 1981).

As this loss of income has had severe effects on the Palestinian economy in both territories, it is a source of great concern to Palestinians and to the Palestinian Authority. Thus the continuing availability of Palestinian labour to be exploited remains a factor in the conflict. Rather than exploiting Palestinian labour for its low wages and vulnerability, Israel has appeared to exploit that very dependency by using access to jobs in Israel as a bargaining chip in negotiations with the Palestinian Authority.[1412]

(II) I. Article 2(f) – Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid

(II) I.1 Interpretation

Article 2(f) provides that repression of opposition to apartheid—that is, to a system of institutionalised racial domination—is one hallmark of an apartheid regime. In reviewing Israeli or any other state's practices in light of this section, however, a dilemma arises. Where a state has institutionalised racial domination as a comprehensive system of laws and practices implemented by state institutions—the defining quality of apartheid—opposition to those laws and practices could easily be equated with a threat to state security. Arguing that resistance to apartheid is illegitimate on grounds of sedition was a ploy of the apartheid government in South Africa (which often equated the anti-apartheid struggle with the global communist menace) and might be expected of any apartheid government. Nevertheless, distinguishing impartially between state actions to protect the state from sedition (legitimate) and actions to protect an apartheid regime (illegitimate) may still be difficult.

(II) I.2 Practices in apartheid South Africa

On 2 February 1990, South African President FW de Klerk announced at the annual opening of Parliament a commitment to a negotiated political settlement and the unbanning of the African National Congress (ANC), the Pan-Africanist Congress (PAC), the South African Communist Party and other organisations and the release of political prisoners, most notably Nelson Mandela. This event recalled years of political persecution and suppression by the apartheid Government.

The TRC found that 'in the period 1960–94, virtually all opposition was labelled "Communist" in its overwhelmingly negative 'Cold War' sense. Extra-parliamentary, and particularly black, opposition was considered illegitimate, and those associated with such opposition were effectively criminalised.'[1413] The apartheid government's efforts to suppress resistance to apartheid extended to a broad counter-insurgency strategy, sometimes called the 'total strategy', to repel the so-called 'total onslaught' of Soviet communism whose goal was believed to be the overthrow of the South African government.[1414] The TRC found that this approach reshaped the regime's entire approach to the resistance movement:

> The growing influence of counter-insurgency thinking – associated with South Africa's involvement in the wars in the former South West Africa and Rhodesia – had a substantial impact on the patterns and modes of abuse reported. In the first place, it introduced a regional dimension to gross violations of human rights. Victims were increasingly non-South Africans. Secondly, as the political temperature rose within South Africa, models of crowd control employed by both the SAP and the SADF were informed by a counter-insurgency perspective. Thus counter-insurgency thinking was turned not only on a foreign but on a domestic civilian population. Increasingly, gross violations were attributed to those

[1412] See B'tselem, 'Restrictions on Movement: The Paris Protocol', available at: http://www.btselem.org/English/Freedom_of_Movement/Paris_Protocol.asp.

[1413] Final Report of the TRC, Vol. 2, Ch. 1, p. 6.

[1414] Final Report of the TRC, Vol. 2, Ch. 1, paras. 108–124.

> responsible for public order policing, among them the riot police and later the SADF. Thirdly, counter-insurgency thinking legitimated and facilitated the emergence of covert units such as Vlakplaas, and resulted in an increase in the number of reported abductions and killings of political activists. This trend intensified from the mid-1980s, as the rationale of counter-revolutionary warfare took hold within dominant quarters of the security establishment.[1415]

State repression of opposition to apartheid included the practices cited earlier, such as arrests and torture, as well as more sweeping measures. In the early 1960s, the government banned the ANC and Pan-African Congress, which were forced underground in the early 1960s. In later decades, the apartheid government targeted both armed and nonviolent opposition to apartheid. The armed struggle was suppressed through broad definitions of outlawed conduct, including 'communism,' which was defined widely enough to include any doctrine or ideology considered undesirable by the state. 'Listed persons' could not be quoted, including those who had been defined as such under the Suppression of Communism Act of 1950, later to become the Internal Security Act in 1976. The *Government Gazette* detailed weekly inventories of publications (national and international) that were banned under the Publications Control Act, for their political content. National leaders and activists of the ANC were also targeted for extra-judicial persecution by the state police, through harassment, beatings, and killings. Such measures eliminated or terrorised many prominent anti-apartheid activists: for example, by beating some leaders to death (such as Black Consciousness leader Steven Biko), maiming others in letter bombs (such as lawyer Albie Sachs) or eliminating prominent activists by assassination (such as Communist Party and Umkhonto wa Sizwe leader Chris Hani).

(II) I.3 *Israeli practices in the OPT*

Security for the state of Israel is conflated with the security of state institutions that fund, enforce and implement the system of domination over Palestinians. Consequently, Palestinian resistance to the policies, practices, and institutions that enforce this system is treated as threats to state security.

Israeli practices falling under Article 2(a) of the Apartheid Convention, in particular, indicate an intention to persecute those opposed to Israel's system of domination over Palestinians in the OPT. As noted, Palestinian political leaders and activists have been subject to targeted extrajudicial killings, as well as torture and other cruel, inhuman, and degrading treatment in prisons. They are subject to arrest and detention because of their political views and membership of political parties, as noted in the analysis of both Article 2(a) relating to arbitrary arrest and illegal imprisonment, and Article 2(c) relating to freedom of expression, and freedom of association. By the end of March 2009, 45 members of the Palestinian Legislative Council – over one third of the democratically elected parliament – were imprisoned in Israeli jails, the majority of whom were convicted of membership of political parties designated as illegal by Israel, and eight of whom were administratively detained without charge or trial. The intent to repress political opposition to Israeli domination is clear.

Also relevant to Article 2(f) of the Apartheid Convention is the targeting and closure of charitable, educational and cultural organisations suspected of affiliation with Hamas or other banned political parties; restrictions imposed on human rights defenders who speak out against the actions of the Israeli armed forces and other instruments of occupation; and the widespread arrest campaigns and excessive use of force against Palestinian individuals and civil society organisations demonstrating against the Wall and the discriminatory administration of land, water and infrastructure in the OPT. Israel's practices in these regards are reviewed under the framework of Article 2(c) – in Part II.F) of this chapter – relating to the denial of the rights to freedom of expression and opinion, and to peaceful assembly and association. From these practices, it can surmised that Israel is engaged in persecuting Palestinians who express certain political views, criticise Israel's human rights practices or demonstrate against the occupation's measures of domination.

[1415] Ibid, p.8, para. 29.

(II) J. *Conclusion*

The analysis of apartheid in this report aimed to establish three things: (i) the definition of apartheid; (ii) the status of the prohibition of apartheid in international law; and (iii) whether Israel's practices in the OPT amount to a breach of that prohibition.

Though not defining the practice with precision, Article 3 of ICERD prohibits the practice of apartheid, as a particularly egregious form of discrimination. Subsequent legal instruments, primarily in the forms of the Apartheid Convention and the Rome Statute, have developed the norm against the practice of apartheid in two ways: first, they criminalise certain apartheid-related acts, thereby reflecting the evolution of the international community's views about the wrongfulness of the practice; and, second, they provide further elaboration of the definition of apartheid.

The substantive core of the definition of the practice of apartheid is reflected in the striking similarity in the terms used in the Apartheid Convention and the Rome Statute: the former criminalises "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them' while the latter criminalises inhumane acts committed in the context of and to maintain "an institutionalized regime of systematic oppression and domination by one racial group over any other racial group.' Both focus on the *systematic, institutionalised, and oppressive* character of the discrimination involved, and the purpose of domination that it entails. Indeed, the reason apartheid was singled out for mention in ICERD was because of its institutionalised character**,** and it is that character that is at the core of the definition.

It has been established in this study that the prohibition of apartheid, which addresses a particularly severe form of racial discrimination and amounts to a denial of the right to self-determination of the subordinate racial group, has assumed the status of customary international law, and, further, is established as a rule of *jus cogens* entailing obligations *erga omnes*.

Having clarified the definition of apartheid and the status of the norm prohibiting it, the principal function of this chapter was to briefly review apartheid practices in South Africa and appraise Israel's practices in the OPT in relation to the prohibition of apartheid. On the basis of the evidence presented, this study concludes that Israel has introduced a system of apartheid in the OPT, [1416] in violation of a peremptory norm of international law.

The language of the Apartheid Convention indicates that the list of 'inhuman acts' described in Article 2 as comprising the 'crime of apartheid' are intended as illustrative and inclusive, not as exhaustive or exclusive. That a narrower range of policies could constitute a case of apartheid is suggested by the history of apartheid South Africa, where, for example, Article 2(b) regarding the intended "physical destruction" of a group was not applicable. A broader potential range of policies is implied by the qualifier of "similar policies and practices … as practiced in southern Africa". The 'shall include…' wording of the Apartheid Convention also suggests that a positive finding of apartheid need not establish that all practices cited in Article 2 are present, or that precisely those practices are present, but rather that 'policies and practices of racial segregation and discrimination' form a comprehensive system that has not only the effect but the purpose of maintaining racial domination by one racial group over the other.

The construction of a 'racial group' is fundamental to the question of apartheid. The cumulative effect of the discussions in Part I.C) of this chapter—on the definition of 'racial' in international law, on the broad construction given to that term in ICERD, on the jurisprudence of the *ad hoc* international criminal tribunals on the interpretation of 'racial group', and on the perceptions (including self-perceptions) of Jewish identity and Palestinian identity—is to illustrate that Israeli Jews and Palestinian Arabs should be defined as distinct racial groups for the purposes of the definition of apartheid.

[1416] The conclusions of this report draw on the evidence of practice over the course of Israel's occupation of the OPT through April 2009.

