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Mais A. M. Qandeel

Enforcing Human Rights of Palestinians in the Occupied Territory

Carl Grossmann Verlag

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To my parents

Abstract

The situation in Palestine has influenced the deployment of international human rights law and international humanitarian law. The impact of long-term Israeli occupation and the rule of the Palestinian Authority in the Occupied Territory is multifaceted. Despite the various research on Palestine, human rights, and the rule of law, few studies have been conducted on the enforcement mechanisms of human rights in Palestine. This study examines the applicability of international human rights and humanitarian laws as well as domestic laws to assess the contribution of these directives in protecting the fundamental human rights of Palestinians in the Occupied Territory. It conducts an in-depth case study of three basic rights: the right to movement, the right to property, and the right to equality and non-discrimination in the Occupied Territory. The study further examines the role of the Palestinian High Court of Justice and the Israeli Supreme Court in implementing domestic and international laws. In this regard, the study examines the major laws which are invoked, in certain circumstances, to limit the ability of Palestinians to confiscate, expropriate, and destruct their private property, and to implement discriminatory practices against them. The study further examines whether the available international and domestic mechanisms are effective, and if not, it suggests modifications upon which a functional national and international system could be built.

The findings of the research demonstrate that international human rights treaties and international humanitarian law conventions are de facto and de jure applicable in the Occupied Territory. As a result of the aforementioned in-depth study cases, it can be concluded that human rights violations against Palestinians in the Occupied Territory are committed by the Palestinian Authority and the Israeli government. In addition, the Palestinian and the Israeli judiciaries have failed to grant Palestinians reasonable protection or a just remedy, and they are dysfunctional and politically driven. The study concludes with a proposal for new mechanisms for Palestinians to redress human rights violations. The further outcomes of this study argue that neither international human rights nor humanitarian law guarantee full protection for

Palestinians. Hence, the implication of the findings indicates that the regulations of international human rights and humanitarian laws, which were made by the powers of the nineteenth century with their colonial provisions, might not fit to the present complications of the current challenges to international law in Palestine. The goal is to promote a re-thinking approach to the employment of human rights to serve all people in an efficient and well-organized system. The scope of this study is not meant to grant Palestinians favorable treatment in the multilateral international system, but to achieve just and successful remedies for victims of human rights violations.

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Part One:
Historical and Legal Background

I. General Introduction

1. Research Questions

This study highlights the circumstances that surround human rights as well as the function of the national and international judiciaries in enforcing these rights for Palestinians in the Occupied Territory. It answers the following three main questions: 1) Are international human rights laws and international humanitarian laws applicable to Palestinians in the Occupied Territory along with the Palestinian and Israeli laws? 2) What is the current situation of human rights in Palestine, particularly in regard to movement, the right to private property, and the right to equality and non-discrimination? 3) Do the available Palestinian, Israeli, and international enforcement mechanisms function effectively in protecting and enforcing human rights for Palestinians in the Occupied Territory?

2. Study Purpose

Many legal scholars, historians, litterateurs, and human rights organizations have covered the issues of the Palestinians and their situation under the prolonged Israeli occupation. There is a tremendous amount of legal research dealing with the violations of human rights laws and humanitarian laws in Palestine. Some have supported the case of the Palestinians; others have defended the practices of the Israeli government and its forces; still others have tried to neutrally picture the complexity of the situation. However, very few resources have highlighted the violations committed by the Palestinian government itself against its people, and there are no studies that deal with the legality of the actions of the Israeli and Palestinian governments under both international and domestic laws. This study is significant in its approach in that it combines international human rights and humanitarian laws as well as domestic laws to seek a remedy for Palestinians, who are living under the control of Palestinian Authority and the Israeli occupation.

This dissertation is purely legal and is intended to be neither political nor historical. Nevertheless, some necessary political statements are used to describe the de facto situation in Palestine. The dissertation highlights the legal remedies to redress human rights violations committed against Palestinians, whether by the Israeli occupation or the Palestinian Authority within the available domestic judicial capacity and international legal mechanisms. It strives to find a legal solution to limit the ongoing violations of the human rights of the Palestinian civilian people. The study of the Palestinian human rights issue and the examination of the function of the judicial system are very challenging. The laws are deeply entangled with each other. Many different laws are applied in the area, and two different actors are present and in control. Thus, the de facto and legal situation might be complex to understand, especially since the valid laws are an extent of the Ottoman Empire, British Mandate, Jordanian and Egyptian rules, and currently the Israeli occupation and the Palestinian Authority eras. This has created a multiplicity of accumulated laws and has put Palestine in a unique legal situation, which reflects the performance of the judiciary including judges, prosecution, and lawyers.

The aim of this dissertation is to identify a distinction between domestic and international laws and determine how to accord the most satisfactory mechanisms within these laws in order to protect the human rights of the Palestinians in general, and their right to movement, private property, and equality in particular. This study, therefore, seeks to draw a distinction through some cases delivered by the Palestinian High Court of Justice and the Israeli Supreme Court. This follows a discussion on the possible remedies for enforcing human rights.

3. Arguments and Discussions

The main arguments and discussions revolve around three main points. The first concern is the protection of the Palestinians' right to movement, right to private property, and right to equality and non-discrimination under international human rights law and international humanitarian law, including the obligations of Israel and the Palestinian Authority. The second point is the applicable constitutional protection of these rights in Occupied Palestine and the performance of the Palestinian and the Israeli judiciaries. The third point is the examination of the functions of the international

mechanisms for Palestinians and their effectiveness in protecting their citizens.

3.1. International Human Rights Law

The respect of human rights is essential in achieving peace, security, and development. Peace and security are never bolstered or achieved through violence and aggression. International human rights provisions have a moral foundation, prohibit all forms of aggression, and set forth optimal guidelines to follow. Human rights visions have been developed throughout the years and have been translated to customary norms and conventional laws where the rights of individuals in all societies are respected. Due to the constitutional and fundamental rights in many legal systems, human rights have been derived from the general principles of national laws, and vice versa.[1] Although human rights are designed with an understanding of human dignity and based on the recognition of equality for all in life and opportunities, they have been politically proclaimed and continued to be a matter of political conflict.[2] Some human rights conventions have clearly brought up the notion of jurisdiction where state parties are held accountable for any human rights violations within a state or territory under its control.[3] In all cases, a state is held responsible for any of its actions that violate human rights of individuals.[4] The argument and the discussion will focus on the applicability of these conventions as well as on the three forenamed human rights.

3.2. International Humanitarian Law

In cases of occupation, a rigorous legal study cannot separate human rights law from humanitarian law because the two laws are gradually coalesced together. International humanitarian provisions and other actors in times of

1 Martin Scheinin, "Characteristics of Human Rights Norms," in International Protection of Human Rights: A Textbook, ed. Catarina Krause and Martin Scheinin (Turku: Abo Akademi University-Institute for Human Rights, 2009), 20.

2 Heiner Bielefeldt, "Philosophical and Historical Foundation of Human Rights," in Krause and Scheinin eds. International Protection of Human Rights: A Textbook, 12.

3 Scheinin, "Characteristics of Human Rights Norms," 26.

4 Martin Scheinin, "Extraterritorial Effect of the International Covenant on Civil and Political Rights." Extraterritorial Application of Human Rights Treaties, ed. fons Coomans and Menno T. Kamminga (Antwerp: Intersentia, 2004), 73–81.

war provide guidelines, while human rights norms set standards at all times.[5] Humanitarian law, the law of occupation, and the customs of war do allow for war, but at the same time they design regulations to reduce the suffering caused by wars. In fact, occupation is a possible consequence of conflict and war. Occupation is temporary in its merit and limited in time; it does not transfer sovereignty or territory to the occupying power.[6] The law of occupation not only regulates conflicts or war and minimizes violence, but it also safeguards those who are not taking part in conflicts and their heritage and property.[7] The Brussels Declaration of 1874 obligates the occupying armies to ensure public safety, and not to confiscate private property.[8] The Hague Regulations of 1899 and 1907, and the Geneva Conventions of 1949 have affirmed that civilians at all times are entitled to respect for their lives, families, dignity, and private property.[9]

3.3. The Palestinian Authority and the Israeli Government: Two Actors in One Territory

In Occupied Palestine, the situation is rather intricate and confusing. It is very difficult to prominently apply the norms of international human rights and international humanitarian law without facing complexities. The situation remains unclear with the presence of two different actors, the Israeli Military Administration and the Palestinian Authority. Notably, the Palestinian Authority and the Israeli government are part of the international community and state parties to a number of international human rights conventions as well as the four Geneva Conventions.

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5 René Provost, International Human Rights and Humanitarian Law (UK: Cambridge University Press, 2004), 3.

6 Eyal Benvenisti, The International Law of Occupation, 2nd ed. (UK: Oxford University Press, 2012), 10.

7 See the Hague regulations, conventions and declarations of 1899 and 1907, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, (Geneva, August 12, 1949); The Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, August 12, 1949; The Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, August 12, 1949; The Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, August 12, 1949.

8 Project of an International Declaration concerning the Laws and Customs of War. Brussels, August 27, 1874, Articles 2 & 6.

9 International Committee of the Red Cross, The Law of Armed Conflict: Belligerent Occupation (Switzerland, ICRC, June 2002), 2.

The first actor is Israel, an occupying power. The process of recognizing the applicability of the norms of international human rights law and humanitarian law is facing an agonizing struggle. Prolonged Israeli occupation in Palestine has increased the humanitarian calamity. Israel, nonetheless, has accompanied its occupation with arguments articulating justification for disregarding the applicability of the Hague Regulations and the Geneva Conventions as well as human rights norms.[10] Israel has used the British Defence Emergency Regulations of 1945 very extensively, which allow for land confiscation, deportation, restrictions on movement, curfews on towns and villages, detention, etc.[11] Israel has utilized the law to impose its military control over the Palestinian people, as the law empowers the military to implement different regulations in Palestine.[12] It has further enacted laws that allow military commanders to execute certain policies.[13] Two main questions exist: Which international laws are applicable to the Palestinians? and Do the Israeli laws and practices violate the applicable international principles? The Palestinians have challenged these laws and policies before Israel's highest judicial entity, the Supreme Court, which has played a unique role in its decisions relating to Occupied Palestine.

The second actor is the Palestinian Authority, a recognized transitional government and the representative of the Palestinian people. The Palestinian Authority in the West Bank and the Gaza Strip has perpetrated certain practices that might constitute violations of international human rights law.[14]

10 Raja Shehadeh, Occupier's Law: Israel and the West Bank. (Washington D.C.: Institute for Palestine Studies, 1985), xi-xiv.

11 The Defence (Emergency) Regulations law was enacted by a British Mandate in Palestine in 1945. The regulations included, in part, provisions against illegal immigration, establishing military tribunals to try civilians without granting the right of appeal, allowing sweeping searches and seizures, prohibiting publication of books and newspapers, demolishing houses, detaining individuals administratively for an indefinite period, sealing off particular territories, and imposing curfews. Israel has used this as a main tool to implement its policies. The Defence (Emergency) Regulations of 1945 will be discussed later in this study.

12 The Defence (Emergency) Regulations Law, 1945, British Mandate in Palestine. The Palestine Gazette No. 1442 – Supplement No. 2. 27 September, 1945.

13 Samih Farsoun and Naseer Aruri, Palestine and the Palestinians: A Social and Political History, 2nd ed. (USA: West View Press, 2006). See Shehadeh, Occupier's Law: Israel and the West Bank, 5.

14 Human Rights Watch, World Report 2015: Events of 2014. (USA: Human Rights Watch, 2015), Israel/Palestine, 308–318. See also The Independent Commission for Human Rights,

Notably, since June 2007, the Palestinian judiciary in the Palestinian Territory has been divided into two parts because of the political dispute between Fatah and Hamas, the two governing political parties. The first High Judicial Council continues to function in the West Bank under the control of Fatah, and the second was formed and began operating in the Gaza Strip under the control of Hamas.[15] The Palestinian judiciary has been reviewing the actions of the Palestinians Authority and its security forces, and the newly established Constitutional Court has begun to safeguard the implementations of Palestinian Basic Law. The question as to whether the practices of Fatah and Hamas are constitutional and in accordance with international human rights provisions will be answered in this study.

3.4. The Right to Movement, the Right to Private Property, and the Right to Equality and Non-Discrimination

As all human rights are universal, indivisible, and interrelated, this research focuses mainly on three rights: the right to movement, the right to private property, and the right to equality and non-discrimination. These rights have been selected because they affect several other human rights. These three basic fundamental rights and their effects will be analyzed, as they reveal fragments of the de facto situation of the Palestinian life under the control of the Israeli military and the rule of the Palestinian Authority. It is necessary to note that other fundamental rights are equally important. Any violations of the aforementioned human rights, however, disturb the enjoyment of most other civil, political, cultural, economic, and social rights, such as the right to life, the right to education, the right to health, the right to live in dignity, etc. They are also analyzed in light of the Israeli and the Palestinian practices against Palestinians. The right to movement, the right to private

16th Annual Report, 1 January–31 December, 2010; The Independent Commission for Human Rights, 17th Annual Report, 1 January- 31 December, 2011; The Independent Commission for Human Rights, 18th Annual Report, 1 January–31 December, 2012; The Independent Commission for Human Rights, 19th Annual Report, 1 January–31 December, 2013; The Independent Commission for Human Rights, 20th Annual Report, 1 January–31 December, 2014;The Independent Commission for Human Rights, 21st Annual Report, 1 January- 31 December, 2015; The Independent Commission for Human Rights, 22nd Annual Report, 1 January–31 December, 2016.

15 The Palestinian Center for the Independence of the Judiciary and the Legal Profession-MUSAWA, The First Legal Observatory on the Status of Justice in Palestine. Palestine: MUSAWA (2010), 46.

property, and the right to equality and non-discrimination are internationally protected rights. Free movement leads to social, economic, cultural, and political development. The full enjoyment of private property is also crucial to guarantee dignity, shelter, economic prosperity, and social stability. Equality and non-discrimination are fundamental components and prerequisites to the enjoyment of all human rights. Inequality and discrimination insult the inner being and the dignity of persons and endanger their efficiency and productivity. These three main rights will be elaborated on in this research and assessed through a number of decisions of the Israeli Supreme Court and the Palestinian High Court of Justice. In addition, the success and/or failure of these courts, whether Palestinian or the Israeli, will be decided by their ability to enforce human rights for all without any distinction, especially where an increased number of governmental actions infringe upon the liberties and the rights of the Palestinian inhabitants in the Occupied Territory.

3.5. The Judicial Systems, their Functions, and Enforcement Mechanisms

In general, the interaction between international principles and the domestic legal system has been a subject of many debates.[16] In Occupied Palestine, the major challenges of international human rights and international humanitarian law are embodied in the implementation and the domestic judicial review. International provisions are explicit; however, the implications and ramifications of these provisions on the ground are problematic. The concept of human rights, as an international norm, sets forth the relation between the states and the individuals. The domestic judiciary plays a role in guiding the governments to respect their international obligations. The way in which a domestic legal system interacts with international law should reflect the effectiveness of both laws to protect human rights.[17] This leads to the question as to whether the Palestinian and the Israeli judiciaries are effectively operating in ways that avoid enforcing international law provisions.

Domestically, can Palestinian individuals access justice and seek remedies according to the Justiciability Doctrine? Justiciability is one of the vital

16 Antonio Cassese, International Law, 2nd ed. (Oxford: Oxford University Press, 2005), 213.

17 Mauro Bussani and Lukas Heckendorn Urscheler, eds. Comparisons in Legal Development: The Impact of Foreign and International Law on National Legal Systems (Switzerland: Schulthess, 2016), 11.

characteristics of human rights.[18] The Justiciability Doctrine enables victims of human rights violations to use different mechanisms to acquire justice and seek proper solutions. International human rights and humanitarian obligations are set forth to be respected and effectively implemented. Disrespect of such responsibilities and ineffectiveness in implementation might require special mechanisms to insure ample execution of human rights and humanitarian guarantees. The right to effective remedy and the right to access to justice are guaranteed, ensuring that everyone has a proper means to human rights, and to redress violations.[19] The justice systems are usually comprised of "the formal and informal institutions that address breaches of law and facilitate peaceful resolution of disputes over rights and obligations."[20] However, weak or non-functioning judicial institutions are significant obstacles, which threaten the protection of human rights.

Whether the available mechanisms within international human rights and humanitarian laws allow individuals to have access to justice and pursuit of remedies is crucial. For example, the Human Rights Committee, the United Nations Individuals Complaints, and the International Court of Justice[21] have the power to act in cases of human rights violations. The crucial question of this research is whether these mechanisms are efficient to redress and prevent human rights violations against Palestinians. The possible remedies and mechanisms for Palestinians are undoubtedly complex. International mechanisms require certain domestic preconditions, while domestic mechanisms directly apply international and national law provisions. These conditions will be addressed later in this study.

18 Bielefeldt, Philosophical and Historical Foundation of Human Rights, 8.

19 This is studied in detail in Chapter VII. For more information, see UN Human Rights Committee, *General Comment No. 31* (2004), CCPR/C/21/Rev.1/Add.13. See also United Nations General Assembly, Resolution No. 67/187 adopted on March 28, 2013, by United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

20 Hassane Cisse, "Justice Reform: The Experience of the World Bank," in Comparisons in Legal Development: The Impact of Foreign and international Law on National Legal Systems, ed. Mauro Bussani and Lukas Heckendorn Urscheler (Switzerland: Schulthess, 2016), 20.

21 The Court's role is to settle, in accordance with international law, legal disputes submitted to it by states and to give advisory opinions on legal questions referred by authorized United Nations organizations and specialized agencies. See the official website of the International Court of Justice: The Court.

4. The Structure

This thesis is divided into three parts, including Chapter I: General Introduction and Chapter VIII: General Conclusions. Part One consists of Chapters II and III. Chapter II addresses the basis for the historical development and points out the evolution of the judiciary in Palestine. Chapter III focuses on the applicable international law resources as well as the applicable Palestinian and Israeli laws in Palestine in matters related to the protection of human rights. Part Two of this work includes three chapters which concentrate on three main human rights. Chapter IV discusses the right to free movement, Chapter V deliberates the right to private property, and Chapter VI examines the right to equality and non-discrimination. Each human right is scrutinized regarding its importance, its practical implementation in Palestine, and its accordance with international human rights and international humanitarian law, domestic laws, and several decisions of the Israeli Supreme Court and the Palestinian High Court of Justice. Part Three is devoted to examining the available enforcement mechanisms for Palestinians and proposing possible remedies and mechanisms to redress human rights violation. It will show the research and results that were conducted in field research through different questionnaires and interviews.

5. Methodology

5.1. Methodological Approaches

This study follows different methodological approaches. In order to provide an overall study on the subject matter, the adopted approaches encompass the following:

5.1.1. Contextual Approach

This study considers the legal theory and the historical background of the Palestinian situation and the judiciaries that affect Palestinians. The contextual background provides a chronological understanding of the current Palestinian-Israeli situation and its influence on human rights and the performance of the judiciary. This approach will give the reader a better grasp of the subject matter, as it is factually influenced by the historical events that took place in Palestine. It may also facilitate comprehension of the complexity of

the developments of the division of Palestine as well as the facts surrounding the Israeli occupation and the Palestinian Authority.

5.1.2. Comparative and Analytical Approach

In order to cover the multi-disciplines involved, this study includes a comparison between the international human rights law and international humanitarian law. Another comparison touches upon the Palestinian Basic Law and the Israeli basic laws as constitutional norms. The main purpose for using this approach is to highlight the difference among international and constitutional provisions vis-à-vis the protection of human rights and the role of the judiciaries as well as the context of the two domestic constitutional laws. In addition, this study analyzes different court decisions concerning human rights and humanitarian laws.

5.1.3. Field Research and Survey

The field data has a complementary nature in this dissertation. Collected data is used to enhance the understanding of the role of the judiciary and international law in Palestinian society. It is also one of the tools used in this research to help understand the situation and to help to determine whether Palestinians trust the available remedies in international law and the domestic judiciary. The available data has been collected through questionnaires and carefully and efficiently employed to reap maximum benefits. Interviews were conducted with judges of the Palestinian High Court of Justice, lawyers, and professors. Given their vast experience, they have helped identify some related problems. There are different reasons for not conducting the same field research with Israeli judges and lawyers. The main reason is that I, as a Palestinian ID holder, do not have access and my movement is restricted in entering Israel, including Jerusalem and its Supreme Court.

5.2. Collected Material and Data

Through the stages of this legal research, all relevant materials were collected. In addition to the authoritative sources, such as scholarly legal writings, legal books, and non-binding precedents, the following resources have been used:

5.2.1. Normative Resources

Normative resources, such as statutory texts, treaties, general principles of law, customary law, binding precedents, and periodicals were the primary resources used in the study. In addition, official reports, such as United

Nations special reports and international human rights organizations' field studies and reports were utilized to profit from available collected information. Normative resources are usually not problematic to get, but difficulties and challenges occurred in collecting court cases. These difficulties were confronted while dealing with the Israeli Supreme Court and the Palestinian High Court of Justice.

5.2.1.1. The Israeli Supreme Court

As part of the analytical approach, a number of law cases and precedents were analyzed and discussed. In the process of collecting court cases, some of the rulings of the Israeli Supreme Court were not available through the Court's database, and these rulings are very important and connected to other judgments. Thus, it was necessary to ask for the support of the Court. The first and second letters were sent on October 24, 2014, and December 11, 2014, respectively, to the Supreme Court of Israel asking for an access to court cases. Unfortunately, the Court never replied to the aforementioned letters. Shortly after, unofficial translated versions became available through a human rights organization called HaMoked: Center for the Defence of the Individual, and they were used in this dissertation. Other cases were accessible in Hebrew or English.

5.2.1.2. The Palestinian High Court of Justice and the Palestinian High Judicial Council

The Palestinian High Judicial Council does not have a database containing the rulings of the Palestinian courts. The Palestinian legal and Judicial System "Al-Muqtafi,"[22] the only legal database in Palestine, provides academics and researchers with legislations and judgments. This database should encompass all court judgments issued by the Palestinian courts since 1994. However, very few judgments are available through it. The other means to gain access to these judgments is through the library of the High Judicial Council; this was obtained after significant effort.

5.2.2. Data Collection Methods

From April 6 to April 28, 2016, field research was conducted in Palestine. This consisted of three questionnaires. The first targeted Palestinian practicing lawyers; the second was directed toward Palestinian disputants who had

22 Al-Muqtafi is part of the Institute of Law (IoL) at Birzeit University, Ramallah.

experienced litigation before the Palestinian or the Israeli courts; and the third targeted judges in the Palestinian courts, especially the Palestinian High Court of Justice.

5.2.2.1. Questionnaire for Palestinian Practicing Lawyers[23]

Most lawyers at the Palestinian courts were helpful and ready to take a few minutes to complete the questionnaire. Many lawyers felt they were given the chance to express their opinion concerning the judiciary and other issues related to the international protection for Palestinians. Sixty-one lawyers completed the questionnaire.

5.2.2.2. Questionnaire for Palestinian Disputants[24]

This questionnaire was targeted to people who experienced/are experiencing litigation before the Palestinian and/or the Israeli courts. The majority of the disputants, when asked, refused to fill in the questionnaire. They said that they were afraid to get involved in the questionnaire even though it was anonymous and would only be used for academic purposes. A total of 23 disputants, however, agreed to complete the questionnaire.

5.2.2.3. Questionnaire for Judges in the Palestinian Courts[25]

After presenting the nature of this research, the significance of the questionnaire, and the importance of knowing the opinion of the Palestinian Judiciary, the judges indicated that they were not allowed to fill in any questionnaire or to answer any questions. A meeting with the Chief (President) of the High Judicial Council, Judge Sami Sarsour, was arranged. Judge Sarsour stated that the research and its approach were interesting. However, he emphasized the importance of the High Judicial Council controlling such requests, because they affected the image of the Palestinian judiciary. He concluded that he was not authorized to decide and so the council members were addressed. After several calls and follow-ups on April 21, 2016, April 24, 2016, and April 27, 2016, the Council's General Secretariat informed me that my request had

23 See the attached questionnaire for lawyers in Arabic and translated to English. Appendix No (1).

24 See the attached questionnaire for disputants in Arabic and translated to English. Appendix No (2).

25 See the attached questionnaire for judges in Arabic and translated to English. Appendix No (3).

been denied. Notably, the letter did not indicate the reasons behind the denial of the request.

The Palestinian Judiciary Council, firstly, made it difficult to acquire a copy of some of the High Court of Justice rulings. Notably, judgments are supposed to be available to the public and easily accessible. Secondly, the denial of a purely academic and non-political research questionnaire was not based on any reasoning. The two standpoints of the judiciary council have had an impact on this academic research, which reflects the judiciary's interests in not disclosing potential failures of the courts. The opinion of the Palestinian judges on the effectiveness of the Palestinian judiciary would have been a remarkable add-value to this dissertation and would have given an exclusive viewpoint of the judges. Most importantly, judges serving on Palestinian courts are explicitly prohibited from expressing their opinions, which raises several questions regarding the independence and freedom of the Palestinian judges.

6. Language

It is important to be careful with the language used in research on Palestine. The language used should reflect the de facto situation of the illegal Israeli Occupation and colonial approach. Richard Falk, the United Nations special rapporteur on human rights in the occupied Palestinian Territory, advises that the language needs to reflect everyday realities.[26] Although he thinks that it is "appropriate to describe such unlawful impositions on the residents in the West Bank by reference to 'annexation' and 'colonial ambitions' rather than 'occupation,'"[27] the term "Israeli occupation" is used in this study, also referring to acts of colonization of Palestine, with reservations on the legitimacy of Israel. Ilan Pappé describes the danger of the terminologies used in the context of Palestine. He argues that even though the term *to settle* is often used, it is "deemed as an act of colonization."[28] In this study, the terms *settlers* and *settlement*(*s*) are also deemed to reflect Israeli colonization. This study

26 Richard Falk, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. Human Rights Council, Twenty-fifth session, Agenda Item 7, Human rights situation in Palestine and other occupied Arab territories No. A/HRC/25/67, 13 January 2014, 4.

27 Id.

28 Frank Barat, Ilan Pappé and Noam Chomsky, On Palestine. (Chicago, Haymarket Books, 2015), 22.

discusses the topic of this research on the basis of Israel's international de facto and de jure status, and the internationally recognized State of Palestine. It is more imperative in this research to behold other crucial Palestinian grievances and to reflect the reality. For example, it is appropriate to use the term "the Israeli Occupying Forces" rather than "the Israeli Defense Forces" and to use "Occupied Palestine" rather than "Occupied Palestinian Territories," where appropriate.

Part One:
Historical and Legal Background

Part One addresses, in Chapter II, the historical development of Palestine and its influence on the legal and judicial systems and human rights. Chapter III focuses on the applicable international law as well as the Palestinian and Israeli laws in Palestine in the matters related to the protection of human rights.

II. The Historical Development of Palestine and Its Influence on the Legal and Judicial Systems and Human Rights

1. Introduction

In a conflict-ridden region, discussing the history of the conflict and its effects on the different domestic entities and the protection of human rights is a demanding necessity. Fulfilling a balanced understanding, however, is difficult, especially since both sides have participated unequally in the process of the history-production. On the one hand, there are written documents on the Palestinian-Israeli history by Zionists, written from an Israeli-Zionist perspective; on the other hand, there is still a hidden and untold history. Arabs have failed to document the Palestinian perspectives.[29] In this chapter of the Palestinian history, neutral, Israeli, and Palestinian resources are cited to describe the history of the Palestinian situation under the rule of different powers, including the Israeli occupation. This sensitive issue raises many questions vis-à-vis the legal situation, in general, and human rights protection, in particular. The present situation in Palestine cannot be disconnected from its history. In other words, it is difficult to comprehend the current Palestinian situation and build a solid understanding, without a proper explanation of the events that have taken place in the last few centuries in Palestine and an in-depth study regarding the evolution of the applicable law. The most significant factor is that this situation has left the territory in a state of chaos and confusion regarding their legal and judicial systems, as well as the protection of human rights. Palestine has been under the control of various authorities

29 Benny Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999. (New York: Alfred A. Knopf, 1999), XIV.

and different legal systems, starting with the Ottoman Empire and passing through British, Jordanian, Egyptian, Israeli, and Palestinian rule. The laws of these powers are still in force in a small geographical area.[30] Israel, the occupying power in the Palestinian Territory, is substantially interrelated with the history of Palestine and has been influenced by the laws of the Ottoman Empire and the British Mandate. In fact, Israel has contributed in changing the legal system in Palestine.[31] Most importantly, the current Palestinian judicial and legal systems are also influenced by the enforced laws of different powers, which ruled Palestine for more than 500 years. Several elements have affected the Palestinian day-to-day life and enjoyment of human rights. Although the Israeli occupation forces and the Palestinian Authority are the only powers that have physical presence in Palestine, the Israeli government and the Palestinian Authority are still implementing the laws and regulations of previous authorities.[32]

This chapter aims to provide an understanding of the current legal and judicial status in Palestine through a historical narrative. It does not aim to document the history nor give historical facts; rather, it focuses on the legal significances of the powers in Palestine in order to facilitate the understanding of the following chapters concerning the applicability of human rights and humanitarian laws in Palestine, as well as the protection and violations of these laws. As the Palestinian Authority exercises its executive, legislative, and judicial powers on parts of Occupied Palestine, its contribution will also be examined to provide a complete picture of the situation.[33] As each era had its own features, the existing situation in the Palestinian Territory has contained all of them. Hence, this chapter explores the eras of authority that have controlled Palestine and influenced the legal and judiciary systems, its structure and function, and the protection of human rights.

30 These laws will be discussed in chronological order.

31 Shehadeh, Occupier's Law: Israel and the West Bank, 76–99.

32 See the laws which are still in force in Palestine on Al-Muqtafi, the Palestinian Legal and Judicial System database, Birzeit University, the Institute of Law.

