



Rule of Law:

A Veil of Compliance in Israel and the oPt 2010–2013

Diakonia International Humanitarian Law Resource Centre
March 2014



diakonia

PEOPLE CHANGING THE WORLD

Rule of Law: A Veil of Compliance in Israel and the oPt 2010–2013



Diakonia IHL Resource Centre

Do you want to learn more about International Humanitarian Law?
Visit our website: An Easy Guide to IHL in the oPt at: www.diakonia.se/ihl/
Or contact us at: ihl@diakonia.se

Published by:

Diakonia
Diakonia International Humanitarian Law Resource Centre
www.diakonia.se/ihl/
ihl@diakonia.se

© Copyright 2014 Diakonia IHL Resource Centre
All Rights Reserved

Diakonia IHL Resource Centre encourages use of information contained in this report but requests that full citation to the respective author and to the source be made.



Disclaimer:

With regard to testimonies, case studies and pictures provided by external organisations, the author wishes to acknowledge that the designation employed and the presentation of materials throughout this publication do not imply the expression of any opinion whatsoever on the part of those external organisations concerning the findings of the report, the legal status of any country, territory, city or area or of its authorities or concerning the delimitation of its frontiers or boundaries.

Designed by: Marwan Hamad, InterTech, Ramallah 02-295 7270

Diakonia International Humanitarian Law Resource Centre Reports

Diakonia IHL Resource Centre provides a legal perspective on current issues of interest related to the protection of civilians and their properties in the Israeli–Palestinian conflict. Our work focuses on the application of international humanitarian law (IHL) and international human rights law (IHRL) to specific policies, practices and issues pertaining to the occupied Palestinian territory (oPt).¹

The analyses aim at providing humanitarian and development experts and practitioners, policy and decision makers, researchers, academics and journalists with accessible and reliable information on international law and its applicability in the oPt. IHL is a key reference and tool for people who work to increase the protection of civilians, alleviate human suffering, and promote peace, justice and development in Israel and the oPt. The objective of these analyses and the related recommendations is to facilitate policy formulation.

Diakonia works together with partners from civil society in both Israel and the occupied Palestinian territory:

Al Haq
www.alhaq.org

Al Mezan Centre for Human Rights
www.mezan.org

The Association for Civil Rights in Israel (ACRI)
www.acri.org

Badil Resource Center for Palestinian Residency and Refugee Rights
www.badil.org

B'Tselem, the Israeli Information Centre for Human Rights in the Occupied Territories
www.btselem.org

Table of Contents

EXECUTIVE SUMMARY	4
I. INTRODUCTION	7
II. CONTEXT: THE CLIMATE OF NON-COMPLIANCE	9
Destruction of Property, Forcible Transfer and Settlement Expansion	9
Mainstreaming the Notion of Annexation of Occupied Territory in Israeli Political Discourse	10
Independence of Judicial Review	11
III. LEGISLATION IN THE ISRAELI PARLIAMENT	12
‘Basic Law: Israel the Nation–State of the Jewish People (2011) and Non–Profit Organizations Law – Amendment (2013).’	12
‘Sovereignty over Judea and Samaria (2011).’	13
‘Law for Prevention of Damage to State of Israel through Boycott (2011)’ and ‘Bill to Amend the Income Tax Ordinance – Support of Israeli NGOs by Foreign Political Entities (2013).’	14
‘Counter–Terrorism Bill (2011)’:	14
IV. INDEPENDENCE OF THE ISRAELI JUDICIARY	17
‘Yesh Din – Volunteers for Human Rights v. The Commander of the IDF Forces in the West Bank, HCJ 2164/09.’	18
Regavim and ‘The Association for Civil Rights in Israel v. Minister of Defense; and IDF Commander for the West Bank, HCJ 413/13.’	20
V. ISRAELI COMMISSIONS AND REPORTS	22
Levy Committee:	22
Turkel Commission:	23
VI. MAINTAINING THE VEIL: ISRAEL’S REPORTS AND STATEMENTS IN INTERNATIONAL FORUMS	24
Applicable legal order	24
Suspension of ties with the Human Rights Council and Universal Periodic Review	26
VII. PIERCING THE VEIL: INTERNATIONAL COMMUNITY REPORTS AND STATEMENTS ...	27
United Nations Human Rights Council	27
International Fact–Finding Mission on Israeli Settlements	28
United Nations HRC Special Procedures	28
United Nations Human Rights Council Universal Periodic Review 2013	29
United Nations Human Rights Treaty Bodies	29
a. The UN Human Rights Committee.	29
b. The UN Committee on the Elimination of Racial Discrimination (CERD)	30
c. The UN Committee on Economic, Social and Cultural Rights	30
The European Union: an inconsistent attitude towards Israel’s non–compliance	30
EU Heads of Missions Reports	32
International Committee of the Red Cross (ICRC) Annual Reports 2010–2012	32
VIII. CONCLUSION: THE VEIL IS LIFTED	33

Legal definitions

De facto

'*concerning fact*'. In law, it often means 'in practice' but not necessarily ordained by law or 'in actuality'.

De Jure

'*concerning law*'. Unlike *de facto*, practices may exist *de jure* and not be obeyed or observed by the people in actuality.

Erga omnes

rights or obligations owed '*toward all*'. Describes obligations owed by states towards the international community at large.

Jus cogens

'*compelling law*'. Describes a fundamental principle of international law, accepted by the international community of states, from which no derogation is ever permitted.

Military necessity

the concept has been defined as "*those measures which are indispensable for securing the ends of the war and which are lawful according to the modern laws and usages of war*". It is a principle whereby a belligerent has the right to apply any measure that is required to bring about the successful conclusion of a military operation, and that is not forbidden by the laws of war. Military necessity is not a *carte blanche* to achieve the military goal at any price.

Jurisprudence

Judicial precedents and rulings that are considered collectively.

EXECUTIVE SUMMARY

Given the indivisible connection between the Israeli legislative, judicial and military systems and the administration of the occupied Palestinian territory (oPt), the question of domestic application of international law in Israel is an extremely pertinent one. Generally speaking, the level of adherence to the rule of law within Israel should inform any analysis of Israel's policies and practices in the oPt and indeed their interaction with the international community.

In this context, and other situations of armed conflict, rule of law should be defined as:

A principle of governance in which all persons, institutions and entities, public and private, including parties to the conflict and third States are accountable to laws that are consistent with international human rights and humanitarian norms and standards.¹

Using the above definition, the Diakonia IHL Resource Centre Rule of Law report examines Israel's compliance with international standards in the period between 2010 and 2013. Specifically, the report studies domestic legislation, the Israeli judiciary, and statements by the Israeli authorities in international forums. It does so while bearing in mind the obligations incumbent upon Israel as the Occupying Power to administer the oPt for the benefit of the protected Palestinian population. This includes maintaining law, order and civil life, respect and protection of private property, protecting Palestinian civilians from any form of violence, and, crucially, ensuring that their rights and needs are protected and fulfilled.

In stark contrast to this obligation, Israel has extended its authority far beyond what is permitted by international law and it is clear that the prolonged and entrenched nature of the Israeli occupation has resulted in the enduring denial of the most basic rights of the Palestinian people. By and large, the report finds that the Israel's administration of the occupation is characterised by an aura of legality with which Israel blankets many of the serious violations of international standards that occur in the occupied territory.

Such violations have been extensively documented,² and most significantly include the destruction of property, the establishment and expansion of settlements, restrictions on movement, and exploitation of natural resources. All of the above contribute to a coercive environment that can lead, directly or indirectly, to the forcible transfer of the protected Palestinian population, a grave breach of the Geneva Conventions. Moreover, the excesses of Israeli policies and practices in the oPt are grounded in an internal normative and political discourse that legitimises permanent changes to the occupied territory. This discourse also facilitates the administration of occupation in a manner inconsistent with the needs of the local population, and encourages the absence of judicial oversight that should effectively scrutinise and preclude these actions.

While the debate over annexation of parts or all of the oPt has been taking place for some time within Israel, it was frequently dismissed as being isolated to a fringe, extreme right-wing element within the political discourse. However, possibly as a by-product of negotiations, the concept is increasingly being advocated as a viable strategy of late, and not only by those who are located at the periphery of the political stratum.³ Indeed, for many within the ruling

¹ Guidance Note of the Secretary-General, UN Approach to Rule of Law Assistance, April 2008.

² See for example, UN Special Procedures' reports, reports by the UN Secretary-General, the UN High Commissioner for Human Rights and Secretariat, available at: <http://www.ohchr.org/EN/countries/MENARegion/Pages/ILIndex.aspx>

³ 'A Greater Israel? Faction says no to two-state solution, yes to annexing Palestinian areas', The Washington Post, (6 November 2013), last accessed 3 December 2013. Available at: http://www.washingtonpost.com/world/middle_east/israeli-right-says-no-to-two-states-yes-to-greater-israel/2013/11/05/aa9068ee-454d-11e3-95a9-3f15b5618ba8_story.html

coalition, the question is no longer whether or not Israel should press ahead with de jure annexation, but rather, how much of the West Bank should be included in the plan and what to do with the Palestinian population located therein.⁴

In addition, a range of legislation has been passed or presented for tabling in recent years that seems to be designed to restrict freedom of expression and association within Israel and the oPt, and in a very real sense limit the freedoms and rights of the protected Palestinian population.

At the same time, it is widely asserted that the Israeli judiciary provides meticulous domestic review of Israel's policies and practices. However, on the numerous occasions that the scope of judicial review, its independence from alien considerations, as well as its consistency with obligations under international law have been challenged within the Israeli High Court of Justice, the Court has mostly dismissed questions relating to the application of international law. Instead, the Court has restricted arguments heard to those related to the specific facts of a given case rather than international legal obligations emanating from those.

The High Court is more comfortable addressing the procedural elements of a case rather than the substance. Regardless of the grave legal violations that they may result in, the Court usually refrains from interfering with government action or questions of policy that it deems political in nature.

Crucially, the question of the domestic application of international law in Israel is not one that has been completely ignored by the Israeli government. During the reporting period, the Levy Committee and the Turkel Commission were created to examine this specific issue. However, both Committees were greeted with skepticism and allegations that their content was more politically motivated than representing a legal assessment carried out in good faith.⁵

During the reporting period, the Israeli authorities have continued to present arguments in international forums that appear to divert attention from, justify, and entrench the protracted nature of Israeli practices and policies in the oPt and their lack of adherence to international law. This non-compliance is increasingly highlighted by unsuccessful efforts on the part of the international community to bring Israel into conformity with international law.⁶ It is true that the international community has become more aware in recent years of the inaccuracy and lack of good faith in the legal positions set out by Israel. This is evident in reports and statements by the United Nations and European Union (EU) that have grown increasingly critical of Israeli policies from the perspective of international law. However, despite some exceptions, particularly on the part of the EU and certain EU Member States, very few of these statements have as of yet been translated into action.

Taken in isolation, the study of any one of the above sections of the Israeli political and judicial system would give rise to questions about the application of the rule of law. However, when taken collectively, the analysis suggests that there is a very serious and concerted failure on the part of the Israeli government and judiciary to adhere to and ensure compliance with international standards and the rule of law, including customary international law. The Israeli authorities have instead sought to cover recurring violations of international law with a veneer of legality. Indeed, many of these practices are often normalised through institutional

⁴ 'Taking annexation seriously', The Times of Israel, available at: <http://blogs.timesofisrael.com/taking-annexation-seriously/>

⁵ 'The Second Turkel Commission Report' The Institute for National Security Studies (13 February 2013), available at: <http://www.inss.org.il/index.aspx?id=4538&articleid=2608>.

⁶ 'The Turkel Report: A Preliminary Analysis' Public Committee Against Torture in Israel (28 February 2013), available at: <http://www.stoptorture.org.il/en/node/1862>

⁶ Virginia Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, Pluto Press, 2012.

processes which appear mundane to many observers, but once examined and understood, are simply a more discrete mechanism with which to bypass basic principles of international law.

Although this report does not conclude with a particular set of recommendations, it is hoped that the study will stimulate further critical examination of this issue and ensure greater focus on and inspection of Israel's adherence to the rule of law. Ultimately, rule of law requires accountability to the law. This maxim applies equally to Israel as it does all members of the international community. As such, third States must abide by their obligation to ensure respect for IHL by Israel and to take all appropriate measures to end IHL violations in the oPt. Additionally, with regard to serious breaches of peremptory norms,⁷ such as the denial of the Palestinian right to self-determination, all States are under an obligation not to recognise the unlawful situation as lawful, not to aid or assist in the maintenance of the unlawful situation, and to cooperate to bring the unlawful situation to an end.