Israel's status as a 'Jewish state' is inscribed in its Basic Laws, and it has developed legal and institutional mechanisms by which the state seeks to ensure an enduring Jewish character. These laws and institutions are channelled into the OPT to convey privileges to Jewish settlers and disadvantage Palestinians on the basis of their respective group identities. This domination is associated principally with transferring control over land in the OPT to exclusively Jewish use, thus also altering the demographic status of the territory. This discriminatory treatment cannot be explained or excused on grounds of citizenship, both because it goes beyond what is permitted by ICERD and because certain provisions in Israeli civil and military law provide that Jews present in the OPT who are not citizens of Israel also enjoy privileges conferred on Jewish-Israeli citizens in the OPT. In sum, the state of Israel exercises control in the OPT with the purpose of maintaining domination by Israeli Jews over Palestinian non-Jews. This system resembles that of apartheid.

Consequently, Israeli policies and practices that correspond to practices cited in Article 2 of the Apartheid Convention, Article 5 of ICERD, and Article 7(1) of the Rome Statute can be interpreted as serving the purpose of maintaining racial domination by one group over another. Summarising this report's discussion of the relevant practices with Article 2 of the Apartheid Convention as the guiding framework, the report has found the following:

- Article 2(a) regarding denial of the right to life and liberty of person is satisfied by Israeli measures serving to repress Palestinian dissent against the occupation and its system of domination. Israel's policies and practices include murder, in the form of targeted extrajudicial killings; torture and other cruel, inhuman or degrading treatment or punishment of detainees; a military court system that falls far short of international standards for fair trial; and arbitrary arrest and detention of Palestinians, including administrative detention imposed without charge or trial and lacking adequate judicial review. All of these practices are discriminatory in that Palestinians are subject to different legal systems and different courts, which apply different standards of evidence and procedure that result in harsher penalties than those applied to Jewish Israelis.
- Article 2(b) regarding 'the deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part' is not satisfied, as the Israel's policies and practices in the OPT are not found to have the intent of causing the physical destruction of the Palestinian people. Policies of collective punishment that entail grave consequences for life and health, such as closures imposed on the Gaza Strip that limit or eliminate Palestinian access to essential health care and medicine, fuel, and adequate nutrition, and Israeli military attacks that inflict high civilian casualties, are serious violations of international humanitarian and human rights law but do not meet the threshold required by this provision regarding the OPT as a whole.
- Article 2(c) regarding measures calculated to prevent a racial group from participation in the political, social, economic and cultural life of the country and to prevent the full development of a group through the denial of basic human rights and freedoms is satisfied on a number of counts:

  (i) Restrictions on the Palestinian right to freedom of movement are endemic, stemming from Israel's control of the OPT's border crossings, from the Wall in the West Bank, from a matrix of checkpoints and separate roads, and from obstructive and all-encompassing permit and ID systems.

  (ii) The right of Palestinians to choose their own place of residence within their territory is severely curtailed by systematic administrative restrictions on both residency and building in East Jerusalem, by discriminatory legislation that operates to prevent Palestinian spouses from living together on the basis of which part of the OPT they originate from, and by the strictures of the permit and ID systems.

  (iii) Palestinians are denied enjoyment of their right to leave and return to their country. Palestinian refugees now living in the OPT (approximately 1.8 million people) are not allowed to return to their homes, while Palestinian refugees outside Israel and the

OPT (approximately 4.5 million) are not allowed to return to either territory. Similarly, hundreds of thousands of Palestinians displaced from the West Bank and Gaza Strip in 1967 have been prevented from returning to the OPT. Many Palestinian residents of the OPT must obtain Israeli permission to leave the territory (which is often denied), political activists and human rights defenders are often subject to arbitrary and undefined 'travel bans', while many Palestinians who travelled abroad for business or personal reasons have had their residence IDs revoked and been prohibited from returning.

(iv) Israel denies Palestinians their right to a nationality by denying Palestinian refugees from inside the Green Line their right of return, residence, and citizenship in the state (Israel) governing the land of their birth. Israel's policies in the OPT also effectively deny Palestinians their right to a nationality by obstructing the exercise of the Palestinian right to self-determination and preventing the formation of a Palestinian state in the West Bank (including East Jerusalem) and Gaza Strip.

(v) Palestinians are restricted in their right to work, through Israeli policies that severely curtail Palestinian agriculture and industry in the OPT, restrict exports and imports, and impose pervasive obstacles to internal movement that impair access to agricultural land and travel for employment and business. Although formerly significant, Palestinian access to work inside Israel has been curtailed in recent years by prevailing closure policies and is now negligible. Palestinian unemployment in the OPT as a whole has reached almost 50 percent.

(vi) Palestinian trade unions exist but are not recognised by the Israeli government or by the Histadrut (the largest Israeli trade union) and cannot effectively represent Palestinians working for Israeli employers and businesses. Palestinian unions are also prohibited from functioning in Israeli settlements. Although they are required to pay dues, the interests and concerns of Palestinian workers are not represented by the Histadrut, and Palestinians have no voice in Histadrut policies.

(vii) The right of Palestinians to education is not impacted directly by Israeli policy, as Israel does not operate the school system in the OPT, but is severely impeded by military rule. Israeli military actions have included extensive school closures, direct attacks on schools, severe restrictions on movement, and arrests and detention of teachers and students. Israel's denial of exit permits, particularly for Palestinians from the Gaza Strip, has prevented thousands of students from continuing their education abroad. Discrimination in relation to education is striking in East Jerusalem, and is further indicated by a parallel Jewish-Israeli school system in illegal settlements throughout the West Bank, supported by the Israeli government.

(viii) Palestinians are denied the right to freedom of opinion and expression through censorship laws enforced by the military authorities and endorsed by the High Court of Justice. Palestinian newspapers must have a military permit and publications must be pre-approved by the military censor. Since 2001, the Israeli Government Press Office has drastically limited Palestinian press accreditation. Journalists are regularly restricted from entering the Gaza Strip and Palestinian journalists suffer from patterns of harassment, detention, confiscation of materials, and even killing.

(ix) The right to freedom of peaceful assembly and association is impeded through military orders. Military legislation bans public gatherings of ten or more persons without a permit from the Israeli military commander. Non-violent demonstrations are regularly suppressed by the Israeli army with live ammunition, tear gas, and arrests. Most Palestinian political parties have been declared illegal and institutions associated with those parties, such as charities and cultural organisations, are regularly subjected to closure and attack.

(x) The prevention of full development in the OPT and participation of Palestinians in political, economic, social and cultural life is most starkly demonstrated by the effects of Israel's ongoing siege and regular large-scale military attacks on the Gaza Strip.

- Article 2(d) relating to division of the population along racial lines, is satisfied in the following ways:

  (iii) Israeli policies have divided the OPT into a series of non-contiguous enclaves or 'reserves' into which Palestinians are effectively confined. Israel has further fragmented the West Bank by creating zones of land for exclusively Jewish use, to which Palestinian entry is prohibited without a permit, as well as by banning Israeli travel into Palestinian zones. The Wall and its infrastructure of gates and permanent checkpoints suggest Israel's intention to impose a system of permanent cantons in which residence and passage will be determined by racial identities. A deliberate state policy of racial discrimination is indicated further by the role of Israeli government ministries, as well as the World Zionist Organisation and other Jewish-national institutions operating in partnership as authorised agencies of the State, in planning, funding and implementing construction of the West Bank settlements and their infrastructure for exclusively Jewish use.

  (iv) Israeli law does not formally prohibit mixed marriages between Jews and Palestinians, but the proscription of civil marriage in Israeli law and the authority of religious courts in matters of marriage and divorce, coupled with restrictions on where Jews and Palestinians can live in the OPT, present major practical obstacles to any potential mixed marriage.

  (v) Israel has extensively appropriated Palestinian land in the OPT for exclusively Jewish use. Private Palestinian land comprises about 30 percent of the land unlawfully appropriated for Jewish settlement in the West Bank. Presently, approximately 40 percent of the West Bank is completely closed to Palestinian use, with significant restrictions on access to much of the rest of it.

- Article 2(e) relating to exploitation of labour is today not significantly satisfied, as Israel has raised barriers to Palestinian employment inside Israel since the 1990s and Palestinian labour is now used extensively only in the construction and services sectors of Jewish-Israeli settlements in the OPT. Otherwise, exploitation of labour has been replaced by practices that fall under Article 2(c) regarding the denial of the right to work.

- Arrest, imprisonment, travel bans and the targeting of Palestinian parliamentarians, national political leaders and human rights defenders, as well as the closing down of related organisations by Israel, represent persecution for opposition to the system of Israeli domination in the OPT, within the meaning of Article 2(f).

In sum, Israel appears clearly to be implementing and sustaining policies intended to maintain its domination over Palestinians in the OPT and to suppress opposition of any form to those policies.

While the comparative analyses of South African apartheid practices threaded throughout this chapter are there to illuminate, rather than define, the meaning of apartheid, and while there are certainly differences between apartheid as it was applied in South Africa and Israel's policies and practices in the OPT, the two systems can be defined by similar dominant features.

Part I.D of this chapter spoke to the key legislative foundations underpinning the South African apartheid regime: especially, the troika of laws—the Population Registration Act 1950, the Group Areas Act 1950, and the Pass Laws[1417]—which laid the foundations for an institutionalised apartheid

[1417] *Inter alia*, the Native Laws Amendment Act 1952, the Natives (Abolition of Passes and Co-ordination of Documents) 1952, the Natives (Urban Areas) Amendment Act 1955, the Bantu (Urban Areas) Consolidation Act.

policy. These laws, respectively, allowed the apartheid regime to categorise the population along racial lines, segregate the population on the basis of those categorisations into different geographic areas allocated to different racial groups, and restrict passage by members of any group into the area allocated to other groups and thus any contact between groups that might ultimately compromise white supremacy. This strategy, called 'grand apartheid' by its South African architects, was then buttressed by two further pillars of apartheid: a pervasive system of institutionalised racial discrimination, which prevented the enjoyment of basic human rights by non-white South Africans based on their racial identity under the Population Registration Act, and a matrix of draconian 'security' laws and policies that were employed to suppress any opposition to the regime and to reinforce the system of racial domination, including administrative detention, torture, censorship, banning, and extra-judicial killing.