33 Declaration of Principles on Interim Self-Government Arrangements of 1993 (Oslo I).

2. The Ottoman Empire 1517–1917

The Ottoman history, in its current state of development, is a rich resource of laws in Palestine. The regulations and laws of the Ottomans were derived from one resource, Sharia law.[34] Ottoman law covered areas related to private law and left administrative law to the authorities.[35] The Ottoman Empire had a great influence on Palestinian laws, judiciary, and human rights implications. The significance of the Ottoman laws revolves around the fact that many of these laws are still in effect and are considered to be the sources of all other legislation in Palestine. Although Ottoman laws have not directly protected the principle of human rights, they have reflected some fundamental rights such as the protection of private property. The focus is not on the history of the Ottoman Empire; rather, the focus is on the influence of this historical era regarding the laws, regulations, judiciary, and consequently, human rights in Palestine. In fact, it is essential to refer to the Ottoman land laws because they are still applicable and are considered to be the foundation of all other recent laws and regulations that have affected human rights and the function of the judiciary. This topic will be elaborated on in the ensuing chapters.

The Ottoman Empire lasted from the late 1300s to 1923.[36] Palestine was part of the Ottoman Empire, and it was ruled from 1517 to 1917–18 as an extended area of the military and administrative power.[37] The Ottoman Empire extensively instituted economic, administrative, legal, military, and political regulations (tanzimat).[38] The Empire, for example, regulated land ownership and the cultivation of the land, and allowed foreigners to possess or use land but only under the condition of paying taxes to the Ottoman government.[39] In Palestine, these laws opened a wide-range potential for outside investments and purchase of the land by foreigners.[40]

34 Cornell H. Fleischer, Bureaucrat and Intellectual in the Ottoman Empire: The Historian Mustafa Ali 1541–1600. (New Jersey: Princeton University Press, 1986), 7.

35 Baki Tezcan, the Second Ottoman Empire: Political and Social Transformation in the Early Modern Worked. (USA: Cambridge University Press, 2010), 27.

36 Halil İnalcık, Donald Quataert, ed., The Ottoman Empire: An Economic and Social History of the Ottoman Empire, 1300–1914. (USA: Cambridge University Press, 1994).

37 Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999, 7.

38 Id.

39 Smith, Palestine and the Arab-Israeli Conflict, 3rd ed., 21.

40 Id.

The Ottoman legal and judicial systems were imposed on Palestine[41] throughout various periods.[42] At the beginning, the legal system was characterized by Sharia Law (Islamic Law), Islamic jurisprudence, customs, and decisions issued by the governor (Sultan).[43] This period was known as the Reform Edict Era.[44] The governing law was basically derived from Al-Quran and applied across the territories under the control of the Ottoman Empire. The Ottoman Governor (Sultan) had "legislative powers as long as they did not break or violate the rules of the religion."[45] This meant that the Sultan was the law giver or the legislator; thus, the law was known as Sultanic Law. The word "law" was referred to as *Qanun*; as a matter of fact, *Qanun* dealt with matters of provincial military organizations, civil and criminal justice, and taxation.[46] The Document of Agreement of 1808 delineated the powers of the Sultan over taxes, military, and the responsibilities and obligations of the Ottoman government.[47] The Proclamation of the Reform Edict of 1856, as a regulation, "implied political, legal, religious, educational, economic, and moral reforms in which equality, freedom, material progress, and rational [enlightenment] would be the keynote."[48]

Different laws were enacted during this period. Some of these laws are still enforced in Palestine, such as the Ottoman Civil Code of 1869 (Al-Mjala) and the Land Law of 1858.[49] Regarding human rights, Al-Mjala has protected the right to property as a main asset for individuals.[50] It also assured the right to peaceful enjoyment and administration of private and public property.[51]

41 Id.

42 Gülnihal Bozkurt, "Review of the Ottoman Legal System," Journal of the Center for Ottoman Studies Ankara University, Issue 3 (1992), 115–128, 116.

43 Baki Tezcan, the Second Ottoman Empire: Political and Social Transformation in the Early Modern World. (USA: Cambridge University Press, 2010), 19–26.

44 Bozkurt, "Review of the Ottoman Legal System," 127.

45 Id., 117.

46 Fleischer, Bureaucrat and Intellectual in the Ottoman Empire: The Historian Mustafa Ali (1541–1600), 198.

47 Stanford J. Shaw and Ezel Kural Shaw, History of the Ottoman Empire and Modern Turkey, Volume II Reform, Revolution, and Republic: The Rise of Modern Turkey 1808–1975. (UK: Cambridge University Press, 1977), 2–3.

48 Niyazi Berkes, the Development of Secularism in Turkey. (New York: Routledge Taylor & Francis Group, 1998), 153.

49 The Ottoman Land Law 1858, قانون الأراضي العثماني لسنة ١٨٥٨.

50 The Ottoman Civil Code (Al-Mjala), Article 125- Property.

51 Id. Article 1659.

The land law also protected the right to disposal of private property.[52] It divided the land into five categories: private property (*mulk*), state land (*miri*), endowment land (*waqf*), abandoned land (*matruk*), and wasteland (*mawat*).[53] The reason behind the protection of the right to private property was that the Ottoman Empire considered land as the main economic, political, and legal asset. Al-Mjala and the land law now are considered as the fundamental roots and the main resources for almost all laws in Palestine.[54]

The second period was a transition to a different legal approach. The Reform Edict Era led to the emergence of a period of reforms known as Regulations Era (*Tmzimat*). This era was aimed at centralizing and modernizing the laws of the Ottoman Empire.[55] In order to reform the new laws, the Ottoman Empire adopted many Western laws, especially the norms found in the French law,[56] and modified their provisions according to Sharia, customs, and Sultanic laws.[57] A significant number of laws were enacted during this reform, such as constitutional law, penal law, trial procedure laws, judicial organizations, civil codes, and land laws.[58] Some of these laws provided basic human rights protections, such as a guarantee for lives and respect for property.[59] New human rights principles were presented in the legal system during this period, and the judiciary, as an enforcement mechanism, was empowered by the constitution.

The Ottoman Constitution of 1876 regulated judicial powers, and religious and regular courts were established.[60] The regular courts included civil tribunals

52 The Ottoman Land Law 1858, Article 3.

53 Id.

54 See for example the Ottoman Civil Code (Al-Mjala), May 1869, مجلة الأحكام العدلية العثمانية (محرم ١٢٨٦).

55 Bozkurt, "Review of the Ottoman Legal System," 120.

56 The Ottoman laws were inspired mainly by the French laws, especially The Declaration of the Rights of Man and Citizen, approved by the National Assembly of France, August 26, 1789, in regard to human rights. In regard to the Judiciary, the Ottomans adopted the French Criminal Trial Procedure Law of 1808. See Bruce Masters, The Arabs of the Ottoman Empire, 1516–1918: A Social and Cultural History. (USA, Cambridge University Press, 2013), 183.

57 Tezcan, the Second Ottoman Empire: Political and Social Transformation in the Early Modern World, 19–26.

58 Bozkurt, "Review of the Ottoman Legal System," 120.

59 The Ottoman Constitution, Promulgated the 7th Zilbridje, 1293 (11/23 December 1876), source: the American Journal of International Law, Vol. 2, No. 4, Supplement: Official Documents (Oct. 1908), 367–387.

60 Bozkurt, "Review of the Ottoman Legal System," 120.

with jurisdiction over civil and criminal matters.[61] In addition to the aforementioned courts, a High Constitutional Court was formed to replace the High Tribunal which served "as a superior court for regular courts in 1868."[62] The court consisted of thirty members.[63] The judges, in hierarchal order, were appointed for a lifetime tenure.[64] The judiciary personnel were independent without any interference.[65] The trials were protected and held in public, although some specified cases were held in secret.[66] The Ottoman Constitution protected the fundamental human rights, as they are known today. In fact, it set forth a basic ground for a safeguard of human rights. The constitution protected the right to equality before the law among all Ottomans, without any discrimination based on religion.[67] Article 17 reads, "All Ottomans are equal before the law. They have the same rights and the same duties towards the country, without prejudice to religion."[68] Under the constitution, the Ottomans enjoyed the right to real and personal property. Article 21 provides that private property was not subjected to expropriation except for public utility and with a compensation of the value of the expropriated property.[69] The Ottoman constitution, in general, embodied liberal and political ideas, but gave no guarantees to protect people's political freedom.[70] In addition, the right to personal liberties (Article 10), the right to freedom of religion (Article 11), freedom of the press (Article 12), and the right to commercial, industrial, and agricultural association (Article 13), were all explicitly protected by the constitution.[71] Palestine was not exceptional to the Ottomans, but it witnessed significant changes. It grew economically and flourished with commerce from Europe and other areas.[72]

61 The Ottoman Constitution, Article 87.
62 Bozkurt, "Review of the Ottoman Legal System," 124.
63 The Ottoman Constitution, Article 92.
64 Id., Article 81.
65 Id., Article 86.
66 The same provisions are adopted in the Palestinian Basic Law, 29 May 2002, Palestine Gazette, Mumtaz on 7 July 2002, 4. See The Ottoman Constitution, Article 82.
67 Id., Article 17.
68 Id., Article 17.
69 Id., Article 21.
70 Masters, The Arabs of the Ottoman Empire, 1516–1918: A Social and Cultural History, 184.
71 The Ottoman Constitution.
72 James Reilly, "The Peasantry of Late Ottoman Palestine." Journal of Palestine Studies, Vol. 10, No. 4 (Summer 1981), 82–97, 82.

The Ottoman administrators, however, were not involved in the daily administrative and legal affairs in Palestine.[73] During the Ottoman Empire rule, Arab Muslims, Christians, Druze, and Jews were living in Palestine and were called the Palestinians.[74] Jews were a minority of less than 5% of the Palestinian Muslim-Christian population in Palestine.[75] All people were guaranteed equal rights despite their religion.[76] At that time, the Zionist movement was "planting the odd"[77] to establish a state for the Jewish people in Palestine, and Jews were entering Palestine as pilgrims and then staying there.[78] Between 1881 and 1900, the movement started to trigger Jewish immigration from all around the world to Palestine.[79] In 1914, World War I took place, and the Ottoman Empire was part of it.[80] Three years later, Britain occupied Palestine and imposed a military mandate.[81]

3. The British Mandate 1917–1948

Palestine, under the British Mandate, witnessed a set of laws where fundamental human rights were weighted differently, a constitution replacement was introduced, and the judicial system was changed. Notably, during the British Mandate, not all Ottoman laws were annulled, subsequently creating a legal problem. In 1917, Palestine fell under British occupation as a result of the Ottoman Empire's defeat.[82] When the British military took over Palestine, on November 2, 1917, the United Kingdom's Foreign Secretary, Arthur Balfour, sent a letter known as the Balfour Declaration, to Walter Rothschild, the

73 Deborah Gerner, One Land, Two People: The Conflict over Palestine, 2nd ed. (USA: Westview Press Inc., 1994), 10.

74 Muslims were the majority; Jewish inhabitants were a small minority. Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999, 7.

75 Ilan Pappe, The Ethnic Cleansing of Palestine (England: Oneworld Publications, 2006), Chapter 2: The Drive for an Exclusively Jewish State.

76 Roderic H. Davison, Reform in the Ottoman Empire: 1856–1876 (USA: Princeton University Press, 1963), 3.

77 Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999, 20.

78 Mim Kemal Öke, the Ottoman Empire, Zionism, and the Question of Palestine: 1880–1908. International Journal for Middle East Studies, Volume 14, Issue 3 (1982), 329–341, 335.

79 Gerner, One Land, Two People: The Conflict over Palestine, 16.

80 Smith, Palestine and the Arab-Israeli Conflict, 3rd ed., 38.

81 Id., 52–55.

82 Id.

leader of the British Jewish community.[83] The letter accentuated Britain's consecration toward the establishment of a Jewish "homeland" in Palestine.[84] By the end of 1917, Palestine was exclusively placed under British military administration, which lasted until 1919.[85] In early 1918, Britain began the implementation of the Balfour declaration.[86] It took measures to stimulate the immigration of Jews into Palestine on a large scale, and granted the Jews special treatment to establish a distinctive economic development by facilitating land purchases as well as agricultural production.[87] In 1920, the British government established the civil administration in Palestine.[88]

On August 12, 1922, the League of Nations (1919–1946), on the basis of its mission to maintain universal peace,[89] adopted a resolution (No. C. 529. M. 314. 1922. VI), concerning the mandate for Palestine, and officially put Palestine under the British Mandate.[90] The League of Nations' Council affirmed that the British Mandate had, at that time, the full power of legislation and of administration over Palestine.[91] This resolution granted the British government the power to rule the people of Palestine.[92] Notably, all the terms of the British Mandate over Palestine were irreconcilable and contained contradictory principles of self-rule for the native Palestinians.[93] In other words, the British Mandate was preparing Palestine to be controlled by a foreign power rather than allowing the indigenous Palestinians to determine their own future. In the ten years after the mandate resolution, Palestine witnessed an increase

83 The Balfour Declaration, Arthur James Balfour (2 November 1917).

84 Id.

85 The United Nations the General Assembly on 2 October 1947, Ad Hoc Committee on the Palestinian Question Communication from the United Kingdom Delegation to the United Nations, A/AC.14 /8, New York 18 August 1947.

86 Benny Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999, 79.

87 Id., 80.

88 Assaf Likhovski, Law and Identity in Mandate Palestine. (USA: The University of North Carolina Press, 2006), 21.

89 The League of Nations, Mandate for Palestine No: C. 529. M. 314. 1922. VI. Communiqué au Conseil et aux Membres de la Société, Genève, le 12 août 1922.

90 Id.

91 The United Nations the General Assembly, Ad Hoc Committee on the Palestinian Question, A/AC.14 /8.

92 Likhovski, Law and identity in Mandate Palestine, 21.

93 Samih K. Farsoun and Christina Zacharia, Palestine and the Palestinians. (Boulder, CO: Westview Press, 1997), 72–86.

in the immigration of Jews.[94] Continuously, and with the help of the British High Commissioner, Jewish immigration to Palestine intensified.[95] In fact, one of the British High Commissioner's missions was to facilitate the immigration of the Jews and settle them in Palestine.[96] Jewish refugees flooded into Palestine to "escape persecution in central and southern Europe, creating friction with the indigenous Palestinian population."[97] The Zionism movement's domination overshadowed the merit of the situation. Zionists craved power in Palestine and repeatedly diluted laws that favored Palestinians and focused on the Zionist movement's "ambitions to turn Palestine into a Jewish state,"[98] This frightened indigenous Palestinians and created tensions between both communities.

Shortly after the resolution, in 1922, the British government enacted the Order-in-Council, which functioned as a constitution in Palestine.[99] According to the Order-in-Council, a person designated as the High Commissioner was appointed. The British High Commissioner had exclusive powers within the Executive Council in accordance with the provisions of the mandate.[100] A Legislative Council was also formed, which had full power and authority to enact ordinances and laws necessary for the maintenance of public order and morals, without discrimination on the ground of race, religion, or language.[101] The council consisted of the High Commissioner and 22 other members. This body consisted of ten officials and twenty elected unofficial persons.[102] The Order-in-Council did not identify a quota for the unofficial representation,

94 Gerner, One Land, Two People: The Conflict over Palestine, 16.

95 Id.

96 Palestine, Instructions passed under the Royal Sign Manual and Signet to the High Commissioner and Commander-in-Chief of Palestine, 14th August 1922; see The Palestine Order-in-Council, at the Court at Buckingham Palace, the 10th day of August 1922 Article XXVII.

97 Robert Home and James Kavanagh, Mapping the Refugee Camps of Gaza: The Surveyor in a Political Environment. (London: Royal Institution of Chartered Surveyors, 2001), 4.

98 Adnan Abu-Ghazaleh, "Arab Cultural Nationalism in Palestine during the British Mandate." Journal of Palestine Studies, Volume. 1, Issue No. 3 (Spring, 1972), 37–63, 38.

99 The Palestine Order-in-Council of 1922.

100 Id., Part II: Executive, Article 4.

101 Id., Part III: Legislature, Articles 17 and 18.

102 Id., Part III: Legislature, Article 19.

but of the elected members, eight were Muslims, two were Christians, and two were Jews.[103]

The principles of non-discrimination, the right to freedom of conscience, and the free exercise of all forms of worship were protected, but were also restricted for the maintenance of public order.[104] The British Mandate focused on land issues and concentrated the power in the hands of the British High Commissioner to make grants of the land. In this regard, Article 13 reads as follows: "The High Commissioner may make grants or leases of any such public lands or mines or minerals or may permit such lands to be temporarily occupied on such terms or conditions as he may think fit subject to the provisions of any Ordinance."[105] This article gave the Commissioner vague wide-ranging powers to determine the beneficiaries of land, mines, or mineral grants and leases. The articles of the Order-in-Council granted the Jews some benefits over the indigenous Palestinians, but not explicitly. Some allowed special facilitation to Jews, and other articles conceded that the British High Commissioner could make grants of land, agriculture and other services. The connection among these articles created favoritism to immigrant Jews because they were interested in purchasing undisputed land and were able to afford such purchases.[106] For example, Jews were the beneficiaries of the aforementioned Article 13, as the Jewish agency had the financial ability to lease and buy land, and, by 1936, the land holdings of the Jews "had increased from 110,000 acres [1 acre = 4047 m2] to 308,000."[107] The agency successfully lobbied the mandate government to grant and lease approximately "195,000 dunums [1 dunum = 1000 m2] of state domain to Jewish settlers by 1947."[108] The British Mandate controlled the system of land tenure and created a new category of land known as "the public lands."[109] Public land is defined in Article 2

103 The General Assembly, Ad Hoc Committee on the Palestinian Question Communication. A/AC.14 /8.

104 The Palestine Order-in-Council of 1922, Article 83.

105 Id. Part II: Executive, Article 13.

106 Shehadeh, "The Land Law of Palestine: An Analysis of the Definition of State Lands," 88.

107 Abu-Ghazaleh, "Arab Cultural Nationalism in Palestine during the British Mandate," 52.

108 George E. Bisharat, "Land, Law, and Legitimacy in Israel and the Occupied Territories." The American University Law Review, Volume 43, Issue No. 467 (1994): 498–499, 501.

109 Raja Shehadeh, "The Land Law of Palestine: An Analysis of the Definition of State Lands." Journal of Palestine Studies, Volume 11, Issue No. 2 (Winter, 1982): 82–99, 94. For information on the other categories of the lands (Ottoman division), see also The Ottoman Land Law 1858, نوناق ارألا يض يناماثعلا ةنسل ١٨٥٨.

as: "all lands in Palestine which are subject to the control of the government of Palestine by virtue of treaty, convention, agreement or succession, and all lands which are or shall be acquired for the public service or otherwise."[110] According to this definition, public land was exclusively used under the control of the government, and in implementation of its purposes to benefit one group.[111]

Notably, the High Commissioner was vested with the right to acquire and expropriate land for public interest in the name of the government of Palestine.[112] The Mandate reshaped individual's land rights, ownership, and land use. For instance, the Land Transfer Ordinance of 1920 was "the first ordinance passed in Mandate Palestine on the issue of land tenure."[113] This Ordinance required that all transfers of private lands must be state registered, and state land was excluded from this ordinance.[114] After a decade, transfers of land to Jews and evictions of Palestinian tenants revealed a contradiction in the Order-in-Council, necessitating the passing of the Protection of Cultivators Ordinances in 1929 and 1933 and the Land Transfers Regulations in 1940, passed in order to protect Palestinians' rights.[115] In the case of leased land, in line with the provisions of the Protection of Cultivators Ordinance of 1929, tenants were offered an amount of money as compensation for evacuation, but were not given alternative land or buildings.[116] Most of the Palestinian farmers, who were beneficiaries of the public land, were evacuated and left with no alternative options. However, Jews objected to the Ordinance of 1929 and claimed that tenant protection would be an obstacle to the development of the country.[117] In addition, the Jewish Agency denied that land purchasing displaced

110 The Palestine Order-in-Council of 1922, Article 2.

111 Shehadeh, "The Land Law of Palestine: An Analysis of the Definition of State Lands," 94.

112 Id.

113 Aida Asim Essaid, Zionism and Land Tenure in Mandate Palestine. (United States: Routledge, 2014), 72.

114 Bisharat, "Land, Law, and Legitimacy in Israel and the Occupied Territories," 498–499. Cited as Transfer of Land Ordinance, 1920–1921, reprinted in 1 Legislation of Palestine 1918- 1925, at 62–65 (Norman Bentwich ed., 1926).

115 Robert Home, "An 'Irreversible Conquest'? Colonial and Postcolonial Land Law in Israel/Palestine." Social and legal Studies Journal Volume 12, Issue No. 3 (2003): 291–310, 299.

116 Id.

117 Home, "An 'Irreversible Conquest'? Colonial and Postcolonial Land Law in Israel/Palestine, 299. Cited as Survey (1946–7) A Survey of Palestine (3 vols.). Washington, DC: Anglo-American Committee (reprinted 1991 by Institute for Palestine Studies). 289–94.

the Palestinian farmers.[118] All transactions of land, shortly thereafter, served the Jewish population, as Jews rented, kept, bought, and controlled more land.[119] These regulations, eventually, affected the Palestinians, as they were unable to afford paying compensation to tenants if they were the owners; furthermore, they were unable to purchase new land if they were the tenants. These laws, in fact, shaped the land ownership percentage, where "all cultivable land was occupied, no cultivable land [then] in possession of the indigenous population."[120]

In 1925, the mandate issued the Palestinian Citizenship Regulations and granted all residents of Palestine, regardless of their religion, origin, language, or race, Palestinian citizenship.[121] Nevertheless, during the mandate, a clear division of the land between Arab and Jews was created in order to implement the terms of the mandate regarding the Jewish state.[122] The mandate, in fact, posed political and administrative problems that discriminated against Palestinians in favor of Jews, and ultimately, rooted conflict and ethnic division.[123] British Mandate did not declare the importance of protecting human rights in Palestine. The Order-in-Council did not explicitly safeguard the basic rights of all Palestinians. It emphasized the establishment of a "national home for the Jewish people… [and] nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine."[124] Notably, human rights during the British Mandate in Palestine were not listed as a bill of rights. The mandate's Order-in-Council focused on specific needed rights, such as the right to vote. Some rights were allowed to be exercised, such as the right to private property, because property was considered to be essential and an important economic and personal asset for all. Conversely, the right to movement was neither protected as a basic right nor

118 John Quigley, Palestine and Israel: A Challenge to Justice. (Durham and London: Duke University Press, 1990), 19.

119 Id., cited as Survey (1946–7) A Survey of Palestine (3 vols). Washington, DC: Anglo-American Committee (reprinted 1991 by Institute for Palestine Studies). 289–94.

120 Quigley, Palestine and Israel: A Challenge to Justice, 19.

121 Palestinian Citizenship Regulations, 1925. The Laws of Palestine (Drayton's Collection – British Mandate), 16 September 1925, 3417.

122 Shehadeh, "The Land Law of Palestine: An Analysis of the Definition of State Lands," 88.

123 Charles Townshend, "Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800–1940." The Historical Journal-University of Keele, Volume 25, Issue No. 1 (1982): 167–195,188.

124 The Palestine Order-in-Council of 1922, Introduction.

was it considered an element of a free life with an economic impact. In this regard, restrictions on movement were not regulated.

The British Mandate also "retained some of the legal rules and institutions that existed… and replaced others."[125] It engaged rules and customs within the society.[126] Therefore, the legal system in Palestine was transferred from the Latin-Ottoman (French and Islamic) legal system to the Anglo-Saxon (British common law) legal system.[127] This period presented a transition period in legislation where all proclamation, ordinances, orders, rules of courts, and other legislative acts, which were issued in Palestine after July 1, 1922, were deemed to be valid and in full effect.[128] At the same time, the British Mandate disposed of the laws that were inherited from the Ottoman Empire, and some of these laws were subjected to possible amendments by the British High Commissioner.[129] The British judicial system significantly influenced the judiciary in Palestine. The legal system went through a prodigious transformation. The British expanded the jurisdictions of the existing Ottoman courts and strengthened the mandate control over these courts.[130] Different laws were enacted, and some of these laws, in fact, articulated the judicial system and court formulation. During this period, the British government issued several laws and regulations in Palestine such as the Civil Procedures Law of 1938,[131] the Supreme Court Law of 1937,[132] the Judicial Authority Act of 1940,[133] and the Magistrate Courts Law of 1940.[134] Military courts were established under the Defence (military courts) Regulations of 1937, which were also named as Martial Courts, and were granted jurisdiction over offenses committed by any person against the British Government, or its personnel.[135] The civil, criminal, and religious courts were reformed to be compatible with the British judiciary.[136] Land Courts were introduced to the judiciary,[137] and the Supreme Court,

125 Likhovski, Law and identity in Mandate Palestine, 23.
126 Essaid, Zionism and land Tenure in Mandate Palestine, 70.
127 Likhovski, Law and Identity in Mandate Palestine, 23.
128 The Palestine Order-in-Council of 1922, Article 74.
129 Essaid, Zionism and land Tenure in Mandate Palestine, 72.
130 Likhovski, Law and identity in Mandate Palestine, 23.
131 See the Civil Procedures Law of 1938, British Mandate in Palestine.
132 See Supreme Court Law of 1937, British Mandate in Palestine.
133 See Judicial Authority Act of 1940, British Mandate in Palestine.
134 See Magistrate Courts Law of 1940, British Mandate in Palestine.
135 The Palestine Order-in-Council of 1922, Article 75.
136 Id., Article 38.
137 Id., Article 42.

sitting as a Court of Appeal, was established as a replacement of the Ottoman Constitutional Court.[138] None of these courts were granted jurisdiction to review human rights petitions, and no cases were found in the database of the British or Palestinian judiciary that related to human rights. The British government controlled the judicial and legal systems, and, in turn, weakened the application of the Ottoman laws.[139] The judiciary suffered insoluble problems, such as a "shortage of staff owing to sickness,"[140] and "the need to set up special courts under British judges, sometimes borrowed from the land courts, to try cases arising from political disturbance, quickly created a backlog."[141] It seems that the British Commissioner had no interest in improving the situation of the judiciary, and thus, decided to neglect it.

In a short period of time, the Jewish Agency became a landowner on a large scale, employed its investments for the benefit of Jews, and exercised its influence on the British Mandate.[142] In 1937, as a result, Arab Palestinians revolted against Britain.[143] In response to the revolution, many regulations were enacted in Palestine, especially the Emergency Powers (Defence) Act of 1939.[144] Shortly thereafter, the High Commissioner enacted the Defence (Emergency) Regulations of 1945.[145] These regulations were used by the British authorities against the Arab-Palestinians, and then against Jews who used violence to achieve political change.[146] In general, these regulations granted the military government extensive powers. The regulations introduced the appointment of military commanders by the General Officer.[147] According to these regulations, military courts were reformed and granted vast jurisdiction over any person who committed or attempted to commit an offense that violated the

138 Id., Article 46.
139 Likhovski, Law and Identity in Mandate Palestine, 26.
140 Martin Bunton, "Inventing the Status Quo: Ottoman Land-Law during the Palestine Mandate 1917–1936." The International History Review, Volume 21, Issue No. 1, (1999): 28–56, 37.
141 Id.
142 Quigley, Palestine and Israel: A Challenge to Justice, 23.
143 Id.
144 The Emergency Powers (Defence) Act 1939, British Gazette No. 185, 377.
145 The Defence (Emergency) Regulation, 1945. Palestine Official Gazette 24.3.37, 268.
146 Martha Roadstrum Moffett, Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defense (Regulations), 1945, in the Occupied Territories (The West Bank: Al-Haq, 1989), 3.
147 The Defence (Emergency) Regulation of 1945, Article 6.

provisions of the emergency regulations.[148] The regulations widely allowed military courts to rule on any acts that the military commander considered offensive.[149] This meant that they had jurisdiction over any offense committed against the British Mandate or its personnel, and, in this regard, civilians were treated and punished as militants and tried before the military courts for criminal offenses.

Extensive legal powers were already given to the High Commissioner in Palestine; however, the regulations increased these powers. Military commanders, or their personnel, were granted the power to seize any property upon suspension, search people, premises, places, and vehicles, in addition to imposing restrictions on movement, detaining and deporting persons from Palestine, and taking possessions of property other than land.[150] They

148 The Palestine Order-in-Council of 1922, Parts I and II.

149 The Defence (Emergency) Regulations of 1945, Parts III, V, X, and XI.

150 Id., Part I, Part II, Part III, Part V, Part X, and Part XI. Part II, for example specifies the military court offenses, and they are as follows: "57. The offences against these Regulations which are described in this Part are Military Court offences. 58. (1) Every person who, not being a member of His Majesty's forces or of the Police Force acting in the course of his duty as such (a) discharges any firearm at any person, or (h) throws or deposits any bomb; grenade or any other explosive or incendiary article with intention to cause death or injury to any person or damage to any property, or (c) unlawfully carries any firearm, ammunition, bomb, grenade, or explosive or incendiary article, shall be guilty of an offence against these Regulations and shall be liable on conviction therefor to suffer death or imprisonment for life or such term of imprisonment as the Court may think fit. (2) For the purposes of paragraph (c) of sub-regulation (1), a person proved to have carried a thing shall be deemed to have carried it unlawfully if – (a) he was required by law to have a licence for the possession of the thing and he fails to satisfy the Court that he had such a licence, or (&) he was otherwise prohibited by law from carrying or having possession of the thing in the circumstances proved, or (c) in any other case, he fails to satisfy the Court that he was carrying the thing for some specific lawful purpose. 59. – (1) Every person who, not being a member of His Majesty's forces or of the Police Force acting in the course of his duty as such, unlawfully has in his possession any firearm, bomb, grenade, ammunition or other explosive or incendiary article, shall be guilty of an offence against these Regulations and shall be liable on conviction therefor to imprisonment for life or such term of imprisonment as the Court may think fit. (2) For the purposes of sub-regulation (1), a person proved to have had possession of a thing shall be deemed to have had possession of it unlawfully if – (a) he was required by law to have a licence for the possession of the thing and he fails to satisfy the Court that he had such a licence, or (&) he was otherwise prohibited by law from having possession of the thing in the circumstances proved, or (c) in any other case, he fails to satisfy the Court that he had possession of the thing for some specific lawful purpose. 60. It shall be a defence

also permitted the military commanders to direct the forfeitures to the government, or even the demolition of a person's property.[151] In addition, they empowered the military commanders to restrict, in general, the movement of persons by enforcing a prohibition on using roads and areas by animals, vehicles, or persons; or by restricting persons of any specified class, by imposing curfews on every person within any area, in addition to commanding closure on areas or places for the purpose of enforcing these regulations.[152] These regulations even restricted the repair of certain buildings; the repairs were conditional upon the absolute discretion of the military commander to authorize any person to carry out such repairs.[153] Since their inception, these regulations are still enforced as permanent rules throughout Palestine.[154] The state of emergency under these regulations has greatly influenced human rights of Palestinians, and this is further elaborated in the next chapter. At that time, the defense regulations were criticized by the Jewish Agency and leaders, describing the regulations as "unparalleled in any civilized country… in Nazi Germany there were no such laws… [and they] destroy the very foundation of justice… [because] the administration has unrestricted freedom to banish any citizen at any moment… a man does not actually have to commit an offense."[155] In short, they introduced the most extreme measures that a government could take and implement on civilians.