⁷ Jus cogens – fundamental principles of international law, accepted by the international community of States, from which no derogation is ever permitted.

I. INTRODUCTION

The Israeli–Palestinian conflict is one of the most politicised and protracted conflicts in the world today, and comes with attached ideological and historical narratives. That said, international law offers the one objective tool with which to assess the conflict. As such, actual compliance with international legal standards and the rule of law should form the basis for any analysis of, and indeed any genuine resolution to, the occupation of Palestinian territory. In this context, and other situations of armed conflict, rule of law should be defined as:

A principle of governance in which all persons, institutions and entities, public and private, including parties to the conflict and third States are accountable to laws that are consistent with international human rights and humanitarian norms and standards.⁸

Ultimately, the ongoing conflict in the occupied Palestinian territory (oPt) would be much more readily resolved through adherence to the rule of law. Furthermore, this would inform the resolution of other situations where peace and human rights are in jeopardy. Unfortunately, such compliance is definitively lacking, and political expediency takes precedence over rule of law far too often and with far too little resistance. This particularly applies to Israel, as the Occupying Power, as well as other parties to the conflict. However, due to its status as the Occupying Power, Israel has higher levels of responsibility and should not be equated with any authority in the occupied territory. That said, the content of this report in no way absolves the other parties to the conflict of their obligations under international law. Crucially, third States are also charged with ensuring that international law is upheld globally.

With the above definition in mind, the Diakonia International Humanitarian Law Resource Centre has undertaken the following legal analysis in the form of a rule of law report, focusing on the domestic application of international law in Israel as it pertains to the oPt. The report examines domestic Israeli legislation, the Israeli judiciary, and statements by the Israeli authorities in international forums in order to assess the level of compliance with the rule of law in the period between 2010 and 2013. By and large, this application is characterised by the aura of legality with which Israel blankets many of the serious violations of international standards that occur in the occupied territory.

The report is based on the principle that, as the Occupying Power and primary duty holder, Israel is under an obligation according to international humanitarian law to administer the oPt for the benefit of the protected⁹ Palestinian population. This includes maintaining law and order, protecting Palestinian civilians from any form of violence, and, crucially, ensuring that their rights and needs are provided for. In stark contrast to this obligation, Israel has extended its authority far beyond what is permitted by international law and it is clear that the prolonged and entrenched nature of the Israeli occupation has resulted in the enduring denial of the most basic rights of the Palestinian people.

The analysis contained herein is largely grounded in Common Article 1 of the 1949 Geneva Conventions, which sets out the obligation of the parties involved in armed conflict to adhere to the law, and the additional obligation of all High Contracting Parties to ensure respect for the Geneva Conventions. As such, all States must take steps to ensure compliance with, and refrain from taking any measures to undermine modern international humanitarian law. Put simply, adherence to the rule of law requires accountability to the law.¹⁰

⁸ Guidance Note of the Secretary-General, UN Approach to Rule of Law Assistance, April 2008.

⁹ As defined in the Fourth Geneva Convention, Article 4. Israeli civilians are not defined with the same 'protected' status as a matter of law. However they are entitled to benefit from general civilian protection.

¹⁰ United Nations General Assembly, Resolution 67/1, 30 November 2012.

In this regard, Israel's strategy of concealing violations behind a veil of legitimacy, combined with the deflection of criticism and scrutiny, has contributed to a lack of accountability to the law. In turn, the failure of the international community to introduce effective remedies for said violations has, until now, strengthened the culture of impunity within Israel.

The defining standard against which we shall measure compliance, and accordingly hold Israel accountable, as we would any other State, is the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels adopted by the General Assembly in November 2012. This emphasises,

the right to self-determination of peoples which remain under colonial domination and foreign occupation, and that greater compliance with international humanitarian law is an indispensable prerequisite for improving the situation of victims of armed conflict, [...] ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law.

Genuine respect for the rule of law and the protection of human dignity go hand in hand. When international law is violated, it means that basic human dignity is undermined. International law is not aspirational; rather, it is a limited body of law which sets out fundamental standards. For it to be respected and ensured there must consequences for violations, not as a matter of policy but as a matter of law. This is true even in the most politicised of conflicts.

Although it contains no specific recommendations, the analysis in this report is intended to provide an accessible resource to policy makers, researchers and international lawyers in relation to Israel's domestic application of international law. While this report is not an exhaustive study on the subject, it seeks to increase focus on, stimulate further examination of, and ultimately increase the level of compliance with the rule of law.

Finally, those basing their analysis of the situation in the oPt on international legal standards are increasingly subjected to accusations of lawfare and of an attempt to delegitimise the Israeli state. This appears to be another strategy aiming to distract from the substance of certain legal analyses that place demands on Israel as an Occupying Power. However, even the most basic notion of international humanitarian law demands that the territory under occupation be administered for the benefit of the protected local population. This concept should be the principle underlying any discussion relating to occupation, and its dismissal as simple lawfare is not one that holds legitimacy.

II. CONTEXT: THE CLIMATE OF NON-COMPLIANCE

The Palestinian population in the occupied Palestinian territory, including East Jerusalem, continued during the period covered in this report to be subjected to violence, displacement, demolitions and dispossession, in many cases in violation of their rights under international law.

Such instances have been extensively documented,¹¹ and most significantly include the destruction of property, the establishment and expansion of settlements, restrictions on movement, and exploitation of natural resources. All of the above contribute to a coercive environment that can lead, directly or indirectly, to the forcible transfer of the protected Palestinian population. Moreover, the Israeli policies and practices in the oPt are grounded in an internal normative and political discourse that legitimises permanent changes to the occupied territory, its administration in a manner inconsistent with the benefit of the local population, and the absence of judicial oversight that would effectively scrutinise and restrain these actions.

Of those, the following will be highlighted in this report, for their immediate bearing on the application of the rule of law in the oPt.

Destruction of Property, Forcible Transfer and Settlement Expansion

Israel has implemented, and continues to pursue, a policy of demolition of property owned and inhabited by Palestinians in the oPt, including residence and livelihood-related structures. The destruction of private property is strictly prohibited under IHL, except where required by imperative military necessity. In addition to its codification under Article 53 of the Fourth Geneva Convention, this prohibition is considered to be a norm of customary international law, and such, is binding on all states. Rule 46 of the Hague Regulations also declare that private property must be respected.

Estimates indicate that at least 28,000 Palestinian structures have been demolished in the oPt since 1967.¹³ Of late, figures illustrate a dramatic growth in the number of demolitions, with a 130 per cent increase in the number of structures demolished and a 175 per cent rise in the number of Palestinians displaced in East Jerusalem and Area C of the West Bank between 2009 and 2012.¹⁴ In 2013, 663 Palestinian-owned structures were demolished in Area C of the West Bank and East Jerusalem, resulting in the displacement of 1,101 individuals.¹⁵ Thousands more were affected by the demolition of animal shelters and water infrastructure or the destruction of other livelihood-related structures. Some 20,000 demolition orders have been issued by the Israeli authorities since 1987, with approximately 16,200 left outstanding.¹⁶ It should be noted that a single demolition order may pertain to either a single structure or multiple structures on the same plot.

It is important to recognise that the demolition of Palestinian property is intrinsically linked to the expansion of Israeli settlements, with a large portion of all demolitions taking place in Palestinian communities situated in land allocated to settlements.¹⁷ Recent months have

¹¹ See for example, UN Special Procedures' reports, reports by the UN Secretary-General, the UN High Commissioner for Human Rights and Secretariat, available at:

<http://www.ohchr.org/EN/countries/MENARRegion/Pages/ILIndex.aspx>

¹² International Committee of the Red Cross (ICRC) Customary IHL Database, Rule 50: 'The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity.'

¹³ Demolishing Homes, Demolishing Peace: Political and Normative Analysis of Israel's Displacement Policy in the OPT, Israeli Committee Against House Demolition (ICAHD), April 2012.

¹⁴ Occupied Palestinian Territory Consolidated Appeal, United Nations, 2013.

¹⁵ 'Protection of Civilians: Weekly 24-30 December 2013' OCHA, Jerusalem, available at:

http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_report_2013_12_31_english.pdf

¹⁶ 'Fact Sheet: Demolition Orders in Area C of the West Bank 1988-2013' Bimkom (December 2013), available at: <http://bimkom.org.il/eng/wp-content/uploads/Demolition-Orders-Fact-Sheet.pdf>

¹⁷ Demolition and Forced Displacement in the Occupied West Bank, January 2012, UN OCHA, last accessed 28 January 2014. Available at:

http://www.ochaopt.org/documents/ocha_opt_demolitions_factSheet_january_2012_english.pdf

seen a dramatic increase in settlement growth. Construction began on 865 new settlement units between January and March 2013, representing a 355 per cent increase in comparison to the same quarter in 2012.¹⁸ Indeed, since the most recent round of peace talks began in July 2013, Israel has announced plans to build more than 5,900 new settlement units in the West Bank, including East Jerusalem.¹⁹ All settlements, regardless of their classification under Israeli law, are constructed in violation of Article 49 of the Fourth Geneva Convention.²⁰ This position has consistently been reiterated by the United Nations²¹ and reaffirmed by the International Court of Justice (ICJ) Advisory Opinion on the Wall (2004).¹²²

Policies linked to demolitions and settlements, which include the denial of access to water and other natural resources, restrictions on freedom of movement and the lack of protection against settler violence, combine to create a coercive environment that could lead, if it has not already done so, to the forcible transfer of the protected population. Forcible transfer of protected persons is prohibited by the Fourth Geneva Convention and amounts to a grave breach of the Convention under Article 147.²³ Upholding this prohibition is a customary international obligation,²⁴ the only exception being the temporary evacuation of protected persons for their own security or for imperative military reasons.²⁵

Mainstreaming the Notion of Annexation of Occupied Territory in Israeli Political Discourse

While the debate over annexation of parts or all of the oPt has been taking place for some time within Israel, it was frequently dismissed as being isolated to a fringe, extreme right-wing element within the political discourse. However, possibly as a by-product of negotiations, the concept is increasingly being advocated as a viable strategy of late, and not only by those who are located at the periphery of the political stratum.²⁶

The openness with which annexation is being discussed at a political level, along with the tabling of two separate legislative bills calling for annexation, represent a precarious shift in the Israeli political discourse, from *informal* annexation of the West Bank through the establishment of settlements (and their associated infrastructure), towards formal annexation, modeled after the 1968 unilateral and illegal annexation of East Jerusalem.²⁷ Indeed, the most recent legislative attempt to formally annex portions of the occupied territory was approved in December 2013 by the Ministerial Committee for Legislative Affairs, and goes to the Knesset plenum with government support.

¹⁸ 'Construction Starts in Settlements Reach 7-year High' Peace Now (9 June 2013), available at: <http://peacenow.org.il/eng/ConstructionStarts1-3-2013>

¹⁹ 'Israel announces plans for building 1,400 settlement homes', Reuters, (10 January, 2014), last accessed 2 February 2014. Available at:

<http://www.reuters.com/article/2014/01/10/us-palestinians-israel-settlements-idUSBREA090KW20140110>. See also, 'Israel issues 558 permits for East Jerusalem housing', Haaretz, (5 February, 2014), last accessed 5 February 2014. Available at: <http://www.haaretz.com/news/diplomacy-defense/1.572616>

²⁰ 24th International Conference of the Red Cross, Res. III: 'settlements in occupied territory are incompatible with article 27 and 49 of the Fourth Geneva Convention.'

²¹ See, for example, United Nations Security Council, Resolution 446 (1979) of 22 March 1979, S/RES/446.

²² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice, 9 July 2004.

²³ Article 49(1) Fourth Geneva Convention.

²⁴ Rule 129 ICRC Customary Law Study, 2005.

²⁵ Article 49(2) Fourth Geneva Convention.