The analysis in Part II of this chapter demonstrates that Israel's practices in the OPT can be defined by the same three 'pillars' of apartheid:

The first pillar derives from how Jewish identity is codified in Israeli law and how Israeli law then extends preferential legal status and material privileges to Jewish settlers in the OPT on the basis of their Jewish identity and discriminate against Palestinians on the basis of the inferior status afforded to them. The review of Israel's practices under Article 2(c) of the Apartheid Convention provides abundant evidence of such discrimination in realms such as freedom of movement and residence and the right to leave and return to one's country. The 2003 Citizenship and Entry into Israel Law banning family unification, the application of Israeli civil law to Jewish settlers in the OPT who are not Israeli citizens on grounds of their Jewish identity, and the denial of the Palestinian right to nationality through the 1950 Law of Return and 1952 Citizenship Law are particularly egregious examples of legislation that confers benefits to Jews over non-Jews and illustrate the adverse impact of having the status of Palestinian Arab. That inferior status is further highlighted through the application of a harsher set of laws and different courts for Palestinians in the OPT than for Jewish-Israeli settlers.

The 'Grand Apartheid' policy to segregate the population into different geographic areas is evidenced by Israel's extensive control of Palestinian land, which continues to shrink the territorial space available to Palestinians; by the hermetic closure and isolation of the Gaza Strip from the rest of the OPT; by the deliberate severing of East Jerusalem from the rest of the West Bank; and by the appropriation and construction policies serving to carve up the West Bank into an intricate and well-serviced network of connected settlements for Jewish-Israelis, and an archipelago of besieged and non-contiguous enclaves for Palestinians. That these measures are intended to segregate the population along racial lines in violation of Article 2(d) of the Apartheid Convention is clear from the visible web of walls, separate roads, and checkpoints and from the invisible web of permit and ID systems, comparable to South Africa's Pass Laws, that combine to ensure that Palestinians remain confined to the reserves designated for them while Israeli Jews are prohibited from entering those reserves but enjoy freedom of movement throughout the rest of the Palestinian territory. Much as the same restrictions functioned in apartheid South Africa, this policy has the effect of crushing Palestinian socio-economic life, securing Palestinian vulnerability to Israeli economic dominance, and of enforcing a rigid segregation of Palestinian and Jewish populations

The third pillar upon which Israel's system of apartheid in the OPT rests is its 'security' laws and policies. The extrajudicial killing, torture and cruel, inhuman or degrading treatment and arbitrary arrest and imprisonment of Palestinians, as described under the rubric of Article 2(a) of the Apartheid Convention, are all justified by Israel on the pretext of security. These policies are state-sanctioned, often approved by the Israeli judicial system, and supported by an oppressive code of military laws and a system of improperly constituted military courts. This report finds that Israel's invocation of 'security' to validate sweeping restrictions on Palestinian freedom of opinion, expression, assembly, association and movement also often purport to mask a true underlying intent to suppress dissent and maintain control over Palestinians as a group.

Thus, while the individual practices listed in the Apartheid Convention do not in themselves define apartheid, they have been shown in this chapter not to occur in the OPT in a vacuum, but to be

integrated and complimentary elements of an institutionalised and oppressive system of Israeli domination and oppression over Palestinians as a group; that is, a system of apartheid.

The legal consequences of such a conclusion—for Israel, for the Palestinians, for third states, and for international organisations—will be addressed more fully in Chapter VI. In particular, that chapter will set forth the basis and contours of the legal obligations incumbent on the international community of states as a whole in respect of commission by Israel of an internationally wrongful act which, as both an especially heinous form of racial discrimination and an infringement of the right to self-determination, entails obligations *erga omnes*.

Chapter V
Conclusion: Findings and Legal Implications

A. Summary Findings

Both colonialism and apartheid are prohibited by international law. This Report has found strong evidence to indicate that Israel has violated, and continues to violate, both prohibitions in the occupied Palestinian territories.

Israel's denial of the Palestinian right to self-determination is comprehensive. It has shown an intention to violate the territorial integrity of the occupied Palestinian territories through its claim to annex East Jerusalem and through its settlement policy. Both are illegal in themselves, demonstrating an intention to acquire territory through the use of force. In addition, the settlement policy violates Article 49(6) of the Fourth Geneva Convention. Israel has overreached the authority that it possesses under the law of occupation to govern the territories. It has exceeded its lawful authority to legislate for the OPT and has prevented the protected population from exercising political authority. It has deliberately adopted measures that have obliterated the separation between its economy and infrastructure and that of the occupied Palestinian territories: this separation is required by international law in order to prevent the unlawful annexation of occupied territory. Israel has also violated the Palestinians' right to permanent sovereignty over natural resources through its discriminatory appropriation of land and water resources. In short, Israel has adopted and implemented colonial practices that have denied the population of the occupied Palestinian territories the opportunity freely to determine its political status and freely pursue its economic, social and cultural development.

Israel has also introduced a system of apartheid in the occupied Palestinian territories. As the precedent of Namibia demonstrates, a State may breach the prohibition of apartheid in territory that lies beyond its borders but which is under its jurisdiction. International law defines apartheid not as isolated acts of unlawful racial discrimination but rather as a system of acts designed to establish and maintain the domination of one racial group over another. In the OPT, Jewish and Palestinian identities function as racial identities in the sense provided by ICERD, the Apartheid Convention, and the jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia. Israel's domestic laws and institutions are channelled into the OPT to convey special rights and privileges to Jewish settlers while denying fundamental rights and freedoms to Palestinians. Domination by the Jewish group is associated principally with transferring control over land in the OPT to exclusively Jewish use, dividing the population of the territory into Jewish and Palestinian enclaves, and restricting movement on discriminatory grounds and disadvantaging Palestinians in all areas of economic, social and political life. This discriminatory treatment cannot be justified or excused on grounds of citizenship. Consequently, this study finds that the State of Israel exercises control in the OPT with the purpose of maintaining a system of domination by Jews over Palestinians and that this system constitutes a breach of the prohibition of apartheid.

This study's findings of colonialism and apartheid do not supersede, negate or affect other grounds for assessing Israel's occupation as unlawful. The precedent of Namibia confirms that a State may breach the prohibition on apartheid in territory that it controls beyond its own borders. Mindful of the right of the Namibian people to self-determination;[1418] of the fact that South Africa's presence in Namibia had outlived its legitimate Mandate;[1419] of South Africa's

[1418] See, *inter alia*, General Assembly Resolution 2145 (XXI) of 27 October 1966.

[1419] General Assembly Resolution 2145 (XXI) of 27 October 1966; Security Council Resolution 264 (1969) of 20 March 1969; Security Council Resolution 276 (1970) of 30 January 1970.

"policy of colonial exploitation" in Namibia;[1420] and of "the evil and abhorrent policies of apartheid and the measures being taken by the Government of South Africa to enforce and extend those policies beyond its borders";[1421] the UN General Assembly, Security Council and the International Court of Justice all found that South Africa's continued occupation of Namibia was illegal and that South Africa was "under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory."[1422] This study's conclusion that Israel is breaching the international legal prohibition on apartheid, when considered in light of its prolonged occupation and colonial practices in the OPT in violation of the Palestinian right to self-determination, suggests that similar legal consequences may result.

It must be nevertheless be stressed that the occupied Palestinian territories remain occupied and Israel's duty to conform to the body of international law that regulates occupation is undiminished, along with its duty to remedy the illegal situation it has created through its colonial and apartheid practices. Israel's observance of the law of occupation is primarily an issue of concern for it and the occupied population. Israel's duty to fulfil its obligations under international humanitarian law is held in parallel with its duty to comply with the international legal norms that prohibit colonialism and apartheid. Further, States parties to the Fourth Geneva Convention, in accordance with Article 1, are under the obligation to ensure that Israel complies with its requirements.[1423] Accordingly, not only is Israel bound to desist from its unlawful practices under the internationally accepted rules on State responsibility, but members of the international community are equally bound to take appropriate action to ensure that Israel complies with its duties as a member of the United Nations and as a party to the Fourth Geneva Convention.

B. Legal Implications of the Findings

This study concludes that Israel—through actions in the OPT that are attributable to the State—is delictually responsible under the rules of State responsibility for wrongful acts of apartheid and colonialism, as detailed in Chapters Three and Four. Colonialism amounts to a denial of self-determination, whereas apartheid is an egregious form of racial discrimination that itself constitutes a denial of self-determination.

International law is inherently biased towards the protection of State interests. Although the Palestinian people has some international status because of its entitlement to self-determination, the remedies available to it on the international sphere are limited, and principally lie in recourse to human rights bodies in attempts to ensure that Palestinian rights are respected. There exists some support for the claim that when an occupied population also finds itself under colonial domination, it has a right to resist this foreign occupation and colonial domination in pursuit of the exercise of its right to self-determination.[1424]

[1420] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Advisory Opinion of 21 June 1971, Separate Opinion of Vice-President Ammoun, para. 19.

[1421] Security Council Resolution 282 (1970) of 23 July 1970.

[1422] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Advisory Opinion of 21 June 1971, para. 133.

1423.See *Wall* advisory opinion, ICJ Rep, 2004, 200, para.159: it may be recalled that the International Committee of the Red Cross claims that all States are now parties to the 1949 Geneva Conventions.

[1424] UN Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 of 24 October 1970.

The relative absence of remedies available to the right-bearer does not, however, have the consequence that Israel's obligations are lessened or extinguished. The conclusion that Israel has breached the international legal prohibitions of apartheid and colonialism in the OPT suggests that the occupation itself is illegal on these grounds. The legal consequences of these findings are grave and entail obligations not merely for Israel but also for the international community as a whole. Both are contrary to public international law and both involve breaches of peremptory (*jus cogens*) norms that have inescapable consequences for all States. States cannot purport to justify or excuse a violation of these peremptory prohibitions and all States have a legitimate interest in ensuring that such violations do not occur. What legal consequences of this finding then arise for other States and competent intergovernmental organisations?