During the British Mandate, besides the confrontation between the Palestinians and the British government, the conflict between the Arabs

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to a prosecution for the offence of carrying or possessing a firearm or ammunition contrary to regulation 58 or 59 for the accused to prove that he was a person to whom an order under section 5 of the Firearms Ordinance applied and that he was entitled under the order to carry such firearm or ammunition. 61. Any person who – (a) wears any uniform or equipment of any of His Majesty's forces or of the Police Force, or of the Arab Legion, not being entitled to do so as a member of those forces, or (b) wears any dress or equipment likely to be mistaken for any such uniform or equipment as is mentioned in paragraph (a) and fails to satisfy the Court that he had no intention that it should be so mistaken, shall be guilty of an offence against these Regulations and shall be liable on conviction therefore to imprisonment for life or to such term of imprisonment as the Court thinks fit."

151 Id. Part XII.

152 Id. Part XIII.

153 Id., Part XIV.

154 Id., Part XIV.

155 Uri Davis, Israel an Apartheid State (UK: Zed books limited, 1987), 66. Cited as Sabri Jiryis, the Arabs in Israel, 12–13.

and Jews in Palestine was also accelerating, causing many deaths on both sides.[156] In 1946, the British government and the United States government invited the Arab countries, within the Arab League, to convene a conference in London.[157] That conference was set up to discuss the situation between Arabs and Jews in Palestine, and to propose a plan to divide Palestine.[158] This invitation led to the London Conference (1946–1947); however, for different reasons, the Arab Higher Committee in Palestine and the Jewish Agency refused to attend.[159] For Arabs, the partition plan was illegal and was intended to expel local residents; while the Zionist movement insisted that Palestine "must be distinctively Jewish rather than religiously or ethnically pluralist."[160] In early 1947, the British government informed the newly-established United Nations organization of its intention to withdraw from Palestine.[161] On November 29, 1947, the United Nations adopted Resolution 181, approving the termination of the British Mandate, and the partition of Palestine.[162] Moreover, that resolution replaced Jerusalem under international supervision, and established two independent states; one for Arabs and one for Jews.[163] Although, at that time, Jews, including Jewish immigrants, represented only 33% of the population, and owned 7% of the land, the UN partition plan gave the promised Jewish state 57% of Palestine, including the most strategic and fertile areas.[164]

On 12 May, 1948, the King of England enacted the Palestine (Revocations) Order-in-Council of 1948, and revoked the Palestine Order-in-Council of 1922 and the Palestine (Defence) Order-in-Council of 1937, and all regulations based on them, including the Emergency Powers (Defence) Act of 1939, and

156 Quigley, Palestine and Israel: A Challenge to Justice, 18–19.

157 The United Nations the General Assembly, Ad Hoc Committee on the Palestinian Question, A/AC.14 /8, 45.

158 Id.

159 Gerner, One Land, Two People: The Conflict over Palestine, 42.

160 Id.

161 United Nations General Assembly, United Nations Palestine Commission, Recent British Editorial Comment on the Palestine Question. Doc. No. A/AC.21/P/43, 9 April 1948. The first paragraph states, "The Manchister Guardian of 25 March 1948, an in editorial entitled 'May 15' states that although Bevin announced that Britain was handing Palestine over to the United Nations and 'not to chaos,' there may in practices be little difference between the two."

162 United Nations General Assembly, Resolution 181 (II). Future Government of Palestine. A/RES/181(II)on 29 November 1947.

163 Id.

164 Gerner, One Land, Two People: The Conflict over Palestine, 43.

the Defence (Emergency) Regulations of 1945.[165] Two days later, on May 14, 1948, the British Government renounced its authority, handing over all powers, and withdrew from Palestine.[166] The Jewish Zionist Movement immediately, on the same day, announced the establishment of a Jewish state on Palestinian Land.[167] By May 15, 1948, a Jewish state had been proclaimed.[168] Since then, an Arab Palestinian state has never emerged, as Arabs considered the partition plan as an inequitable and catastrophic event in the history of their beloved land.[169]

The partition of Palestine triggered the war of 1948 between Arabs and Jews.[170] After the 1948 war, more than three quarters of the Palestinian lands, that is, approximately 77%, were controlled by Israel, a proportion that was much more than what the UN partition plan had originally granted Israel.[171] The Israeli military operations in 1948 caused displacement of 750,000–900,000 Palestinians, both internal and external refugees,[172] and the demolition and depopulation of more than 385 Palestinian villages.[173] In order to establish the planned Jewish state, Zionist military organizations carried out several attacks against Palestinian villages and towns, massacring their inhabitants.[174] The conflict advanced very asymmetrically with Israel fighting as a state with well-equipped and well-organized Zionist military forces; and the Palestinians, fighting the aggression as individuals. As a result, the name "Palestine" was wiped from the world's map, and Palestinians who fled internally and externally were not allowed to return to their homes, with Egypt

165 The Palestine (Revocations) Order-in-Council of 1948, No. 1004 (12 May 1948). The legality of implementing the defense regulations in the Occupied Territory by Israel will be discussed in detail in the next chapter.

166 Quigley, Palestine and Israel: A Challenge to Justice, 64.

167 Declaration of Israel's Independence 1948, Issued in Tel Aviv on May 14, 1948 (5th of Iyar, 5708).

168 Smith, Palestine and the Arab-Israeli Conflict, 3rd ed., 187.

169 Ilan Pappe, The Making of the Arab-Israeli Conflict: 1947–1951 (London and New York: I.B. Tauris & Co Ltd, 2001), 16–18.

170 Gerner, One Land, Two People: The Conflict over Palestine, 43.

171 Id.

172 United Nations, the Question of Palestine and the United Nation (New York, the United Nations Department of Public Information, April 2008), 97.

173 Davis, Israel an Apartheid State, 18.

174 Id., 4–8.

retaining control over the Gaza Strip while Jordan took control over the West Bank.[175]

4. Jordanian Rule over the West Bank: 1948–1967

The Jordanian Army declared control over the West Bank of the Jordan River on May 19, 1948.[176] Jordan annexed the West Bank, ruled it as a part of its territories, imposed its laws and regulations, and granted the West Bankers Jordanian nationality.[177] The Jordanian King assigned a military governor in the West Bank and empowered him to approve, issue, and enact different laws and regulations.[178] The Jordanian military governor announced, on May 24, 1948, the applicability of the Jordanian Defense Law of 1935 No. 20/48 and related legislations in the West Bank.[179] The Jordanian governor exercised his powers according to the aforesaid law. The governor confirmed, in the Jordanian Military Order No. 2, that the Ottoman and the British laws remain valid in the West Bank, i.e., those which do not contradict the laws on the Defense of the Trans-Jordan of 1935 and those laws that might be replaced by new Jordanian laws.[180] In other words, the in-force laws in the West Bank were to remain until they were amended or annulled by the Jordanian governor. In 1949, the West Bank was ruled under the civilian administration according to the *Law of the Public Administration* and the valid laws in the West Bank were to remain until amended or repealed.[181] Strictly speaking, the Jordanian governor enacted several laws and kept in force the Ottoman and British ones, which means that three laws of different origins were valid at that time. This, in fact, contributed to a more complex legal system and judiciary in the West Bank. In practice, it created an overlapping implementation of these laws.

175 The United Nations the General Assembly, Ad Hoc Committee on the Palestinian Question, A/AC.14 /8, 45.

176 Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999, 262.

177 Yehuda Lukacs, Israel, Jordan, and the Peace Process. (New York: Syracuse University Press, 1997), 18.

178 The Palestine Year Book of International Law, Volume III (1986) Al-Shaybani Society of International Law Ltd., Cyprus (1986), 151.

179 Compilation of laws and regulations issued and in force in the Hashemite Kingdom of Jordan until 1960, 13 (in Arabic, 1961).

180 Id., 14.

181 Public Administration Law, No. 10, 1965, Jordan Gazette, Issue No. 1840, (28 April 1965), 565.

The Jordanian Constitution was enacted in 1952.[182] Article 128, stated, "All laws, regulations and other legislative acts in force in the Hashemite Kingdom of Jordan on the date on which this Constitution comes into force shall continue to be in force until they are repealed or amended by the legislation issued thereunder."[183] This article was actually based on the aforementioned Jordanian Order No. 2, as there was no explicit annulment of certain laws, unless they contradicted the Constitution. Most essentially, it stated, "The Palestine Order-in-Council for the Year 1922 and the amendments thereto are hereby repealed."[184] This meant that the Jordanian Constitution was enforced in the West Bank as part of the Jordanian territory, after the annulment of the Palestine Order-in-Council. Remarkably, the Jordanian Constitution protected some fundamental basic human rights. It guaranteed equality to all Jordanians without distinction as to race, language or religion.[185] Article 11 protected the right to property. It reads: "No property of any person may be expropriated except for purposes of public utility and in consideration of a just compensation, as may be prescribed by law."[186] While the right to property might be limited, but only for public interests and for a fair reward, equality was recognized as an absolute right. In addition, some rights were not constitutionally protected such as the right to movement, but some restrictions were imposed on movement through the Restriction of Travelling Abroad Regulations (No. 145) of 1966.[187] These regulations prevented some citizens from traveling abroad without governmental permission.[188]

Jordan transformed the legal system in the West Bank from the British Anglo-Saxon system to a Latin Civil Law system.[189] Several laws were enforced on the West Bank during Jordanian Rule, such as the Jordanian Penal Code (No. 16) of 1960, Prevention of Crime Law (No. 7) of 1954, and the Owners and Lessees

182 The Constitution of the Hashemite Kingdom of Jordan of 1952, (1 January 1952), Jordan Official Gazette Issue No. 1039.

183 Id., Article 128.

184 Id., Article 129.

185 Id., Article 6.

186 Id., Article 11.

187 Restriction of Travelling Abroad Regulations, No. 145, Jordan Gazette, Issue No. 1968, (28 November 1966), 2483.

188 These regulations are applicable only to Jordanian citizens who had obligatory civil service; see Restriction of Travelling Abroad Regulations (No. 145) 1966.

189 Mark LeVine and Mathias Mossberg, One Land, Two States: Israel and Palestine as Parallel States. (California & London: University of California Press Ltd., 2014), 185.

Law (No. 62) of 1953. Most of the enacted laws are still in force in the West Bank today, such as the Penal Code No. 16 of 1960, Sharia Procedure Law (No. 31) of 1959, Owners and Lessees Law (No. 62) of 1953, and the Endowments Premises (Owners and Lessees) Law (No. 5) of 1964.[190] Most importantly, Jordan partially changed the judiciary in the West Bank. The British military courts were replaced by Jordanian State Security Courts.[191] The existing civil courts remained, but were reformed, and were divided into three categories: Regular Courts, Religious Courts, and Special Courts.[192] The Regular Courts had jurisdiction over all persons in all civil and criminal matters, including cases against the government.[193] According to the law of the Constitution of Regular Courts No. 26 of 1952, the regular courts comprised the Magistrate Courts, the Court of First Instance, the Court of Appeals, and finally, the Cassation Court sitting as a High Court of Justice and Second Appeals Court.[194] The Cassation Court replaced the British Supreme Court, and the Land Courts fell under the category of special courts. In addition, the Religious Courts included the Sharia Courts and the Tribunals of other Religious Communities.[195] Under Jordanian rule, judges were more limited and did not have power to create legal precedents. The Constitution granted the judiciary its independence; matters of appointing judges, promotions, and transfers were determined by a royal decree in accordance with the provision of the law.[196]

The situation in the West Bank under Jordanian rule was not restful for Palestinians. Although Jordan, theoretically, encouraged Palestinians in the West Bank to engage in socioeconomic activities, it did not give them the means for such engagement.[197] The Jordanian government excluded the West Bank from governmental, industrial and cultural activities, as well as from higher educational institutions.[198] Jordan only highlighted the West Bank's

190 See the laws that are still in force in Palestine on Al-Muqtafi, the Palestinian Legal and Judicial System database, Birzeit University, the Institute of Law.

191 State Security Court Law, No. 17, Jordan Gazette, Issue No. 1429, (27 June 1959), 529.

192 The Constitution of the Hashemite Kingdom of Jordan, Article 99.

193 Id., Article 102.

194 The Law of the Constitution of Regular Courts No. 26 of 1952, Jordanian Official Gazette, Issue No. 1105 (16 April 1952).

195 The Constitution of the Hashemite Kingdom of Jordan, Article 104.

196 Id., Article 97–98.

197 Lukacs, Israel, Jordan, and the Peace Process, 18.

198 Don Peretz, Palestinians, Refugees, and the Middle East Peace Process. (USA: United States Institute of Peace, 1993), 49.

religious sites and their potential for tourism.[199] Palestinians were not integrated into political activities and were not represented in any governmental positions, the army, or security services.[200] Jordan did not consider the West Bank as an economic gain, and the priority in economic development was given to those in the East Bank of Jordan.[201] The majority of the trade and contracts went to the Jordanian side, while the West Bankers had to prove their loyalty to be granted the remaining ones, and eventually found themselves workers for Jordanian employers.[202] Moreover, Jordan disregarded agriculture in the West Bank and doled the majority of investment funds to the East Bank's farmers. Similarly to before 1967, the income of the East Bank was 75% more than that in the West Bank.[203] Thus, discrimination practices and the negligence of human rights of Palestinians were present under Jordanian Rule. While the Jordanian government was ruling the West Bank from 1948 to 1967, Egypt was ruling the Gaza Strip. However, Egypt controlled the Gaza Strip using a different approach. The Egyptian Administration is discussed below.

5. The Egyptian Administration in the Gaza Strip: 1948–1967

As previously mentioned, the Egyptian government took over and controlled the Gaza Strip from 1948 until 1967. The Egyptian policy was different from the Jordanian rule. Egypt neither annexed the Gaza Strip nor considered it as part of its territory; rather, it militarily administrated the strip.[204] Palestinian residents were controlled by the Egyptian military, but kept their

199 Betty S. Anderson, Nationalist Voices in Jordan: The Street and the State. (Austin: University of Texas Press, 2005), 131.

200 Lukacs, Israel, Jordan, and the Peace Process, 18.

201 Peretz, Palestinians, Refugees, and the Middle East Peace Process, 49.

202 Anderson, Nationalist Voices in Jordan: The Street and the State, 131.

203 Id.

204 Hiba Husseini, "Palestinian Water Authority: Developments and Challenges: Legal Framework and Capacity," in Water Resources in the Middle East: Israel-Palestinian Water Issues from Conflict to Cooperation, ed. Hillel Shuval and Hassan Dweik (Germany: Springer, 2007), 302.

Palestinian nationality.[205] In Order No. 103 on January 30, 1950,[206] the Egyptian Military Administration established Special Courts to replace the British military courts for the first time in Gaza, in order to rule against crimes committed against the Egyptian Forces.[207] Nine years later, the military control was turned into a civil administration.[208] During this period, the Egyptian administration had issued orders to organize the legal, political, economic, and social issues in the Strip, but was not interested in changing the legal system or granting rights to Palestinians.[209] In Order No. 481, the Egyptian Administration explicitly stated that all laws, regulations, orders, decisions, and rules, which were issued before November 1, 1956, remained in force in the Gaza Strip.[210] This designated that the valid Ottoman laws and the British laws would remain applicable in the region. Notably, only a few laws and orders were enacted exclusively for Palestinians in the Gaza Strip. On December 18, 1949, for instance, the Egyptian General Commander issued Order No. 95 to reorganize the formation of the Regular and Religious Courts.[211] The jurisdiction of the British courts, according to Order No. 95, did not change and remained the same as it was under the British Mandate in Palestine.[212]

205 Middle East Watch-Committee of Human Rights Watch, The Palestinians in Kuwait: Nowhere to Go – The Tragedy of the Remaining Palestinian Families in Kuwait. Palestine Yearbook of International Law, Volume VI 1990/91, Al-Shaybani Society of International Law Ltd., 101.

206 Order No. 103 on 30 January, 1950, Published in the Palestinian Official Gazette No. 139, 4th ed. on 30 September 1950.

207 Military Order No. 103 on 30 January, 1950 Published in the Palestinian Official Gazette No. 139, 4th ed. on 30 September 1950.

208 Hiba Husseini, "Palestinian Water Authority: Developments and Challenges: Legal Framework and Capacity." 302.

209 Jean-Pierre Filiu, Gaza: A History, translated by John King, (UK and New York: Oxford University Press, 2014), 119.

210 The Order No. 481 of 1957, Relating to Continuation of All Operative Legislation in Gaza Strip (on and before November 1, 1956 issued on April 7, 1957, the Palestine Official Gazette/ Gaza Strip, No. 71 (Text in Arabic).

211 The Order No. 95 Concerning the Formation of Regular and Religious Courts in the Areas under the Observation of the Egyptian Forces in Palestine of 1949, 18 December 1949, Palestine Official Gazette/ Gaza Strip, No. 17 on 31 December 1949. (Text in Arabic).

212 The Order No. 95 Concerning the Formation of Regular and Religious Courts in the Areas under the Observation of the Egyptian Forces in Palestine of 1949, 18 December 1949, published in the Palestinian Official Gazette No. 17 on 31 December 1949. Article 1 (Text in Arabic).

In 1955, Egypt enacted the Basic Law for Gaza Strip No. 255 to constitutionally regulate the Strip. A legislative council was established under the administration of the General Commander.[213] The law also regulated the judiciary in Gaza and granted its independence; furthermore, it stated that the appointment of judges, their promotions, and transfers would remain regulated by British laws.[214] In the same order, the General Commander established military courts to rule in crimes against the Egyptian Military Forces, which were replacements of the Egyptian Special Courts in Gaza.[215] In 1962, the Egyptian administration enacted the Proclamation of the Constitutional Regime of the Gaza Strip to complete the provisions of the Basic Law No. 255 of 1955.[216] This proclamation had been functioning as a constitutional document in Gaza and reflected the Ottoman and British laws, but in a modern form where a list of protected human rights was provided. The proclamation regulated all matters relating to rights and liberties, public authorities, the general commander, the executive council, the legislative council, the judiciary, and the armed forces.[217] Freedoms and liberties were protected in the proclamation and listed as constitutional human rights. Article 3 of the proclamation guaranteed the right to equality for Palestinians without distinction as to origin, language, or religion.[218] Article 10 guaranteed free movement within the law.[219] Article 13 protected private property, which might be expropriated only for public interests with a fair compensation.[220] These rights were presented to Palestinians in Gaza as constitutional principles that must be respected. Although the Egyptian administration did not substantially change the legal system, the proclamation of 1962 introduced a model of the concept of human rights. This model influenced Palestinian basic laws in light of human rights. It is, in fact, still in force in the Gaza Strip, where there is no contradiction with any other valid legislation.[221]

213 Basic Law for Gaza Strip No. 255, 1955. Published in the Official- Gaza Strip No. 304 on 25 February 1958, Article 23 (Text in Arabic).

214 Id., Article 33.

215 Id., Article 37.

216 Proclamation of the Constitutional Regime of Gaza Strip of 1962, 5 March 1962. Official Gazette, Gaza Strip No. 675 on 29 March 1962 (Text in Arabic).

217 Proclamation of the Constitutional Regime of Gaza Strip of 1962.

218 Id., Article 3.

219 Id., Article 10.

220 Id., Article 13.

221 According to the database of the Palestinian Legal and Judicial System, Al-Muqtafi.

However, human rights afforded by the Proclamation of 1962 were not implemented in practice. As Gaza was not economically or socially connected to Egypt, it was considered as a separate unit.[222] The Gaza Strip suffered severe restrictions imposed on the movement of both goods and labor with Egypt.[223] Poverty dominated the Strip and the people of Gaza were a sole field of relief operations of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA).[224] The unemployment rate was 81%, the industrial sector did not exist, and foreign trade restrictions were imposed on the strip and controlled by Egyptians.[225] Agriculture was the primary resource for families, but remained unsupported in the Strip.[226] Palestinians in the Gaza Strip were neither treated equally with the Egyptians nor allowed to freely develop the Strip. As a result, the economic, social, judiciary, and legal situations deteriorated.

As discussed previously, the Egyptian administration enacted laws, orders, decrees and proclamations in the Gaza Strip, but it did not invalidate the Ottoman Empire and the British Mandate Laws.[227] Therefore, besides the Egyptian administration's laws, the Ottoman and the British laws were in force in Gaza in 1967.[228] In June 1967, the Arab-Israeli War, also known as the Six-Day War, broke out.[229] The Israeli forces defeated the Arab countries and occupied the West Bank and the Gaza Strip, the remaining parts of Palestine.[230]

222 M.K. Budeiri, "Changes in the Economic Structure of the West Bank and Gaza Strip under Israeli Occupation." Labour Capital and Society Volume 15 No. 1 (April 1982): 46–63, 47.

223 Budeiri, "Changes in the Economic Structure of the West Bank and Gaza Strip under Israeli Occupation, 47.

224 Filiu, Gaza: A History, 119.

225 Budeiri, "Changes in the Economic Structure of the West Bank and Gaza Strip under Israeli Occupation, 49.

226 Sara Roy, "The Gaza Strip: A Case of Economic De-Development." University of California Press, Journal of Palestine Studies, Vol. 17, No. 1 (Autumn, 1987), 56–88, 59.

227 See the laws which are still in force in Palestine on Al-Muqtafi, the Palestinian Legal and Judicial System database, Birzeit University, the Institute of Law.

228 Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999, 302.

229 Id.

230 Id., 340–343.

6. The Israeli Occupation: 1948 – Present

Since its establishment, Israel has developed a legal system that is made up of Ottoman (Islamic and French) and English laws.[231] The Israeli judiciary also inherited the British-Ottoman principles. Yet, it has a slightly different organization. In addition to the District Courts, the First-Instance Courts, and the Supreme Court, Labor Courts were introduced to the judiciary system.[232] The absence of a complete written constitution, with the presence of regulations remaining from Ottoman and British, placed the Israeli judiciary in an important position. Upon their establishment, these courts served only Israeli citizens in Israel. Palestinians were only allowed to petition before either the Jordanian or the Egyptian courts in the West Bank and the Gaza Strip, respectively. The West Bankers were subjected to the Jordanian courts' jurisdictions, and the Gazans were entitled under the jurisdiction of the Egyptian courts.[233] After the Israeli forces occupied the regions, Palestinians could not petition against the acts of the Israeli government. Its personnel and the Israeli Supreme Court were not decisive in granting justiciability to Palestinians or extending jurisdiction to review the actions of the Israeli military, which were committed in the Occupied Territory.[234] As Palestinians petitioned before the Israeli Supreme Court, according to the Justiciability Doctrine, the Court had to rule whether it had jurisdiction over the acts committed by the Israeli authorities and forces in the Occupied Territory. The focus on the Supreme Court and its influential rule regarding human rights will be examined in detail later.[235]

On June 6, 1967, after the Arab-Israeli Six-Day War of 1967,[236] "Israel defeated Egypt, Jordan, and Syria and occupied the Sinai Peninsula, the Gaza Strip, the West Bank [including] East Jerusalem, and the Golan Heights."[237] The

231 Suzie Navot, the Constitutional Law of Israel. (The Netherlands: Kluwer Law International, 2007), 23.

232 See the Basic Law: The Judiciary, 28 Feb 1984, see also the Courts Law 5744-1984.

233 David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories. (United States: State University of New York Press, 2002), 21.

234 Id.

235 The Supreme Court of Israel is examined in Chapter III: The Applicable Legal Resources in the Palestinian Territory.

236 The Six-Day War lasted from June 5 to June 10, 1967; See Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999, 340–343.

237 Benvenisti, The International Law of Occupation, 2nd ed., 203–204.

Israeli military repeated the same experience of 1948 in the West Bank, the Gaza Strip, and Jerusalem, and it succeeded in exiling around 300,000–390,000 Palestinian Arabs, more than one-quarter of the population in the West Bank. Approximately 70,000 Gazans fled to Jordan, Golan Heights, and Egypt; tens of villages were demolished and thousands of houses were destroyed "not in battle, but as a punishment."[238] East Jerusalem also systematically witnessed home destruction and massive evictions of the Jerusalemite Palestinians, where they were replaced by Jewish settlers, and Israel applied its own laws.[239] The Israeli government started transferring Israeli population into the Occupied Territory, where it began to confiscate Palestinian land and building communities for Israeli Jews.[240] Immediately following, the General Commander of the Israeli Forces declared Israel's full control over the Occupied Territory and issued a number of military proclamations and orders to impose the Israeli military and administrative control in the West Bank, including East Jerusalem, and the Gaza Strip.[241] The General Commander issued the Proclamation of 1967, concerning the taking over of authority by the Israeli forces, and appointed two military regional commanders, a commander in the West Bank and another in the Gaza Strip. These commanders were given extensive powers to govern, legislate, and manage the regions.[242] The military commanders immediately took over their responsibilities and issued regulations in the areas.

First, in the West Bank, the military commander issued Proclamation No. 1 of 1967, concerning the takeover of authority (the West Bank), declaring several

238 Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999, 328.

239 Ibrahim Mattar, "From Palestinian to Israeli: Jerusalem 1948–1982," Journal of Palestine Studies, Vol. 12, No. 4 (Summer, 1983): 57–63, 59–62.

240 See B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Land Grab: Israel's Settlement Policy in the West Bank (Jerusalem, B'Tselem, May 2002).

241 The Proclamation concerning the Taking Over of Authority by the Israeli forces (the West Bank) No. 1 of 1967, on 7 May 1967, and Proclamation concerning the Taking Over of Authority by the Israeli Occupying Forces (Gaza Strip and Northern Sinai), on 6 June 1967.

242 For more information, see Feras Milhem and Jamil Salem, Building the Rule of Law in Palestine: Rule of Law without Freedom (15 January 2010) International Law and the Israeli-Palestinian Conflict: A Right-Based Approach to Middle East Peace. Routledge, 2010, 25.

restrictions.[243] On the same day, the commander enacted Proclamation No. 2 of 1967, regarding regulations of the administration of rules and justice (West Bank Region), declared a complete curfew on the region and imposed his powers on public property, enforced taxes, and cancelled any laws that contradicted the military orders and the Israeli laws and regulations.[244] In this proclamation, the military commander emphasized his granted powers in legislation, governing, and administration.[245]

The remaining Ottoman, British, and Jordanian laws in the West Bank continued to be in force along with the Israeli laws and regulations. The Israeli laws and regulations added another legal complication to the region. In Military Order No. 3 of 1967, the Israeli commanders formed military courts, which had an extended jurisdiction over the West Bank.[246] Most importantly, Israeli Order No. 412 reformed the local courts in the West Bank and determined their jurisdiction.[247] This order adopted the same court structure and the same laws in the West Bank. However, the Jordanian Court of Cassation was annulled.[248] The jurisdiction of the Cassation Court was given to the Court of Appeals sitting as a High Court of Justice.[249] The order limited the jurisdiction of the courts in the West Bank. The Military Order No. 164 of 1967, concerning local courts and the status of the Israeli occupying forces authorities (the West Bank), prohibited all courts in the West Bank to accept a petition or rule on a petition against Israel, any of its authorities or employees, or the Israeli occupying Army.[250] The effect of this order was basically to grant immunity to the aforementioned personnel from any legal actions, which could be brought before the courts in the West Bank. Under the named order, the courts had no power to call on witnesses within the Israeli administration without permission from the Israeli Commander of the region.[251] The Israeli

243 Proclamation concerning the Taking Over of Authority (West Bank), No. 1 of 1967.
244 Proclamation Regarding Regulation of Administration of Rule and Justice (The West Bank and the Gaza Strip Regions) (No. 2), 1967. Jerusalem, (7 June 1967).
245 Id.
246 Military Order No. 3 of 1967 (West Bank region) was later replaced by Military Order No. 378.
247 Order No. 412 of 1970 Concerning Local Courts (West Bank), issued on 5 October 1970.
248 Id.
249 Id.
250 Military Order No. 164 of 1967, concerning local courts (Status of the Israeli Forces Authorities) West Bank Region, issued on 3 November 1967.
251 Id.

military commander issued Military Order No. 947 in 1981, and the military administration was transferred to a civil administration.[252] Since then, the commander of the civil administration has had all the powers of legislation and security.[253]

Secondly and similarly, the Israeli military commander also issued a number of orders to control the Gaza Strip. The day Israel took control over the Gaza Strip, the military commander issued the Proclamation of 1967, concerning the takeover of authority (Gaza Strip and North Sinai No. 1, claimed control over the Strip, and imposed different restrictions.)[254] The takeover of authority orders in the West Bank and the Gaza Strip were similar, if not identical, in content and text. In Proclamation No. 2 of 1967, concerning the administration of rules and justice (Gaza Strip and North Sinai), the military commander also enforced his full power in governing, administrating, legislating, and appointing judges and court employees in the area of the Gaza Strip and Northern Sinai.[255] In addition, the commander announced that all laws and legislation in the areas remained valid as long as they were not in contradiction with the Israeli military orders.[256] Common Article 4 of Proclamation No. 2 in the West Bank and the Gaza Strip[257] also granted the military commanders absolute control over any public property in the region.[258] The proclamation reads, "Movable and unmovable property, including money, bank accounts, weapons, ammunition, vehicles, other means of transportation, and any other military or civilian equipment that belonged to, or was registered in the name of … [the] government, or any unit or branch thereof, or part of any of these, which are situated in the region – will be transferred to my [as a military commander] exclusive custody and will be subjected to my

252 Order No. 947 of 1981 Concerning the Establishment of a Civil Administration (Judaea and Samaria), issued on 8 November 1981.