²⁶ 'A Greater Israel? Faction says no to two-state solution, yes to annexing Palestinian areas', The Washington Post, (6 November 2013), last accessed 3 December 2013. Available at:

http://www.washingtonpost.com/world/middle_east/israeli-right-says-no-to-two-states-yes-to-greater-israel/2013/11/05/aa9068ee-454d-11e3-95a9-3f15b5618ba8_story.html

²⁷ In 1980, the Israeli Parliament (the "Knesset") passed Basic Law: Jerusalem, Capital of Israel which, on a constitutional level, declared Jerusalem to be Israel's "eternal and indivisible" capital and included occupied East Jerusalem territory. In response, the UN Security Council (UNSC) Resolution 478 affirmed that acquisition of territory, annexation, by force is forbidden according to international law and confirmed the continued application of the Fourth Geneva Convention to the areas annexed by Israel. It also called upon member States to withdraw their diplomatic missions from the city.

This openness has taken the form of public statements and programs, advocated for by prominent Israeli politicians, including Danny Danon, Deputy Minister for Defense and the head of the central committee of the Likud party, explicitly calling for the de jure annexation of large portions of the West Bank. The Housing Minister, Minister of Trade and Commerce, Deputy Foreign Minister and Deputy Minister for Transport, amongst others, have all joined Mr. Danon in openly advocating for annexation and the full application of Israeli sovereignty over parts of the West Bank.²⁸ Indeed, for many, the question is no longer whether or not Israel should press ahead with de jure annexation, but rather, how much of the West Bank should be included in the plan and what to do with the Palestinian population located therein.²⁹

Independence of Judicial Review

It is widely accepted that the Israeli judiciary provides meticulous domestic review of Israel's policies and practices. However, on the numerous occasions that the scope of judicial review, its independence from alien considerations, as well as its consistency with obligations under international law have been challenged within the Israeli High Court of Justice, the Court has mostly dismissed questions relating to the application of international law. Instead, the Court has restricted arguments heard to those related to the specific facts of a given case rather than international legal obligations emanating from those. Typically, the Court will state that it has not "*seen cause to address the petitioners' arguments regarding the interpretation of the provisions [...] of the [Fourth Geneva] Convention*".³⁰ Ultimately, the Court focuses on "*matters of procedural fairness [...] rather than those of international law*".³¹

According to David Kretzmer, when it comes to substantive transgressions from peremptory norms of international law, the "*legitimizing function of the Court has been dominant*".³² Consequently, the judiciary has, in the words of another Israeli academic, Orna Ben-Naftali, "*generated the normalization of the exception and the subversion of the very notion of the rule of law on both the individual and the systematic levels*".³³

²⁸ 'Hotovely: Annex Judea and Samaria, Pay Demographic Price', Arutz Sheva 7 (24 June 2013), available at: <http://www.israelnationalnews.com/News/News.aspx/169233#.UoSECnBBO-0>; 'A Greater Israel? Faction says no to two-state solution, yes to annexing Palestinian areas', The Washington Post, (6 November 2013), last accessed 3 December 2013. Available at: http://www.washingtonpost.com/world/middle_east/israeli-right-says-no-to-two-states-yes-to-greater-israel/2013/11/05/aa9068ee-454d-11e3-95a9-3f15b5618ba8_story.html

²⁹ 'Taking annexation seriously', The Times of Israel, available at: <http://blogs.timesofisrael.com/taking-annexation-seriously/>

³⁰ HCJ 2690/09, Yesh Din et al. v. Commander of the IDF Forces in the West Bank et al. Judgment.

³¹ David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York, 2002.

³² David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York, 2002.

³³ Orna Ben-Naftali, *Pathological Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies*, International Humanitarian Law and International Human Rights Law, Oxford, 2011.

III. LEGISLATION IN THE ISRAELI PARLIAMENT

Since the Israeli general elections in February 2009, which brought to power a right-wing government coalition led by *Likud*, several pieces of legislation have been introduced in the Israeli Parliament (the 'Knesset') that seem to disregard peremptory norms of international law while adversely targeting the Palestinian population of the oPt, or curtailing the efforts of those advocating justice for Palestinians.

These laws and draft bills appear to dispossess Palestinians of their natural resources, undercut their right to self-determination, and criminalise political expressions or advocacy initiatives that question the policies and practices of Israel.

The following examples are drawn upon as evidence, rather than an exhaustive list, of this apparent willingness by the Knesset to disregard international standards of substantive rule of law.

'Basic Law: Israel the Nation-State of the Jewish People (2011) and Non-Profit Organizations Law - Amendment (2013).'

The draft bill, tabled in August 2011, sets out to define Israel as *"the national home of the Jewish people"*, and declares that *"the right to realize national self-determination is exclusive to the Jewish people"*.³⁴

In May 2013, Coalition Chairman MK Yariv Levin (*Likud*) presented his formulation for the draft basic law, extending the scope of exclusive right to self-determination to the "land of Israel" (synonymous with "historic Palestine", including what is now the occupied West Bank and the Gaza Strip), stating that the *"proposed law emphasizes the traditional and historical connection between the Jewish people and the land of Israel and the national rights granted to it"*.³⁵

In the draft bill explanatory note, reference is made to the First Zionist Congress Basel Declaration of 1897, stating that the aim of Zionism is to "create for the Jewish people a home in Palestine secured by law".³⁶ At the time, the Congress decided against the inclusion of the suffix "by international law". This position was echoed in current bill's apparent disregard of the position taken by the international community on the realisation of self-determination by the Palestinian people.

Following a similar legislative agenda, and highlighting the perilous nature of the draft basic law beyond an inflammatory political statement, in December 2013 the Ministerial Committee for Legislative Affairs reviewed a draft bill tabled by MK Miri Regev (*Likud*). The bill presented an amendment to the Non-Profit Organizations Law under which the state would be able to prevent an organisation's registration if any of its objectives contradicted the definition of *"Israel as a Jewish and democratic state"*. In addition to human rights organisations supporting the right of Palestinians to be citizens of Israel or the right of return for Palestinian refugees, this could, for example, include organisations that promote absolute equality for minorities in Israel through a democratic government.³⁷

³⁴ Available at: <http://oknesset.org/bill/6111/>

³⁵ 'Jewish Identity Bill Returns to Knesset' Haaretz (7 May 2013), available at: <http://www.haaretz.com/news/national/lawmakers-to-debate-proposal-giving-jews-unique-right-to-self-determination-in-israel.premium-1.526237>

³⁶ See: http://www.jewishvirtuallibrary.org/jsource/Zionism/First_Cong_&_Basel_Program.html

³⁷ 'ACRI Opposes Yet Another Anti-NGO Bill', ACRI (26 December 2013), available at: <http://www.acri.org.il/en/2013/12/26/new-amuta-bill/>

In light of the amendment, the Association for Civil Rights in Israel (ACRI) warns that:

*Israel will join a dubious list of countries in which there is no freedom of activity for civil society organizations. It appears that this bill seeks to exclude anyone whose outlook and actions are inconsistent with the positions of the present political majority.*³⁸

'Sovereignty over Judea and Samaria (2011).'

In tandem with the previous draft bill, in May 2011 Israeli Parliament Members, hailing from the *Likud* ruling party and other members of the Israeli coalition government, established a parliamentary caucus for the de jure annexation of Area C. The parliamentary caucus is related to the "Partial Annexation and Pacification Program" advocated for by the Minister of Trade and Commerce and former leader of the Judea and Samaria Settlement Council, Naftali Bennett (*The Jewish Home*), explicitly calling for the formal annexation of 62% of the West Bank (referred to as "Judea and Samaria").

Caucus Chair MK Miri Regev (*Likud*) introduced a draft bill in June 2011, later endorsed by the Caucus, calling for the application of Israeli sovereignty to Area C of the West Bank.³⁹ The draft bill was modeled after the Golan Heights Law which applied Israel's government and laws to the Syrian Golan Heights (determined null and void by United Nations Security Council Resolution 497). During a meeting of the Ministerial Committee on Legislative Affairs to vote on government endorsement of the draft bill, the Deputy Attorney General remarked that "*the meaning is virtually full annexation. There is no legal impediment to do this but one needs to understand the consequences*".⁴⁰

Deliberations on the draft bill were ultimately postponed by Prime Minister Netanyahu,⁴¹ but could resume given that it was re-tabled in March 2013 in the original language.⁴² In July 2012, the parliamentary caucus tabled another draft bill, this time calling for the de jure annexation of the vast majority of the Jordan Valley.⁴³ The bill calls for the application of Israeli sovereignty over "*all Israeli settlements*" and "*areas except non-Jewish villages*" in the Jordan Valley.⁴⁴

It is worth noting that the explanatory note for the draft bill cites the Palestinian statehood initiative⁴⁵ as the pretext for annexation, stating that the "*Palestinian declaration [...] does not genuinely pursue peace [...] thus the Jewish character of settlements in Judea and Samaria should be retained*".

The draft bill was approved in December 2013 by the Ministerial Committee for Legislative Affairs, although it was immediately appealed by Justice Minister Tzipi Livni. Given Prime Minister Benjamin Netanyahu's opposition to the bill, it is unlikely to become law in the near future. That said, the cross party support for the bill is noteworthy, as is the apparent absence of any reference to international law in the ensuing debate.⁴⁶ On this note, it is worth

³⁸ *ibid*

³⁹ See: <http://www.miri-regev.co.il/content.php?id=480>

⁴⁰ 'Netanyahu Says No to West Bank Annexation' Ynet News (13 May 2012), available at: <http://www.ynetnews.com/articles/0,7340,L-4228574,00.html>

⁴¹ 'Ministerial Committee on Legislative Affairs called to vote on bill to impose Israeli law on Jewish settlements in West Bank', Ynet News (13 May 2012) available at: <http://www.ynetnews.com/articles/0,7340,L-4228574,00.html>

⁴² See: <http://oknesset.org/bill/5964/>

⁴³ See: <http://www.miri-regev.co.il/content.php?id=634>

⁴⁴ *ibid*.

⁴⁵ 'Palestine's UN Initiatives: Questions and Answers on the Representation of the Rights of the Palestinian People' Al-Haq (2011), available at: <http://www.alhaq.org/advocacy/targets/united-nations/453-palestines-un-initiatives-questions-and-answers-on-the-representation-of-the-rights-of-the-palestinian-people>

⁴⁶ 'Rightist MK makes headlines at ministerial committee for legislation' Haaretz (31 December 2013), available at: <http://www.haaretz.com/news/national/.premium-1.566358>. 'Bill annexing Jordan Valley advances; PM to oppose it' The Times of Israel (29 December 2013), available at: <http://www.timesofisrael.com/bill-annexing-jordan-valley-advances-pm-to-oppose-it/>. 'Palestinians attack symbolic ministerial vote to annex Jordan Valley' The Jerusalem Post (29 December 2013), available at: <http://www.jpost.com/Diplomacy-and-Politics/Ministers-vote-to-annex-Jordan-Valley-336466>.

remembering that UN Security Council Resolution 497, which invalidated Israel's annexation of the Golan Heights, reaffirmed that the acquisition of territory by force was inadmissible in accordance with the UN Charter and the principles of international law.

'Law for Prevention of Damage to State of Israel through Boycott (2011)' and 'Bill to Amend the Income Tax Ordinance – Support of Israeli NGOs by Foreign Political Entities (2013)'.

The 'Boycott Law' was introduced in the Knesset in July 2010, sponsored by a group of Knesset members from the coalition government, and approved the following year. It states that individuals or organisations who call for an economic, cultural or academic boycott against a person or entity merely because of its affiliation to the State of Israel, to an Israeli institute or to a specific region under Israeli control (alluding to the oPt), may be sued civilly, in tort, by a party claiming that it might be damaged by such a boycott. Plaintiffs can take a civil case without having to prove that they suffered actual damages.