1. Criminal Responsibility of Individuals and States

As was stated at the outset, this Report does not address the question of whether individuals might bear criminal responsibility under international law for the activities it has scrutinised. Nor has it considered possible criminal penalties or civil liabilities that private non-State actors—such as corporations—might bear as a consequence of their involvement in the activities examined. Essentially, these would arise under domestic law, although international law may be relevant in determining how that law should be applied.

Rather, this study has focused on the question of State responsibility. In that respect, it serves no legal purpose to note that Israel's responsibility may be perceived by its victims to arise from the 'criminal' nature of the apartheid and colonial practices as confirmed, *inter alia*, by treaties dealing with serious international crimes, such as the Rome Statute of the International Criminal Court. Such treaties speak only to individual criminal responsibility.

In its study of the responsibility of States for internationally wrongful acts, the International Law Commission (ILC) initially provided for State criminal responsibility by adopting a draft Article which stated:

> An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole, constitutes an international crime.[1425]

Examples of State crimes given by the ILC at that time included 'colonial domination' and 'apartheid'. However, the ILC ultimately dropped the notion of State criminal responsibility from its 2001 Articles, due to opposition to the inclusion of this concept by some States.[1426] It opted instead for a special regime regulating serious violations of peremptory norms that did not involve State criminal responsibility.[1427]

[1425] Reproduced, with commentary, at http://www.lcil.cam.ac.uk/Media/ILCSR/Arts.htm#A19. The notion of State crime was first proposed in 1976 and was retained by the International Law Commission in Article 19 in its first reading of the Draft Articles on State Responsibility of 1996 (see Report of the ILC (1996) *GAOR* 51st Session (1998) 37 *ILM* 440. See also John Dugard, *International Law – A South African Perspective*, 3rd Edition, 2007 at 269 to 270.

[1426] See James Crawford , *The International Law Commission's Articles on State responsibility: introduction, text and commentaries* (Cambridge: Cambridge UP, 2002), pp. 16 -20: the status of draft Article 19.2, regulating crimes of State, had been placed in abeyance in 1998 by the Commission, ibid, 27.

[1427] See further discussion below on the special regime (represented by articles 40 and 41 of the 2001 Articles on State Responsibility) for the violation of peremptory norms not involving State criminal responsibility.

Nevertheless, although States viewed the concept of State responsibility as controversial, its excision from the ILC Articles was not intended to indicate, as a matter of law, that this category of crimes does not exist.[1428] After this substitution had been made, Japan commented that 'the text... is still haunted by the ghost of "international crime"'. It has been argued that the notion of serious breaches of peremptory norms defined in Article 40 and the discarded notion of State crimes in fact refer to the same thing. Wyler, for example, has termed them 'the twin brothers of horror'.[1429]

2. Responsibility of States

The Charter of the United Nations obliges member States to promote 'universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. The content of the human rights to be protected was subsequently spelt out in a variety of instruments and the right to bring a claim for a violation of internationally recognised human rights is well established in various human rights declarations and treaties.

For example, Article 8 of the Universal Declaration of Human Rights[1430] states that, '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. Similarly, Article 2(3)(a) of the International Covenant on Civil and Political Rights[1431] states that, '[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity…'.[1432] Article 6 of the UN Convention on the Elimination of All Forms of Racial Discrimination[1433] provides that, 'States Parties shall assure to everyone within their jurisdiction effective protection and remedies… against any acts of racial discrimination which violate his human rights… as well as the right to seek from such tribunals just and adequate reparation or

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[1428] See International Law Commission, *Report on the work of its Fifty-Second session*, UN Doc.A/55/10 (2000), 59, paras. 360-362, available at: http://untreaty.un.org/ilc/reports/2000/repfra.htm; (also II(2) YbILC 59, paras. 360-362 (2000)). There is an extensive literature on crimes of States: see, for instance, Georges Abi-Saab, 'The uses of Article 19' (1999) 10 *European Journal of International Law* 339; Ian Brownlie, *International law and the use of force by States* (Oxford: Clarendon Press, 1963), pp. 150-166, and *System of the law of nations. State responsibility (Part One)* (Oxford: Clarendon Press, 1983), pp. 32-33; Giorgio Gaja, 'Should all references to international crimes disappear from the ILC draft articles on State responsibility?' (1999) 10 *European Journal of International Law* 365; Andre de Hoogh, *Obligations erga omnes and international crimes* (The Hague: Kluwer, 1996); Alain Pellet, 'Can a State commit a crime? Definitely, yes!' (1999) 10 *European Journal of International Law* 425; Shabtai Rosenne, 'State responsibility and international crimes: further reflections on Article 19 of the draft articles on State responsibility' (1997-98) 30 *New York University JILP* 145; Christian Tomuschat, 'International crimes by States: an endangered species?', in Karel Wellens (ed.), *International law: theory and practice. Essays in honour of Eric Suy* (The Hague: Nijhoff, 1998), p. 253; and Joseph Weiler et al (eds.), *International crimes of State* (Berlin: de Gruyter, 1989), Part Two.

[1429] Eric Wyler, 'From "State crime" to responsibility for serious breaches of obligations under peremptory norms of general international law' (2002) 13 *European Journal of International Law* 1147 at 1159.

[1430] General Assembly Resolution 217A (III).

[1431] General Assembly Resolution 2200 A (XXI), annex.

[1432] For a review of the jurisprudence of the Human Rights Committee of the ICCPR on the question of reparations, see Catherine Jenkins 'After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa' (2000) 16 *South African Journal on Human Rights* 421 at 423-9.

[1433] ILM (1966) 5 352.

satisfaction for any damage suffered as a result of such discrimination'. Article 14 of the UN Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment[1434] requires each State party to, 'ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensations, including the means for as full rehabilitation as possible'.[1435]

Further, as the International Court of Justice (ICJ) held in its advisory opinion on the *Legal consequences of the construction of a wall*, Israel is required to observe not only human rights law but also the strictures of international humanitarian law.

a. Responsibility of Israel

The legal consequences arising from an internationally wrongful act are not uniform. Under the international law of State responsibility, Israel bears the greatest responsibility for remedying the illegal situation it has created, for instance by making reparations to victims of the human rights violations inflicted by Israel's apartheid and colonial practices.

The rules of international law regarding State responsibility were codified in the 2001 Articles on State Responsibility adopted by the International Law Commission (ILC).[1436] In Chapter II of the Articles,[1437] the ILC stipulates that one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. The general rule is that the only conduct attributable to the State on the international level is that of its official organs or of others who acted under the direction, instigation or control of those organs. This general rule embraces the conduct of all States who through their agencies involve themselves in acts prohibited by international law, including apartheid and colonialism.

[1434] 24 International Legal Materials 535 (1985).

[1435] For a review of the jurisprudence of the UN Committee against Torture on reparations, see Jenkins op cit 429-430.

[1436] The 2001 Articles were approved, without vote, by the General Assembly in resolution 56/83 (12 December 2001), UN Doc.A/RES/56/83, operative paragraph 3 of which provided: '*Takes note* of the articles on the responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.'

This approval followed the recommendation of the International Law Commission that the General Assembly take note of the Articles and subsequently decide whether to convene a diplomatic conference with a view to conclude a convention on State responsibility. See International Law Commission, Report on the work of its Fifty-Third session, UN Doc.A/56/10 (2001), 38-41 and 42, paras.61-67 and 72-73; and also Crawford J, *Articles on State responsibility*, pp. 58-60. In 2004, the General Assembly reconsidered this matter, and decided to defer its decision. See James Crawford and Simon Olleson, 'The continuing debate on a UN Convention on State Responsibility' (2005) 54 *International and Comparative Law Quarterly* 959. The General Assembly has since adopted resolution 62/61 (8 January 2008), UN Doc.A/RES/62/61, in which it, once again, commended the Articles to the attention of States, 'without prejudice to the question of their future adoption or other appropriate action' (operative paragraph 1), and included on the provisional agenda of its sixty-fifth session consideration of whether a convention should be adopted, or other appropriate action be taken, on the basis of the Articles (operative paragraph 4). See also David Caron, 'The ILC Articles on State responsibility: the paradoxical relationship between form and authority' (2002) 96 *American JIL* 857.

[1437] The Articles deal with responsibility in a logical sequence, starting with a definition in Chapter I of the basic principles of responsibility, and moving on in Chapter II to define the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned.

The United Nations has paid particular attention to the issue of reparations, through the work of a series of Special Rapporteurs.[1438] Their work subsequently developed into the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly on 16 December 2005.[1439] According to the *Basic Principles,* States are obliged to respect, ensure respect for, and enforce the norms of both international human rights law and humanitarian law that are contained in customary international law, as well as in the treaties to which a particular State is party. States must prevent violations; investigate any violations which do occur and, where appropriate, take action against the violator in accordance with domestic and international law; provide victims with equal and effective access to justice; provide appropriate remedies to victims; and provide for or facilitate reparations to victims.[1440]

Reparation to victims is thus recognised as an integral part of the obligations of States under international human rights law and humanitarian law. As stated above, in terms of the *Basic Principles*, a State has the obligation to ensure respect for human rights, which includes the duty to prevent violations, to investigate violations, to take appropriate action against the violators and to afford remedies to victims. Where there has been a violation of internationally recognised human rights, a State has responsibility to make just and adequate reparation to all persons within the jurisdiction of the offending State. Reparation should respond to the needs and wishes of the victims and be proportionate to the gravity of the violation and the resulting harm. It should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In addition to providing reparation to individuals, States should make adequate provision for collective reparations to groups of victims and special measures should be taken to afford opportunities for self-development and advancement to groups which, as a result of human rights violations, have been denied such opportunities.[1441] These are the more obvious responsibilities that Israel bears as the violating State.

b. Responsibility of Other States

The prohibitions concerning colonialism and apartheid are peremptory norms; all States have a legitimate interest that they be observed and have obligations consequent upon their breach

While the ILC ultimately dropped the notion of State criminal responsibility from its 2001 Articles for acts such as apartheid and colonial domination, as stated above, it nonetheless accepted that violations of peremptory norms were of particular concern to the international community as a whole, and opted instead for a special regime for the violation of peremptory norms.[1442] This is contained in Articles 40 and 41 of the ILC's 2001 *Articles on Responsibility of States for Internationally Wrongful Acts*. Article 40 provides:

[1438] Theo Van Boven was appointed Special Rapporteur in 1989 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Sub-Commission suggested that international standards needed to be developed and remaining gaps filled to ensure that victims of gross violations in particular would have an enforceable right to restitution, compensation and rehabilitation. See T van Boven, *Final Report on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms,* UN Doc No E/CN 4/Sub 2/1993/8 (2 July 1993). Van Boven's study was taken forward by the UN through the appointment of M Cherif Bassiouni, an expert on reparations.