253 Id.

254 Proclamation concerning the takeover of authority of 1967 (Gaza Strip and Northern Sinai).

255 Proclamation concerning the administration of rule and justice No. 2 of 1967 (Gaza Strip and North Sinai) on 8 June 1967

256 Id.

257 Article 4 was repeated in both the Proclamation No. 2 of 1976 regarding regulation of administration and law in the West Bank, and Proclamation No. 2 of 1976 concerning the administration of rule and justice in the Gaza Strip and North Sinai.

258 Proclamation concerning the administration of rule and justice No. 2 of 1967 (Gaza Strip and North Sinai), Article 4.

administration."[259] The military commanders imposed complete control over all the assets of the regions. The military commanders in the West Bank and the Gaza Strip militarily controlled Palestinian inhabitants, imposed restrictions, and implemented maximum penalties.[260] Order No. 395 (Gaza),[261] concerning local courts, adopted the same judicial structure as mentioned in Order No. 412 (West Bank). Order No. 61 of 1976 set forth the jurisdiction of the regular courts in the Gaza Strip.[262] According to these military orders, the judiciary system was harmonized in the West Bank and the Gaza Strip.

In the Gaza Strip and the West Bank, in 1967, Israeli commanders formed military courts to rule over security and public order offenses and these courts had extensive jurisdiction over Palestinian civilians.[263] The British Emergency Regulations of 1945 were reinforced and considered the foundation of the military courts' powers. At that time, the Israeli military courts had experience in putting civilians on trial, and the Israeli government immediately began to prepare for imposition of the military rule.[264] Thousands of Palestinians had been put on trial prior to the establishment of the military courts in the West Bank and the Gaza Strip areas, and Israeli soldiers, who were charged with offenses in the areas, were tried in the Israeli civilian courts.[265] The military courts ruled not only in cases involving security and public order offenses, but also in cases involving "traffic and drug offence and… offences…

259 Proclamation regarding regulation of administration of rule and justice No. 2 (1967), Article 4.

260 See the proclamations regarding regulation of administration of rule and justice (The West Bank Region and the Gaza Strip Region).

261 Order No. 395, concerning local courts (Gaza Strip and North Sinai), 1971, on 17 January 1972, in proclamations, Orders, and Appointments, Issue No. 27.

262 Order No. 61 of 1976, concerning Civil Courts (Gaza Strip and Northern Sinai), 20 August 1967.

263 Proclamation regarding the entry into effect of the order regarding security provisions (West Bank) (No. 3) 5727-1967; Order regarding security provisions, 5727-1967; Order regarding the establishment of Military Courts (No. 3) 5727-1967. These provisions were later consolidated into one order: The order regarding security provisions [consolidated version] (Judea and Samaria) (No. 1651) 5770-2009 and Military Order No. 128 of 1967 concerning thee of a military tribunal (expansion of jurisdiction) (Gaza Strip and Northern Sinai, issued on 3 December 1967.

264 Sharon Weill, "The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories," International Review of the Red Cross, Volume 89, Number 886 (June 2007): 395- 419.

265 Michal Tamir and Amir Dahan, "Side Judges: The Case of the Israeli Military Courts." Socio-Legal Review, Volume 8, number 1 (2012): 1–35, 10.

involving price fixing."[266] In their orders, the military commanders in the West Bank and the Gaza Strip announced that anyone, including civilians, committing an action that constituted an offense to public order, security, or any provisions or orders issued by the military commander would be punished to the full extent of the law.[267] Today, the Israeli military courts have jurisdiction over two categorized offenses: security offenses and offenses to public order.[268] According to Section 10 of the Security Provisions of 2009, security offenses include any breach of security regulations and laws, offenses to public orders, criminal offenses according to Jordanian criminal law, and traffic violations.[269] The jurisdiction of the military courts applies in all areas, whether the offense was committed in areas under control of the Israeli military, outside the West Bank, or in areas controlled and/or administrated by the Palestinian Authority as long as these offenses are considered as a threat to security or public order.[270] The existence of military courts, with an unlimited territorial, and subject matter jurisdiction based on the Emergency Regulations of 1945, has affected the Palestinians and their enjoyment of basic human rights; hence, these regulations will be discussed in greater detail in the following chapter.

On the ground, the officer in charge of the judiciary was vested in all powers of the Minister of Justice under Jordanian law. Nevertheless, changes and improvements in the judiciary were not officially carried out.[271] Under the Israeli occupation, in both the West Bank and Gaza Strip, judges were appointed by the military commander, paid low salaries, and given no immunities or independence.[272] As a result, these courts suffered poor conditions,[273] did not follow their own precedents, and cases were rejected for the simplest

266 Shehadeh, Occupier's Law: Israel and the West Bank, 85.

267 Proclamation concerning the takeover of the administration by the Israel Defense Forces, Proclamation No. 1, Proclamation concerning administrative and judiciary procedures (West Bank Area) (No. 2), 5727-1967, and Military Order No. 128 of 1967 concerning the establishment of a military tribunal (expansion of jurisdiction) (Gaza Strip and Northern Sinai, issued on 3 December 1967

268 Military Order No. 1651 (5770-2009) regarding security provisions [Consolidated Version], the West Bank (1 November 2009), Articles 8–20.

269 Id.

270 Id.

271 Shehadeh, Occupier's Law: Israel and the West Bank, 76.

272 Id., 81.

273 Benvenisti, The International Law of Occupation, 2nd ed., 228.

of reasons.[274] The Israeli military authorities expatriated the judicial committee that protected Palestinian judges from political control, deprived the Palestinian courts from their jurisdiction, and controlled the decisions of the Palestinian judges.[275] In addition to postponements and adjournments, which occurred without any justifications, judges were often absent, lawyers were not notified, and Israeli witnesses refused to comply with the courts' notifications.[276] These problems contributed to delays in the litigation process and weakened the performance of the judiciary. This meant that the judiciary was a dysfunctional institution. By comparison, military courts were granted vast jurisdiction and considered part of the Israeli policies; therefore, the Israeli authorities showed interest in enhancing the rules of the military courts.[277] The military courts were in a better situation and seemingly functioning,[278] where qualified judges and prosecutors were appointed by the military commander and approved by the military general.[279]

In the West Bank and the Gaza Strip, massive numbers of military orders were enacted. They were considered the cornerstone of legislation and administration of the military occupation and the main resources of full control over the Palestinians. The military commanders had vast powers and imposed regulations and restrictions on the Palestinians' enjoyment of private property and ownership. For instance, Order No. 321 of 1969 concerning land law (acquisition for public purposes), Order No. 451 of 1971, concerning land demarcation and measurement (the West Bank), Order No. 1054 of 1983, concerning land transaction (Amendment No. 5) (the West Bank),[280] Order No. 451 of 1971, concerning land demarcation and measurement (the West Bank), and Order No. 1054 of 1983, concerning land transaction, facilitated the military and administrative powers to impose control over the Occupied Territory and

274 Shehadeh, Occupier's Law: Israel and the West Bank, 81.

275 John Quigley, "Judicial Autonomy in Palestine: Problems and Prospects." University of Dayton Law Review, Volume 21, No. 3 (1996), 697–717, 707.

276 Shehadeh, Occupier's Law: Israel and the West Bank, 82.

277 Zvi Hadar, "The Military Courts," in Military Government in the Territories Administered by Israel 1967–1980: The Legal Aspects, ed. Meir Shamgar, Volume I. (Jerusalem: Alpha Press 1982),171–176.

278 Shehadeh, Occupier's Law: Israel and the West Bank, 84.

279 Tamir and Dahan, "Side Judges: The Case of the Israeli Military Courts," 13.

280 See Order No. 451 of 1971 concerning land demarcation and measurement (the West Bank) on 6 October 1971, Order No. 1054 of 1983 concerning land transaction (Amendment No. 5) (Judaea and Samaria).

its inhabitants. Such orders empowered commanders to confiscate land for public purposes and demarcated areas; these measures strengthened the military role on the Palestinian inhabitants and their lands. Other military orders imposed prevention of construction, and a set of orders was issued in 2004 to prohibit construction in areas where Palestinians lived.[281] These examples are presented, at this stage, to give an overall view on the variability of the restrictions that were imposed by the Israeli military commanders. Military orders will be elaborated on in the ensuing chapters. In the West Bank and the Gaza Strip, not only did military commanders have the power to regulate and impose restrictions, the Israeli Knesset, but they also enacted laws that allowed certain policies and practices. These restrictions and laws will also be discussed further in Chapters III and V.

On the one hand, Israeli military commanders united the applicable legal system in the West Bank and the Gaza Strip through their orders. On the other hand, they separated the legal system, which was enforced in the Jewish settlements in the Occupied Territory, since the Jewish inhabitants were not tried before the local courts in criminal or civil matters.[282] The civil courts in the West Bank and the Gaza Strip only had jurisdiction to rule in disputes among Palestinian inhabitants on civil matters, and criminal courts ruled on criminal offenses committed by Palestinians.[283] The Israeli judiciary was built as a separate independent entity, where only Israelis were granted the right to petition.[284] The Israeli courts have exercised their jurisdiction in the Occupied Territory over cases in which one of the parties is an Israeli citizen.[285] At the end of 1967, the Israeli Knesset passed a law which officially granted the Israeli Courts jurisdiction to rule in civil or criminal acts or omissions, which occurred in any region under their jurisdictions and constituted offenses in the Israeli law concerning Israeli citizens.[286] This law, in fact, was passed to allow Israeli courts to apply their laws on Israeli settlers in the West

281 Military Orders No. (2/04) 5764, (3/04) 5764, (4/04) 5764, (5/04) 5764, (6/04) 5764, (7/04) 5764, (8/04) 5764, (9/04) 5764, (10/04) 5764 concerning the prevention of construction issued during the period of 5 June 2004 to 4 October 2004.

282 Shehadeh, Occupier's Law: Israel and the West Bank, 91.

283 Id., 91–95.

284 Benvenisti, The International Law of Occupation, 2nd ed., 228.

285 Id.

286 Shehadeh, Occupier's Law: Israel and the West Bank, 9.

Bank and Gaza[287] and to prohibit Palestinian local courts to put Israelis on trial.[288] Palestinians were not included in this law. The question remained as to whether Palestinians had the right to challenge the actions of the military commander in the Occupied Territory. The question was posed to the Israeli Supreme Court sitting as the High Court of Justice, but the Court was not ready to grant justiciability to Palestinian individuals and/or grant itself the power to rule in disputes which can be submitted by Palestinians in the West Bank and Gaza Strip against the military commander and government actions.[289] This question and the developments on this matter will be examined in the following chapter.

In 1979, after 12 years of secret negotiations between the Israeli and Egyptian governments, two agreements were signed. These negotiations were hosted by the American government at Camp David.[290] The first agreement settled a peaceful means between the two parties, and the second drew a framework for establishing a Palestinian autonomy in the West Bank and the Gaza Strip.[291]

On December 8, 1987, four Palestinians were killed by an Israeli army tank in Gaza. During the funeral, demonstrations erupted in the Gaza Strip and spread to the West Bank, including East Jerusalem.[292] This led to a Palestinian civilian uprising known as "The First Intifada."[293] The First Intifada was a result of the daily harassments by the Israeli military and settlers against the Palestinians, including detentions and arrests, restrictions on movements, and curfews, as well as massive land confiscation. This led to daily demonstrations and to confrontations between the Palestinian civilians and the Israeli

287 Raja Shehadeh, Occupier's Law Israel and the West Bank, Institute for Palestine Studies Washington D.C. 1985, 1988), at 91.

288 Benvenisti, The International Law of Occupation, 2nd ed., 228.

289 Shehadeh, Occupier's Law: Israel and the West Bank, 91.

290 See Israel Ministry of Foreign Affairs, Camp David Accords. Viewed on 17 June 2017, at 18:35. Available at: http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/camp%20david%20accords.aspx.

291 The Camp David Accords I and II, Washington D.C., April 1979, see Fayez A. Sayegh, "The Camp David Agreement and the Palestine Problem." Journal of Palestine Studies, Vol. 8, No. 2 (Winter, 1979): 3–40.

292 Smith, Palestine and the Arab-Israeli Conflict, 3rd ed., 291.

293 Sonja Karkar, "The First Intifada 20 Years Later," The Electronic Intifada, 10 December 2007.

military.[294] Israel used violence against demonstrators, imposed collective punishments on all Palestinians by cutting off water, electricity, and phone lines, and imposed further curfews on some refugee camps and villages.[295] After years of violence, in 1993, the Israeli government and the Palestinian Liberation Organization (PLO) signed the Declaration of Principles on Interim Self-Government Arrangements.[296] Consequently, the Palestinian Authority was established.[297] In 1995, both parties signed the Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip.[298] At the time the Palestinian Liberation Organization entered Jericho, Gaza Strip, Ottoman, British, Jordanian, and Egyptian laws as well as the Israeli military orders that were in force. The fragmentation of valid laws already dominated the area. Palestine had been divided and the judiciary had an ethnically-based jurisdiction. Human rights and the rule of law were deteriorating, and the Palestinian Authority inherited a chaotic judiciary and legal system.

7. The Palestinian Authority: 1994–Present

In 1995, the Palestinian Authority took control over parts of the West Bank and the Gaza Strip. The history of the Palestinian Authority dates back to the beginning of the Israeli control over Palestine. In 1964, the Arab League sponsored the creation of a Palestinian movement aimed to liberate the Occupied Palestinian Land, and named it the Palestinian Liberation Organization (PLO).[299] The PLO is considered a national liberation movement representing the people of Palestine.[300] In 1967, the leaders of the PLO were located in Lebanon, because it was where many Palestinians fled during the wars of 1948 and 1967.[301] With a series of clashes between members of the PLO and some Lebanese groups, in addition to the Israeli attack on Lebanon, the PLO

294 Smith, Palestine and the Arab-Israeli Conflict, 3rd ed., 294–295.
295 Gerner, One Land, Two People: The Conflict over Palestine, 97–98.
296 The Declaration of Principles on Interim Self-Government Arrangements of 1993 (Oslo I).
297 Id.
298 Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995.
299 Smith, Palestine and the Arab-Israeli Conflict, 3rd ed., 187.
300 W. Thomas Mallison and Sally V. Mallison, The Palestine Problem in International Law and World Order. (England: Longman Group Limited, 1986), 306.
301 Id. 277.

moved to Tunisia.[302] The PLO, with the initiatives of the Arab countries, was involved in the United Nations at the international level. In its Resolution 3237 (XXIX) of November 22, 1974, the General Assembly invited the Palestinian Liberation Organization to participate with an observer's status, as the representative of the Palestinian people in the General Assembly's meetings, as well as in other organs of the United Nations, as a step toward recognizing the Palestinian people's right to self-determination.[303] Later, in its Resolution 43/177 of December 15, 1988, the General Assembly acknowledged the proclamation of the State of Palestine.[304] The Assembly, in fact, reaffirmed the need to "acknowledge the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988, [and] affirm the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967."[305] In addition, the General Assembly decided that the designation "Palestine" should be used (in place of the designation "Palestine Liberation Organization") in the United Nations system, without prejudice to the observer status and functions of the PLO within the system.[306]

Most importantly, the PLO entered into negotiations with the Israeli government. These negotiations led both the Israeli government and the PLO to sign the Declaration of Principles on Interim Self-Government Arrangements (Oslo Accord I), an agreement signed on September 13, 1993.[307] The Palestinian Liberation Organization recognized Israel as a state and the Israeli government recognized the PLO, and later the Palestinian Authority as the sole representative of the Palestinian people.[308] The two parties agreed to "put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security to achieve a just, lasting and comprehensive peace settlement."[309] A year later, on May 4, 1994, the Gaza-Jericho Agreement was

302 Smith, Palestine and the Arab-Israeli Conflict, 3rd ed., 191–211.

303 United Nations General Assembly A/RES/3237 (xxix), 22 November 11974, Observer status for the Palestinian Liberation Organization.

304 United Nations General Assembly, Resolution 43/177 on the Question of Palestine, A/RES/43/177 on 15 December 1988, 82nd plenary meeting.

305 Id.

306 Id.

307 Oslo Accords Declaration of Principles on Interim Self-Government Arrangements of 1993.

308 Id.

309 Id., The Preamble.

signed by both parties in Cairo in order to put into force the Declaration of Principles on Interim Self-Government Arrangements.[310] In addition, this agreement arranged for a scheduled withdrawal of the Israeli Military Forces from parts of the cities of Gaza Strip and Jericho.[311] Upon the Israeli military withdrawal, the PLO was given partial control over parts of the Gaza Strip and the city of Jericho.[312] The Palestinian Authority was established according to the Gaza-Jericho Agreement of 1994, which was signed between the Palestinian Liberation Organization and the government of Israel.[313] The Palestinian Authority was seen as an entity to administer the West Bank and the Gaza Strip through a transitional period until a permanent agreement was reached.[314] The Oslo I Accord provided for immediate Palestinian administration over basic education, health care, social fare, tourism, and direct taxation in the West Bank and the Gaza Strip, and transferred the burden of the Israeli occupying power to the Palestinians themselves.

On September 28, 1995, the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo Accord II) was signed to transfer power over cities in the West Bank to the Palestinian Authority.[315] The Palestinian-Israeli agreement set forth detailed arrangements regarding issues in the West Bank and the Gaza Strip. Both parties, the Palestinians and the Israelis, agreed on the structure of the Palestinian Council including its elections and responsibilities, the Palestinian Authority's jurisdiction, redeployment and security arrangements, Palestinian police, human rights and the rule of law, the laws and the military orders, and economic relations. In regard to the application of human rights, Article XIX, states, "Israel and the Council shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law."[316] This means that both parties agreed to pursue their duties in accordance with international human rights standards. According to the Oslo Accord II, administrative governmental responsibilities were transmitted to

310 The Agreement on the Gaza Strip and the Jericho Area, signed on 4 May 1994 between the Israeli government and the Palestinian Liberation Organization, Cairo.

311 Id.

312 Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995.

313 The Agreement on the Gaza Strip and the Jericho Area of 1994.

314 Nathan Brown, Palestinian Politics after the Oslo Accords: Resuming Arab Palestine. (Berkeley: University of California Press, 2003), 7.

315 Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995.

316 Id., Article XIX.

the Palestinian Authority excluding responsibilities related to Jerusalem, the Jewish settlements in the West Bank and the Gaza Strip, the Israeli military locations, the Palestinian refugees, borders, land and water issues, foreign relations, and the Israeli security.[317] Palestinian police forces were established to ensure security in the areas under the Palestinian Authority's control.[318] The Oslo Accords represented a discussion over the 20% of Palestine that Israel controlled in 1967, where the 80% in 1948 was never brought into the negotiations.[319] After Oslo Accords I and II, the PLO entered in the West Bank and Gaza as the Palestinian Authority (PA) and the representative of the Palestinian people in order to take over some power and responsibilities to govern the Palestinian people through democracy.[320] A few years later, in 1998, the General Assembly adopted Resolution 52/250, and granted Palestine additional rights and privileges to participate in the work of the United Nations.[321]

The Oslo Accord II defined three types of land (areas) within the West Bank and Gaza Strip: Areas A, B, and C. Area A included the Palestinian cities and towns except the city of Hebron; Area B included the Palestinian villages, refugee camps, and hamlets; and Area C included certain Palestinian villages, the Israeli Jewish Settlements, and the Israeli military locations.[322] The agreement granted the Palestinian Authority control over both security-related and civilian issues in the Palestinian urban areas (referred to as Area A), and only civilian control over the Palestinian rural areas (referred to as area B). Other territories including some Palestinian villages, the Israeli settlements, the Jordan Valley region, and bypass roads constructed by Israel to link settlements remained under Israeli control (referred to as Area C), and Israel maintained its sole jurisdiction and control over security, planning, and construction.[323] Areas A and B were drawn to include small central

317 Id.

318 Id.

319 John Quigley, "The Oslo Accords: More than Israel Deserves." American University International Law Review, Vol. 12, No. 2 (1997): 285–298, 287.

320 The Declaration of Principles on Interim Self-Government Arrangements (Oslo I) of Washington, 13 September 1993 and the Interim Arrangement on the West Bank and the Gaza Strip (Oslo II) of 28 September 1995.

321 The General Assembly, Resolution 52/250, participation of Palestine in the work of the United Nations [without reference to a Main Committee (A/52/L.53/Rev.2 and Add.1)] on 13 July 1998, Fifty-second session, Agenda item 36.

322 Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995, Annexes III.

323 Id.

areas of the Palestinian cities that included the majority of the Palestinians, while Area C consisted of almost all Palestinian lands that in the West Bank without significant Palestinian population.[324] The Palestinian areas A and B were "artificially divided into 165 non-contiguous 'territorial islands'... [Area C] including all settlements and the areas slated for their expansion."[325] In addition, Israel preserved control over external security issues, borders, air space, and sea-lanes to all areas.[326] The city of Hebron in the West Bank was entitled to a special protocol in 1997 (the Hebron Protocol), and was divided into H-1 and H-2 areas.[327] Area H-1 fell under the Palestinian police responsibilities, area H-2 remained under the Israeli internal security, and both areas continued to be under Israeli responsibility for the overall security of the Israelis in the city.[328]

The Palestinian Council was established and based in Ramallah to take over responsibilities from the Israeli government and assign them to its administration.[329] The Council carries out responsibilities of both legislative and executive powers, and takes necessary measures to enforce the law.[330] However, it does not have any powers in the sphere of foreign affairs, which includes the establishment of embassies abroad or any other missions or exercises involving diplomatic functions.[331] Negotiations with international organizations may be conducted only in cases of specified economic, regional development, cultural, scientific, and educational agreements.[332] Oslo Accord II obligates Israel and the Palestinian Council to take over responsibilities in respect to international law norms and principles of human rights and the rule

324 Anthony Coon, Israel and the Occupied Territories: Demolition and Dispossession – the Destruction of Palestinian homes, Amnesty International, December 1999, 8.

325 B'tselem, Expel and Exploit: the Israeli Practice of Taking Over Rural Palestinian Land (December 2016), 12.

326 Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995, Annexes III.

327 Israel-Palestinian Peace Process: Protocol Concerning the Redeployment in Hebron, January 17, 1997. Art. 2.

328 Id.

329 According to Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995, the Palestinian Council, the offices of the President of the Palestinian Authority, its Executive Authority and other committees shall be located in areas under the Palestinian territorial jurisdiction in the West Bank and Gaza Strip; see Article I (.7).

330 Id., Article III.

331 Id., Article IX.

332 Id.

of law.[333] The PLO was not eligible to ratify international treaties; however, it was obliged to respect the principles of the United Nations Charter. This obligation was a derivative of the observatory status of the PLO at the United Nations General Assembly. Israel is obligated, as a member state of different international treaties, to respect the principles of international law norms including human rights and international humanitarian principles.

The Council was granted primary and secondary legislative powers, which included basic laws, laws, regulations, and other legislative acts. However, all legislations are supervised by Israel through a legal committee.[334] This means that the council cannot pass laws or regulations without the approval of the Israeli legal committee. As a result, the only legislative body in Palestine has not been granted any independence in its legislative functions, and since 1994, the Legislative Council has restricted its power of legislation under the structure of the Palestinian Authority. On May 20, 1994, the former chairman of the Palestinian Authority, Yasser Arafat, issued a decree concerning the legal situation in the West Bank and the Gaza Strip, stating that valid legislations and laws should persist in force in these areas.[335] This meant that the Ottoman, British, Egyptian (Gaza Strip), Jordanian (West Bank), and Israeli laws and military orders remained valid in the Occupied Territory. At that time, the Palestinian Authority's capability of enacting new laws and regulations was limited and controlled, because the Israeli legal committee had the power to revise any primary and secondary legislation, basic laws, laws, regulations, and any other legislative acts. Notably, the Israeli legal committee had the power to oppose any legislation that Israel considered contradictory to the Oslo Agreements.[336]

In 1995, the Palestinian Authority enacted the Palestinian Electoral Law No. 13 in order to conduct the first Palestinian elections. On January 20, 1996, the first Palestinian general elections were held in the West Bank and Gaza Strip.[337] Although candidacy was opened to all Palestinians, the Popular Front

333 Id., Article XIX.

334 Id.

335 The archive of the Palestinian Legislative Council, document issued on 20 May 1994. (Text in Arabic).

336 Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995, Article XVIII.

337 As'ad Ghanem, "Founding Elections in a Transitional Period: The First Palestinian General Elections." Middle East Journal, Vol. 50, No. 4 (Autumn, 1996): 513–528, 513.

for the Liberation of Palestine (PFLP), the Democratic Front for the Liberation of Palestine, and Hamas, as political parties, boycotted the elections.[338] Yasser Arafat, the representative of the Fatah political party, was elected as the president of the Palestinian Authority.[339] In 2002, the Palestinian Basic Law was passed by the Legislative Council, approved by the (former) President of the Palestinian Authority, and published in the Palestinian Official Gazette *Alwqaeh*.[340] The Palestinian Basic Law, for the first time, represented a potential central document for human rights. In this basic law, the Palestinian legislation focused on general issues concerning administration, commercial, financial, health, educational, and political issues. A few fundamental human rights were protected in the basic laws, and these rights will be briefly highlighted in the following chapter.

Soon thereafter, the Legislative Council passed a number of laws concerning judicial procedures, such as the Civil and Commercial Procedures Law,[341] the Criminal Procedures Law,[342] the Judicial Authority Act[343] and the Law of Evidence.[344] The Palestinian Authority did not entirely reformulate the courts in the West Bank and Gaza Strip; the Magistrate Court, the Court of First Instance, and the Court of Appeals remained without changes.[345] The Cassation Court was reestablished and the High Court of Justice was retained, both under the category of the High Court.[346] The High Court of Justice, most importantly, was granted jurisdiction over governmental and administrative matters, and was temporarily given the power to sit as a Constitutional Court.

338 Id., 526.

339 Id., 520.

340 According the documents and correspondence between the President of the Palestinian Authority and the Legislative Council, President Yasser Arafat approved the draft without considering the notes and changes by the Legislative Council. This appears on the documents that were collected from the files of the Basic Law at the Legislative Council.

341 The Law of Civil and Commercial Procedures No. 2, 2001, (12 May 2001), the Palestinian Official Gazette No. 88 of September 2001.

342 The Penal Procedures Law No. (3), 2001, (12 May 2001), the Palestinian Official Gazette No. 88 of September 2001.

343 The Law of the Judicial Authority No (1) of 2002, the Palestinian Official Gazette No. 40 (14 May 2002).

344 The Law of Evidence in Civil and Commercial Matters No. (4) of 2001, (12 May 2001), and the Palestinian Official Gazette No. 88 of September 2001.

345 The Law of the Judicial Authority No. (1) of 2002.

346 Id.

The Palestinian Supreme Constitutional Court was to be established according to the law of the Supreme Constitutional Court No. 3 of 2006.[347] In 2016, the Palestinian Constitutional Court was established, and this will be elaborated on in the following chapters.

In 2000, the Palestinian Authority and the Israeli government convened a summit meeting in Camp David with the United States, in order to negotiate a final peace agreement that would bring reconciliation between the parties.[348] However, the parties failed to sign an agreement.[349] During the transitional period, on September 29, 2000, the Palestinian Territory witnessed the outbreak of the Al-Aqsa Intifada known as "*The Second Intifada.*"[350] This was sparked by the visit of Ariel Sharon, the Israeli Prime Minister at that time. The Second Intifada took place in the Al-Aqsa Compound, located in East Jerusalem, the holiest Islamic site in Palestine and the third holiest site in the world, and the Israelis were accompanied by more than 1,000 police officers.[351] Some considered the visit as a provocation that sparked riots,[352] while others considered it as a commitment to access to the site, as it was considered holy in Judaism.[353]

The Intifada was seen among Palestinians as a form of resistance against the Israeli occupation, especially after the failure of the Oslo Accords and the Camp David summit in protecting the Palestinians against the practices of

347 The Law of the Supreme Constitutional Court No. 3 of 2006, (17 February 2006), the Palestinian Official Gazette No. 62 of March 2006.

348 Jacob Shamir and Khalil Shikaki, Determinants of Reconciliation and Compromise Among Israelis and Palestinians. Journal of Peace Research, Vol. 39, No. 2 (2002): 185–202, 185.

349 Id., 185–186.

350 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Civilians under Siege: Restrictions on Freedom of Movement as Collective Punishment. (January 2011), 1.

351 Jeremy Pressman, "The Second Intifada: Background and Causes of the Israeli-Palestinian Conflict." The Journal of Conflict Studies, Vol. 23, No. 2 (2003).

352 Amos Harel, Nitzan Horowitz, Baruch Kra and Amira Hass, "No End in Sight, as Violence Spreads Also to Israel," *Ha'aretz*, 2 October 2000; and Daniel Sobelman, "Arafat Not Ruling Out War on Israel'," *Ha'aretz*, 2 October 2000; BBC, 2000: Provocative Mosque Visit Sparks Riots, available on BBC, accessed on July 4, 2017.

353 Sharon insisted that the visit was not provocative. See BBC, 2000: Provocative Mosque Visit Sparks Riots, available on BBC, accessed on July 4, 2017. the Jewish Virtual Library, Al-Aqsa Intifada: Background and Overview. Available on the library website, accessed on July 4, 2017.

the Israeli occupation forces.[354] During Al-Aqsa Intifada, the Palestinians used "a variety of unarmed direct action tactics, combined with pursuing a legal case in Israeli courts."[355] The non-violent resistance included peaceful protests, raising awareness of human rights, public statements, and judicial petitions.[356] For example, the village of Budrous challenged a number of military orders before the Israeli Supreme Court.[357] Nonetheless, Israel used unprecedented violence against all Palestinians in the Occupied Territory. Israel "has secured increasingly tight control of the West Bank and Gaza, for instance through settlement expansion, an elaborate system of checkpoints and other mechanisms of closure, the construction of the apartheid wall in the West Bank, and through the expansion of military no-go zones and Access Restricted Areas."[358] At the same time, as a form of resistance to the Israeli occupation, some Palestinian militants conducted several attacks on Israeli targets.[359] As a response, Israel conducted a large-scale military operation, known as Operation Defensive Shield, in which the cities, towns, refugee camps, and villages of the West Bank were occupied again by the Israeli military.[360]

After almost nine years in power, the elected president of the Palestinian Authority, Yasser Arafat, died on November 11, 2004.[361] In 2005, the Law No. 9 concerning the Palestinian election was enacted.[362] New Palestinian presidential and parliamentary elections were held in 2005 and 2006, respectively.[363]

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354 Laura Junka-Aikio, Late Modern Palestine: The Subject and Representation of the Second Intifada. (London and New York, Routledge, 2016), Introduction.