The law also allows Israeli authorities to deny individuals or organisations of benefits – such as tax exemptions or participation in government contracts – if they have publicised a call to boycott or if they have committed to participate in a boycott. The law can be seen as a clear attempt to thwart the boycott of Israeli activities in the oPt. ACRI has labeled the law as a violation of the constitutional right to freedom of speech.⁴⁷ Indeed, Eyal Yinon, the Knesset's Legal Advisor, condemned the legislation as a "*strike to the heart of freedom of political expression in the state of Israel*".⁴⁸

In December 2013, the Ministerial Committee for Legislative Affairs approved the 'Bill to Amend the Income Tax Ordinance', a draft law that would impose sanctions, in the form of a 45 per cent tax, on donations from foreign State entities to certain organisations in Israel. The draft bill targets organisations who support the call for boycott, divestment or sanctions against Israel, or who call for IDF soldiers to be prosecuted in international courts. Attorney-General Yehuda Weinstein has opposed the bill, recognising that it "*infringes on a series of constitutional rights, chiefly the freedom of expression and the freedom of association*".⁴⁹ The bill has been highlighted as the latest in a series of efforts by Members of the Knesset to suppress freedom of expression and political dissent from non-governmental organisations in Israel.⁵⁰

'Counter-Terrorism Bill (2011)':

A Counter-Terrorism Bill⁵¹ was approved for tabling by the Ministerial Committee on Legislation in June 2013.⁵² The bill would provide the government of Israel an array of public and criminal law means with which to target the financial and organisational infrastructure of alleged terrorist organisations. The draft bill will replace the 1948 Prevention of Terror Ordinance and the 2005 Prohibition on Terrorist Financing Law, and details the procedures for the declaration of unlawful associations, appeals and revocation, as well as harsher punishment for individuals suspected or convicted of aiding or associating with unlawful associations in Israel and elsewhere.

The significance of this draft bill stems from the fact that it grants the Israeli Minister of Defense the authority to proclaim any area outside the boundaries of Israel as a "terror infrastructure area" to which the law would apply, provided acts of terror directed against Israel and its nationals, or the preparation of such acts, regularly take place there.

⁴⁷ 'ACRI Petitions Supreme Court to Annul the Anti-Boycott Law', (16 February 2014) <<http://www.acri.org.il/en/2014/02/16/anti-boycott-court-2014/>> accessed 10 January 2014

⁴⁸ *ibid.*

⁴⁹ Edna Adato, Mati Tuchfeld and Gideon Allon, 'Attorney-general warns against passage of anti-NGO bill' Israel Hayom (Tel Aviv, 16 December 2013) <http://www.israelhayom.com/site/newsletter_article.php?id=14047> accessed 5 January 2014

⁵⁰ 'A New Law to Limit Foreign Donations to Non-Profit Organizations' Association of Civil Rights in Israel (19 December 2013) <<http://www.acri.org.il/en/2013/12/19/ngo-bill-dec13/>> accessed 21 February 2014

⁵¹ See: http://www.nevo.co.il/law_word/law15/memshala-611.pdf

⁵² See: <http://www.pmo.gov.il/Secretary/GovDecisions/2013/Pages/des459.aspx>

Based upon the draft bill, the Minister can declare any bodies of persons as an unlawful association, regardless of the nature of the endeavor undertaken by them, be it political or humanitarian in nature.⁵³ Organisations or individuals associated with “*unlawful associations*” become subject to military tribunals (or military courts), prohibited of publication of books and newspapers, destruction or seizure of their property, indefinite administrative detention, and the imposition of restrictions on movement, pursuant to Regulations 84–85.

Between the years 1967 and 2010, 297 organisations were declared unlawful associations by the Military Commander (who was delegated to do so by the Minister of Defense) under the Defense (Emergency) Regulations and the Prohibition on Terrorist Financing Law of 2005.⁵⁴ As of July 2012, 163 organizations remain on the list issued by the Military Commander.⁵⁵ With the passing of the draft bill, that list stands a good chance of becoming ever more sweeping and inclusive.

In December 2013, for example, the Council for European Palestinian Relations (CEPR) – a Belgian non-profit organisation, whose Chair of the Board is former UK International Development Secretary Clare Short, was declared an unlawful association by the Israeli Military Commander. As a result, the GOI can confiscate funds connected to the group and try its members or those who provide them with services, irrespective of the organisation’s declared mandate of “*resolution to the Israeli–Palestinian conflict based on justice and the restoration of Palestinian rights in accordance with international humanitarian and human rights law*”.⁵⁶

Other examples include Interpal⁵⁷ (Palestinian Relief and Development Fund), founded in the United Kingdom in 1994, and Swedish-based Al Aqsa Spannmål Stiftelse. Both organisations, with humanitarian mandates that include the delivery of emergency aid and the provision of aid to Palestinian widows and orphans, have been declared unlawful associations by the Military Commander under Regulation 84 of the Defense (Emergency) Regulations.⁵⁸

Allegations made against Interpal of links with terrorist organisations were investigated by the Charity Commission for England and Wales three times between 1996 and 2009, with no evidence found to prove the accusations.⁵⁹ The Commission did advise Interpal on procedural matters. However, it also concluded that organisation had presented “*clear financial audit trails in their delivery of aid for humanitarian purposes*”⁶⁰ and declared that it could not verify any links with the promotion of terrorist ideology or activities.⁶¹ Similarly, Al Aqsa Spannmål Stiftelse was investigated by Swedish police following a 2003 allegation made by the United States Government of links to Hamas.⁶² The ensuing investigation by found no evidence of such alleged ties or support of terrorism on the part of the charity.⁶³

The purpose of this paper is not to examine the humanitarian nature of every organisation declared to be an unlawful association. That said, it is worth referencing the 2013 position paper prepared by ACRI that highlights the overly broad definitions for terms such as “*terrorist act*”, “*terrorist organization*” and “*member of a terrorist group*”. ACRI argues that such definitions grant the state overly broad discretion, and that the draft bill will enshrine in law the authority to arrest people indefinitely in the form of administrative detention.

⁵³ (Captain Adv.) Alexander Averbuch, Fighting Terror Funding in Israel: Legal Aspects, Research Officer, Israel Military Advocate General Corps.

⁵⁴ ‘List of Organizations Declared as Unlawful Associations’, available at: <http://nolegalfrontiers.org/military-orders/mil08?lang=en>

⁵⁵ See: <http://www.law.idf.il/163-5149-he/Patzar.aspx>

⁵⁶ ‘Clare Short at risk of arrest in Israel, warns defence minister Moshe Ya’alon’, Independent (31 December 2013), available at: <http://www.independent.co.uk/news/world/middle-east/clare-short-at-risk-of-arrest-in-israel-warns-defence-minister-moshe-yaalon-9031682.html>

⁵⁷ See: <http://www.interpal.org/contentRamadan.aspx?pageID=11>

⁵⁸ ‘List of Organizations Declared as Unlawful Associations’, available at: <http://nolegalfrontiers.org/military-orders/mil08?lang=en>. See: <http://nolegalfrontiers.org/military-orders/mil08?lang=en>

⁵⁹ ‘Inquiry Report: Palestinians Relief and Development Fund, UK Charity Commission (2009), available at: <http://offlinehbpl.hbpl.co.uk/NewsAttachments/NST/interpal09.pdf>

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² Available at: http://www.aftonbladet.se/vss/telegram/0,1082,61886669_852_p_o,00.html

⁶³ Available at: <http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=252720>

ACRI describes the draft bill as one that *“seeks to perpetuate and “normalize” the anti-democratic measures currently provided for by emergency legislation and by draconian defense ordinances from the time of the British Mandate, by enshrining them in the permanent law of the State of Israel”*.⁶⁴ In this regard, it is important to note the Israeli Military Advocate General's assertion in 2004 that some of the organisations declared unlawful are *“possibly directed toward civil and humanitarian activities [...] and includes education, relief, religious services and other social activities”*.⁶⁵

⁶⁴ See: <http://www.acri.org.il/en/wp-content/uploads/2013/06/ACRI-Position-Paper-CounterTerrorism-Bill.pdf>

⁶⁵ (Captain Adv.) Alexander Averbuch, Fighting Terror Funding in Israel: Legal Aspects, Research Officer, Israel Military Advocate General Corps.

IV. INDEPENDENCE OF THE ISRAELI JUDICIARY

*It would be naive to think that a domestic court could deal with such an anomalous situation as if it were an outside, neutral, observer that is oblivious to the political realities in its own country.*⁶⁶

Professor David Kretzmer

The Israeli High Court of Justice (HCJ) has established, with the consent of the State Attorney General,⁶⁷ judicial oversight of the Israeli Military Commander of the oPt, and asserted judicial authority over the military, which is the administrative body charged with governing Palestinians in the occupied territory. Israeli authorities claim that Palestinians enjoy access to and are served justice in the Israeli Supreme Court, sitting as the High Court of Justice.⁶⁸ However, effective access to the Court requires more than the ability to physically stand before a judge, and is dependent on the remedies available and granted.

Effective access to the Court

The notion of effective access is based on the criteria of legal and institutional frameworks devised by the UN Special Rapporteur on the Independence of Judges and Lawyers.⁶⁹

The right to a fair trial is stipulated in Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights (ICCPR), and entails access to independent and impartial courts, whose decisions are based on law, and which observe procedural guarantees. Likewise, the independence of the judiciary is a treaty-based obligation, contained in Article 14(1) of the ICCPR, and reinforced by Human Rights Committee General Comment No.32.⁷⁰ These guarantees include equality before the courts, and hearing by an independent and impartial tribunal.⁷¹

Access must not be theoretical but “available to the persons concerned; [...] capable of restoring the enjoyment of the impaired right; and ensure the effectiveness of the judgment”.⁷² Most notably, the remedies made available by the courts should be genuinely capable of meeting the desired objective of equality and must allow all people, regardless of nationally or administrative status, to claim justice. Thus, equality of justice “is not just a matter of guaranteeing entry to the judicial process: equality of access must determine the entire conduct of that process”.⁷³

Broadly, the Court has acknowledged that customary international law is embedded in Israel's national legislation, unless contradictory to provisions of Israeli domestic law.⁷⁴ Since 1967, the Court has consistently upheld the supremacy of domestic legislation (notably, orders of the Israeli Military Commander), which, according to the Court, “trumps the provisions of the [Fourth Geneva] Convention”.⁷⁵ Based on its jurisprudence and statements, it is clear that in the view of the Court, domestic Israeli law comes before the principles of international law, even when they are customary in nature.

⁶⁶ David Kretzmer, The law of belligerent occupation in the Supreme Court of Israel, *International Review of the Red Cross*, No. 885, 2012.

⁶⁷ HCJ 802/79, Samara v. the Commander of Judea and Samaria.

⁶⁸ Committee on the Elimination of Racial Discrimination, Seventieth session, 1 March 2007, CERD/C/SR.1794.

⁶⁹ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 31 December 2003, E/CN.4/2004/60.

⁷⁰ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 24 March 2009, A/HRC/11/41.

⁷¹ Human Rights Committee, General Comment No.32 Article 14.

⁷² Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 11 April 2008, A/HRC/8/4.

⁷³ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 11 April 2008, A/HRC/8/4.

⁷⁴ HCJ 302/72 Hilo v. The Government of Israel (also HCJ 306/72).

⁷⁵ For example: HCJ 253/88 Sajdyia v. Minister of Defense; Eichman v. Attorney General; HCJ 256/01Rabakh v. Municipal Court in Jerusalem; HCJ 591/88 Taha v. Minister of Defense.

Under the law of occupation, the Occupying Power has a clear set of obligations and privileges. However, the High Court has, in many cases, expanded these privileges beyond what is allowed for under international law, while limiting its obligations and the protection afforded to the protected Palestinian population. The Court will refer in its ruling, at times in great detail, to certain provisions of IHL, including both the Hague Regulations and the Geneva Conventions. However, the Court will do so in a way that corresponds,

*to the special circumstances and characteristics dictated by the need to apply the laws of occupation in conditions that match the way the Area is held [...] considering the protracted period of the holding, the geographic conditions and the possibility of maintaining contact between Israel and the Area.*⁷⁶

As such, the Court has made the application of international customary law contingent on a broad set of arbitrarily-defined circumstances, as opposed to making adherence to international law the foundation of its policies and practices in the oPt. By applying legal standards in such a manner, the Court often facilitates the denial of even the minimum protections guaranteed to Palestinians under both the law of occupation and international human rights law.

The following recent cases adjudicated by the HCJ illustrate the willingness of the Court to disregard the principles of international law, addressing three interlinked issues:

- (a) prolongation of occupation and denial of Palestinian sovereignty over natural resources;
- (b) exploitation of occupied territory, economic and otherwise;
- (c) rationalisation of settlement establishment and expansion and the status of the civilian population of the occupying power.

The following cases, adjudicated between 2010 and 2013, serve to substantiate the claim made above in respect to the Court's marginalisation of international law. The examples below also provide evidence of the ways in which the Israeli judiciary is complicit in the maintenance of the occupation.

'Yesh Din - Volunteers for Human Rights v. The Commander of the IDF Forces in the West Bank, HCJ 2164/09.'