[1439] General Assembly Resolution A/Res/60/147.

[1440] See Articles 1-3 of the Basic Principles.

[1441] Basic Principles, articles 15 to 23.

[1442] See International Law Commission, *Report of the work of its 53rd session*, UN Doc.A/56/10, *Commentary to Chapter III of its 2001 Articles on Responsibility of States for Internationally Wrongful*

> 1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
>
> 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

The consequences of a serious breach of an obligation arising under a peremptory norm of general international law are set out in Article 41, which provides:

> 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.
>
> 2. No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.
>
> 3. This Article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

The significance of these consequences is that they are multilateral and imposed on all States, as opposed to the remedies which may arise for a State directly injured by the internationally wrongful act of another.

As yet, relatively little judicial attention has been paid to Articles 40 and 41, and their precise contours are yet to be developed. In the ICJ's *Wall* advisory opinion, Judge Kooijmans was mystified over the substantive content of the duty not to recognise an illegal act imposed on States by Article 41.[1443] In the Inter-American Court of Human Rights, Judge Cançado Trindade deemed these Articles under-developed:

> The relatively succinct treatment of grave violations—and their consequences—of obligations under mandatory norms of general International Law (Articles 40-41) in the ILC's Articles on the Responsibility of the States (2001) reveals the insufficient conceptual development of the matter up to our days, in an international community that is still seeking a greater degree of cohesion and solidarity.[1444]

Nevertheless, the ICJ's ruling in the *Wall* advisory opinion echoes the terms of these two Articles[1445] and both have been affirmed by domestic supreme courts.[1446] For example, the

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Acts (henceforth ILC Report), p. 110, available at: http://untreaty.un.org/ilc/reports/2001/2001report.htm; II(2) *Yearbook of the International Law Commission* (henceforth *Yearbook*) (2001) UN Doc.A/CN.4/SER.A/2001/Add.1 (Part 2), *Commentary to Chapter III*, 110; and Crawford, *State responsibility*, *Commentary to Chapter III*, p. 242.

[1443] *Wall* advisory opinion, ICJ Rep, 2004, 136, separate opinion of Judge Kooijmans, 219 at 231-232, paras.40-45, especially at 232, para.44.

[1444] *Myrna Mack Chang v Guatemala*, Inter-American Court of Human Rights (25 November 2003), Ser.C, No.101, [2003] IACHR 4, Opinion of Judge Cançado Trindade, para. 8, note omitted, available at: www.worldlii.org/int/cases/IACHR/2003/4.html#fn1.

[1445] Paragraph 159 provides that, 'Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction': Simon Olleson, *The impact of the ILC's Articles on responsibility of States for internationally wrongful acts*, (London: BIICL, 2007), pp. 237-241: available at www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf.

[1446] Article 40 was affirmed by the German Federal Constitutional Court in case No.2 BvR 955/00 (26 October 2004), see *Responsibility of States for internationally wrongful acts: comments and information received from Governments*, UN Doc.A/62/63 (9 March 2007), statement of Germany, 7 at

German Federal Constitutional Court referred implicitly to Article 41 in a 2004 decision[1447], stating:

> The concept of peremptory rules of public international law has recently been affirmed and further developed in the articles of the International Law Commission on the law of State responsibility...This field of law is a core area of general international law that governs the (secondary) legal consequences of a State's violation of its (primary) obligations under international law. Article 40 (2) of the International Law Commission articles on the responsibility of States contains the definition of a serious violation of *ius cogens* and obliges the community of States to cooperate in order to terminate the violation using the means of international law. In addition, a duty is imposed on States not to recognize a situation created in violation of *ius cogens*.[1448]

Furthermore, academic research has supported its customary status. For example, Gattini[1449] convincingly argues that Article 41 is declaratory of existing customary international law.

By its nature and definition in the Apartheid Convention, apartheid is a 'systematic failure' to observe an international obligation within the terms of Article 40.2. It does not lie in isolated acts of racial discrimination, but is constituted by a systematic programme undertaken by one racial group to oppress any other. In its commentary to Article 40, the ILC observed that:

> To be regarded as systematic, a violation would have to be carried out in an organised and deliberate way. In contrast, the term 'gross' refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims.[1450]

As this Report has demonstrated, Israel's violation of the prohibition of colonialism may readily be described as a 'direct and outright assault' on the exercise of the Palestinian people's right to self-determination. The ICJ declared in the *East Timor* case that self-determination is 'one of the essential principles of contemporary international law'.[1451] In the *Wall* advisory opinion, it ruled that self-determination was a right *erga omnes*, that is, an obligation owed to the international community as a whole, and whose realisation all United

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15-17, paras.33-38. It was also affirmed by the United Kingdom House of Lords in *A and others v Secretary of State for the Home Department No.2*, [2005] UKHL 71 (8 December 2005), opinion of Lord Bingham of Cornhill, para.34. Further, in *R (on the application of Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, [2006] EWHC 972 (Admin) (4 May 2006), the English Divisional Court noted and affirmed a ministerial reliance on Articles 40 and 41, see opinion of Lord Justice Latham, paras.69-70.

[1447] The case concerned the expropriation of land without compensation in the Soviet Zone of Occupation between 1945 and 1949.

[1448] See Report of the Secretary-General, *Responsibility of States for internationally wrongful acts: comments and information received from Governments*, UN Doc.A/62/63 (9 March 2007), comments by Germany, 15-16, para.36: for an account of this case, see 15-17, paras.33-38.

[1449] Andrea Gattini, 'A return ticket to '*communitarianism*', please' (2002) 13 *European Journal of International Law* 1181 at 1185-1195.

[1450] ILC Report, *Commentary to Article 40*, 113, para. 8; *Yearbook* (2001), *Commentary to Article 40*, UN Doc.A/CN.4/SER.A/2001/Add.1 (Part 2), 113, para. 8; and also Crawford, *State responsibility, Commentary to Article 40*, p. 247, para. 8.

[1451] *East Timor case* (Portugal v Australia), ICJ Rep, 1995, 90 at 102, para.29.

Nations member States,[1452] as well as all States parties to the UN Covenants on Human Rights, have the duty to promote.[1453] The ILC's exegesis of the Court's jurisprudence concludes that self-determination has *ius cogens* status.[1454]

Israel's colonial practices in breach of Palestinian self-determination are equally as systematic as its practices of apartheid. Its settlements policy is not a series of isolated acts but a concerted enterprise, buttressed by the construction of roads and the wall. This policy is designed to fragment the territorial sphere in which the Palestinians seeks to exercise their right to self-determination through the establishment of an independent, sovereign, and viable State. Israel's discriminatory appropriation of natural resources, principally land and water, violates the principle of permanent sovereignty over natural resources, which is the principal expression of the economic aspect of self-determination. This principle has also been violated by the intentional integration of the Palestinian economy and infrastructure into that of Israel. Accordingly, different components of the principle of self-determination have been targeted in 'an organised and deliberate way,' thereby meeting the threshold set by the ILC for the application of Article 40. The consequences for third States that arise from these breaches are clear: they must cooperate to bring these violations to an end, and must not recognise as lawful the situation created by these violations, or render aid or assistance in maintaining that situation. This last consequence is also dictated by Article 16 of the ILC's Articles, which provides that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that State.

Faced with a serious breach of peremptory norms—in the case at hand, Israel's introduction of an apartheid system within the occupied Palestinian territories and its colonial practices, which amount to a comprehensive denial of self-determination—Article 41 imposes two broad and distinct obligations on all States, 'whether or not they are individually affected by the serious breach':[1455] namely the duty to cooperate and the duty of abstention. Further, should a State fail to fulfil its duty of abstention then, under certain circumstances, it might also become complicit in the commission of the initial internationally wrongful act under the terms of Article 16 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts.[1456]

[1452] By virtue of General Assembly resolution 2625 (XXV)(24 October 1970). In the *Nicaragua case*, the International Court ruled that resolution 2625 expressed rules of customary international law – see *Military and paramilitary activities in and against Nicaragua case: merits judgment* (Nicaragua v United States), ICJ Rep, 1986, 14 at 99-100, para.188: see also *Wall* advisory opinion, ICJ Rep, 2004, 171, para. 87.

[1453] *Wall* advisory opinion, ICJ Rep, 2004, 171-172, para. 88: see also 199, paras. 155-156.

[1454] ILC Report, *Commentary to Article 40*, p. 112, para.5; *Yearbook* (2001), *Commentary to Article 40*, p. 112, para. 5; and also Crawford, *State responsibility*, *Commentary to Article 40*, pp. 246-247, para. 5.

[1455] ILC Report, *Commentary to Article 41*, p. 114, para. 3; *Yearbook* (2001), *Commentary to Article 41*, p. 114, para. 3; and Crawford, *State responsibility*, *Commentary to Article 41*, p. 249, para. 3.