355 Julie M. Norman, The Second Palestinian Intifada: Civil Resistance. (London and New York, Routledge, 2010), Introduction.

356 Id.

357 Id.

358 Junka-Aikio, Late Modern Palestine: The Subject and Representation of the Second Intifada, Introduction.

359 Robert Brym and Bader Araj, Suicide Bombing as Strategy and Interaction: The Case of the Second Intifada. Social Forces, Vol. 84, No. 4 (June 2006): 1969-1086, 1970.

360 United Nations Press Release, Report of Secretary-General on Recent Events in Jenin, other Palestinian Cities. (SG2077, 1 August 2002).

361 CNN International, News release, Palestinian Leader Arafat Dies at 75. Paris, France, posted on 11 November 2004 at 09:01 GMT.

362 The Law No. 9 of 2005 Concerning the Election, issued on 13 August 2005, the Official Palestinian Gazette No. 57 of August 2005.

363 The Central Elections Commission-Palestine, documents concerning past elections 2005 Presidential Elections, 2006 legislative Elections.

After the Palestinian presidential elections, on August 15, 2005, the Israeli forces withdrew from the Gaza Strip, and forcibly evacuated some Jewish communities in the Strip,[364] as an implementation of the Israel's Disengagement from Gaza and North Samaria of 2005.[365] Palestinian parliamentary elections were held on January 25, 2006, and Hamas won a substantial majority in the Palestinian Legislative Council (Parliament), amassing 74 of 132 seats.[366] Shortly after these elections, Israeli authorities opposed the results and "arrested several Palestinian members of Parliament and ministers from different parties."[367] Furthermore, they imposed an absolute closure on the Gaza Strip, and retained control of all areas from the land and the sea.[368]

The success of Hamas was also defied by the leaders of the Palestinian Authority, who immediately, introduced several constitutional amendments to strengthen the Fatah-affiliated President, and paralyzed the Palestinian Parliament (Legislative Council).[369] As a result, leaders of Hamas moved to the Gaza Strip and Fatah members remained in the West Bank, where the two political parties became separated and conceivably competitors. Remarkably, the Palestinian Legislative Council has not convened a session since 2006.[370] This means that no laws have been enacted through the Council. People were separated on the grounds of their political affiliations, and Palestinians were not represented according to election results. Since then, the laws and regulations in Palestine have been enacted by decrees of the President of the

364 Jefferson Morley, the Washington Post Newspaper, News release on Wednesday 10 August 2005; 10:36 am.

365 The Israeli Forces Commander in Judea and Samaria, Prohibition of Entry and Presence of Israeli Citizens in Areas Due to be Evacuated in Accordance with the Implementation of the Disengagement plan 2005 Law.

366 The Central Elections Commission-Palestine, documents concerning past elections 2006 legislative Elections.

367 Stéphanie Latte Abdallah, "Denial of Borders: The Prison Web and the Management of Palestinian Political Prisoners After the Oslo Accords 1993–2013," in Israelis and Palestinians in the Shadows of the Wall: Spaces of Separation and Occupation, eds. Cédric Parizot and Stéphanie Latte Abdallah (England and USA: Ashgate Publishing Limited, 2010), 45.

368 Carol Migdalovitz, Israel's Blockade of Gaza, and the Mavi Marmara Incident, and its Aftermath. (USA: Congressional Research Service, 2010), 1.

369 Abdallah, Denial of Borders: The Prison Web and the Management of Palestinian Political Prisoners After the Oslo Accords 1993–2013, 70.

370 The Palestinian Legislative Council, the Council meetings since the elections of 2006. All meetings are available in Arabic on the database of the Council.

Palestinian Authority, without the Legislative Council's approval. Hamas established a separate government in the Gaza Strip and Fatah maintained the one in the West Bank.[371] On May 20, 2012, both Hamas and Fatah signed the Palestinian National Reconciliation document to end the division and formulated a government for both the West Bank and the Gaza Strip.[372]

The Palestinian Authority has made several attempts to join the United Nations Organization as a full member state. On September 28, 2011, the Security Council turned down the Palestinian application for the United Nations membership, The application was submitted to the Committee on Admission of New Members by the President of the Palestinian Authority.[373] The United States, in the session of the Security Council, used its veto power against the application.[374] On November 29, 2012, upon the Palestinian Authority's request, with the support of some countries, the General Assembly voted overwhelmingly, 138 states out of 193 states voted in favor of according Palestine Non-Member-Observer-State status in the United Nations.[375] Nevertheless, this has not changed the situation of the Palestinian Territory as it is still de facto under Israeli control. The Israeli Occupying Forces are continuing to "exert authority over Palestinians [in the West Bank and Gaza Strip] including those residing in Area (A)."[376] The fact remains that nothing has changed on the ground. The only difference is in the status of the State of Palestine in the international community and its ability to ratify different international instruments.

The discussion as to whether Palestine qualifies as a state is a separate topic. It is worth noting that the question of statehood is separate from the question of a full membership at the United Nations. The statehood conditions are set forth by public international law, while the United Nations membership is regulated by the United Nations Charter. According to the Montevideo Convention on the Rights and Duties of States, a state, according to international law, should

371 This will be discussed later in this work.

372 The Official agreements between Hamas and Fatah signed on 20 May 2012 in Cairo.

373 The United Nations, Meeting Coverage and Press Releases on 28 September 2011, Security Council 6624th Meeting.

374 Id.

375 The United Nations, Meeting Coverage and Press Releases on 29 November 2012, the 67th General Assembly, General Assembly Plenary 44th and 45th meetings.

376 Benvenisti, The International Law of Occupation, 2nd ed., 239.

have four qualifications.[377] These qualifications are: a permanent population; a defined territory; government; and the capacity to enter into relations with other states.[378] Palestinians live in a territory with a functioning government, which has established relations with other states. The international recognition of the United Nations and other states might not be a priority at this stage for Palestine, but it is important to implement international enforcement mechanisms, which will be discussed in Chapter VII, and ultimately to hold human rights violators accountable at an international level.

Finally, the current situation of the Palestinian legal and judicial systems reflects decades of negligence and a confusing mass of laws due to the different powers that have ruled Palestine.[379] Simply stated, the Palestinian legal and judicial systems were built on outdated laws. Their development was handicapped, and the political division created a system of geographical fracturing. In essence, "the Palestinian Authority inherited a system which was decades old, and burdened with an incompatible mix of different legal systems… compounding the problem were the decades of neglect of the aging physical infrastructure, lacking the most basic equipment… further complicating matters were the lack of a standardized curriculum for legal and judicial training, and long-time territorial separation of those legal professionals in the West Bank from those in the Gaza Strip."[380] In essence, the Palestinian Authority has kept the laws of the prior powers in Palestine. Nevertheless, the Palestinian Basic Law explicitly annuls the British Emergency Regulations of 1945. This, in fact, does not have any effect on the implementation of the emergency regulations by the Israeli authorities.[381] The only implication is that the Palestinian Authority, according to the Basic Law, has its own emergency provisions, which are implemented by and according to its law. The protection and respect of human rights and the function of the judiciary are examined later in this research.

377 Montevideo Convention on the Rights and Duties of States, signed at Montevideo on 26 December 1933 and entered into force on 26 December 1934, Article 1.

378 Id.

379 United Nations Office of the Special Coordinator in the Occupied Territories, Rule of Law Development in the West Bank and Gaza Strip: Survey and State of the Development Effort, UNSCO Rule of Law Survey 31 May 1999.

380 Id.

381 This will be examined in detail later.

8. Conclusion

The legal and judicial systems in Palestine have witnessed changes over hundreds of years. Powers have ruled and enforced their own legal and judicial systems in a small region. Each power imposed its laws and formulated a judicial system according to its interests, starting with the Ottoman Empire and continuing through the current Israeli Occupation and Palestinian Authority rule. This accumulation of laws has left a state of misunderstanding and ambiguity. The interventions of foreign powers, their judiciaries, and their laws have created a situation of legal chaos. In some cases, judges, prosecution, and lawyers, as well as lawyers among themselves, cannot agree on an applicable law. This confusion has definitely disturbed the function of the legal system in protecting Palestinians and their human rights. It is early to draw conclusions on the effectiveness or the weaknesses of the Palestinian and the Israeli judiciaries, but it is important to note that it is very difficult to categorize the valid and invalid laws in the Palestinian Territory.

The present legal fragmentation is a major problem for the enforcement of human rights. This, in fact, explains the current legal situation in the Palestinian Territory and its effect on human rights protection. The legal process has become progressively destabilized under the rule of violence; the Israeli military has handed over responsibilities to the Palestinian Authority, but it has not granted it any powers.[382] At the same time, the Palestinian Authority has made the situation even more confusing by avoiding a clear legal indication of the valid laws;[383] instead, it has enacted new sets of laws on different matters without invalidating the existing ones. Consequently, on one hand, these events have gravely affected the judiciary and its performance in Palestine. On the other hand, they have impacted the implication, respect, and enforcement of human rights of the Palestinian people. The Palestinian Authority must clearly state the applicable and valid laws that have been implemented in Occupied Palestine.

The system of multi-layered, complex, and contradictory laws is an obstruction to the development of the legal system. In fact, it remains very difficult to uphold the rule of law and the protection of human rights in Palestine under such a situation. The surrounding circumstances and conditions also limit the

382 This will be elaborated on in Chapter III- Oslo Accords.

383 Brown, Palestinian Politics after the Oslo Accords: Resuming Arab Palestine, 19.

potential, progress, and possible capacity building to reach a state of justice and law reinforcement. Internationally, there has been a debate on whether to apply international law to protect the rights of the Palestinians under the current situation of Israeli Occupation and the Palestinian Authority. The accumulation of laws and the confusion of the de facto situation have opened wide doors for Israel to deny and question the applicability of international human rights and humanitarian laws in Occupied Palestine. In fact, Israel, as the occupier of the Palestinian Territory, has been trying to deviate from its obligations under the named laws. This is the topic of the following chapter, where international human rights instruments and international humanitarian law, as well as applicable domestic laws, will be examined.

III. The Applicable Law in Occupied Palestine

1. Introduction

The dispute over the applicability of different laws in the Palestinian Occupied Territory is an extremely intractable subject. The complexity of the legal status of Palestine has made the situation *de integro* distinctive and unique. The different powers, which ruled Palestine, imposed their laws and regulations.[384] As detailed previously, the Ottoman laws are still valid in Palestine along with the British, Jordanian in the West Bank, Egyptian in the Gaza Strip, Israeli, and Palestinian laws; this has created a problematic multiplicity and confusion in the legal system.[385] Primarily, the situation might seem complex and incomprehensible because of virtual verity and explicit misperceptions in the law. In fact, this has affected the enforcement of domestic and international human rights as well as humanitarian laws in the domestic and international spheres, especially since the applicability of international law norms to the Occupied Palestinian Territory has been disputed for many years. The two most important factors of the Palestinian situation are the existence of a long-term occupation as well as the existence of a conflict between the applicable domestic laws, including Israeli laws, with international laws. Before examining the applicable laws, one must continually question the legality of the prolonged Israeli occupation in the Palestinian Territory as the root that causes the problem instead of questioning only the symptoms.[386] Nonetheless,

384 See Chapter II on the historical background, and the legal system in Palestine starting from the rule of the Ottoman Empire to the present Israel Occupation and the Palestinian Authority.

385 See the laws which are still in force in Palestine on Al-Muqtafi, the Palestinian Legal and Judicial System database, Birzeit University, the Institute of Law.

386 In a statement to the Security Council, on March 12, 2002, the Secretary-General of the United Nations called on Israel to "end the illegal occupation," which explicitly calls

this is beyond the scope of this work and this subject shall be examined in a separate study. Here, the study is rather focusing on the current situation and its impact on the human rights of Palestinians in the Occupied Territory. Although this research does not examine the legality of the Israeli occupation, it does not, under any circumstances, knuckle under to the Israeli prolonged occupation. Certainly, a study of the compliance of the Israeli government with its obligations under international law norms as an occupying power does not grant legitimacy to this occupation itself.

When discussing the legal resources in Palestine, it is necessary to highlight the applicable domestic laws in addition to international human rights and humanitarian laws. Accordingly, the aim of this chapter is not to list laws and treaties, nor to show their variety. The main goal of this chapter is to examine the laws and treaties that are applicable – those that have been implemented in the Occupied Palestinian Territory and affect fundamental and basic rights. These laws include the customary and conventional international human rights and humanitarian laws, all of which concern the protection of fundamental rights of the Palestinians. This chapter will address the impact of the Israeli long-term occupation in the Palestinian Territory as well as the Israeli laws and military orders along with the jurisdiction of the Supreme Court of Israel. Lastly, Palestinian law will also be discussed together with the role of the Palestinian High Court of Justice in protecting human rights under the rule of the Palestinian Authority.

on Israel to end the illegal occupation in the Palestinian Territory, United Nations, Meetings Coverage and Press Releases. Secretary-General Tells Security Council Middle East Crisis Worst in Ten Years. Secretary-General: Press Release, UN, Doc No. SG/SM/8159-SC/7325 (12 March 2002). See Richard A. Falk and Burns H. Weston, "The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada," Harvard International Law Journal Vol. 32, No. 1, (Winter 1991): 129–157; Orna Ben-Naftlai, Aeyal M. Gross, and Keren Michaeli, Illegal Occupation: Framing the Occupied Palestinian Territory. Berkeley Journal of International Law, Vol. 23, Issue 3, (2005), 551–614; and John Quigley, "Israel's Forty-Five Year Emergency: Are there Time Limits to Derogation from Human Rights Obligations?" Michigan Journal of International Law, Vol. 15 (Winter 1994):491–518.

2. International Law

Are the principles of international human rights law and international humanitarian law jointly *de jure* and *de facto* applicable in the Palestinian Territory? Before questioning the applicability of international law, it is essential to understand the relationship between human rights and humanitarian law. International human rights law protects inherited rights of persons against abusive powers, and international humanitarian law regulates the conduct of parties in cases of hostilities.[387] Humanitarian laws and principles apply in cases of occupation, armed conflicts, and war, while human rights laws apply at all times and address a wide range of actions.[388] When both laws are applicable, human rights law completes the protection that is identified in humanitarian law. In fact, both laws function in conformity with each other, and "more specific rules of international humanitarian law may be relevant for the purposes of the interpretation of Covenant rights; both spheres of law are complementary, not mutually exclusive."[389] The entangled relationship between the two laws is intended to maximize the protection in times of conflicts, where violations are most likely to occur. It is clear that "[t]he conventional division between the law of war and the law of peace is no longer tenable [and that] [t]he application of the law of war no longer automatically excludes the application of the law of peace."[390] Simply put, cases of war and occupation do not halt the applicability of human rights, the duties to respect the state's international obligations, and the implementation of these duties.

Another entangled relationship exists between customary and conventional (treaty) laws. Treaties and conventions are the main resource of international

387 Cordula Drogege, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict," Israel Law Review, Vol. 40, No. 2, (2007): 310- 355, 311.

388 Oona A. Hathaway, Rebecca Crootof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis, and Julia Spiegelt, "Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law," Minnesota Law Review, No. 96, (2012): 1883–1943, 1888 &1891.

389 UN Human Rights Committee, *General Comment No. 31*, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. CCPR/C/21/Rev.1/Add.13 (26 May 2004) 2187th meeting, at § 11.

390 Dietrich Schindler, "Human Rights and Humanitarian Law: Interrelationship of the Laws," The American University Law Review Vol. 31 (1981–1982): 935–977, 941–942.

law.[391] Treaties, conventions, or covenants, which are in effect today, are very diverse. International treaties refer to written agreements signed between and ratified by states.[392] State parties are obliged to respect the obligations set forth in the treaties, which they have signed and ratified.[393] That is to say, ratification of an international treaty is sufficient for a state to be obligated by its provisions. Customary law is a primary international legal binding resource, which all states are obligated to respect.[394] The states' acceptance of consistent practices of non-binding provisions creates the norms of customary international law.[395] Customary international law develops from the practices of the states,[396] and it is known as regulations, which are defined by the behavior of states.[397] The elements of customary international law are the repetition of a behavior, the sense of obligation (*opinio juris*), and the practice of states (*consuetudo*).[398] Therefore, in order to accept a custom as a law, the required substantive elements must include the state practice and the opinio juris, which is the belief that such practice is in accordance with the provisions of international law.[399] The principles of customary international law have been accepted as binding rules by the International Court of Justice (ICJ). The ICJ accepts customary international law as "evidence of a general practice accepted as law."[400] In Article 38(1), the Statute of the International Court of Justice states, "The Court, whose function is to decide in accordance

391 Vienna Convention on the law of Treaties (with annex), Concluded at Vienna on 23 May 1969, Preamble.

392 Vienna Convention defines a "treaty" as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties of 1969, Article 2.

393 See Enzo Cannizzaro, ed., The Law of Treaties Beyond the Vienna Convention (New York: Oxford University Press, 2011).

394 Jack L. Goldsmith and Eric A. Posner, "A Theory of Customary International Law," University of Chicago Law Review, Vol. No. 66 (1999): 1113–1177, 1116.

395 Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (New York: Clarendon Press and Oxford University Press, 1989), 3.

396 Marci Hoffman, and Mary Rumsey, International and Foreign Legal Research, 2nd ed. (The Netherlands: Martinus Nijhoff Publishers, 2012), 114.

397 Goldsmith and Posner, "A Theory of Customary International Law," 1116.

398 Hoffman and Rumsey, International and Foreign Legal Research, 114.

399 André da Rocha Ferreira, Chistieli Carvalho, Fernanda Graeff Machry and Pedro Barreto, "Formation and Evidence of Customary International Law," United Nations Journal- International Law Commission, Vol. No. 1 (2013):182–201, 187.

400 The Statute of the International Court of Justice (18 April 1948), Article 38(1)(b).

with international law such disputes as are submitted to it, shall apply… b. international custom."[401] In the 1969 North Sea Continental Shelf case, the ICJ recognized the importance of the rules of customary law, and acknowledged their compulsory nature on states.[402] This means that all states are obliged to respect these principles under all circumstances without exceptions.

In the Israeli-Palestinian context, the question is whether Israel and Palestine are obligated to respect the norms and principles of customary international law in the territories under their control. In situations of occupation, a special question rises as to whether human rights law is applicable to the Occupied Territory, similar to its application to the state's territory, along with international humanitarian law. Israel denies the applicability of international human rights instruments and international humanitarian conventions to Palestinians in the Occupied Territory.[403] As the Palestinian Authority has recently been considered a state and eligible to join international treaties, the question is whether both the Palestinian Authority and the Israeli government are obliged to respect the named laws in the Occupied Palestinian Territory. In the following section, the applicability of the conventional and customary international human rights and international humanitarian principles in Occupied Palestine are subsequently deliberated in parallel with the Israeli proclamations concerning its obligations under international human rights and humanitarian laws.

2.1. International Human Rights Law

International law covers essential and additional human rights to protect all persons. These rights are clearly granted to individuals and must be respected by states, drawing the line between customary and conventional obligations. This subsection distinguishes different points of discussion. It, first, examines the general protection under human right covenants and treaties and the exceptions, including emergency clauses and derogations. It follows a discussion as to whether Israel and the Palestinian Authority are obliged to apply

401 Id.

402 International Court of Justice, Advisory Opinion. North Sea Continental Shelf Cases (Federal Republic of Germany and Denmark; Federal Republic of Germany and Netherlands), 20 February 1969.

403 International Court of Justice, Advisory Opinions, the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, (the Netherlands, Advisory Opinion of 9 July 2004), 40.

international human rights treaties in the Occupied Territory. Secondly, it outlines the obligations of both the Israeli government and the Palestinian Authority under customary international human rights.

2.1.1. Human Rights Treaties

The importance of the protection of human rights derives from the necessity of maintaining international peace and security, achievement of equality among all people, and protection of the human rights of all people; thus, disrespect of human rights endangers international peace and security.[404] Human rights protection is meant to be implemented worldwide without discrimination, and mechanisms for implementing such protection are essential.[405] That is to say, the protection of the fundamental rights should not be monopolized by certain groups, individuals, or states; it is meant to serve all people. Human rights laws are applicable at all times, embodying general principles. "Human rights are essentially applicable in peace-time, and contain derogation clauses in case of conflict."[406]

Some human rights are protected without any limitations or exceptional circumstances whatsoever, "whether a state of war or a threat of war, internal political instability or any other public emergency,"[407] such as the right to freedom from torture and freedom from slavery.[408] Other rights are not absolute; some international human rights norms allow restrictions of some rights in certain circumstances. For example, the right to movement is protected,

404 B. G. Ramcharan, The Concept and Present Status of the International Protection of Human Rights: Forty Years after the Universal Declaration. (The Netherlands: Martinus Nijhoff Publishers, 1989), cited as Official Records of the General Assembly, 36th Session, Supplement No. 1 (A/36/1), Section VIII.

405 Id., 11.

406 Jean Pictet, Humanitarian Law and the Protection of War Victims. (Leyden-Geneva, A.W. Sijthoff-Henry Dunant Institute, 1975), 15.

407 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with Article 27(1), Article 2 (2).

408 See Slavery Convention Signed at Geneva on 25 September 1926, Entry into force: 9 March 1927, in accordance with Article 12, and Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608 (XXI) of 30 April 1956 and done at Geneva on 7 September 1956 Entry into force: 30 April 1957, in accordance with Article 13.

but limited in some instances.[409] Article 12(1) guarantees everyone the right to liberty of movement and freedom to choose residency.[410] However, Article 12(3) limits the applicability of these rights in case of the necessity to protect national security, public order, public health, or freedom of others.[411] These restrictions must be regulated, nevertheless, by domestic laws, and in coherence with the other domestic and international provisions.[412] The general limitation clauses set forth prerequisites to impose restrictions for 1) necessity, 2) specific purpose to achieve, namely national security, public order, public health, or freedom of others, and 3) restrictions must be regulated in domestic laws.[413] These prerequisites of imposing limitations on human rights are broad; nonetheless, the interpretation of the limitations must be very narrow and strict.[414] The limitations on human rights must also be read and implemented for the benefit of the individuals.[415]

In exceptional circumstances, human rights might be further limited. The International Covenant on Civil and Political Rights allows a state to partially halt human rights protection in times of emergency. Article 4 (1) reads:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[416]

409 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, Article 12, paragraph 1.

410 Id., Article 12 (1).

411 Id., Article 12 (3).

412 Id.

413 These prerequisites will be discussed later while discussing each case concerning land confiscation and restrictions on movement.

414 Kerstin Mechlem, "Treaty Bodies and the Interpretation of Human Rights," Vanderbilt Journal of Transnational Law, Vol. 92 (2009): 905–947, 912.

415 Id.

416 International Covenant on Civil and Political Rights of 1966, Article 4(1).

In cases of public emergency that threaten the existence and the life of the nation, the state parties to the convention can strictly derogate the protection of some human rights. This means that states can limit human rights provisions without violating the convention itself. Public emergency is a broad concept, and there is nothing in the convention that provides a definition of emergency. Emergency, however, can be defined as "a sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm."[417] In fact, emergency is an "elastic and ambiguous concept… does not permit any exact definition, but merely points to a state of affairs calling for drastic action."[418] Such drastic actions involve replacing the constitution and the laws with a situation where violations are justifiable. Emergency represents the abnormal, which might create a state of lawlessness.[419] It is also very challenging to define which circumstances fall under the category of emergency. In most constitutions and some international treaties, the term emergency and derogation provisions are the realm of exceptional powers to a state in exceptional circumstances.[420] According to the aforementioned Article 4, public emergency situations have conditions: first, the state parties are obligated to officially proclaim the state of emergency domestically and inform other states through the Secretary-General of the United Nations.[421] In addition, the state that is derogating from its obligations under Article 4, must immediately notify other state parties through the Secretary-General and provide details on the emergency situation and constitutional provisions, specifying the reasons that actuate the derogation measures, describing the anticipated effects of such measures on the recognized human rights, and terminating these measures in the shortest time required to end the emergency situation.[422] Second, emergency measures must not involve any discriminatory acts.[423] Remarkably, the Committee on the Enforcement of Human Rights Law convened the 61st Conference of the

417 Bryan A. Garner, ed., Black's Law Dictionary, 10th ed. (USA: Thomson Reuters, 2009–2014), 636.

418 Mark Neocleous, "The Problem with Normality: Taking Exception to Permanent Emergency," Alternatives: Global, Local, Political, Vol. 31, No. 2 (April-June):191–213.

419 Giorgio Agamben, State of Exception, tran. by Kevin Attll (Chicago: The University of Chicago Press, 2005), 51.

420 Nasser Hussain, The Jurisprudence of Emergency: Colonialism and the Rule of Law (USA: University of Michigan Press, 2003), 17.

421 International Covenant on Civil and Political Rights of 1966, Article 4(3).

422 Id., 42–48.

423 Id. Article 4(2).

International Law Association, and approved a set of standards that designated the Paris Minimum Standards of Human Rights Norms in a state of emergency.[424] These standards govern the declaration and administration of the state of emergency to ensure that "the state concerned will refrain from suspending those basic rights."[425] The standards also regulate the state practice, as the necessity of proclaiming the emergency must be actual or imminent, and represent a crisis that will not be restored otherwise.[426] The measures must be proportionate to the exigencies of the emergency situation, and must be consistent with the state's other international obligations.[427] In its General Comment No. 29, the United Nations Human Rights Committee reaffirmed such limitations on states in compliance with their obligations to narrow all derogations, and added that "the fact that some of the provisions of the Covenant have been listed in Article 4(2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists."[428]

There are specific rights that a state cannot violate during a state of emergency. The right to equality and non-discrimination (Art. 4), the right to life (Art. 6), the right not to be subjected to torture or to cruel, inhumane or degrading treatment or punishment (Art. 7), the right not to be held in slavery or servitude (Art. 8.1 and 2), the right not to be imprisoned because of inability to fulfill contractual obligation (Art. 11), the right not to be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence- the principle non-retroactivity of criminal laws (Art. 15), the right to recognition as a person before the law (Art. 16), and the right to freedom of thought, conscience and religion (Art. 18), are all non-derogable rights.[429] Other rights might be derogated, and might be restricted, but under certain circumstances and limited conditions. The state of emergency is accompanied with extensive state powers; these powers must only be applicable

424 Richard B. Lillich, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency," The American Journal of International Law, Vol. 79, No. 4 (Oct. 1985): 1072–1081, 1072.

425 Id., 1072.

426 Id., 1073.

427 Id., 1074.

428 United Nations Human Rights Committee (HRC), *CCPR General Comment No. 29 on Article 4 of Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11, (31 August 2001), § 6.

429 International Covenant on Civil and Political Rights of 1966, Article 4(1 and 2).

to the emergency situation,[430] the *ultra vires principle*.[431] As it requires a suspension of parts of the laws, it necessitates a decision that involves a state. The general principles of the emergency powers and the protection of individuals affirms that a state must revise its emergency regulations and measures in order to ensure reasonable protection against any abuse of powers.[432] Additionally, the judiciary of the state must have the powers to decide on the legality and constitutionality of the emergency regulations, and to rule on the legality of the practices of the state.[433] On this matter, the state of emergency is limited, and it must be revised in order to ensure a minimum protection to individuals and to eliminate the abuse of using emergency powers.

Limits of emergency clauses do exist. A state of emergency is normally temporary and has an end, because it is an exception. Ultimately the state has to restore its "normal structure again, otherwise, the exception becomes the rule."[434] International law has intended to minimize the application of emergency so that states do not normalize the practice of unjustifiable injudicious actions. States are allowed to impose derogation measures only if they face an actual danger that threatens the life of the nation.[435] The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights emphasize that "severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent."[436] This means that the powers of a state in emergency situations are limited. Emergency clauses are likely to be a resource that leads

430 Andrej Zwitter, "The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy," Franz Steiner Verlag, Vol. 98, No. 1 (2012): 95–111, 100.

431 Latin "*beyond the powers*, unauthorized, beyond the scope of powers allowed or granted by a corporate charter or by law." Garner, ed., Black's Law Dictionary, 1755.

432 Lillich, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency, 1075.

433 Id.

434 Zwitter, "The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy," 99.

435 United Nations Economic and Social Council, The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), 39.

436 Id., 51.

to unjustifiable actions of the states.[437] Emergency is "not just a regulative problem of a periodic crisis, but a jurisprudential problem."[438] It means that emergency clauses do not necessarily solve the crisis, but rather create other problems regarding the laws, the judiciary, the rule of law, and the protection of human rights.[439] Emergency regulations within the Palestinian-Israeli context involve different concerns; hence, they will be discussed later.

The Palestinian Authority has recently joined a few international treaties, where it committed itself to respect human rights. Israel, conversely, denies the applicability of international human rights instruments, which it ratified, to Palestinians in the Occupied Territory.[440] The general principles of human rights protection and their limitations normally apply to all state parties. Yet, the question as to whether they are applicable to the Occupied Palestinian remains unanswered; the following subsection provides a comprehensive response and discussion on this issue.

2.1.1.1. The Obligations of the Palestinian Authority under Ratified Human Rights Conventions

The State of Palestine,[441] on April 2, 2014, ratified the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination[442] without any reservations. Although the Palestinian government has restricted and limited control over its territory, because of Israel's effective control over the Palestinian state, it is responsible for violations committed against Palestinians by its entities, personnel, and

437 Natalie Kaufman Hevener and Steven A. Moshe, "General Principles of Law and the UN Covenant on Civil and Political Rights," International and Comparative Law Quarterly, Vol. 27 (July 1078): 596–613, 601.