*Quarrying natural resources in an occupied territory for the economic benefit of the occupying state is pillage, and the court's reasoning that a long-term occupation should be treated differently cannot legalize an economic activity that harms the occupied residents.*⁷⁷

Attorney Michael Sfard, Yesh Din

In December 2011, the High Court of Justice rejected a petition challenging the legality of Israeli quarries in the oPt, arguing that the laws of occupation need to be adjusted in situations of long-term occupation, and thus provided the Occupying Power with greater authority, beyond the provisions of IHL. In addition, the HCJ argued that the exploitation of quarries in the oPt provided economic benefits and employment opportunities to the local Palestinian population, as if to suggest that this provided further justification for overruling the basic tenets of international law.

⁷⁶ *ibid.*

⁷⁷ Yesh Din, 'HCJ legalizes quarrying in the West Bank by Israeli companies', 27 December 2011. See: <http://www.yesh-din.org/infoitem.asp?infocatid=171>, last accessed 15 January 2014.

The Court considered that owing to the prolonged nature of the belligerent occupation, the general principle expressed in Article 43⁷⁸ should be read in a broad manner to facilitate an “adjustment” of the laws of belligerent occupation to fit the prolonged nature of the occupation and “the sustainability of economic relations between the two authorities”.⁷⁹ According to the Court, such a reading would support “the adoption of a wide and dynamic view of the duties of the military commander in the Area, which impose upon him, inter alia, the responsibility to ensure the development and growth of the Area.”⁸⁰ Despite the Court’s reasoning, such measures are beyond the temporary remit of the law of occupation and importantly, allowed for the exploitation of natural resources for the benefit of the Occupying Power’s domestic economy, in clear contradiction with international law.

The judgment concluded that “the State’s interpretation of the manner in which it exercise its powers in accordance with Article 55⁸¹ is reasonable, and thus requires the adjustment of the laws of occupation to the reality of prolonged occupation”.⁸² However, employing principles of reasonableness to circumvent international legal standards distorts the application of the Hague Regulations beyond their conservationist nature.⁸³

In addition, the Court factored in the potential harm caused to the quarries owners, and “perhaps even to the Palestinian population itself” should the quarries discontinue.⁸⁴ In doing so, the Court placed the interests of private Israeli quarrying companies ahead of the interests of the protected persons. The Court applied the doctrine of laches, arguing that there had been an inexcusable delay seeking relief on the part of the plaintiff, and in doing so relied upon an irrelevant consideration to the laws of belligerent occupation.⁸⁵

The Court originally considered the case non-justiciable, alleging that the exploitation of the quarries in Area C was permitted under the 1995 Israeli-Palestinian Interim Agreement until a permanent peace settlement was agreed.⁸⁶ However, regardless of the interpretation of the relevant clause in the Interim Agreement, Article 47 of the Fourth Geneva Convention prohibits the deprivation of the rights of protected persons resulting from political agreements concluded between the occupying powers and authorities of the occupied territory.⁸⁷ With regard to the Interim Agreement, it is important to remember that the agreement was designed to transfer authority over the quarries back to the Palestinian Authority, and not facilitate the prolonged exploitation of the resources by private Israeli commercial interests.⁸⁸

It should also be noted that the Court has previously avoided ruling on the legality of settlements, and has rejected a petition against the settlement enterprise in HCJ 4481/94 Bargil v. The Government of Israel. The Court found that the issue was non-justiciable since it would amount to “intervention in questions of policy that are in the jurisdiction of another branch of Government, the absence of a concrete dispute and the predominantly political nature of the issue”.

⁷⁸ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Art. 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.”

⁷⁹ “Yesh Din”, paragraph 10.

⁸⁰ *ibid.*

⁸¹ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Art. 55: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”

⁸² For example: HCJ 253/88 Sajdyia v. Minister of Defense; Eichman v. Attorney General; HCJ 256/01 Rabakh v. Municipal Court in Jerusalem; HCJ 591/88 Taha v. Minister of Defense.

⁸³ Prof. Yuval Shany et al. ‘Expert Legal Opinion’ at paragraph 116

⁸⁴ “Yesh Din” paragraph 6.

⁸⁵ Prof. Yuval Shany et al. ‘Expert Legal Opinion’ at paragraph 22.

⁸⁶ “Yesh Din” paragraph 6.

⁸⁷ Article 47, Fourth Geneva Convention; J. Pictet, Commentary: Geneva Convention IV (ICRC, 1958), para 70–71, 274; Expert Opinion by Professor Iain Scobbie and Alon Margalit, “The Israeli Military Commander’s Powers under the Law of Occupation in relation to Quarrying Activity in Area C”, para. 7, p. 3.

⁸⁸ Prof. Yuval Shany et al. ‘Expert Legal Opinion’ paragraph 69.

Nevertheless, the Court has ruled that the interests of settlers are, at the very least, on par with those of the protected Palestinian population. In HCJ 256/72 *The Jerusalem District Electric Company v. The Minister of Defense*, which related to Jewish settlers in Hebron, the Court ruled that “*it is necessary to regard the residents of Kiryat Arba as those who were added to the local population and they too are entitled to receive a stable supply of electricity*”.

Having recognised the connection between the settlers’ presence and the exercise of authority by the Military Commander, the Court invoked the Hague Regulations in relation to settlers in another quarries related case, HCJ 9717/03 *Nili Local Committee v. The Civil Administration for Judea and Samaria*. In its ruling, the Court addressed the potential harm caused by a quarry “*to the quality of life of the inhabitants that are living in the settlements in the vicinity of the quarry*”.⁸⁹ The Court has relied on Regulation 43 to ensure public order and civil life, while in effect ruling against the very logic embodied in the principals of protection for local population under belligerent occupation. Instead, these rulings create an erroneous equality before the law between the protected Palestinian population and the civilian population of the occupying power, transferred to occupied territory.

Regavim and ‘The Association for Civil Rights in Israel v. Minister of Defense; and IDF Commander for the West Bank, HCJ 413/13.’

Recently, settler organisations have, jointly with settlement local-councils, taken to initiating legal action in the Court. This includes targeting Palestinian individuals, communities, and State authorities, promoting the destruction of Palestinian-owned property, and encouraging the forcible transfer of Palestinian communities adjacent to settlements. The Court is thus used to exert pressure on State authorities (including the Ministry of Defense, the Military Commander, and the State Attorney General) to expedite processes of appropriation of Palestinian-owned land and the destruction of private and public property (including schools, places of worship, health clinics and water and livelihood-related infrastructure).

Regavim (Hebrew for earth mounds) is a settler non-governmental organisation founded in 2006⁹⁰ with a mandate to monitor Palestinian construction in the oPt and the expressed intent to safeguard land and natural resources in the “land of Israel” (historic Palestine) for the exclusive use of Jews.⁹¹ The organisation made its first appearance in a September 2009 joint petition to the High Court of Justice with the local councils of settlements *Kfar Adumim, Alon and Nofei Prat*.⁹² The petition called on the Court to order the State to exercise its authority as the “sovereign power in the West Bank to destroy structures that the Bedouin-Palestinian Jahalin tribe has built in Khan al-Ahmar” on the grounds that they constitute unauthorised construction on state-owned lands.⁹³ While the Court did not uphold the petition at the time,⁹⁴ soon after the decision the Military Commander issued demolition orders for the village in its entirety, including the community’s school. Efforts are also underway to forcibly transfer the community to another, as yet unspecified, location.

Subsequent petitions by *Regavim* and settlement local-councils saw the Court accommodating their claims. These include a demolition order against a mosque in *Burin*⁹⁵ and the December 2012 demolition of a mosque in *Um Faqarah*,⁹⁶ which was financially supported by the *Ma’on* settlement local-council. In addition, the Court upheld a petition submitted by *Regavim* and the *Susya*-settlement local-council, resulting in 52 demolition orders being issued in *Susya*

⁸⁹ HCJ 9717/03 *Nili Local Committee v. The Civil Administration for Judea and Samaria*.

⁹⁰ *Regavim* reported to the Israeli Registrar of Non-Profits, receiving 3,117,528 ILS (865,980 USD) in donations in 2011 (including from the Jewish Federation of Canada, and the local-councils for the settlements Beit Yatir and Ma’on Tzviel in the South Hebron hills) and 2,154,503 ILS (598,473 USD) in 2010. *Regavim*’s 2011 operational budget was 2,751,237 ILS (764,232 USD), and it employs a staff of 12. See: <http://documents.guidestar.org.il/PDF/newfiles/fin/2011/117-99-2012-0217657.pdf>

⁹¹ See: <http://regavim.org.il/en/about-regavim/>

⁹² HCJ 7264/09, *Kfar Adumim et al. v. Minister of Defense et al.*

⁹³ HCJ 7264/09, *Kfar Adumim et al. v. Minister of Defense et al.*

⁹⁴ See: <http://elyon2.court.gov.il/files/09/880/062/M24/09062880.M24.html>

⁹⁵ HCJ 5790/10, *Regavim v. Military Commander Burin Village Council et al.*

⁹⁶ HCJ 7121/12, *Regavim v. Military Commander et al.*

⁹⁷ ‘Court Orders Demolition of Illegal Arab Buildings’ *Arutz Sheva* 7 (13 June 2012), available at: <http://www.israelnationalnews.com/News/News.aspx/156822#.UbGgbec3BfQ>

in June 2012, targeting the village in its entirety.⁹⁷ *Regavim's* legal counsel, Attorney Amir Fisher, depicts the use of petitions as “effective, because it brings the true facts before the Court. [...] [I]t is time that we change the hearts and minds of the judges. We show them that the Palestinians are building villas, castles and huge schools, and all without a permit”.⁹⁸ Currently, *Regavim* reports that 30 cases are being adjudicated in the Court, with up to 140 investigations being conducted.⁹⁹

Moreover, the Court has granted *Regavim* the status of *amicus curiae* (friend of the court) in several cases argued before it, including one pertaining to the potential forcible transfer of nine Palestinian communities in the South Hebron Hills area known as Firing Zone 918.¹⁰⁰ By virtue of being awarded *amicus curiae*, *Regavim* is granted access to privileged information submitted to the Court. Given that *Regavim* has received funding from settlements adjacent to the area in question, that would likely stand to profit from the removal of the communities therein, there appears to be a serious conflict of interest involved in the granting of such status to a settler organisation.

In conceding to the claims made by settler organisations, which find no grounding in international law and by additionally granting settler organisations *amicus curiae* status as in HCJ 413/13, the Court again creates a false equality before the law between the protected population and the settler community. It also adds to the aura of legality that blankets clear violations of international law, and allows the Occupying Power to continue to ignore its obligation to administrate occupied territory for the benefit of the local protected population, and for their benefit alone.

⁹⁸ *ibid.*

⁹⁹ ‘NGO counters illegal Palestinian and Arab building amid global focus on Jewish construction’ JNS.org (9 June 2013), available at: <http://www.jns.org/latest-articles/2013/6/9/amid-global-focus-on-jewish-construction-ngo-counters-illegal-arab-building>

¹⁰⁰ HCJ 413/13, *The Association for Civil Rights in Israel v. Minister of Defense; and IDF Commander for the West Bank*. HCJ 1039/13 *Muhammad Yunis et al V. Minister of Defense; and IDF Commander for the West Bank*.

V. ISRAELI COMMISSIONS AND REPORTS

In recent years, two governmental commissions, the Turkel Commission and the Levy Committee, have been created with the aim of analysing Israel's compliance with international law, or rationalising and legalising Israeli policies and practices, including the settlement enterprise.

Levy Committee

In July 2012, an Israeli Judiciary Panel Committee, formed by Prime Minister Benjamin Netanyahu and headed by former Israeli Supreme Court Justice Edmond Levy, published a report examining the legal aspects of West Bank land ownership. In its findings, the Committee rejected the well-established assertion that Israel's presence in the territory is that of an Occupying Power, instead upholding the doctrine of the "Missing Reversioner" (or Missing Sovereign)¹⁰¹ and arguing that the territory was in fact conquered from Jordan, who had never been the sovereign in the territory.¹⁰² As such, according to the Committee, IHL does not apply. The Committee also dismissed the internationally-held position that Israeli settlements violate the clear prohibition, under IHL, against the transfer of the Occupying Power's own population into occupied territories.