[1456] The question of complicity is addressed below in section C.

i. The Duty of Cooperation to End Violations

The first obligation, which the ILC emphasises is a 'positive duty', is the duty to *cooperate* to bring to an end the serious breaches of the peremptory norms in question:

> Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organised in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalised cooperation.[1457]

The Commission noted that cooperation was generally taken within the framework of international organisations but did not specify the measures which might be required, as the choice of appropriate measures would depend on the circumstances of the particular situation. It simply stated that these must be lawful and constitute 'a joint and coordinated effort by all States to counteract the effects of these breaches'.[1458] This non-specific approach appears to follow that adopted by the ICJ in the *Namibia* advisory opinion.[1459]

The law of State responsibility functions on the international plane where, characteristically, remedies for the breach of an international obligation will be sought by one or more States from another. The 2001 Articles identify two categories of States which may invoke the responsibility of another. In broad terms, Article 42 provides that a State is entitled as 'an injured State' to invoke the responsibility of another if the obligation breached was owed to the claimant State individually, or to a group of States and the breach of the obligation especially affects the claimant State. [1460]

This right of this category of States ('injured' States) to challenge the delinquent behaviour of another State is clearly established in international law. In contrast, the second category of States identified in Article 48 of the 2001 Articles ('interested' States), was seen by some to involve a degree of innovation. Article 48.1 provides that:

> Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
>
> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (b) the obligation breached is owed to the international community as a whole.

Article 48 continues that an interested claimant State may seek the cessation of the delict and guarantees of non-repetition, as well as reparation in favour of the injured State or the beneficiaries of the obligation breached. 'Interested' States are conceptually distinct from 'injured' States, a matter which has attracted criticism from States themselves, some of which

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[1457] ILC Report, *Commentary to Article 41*, p. 114, para. 2; *Yearbook* (2001), p. 114, para. 2; and Crawford, *State responsibility*, *Commentary to Article 41*, p. 249, para. 2.

[1458] ILC Report, *Commentary to Article 41*, para. 3; *Yearbook* (2001), p. 114, para. 3; and Crawford, *State responsibility*, *Commentary to Article 41*, p. 249, para. 3.

[1459] See *Namibia* advisory opinion, ICJ Rep, 1971, 55, para.120.

[1460] If the Road Map is considered to be a legally binding international instrument, members of the Quartet fall into this category: see 'A performance-based roadmap to a permanent two-state solution to the Israeli-Palestinian conflict' annexed to a letter dated 7 May 2003 from the Secretary-General addressed to the President of the Security Council, UN doc. S/2003/529, 7 May 2003. For Israel's fourteen reservations see 'Israel's Response to the Road Map, 25 May, 2003, available at: http://www.knesset.gov.il/process/docs/roadmap_response_eng.htm.

have objected to the formulation of the distinction between injured and interested States, and the recognition of the latter category's entitlement to invoke responsibility.[1461]

In drafting Articles 42 and 48, the ILC elaborated upon the ICJ's dictum in the *Barcelona Traction* case, which distinguished between obligations whose breach particularly affects one State and those obligations owed to the international community as a whole, and which all States have a legal interest in their protection:

> 33. ...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law...; others are conferred by international instruments of a universal or quasi-universal character.
>
> 35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so...[1462]

Articles 42 and 48 are not mutually exclusive: a State may be injured within the meaning of Article 42 by another's breach of an obligation owed to the international community as a whole, which thus simultaneously gives rise to the possibility of interested States invoking the delinquent's responsibility under Article 48.[1463] While Article 42 expresses an established principle, Article 48 is generally seen as an example of progressive development of the law by the ILC. It received a mixed reaction from States[1464] and, as yet, has apparently not received judicial scrutiny.[1465]

[1461] See, for instance, the comments of France, India and the Nordic States recorded in Bodeau P, *Comments and observations by governments in the 6th Committee, 54th Session - 1999: summary of main points* (1999), p. 11, available at: www.lcil.cam.ac.uk/projects/state_responsibility_document_collection.php, and *State responsibility: comments and observations received from governments*, A/CN.4/515 (19 March 2001), the Netherlands (61-62), China (69-70) and Japan (70). By 2001, however, the Nordic States had decided to support the distinction (70).

[1462] *Barcelona Traction, Light and Power Co. Ltd case, second phase, final judgment*, ICJ Rep, 1970, 3 at 32, paras. 33 and 35: compare 47, para.91: reaffirmed *Wall* advisory opinion, ICJ Rep, 2004, 199, para.155. On Article 48 and *Barcelona Traction*, see ILC Report, *Commentary to Article 48*, 126, para. 2 and 127, paras.8 and 9; *Yearbook* (2001), *Commentary to Article 48*, 126, para.2 and 127, paras.8 and 9; and Crawford, *State responsibility*, *Commentary to Article 48*, 276-277, para.2, and 278, paras.8 and 9. The germ of this development may be traced back to Roberto Ago's *Second report on State responsibility* (1970), UN Doc.A/CN.4/233, [1970] II YBILC 184, para.23.

[1463] See ILC Report, *Commentary to Part Three, Chapter I*, 116, para. 3; *Yearbook* (2001), *Commentary to Part Three, Chapter I*, 116, para. 3; and Crawford, *State responsibility*, *Commentary to Part Three, Chapter I*, p. 255, para. 3.

[1464] See *State responsibility: comments and observations received from governments*, A/CN.4/515 (19 March 2001), 69-74 (and compare 60-66); and also Bodeau, *Comments and observations*, pp. 10-11.

[1465] In his separate opinion in the *Armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)* case, Judge Simma endorsed Article 48 in his separate opinion, but it is clear that this opinion was expressed on a point which had not been argued by the parties. See ICJ Rep,

Further, the scope of Article 48 bears a relationship to that of Article 40. Article 48.1.b permits States other than the injured State to invoke the responsibility of another where 'the obligation breached is owed to the international community as a whole'. The ILC's view is that peremptory norms and those owed to the international community as a whole are essentially the two sides of the same coin:

> From the Court's reference [in the *Barcelona Traction* case] to the international community as a whole, and from the character of the examples it gave, one can infer that the core cases of obligations *erga omnes* are those non-derogable obligations of a general character which arise either directly under general international law or under generally accepted multilateral treaties (e.g. in the field of human rights). They are thus virtually coextensive with peremptory obligations (arising under norms of *jus cogens*). For if a particular obligation can be set aside or displaced as between two States, it is hard to see how that obligation is owed to the international community as a whole.[1466]

Nevertheless, the ILC views peremptory norms and core obligations owed to the international community as a whole as having different emphasis. Peremptory norms focus on the scope and priority of the obligations they embody. The focus of obligations owed to the international community as a whole is on the interest all States have in compliance, through their entitlement to invoke the responsibility of any State in breach.[1467] Article 48, however, encompasses a wider class of delicts than Article 40 because it is not restricted to serious breaches of peremptory norms.

In summary, the ILC Articles on State Responsibility recognise the traditional rule that a State may invoke the responsibility of another State if the obligation is owed to the injured State itself, or to a group of States including that State and that State is specially affected. Moreover, Article 48, in Dugard's words, 'repudiates the 1966 decision of the International Court of Justice in the *South West Africa Cases* which held that Ethiopia and Liberia had no legal standing to bring proceedings against South Africa in respect of its treatment of the people of Namibia because they were not directly affected themselves and international law did not recognize an 'actio popularis', or right resident in any member of a community to take legal action in vindication of a public interest'.[1468]

2005, 168, separate opinion of Judge Simma, 334 at 346, para.32 and 347, para.35. Elements of an earlier draft Article which do not entirely correspond to Article 48 in its final form were considered by a 1997 WTO Panel Report on *European Communities–Regime for the importation, sale and distribution of bananas*, and by the International Tribunal for the Former Yugoslavia Appeals Chamber in the *Blaskic* case (1997). See Report of the Secretary-General, *Responsibility of States for internationally wrongful acts: compilation of decisions of international courts, tribunals and other bodies*, UN Doc.A/62/62 (1 February 2007) 74 and 77-79.

[1466] Crawford J, *Third report on State responsibility*, UN Doc.A/CN.4/507 (10 March 2000), 46-47, para. 106(a), available at: http://daccessdds.un.org/doc/UNDOC/GEN/N00/345/10/PDF/N0034510.pdf?OpenElement. See also ILC Report, *Commentary to Part Two, Chapter III*, 111-112, para.7; *Yearbook* (2001), *Commentary to Part Two, Chapter III*, pp. 111-112, para.7; Crawford, *State responsibility, Commentary to Part Two, Chapter III*, pp. 244-245, para.7; and Andre de Hoogh, 'The relationship between jus cogens, obligations erga omnes, and international crimes: peremptory norms in perspective' (1991) 42 *Austrian Journal of Public and International Law* 183.

[1467] ILC Report, *Commentary to Part Two, Chapter III*, pp. 111-112, para.7; *Yearbook* (2001), *Commentary to Part Two, Chapter III*, 111-112, para.7; and Crawford, *State responsibility, Commentary to Part Two, Chapter III*, pp. 244-245, para.7.

[1468] John Dugard, *International Law – A South African Perspective* (3rd Edition, 2007), 279.

ii. The Duty of Abstention

The second duty, imposed by Article 41.2, is the duty of *abstention*, which has two elements: States must not (1) recognise as lawful situations created by serious breaches of peremptory norms, or (2) render aid or assistance in maintaining that situation.

Regarding the first element, the ILC expressly referred to an 'attempted acquisition of sovereignty over territory through the denial of the right of self-determination' as an example of a situation that States must not recognise.[1469] Indeed, collective non-recognition of this situation is a prerequisite for any collective community response and is the minimum necessary response expected from States.[1470] In relation to Israel's colonial practices in the occupied Palestinian territories, at the very least this clearly mandates that all States must maintain their refusal to recognise Israel's purported annexation of East Jerusalem and of any areas of the West Bank on which settlements have been constructed, including 'seam' areas between the green (Armistice) line and the Wall. Following the *Namibia* advisory opinion, States should also refrain from locating their embassies in Jerusalem, lest this be interpreted as recognition of Israel's claim to have annexed East Jerusalem,[1471] and ensure that the application of treaty relationships with Israel are not extended to the OPT.[1472] Implementation of the duty of abstention in relation to economic aspects of self-determination is perhaps more fluid and straddles the duty of non-recognition and the second aspect which prohibits the granting of aid or assistance to the commission of the serious breach of peremptory norms. Nevertheless, the duty of non-recognition as such clearly requires that States deny Israel title to the natural resources of the OPT.