438 Hussain, The Jurisprudence of Emergency: Colonialism and the Rule of Law, 19.

439 One could go all the way back to the theories of Carl Schmitt on the state of exception and sovereignty and follow the discussions of Giorgio Agamben. However, this does not help the subject of this work. The most important point here is that extreme views could lead to fatal consequences. For resources on these discussions see: Carl Schmitt, Political Theology; Four Chapters on the Concept of Sovereignty. Translated by George Schwab (Chicago: University of Chicago Press, 1985). See also Agamben, State of Exception.

440 International Court of Justice, Advisory opinion (2004), 40.

441 The status of Palestine in the United Nations as an observer non-member state is discussed in Chapter II on historical background.

442 See the United Nations' database of the States Parities.

forces. In other words, the Palestinian Authority is obligated to respect its duties under the international human rights norms and provisions within its territory and toward its citizens.

As mentioned previously, Oslo Accord II defined three areas within the West Bank and Gaza Strip. The agreement has given the Palestinian Authority control over both security-related and civilian issues in Palestine's urban Area A, and only civilian control over rural Area B. Although the Palestinian Authority has enjoyed a limited autonomy in these areas, the practices of the Israeli government remained unchanged.[443] It should be noted that Area C, which falls under the sole control of the Israeli government, surrounds areas A and B, and this limits the ranges of the Palestinian Authority for development of an effective government and allows Israel to impose its control on areas A and B.[444] The Palestinian Authority has entered into an agreement that left Palestine "without an implied recognition of Israeli sovereignty in those areas."[445] Nevertheless, the Palestinian Authority is performing an effective control in some areas with the powers of a state in relation to the Palestinian citizens.[446] It exercises legislative, executive, and judicial authority over Palestinians in parts of the Occupied Territory.[447] This relation between the Palestinian government and the Palestinian people, beginning after the Oslo Accords and continuing until April 2014, has been governed by the principles of customary human rights law, the principles of the Oslo Accords, and the Palestinian Basic Law.[448] After the Palestinian ratification of some international human rights treaties, the protection of these treaties was applied.

The Palestinian Authority is committed to respecting all civil, political, economic, social, and cultural rights. In addition, it is compelled to eliminate all forms of racial discrimination. No particular questions have arisen in light of the applicability of human rights conventions and the obligations of the Palestinian Authority toward all individuals in the Palestinian Territory

443 Said, The End of the Pease Process: Oslo and After, 3–5.

444 United Nations Country Team Occupied Palestinian Territories. Leave No One Behind: A Perspective on Vulnerability and Structural Disadvantage in Palestine, (2016), 12–13.

445 Eyal Benvenisti, "Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements." Israel Law Review, Vol. 28, Nos. 2–3 (1994): 297–317, 303.

446 The Independent Commission for Human Rights, Annual Reports 2010- 2016.

447 See Chapter II: 7. The Palestinian Authority: 1994- Present.

448 The obligations of the Palestinian Authority under customary human rights law, Oslo Accords, and the Palestinian Basic Law will be discussed later in this chapter.

under its control. Remarkably, the ongoing conflict and division between Fatah and Hamas has deepened the dilemma in respect to the implementation of human rights, because the political situation dominates the legal obligations and the rule of law. For the purpose of this study, Fatah and Hamas, as political parties, will be considered as governing actors, and both are obliged to respect human rights principles. This study does not draw any differentiation between the two political parties, especially given that the national reconciliation government is active in both the West Bank and Gaza Strip, although they are still *de facto* separated.[449]

The Palestinian Authority, to the extent of its *de jure* and *de facto* competency, is bound to respect its obligations under international human rights conventions. It is crucial to protect Palestinians in the Palestinian Territory under the applicable human rights conventions regardless of the overlapping conditions. The core point is the relation between the obligations of the Palestinian Authority and the Israeli government toward Palestinians within the areas that fall under the effective control of both actors. Thus, the stance of the Israeli government regarding the applicability of human rights treaties to Palestinians is examined below.

2.1.1.2. The Israeli Stance Regarding the Applicability of Human Rights Treaties in the Occupied Territory

Israel accepted the principles set in the Charter of the United Nations, and was admitted as a member state on May 11, 1949.[450] Israel ratified the International Covenant on Civil and Political Rights on October 3, 1991, with a reservation that reads: "With reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned, [and] [t]o the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law."[451] In this reservation, Israel has obtained its right to apply the religious law related to matters of family, marriage, and divorce. Israel also ratified the International Covenant on Economic, Social and Cultural Rights on

449 See Chapter II on the historical background.

450 See United Nations Member States information database.

451 United Nations, *Treaty Series*, Vol. 999, 171 and Vol. 1057, 407. International Covenant on Civil and Political Rights, States parties, Status as at: 16.09.2015, 06:48 EDT.

October 3, 1991.[452] These conventions protect the fundamental human rights of all people. Israel ratified the International Convention on the Elimination of All Forms of Racial Discrimination on January 3, 1979, with a reservation that reads, "The State of Israel does not consider itself bound by the provisions of Article 22 of the said Convention."[453] The reservation, essentially, immunizes Israel from being disputed before the International Court of Justice (ICJ).[454] Likewise, it ratified the convention against torture on October 3, 1991 with a reservation that reads, "Israel hereby declares that it does not recognize the competence of the Committee provided for in Article 20… [and] paragraph 2 of Article 30, the State of Israel hereby declares that it does not consider itself bound by paragraph 1 of that article."[455] These reservations prevent the committee from examining any indications that torture has been systematically practiced and immunes Israel from being disputed before the ICJ in this regard. As a member state, Israel is still obligated to respect human rights and fundamental freedoms for all people without discrimination.[456]

Israel has opposed and denied the applicability of international human rights in the Occupied Territory.[457] In 2001, in its Second Periodic Report submitted to the United Nations Committee on Economic, Social, and Cultural Rights (ESCR Committee), the Israeli government stated:

452 International Covenant on Economic, Social and Cultural Rights, States Parties, Reservations, and Ratifications.

453 UN database, states parties of the International Convention on the Elimination of all Forms of Racial Discrimination 1965.

454 International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19, Article 22 reads, "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

455 UN database, state parties of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

456 The Charter of the United Nations, San Francisco (1945), Article 1(3).

457 United Nations Economic and Social Council, Implementation of the International Covenant on Economic, Social and Cultural Rights--Second Periodic Report: State of Israel, UN doc. E/1990/6/Add. 32, (16 October 2001).

> Israel has consistently maintained that the Covenant does not apply to areas [the West Bank and the Gaza Strip] that are not subject to its sovereign territory and jurisdiction… this position is based on the well-established distinction between human rights and humanitarian law under international law…pursuant to the Israeli-Palestinian Interim Agreement of 1995, and the consequent documentation and undertakings of the Palestine Liberation Organization, the overwhelming majority of powers and responsibilities in all civil spheres (including economic, social and cultural), as well as a variety of security issues, have been transferred to the Palestinian Council, which in any event is directly responsible and accountable vis-à-vis the entire Palestinian population of the West Bank and the Gaza Strip with regard to such issues… [and that] the fact that the Palestinian Council does not represent a State, does not, in itself, preclude its responsibility in the sphere of human rights protection.[458]

It is interesting that in this statement, Israel relies on the existence of the Oslo Accords and the responsibility that was transferred to the Palestinian Council. This raises the question of whether Israel applied human rights provisions before the agreement of 1995. The answer is no; Israel, since 1967, has never tried to apply human rights law on the Palestinians in the Occupied Territory.[459] Interestingly, Israel, in its statement, denies a sovereign Palestinian state, but emphasizes the responsibility of the Palestinian Council to respect human rights. The Israeli argument does not fall under or deal with the main issue, which is the duty of the Israeli government to respect human rights provisions in the Palestinian Territory under its occupation and de facto control.

In 2003, in its Second Periodic Report to the Human Rights Committee, Israel used the same language and arguments as employed previously, and refused to apply the International Covenant on Civil and Political Rights in the West Bank and the Gaza Strip.[460] Again, in 2004, in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case, the Israeli government explicitly denied the de jure applicability of the International Covenant on Civil and Political Rights and the International Covenant on

458 Id., 5–8.

459 Orna Ben-Naftali and Yuval Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories," Israel Law Review, Vol. 37, No. 1, (2003–2004): 17–118.

460 Human Rights Committee, International Covenant on Civil and Political Rights--Second Periodic Report: State of Israel, UN doc. CCPR/C/ISR/2001/2. (4 December 2001), 8.

Economic, Social and Cultural Rights, both to which it is a member state in the Occupied Palestinian Territory.[461] Israel argued that Palestinians might only be protected by the humanitarian provisions, whereas, protection of human rights treaties does not apply extraterritoriality, which was a right granted only for citizens from their own government.[462] Israel claimed that it did not consider itself obligated to apply this protection to Palestinians in the Occupied Territory, and that under the Oslo Accords, Israel transferred most of the civil responsibilities to the Palestinian Authority in the West Bank and the Gaza Strip. In all of its reports to the Human Rights Committee, the Economic and Social Council, and the Committee on the Elimination of Racial Discrimination, Israel continued to refuse the applicability of the covenants to Palestinians in the Occupied Territory.[463] The Israeli Supreme Court, in its rulings, has never examined the state's obligations under human rights treaties, but only under the duties of humanitarian principles.[464] The Supreme Court might not have had the courage to rule against the stand of the government, or it might have made the decision to unarguably support the government's claims and to take a silent passive position in this regard. It might have intentionally avoided ruling on this subject.[465] In the case of Bethlehem Municipality, the Court did not answer whether and to what extent the principles of international human rights apply in the West Bank and the Gaza Strip. Rather, it stated that it is sufficient to emphasize that the military commander "must also take into account, among his considerations, the interests and rights of the local population, including the need to minimize the degree of harm."[466] The Israeli denial has been a major concern to the international human rights bodies where the Palestinian people, under Israeli control and

461 International Court of Justice, Advisory opinion (2004), 45.

462 Id.

463 Concluding observations of the Committee on Economic, Social, and Cultural Rights, Doc. E/C.12/ISR/CO/3 (16 December 2011) para 8. See also concluding observations of the Committee on Elimination of Racial Discrimination, Doc. CERD/C/ISR/CO/14-16, 10.

464 HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel and Commander of the IDF in the West Bank. The Israeli High Court of Justice (2 May 2004).

465 See CC 910/82 National Insurance Institution v. Abu-Ata (1988) 829 PSM 133, 143.

466 HCJ 1890/03Bethlehem Municipality and 22 others v. State of Israel, Ministry of Defence and IDF Commander in Judaea and Samaria. The Israeli High Court of Justice (3 February 2005), 15; also, HCJ 3239/02 Marab and 9 others v. IDF Commander in Judaea and Samaria. The Israeli High Court (18 April 2002, 28 July 2002); HCJ 13/86 Shahin v. The Commander of IDF Forces in the Judea and Samaria Area, (1987) Isr. SC 41(1) P.D. 197.

within the same jurisdictional areas, is excluded from the protection of the international human rights instruments.[467]

In response to the Israeli claims, the international community took a clear stance on the subject matter. The International Court of Justice (ICJ) ruled in several cases that the principles of human rights law are applicable in times of peace and times of armed conflict and ultimately rejected the argument that human rights are not to be applied during times of armed conflict.[468] In the case of the *Legality of the Threat or Use of Nuclear Weapons* in 1998, the Court answered the question of whether the application of human rights ceases in times of war. It stated:

> … [O]thers contended that the International Covenant on Civil and Political Rights made no mention of war or weapons, and it had never been envisaged that the legality of nuclear weapons was regulated by that instrument. It was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict… The Court observes that the protection of the International Covenant [on] Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision.[469]

The ICJ clearly ruled that the provisions of human rights must be applied in times of conflicts, but states of national emergency constitute an exceptional situation. As discussed earlier, emergency situations are regulated by Article 4 of the Covenant and are limited in times and restricted to certain conditions. This was not the only ruling on this matter. The same court later maintained the same principle, specifically regarding the Palestinian Territory. The ICJ disagreed with the Israeli argument and affirmed that both Covenants were applicable in Occupied Palestine.[470] The Court ruled that human rights treaties should not only be respected by the state parties for the protection of their own

467 Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR /C/79/Add. 93 (1998), para. 10. See concluding observations of the Committee on Economic, Social and Cultural Rights: Israel, UN Doc. E/C.12/1/Add.90 (26 June 2003), 15.

468 See International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (8 July 1996); International Court of Justice, advisory opinion, (2004).

469 International Court of Justice, advisory opinion (1996), 17–18.

470 International Court of Justice, advisory opinion (2004), 45.

citizens, but they should also be respected "where the state exercises its jurisdiction on foreign territory."[471] The Court unambiguously decided that the protection of human rights conventions "does not cease in case of armed conflict."[472]

Many UN General Assembly resolutions affirm the applicability of the provisions of human rights in the Occupied Territory.[473] The United Nations General Assembly on many occasions called upon Israel to respect and implement the provisions of international human rights in the Occupied Territory.[474] The United Nations Human Rights Committee recognized the applicability of the Covenant on Civil and Political Rights (1966) to both international and non-international armed conflicts, including situations of occupation, to which the rules of international humanitarian law are recognizably applicable.[475] Accordingly, all state parties should respect all provisions of international human rights conventions at all times and toward all people. More specifically, the Committee concluded that Israel was responsible for implementing human rights conventions in the Palestinian Territory, and it emphasized that "the applicability of rules of humanitarian law does not by itself impede the application of the Covenant [referring to the Covenant on Civil and Political Rights] or the accountability of the State under Article 2, paragraph 1, for the actions of its authorities."[476] Moreover, the Committee on Economic, Social and Cultural Rights reaffirmed that Israel's obligations under the Covenant applied to all territories and populations under its effective control.[477]

The nature of the long-term Israeli occupation has put the Palestinian Territory in unusual circumstances where occupation, military presence, and the exercise of effective control have become the norm. Hence, the Human

471 Id., 47.

472 Id., 46.

473 See the General Assembly resolutions cited in the Israeli Stance Regarding the Applicability of Human Rights Treaties in the Occupied Territory: General Assembly Resolution 2243 (December 19, 1968), General Assembly Resolution 2546 (December 11, 1969), and General Assembly 2727 (December 15, 1970).

474 See General Assembly Resolution 2243 (December 19, 1968), General Assembly Resolution 2546 (December 11, 1969), and General Assembly 2727 (December 15, 1970).

475 UN Human Rights Committee, *General Comment No. 31* (2004), CCPR/C/21/Rev.1/Add.13, § 11.

476 Concluding observations of the Human Rights Committee, UN Doc. CCPR /C/79/Add.93 (1998), 10.

477 Concluding observations of the Committee on Economic, Social and Cultural Rights, Doc. E/C.12/1/Add.90, 15.

Rights Committee emphasized that in such circumstances, the provisions of the Covenant "apply to the benefit of the population in the Occupied Territories."[478] In addition, the Committee on the Elimination of Racial Discrimination reiterated that the convention is applicable in the West Bank and the Gaza Strip, and that Israel has obligations to "ensure that all civilians under its control enjoy full rights under the Convention without discrimination based on ethnicity, citizenship, or national origin."[479] The Convention against torture is also applicable in the Occupied Palestinian Territory. In 2001, the Chairman of the Committee against Torture asked the legal counsel to provide the committee with an opinion in this regard. The legal counsel answered, "The Convention is binding upon Israel, as the occupying power in respect of the Occupied Palestinian Territory, [and that] the Committee against Torture appears already to have proceeded upon this supposition."[480]

The Israeli position might be acceptable, as the primary idea of international human rights norms is designed to govern the relation between a state and its citizens.[481] However, this position is only acceptable if Israel is performing its obligations toward its citizen and acting within its own territory. Whenever Palestinian citizens who are living under the Israeli occupation are involved, different principles and complications apply. The *Universalist Approach* views emphasize that individual rights are applicable to all persons regardless of their differences, such as background, culture, or citizenship.[482] The protection of human rights applies everywhere with no exceptions, and an absolute state sovereignty is not necessary where human rights are "ultimately based upon essential human needs and interests possessed by all people equally as prerequisites to human dignity."[483] Human rights conventions assure that a state party undertakes to apply human rights law provisions "to all individuals

478 International Court of Justice, advisory opinion (2004), 110. Cited as (CCPR/Co/78/1SR, para.11).

479 Concluding observations of the Committee on Elimination of Racial Discrimination, Doc. CERD/C/ISR/CO/ 14-16, 10.

480 Report of the Committee against Torture, Doc. No. 44 (A/57/44), (12–23 November 2001), 215.

481 Louis Henkin, The International Bill of Rights: The Covenant on Civil and Political Rights (New York: Columbia University Press, 1981), 5.

482 Douglas Lee Donoho, "Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards. Stanford Journal of International Law, Vol. No. 27, Issue No. 2 (1991): 345–391, 359.

483 Id.

within its territory and subject to its jurisdiction."[484] This means that as long as the Palestinians in the Occupied Territory are subject to the de facto Israeli jurisdiction and effective control, all ratified international human rights treaties apply with no exceptions. Additionally, this discussion might broach the principle of extraterritoriality, which has been a subject of many studies and research. The responsibility of a state concerning the implementation of human rights law is not limited to its borders, and states' obligations are not territorially restricted.[485] The Human Rights Committee stated that "States Parties are required… to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction… a state party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[486] Extraterritorial practices of the Israeli government in the Occupied Territory could be seen as falling under its jurisdiction as individuals are affected by these factual practices.[487]

The rationale behind the principles of extraterritoriality and universality in human rights is that under international human rights law, states are responsible and accountable for their actions and wrong-doings outside their territories. It cannot be argued that Palestinians are not entitled to the protection of human rights, because Israel is de facto "in the exercise of its jurisdiction [in the West Bank and the Gaza Strip] outside its own territory."[488] Within these areas, where Israel transferred administrative powers to the Palestinian Authority (PA), Israel is still imposing its control and reserves full control on the land, trade, economy, sovereignty, and borders.[489] The effective control of the Israeli forces on the PA controlled areas has never stopped, even during and after transferring the administrative powers.[490] In 2002, after the Oslo

484 International Covenant on Civil and Political Rights, Article 2(1).

485 Robert McCorquodale and Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law," The Modern Law Review Limited, Vol. 70, Issue No. 4 (2007): 598–625, 602.

486 UN Human Rights Committee, *General Comment No. 31* (2004), CCPR/C/21/Rev.1/Add.13, §10.

487 Ben-Naftali and Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories," 64–87.

488 International Court of Justice, advisory opinion (2004), 111.

489 Edward W. Said, The End of the Pease Process: Oslo and After. (USA: Vintage, 2001), 16–17.

490 Ben-Naftali and Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories," 23.

Accords, the peace talks between the Palestinian Authority and the Israeli government collapsed. Israel re-occupied these areas and further engaged in military activities, including closures, property confiscations, trade, etc.[491] In addition, with the ratification of human rights conventions, "Israel has committed itself to implement them in the territories it occupies,"[492] as these territories fall under its jurisdiction. Furthermore, the Israeli position fails to provide a legal basis to exclude certain populations, which it controls and occupies, from the protection of human rights principles.

Some scholars have adopted the position of the Israeli government. Michael Dennis based his argument on "the best reading of the Court's opinion [referring to the ICJ advisory opinion on the construction of a wall in the Occupied Palestinian Territory] is that it was based only on the view that the West Bank and Gaza were part of the territory of Israel for purposes of the application of the Covenant [referring to ICCPR]… the Court did not examine the negotiating history of the treaty but, instead, noted that on the basis of ICESCR Article 14… [and that] the ICJ's reliance upon the observations of the Committee on Economic, Social and Cultural rights (ESCR Committee) regarding the extraterritorial application of the ICESCR in the West Bank and Gaza is even more questionable… [because] the Committee was not constituted to render authoritative interpretations of Covenant rights."[493] In his article, he attacked the advisory opinion on the wall without a consistent argument against it, and has only relied on the opinion of the Israeli Supreme Court, which did not even examine Israel's obligations under international human rights treaties.[494] His article lists the aforementioned positions of UN bodies, He, nevertheless, disagrees that the applicability of human rights treaties "did extend to Israeli conduct in the West Bank and Gaza appears [referring to the ICJ Advisory Opinion on the wall] to have been based upon unusual circumstances of Israeli's prolonged occupation."[495] In fact, the existence of the Israeli prolonged occupation in the Palestinian Territory creates

491 Id.

492 Eyal Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories," Israel Law Review, Vol. 26, No. 1 (1992): 24–35, 35.

493 Michael J. Dennis, "Application of Human Rights Treaties Extraterritoriality in Times of Armed conflict and Military Occupation," The American Journal of International Law, Vol. 99, No. 1 (Jan. 2005): 119–141, 123–128.

494 Id. 121.

495 Id. 122.

unique circumstances that need special protection. This will be discussed later in this chapter.

Furthermore, the occupation power would adopt measures that "could only increase the well-being of the occupied community… [and that] the adoption of human rights conventions by an occupant clearly fits that description."[496] Recalling the situation of the long-term Israeli occupation, human rights provisions are mostly needed to maintain the continuance of the day-to-day life of Palestinians on their land under the Israeli occupation. The provisions of human rights law fill the gaps that might be left after international humanitarian law is applied. The purpose is to maximize protection to all individuals and prevent human rights violations. In conclusion, according to the internationally accepted norms, human rights conventions must be applicable in the Occupied Palestinian Territory. Israel has the obligation to respect these conventions and ensure that Palestinians are peacefully enjoying their human rights.

Arguably, Israel, according to the Oslo Accords, is obligated to assure full respect and implementation of human rights, and to ensure "the realization of the legitimate rights of the Palestinian people."[497] Notably, even with the existence of the Palestinian Authority, Israel still has the obligation "not to raise any obstacle to the exercise of such rights in those fields."[498] This means that Israel has both negative and positive obligations. Knowingly, negative obligations mean that Israel must not violate human rights norms, and must allow individuals to enjoy their rights peacefully, while its positive obligations refer to the duties to protect the rights of all individuals from any harm and prevent all actions that might violate such rights.[499] Israel has the duty to conduct its activities in accordance with human rights standards whenever individuals are under its control and/or jurisdiction and are directly affected.[500] As an

496 Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories," 31–32.

497 The Declaration of Principles on Interim Self-Government Arrangements (Oslo I) of 1993, Article III (3).

498 International Court of Justice, advisory opinion (2004), 112.

499 Francoise J. Hampson, "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body," International Review of the Red Cross, Vol. 90, Issue No. 871 (September 2008): 549–572, 567.

500 Ben-Naftali and Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories," 63. Cited as HCJ 320/80 Kawasma v. Minister of Defense, 35(3) P.D 113,127.

occupying power, Israel has the obligation to provide the local inhabitants of the Occupied Territory with basic rights, such as education, health, and infrastructure, and enable them to enjoy their basic human rights without raising any obstacles. Israel and the Palestinian Authority are obliged to respect human rights conventions to which they are state parties. Both parties have the obligations to protect and respect human rights law in the same territory, as each government is responsible in light of the actions committed by its forces and personnel. The provisions of customary human rights are also possible parts of the applicable law in Palestine. This is examined below.

2.1.2. Customary Human Rights

Customary international human rights law is part of the behavioral regularity, which almost all states have adopted.[501] It also reflects cooperation between states in implementing the general rules of international law.[502] The norms of customary international law bind "[all] states that are not parties to the instrument in which the norm is stated."[503] The legal significance of human rights phenomenon started through the provisions of the United Nations Charter. One of the provision's functions is to promote universal respect of human rights.[504] Shortly after the establishment of the United Nations Organization (UN), several governments were ready and sought to entrench a bill of rights that embodied the principles of human rights.[505] In 1948, the Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly in the hope that all nations would live in dignity and equality.[506] Although the UDHR was not legally binding at that time, it had an influence on the respect of human rights as a moral value and a human need.

The UDHR has been widely accepted as a fundamental instrument of human rights, which all states are obligated to respect and protect. In fact, it is

501 Jack L. Goldsmith and Eric A. Posner, The Limits of International Law (USA: Oxford University Press, 2005), 26.

502 Id., 39.

503 Meron, Human Rights and Humanitarian Norms as Customary Law, 80.

504 Year Book of the United Nations of 1948–1949, No. 1950. I. II, (USA: United Nations Publications, 1950), Chapter 5. Social, Humanitarian and Cultural Questions, A. Human Rights, 1. Universal Declaration of Human Rights.

505 John P. Humphery, "The International Bill of Rights: Scope and Implementation," William and Mary Law Review, Vol. 17 (1976): 527- 541, 527.

506 The Universal Declaration of Human Rights, 10 December 1948, the Preamble.

considered as the "centerpiece of the modern international law of human rights,"[507] and is more than an affirmation of moral principles. A state does not need to clearly accept a customary principle to be obliged by it, because once this principle is considered as a customary law, all states must respect it.[508] The UDHR has been described as a human rights instrument that constitutes an important part of the customary international law, which was formulated by legal experts and accepted by states.[509] As such, the UDHR has become a compulsory part of customary law of human rights. Put another way, it has become a norm that all states should respect. The Proclamation of Teheran of 1968, which was adopted by the International Conference on Human Rights, the International Conference on Human Rights concluded that "the Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community... [and that all] declarations in the field of human rights adopted under the auspices of the United Nations, the specialized agencies and the regional intergovernmental organizations, have created new standards and obligations to which States should conform."[510] Notably, many of the principles found in the UDHR and then "replicated in the Civil and Political Covenant now constitute part of customary international law binding upon all states."[511] Simply stated, the UDHR is the fundamental basis on which human rights conventions were built. In addition, cases of the International Court of Justice have also played a role in adapting international principles and norms.[512] Such cases have exposed different questions

507 William Schabas Oc Mria, The Universal Declaration of Human Rights: The Travaux Préparatiores, Vol. 1, October 1946 to November 1947 (UK: Cambridge University Press, 2013), xxxvii.

508 Richard B. Lillich, "The Growing Importance of Customary International Human Rights Law," Georgia Journal of International and Comparative Law, Vol. No. 25 (1995-1996): 1–30, 8.

509 HCJ 698/80 Kawasma v. Minister of Defence 35P.D. (1)617. Judge H. Cohn in his dissenting opinion.

510 Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968), para 2.

511 Lillich, "The Growing Importance of Customary International Human Rights Law," 8.

512 Anthony D'Amato, "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms," Georgia Journal of International and Comparative Law, Vol, 25 (1995–1996): 47–98, 47.

on international law violations upon the actions of other governments.[513] The decisions of the Court are normally binding on the disputed states parties, but other states might respect and consider such decisions. The acceptance of the Court's rulings might lead to creating principles of international customs. The High Court of Justice, in the construction of the wall case, advised that the rules of the customary international human rights were applied and should be respected in the Palestinian Territory.[514]

Furthermore, the sequences of United Nations resolutions differ in their effects; there are legally binding resolutions and noncompulsory resolutions. A UN's resolution is legally "binding when it is capable of creating obligations on its addressee(s)."[515] The non-binding resolutions do not obligate states to implement the rulings; however, they pass a moral and ethical obligation at the UN and international levels.[516] States might consider following such non-binding resolutions out of respect for the international community. In addition, the resolutions of the General Assembly are not necessarily legally binding, but they undeniably contribute in the form of state practice, which may rise to customary international law.[517] The resolutions of the United Nations will be further elaborated on in the next chapters.

The resolutions adopted by the Security Council, in accordance with Article 25 of the UN Charter are legally binding.[518] This means that all UN member states, which have accepted the UN Charter, are obligated to respect, and have the responsibility to carry out and implement the Security Council's resolutions. Some scholars limit the scope of the Security Council enforcement powers based on Chapter VII of the Charter.[519] In all circumstances, the Security Council's practice in exercising its powers shows that "the Council has frequently… imposed economic sanctions or other restrictions requiring

513 Id.

514 International Court of Justice, advisory opinion (2004).

515 Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ," The European Journal of International Law, Vol. 16, Issue No. 5 (2005): 879–906, 880.

516 Id.

517 Stephen M. Schwebel, "The Effect of Resolutions of the U.N. General Assembly on Customary International Law," American Society of International Law, Vol. No. 73, Proceedings of the Annual Meeting (April 26–28, 1979): 301–309.

518 The Charter of the United Nations of 1945, Article 25.

519 Erika De Wet, The Chapter 7 Powers of the United Nations Security Council (Oxford: Hart, 2004).

compliance by all states – expressed by stating that the Council decides that all States shall."[520] The resolutions of the General Assembly, on the contrary, may carry out "recommendations with respect to the maintenance of international peace and security."[521] Recommendations are considered to be legally non-binding.[522] Although most recommendations are not legally compulsory, the General Assembly decisions "possess moral force and should, as such, exert great influence."[523] Meaningfully, the resolutions of the General Assembly are morally binding, and all states must consider implementing them. The Security Council, in accordance with Articles 41 and 42 of the UN Charter, may decide or call upon states to take measures to give effect to its decisions through "interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[524] If these measures are inadequate, the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security… [an] action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[525] These articles grant the Security Council the power to act, even to use force if necessary, in cases of human rights violations or breaches of the UN Charter.

More precisely, the right to movement, the right to property, and the right to equality and non-discrimination are all enshrined in the principles of customary international human rights law. These three human rights are unquestionably part of the globally binding bill of rights.[526] These rights will be separately addressed in the coming chapters. Within the Palestinian-Israeli context, the applicability of customary international law was not a significant disagreement. Israel and the Palestinian Authority have accepted the

520 Paul C. Szasz, "The Security Council Starts Legislating," The American Journal of International Law, Vol. 96, No. 4 (October 2002): 901–905, 901.

521 The Charter of the United Nations of 1945, Article 18.

522 Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ," 880.

523 F. Blaine Sloan, "The Binding Force of a Recommendation of the General Assembly of the United Nations," British Year Book of International Law, Vol. 25 (1948): 1–33, 31.