However, in arriving at this position, the Committee failed to recognise that under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, 'territory is considered occupied when it is actually placed under the authority of the hostile army'. The Levy Committee's conclusions are in stark contrast to the consistent position of the international community. Numerous resolutions of the UN Security Council (UNSC 242 and UNSC 338) and the General Assembly have repeated the de jure applicability of the Fourth Geneva Convention to the oPt, an area which they consider to be under belligerent occupation.

In its November 2012 response to the Levy Report, the International Committee of the Red Cross (ICRC) reiterated that for the purpose of the law of occupation,

*it is sufficient that the state whose army established effective control over the territory was not itself the rightful sovereign of the place when the conflict broke out. Nowhere in the law of occupation can one find the suggestion that only territory whose title is clear and uncontested can be considered occupied for the purposes of international humanitarian law.*¹⁰³

Indeed, the occupation would only end when Israel relinquishes its "effective control" over the West Bank and Gaza Strip.

Furthermore, the occupation of the Palestinian territory was authoritatively affirmed by the International Court of Justice (ICJ) – the leading international judicial body – in its Advisory Opinion on the Wall (2004), noting that the Fourth Geneva Convention applies "to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties...." – in this case Israel and Jordan. Once these conditions have been met, the ICJ stated that the Fourth Geneva Convention is deemed to apply "in any territory occupied in the course of the conflict by one of the High Contracting Parties." Hence the argument that the territories do not "belong" to anyone, which can be challenged factually, is in fact of no pertinent legal relevance to the applicability of the Geneva Conventions. Indeed, it would be completely contrary to the humanitarian purpose of the Fourth Geneva Convention to deprive people living under occupation of the protection afforded by the law because of disputes between belligerents regarding sovereignty over the territory concerned.

¹⁰¹ The Missing Reversioner: Reflections on the Status of Judea and Samaria, Yehuda Z. Blum, Israel Law Review 3. 279,1968.

¹⁰² This theory claims that the provisions of the Fourth Geneva Convention do not apply in the case of Israeli occupation of Palestinian land and people: "When territory without an established sovereign comes into the possession of a state with a competing claim – particularly during a war of self-defence – that territory can be considered disputed". Disputed Territories: Forgotten Facts about the West Bank and Gaza Strip, Israel Ministry of Foreign Affairs, February 2003.

¹⁰³ 'The Levy report vs. international law' Haaretz (4 November 2012), available at: <http://www.haaretz.com/opinion/the-levy-report-vs-international-law-1.474129>

Finally, it is important to note that, as stated by Alan Baker, the findings of the Committee were “no different from Israel’s policy statements over the years, including speeches by all of Israel’s leaders and ambassadors in the United Nations, as well as in official policy documents issued by the Foreign Ministry.” The report, the publishing of which only serves to further undermine the importance of international law within Israel, is subject to the review and approval of Israeli Attorney General. However, according to reports, the Knesset’s Constitution, Law and Justice Committee are due to meet to discuss the implementation of the Levy Report.¹⁰⁴

Turkel Commission

The Public Commission to Examine the Maritime Incident of 31 May 2010 (known also as the “Gaza flotilla raid”), headed by retired Israeli Supreme Court Justice Yaakov Turkel published its second report in February 2013. The report examines the effectiveness of investigations by the Israeli authorities into violations of international law and the level of accountability for said violations. While providing instrumental advice on necessary reform, the report concludes that *“the examination and investigation mechanisms in Israel for complaints and claims of violations of the laws of armed conflict generally comply with Israel’s obligations under international law”*.¹⁰⁵ Thus, despite clear recommendations for substantial reform, the Commission upholds the appearance of legitimacy and competency of Israel’s law enforcement and judicial system.

The findings of the Commission were celebrated by the GOI, prior to any implementation, and reflected upon in length in the National Report to the United Nations Human Rights Council Universal Periodic Review submitted in October 2013. The Report depicts the work of the Commission as *“one reflection of Israel’s continuing commitment to advancing the rule of law in the fight against terrorism”*.¹⁰⁶ It should be highlighted, however, that the Commission’s recommendations are not legally binding and there is no legal obligation on the part of the Israeli government to adopt them. While few, if any, of Turkel’s recommendations have been implemented more than one year after being issued, a committee was recently appointed to propose ways in which to carry out the implementation. The new committee was given nine months to do so, in what can be seen as another means by which the report’s proposals can be pushed into the future.

The Institute for National Security Studies (an Israeli research institute and think tank affiliated with Tel Aviv University) has declared the report to be an *“almost insurmountable obstacle to those who wish to avail themselves of international judicial mechanisms in place of the Israeli law enforcement system”*.¹⁰⁷ Others, too, have argued that the report was designed to accomplish that end, with little or no implications beyond shielding Israeli suspects of war crimes from prosecution in foreign tribunals.

Adalah, the Public Committee Against Torture in Israel (PCATI) and Physicians for Human Rights–Israel (PHR–I) declared in a public statement that the Commission’s impartiality was undermined by its apparent purpose; *“an attempt to provide immunity for Israel for its past actions”*. The statement further questioned the utility of the report, stating that the,

*obstacles preventing Israel from conducting effective investigations and criminal procedures regarding human rights violations of Palestinians have always been more to do with a lack of political will rather than professional competency, capacity or knowledge.*¹⁰⁸

¹⁰⁴ ‘Knesset Committee to discuss Implementation of Levy Report’ Arutz Sheva 7 (26 November 2013), available at: <http://www.israelnationalnews.com/News/News.aspx/174502#.UqGwF9IW2M0>

¹⁰⁵ The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission Second Report, Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, February 2013.

¹⁰⁶ National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Israel, A/HRC/WG.6/17/ISR/1, 28 October 2013.

¹⁰⁷ ‘The Second Turkel Commission Report’ The Institute for National Security Studies (13 February 2013), available at: <http://www.inss.org.il/index.aspx?id=4538&articleid=2608>

¹⁰⁸ ‘The Turkel Report: A Preliminary Analysis’ Public Committee Against Torture in Israel (28 February 2013), available at: <http://www.stoptorture.org.il/en/node/1862>

VI. MAINTAINING THE VEIL: ISRAEL'S REPORTS AND STATEMENTS IN INTERNATIONAL FORUMS

During the reporting period, the Israeli authorities have continued to present strong arguments in international forums that serve to divert attention from, justify and entrench the protracted nature of Israeli practices and policies in the oPt and their lack of adherence to international law. This non-compliance is increasingly highlighted by unsuccessful efforts on the part of the international community to bring Israel into conformity with international law.¹⁰⁹

Applicable legal order

Israel is bound by human rights provisions contained in the Universal Declaration of Human Rights, and is State Party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC), amongst others.

Accordingly, Israel is bound to comply with its obligations in respect of all persons under their jurisdiction, irrespective of whether they are in Israeli territory or not. While derogations from rules protecting civilians are admissible in some strictly limited circumstances, such as reasons of military necessity or security, it is widely recognised that international human rights law is applicable concurrently with IHL.¹¹⁰ However, the Government of Israel has consistently rejected any application of international human rights law to the oPt.¹¹¹ This is particularly evident in Israel's interactions with UN treaty bodies.

In its 2011 report to the UN Committee on Economic, Social and Cultural Rights (CESCR) the GOI recognised the *"profound connection between Human Rights Law and the Law of Armed Conflict, and that there may well be a convergence between these two bodies-of-law in some respects"*. Nonetheless, Israel took the view that these two systems-of-law, *"remain distinct and apply in different circumstances"*. Israel consistently articulates the same position with regard to IHRL.¹¹²

Consequently, Israel has repeatedly reserved the right to extend the applicability of the International Convention on Economic, Social and Cultural Rights, for example, with respect to the West Bank or the Gaza Strip, stating that:

*In line with basic principles of interpretation of treaty law, and in the absence of such a voluntarily-made declaration, the Convention, which is a territorially bound Convention, does not apply, nor was it intended to apply, to areas outside its national territory.*¹¹³

Such a statement should also be read in light of Israel's assertion that IHL does not apply to occupied territory (in accordance with the self-proclaimed 'missing reversioner' doctrine, discussed previously). The result, then, of such a position where neither body of law applies, is a legal vacuum; a unique situation where no legal order, neither IHL nor IHRL, protects the occupied Palestinian population.

¹⁰⁹ Virginia Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, Pluto Press, 2012.

¹¹⁰ 'International Legal Protection of Human Rights in Armed Conflict' OHCHR (2011), available at: http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf

¹¹¹ Legal Consequences of the Construction of a Wall, para. 113.

¹¹² Written replies by the Government of Israel to the list of issues (CAT/C/ISR/Q/4) to be taken up in connection with the consideration of the fourth periodic report of Israel, 2009.

¹¹³ See: <http://index.justice.gov.il/Units/InternationalAgreements/IA/Reports/ReportsUnCommittees/CESCRLOIReplies2011.pdf>

Inapplicable Yet Applied in Good Faith? Destruction of Property as a Rule of Law Measure

The following examples elaborate the extent to which the GOI and the Israeli judiciary have rationalised the inapplicability of customary norms of international law, both in principle and in practice, including those considered peremptory norms, binding on all, and from which no derogation is allowed.

The GOI in its reports to treaty bodies has made passing reference to certain policies and practices prevalent in the oPt. Most notably, in relation to destruction of Palestinian private property, the GOI has regularly claimed its consistency with the rule of law and that actions taken were for the benefit of the local population, which is language reminiscent of IHL and IHRL obligations. Israel has declared that “illegal construction is not tolerated [...] given the fact that it does not take into consideration planning policies that will ensure a reasonable quality of life, and public needs”.¹¹⁴

Notably, the GOI refers to the judicial review undertaken by the HCJ as a definitive response to criticism raised by treaty bodies. Israeli authorities assert that:

*All demolitions are conducted in accordance with due process guarantees and following a fair hearing, which is subject to judicial review and the right to appeal, and all demolitions are decided upon without distinction on the basis of race or ethnic origin. Those affected by a demolition order are entitled by law to appeal to the Supreme Court.*¹¹⁵

Haas et al. v. IDF Commander in the West Bank and City of Hebron et al. v. IDF Commander in the West Bank.

In Haas et al. v. IDF Commander in the West Bank and City of Hebron et al. v. IDF Commander in the West Bank,¹¹⁶ the Court examined the requisition and demolition orders standing against Palestinian structures in Hebron, which would allow for the widening of a pedestrian path (known as the Worshippers’ Route) connecting the settlement of Kiryat Arba on the outskirts of Hebron with the Cave of the Patriarchs.

In its judgment, the Court recognised the private property right of the local Palestinians, but found that there was no reason to intervene in the discretion of the Military Commander. The Court ruled that the Military Commander was “responsible for the protection of the security of all the area’s inhabitants – Jews and Arabs alike”¹¹⁷ and found that it was “essential to increase the safety measures in the Worshippers’ Route in order to protect the pedestrians using it”.¹¹⁸

Salim Ismail Hassan v. IDF Commander in the West Bank

In HCJ 8918/03, an administrative demolition order issued to a residential structure in the village of Anata (Area C of the West Bank) in 1995 was challenged. The demolition order had followed the denial of a construction permit in 1994 in accordance with a local special outline plan imposed by the Military Commander to limit construction in the area.

¹¹⁴ See: http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.ISR.Q.5.Add.1_en.pdf

¹¹⁵ See: <http://www2.ohchr.org/english/bodies/hrc/docs/.../CCPR-C-ISR-Q3-Add1.doc>

¹¹⁶ HCJ 10356/02, Hass et al v. IDF Commander in the West Bank et al.; HCJ 10497/02, The City of Hebron at al. v. IDF Commander in the West Bank et al.

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

In the 2009 verdict, the Court reiterated the position that “the Court is not a planning institution”¹¹⁹ and could therefore not provide remedy to petitioners who challenge the validity of administrative planning decisions made by the Military Commander. Consequently, the substantive scope of the judicial review undertaken is severely restricted to the point that the Court is reluctant to “take responsibility for interfering with government action [...] consistent with the distinction between the Court’s attitude on questions of substance and procedure”.¹²⁰

Bisharat et al. v. IDF Commander in the West Bank et al.

More recently, the offhand approach towards the prohibition on destruction of property, and the reluctance to apply substantive judicial review to seemingly administrative matters (such as spatial planning, zoning and the issuance of construction permits) resurfaced in HCJ 3758/13. The Court was asked to review the decision of the Military Commander to reject the applications of 21 petitioners from the Jordan Valley (mostly in the village of Makhul, Area C of the West Bank) for construction permits for preexisting structures.