Regarding the second element, the ILC observes that the duty not to render aid or assistance is a logical extension of the duty of non-recognition, but states that:

> [I]t has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches... This separate existence is confirmed, for example, in the Security Council's resolutions prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa.[1473]

In relation to South Africa's illegal presence in Namibia, the International Court of Justice ruled that States had a duty 'to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the territory'.[1474] In his separate opinion, Judge Ammoun gave a more elaborate account of this duty, arguing that it prohibited:

> [A]ll economic, industrial or financial assistance, in the form of gifts, loans, credit, advances or guarantees, or in any other form. This prohibition is not confined to States. It naturally extends to institutions in which States have voting rights, such as the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation.[1475]

[1469] ILC Report, *Commentary to Article 41*, 114, para.5; *Yearbook* (2001), *Commentary to Article 41*, 114, para.5; and Crawford, *State responsibility*, *Commentary to Article 41*, p. 250, para. 5.

[1470] ILC Report, *Commentary to Article 41*, 115, para.8; *Yearbook* (2001), *Commentary to Article 41*, p. 115, para.8; and Crawford, *State responsibility*, *Commentary to Article 41*, 251, para.8.

[1471] See *Namibia* advisory opinion, ICJ Rep, 1971, 55, para.123.

1472 See *Namibia* advisory opinion, ICJ Rep, 1971, 55, para.122.

[1473] ILC Report, *Commentary to Article 41*, p. 115, para.12; *Yearbook* (2001), *Commentary to Article 41*, 115, para.12; and Crawford, *State responsibility*, *Commentary to Article 41*, p. 252, para.12.

[1474] See *Namibia* advisory opinion, ICJ Rep, 1971, 55-56, para.124.

[1475] *Namibia* advisory opinion, ICJ Rep 1971, 16, separate opinion of Judge Ammoun, 67 at 94-95, para.14.7: note omitted.

In short, in the economic realm, the duty of abstention imposed by Article 41 requires all States to ensure that they do not bolster the economic viability of Israel's colonial and apartheid projects in the OPT. For example, the obligation not to recognise Israel's title over natural resources has implications for trade in these resources, whether in primary or processed form. This is a general duty, not one confined to economic issues, and, as Judge Ammoun notes, it extends to international organisations whose activities are determined or controlled by their member States.

c. The question of complicity

Should a State fail to fulfil its duty of abstention (when faced with a situation arising from the serious breach of an obligation arising from the breach of a peremptory norm of international law) then, in certain circumstances, it can become complicit in the delinquent State's internationally wrongful act, and thus independently engage its own responsibility by helping to maintain that situation. Article 16 of the 2001 *Articles on the Responsibility of States for Internationally Wrongful Acts* provides that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> a. that State does so with knowledge of the circumstances of the internationally wrongful act; and
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> b. the act would be internationally wrongful if committed by that State.

Article 16 has been affirmed as expressing a rule of customary international law by the German Federal Constitutional Court and by the ICJ.

In ruling on the legality of the extradition to the United States of Yemeni nationals who had been arrested in Germany, the Federal Constitutional Court cited Article 16 to illustrate that States may be held responsible for aiding or assisting the commission of an internationally wrongful act. The Court held that:

> [T]he administrative authorities and courts of the Federal Republic of Germany are as a matter of principle barred by article 25 of the Basic Law from interpreting and applying national law in a way that violates such general rules of international law. They are also obliged to refrain form doing anything that lends effectiveness to acts performed in violation of general rules of international law by non-German sovereign entities within the territorial area of application of the Basic Law and are prohibited from playing any decisive role in such acts by non-German sovereign entities...
>
> ...
>
> That State responsibility can under specific conditions be established by acting in support of third party actions that are contrary to international law is shown by article 16 of the International Law Commission's draft convention on State responsibility, which codifies customary international law in this field.[1476]

Article 16 was also examined by the ICJ in 2007 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[1477] In considering the construction of

[1476] See Report of the Secretary-General, *Responsibility of States for internationally wrongful acts: comments and information received from Governments*, UN Doc.A/62/63 (9 March 2007), comments by Germany, 12-13, paras.23-25. Article 16 was also referred to in a decision of the German Federal Administrative Court in its 2005 decision on the legality of the war in Iraq: see N. Schultz, 'Was the War on Iraq Illegal? – The German Federal Administrative Court's Judgment of 21st June 2005' (2005) 7/1 *German Law Journal* 25 at 33-34, available at: www.germanlawjournal.com/pdf/Vol07No01/PDF_Vol_07_No_1_25-44_Developments_Schultz.pdf.

[1477] Bosnia and Herzegovina v Serbia and Montenegro: judgment of 26 February 2007.

complicity to commit genocide under Article 3(e) of the Genocide Convention, the Court ruled that it:

> 419. ...includes the provision of means to enable or facilitate the commission of the crime...although "complicity", as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the "aid or assistance" furnished by one State for the commission of a wrongful act by another State.
>
> 420. ...The Court sees no reason to make any distinction of substance between "complicity in genocide", within the meaning of Article III, paragraph *(e)*, of the Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of...Article 16...In other words, to ascertain whether the Respondent is responsible for "complicity in genocide" within the meaning of Article III, paragraph *(e)*...the Court...must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished "aid or assistance" in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.
>
> ...
>
> 432. ...complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent [genocide] results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the failure to prevent results from omission...there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts.[1478]

Thus, the ICJ not only affirmed the customary status of Article 16, but also held that complicity under international law requires knowledge of the unlawful situation and the provision of positive support.

The law is clear. When faced with a serious breach of an obligation arising under a peremptory norm, all States have the duty not to recognise this situation as lawful and the duty not to aid or assist the maintenance of this situation. Further, all States must co-operate to bring this situation to an end. If a State fails to fulfil these duties, axiomatically it commits an internationally wrongful act. If a State aids or assists another State in maintaining that unlawful situation, knowing it to be unlawful, then it becomes complicit in its commission and itself commits an internationally wrongful act.

3. Responsibility of International Organisations

The peremptory prohibitions on apartheid and colonialism which denies the right of self-determination do not merely bind all States, but also, by extension, intergovernmental organisations to which they belong. There is authority for the proposition that States cannot evade their international obligations by hiding behind the independent personality of an

[1478] *Genocide in Bosnia case: judgment of 26 February 2007*, paras.419-420 and para.432. For further discussion of this aspect of the case, see Olleson, *Impact of the ILC's Articles*, pp. 136-138.

international organisation of which they are members. This question was examined, albeit obliquely, in a case heard by the European Court of Justice, namely *SAT Fluggesellschaft mbH v European Organization for the Safety of Air Navigation (Eurocontrol).*[1479] In his opinion to the Court, Advocate General Tesauro expressed the view that the fact that Eurocontrol was an international organisation did not insulate it from the Community's competition laws. In justifying his conclusion, Advocate General Tesauro argued:

> Just as it is not permissible for a Member State to have recourse to its own domestic law in order to limit the scope of Community law, since that would undermine the unity and effectiveness of Community law, so it would not be possible to arrive at a similar result by relying on the obligations arising from an international agreement... In other words, if national public bodies and Member States themselves, in so far as they carry on an economic activity, are under an obligation to respect the provisions of Article 85 et seq. of the Treaty, they may not escape that obligation by entrusting the activity to an international organization.[1480]

This consideration is capable of a more general application beyond the confines of the European legal order. It seems illogical to allow States to evade responsibility simply through the fact of combination.

Moreover, in his *Fifth report on responsibility of international organizations*, the rapporteur of the ILC, Professor Gaja, stated that, like States, international organisations are capable of committing internationally wrongful acts which constitute serious breaches of peremptory norms of international law.[1481] This conclusion had been foreshadowed in his *Third report on the responsibility of international organizations*, where Gaja stated that, under certain circumstances, the United Nations may be under a duty to prevent genocide. Using the failure to prevent genocide in Rwanda as an example, he commented:

> Assuming that general international law requires States and other entities to prevent genocide in the same way as the Convention on the Prevention and Punishment of the Crime of Genocide, and that the United Nations had been in a position to prevent genocide, failure to act would have represented a breach of an international obligation. Difficulties relating to the decision-making process could not exonerate the United Nations.[1482]

Gaja's conclusion reflects established international doctrine. For example, in an early phase of the *Genocide in Bosnia* case, Judge *ad hoc* Lauterpacht ruled that the Security Council could not lawfully adopt a resolution which breached a peremptory norm and, if it did so, that act would be 'void and legally ineffective'.[1483]

In the *Legal consequences of the construction of a wall* advisory opinion, the International Court of Justice specifically recalled that under General Assembly resolution 2625 (XXV)(24 October 1970), the *Declaration on principles of international law concerning friendly*

[1479] 101 *International Law Reports* 9 (1994). Eurocontrol, an inter-governmental organisation, was established in 1960 to provide common air navigation services in the airspace of European member States.

[1480] 101 International Law Reports (1994) 17, para.7.

[1481] See Giorgio Gaja, *Fifth report on responsibility of international organizations*, UN Doc.A/CN.4/583 (2 May 2007), 17, para.55, and also draft Articles 43 and 44, 19-20: essentially international organisations were assimilated to States in this matter.

[1482] See Giorgio Gaja, *Third report on the responsibility of international organisations*, UN Doc.A/CN.4/553 (13 May 2005) 4, para.10, note omitted.