524 The Charter of the United Nations of 1945, Article 41.

525 Id. Article 42.

526 The International Bill of Human Rights consists of the Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966 and its two Optional Protocols.

applicability of the customary international law in the Occupied Palestinian Territory. The principles of customary international human rights have gained acceptance in the Israeli Supreme Court as well as the Israeli government.[527] In 1979, the Court evinced that international customary law is applicable in the Occupied Territory, as part of the domestic law, but never explicitly mentioned customary human rights.[528] The vast majority of scholars have accepted the customary law, in general, and consider it as part of the Israeli domestic law.[529] It must be noted that some conventional human rights instruments might be considered as part of the principles of customary human rights, whose purpose is to avoid situations of lawlessness and to provide protection to all persons under the principles of human rights. Despite the position of the Israeli government concerning human rights, Palestinians are protected by a set of customary human rights provisions. Israel is obliged to respect these because "the texts of widely accepted international instruments, and the relative consensus among scholars, all indicate that there is considerable room to argue that the duty to accord human rights protection to all persons subject to a state's jurisdiction – including individuals situated outside its sovereign territory – has become customary international law."[530] Stated another way, it is still arguable that human rights provisions have become an accepted practice among states with the existence of a sense of obligation toward such practice. Consequently, the Palestinian Authority and Israel, in addition to their obligations under human rights conventions, are obliged to respect the provisions of customary human rights law. Similarly, the applicability of the provisions of international humanitarian law in the Occupied Palestinian Territory is a disputed topic. This point is examined in the following section.

527 ICJ 390/79 Izzat Muhammad Duweikat and 16 others v. Government of Israel. The Israeli High Court of Justice, September 6, 1979, September 13, 1979, September 14, 1979, September 19, 1979, October 3, 1979 and October 22, 1979, 9. (Translated by HaMoked, the original text in Hebrew).

528 HCJ 606/78 Saliman Tawfiq Ayub and 11 others v. Minister of Defense & 2 others and HCJ 610/78 Jamil Aresm Mutawe'a & 12 others v. Minister of Defense & 3 others. (Joint in one decision, March 18, 1979), 113.

529 Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories," 25; Ben-Naftali and Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories," 58.

530 Ben-Naftali and Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories," 87.

2.2. International Humanitarian Law

Before examining the applicability of international humanitarian law, it is important to define the persons who benefit from the applicability of this law, as well as to outline the obligations, powers, and duties of a military commander in the Occupied Territory. Protected persons, as defined in the Fourth Geneva Convention are as follows: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals… [n]ationals of a State which is not bound by the Convention are not protected by it, [and] [n]ationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."[531] This means that the people, who are controlled by and living under a foreign occupying power, exclusively benefit from the protection provided by the convention. On the one hand, Palestinians, who live in Occupied Palestine under the Israeli occupation, are protected by the conventions. On the other hand, Israeli citizens, who are living in Occupied Palestine, are not deemed to be protected persons under the named convention. There are different dimensions related to this issue and whether the depicted reference is based on ethnicity or citizenship. For the purpose of this study, both references will be used interchangeably especially in the next chapters. In regard to the protected persons, the reference here is based on citizenship.

The military commander, in general, governs the Occupied Territory to keep it secure,[532] and has duties concerning administration and control in order to ensure public order.[533] The law of occupation protects the occupied people, limits the powers of an occupant, and prohibits the occupant from holding

531 The Geneva Convention (IV) of 1949, Article 4.

532 The Hague 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), Article 43.

533 Id., Article 43 reads: "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."

and using its control of the Occupied Territory as leverage.[534] The duties of the occupying power are pointed out primarily in the 1907 Hague Regulations and the Fourth Geneva Convention, as well as in certain provisions of Additional Protocol I.[535] The related main rules of the applicable law in case of occupation not only limit the occupant's powers, but also regulate the occupant's duties. First, the occupant must respect the laws in force in the Occupied Territory; secondly, the occupying power must take all measures to restore and ensure public order and safety of the local population; thirdly, the occupying power must ensure sufficient hygiene and public health standards, in addition to food and medical care to the population under occupation; fourthly, collective or individual forcible transfers of population from and within the Occupied Territory, forcible or voluntary transfers of the civilian population of the occupying power into the Occupied Territory, collective punishment, reprisals against protected persons or their property are all prohibited.[536] Fifthly, confiscation of private property and destruction or seizure of enemy property are prohibited, unless absolutely required by military necessity during hostile conduct of the occupant.[537] Any agreement between the occupying power and local authorities cannot deprive the population of the Occupied Territory of the protection and even protected persons themselves cannot under any circumstances renounce their rights.[538]

More specifically, the military commander is allowed to take measures in order to reinstate and ensure public order and safety. At the same time, he is obligated to respect the laws in force in the Occupied Territory, unless these laws absolutely threaten the existence of the occupant state.[539] The military commander, the military forces, and the occupying authority, however, are prohibited from using brutality or cruel, inhumane, or degrading treatment against the inhabitants of the Occupied Territory.[540] In addition, during the occupation, the occupying power is obligated to respect "family honor and rights, the lives of persons, and private property, as well as religious convic-

534 Benvenisti, The International Law of Occupation, 2nd ed., 349–350.

535 The Hague Convention (IV) of 1907, Articles 42–56; Geneva Convention (IV) of 1949, Articles 27–34 and 47–78); Additional Protocol I (Art. 51–56).

536 Id.

537 Id.

538 Geneva Convention (IV) of 1949, Articles 47 and 8.

539 The Hague Convention (IV) of 1907, Article 43.

540 Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Vol. I: Rules (UK: Cambridge University Press, 2005), 315.

tions and practice."[541] The Geneva Conventions obligate the occupying power to respect the needs and benefits of the local population (the protected persons) and there shall be no restrictions on their rights except for imperative national security or military necessity.[542]

The question is whether these principles apply to Palestinians in the Occupied Territory. This subsection answers this question and elucidates different points of discussion. It examines the protection and applicability of international humanitarian law in the Occupied Territory, as well as the Israeli stance and the Palestinian obligations under international humanitarian conventions. It also outlines the obligations of both the Israeli government and the Palestinian Authority under international human rights instruments.

2.2.1. Humanitarian Law Conventions

The international humanitarian law conventions were outlined in the four Geneva Conventions in addition to four additional protocols. These conventions and protocols set forth the regulations related to armed conflicts, wars, and occupation. While the first and the second Conventions protect the wounded and sick in armed forces in the field and in the sea, the third convention protects prisoners of war, and the fourth is basically aimed at protecting civilians in times of war.[543] These conventions and their protocols obligate the state parties to apply and respect their provisions, whenever there is a presence of an armed conflict, war, or occupation. The rules of humanitarian law are derived from the regulations concerning the laws and customs of war on land (the Hague Regulations of 1907),[544] which reflect customary international law. Notably, the law of occupation has developed as part of the law of war; in fact, occupation is ruled by the same principles. Thus, occupation was further introduced in the Fourth Geneva Convention along with the additional protocols. The Convention limits the effects of wars, conflicts, and occupation on people who are not taking part in the hostilities, especially civilians.

International humanitarian law provides civilians under the control of enemy forces distinct protection. Without any form of discrimination, civilians must

541 The Hague Convention (IV) of 1907, Article 46.

542 Geneva Convention (IV) of 1949.

543 The Geneva Convention (I) of 1949; The Geneva Convention (II) of 1949; The Geneva Convention (III) of 1949; The Geneva Convention (IV) of 1949.

544 Beit Sourik Village Council v. The Government of Israel and Commander of the IDF in the West Bank (2004), 14.

be treated humanely and with dignity; they must be protected against violence and degrading treatment and must be provided with all necessary needs and essentials.[545] The Fourth Geneva Convention sets forth rules to safeguard the rights of the protected persons, who are living under occupation, prohibits all forms of physical and mental ill-treatment and coercion, and collective punishment, protects these persons, their property and families, and their culture and traditions, forbids deportation of the protected persons from the Occupied Territory, and prevents destruction of their property, except for in the case of an absolute military necessity.[546]

2.2.1.1. The Responsibilities of the Palestinian Authority under the Geneva Conventions

On April 2, 2014, Palestine ratified the four Geneva Conventions of August 12, 1949, the Additional Protocols I and II of 1977, and Protocol III of 2005.[547] These ratifications obligate the Palestinian Authority, including all political parties, to respect the principles set forth in these conventions. The Palestinian ratification of the Geneva Conventions is recent. Notably, the Palestinian Authority has no effective control over territories beyond its drawn areas. It is important to note that in the relation with Israel, the Palestinian Authority and its personnel, including all political parties, such as Fatah and Hamas, are obligated to respect the principles of the four Geneva Conventions. The obligations of the Palestinian Authority toward Israel constitute a separate study, which will not be conducted in this research. The focus here is the obligation of the Israeli government under the provisions of international humanitarian law.

2.2.1.2. Israeli Stance Concerning the Applicability of International Humanitarian Conventions in the Occupied Territory

On July 6, 1951, Israel ratified the Geneva Conventions of 1949.[548] The applicability of the Geneva Conventions in the Occupied Palestinian Territory was disputed by Israel. The principles of the law of occupation and "their

545 The Geneva Convention (IV) of 1949.

546 Id.

547 Palestine directly joined the conventions and their additional protocols without any reservations. See the International Committee of the Red Cross, Treaties and States Parties to Such Treaties, Palestine.

548 Israel signed the conventions on 8 December 1949; it declared its reservations on 8 December 1949, 6 July 1951, 22 January 1968, and 10 February 1978. See the International Committee of the Red Cross, Treaties and States Parties, seen on 15 August 2017 at 12:55,

de jure applicability to the territories [was] never officially recognized by the Israeli government."[549] The issue of the Israeli denial of the applicability of the Geneva Conventions in the Occupied Palestinian Territory is no less complicated than the one regarding human rights, because the Israeli government has constantly refused the applicability of the Geneva Conventions through exhausting different claims and allegations.[550] It must be noted that the Israeli position and claims have diverged since 1967. In 1967, the Israeli military commander enacted Proclamation No. 3, stating that "the military courts and their personnel are obligated to apply the provisions of the Geneva Convention of 13 August 1949 relative to the protection of civilians in times of war, in cases of any contradiction between the convention and the provisions of the military orders, the provisions of the Convention prevail."[551] However, a few months later, these provisions were explicitly abrogated, after which the Israeli government denied the de jure applicability of the Geneva Conventions.[552] Perhaps, it feared that an acknowledgment of the applicability of the Geneva Conventions might be taken as "the Israeli government had formally recognized that the territory occupied was the sovereign territory."[553] Even under this assumption, the recognition of the applicability of the Geneva Conventions does not, under any circumstance, constitute an acknowledgement of the other party's sovereignty, because Article 3 of the Fourth Geneva Convention states, "The application of the preceding provisions [humanitarian law] shall not affect the status of the parties to the conflict."[554] The Israeli government followed, in its stance, an argument that was made in 1968, by an Israeli Professor in an article dealing with the status of Israel in the West Bank and Gaza Strip. He concluded in his article that the only part of the law that applies is the one that intended to safeguard the population's

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the signed treaties by Israeli available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=IL.

549 Benvenisti, The International Law of Occupation, 2nd ed., 206.

550 Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupation Territories Since 1967," The American Journal of International Law, Vol. 84, No. 1 (January 1990): 44–103, 66.

551 Order Concerning Security Provisions No. 3 (West Bank) 1967, Published in Proclamation, Orders and Appointments No. 1, Article 35. (Text in Arabic and Hebrew).

552 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 33.

553 Esther Rosalind Cohen, Human Rights in the Israeli-Occupied Territories: 1967–1982 (Manchester: Manchester University Press, 1985), 45.

554 The Geneva Convention (IV) of 1949, Article 3.

humanitarian rights, and that any reversionary rights of a legitimate sovereign state do not apply.[555] Since then, the Israeli government adopted this position, which denies the applicability of the Geneva Conventions, but pays some consideration to what it calls *humanitarian provisions*.[556] This position was supported by some Israeli scholars, such as Shamgar. In his opinion, the government of Israel is not obliged to accept the applicability of the Fourth Geneva Convention to the Occupied Territory, but decided to act de facto, in accordance with the humanitarian provisions of the Convention.[557]

The Israeli Supreme Court, sitting as a High Court of Justice (HCJ), did not accept the applicability of the Geneva Conventions either. The HCJ, in Christian Society for the Holy Places v. Minister of Defense, in 1971, had to answer the question whether the military order No. 439, which amended the Jordanian labor law, violated Article 43 of the Hague Regulations and Article 65 of the Fourth Geneva Convention, and whether the military commander exceeded his legislative powers in the Occupied Territory.[558] The Court did not answer the main question; rather, it concluded that the military commander has the rights to impose his authority, revise the local laws, and safeguard the civilian population in conformity with the laws in force at times of occupation.[559] The Court refused to review the acts of the military government in the Occupied Territory under the Geneva Conventions and stated that "it would reserve its doubts and refrain from deciding whether the conventions could be enforced."[560]

The refusal of the Court to enforce the conventions, especially the Fourth Geneva Convention, impairs the ability of the Court to rule according to the law in such matters. The Court ignored two important elements: first, it had

555 Yehuda Z. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria," Israel Law Review, Vol. 3, Issue No. 21(1968): 279–301.

556 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 33.

557 Meir Shamgar, "The Observance of International Law in the Administered Territories," Israel Yearbook on Human Rights, Vol. 1 (1971): 262–277.

558 Yoram Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulations," in Israel Yearbook on Human Rights, Vol. 25, ed. Yoram Dinstein (The Netherlands, Martinus Nijhoff Publishers, 1995), 4. PD 579 (1971) 26 (1), Summary of the case in English, 354.

559 Id.

560 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 35.

jurisdiction over the acts of the military commander according to the laws of occupation, including the Geneva Conventions, and second, it refused to implement contractual conventions which Israel ratified.[561] In the Helou case, in 1972, regarding Rafah, an area separating the Gaza Strip from the Egyptian Sinai, the Court did not consider the Geneva Conventions and the Hague Regulations enforceable in domestic courts.[562] The ruling of the Court in this case did not draw any differences between the laws. The Helou was one of the first cases in which the Israeli Supreme Court was asked to review the legality of the military orders in the Occupied Territory.[563] In this case, Palestinian petitioners challenged the eviction of Bedouin inhabitants from their places of residence and their private land. The High Court ruled that it was legitimate, for the purposes of security, to evict Palestinians and use their land for the designated Jewish settlement.[564] However, in the Elon Moreh case in 1979, which will be discussed later, the Court recognized the applicability of customary international law, but not the applicability of the Geneva Conventions.[565] The Court has not changed its position; it has continued to refuse the application of the Geneva Conventions in the West Bank and the Gaza Strip, and reaffirmed that the Israeli government stand remains valid in applying only the humanitarian provisions to the territory.[566] It "excluded Article 49(6) from the deliberation at the time as it forms part of treaty international law which does not constitute binding law in Israeli courts."[567] The Court considered the Geneva Conventions as a constitutive treaty that added new norms and obligations on the state and this did not qualify to be part of the domestic laws. In 2004, in the Beit Sourik case, which will be

561 Esther Cohen, "Justice for Occupied Territory? The Israeli High Court of Justice Paradigm," Columbia Journal of Transnational Law, Vol. 24 (1986): 471–507, 497.

562 HCJ 302/72, Sheikh Suleiman Hsein 'Odeh Abu Helou and 3 others v. Government of Israel. The Israeli High Court of Justice, P.D 27 (2) 169–180. Summary in English in Israel Yearbook Review 5 (1975) 384.

563 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 79.

564 HCJ 302/72, Sheikh Suleiman Hsein 'Odeh Abu Helou and 3 others v. Government of Israel, P.D 27 (2) 169–180.

565 Izzat Muhammad Duweikat and 16 others v. Government of Israel (1979).

566 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 40–41. *See* Izzat Muhammad Duweikat and 16 others v. Government of Israel (1979); HCJ 61/80 *Haetzni v. State of Israel*, The Israeli High Court of Justice, Isr.SC 34(3) 595, 597.

567 Id.

discussed later, the Israeli government and the military commander agreed with the petitioners to apply only the humanitarian principles of the Fourth Geneva Convention, and the Court chose not to review the applicability of the Convention as such.[568] The Court accordingly applied some of the humanitarian provisions of the Fourth Geneva Convention without examining the significance of applying the Convention.[569] This gives the sense that the Court has been granting the Israeli government an authorization to continue in its rejection to apply the Geneva Conventions, even though it was fully aware that the Israeli stance was refuted by the entire international community.[570]

The Israeli government refused to refer to the Palestinian Territory as occupied; rather, it used the terms *liberated* or *administrated* territories.[571] Israel claimed that it was not bound by the provisions of the Geneva Conventions. It argued that under the provision of Article 2, paragraph 2, the Four Geneva Conventions only applied in cases of occupation of a land of a sovereign high contracting party.[572] Israel proclaimed that the West Bank and the Gaza Strip were not falling under the sovereignty of a high contracting party, as these territories by Israel subsequent to the 1967 conflict had not previously fallen under Jordanian or Egyptian sovereignty.[573] The Israeli position is based on the interpretations of the provisions of Article 2. According to the Israeli claim, the precondition of applying the Geneva Conventions is the sovereignty of a high contracting party on the Occupied Territory. The common Article 2 of the four Geneva Conventions reads:

(1) In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other

568 Beit Sourik Village Council v. The Government of Israel and Commander of the IDF in the West Bank (2004), 14.

569 The case will be examined in detail in Chapter V.

570 Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v. The International Court of Justice," Vanderbilt Journal of Transnational Law, Vol 40, (2007): 1425–1521, 1433.

571 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 32–33.

572 International Court of Justice, advisory opinion (2004), 45.

573 See Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria," 279; Shamgar, "The Observance of International Law in the Administered Territories," 263; and Stacy Howlett, "Palestinian Private Property Rights in Israel and the Occupied Territories," *Vanderbilt Journal of Transnational Law, Volume* 34 (2001): 117–167, 153.

armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

(2) The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

(3) Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations.[574]

The Israeli claim is not valid in regard to Gaza and the West Bank. Although the Gaza Strip was never claimed by Egypt, unlike the case with the West Bank under the Jordanian rule,[575] this interpretation reveals a weak argument. The Common Article 1 strongly emphasizes that the four Geneva Conventions must be respected "in all circumstance."[576] This indicates that the protection of the Geneva Conventions is not preconditioned to any circumstances, because they are not meant to leave an entire civilian population without any humanitarian protection. Kretzmer argues that one should examine the history of Article 2(2).[577] He states that the history divulges that Article 2(2) was drafted to guarantee the "application of the convention [referring to Geneva Convention IV] in cases of occupation that did not result from armed conflict… the second paragraph is irrelevant in cases of occupation arising from armed conflict, as these are covered by the first paragraph."[578] His argument, in fact, depends on reading Article 2 as a whole with the importance of connecting its paragraphs with each other. The Israeli occupation is the result of the 1967 War, and thus, the convention applies in the Occupied Palestinian Territory through applying Article 1 and 2 in parallel. In addition, Roberts confirms that it is irrelevant to refer to the second paragraph in this situation, because the first paragraph applies when belligerent occupation begins during a war.[579]

574 The Geneva Conventions I, II, III, and IV of 1949, the Common Article 2.

575 Cohen, Human Rights in the Israeli-Occupied Territories: 1967–1982, 47.

576 The Geneva Conventions I, II, III, and IV of 1949, Article 1.

577 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 34.

578 Id.

579 Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967," 64.

This study argues that the Geneva Conventions must be read as a whole, where all articles must be connected together. The main purpose of the Geneva Conventions is to protect those who are not taking part in the hostilities; these people should not be affected by the legal status of the state or the relation between the two governments or parties. Regarding these discussions, the aforementioned definition of the protected persons under the Fourth Geneva Convention is explicit in including persons who found themselves under the control of an occupying power, of which they are not nationals.[580] This affirms that Palestinians, who have actually found themselves under the control of the Israeli occupation, are beneficiaries of the protection of the Fourth Geneva Convention. Thus, there is no legal basis to further claim that the Geneva Conventions are not applicable in Occupied Palestine.

Israel has insisted on its stance and presented it before the International Committee of the Red Cross (ICRC), the International Court of Justice, and the United Nations bodies on many occasions. Nevertheless, it was rejected by these entities. The ICRC, as the recognized entity to supervise the implementation of the Geneva Conventions, has explicitly rejected the Israeli argument. It officially announced that "the ICRC has always affirmed the de jure applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem."[581] It recalled the obligation of Israel to ensure the respect of the four Geneva Conventions in all circumstances and to confirm the application of and the compliance with international humanitarian law, all in the interest of protecting the population.[582] The International Court of Justice (ICJ), in its advisory opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory, rejected the Israeli argument and based its judgment on the basis of the de facto applicability of Geneva Conventions and their protocols in the Palestinian Territory.[583] It stated that "the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict…

580 Geneva Convention (IV) of 1949, Article, 4.

581 "International Committee of the Red Cross, Implementation of the Fourth Geneva Convention in the Occupied Palestinian Territories: History of a Multilateral Process (1997–2001)," International Review of the Red Cross, Volume No. 847. Annex 2, Conference of High Contracting Parties to the Fourth Geneva Convention: statement by the International Committee of the Red Cross, Geneva, 5 December 2001, para 2. available at https://www.icrc.org/eng/resources/documents/article/other/5fldpj.htm.

582 Id., 10–11.

583 International Court of Justice, advisory opinion (2004), 45.

[accordingly, the] Convention is applicable in the Palestinian territories."[584] The Israeli military commander and the Israeli government are obligated to respect the principles of international humanitarian law, especially the Fourth Geneva Convention relative to the protection of civilian persons in time of war 1949.[585] In response to Israel's claims, the ICJ stated that Article 2(2) of the Geneva Conventions must be read and interpreted in good faith and that the article's intention is to "protect civilians who find themselves, in whatever way, in the hands of the occupying power."[586] In other words, allegations to deprive an entire population from the protection of the Geneva Conventions are against the fundamentals of international humanitarian law.

The United Nations Security Council and General Assembly have acknowledged the applicability of the Geneva Conventions to the Palestinian Territory. According to the Security Council, the Arab territories have been under Israeli occupation since 1967, including the West Bank, the Gaza Strip, and Jerusalem.[587] The United Nations Security Council has, in a number of adopted resolutions, affirmed the applicability of Geneva Conventions to all occupied Arab territories by Israel.[588] For example, on June 14, 1967, the United Nations Security Council confirmed, in Resolution 237 (1967), that the principles set forth in the Geneva Conventions must be respected by the parties involved in the conflict.[589] The resolution states that "all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 should be obeyed with by the parties involved in the conflict."[590] In addition, it called upon the Israeli Government to "ensure the safety, welfare and security of the inhabitants of the areas where military operations have taken place and to facilitate the return of those inhabitants who have fled the

584 Id.

585 Beit Sourik Village Council v. The Government of Israel and Commander of the IDF in the West Bank (2004), 14.

586 International Court of Justice, advisory opinion (2004), 42–43.

587 See the Security Council Resolution No. Resolution 242 (1967) of 22 November 1967; see also United Nations Security Council Resolution No. 471 (1980) of 5 June 1980.

588 See Security Council Resolution No. 237 (1967), Security Council Resolution No. 446 (1979), Security Council Resolution No. 681 (1990). Security Council Resolution No 799 (1992), Security Council Resolution No. 904 (1994), and Security Council Resolution No. 248 (1968).

589 United Nations Security Council Resolution No. 237 (1967) of 14 June 1967 adopted at the 1361st meeting.

590 Id.

areas since the outbreak of the hostilities."[591] The Security Council Resolution No. 446 (1979) reads: "The Geneva Convention Relative to the Protection of Civilian Persons in Times of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem."[592] Notably, the resolutions adopted by the Security Council, in accordance with Article 25 of the UN Charter are considered legally binding, and the state members agree to carry out these resolutions.[593] This means that Israel, as a member state who accepted the UN Charter, is obliged to accept and implement the Security Council Resolutions. Additionally, the General Assembly has adopted the same position as the Security Council and affirmed that the West Bank and the Gaza Strip, including East Jerusalem, are occupied by the Israeli forces. The General Assembly in Resolution ES-10/14 (2003) also reaffirmed the applicability of the Fourth Geneva Convention, as well as the Additional Protocol I to the Geneva Conventions to the Occupied Palestinian Territory, including East Jerusalem.[594] Hence, the Israeli government has the obligation to apply the four Geneva Conventions and ensure the safety of the protected persons, their families and properties, heritage and culture, and traditions.[595]

Although the aforementioned arguments prove that the Geneva Conventions are applicable in Occupied Palestine, the Israeli government still states, "Although Israel has voluntarily taken upon itself the obligation to uphold the humanitarian provisions of the Fourth Geneva Convention; Israel maintains that the Convention (which deals with occupied territories) was not

591 Id.

592 United Nations Security Council Resolution No. 446 (1979) of 22 March 1979.

593 The Charter of the United Nations of 1945, Article 25.

594 The United Nations General Assembly in Resolution ES-10/14 (2003) adopted on 12 December 2003 in the 10th Emergency Special Session.

595 See General Assembly Resolutions 36/15 of 3 November 1981, 36/147 of 16 December 1981, 37/122 of 16 December 1982, 37/135 of 17 December 1982, 39/146 of 14 December 1984, 40/161 of 16 December 1985, 41/69 of 3 December 1986, 41/63 of 3 December 1986, 43/57 of 6 December 1988, 44/48 of 8 December 1989, 45/83 of 13 December 1990, 46/76 of 11 December 1991, 47/63 of 11 December 1992, 48/212 of 21 December 1993, 49/35 of 9 December 1994, 50/22 of 4 December 1995, 50/29 of 6 December 1995, 51/190 of 16 December 1996, 51/223 of 13 March 1997, ES-10/2 of 25 April 1997, ES-10/3 of 15 July 1997, 52/65 of 20 February 1998, 52/66 of 20 February 1998, 53/54 of 10 February 1999, 54/80 of 22 February 2000, 55/131 of 28 February 2001, 56/61 of 14 February 2002, 56/204 of 21 February 2002, ES-10/10 of 14 May 2002, ES-10/11 of 10 September 2002, 57/125 of 24 February 2003, and 57/269 of 5 March 2003.

applicable to the disputed territory."[596] This statement, as discussed earlier, does not have any legal basis and contradicts the purpose and provisions of humanitarian law. Therefore, this research follows the principle of interpreting the conventions for the benefit of the protected persons, and further recognizes the necessity to apply the Geneva Conventions in the West Bank and the Gaza Strip, including East Jerusalem, following the internationally adopted position.

2.2.2. Customary Humanitarian Law

Customary international humanitarian law principles have developed over centuries during conflicts and wars.[597] The principles of customary international humanitarian law, in general, exist to regulate conflicts and to prevent inhumane behavior during wars.[598] These regulations are called *the Hague Regulations*, conventions and declarations of 1899 and 1907, and are known as the customs of war.[599] These regulations "have become part of customary law"[600] and constitute the principles of customary international humanitarian law.[601] These customs of war laid the foundation of the law of occupation and international humanitarian law, which were adopted in 1949.[602] The Hague Regulations exist in a written form, and are compulsory where "no State would be justified today in claiming that the Regulations are not binding on it because it is not party to them."[603]

In Occupied Palestine, the applicability of the Hague Regulations and other customary humanitarian provisions have been met with wide confusion. The Hague Regulations have been accepted by the Palestinian Authority;

596 Israeli Ministry of Foreigner Affairs, Israel, the Conflict and Peace: Answers to Frequently Asked Questions. November 1, 2007, amended December 2009. Seen on 21 April 2017 at 12h 32. It is available at http://mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/Israel-%20the%20Conflict%20and%20Peace-%20Answers%20to%20Frequen.aspx

597 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol.I: Rules, xxxi.

598 Id.

599 Id.

600 International Court of Justice, advisory opinion (2004), 39.

601 See the list of the Customary International Humanitarian Law on the International Committee of the Red Cross database.

602 Cohen, Human Rights in the Israeli-Occupied Territories: 1967–1982, 23.

603 Jean S. Pictet, Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War (Geneva: International Committee of the Red Cross, 1958), 614.

however, in contrast, the Regulations have not been recognized by the Israeli Government.[604] Some Israeli scholars and judges opposed the applicability of the customary international humanitarian law to the Occupied Palestinian Territory.[605] This position received significant criticism by other Israeli and international scholars as well as international bodies.[606] In this framework, the United Nations has played an essential role. In fact, the General Assembly and the Security Council adopted a number of resolutions concerning Palestine, in which both emphasized that Israel is unquestionably obligated to respect the principles of the Hague regulations. For example, the Security Council Resolutions 237 (1967)[607] and 484 (1980)[608] called upon the government of Israel to insure the safety and security of the Palestinian inhabitants, and to respect the humanitarian principles.[609] The General Assembly, in Resolution ES-10/14 of 2003, also recalled the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of

604 International Court of Justice, advisory opinion (2004), 39–40.

605 See Meir Shamgar, "Legal Concepts and Problems of the Israeli Military Government: The Initial Stage," in *Military Government in the Territories Administered by Israel 1967–1980,* ed. Meir Shamgar (Jerusalem: The Harry Sacher Institute, 1982), 31–43; Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria," 279.

606 G.A. Res. 32/91, UN. GAOR, 32nd Sess., Supp. No. 45 (1977) 69; G.A. Res. 33/113, UN. GAOR, Supp. No. 45 (1978) 70; G.A. Res. 44/40, UN. GAOR, 44th Sess., Supp. No. 49 (1989) 41; S.C. Res. 237, UN. SCOR, 1361st mtg. (1967) 5; S.C. Res. 446, UN. SCOR, 2134th mtg. (1979) 4; S.C. Res. 605, UN. SCOR. 2777th mtg. (1987) 4. See also Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967," 69–70; Richard A. Falk and Burns H. Weston, "The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada," Harvard International Law Journal Vol. 32, Number I, (Winter 1991): 129–157; Yoram Dinstein, The International Law of Belligerent Occupation and Human Rights (1978) 8 *Is. Y.B. Hum. Rts.* 104, at 107; Cohen, Human Rights in the Israeli-Occupied Territories: 1967–1982, 51–56; Eyal Benvenisti, *The International Law of Occupation* (Princeton, Princeton University Press, 1993) at 109–110; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany, State University of New York Press, 2002) at 34; Orna Ben-Naftali and Keren R. Michaeli, We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings (2003) 36 (2) *Cornell J. Int. L.* 233, at 260–292; Ardi Imseis, "The Fourth Geneva Convention and the Occupied Palestinian Territory" (2003) 44 *Harv. Int'l L. J.* 65.