The Court rejected the petition in limine – from the beginning – and described it as futile, echoing the position of the State that the sole purpose of such petitions was to “buy time, while the petitioners’ houses remain standing after being built illegally and without permits”. The Court did so while cognisant of the fact that such permits most likely would not be granted under the current planning regime. Consequently, a few weeks after the Court ruling the Military Commander proceeded to destroy the entire village of Makhul, consisting of 58 structures, affecting over one hundred people.

Suspension of ties with the Human Rights Council and Universal Periodic Review

Following the announcement in March 2012 by the UN Human Rights Council (HRC) that an independent fact-finding mission (FFM) would be dispatched to investigate the implications of Israeli settlements on the Palestinian people, Israeli Prime Minister Netanyahu characterised the appointment of the FFM as “*a tool to push for one-sided politicized moves instead of promoting human rights*”.¹²¹ Consequently, Israel suspended its ties with the HRC and decided to withhold cooperation from the proceedings of the HRC, until it re-engaged some 18 months later.

When Israel submitted the National Report in October 2013,¹²² no reference was made to occupied Palestinian territory, the protected population or Israel’s policies and practices in relation to those. The report specifically ignored the questions submitted in advance by member States, including Sweden, Norway and Germany relating to the application of IHL and IHRL in the oPt.¹²³

In his concluding remarks to the review, Ambassador Manor was able to capture the GOI perception of the HRC, expressing “*disappointment with the lack of interest in issues of human rights in Israel at the expense of an inflated interest in the Palestinian issue*”.¹²⁴ Nowhere, however, did the Israeli submission or the Ambassador address the substantive issues relating to the oPt, instead preferring to criticise the process and the forum.

¹¹⁹ HCJ 8918/03 Salim Ismail Hassan v. Military Commander of IDF in the West Bank.

¹²⁰ David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York, 2002.

¹²¹ See: http://mfa.gov.il/MFA/InternatlOrgs/Issues/Pages/Response_UNHRC_commission_settlements_22-Mar-2012.aspx

¹²² National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/2, Israel, A/HRC/WG.6/17/ISR/1, 28 October 2013.

¹²³ See: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ILSession15.aspx>

¹²⁴ Concluding Remarks Speech by Ambassador Eviatar Manor, Permanent Representative of Israel to the United Nations Office

VII. PIERCING THE VEIL: INTERNATIONAL COMMUNITY REPORTS AND STATEMENTS

The international community has, for some time, taken issue with Israel's lack of compliance with international law, with varying degrees of effectiveness.

The United Nations Human Rights Council

The HRC has played a leading role in highlighting Israel's failure to abide by its legal obligations. In 2010, following the raid on the flotilla of ships carrying humanitarian assistance to Gaza, the HRC held an urgent debate in which the High Commissioner for Human Rights observed that the main conclusions of the international fact-finding mission to investigate violations of international law resulting from the attacks had yet to be met with effective action by the Israeli authorities, and that Israel had not cooperated with the mission.¹²⁵

In its resolution 19/16 of 22 March 2012, the HRC reiterated demands that Israel comply with its legal obligations under international law, as mentioned in the 2004 Advisory Opinion by the International Court of Justice and as demanded in General Assembly resolutions in 2003. At that time, the HRC also demanded that Israel immediately cease the construction of the wall in the oPt, including in and around East Jerusalem, dismantle the structure situated therein, repeal legislative and regulatory acts relating thereto, and make reparation for damage caused by the construction of the wall.

In 2009, 2010, 2011 and 2012, the Human Rights Council adopted resolutions on the Israeli settlements in the oPt, including East Jerusalem. In its resolution 19/17, the Council expressed concern at the expansion of settlements, and decided to dispatch an independent international fact-finding mission to investigate the implications of the Israeli settlements on the rights of the Palestinian people.¹²⁶ Several resolutions on the human rights situation in the oPt, including East Jerusalem, were also passed during this period.¹²⁷

Article 41 of the International Law Commission (ILC) Draft Articles on State Responsibility

Article 41 of the International Law Commission (ILC) Draft Articles, reflecting customary international law, affirms that all States are under an obligation to actively cooperate to bring any serious breach of peremptory norms of international law, such as the violation of the right to self-determination, to an end through lawful means. According to the same Draft Articles, this cooperation could be organised either in the framework of a competent international organisation or through means of non-institutionalised cooperation.

Although Article 41 does not indicate what measures States should take in order to bring serious breaches to an end, Human Rights Council Agenda Item 7, relating to "the human rights situation in Palestine and other occupied Arab territories", provides exactly such a forum of cooperation. Such recourse to international accountability mechanisms is essential.¹²⁸

Agenda Item 7 has been a standing item on the Council's agenda since its creation in 2006 and similarly appeared on the agenda of the former Human Rights Commission. This agenda item has provided a vital platform for highlighting the persistent violations of international human rights and humanitarian law committed in these territories over a 46-year period.

in Geneva, Before the 17th Session of the UPR Working Group, 29 October 2013.

¹²⁵ A/HRC/20/3/Rev.1, para. 16.

¹²⁶ A/HRC/19/17, paras. 4 and 9.

¹²⁷ Human Rights Council resolutions 13/8 of 24 March 2010, 16/29 of 25 March 2011 and 19/16 of 22 March 2012.

¹²⁸ 'PHROC letter on the EU's position on and participation in Agenda Item 7 of the United Nations Human Rights Council' Palestine Human Rights Organisations Council (21 September 2013), available at: <http://www.alhaq.org/advocacy/targets/european-union/743-phroc-letter-on-the-eus-position-on-and-participation-in-agenda-item-7-of-the-united-nations-human-rights-council>

International Fact-Finding Mission on Israeli Settlements

In March 2013, the International Fact-Finding Mission on Israeli Settlements in the Occupied Palestinian Territory issued its report to the HRC. The report reiterated the point that Israeli settlements in the oPt, including East Jerusalem, are illegal under international law and further called on Israel to dismantle all settlements. The mission also reaffirmed that fact that crime of the *deportation or transfer, directly or indirectly, by the occupying Power of parts of its own 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 that territory* fell under the jurisdiction of the International Criminal Court (ICC).¹²⁹ With regard to the ICC, the report noted that ratification of the Rome Statute by Palestine would potentially lead to accountability for gross violations of human rights law and serious violations of international humanitarian law and ultimately, to justice for victims. The report also notes that the settlements are established for the exclusive benefit of Israeli Jews and are being developed and maintained through a system of total segregation between the settlers and the rest of the population living in the oPt.

“The existence of the settlements has had a heavy toll on the rights of the Palestinians. Their rights to freedom of self-determination, non-discrimination, freedom of movement, equality, due process, fair trial, not to be arbitrarily detained, liberty and security of person, freedom of expression, freedom to access places of worship, education, water, housing, adequate standard of living, property, access to natural resources and effective remedy are being violated consistently and on a daily basis. The volume of information received on dispossession, evictions, demolitions and displacement points to the magnitude of these practices.”¹³⁰

The Mission concluded that Israel must, in compliance with Article 49 of the Fourth Geneva Convention, cease all settlement activities without preconditions. In addition, it must immediately initiate a process of withdrawal of all settlers from the oPt. Notably, the report criticises governments that allow Israel to pursue its settlement policy with no regard for human rights or international law in *“a situation of prevailing impunity”*.¹³¹ It also calls on private businesses profiting from the Occupation to cease their connections with the illegal settlement enterprise.

United Nations HRC Special Procedures

During the reporting period, the UN Special Rapporteurs on Adequate Housing and Freedom of Expression undertook country visits to Israel, while the Special Rapporteur for the oPt was repeatedly denied entry into occupied territory by the GOI.¹³² Similar requests by the Special Rapporteurs on Summary Executions; Racism; Education; Violence against Women; and Indigenous Peoples were denied or have gone unanswered.¹³³ The GOI has been equally unresponsive to communications sent by Special Procedures. During the reporting period, only 18 of the 52 communications sent were even replied to by the Israeli government.¹³⁴

The UN Special Rapporteur on Adequate Housing, Professor Raquel Rolnik, was extremely critical of planning and displacement strategies employed by Israel in the oPt. According to Prof. Rolnik, these practices culminated in,

¹²⁹ ‘Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem’, available at:

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/FFM/FFMSettlements.pdf>

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² A/HRC/20/32.

¹³³ Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Israel, A/HRC/WG.6/15/ISR/2, 9 November 2012.

¹³⁴ Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Israel, A/HRC/WG.6/15/ISR/2, 9 November 2012.

*a land development model that excludes, discriminates against and displaces minorities in Israel which is being replicated in the occupied territory, affecting Palestinian communities [...] new Jewish settlements in Area C of the West Bank and inside Palestinian neighborhoods in East Jerusalem – are the new frontiers of dispossession of the traditional inhabitants, and the implementation of a strategy of Judaization and control of the territory.*¹³⁵

Professor Richard Falk, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, has been instrumental in highlighting the scope and gravity of Israel's noncompliance with tenants of international law, and the complicity of other actors ranging from third States through international organisations to multinational corporations.¹³⁶ Prof. Falk has also underlined the significant challenges presented to the international rule of law by situations of long-term occupation.¹³⁷

United Nations Human Rights Council Universal Periodic Review 2013

Upon its re-engagement with the HRC, Israel underwent the Universal Periodic Review (UPR) in October 2013. This has already been discussed briefly in this report. However, it is worth acknowledging that the conclusions and recommendations formulated during the interactive dialogue¹³⁸ extend to the application of and compliance with IHL and IHRL on the part of Israel, respect for prevailing mechanisms of the United Nations and its resolutions, ratification of pertinent treaties and conventions (including the additional protocols to the Geneva Conventions, and the Rome Statute of the International Criminal Court), as well as reference to particular policies and practices prevalent in the oPt in defiance of international law.

United Nations Human Rights Treaty Bodies

During the reporting period, UN Treaty Bodies adopted the strongest language to date in relation to Israeli non-compliance with IHRL obligations.

a. The UN Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR),¹³⁹ has repeatedly refuted the Israeli position that the ICCPR is not applicable to the oPt. The Committee noted that the Israeli standpoint is contrary to the views of treaty bodies and also of the ICJ, all of which have noted that obligations under international human rights as well as humanitarian law apply to all persons brought under the jurisdiction or effective control of a State party.

In September 2012, the Committee posed 26 questions to Israel regarding its compliance with the ICCPR. Israel was asked to provide,

*updated information on measures taken: To cease the practice of [...] demolition of houses and private property; To review the State party's housing policy and the issuance of construction permits; and indicate which measures have been taken to refrain from constructing settlements in, or transferring its population to, the Occupied Palestinian Territory, including East Jerusalem, [...] and to prevent and eradicate all practices of segregation which affect the Palestinian population.*¹⁴⁰

¹³⁵ 'UN human rights expert calls for urgent revision of Israeli housing policies' UN News Centre (13 February 2012), available at: <http://www.un.org/apps/news/story.asp?NewsID=41211#.UsZ2iNIW1Bk>

¹³⁶ See: <http://www.ohchr.org/EN/countries/MENARegion/Pages/ILIndex.aspx>

¹³⁷ OHCHR "Prolonged occupation, a new type of crime against humanity" (29 November 2010) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10568&LangID=E> accessed 15 November 2013

¹³⁸ Draft Report of the Working Group on the Universal Periodic Review, Israel, A/HRC/WG.6/17/L.12, 1 November 2013.

¹³⁹ Israel ratified the ICCPR in 1991, with no pertinent reservations.

¹⁴⁰ See: <http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceVersions/CCPR.C.ISR.Q4.pdf>

Israel has not stood before the Human Rights Committee since, and so no answers have yet been provided.

b. The UN Committee on the Elimination of Racial Discrimination (CERD), published its concluding observations in March 2012,¹⁴¹ and declared itself to be “*particularly appalled*” by institutionalised Israeli practices that “*amount to de facto segregation*” in the oPt. The Committee called on Israel to take immediate measures to eradicate any such policies or practices that violate the provisions of the Convention on the Prevention of Racial Segregation and Apartheid. The Committee further urged Israel to guarantee Palestinian and Bedouin rights to property, access to land, access to housing and access to natural resources, and eliminate any policy of “*demographic balance*” from its Jerusalem Master Plan as well as from its planning and zoning policy in the rest of the West Bank.