[1483] *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide: further requests for the indication of provisional measures, Order of 13 September 1993* (*Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro*), ICJ Rep, 1993, 325, separate opinion of Judge *ad hoc* Lauterpacht, 407 at 440-441, paras. 100-104.

relations and co-operation among States in accordance with the Charter of the United Nations:

> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle.[1484]

The Court also underlined that the General Assembly should encourage efforts aimed at reaching a negotiated solution to the Israel-Palestine conflict which would lead to the creation of a Palestinian State,[1485] and that both it and the Security Council should consider what further action was required to bring an end to the illegal situation resulting from the construction of the wall.[1486]

Failure by the United Nations to foster self-determination and combat apartheid when it is in a position to do so is no different from failure to prevent genocide. In both cases, the United Nations would be failing to act to discharge peremptory obligations which are incumbent on all its member States, as well as on itself. While the duty of States to co-operate to bring an end to serious breaches of peremptory norms of international law does not necessarily imply that such co-operation should take place within the United Nations,[1487] this is a duty which the principal political organs of the United Nations should also discharge, as the ICJ indicated. At the very least, the United Nations, and in particular the General Assembly and Security Council, is under a duty to act in good faith to foster co-operation to ensure the eradication of apartheid in the occupied Palestinian territories, and achieve the exercise of self-determination by the Palestinians. As both norms prohibiting apartheid and colonialism have peremptory status, a failure to do so amounts to a serious breach of international law by the United Nations, one which engages its international responsibility.

Similarly, Quartet members may have responsibilities over and above those arising for other States. It is significant in this regard that the United Nations is the principal global political organisation and is also a member of the Quartet.[1488] It is also important to recall that the European Union is a member of the Quartet. Other regional organisations, even if not part of the Quartet, would in any event have to consider their response to Israel's apartheid and colonial practices within the rubric of their own competence and responsibility to promote human rights.[1489] The consequences attaching to States and intergovernmental organisations

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[1484] *Wall* advisory opinion, ICJ Rep, 2004, 199, para. 156.

[1485] *Wall* advisory opinion, ICJ Rep, 2004, 201, para.162.

[1486] Ibid., p. 200, para.160.

[1487] ILC Report, *Commentary to Article 41*, p. 114, para. 2; *Yearbook* (2001), UN Doc.A/CN.4/SER.A/2001/Add.1 (Part 2), p. 114, para. 2; and also Crawford, *State responsibility, Commentary to Article 41*, p. 249, para. 2.

[1488] See, for example, *Wall* advisory opinion, ICJ Rep, 2004 200, paras. 160 and 161 in which the ICJ drew specific attention to 'the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region'.

[1489] For example, the Constitutive Act of the African Union contains no reference to apartheid, but Article 3.h provides that one of the objectives of the Union is to 'Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. The preamble to the African Charter contains a passing reference to apartheid—'Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions'.

overlap. It is possible that States might best discharge some of their obligations through an organisation to which they belong. However, as demonstrated above, the failure of an organisation to act does not exonerate each member State of its responsibility to do so.

C. Recommendations:

1. That States Take Urgent Action to Uphold Their Legal Obligations in Respect of Violations of Peremptory Norms of International Law

The prohibitions of colonialism (as a denial of self-determination and violation of the prohibition of the acquisition of territory by force) and apartheid (as an egregious form of racial discrimination) are both established as *jus cogens* and their breach gives rise to obligations *erga omnes*. The findings of this report thus imply legal obligations on *all* States in relation to the internationally wrongful acts committed by Israel in the OPT. Accordingly, States are legally bound to pursue the following policies:

- Not to recognise as lawful the illegal situation created by Israel's practices of colonialism and apartheid in the OPT;
- Not to render aid or assistance in maintaining that illegal situation;
- To cooperate with a view to bringing the illegal situation to an end;
- Not to render themselves complicit in the internationally wrongful acts in question by failing to fulfil the above obligations.

2. That States Urgently Request an Advisory Opinion from the International Court of Justice

The conclusions reached in this report provide a basis for urgent consideration by concerned States to call upon the UN General Assembly to request an advisory opinion from the International Court of Justice regarding Israel's practices of apartheid and colonialism. Accordingly, in this Report it is respectfully recommended that States, in accordance with Article 96 of the Charter of the United Nations and pursuant to Article 65 of the Statute of the ICJ, request the ICJ urgently to render an advisory opinion on the following question:

> Do the policies and practices of Israel within the Occupied Palestinian Territories violate the norms prohibiting apartheid and colonialism; and, if so, what are the legal consequences arising from Israel's policies and practices, considering the rules and principles of international law, including the International Convention on the Elimination of all forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly Resolution 1514 (1960), the Fourth Geneva Convention of 1949, and other relevant Security Council and General Assembly resolutions?

APPENDIX I:

International Convention on the Suppression and Punishment of the Crime of *Apartheid*

[Full Text]

Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973, *entry into force* 18 July 1976, in accordance with article XV

The States Parties to the present Convention,

Recalling the provisions of the Charter of the United Nations, in which all Members pledged themselves to take joint and separate action in co-operation with the Organization for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Considering the Universal Declaration of Human Rights, which states that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour or national origin,

Considering the Declaration on the Granting of Independence to Colonial Countries and Peoples, in which the General Assembly stated that the process of liberation is irresistible and irreversible and that, in the interests of human dignity, progress and justice, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Observing that, in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination, States particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction,

Observing that, in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid constitute a crime under international law,

Observing that, in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, "inhuman acts resulting from the policy of apartheid" are qualified as crimes against humanity, *Observing* that the General Assembly of the United Nations has adopted a number of resolutions in which the policies and practices of apartheid are condemned as a crime against humanity,

Observing that the Security Council has emphasized that apartheid and its continued intensification and expansion seriously disturb and threaten international peace and security, *Convinced* that an International Convention on the Suppression and Punishment of the Crime of Apartheid would make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid, *Have agreed* as follows:

Article I

1. The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the

purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.
2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid.

Article II

For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

Article III

International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State,

whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

(a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;

(b) Directly abet, encourage or co-operate in the commission of the crime of apartheid.

Article IV

The States Parties to the present Convention undertake:

(a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime;

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.

Article V

Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.

Article VI

The States Parties to the present Convention undertake to accept and carry out in accordance with the Charter of the United Nations the decisions taken by the Security Council aimed at the prevention, suppression and punishment of the crime of apartheid, and to co-operate in the implementation of decisions adopted by other competent organs of the United Nations with a view to achieving the purposes of the Convention.

Article VII

1. The States Parties to the present Convention undertake to submit periodic reports to the group established under article IX on the legislative, judicial, administrative or other measures that they have adopted and that give effect to the provisions of the Convention.

2. Copies of the reports shall be transmitted through the Secretary-General of the United Nations to the Special Committee on Apartheid.

Article VIII

Any State Party to the present Convention may call upon any competent organ of the United Nations to take such action under the Charter of the United Nations as it considers appropriate for the prevention and suppression of the crime of apartheid.

Article IX

1. The Chairman of the Commission on Human Rights shall appoint a group consisting of three members of the Commission on Human Rights, who are also representatives of States Parties to the present Convention, to consider reports submitted by States Parties in accordance with article VII.

2. If, among the members of the Commission on Human Rights, there are no representatives of States Parties to the present Convention or if there are fewer than three such representatives, the Secretary-General of the United Nations shall, after consulting all States Parties to the Convention, designate a representative of the State Party or representatives of the States Parties which are not members of the Commission on Human Rights to take part in the work of the group established in accordance with paragraph 1 of this article, until such time as representatives of the States Parties to the Convention are elected to the Commission on Human Rights.

3. The group may meet for a period of not more than five days, either before the opening or after the closing of the session of the Commission on Human Rights, to consider the reports submitted in accordance with article VII.

Article X

1 . The States Parties to the present Convention empower the Commission on Human Rights:

(a) To request United Nations organs, when transmitting copies of petitions under article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination, to draw its attention to complaints concerning acts which are enumerated in article II of the present Convention;

(b) To prepare, on the basis of reports from competent organs of the United Nations and periodic reports from States Parties to the present Convention, a list of individuals, organizations, institutions and representatives of States which are alleged to be responsible for the crimes enumerated in article II of the Convention, as well as those against whom legal proceedings have been undertaken by States Parties to the Convention;

(c) To request information from the competent United Nations organs concerning measures taken by the authorities responsible for the administration of Trust and Non-Self-Governing Territories, and all other Territories to which General Assembly resolution 1514 (XV) of 14 December 1960 applies, with regard to such individuals alleged to be responsible for crimes under article II of the Convention who are believed to be under their territorial and administrative jurisdiction.

2. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV), the provisions of the present Convention shall in no way limit the right of petition granted to those peoples by other international instruments or by the United Nations and its specialized agencies.

Article XI

1. Acts enumerated in article II of the present Convention shall not be considered political crimes for the purpose of extradition.

2. The States Parties to the present Convention undertake in such cases to grant extradition in accordance with their legislation and with the treaties in force.

Article XII

Disputes between States Parties arising out of the interpretation, application or implementation of the present Convention which have not been settled by negotiation shall, at the request of the States parties to the dispute, be brought before the International Court of Justice, save where the parties to the dispute have agreed on some other form of settlement.

Article XIII

The present Convention is open for signature by all States. Any State which does not sign the Convention before its entry into force may accede to it.

Article XIV

1. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article XV

1. The present Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article XVI

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article XVII

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

Article XVIII

The Secretary-General of the United Nations shall inform all States of the following particulars:

(a) Signatures, ratifications and accessions under articles XIII and XIV;

(b) The date of entry into force of the present Convention under article XV;

(c) Denunciations under article XVI;

(d) Notifications under article XVII.

Article XIX

1. The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

Appendix II

Declaration on the Granting of Independence to Colonial Countries and Peoples

[Full Text]

Adopted by General Assembly resolution 1514 (XV) of 14 December 1960

The General Assembly,

Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

A *ware* of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non- Self- Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.