In the concluding observations, the Committee also expressed alarm at the “*impunity of terrorist groups such as Price Tag, which reportedly enjoy political and legal support from certain sections of the Israeli political establishment*”.¹⁴²

c. The UN Committee on Economic, Social and Cultural Rights, which monitors implementation of the International Covenant on Economic, Social and Cultural Rights published its concluding observations in December 2011, calling Israel to immediately stop house demolitions, forced eviction and residency revocation in the oPt, including East Jerusalem.¹⁴³

The European Union: an inconsistent attitude towards Israel’s non-compliance

The legal basis for the European Union’s (EU) relations with Israel is the EU–Israel Association Agreement, according to which:

Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.

In June 2008, the EU decided to condition the upgrade of its relations with Israel on the resolution of the Israeli–Palestinian conflict through the implementation of the two–state solution.¹⁴⁴ The following year, the EU decided to freeze the upgrading of its relations with Israel and stressed that any such upgrade must be based on respect for human rights and IHL.¹⁴⁵

European Union institutions have increasingly been voicing criticism of Israeli policies in a variety of documents, including Heads of Missions (HoMs) reports, statements and Foreign Affairs Council (FAC) Conclusions. However, rarely has that criticism been translated into determined, effective action. The EU guidelines on the promotion of compliance with international humanitarian law outline a number of tactics that could be used against states that repeatedly violate IHL. These tactics range from political dialogue and demarches to sanctions and prosecution of individuals responsible for IHL violations. However, when given an opportunity, the EU has often seemed reluctant to take concrete steps.

¹⁴¹ See: <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ISR.CO.14-16.pdf>

¹⁴² *ibid.*

¹⁴³ See: http://www2.ohchr.org/english/bodies/cescr/docs/co/E-C-12-ISR-CO-3_en.doc

¹⁴⁴ EU–Israeli Association Council meeting, 16 June 2008.

¹⁴⁵ ‘EU to intensify cooperation with Israel: Double standards in practice’ Euro–Mediterranean Human Rights Network (25 July 2012), available at: <http://www.euromedrights.org/eng/2012/07/25/eu-to-intensify-cooperation-with-israel-double-standards-in-practice/>

In the period covered in this report the EU has taken positions that differ drastically in relation to its cooperation with Israel, and may serve as a testament to the nuanced and complex process of forging a common EU position. On 14 May 2012, the EU's 27 foreign ministers unanimously condemned Israel's settlement expansion plans, its demolition of Palestinian homes and displacement policies as well as settler violence.¹⁴⁶ They also commented on the deteriorating living conditions for Palestinians in the West Bank and recognised that Israel's policies "*threaten to make the viability of a two-state solution impossible*".¹⁴⁷

Similarly, the European Neighborhood Policy (ENP) Country Progress Report 2010–2012 acknowledged that "*Palestinian economic and social rights remain hampered by Israeli restrictions on the freedom of movement. [...] Property rights came under particular strain and the risk of forced displacement of Bedouin communities increased*".¹⁴⁸ In July 2012 the European Parliament passed a landmark resolution condemning Israeli policies in the West Bank and East Jerusalem,¹⁴⁹ focusing highly critical language on home demolitions and forced displacement of the Palestinian population.

Nevertheless, at the annual EU–Israel Association Council meeting held in the same month, the EU decided to increase its trade and diplomatic relations with Israel and has identified 60 new activities in 15 fields.¹⁵⁰ This was done despite expressing, at the same event, "*deep concern*" at increasing levels of settler violence and while noting the absolute impunity granted to perpetrators of settler extremism.¹⁵¹

More recently, in July 2013, the EU took positive steps by adopting 'Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU'.¹⁵² While the Guidelines are a major milestone in solidifying the EU's non-recognition of Israel's sovereignty over the oPt, in a time where the application of IHL is questioned by Israel and legislative attempts to formalise annexation are being undertaken, it remains to be seen what political traction those Guidelines will have. This worry remains in spite of the clear compliance of the Guidelines with international law.

Despite various unilateral efforts by European Governments, encouragement from civil society and informal initiatives by EU institutions, the EU has so far failed to adopt common guidelines on the labeling of settlements products, as well as a common policy on the involvement of European corporations in financial and economic activities in the settlements.

Finally, it should be noted that, in the final six months of the reporting period, the EU has been hampered by the insistence of certain Member States that no action should be taken against Israel that may impact negatively on the peace talks. This has included delaying steps that aim to ensure compliance with the rule of law.¹⁵³

¹⁴⁶ See: <http://www.consilium.europa.eu/uedocs/NewsWord/EN/foraff/130195.doc>

¹⁴⁷ *ibid.*

¹⁴⁸ ENP Package, Country Progress Report – Israel, MEMO/12/335, Brussels, 15 May 2012.

¹⁴⁹ See:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0298&language=EN>

¹⁵⁰ See: http://www.eu-un.europa.eu/articles/en/article_12170_en.htm

¹⁵¹ *ibid.*

¹⁵² Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards (2013/C 205/05), available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:205:0009:0011:EN:PDF>

¹⁵³ Based on conversations and private meetings between Diakonia IHLRC and EU Member States.

EU Heads of Missions Reports

In the years since 2010, several documents from the offices of EU representatives to the Palestinian Authority, including “EU Heads of Mission Report on East Jerusalem” from 2010 and 2011, and “Area C and Palestinian State Building” from 2011, have been released to international media.

The reports establish and reiterate the EU position on several key aspects of international law pertaining to the administration of occupied territory by Israel. Most notably, the reports state that Israel is obliged to administer its occupation in a manner that benefits the local Palestinian population, and that it cannot transfer its own civilian population into occupied territory. The reports clearly articulate the position that the *“occupying power can never obtain sovereignty over the occupied territory based on its prolonged control”*¹⁵⁴.

Furthermore, in respect to the unilateral annexation of East Jerusalem, the reports restate the EU position on the inadmissibility of acquisition of territory by force, as set out in Article 2(4) of the UN Charter and in UN Security Council Resolution 242.

The Heads of Mission documents also adhere to the position the IHRL is applicable to the oPt, further stressing that the *“administrative division of authorities and responsibilities of the West Bank following the Oslo Agreements did not alter the application of IHRL to the whole of the West Bank, including Area C”*.¹⁵⁵

The reports are noteworthy in the facilitation of the European Parliament resolution, and the EU Guidelines on financing as the legal and political analysis contained within them was extensively relied upon and confirmed once more the *“alarming and potentially irreversible developments on the ground”*.¹⁵⁶

International Committee of the Red Cross (ICRC) Annual Reports 2010–2012

In its annual reports during the period covered in this report, the ICRC repeatedly highlighted Israel’s non-compliance with IHL. Several issues were reportedly raised with Israel as the Occupying Power, including the application of basic rules of IHL in the conduct of hostilities; destruction of civilian property and humanitarian aid projects; establishment of planning mechanisms that fail to take into consideration the needs of the Palestinian population; and more broadly calling on Israel to review its occupation policies in line with the relevant provisions of IHL.

The ICRC continuously underlined the *“adverse impact of certain Israeli policies and practices on the civilian population”*¹⁵⁷ and reminded the GOI of *“the humanitarian issues arising from their non-compliance with the 1949 Geneva Conventions”*.¹⁵⁸ The recurrent nature of these observations stands as further testament to the entrenched nature of Israel’s non-compliance with international law, which is further reflected in the fact that the dialogue depicted in the reports has *“so far failed to yield concrete outcomes”*.¹⁵⁹

¹⁵⁴ See: <http://rebuildingalliance.org/wp-content/uploads/2012/03/Area-C-Palestinian-State-Building.pdf>

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ International Committee of the Red Cross (ICRC), ICRC Annual Report 2012 – Israel and the Occupied Territories, June 2013.

¹⁵⁸ International Committee of the Red Cross (ICRC), ICRC Annual Report 2010 – Israel and The Occupied Territories, May 2011.

¹⁵⁹ International Committee of the Red Cross (ICRC), ICRC Annual Report 2012 – Israel and the Occupied Territories, June 2013.

VIII. CONCLUSION: THE VEIL IS LIFTED

This report has examined legal and political developments in the normative climate in Israel and the oPt since 2010, focusing on Israel's compliance with international law. The report has also discussed the positions that Israel has taken in defense of its actions. Some of these justifications are directed internally with a view towards shaping the Israeli normative and political discourse, while others are directed externally, towards the international community and those who wish to scrutinise Israel's compliance with international law. As noted at the outset, the contents of this paper do not seek to undermine in any way the obligations of other parties to the conflict.

In terms of the application of the rule of law, Israel's policies and practices in the oPt have been found to violate not only the provisions of IHL, but also Palestinians' economic, social, cultural, civil, and political rights as enshrined in several bodies of international human rights law. Taken in isolation, the failure by Israel to apply international law in any one of the areas examined in this report would give rise to serious questions about the application of the rule of law. However, when taken collectively, the analysis suggests that there is a clear unwillingness on the part of the Israeli government and judiciary to adhere to and ensure compliance with international standards and the rule of law, including customary international law.

These policies undertaken by Israel, examined in their totality, can be seen as a move to substitute temporary belligerent occupation, as prescribed by international law, with an "*indefinite occupation*" resulting in a normative climate that gives rise to the "*reversal of the relationship between the rule and the exception and ergo the suspension of the rule of law itself*".¹⁶⁰

Israel continues to present arguments to the international community that seem designed to deflect criticism and to cover its persistent non-compliance behind a veneer of legality. However, a careful examination of the reception of these arguments suggests that the efforts on the part of the GOI have been ultimately unsuccessful, and there is a growing awareness amongst the international community of Israel's violations of international law. In spite of this, we are yet to see a significant shift from increasingly critical statements towards determined action designed to ensure Israel's compliance with its prescribed obligations.

Given the dire circumstances of the Palestinian population in occupied territory and Israel's manifest lack of compliance with applicable international law in the administration of occupation, the humanitarian and human rights situation in the oPt requires further vigilant monitoring and resolute reporting on the part of the international community. However, such monitoring is of very little use unless it is followed up by informed and decisive action on the part of the international community. This is particularly true in light of the apparent political impasse with regard to the resolution of conflict and the enduring denial of rights erga omnes. On this note, negotiations that seek the resolution of the conflict should never allow for international legal standards to be sidelined in favour of political expediency. Rather, any peace process that seeks a just and durable solution to the conflict must be based on adherence to the principles of international law.

Ultimately, full compliance with the rule of law requires accountability to that same law. In this regard, Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, and former Legal Adviser to the Israeli Foreign Ministry, reflected recently on the importance of rule of law at the international level, stating that:

*A shared commitment to accountability can and will win out over impunity, that heinous crimes can be punished, whoever their architects may be – and that principled justice, fair and impartial justice, is the only way to uphold the rule of law.*¹⁶¹

¹⁶⁰ Orna Ben-Naftali, Aeyal M Gross, and Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, Berkeley Journal of International Law, 2005.

¹⁶¹ see: http://www.unmict.org/files/statements/130701_president_meron_thehague_en.pdf



What is Diakonia?

Diakonia is a Swedish development organisation working together with local partners for a sustainable change for the most vulnerable people in the world. We support more than 400 partners in nearly 30 countries and believe in a rights-based approach that aims to empower discriminated individuals or groups to demand what is rightfully theirs. Throughout the world we work toward five main goals: human rights, democratisation, social and economic justice, gender equality and sustainable peace.

Diakonia International Humanitarian Law Resource Centre

The goal of Diakonia International Humanitarian Law Resource Centre is to increase the respect for and further implementation of international law, specifically international humanitarian law (IHL), in the Israeli–Palestinian conflict. We believe that addressing violations of IHL and international human rights law tackle the root causes of the humanitarian and protection crisis in the oPt, in a sustainable manner. Our Centre makes IHL expertise available by providing:

- Briefings to groups and organisations on IHL and its applicability to Israel and the oPt;
- Tailored in-depth trainings on specific issues and policies relating to IHL;
- Legal analyses and ongoing research on current IHL topics; and
- Legal advice, consultation and legal review of documents for other actors in the oPt, to support policy formulation and strengthen advocacy with an IHL perspective.

Do you or your organisation want to learn more about IHL and its applicability to the oPt? Visit our website 'An Easy Guide to International Humanitarian Law in the occupied Palestinian territory' at: www.diakonia.se/ihl/ or contact us to set up a general or specialised legal briefing by our legal advisors.

Contact us at: ihl@diakonia.se