607 United Nations the Security Council, Resolution 237 (1967).

608 United Nations the Security Council, Resolution 484 (1980) of 19 December 1980. Adopted unanimously at the 2260th meeting.

609 Id.

1907, and reaffirmed their applicability in Palestine.[610] Likewise, the Human Rights Council adopted Resolution S-21/1 of 2014 ensuring respect for international law and affirming the applicability of international human rights law and international humanitarian law, customs and treaties in the Occupied Palestinian Territory, including East Jerusalem.[611]

The Statute of the International Court of Justice (ICJ) does not consider the resolutions of the Security Council and the General Assembly as sources of international law. However, the ICJ has cited many resolutions in its Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory, The ICJ called upon the significance of the General Assembly Resolution No. 2645,[612] which reads "The territory of a state shall not be the object of military occupation resulting from the use of force … [and] shall not be the object of acquisition by another State … no territorial acquisition resulting from the threat or use of force shall be recognized as legal."[613] The ICJ has affirmed the applicability of customary international law rules to the Occupied Palestinian Territory. Likewise, the Charter of the United Nations stresses that the principle of self-determination of peoples is universal and applicable to all territories as part of customary international law.[614]

It is essential to note that "the principles as to the use of force incorporated in the Charter reflect customary international law."[615] In a statement

610 The General Assembly Resolution ES-10/14 (2003); The Resolution also recalled further relevant Security Council resolutions, including Resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 267 (1969) of 3 July 1969, 298 (1971) of 25 September 1971, 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979, 465 (1980) of 1 March 1980, 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980, 904 (1994) of 18 March 1994, 1073 (1996) of 28 September 1996, 1397 (2002) of 12 March 2002 and 1515 (2003) of 19 November 2003.

611 United Nations the General Assembly, Resolution S-21/1, adopted by the Human Rights Council on the Twenty-first special session, UN Doc. No. A/HRC/RES/S-21/1 (23 July 2014).

612 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations. Resolution No. 2625 (XXV) adopted by the United Nations General Assembly on a Report from the Sixth Committee (A/8082) in 25th session, UN Doc. No. A/RES/25/2625 (27 October 1970).

613 Id.

614 International Court of Justice, Advisory Opinion (2004), 40.

615 Id., 39.

to the Security Council, on March 12, 2002, the Secretary-General of the United Nations explicitly called on Israel to end its illegal occupation in the Palestinian Territory,[616] and emphasized that customary international law principles, which protect civilians under the control of the occupying power, are applicable to Palestine.[617] Accordingly, Israel, as a state actor and an occupying power in Palestine, must respect the customary humanitarian principles, and must not deviate from its obligations toward Palestinians. It is clear and widely undisputed that Israel is legally obligated to obey and respect the provisions of customary international humanitarian law in the Occupied Territory. In its proclamations, although the Israeli government denied the applicability of the Geneva Conventions, it agreed to apply the humanitarian provisions. Notably, in the Israeli legal system, "the rules of customary international law are absorbed automatically into Israeli law and form a part of it."[618] At the beginning of 1967 until 1979, the Israeli Supreme Court had avoided ruling on the applicability of the Hague Regulations. In the Beit El case in 1978, Justice Vitkon considered the Hague Regulations as non-customary law and inapplicable in the Occupied Territory, but admitted that the status of the Israeli government is that of an occupying power, and examined the petition according to the status of the respondents as occupier.[619] In 1983, the Court explicitly recognized the applicability of the Hague Regulations as customary norms in the Occupied Territory.[620] The applicability of international customary norms has been accepted in many of the Court's rulings. Nevertheless, the Israeli government still insists on applying only the humanitarian provisions.

616 Falk and Weston, "The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada," 129–157.

617 United Nations, Meetings Coverage and Press Releases. Secretary-General Tells Security Council Middle East Crisis Worst in Ten Years. Secretary-General: Press Release, UN, Doc No. SG/SM/8159-SC/7325 (2002).

618 Cohen, "Justice for Occupied Territory? The Israeli High Court of Justice Paradigm," 484.

619 Saliman Ayub v. Minister of Defense & HCJ Jamil Mutawe'a v. Minister of Defense (1979), 5.

620 HCJ 69/81 Abu Atia et all v. Commander of Judea and Samaria et al., 37 (2) P.D 197, 260 (1983); HCJ 393/82 Jam'iat Iscan Al-Ma'almoun Al-Tha'auniya Al-Mahduda Al-Mauliya, Cooperative Association Legally registered at the Judea and Samaria Area Headquarters v. Commander of the IDF Forces in the Area of Judea and Samaria Supreme Planning Committee in the Judea and Samaria Area. Israeli High Court of Justice (25 July 1982, 28 December 1983.

2.3. Prolonged Occupation in the Palestinian Territory and its Effect on the Applicable Law

The term "occupation" is clearly defined in Article 42 of the Hague Regulations of 1907. The article states, "Territory is considered occupied when it is actually placed under the authority of the hostile army; the occupation extends only to the territory where such authority has been established and can be exercised."[621] Nothing in the definition of the Hague Regulations indicates a time frame or regulates the maximal durations of an occupation. None of the humanitarian law principles standardize a time limit for occupation. However, occupation should be temporary; it cannot be long-lasting or unlimited.[622]

The prolonged occupation has been questioned on many occasions by different courts and scholars. Long-term occupation raises an issue related to the duration of occupation, because occupation hitherto "refers to the … word temporary."[623] The occupation, under the provisions of international humanitarian law, shall not be permanent.[624] Therefore, occupation is a short-term, a state of exception, and a reversible incident of hostilities.[625] Some scholars bond prolonged occupation to the duration, and some link it to the absence of hostilities.[626] While the military occupation can unlimitedly continue, the provisions of humanitarian law and their protection remain uninterruptedly applicable and valid at all times. The Fourth Geneva Convention "was designed to protect the civilian population under an essentially temporary occupation… the conventions remain applicable to a large extent

621 The Hague Convention (IV) of 1907, Article 42.

622 International Court of Justice, advisory opinion (2004), Separate Opinion of Judge Elaraby.

623 Vaios Koutroulis, "The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?" International Review of the Red Cross, Vol. 94, No, 885 (Spring 2012): 165–205, 167.

624 International Court of Justice, advisory opinion (2004), Separate Opinion of Judge Elaraby.

625 Falk and Weston, "The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada," 143.

626 For details, see Koutroulis, "The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?" 168; See also Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967," 47.

during the prolonged belligerent occupation phase."[627] The application of the Fourth Geneva Convention "does not depend upon the existence of a state of occupation within the meaning of the Article 42."[628] The Fourth Geneva Convention governs "the relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not."[629] In the case of a belligerent occupation with an unlimited time frame, civilians should be protected. Regardless of the circumstances, belligerent occupation "connotes only a temporary, provisional circumstance and an implicit duty to withdraw once hostilities have been brought to an end."[630] The question of whether Palestinian civilians under belligerent occupation are protected only by the provision of humanitarian law or also by the provisions of international human rights law was previously answered. Yet, it is important to point out the impact of the Israeli prolonged occupation in the Palestinian Territory.

Seemingly, the provisions of the Fourth Geneva Convention did not foresee the possibility of prolonged occupation such as the Israelis in the Palestinian Territory. This situation has not been dealt with adequately in the treaties of the laws of war and occupation. The Israeli occupation is associated with the term "prolonged" because Israel has occupied the Palestinian Territory for more than six decades, and that it is categorized as a prolonged occupation.[631] In fact, it is the single "instance of a long-time Occupying Power openly recognizing that status."[632] The unique situation of the Israeli occupation in Palestine necessitates a discussion of the nature of the occupation. Internationally, the United Nations Security Council has, in Resolution No. 471, called upon the necessity to end the prolonged occupation of the occupied territories by Israel.[633] Regardless of the duration of the occupation, the principles of international law are applicable, and "the law of the belligerent

627 Cohen, Human Rights in the Israeli-Occupied Territories: 1967–1982, 29.

628 The International Committee of the Red Cross, Commentary of 1958, the Geneva Convention (IV) of 1949, Article 6. Available on the database of the Committee.

629 Id.

630 Falk and Weston, "The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada," 142.

631 International Court of Justice, advisory opinion (2004), Separate Opinion of Judge Elaraby.

632 Koutroulis, "The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?" 171.

633 United Nations Security Council Resolution No. 471 (1980); See Also United Nations Security Council Resolution No. 476 (1980) of 30 June 1980 which reads "Recalling the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of

occupation must be fully respected."[634] In such a situation, it is illegal to disregard the provisions of international law of occupation. The fact that the occupation is confronted by resistance cannot be used as a reason for ignoring basic human rights in the occupied territories.[635] In the long-term Israeli occupation, an armed conflict is intertwined with peace times or sometimes an absence of direct military confrontation, in which Universal Declaration of Human Rights and International Convents on Human Rights should be applied along with international humanitarian law. One might argue that the military operations have stopped in Palestine, and that not all articles of the Fourth Geneva Convention are applicable. The Fourth Geneva Convention limits the applicability of its provisions in Article 6, which reads:

> The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2. In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations. In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143… protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.[636]

The Convention limits the general cessation of its applicability in this article. It sets forth the general considerations of the enforcement of the convention. However, this is not the case in the Occupied Palestinian Territory. Israel still militarily controls the West Bank and the Gaza Strip; furthermore, it conducts military operations in these areas.[637] There are no provisions, in the convention, that guarantee further protection to civilians in cases of prolonged

12 August 1949 … 1. Reaffirms the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem."

634 International Court of Justice, advisory opinion (2004), Separate Opinion of Judge Elaraby.

635 Id., 124.

636 The Geneva Convention (IV) of 1949, Article 6.

637 Human Rights Watch, World Report 2017: Events of 2016. (USA: Human Rights Watch, 2017), Israel/Palestine, 347–356.

occupation. Hence, the Convention does not fully recognize the needs of the Palestinian civilian population under the prolonged Israeli occupation and "additional protection and guarantees are required."[638] Prolonged occupation is special, in the sense of Article 6 of the Fourth Geneva Convention; some of the conventions provisions arguably might not be applicable after a year of the end of military operation. In this matter, human rights law along with customary law must fill in the gaps that the Fourth Geneva Convention leaves.[639] The two bodies of international law, the international humanitarian law and international human rights law, are jointly brought together to protect civilians, their property, and their existence. The Commentary to Geneva IV discusses an occupation that lasts more than one year in the absence of hostilities and states that "stringent measures against the civilian population will no longer be justified."[640] Minding the duration of the occupation, it can be understood that after one year, where occupation becomes the norm of the daily life in the Occupied Territory, any strict measures against the civilians are not acceptable in any way. In other words, the situation must be normalized and the full application of the provisions of human rights must be established.

The regime of Israeli occupation in Palestine has become the normality of the region and the main characteristic of the day-to-day life, which affects the basic needs of the Palestinian civilians. It cannot be legally argued that the principles and the protection of international human rights and humanitarian law are not applicable in situations of prolonged occupation. This situation, in fact, necessitates a cumulative application of international humanitarian and human rights laws especially in that prolonged occupation anticipates a worsening and affects the lives of civilians, where they are in the greatest need of protection. Therefore, the protection of civilian Palestinians under the Israeli long-term occupation should be special and more intensified. The nature of the Israeli occupation has created a territorial, economic, social, and political linkage between Israel and the Palestinian Territory that supports "the attribution of human rights responsibilities to Israel."[641] As long as the prolonged

638 Ben-Naftali and Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories," 97.

639 Cohen, Human Rights in the Israeli-Occupied Territories: 1967–1982, xvii.

640 Pictet, Commentary: IV Geneva Convention, 63.

641 Ben-Naftali and Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories," 97.

Israeli occupation creates an exceptional situation that requires special protection for the Palestinians, there are no justifications to derogate from international obligations or to commit any violations. In such a situation, both the law of human rights and humanitarian law might not be sufficient, and do not provide the needed protection for the people. Therefore, new provisions and regulations must be introduced, and special enforcement mechanisms must be designed for Palestinians under the prolonged Israeli occupation.

As the situation in the Occupied Territory is complex, not only the aforementioned international law principles are applicable, the domestic laws and regulations of the occupying power apply in certain situations and the laws of the occupied people apply in others. Israeli laws and military regulations and the Palestinian domestic laws are also applied in Palestine. Therefore, it is proper to discuss these laws and their effects on the Palestinians.

3. Domestic Law

Although the relationship between international law and domestic law constitutes a separate study, it is essential to briefly point out how they reciprocally influence one another. International human rights and humanitarian laws refer to the responsibility of state parties to act in conformity with their principles. Domestic laws must be enacted, read, and implemented in light of international law principles.[642] States integrate international law principles according to their domestic system. Whether monolithic or dualistic, the treaty-making process and ratification of international treaties is a national decision. This process is not examined in this research, as it constitutes another path of study.[643] The subject matter here is that the states must fulfill their obligations under customary law and ratified international treaties. Compliance with the provisions of international law not only relies on the "enforcement mechanisms available at the international level, but rather on the resolve of domestic legal operators… to ensure compliance with international

642 Dinah Sheltoned, International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion. (Oxford: Oxford University Press, 2011), 1.

643 For a good understanding regarding this topic, see Davíd Thór Björgvinsson, the Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis (UK: Edward Elgar Publishing Limited, 2015).

norms."[644] The Israeli and Palestinian laws and regulations, in all circumstance, must not contradict the principles of international human rights and humanitarian laws. The enforcement of these laws is a duty of the Palestinian and Israeli governments and their judiciaries. International human rights and humanitarian treaties influence both the Israeli and the Palestinian national legislative to the extent of the parliamentary and presidential powers, judicial, legal, and executive systems.

In this section, the domestic laws, which affect the Palestinians' rights under the provisions of human rights and humanitarian laws are deliberated, including the Palestinian Basic Law, the Constitutional Court, and the High Court of Justice along with the role of the Israeli law, the state of emergency, the military orders, and the Israeli Supreme Court.

3.1. Palestinian Law

The purpose of studying the applicable Palestinian laws is to highlight the obligations of the government under domestic regulations toward its people. It also identifies their conformity in light of the international human rights norms. This will later assist in determining the legality of the practices of the Palestinian government in the areas under its control.

3.1.1. The Palestinian Authority and the Oslo Accords

The Oslo Accords are the main agreements that regulate the relationship between the Israeli government and the Palestinian Authority.[645] Recalling the previous discussion, in the Declaration of Principles on Interim Self-Government Arrangements (Oslo I) of 1993 and the Interim Arrangement on the West Bank and the Gaza Strip (Oslo II) of 1995, Israel transferred, in some areas, the power of its military and civil administration to the Palestinian Authority in which Palestinians democratically practice self-governance.[646] Even under the effects of the Oslo Accords, Israel has maintained authority regarding border control, security, economy, and trade.[647] Israel is not responsible in cases of abuses or violations against the Palestinian inhabitants

644 Benedetto Confroti, International Law and the Role of Domestic Legal Systems, trans. René Provost (The Netherlands, Martinus Nijhoff Publishers, 1993), 8–9.

645 See Chapter II.

646 The Declaration of Principles on Interim Self-Government Arrangements of 1993 (Oslo I) and the Interim Arrangement on the West Bank and the Gaza Strip of 1995 (Oslo II).

647 Id.

committed by the Palestinian police force or any other Palestinian entity.[648] It should be noted that the Palestinian government is responsible in such cases of human rights violations.[649]

The defined interim period in the Declaration of Principles should not exceed five years;[650] and after this time, both parties are freed from their obligations. In fact, after this transitional period, the Palestinian political reform "could take a place outside the context of the relations with Israel."[651] Although the time limit of the Oslo Accords passed a long time ago, both signing parties are still implementing them de facto. As mentioned earlier, the establishment of the Palestinian Authority (PA) has created three bodies: the legislative, the executive, and the judicial authorities. These bodies include the Legislative Council, police, ministries, and courts.[652] The Legislative Council, as the legislative body of the PA, enacted a number of laws including the Palestinian Basic Law, which guaranteed some fundamental human rights.[653]

3.1.2. The Palestinian Constitutional Law

The early history of the Palestinian constitutional law began during the Ottoman period. As Palestine was part of the Ottoman Empire, the legal system and constitution were greatly influenced by the Ottoman laws.[654] Before the Palestinian Basic Law entered into force, there were two valid laws in the West Bank and the Gaza Strip. The Jordanian Constitution of 1952 was

648 John Quigley, "The PLO-Israeli Interim Arrangements and the Geneva Civilians Convention," International Studies in Human Rights, Vol. 52 (1997): 25–46; see also Stephen Bowen, ed. Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories (The Netherlands: Kluwer Law International, 1997), 30.

649 See the mentioned human rights instruments, which were signed by the Palestinian Authority in 2014.

650 The Declaration of Principles on Interim Self-Government Arrangements of 1993 (Oslo I), Article (1).

651 Brown, Palestinian Politics after the Oslo Accords: Resuming Arab Palestine, 1.

652 See Chapter II on the legal background for further details

653 Most of the laws were enacted after 2000, such as the Basic Law in 2002, the Law of the Judicial Authority No. (15) of 2005, the Law of Civil and Commercial Procedures No. 2 of 2001, the Law of Penal Procedures Law No. (3) of 2001, the Law of Formation of Civil Courts No. (5) of 2001, the Law of Evidence in Civil and Commercial Matters No. (4) of 2001, the Law of Execution No. (23) of 2005 and the Law of the Supreme Constitutional Court No. (3) 2006 (17 February 2006), Palestine Gazette, Issue No. 62 (25 March 2006).

654 Anis Kassim, "Legal Systems and Development in Palestine," The Palestine Yearbook of International Law, Vol. 1, Issue 1(1984): 19–35, 19.

enforced in the West Bank and the Constitutional Regulation of 1962 was enforced in the Gaza Strip.[655]

After the Oslo Accords, on October 2, 1997, the Legislative Council approved the third edition of the Basic Law.[656] The president of the Palestinian Authority signed the second edition ignoring the recommendations of the Legislative Council and the law was published in the Official Gazette in the Mumtaz edition on July 7, 2002.[657] Since the Palestinian Legislative Council passed the Basic Law in 2002, the latter was applied in the territories under the control of the Palestinian Authority.[658] The Basic Law is limited in time, because it serves as a temporary constitution for Palestinians until the establishment of a sovereign Palestinian state.[659] In fact, the Basic Law clarifies this by stating that "the enactment of this temporary Basic Law for a transitional and interim period constitutes a fundamental step toward the realization of the firm national and historical rights of the Arab Palestinian people."[660] The Palestinian Authority has taken initiatives, and has engaged in a significant process of writing a draft of Palestinian constitutional law, but this draft was not passed by the Palestinian Parliament until this time.[661]

The Palestinian Basic Law has been amended twice, in 2003 and again in 2005. The First Amendment of 2003 introduced a designation of Prime Minister.[662] While Article 45 obligates the president of the National Authority to appoint the Prime Minister, who is in sequence obliged to establish the government,[663] Article 68 specifies the powers of the Prime Minister.[664] The Second Amendment of 2005 confirmed the new election law and the presi-

655 See the Constitution of the Hashemite Kingdom of Jordan of 1952 and the Proclamation of the Constitutional Regime of Gaza Strip of 1962.

656 The Basic Law documents are available to the writer by the Legislative Council in Ramallah. Copied from the council archive in Arabic language.

657 The correspondences documents collected by the researcher from the Palestinian legislative Council.

658 The Palestinian Basic Law, Amended 18 March 2003, Palestine Gazette, Mumtaz 2 (2003), the Preamble.

659 The Amended Palestinian Basic Law of 2003, the Preamble.

660 Id.

661 The Basic Law documents are available to the writer by the Legislative Council in Ramallah. Copied from the council archive in the Arabic language.

662 The Amended Palestinian Basic Law of 2003, Article 45.

663 Id.

664 Id., 68.

dency regulations.[665] For instance, Article 36 changed the term of the presidency from an interim phase to a four-year term for no more than two consecutive terms.[666] In other words, the two amendments were political and have not affected the provisions concerning human rights. The chapters of the Basic Law include modern constitutional rules in order to achieve justice and equality and ensure the rule of law. The political democratic system in Palestine is built on the separation of powers, where the executive, legislative, and judicial authorities are separate and independent, but have an integrative relationship of checks and balances.[667] The Palestinian judicial bodies, courts, the executive authorities, and the Legislative Council are obligated to respect the articles and principles set forth in the Basic Law. Namely, human rights provisions must be respected by these bodies with no exceptions. The Judicial Authority and the judicial system are regulated in the Basic Law.

Given the importance of protecting human rights for all, the Palestinian Basic Law guarantees fundamental rights in its Chapter Two: Public Rights and Liberties (Articles 9–33).[668] It protects most fundamental human rights. Article 10 obliges, without delay, the Palestinian National Authority to sign and ratify reginal and international human rights instruments.[669] It generally states that human rights and liberties should be respected and protected.[670] However, the Article does not mention that the domestic laws should be regulated in conformity with international law norms and standards. In accordance with Article 10, the Palestinian Authority has already ratified eight treaties, including seven of the nine core human rights treaties.[671] Articles (9–33)

665 The Palestinian Basic Law of 2005 Concerning the Amendment of Some of the Provision of the Amended Basic Law of 2003, Palestine Gazette, Issue No. 57 (18 August 2005).

666 Id., Article 36.

667 The Amended Palestinian Basic Law of 2003, see also Coalition for Accountability and Integrity-Aman, Report No. 6: Problem in Separation of Powers in the Palestinian Political System, text in Arabic (February 2007), 2.

668 The Amended Palestinian Basic Law of 2003, Title two: Public Rights and Liberties.

669 Id., Article 10.

670 Id.

671 The International Covenant on Civil and Political Rights (ICCPR), The International Covenant on Economic, Social and Cultural Rights (ICESCR), The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), The Convention on the Rights of Persons with Disabilities (CRPD), The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), The Convention on the Rights of the Child (CRC), and The Optional Protocol to the

state the most important rights, which are constitutionally protected. Article 9 guarantees the right to equality for all Palestinians without any discrimination.[672] Articles 11–33 guarantee the freedom of belief, the freedom of speech, the freedom of movement, the freedom of economic activity, the right to proper housing, the right to education, the right to work, the right to participate in political life, children's rights, the right to a clean environment, prohibition of torture, prevention of unlawful arrest, and proscription of collective punishment as fundamental guaranteed basic rights.[673] In addition, the constitutional provisions contain human rights guarantees. There are particular articles in the Oslo Accord II that minimize the possibility for Palestinians to enjoy fundamental human rights. For example, the Accord grants Israel the powers to control the borders, which basically means that Israel controls and restricts the movement of the Palestinians.[674]

Palestinian Basic Law is in force in the Palestinian Territory, which is under the control of the Palestinian Authority. The Amended Basic Law of 2003 affirmed its applicability to the Arab Palestinian people in the land of Palestine.[675] This means that Israeli settlers, who are living in the West Bank, are not entitled to the provisions of the Palestinian laws, but rather, to the Israeli laws.[676] Therefore, the Palestinian law is only applicable to Palestinians in the Territory. Additionally, the Palestinian courts have jurisdiction over Palestinians only in the area under its control. It is also explicit in the Law of Civil and Commercial Procedures No. (2) that all Palestinian courts exercise their jurisdiction only over Palestinians in the Palestinian Territory.[677] That is to say, the jurisdiction of the Palestinian courts extends only to Palestinians in areas A and B, while area C remains under the jurisdiction of the Israeli courts. It is important to note that limited jurisdiction of the Palestinian courts might create a gap in enforcing human rights and upholding the rule of law.

Convention on the Rights of the Child on the Involvement of Children in armed conflict. For more information, see state parties of international treaties, the United Nations High Commissioner for Human Rights (UNHCHR).

672 The Amended Palestinian Basic Law of 2003, Article 9.

673 Id., Articles 11–33.

674 The Declaration of Principles on Interim Self-Government Arrangements of 1995 (Oslo II), Article XII.

675 Id. Preamble.

676 See Chapter II: Historical Background.

677 The Law of Civil and Commercial Procedures No. 2 of 2001, Part 14.

3.1.3. The Palestinian Judiciary: The High Court of Justice and the Constitutional Court

In Articles 97–109, the Palestinian Basic Law organizes the Palestinian judicial system, where the judicial authority is independent, and no other authority is permitted to interfere in its work.[678] The judges are also independent; their appointment, transfer, and promotion are processed according to the Judicial Authority Law.[679] According to Article 100, a high judicial council is established, and this council has to be consulted in drafting any laws, concerning the Judicial Authority or the Public Prosecution.[680] Furthermore, Administrative Courts are created to rule in administrative disputes and a Constitutional Court must also be established.[681] These two courts were not established, in 2002, as separated entities; instead, the High Court of Justice had temporarily resumed all duties of both the constitutional and administrative courts.[682] Until 2016, the Palestinian High Court of Justice exercised its jurisdiction over administrative disputes as well as constitutional matters.[683] On April 3, 2016, the first Palestinian Constitutional Court was established by a presidential decree of the President of the Palestinian Authority.[684] The role of the constitutional court is to consider the constitutionality of laws, to interpret the Basic Law, and to rule in jurisdictional disputes, which might arise between judicial entities.[685] The effectiveness of both courts will be deliberated in Chapter VII. Palestinian law permits the executive branch of the Palestinian Authority, the President, to appoint, promote, and dismiss the judges, especially the Chief of the High Judicial Council, which may interfere in the independency of the judiciary in Palestine.[686] Most powers are concentrated in the hands of the President, and thus interfere in the independency, neutrality, and impartiality of the judiciary. Notably, the procedures of appointing and promoting judges should be in accordance with the law considering the legal competence of the

678 The Amended Palestinian Basic Law of 2003, Article 98.

679 Id., Article 99.

680 Id., Article 100.

681 Id., Article 102 and 103.

682 Id.

683 Administrative disputes are regulated by the administration law. In general, these disputes are filed whereby one party is a governmental entity and/or municipality, as they are in authority in exercising their tasks toward the public.

684 Press release, Al-Hayette Al-Jdedah, A Presidential Decree to Establish the First Constitutional Court in Palestine. Published on April 3, 2016 at 20:17. (Text in Arabic).

685 Amended Palestinian Basic Law of 2003, Article 103.

686 The Law of the Supreme Constitutional Court No. 3 of 2006.

appointed judges without discrimination of their political affiliation.[687] These discussions will also be examined later.

Palestinian laws that affect the Palestinians in the Occupied Territories have been discussed. The laws that affect the human rights of the Palestinians in the Occupied Territory are not only international and Palestinian laws. Most of these laws and regulations are actually Israeli, applied by Israel as an occupying power. These laws are discussed below.

3.2. Israeli Law

The present Israeli legal system, as discussed earlier, was influenced by the Ottoman, French, and English laws. The Palestine "Order-in-Council"[688] during the British Mandate formed the basis of the legal and judicial system in Palestine. In 1980, the Israeli courts were forced to obey Article 46 of the Palestine Order-in-Council[689] which obligated civil courts to apply the Ottoman Law.[690] Normally, the jurisdiction of domestic laws does not extend beyond the state sovereignty.[691] Regarding Israeli occupation, Professor Yael

687 The Palestinian Center for the Independence of the Judiciary and the Legal Profession – MUSAWA, The Second Legal Monitor: Report for the Situation of Justice in Palestine (Ramallah, Alpha International for Research, Informatics and Polling, April 2012), 87.

688 The Order-in-Council: a body which was established by the British Mandate in Palestine to regulate the area under the supervision of the British governor. For more information, see Chapter II.

689 The Palestine Order-in-Council of 1922, Article (46) "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary."

690 Navot, the Constitutional Law of Israel, 21.

691 Malcolm N. Shaw, International Law, 6th ed. (New York: Cambridge University Press, 2008), 487.

Ronen argues that the extraterritorial application of the Israel domestic laws to the Occupied Territory is not prohibited.[692] However, the Fourth Geneva Convention is explicit in prohibiting the occupying power from changing the valid laws in the Occupied Territory.[693] In the Occupied Palestinian Territory, the Israeli government assumed that it was rational to implement the Israeli law on Palestinians.[694] It should be noted that the reliance on the Basic Law "might not be very significant since… the limitations on rights in the West Bank … are not characteristically entrenched in primary legislation, [n]evertheless, interpreting the Basic Law as applicable extraterritorially may… entrench Israel's international obligations and thereby enable their implementation."[695] A set of Israeli laws was applied on Palestinians in the Occupied Territory. The Israeli Knesset, as the legislative body and the constituent authority of the Israeli government, also played a role and contributed to the formation of regulations, not only in Israel but also in the Occupied Palestinian Territory.[696] This meant that it had the powers to prove, enact, and amend laws. Under the Basic Law, the Knesset consisted of 120 members, elected directly by the public for four years.[697] The Knesset passed its decisions by the majority of the participants in the voting process.[698] Therefore, the voting in a session was conducted despite the number of participants, and passed or enacted laws in accordance with their voting. The Knesset passed laws that were used in the Occupied Territory, especially laws regarding the confiscation of land from the Israeli settlements. Some of these laws will be discussed later.

3.2.1. The Israeli Constitutional Law

Israel does not have an official document known as a constitution; rather, it has basic laws concerning different issues.[699] The Basic Law has a superior normative status in Israel.[700] Since 1958, the Israeli Knesset enacted 11 basic laws on

692 Yael Ronen, "Applicability of Basic Law: Human Dignity and Freedom in the West Bank," Israel Law Review, Vol. 46, Issue No. 1 (2013): 135–165, 136.
693 The Geneva Convention VI, Articles 64 and 67.
694 Id., 137.
695 Id., 143.
696 Suzie Navot, The Constitution of Israel: A Contextual Analysis. (Oxford: Hart Publishing, 2014), 94.
697 The Israeli Basic Law: The Knesset of 1958, Articles 3, 4, and 8.
698 Id., Article 25.
699 Navot, the Constitutional Law of Israel, 35.
700 Id., 208.

various subjects, and these laws serve as a constitution.[701] For example, Basic Law: The Judiciary (1984), Basic Law: Human Dignity and Liberty (1992), and Basic Law: Freedom of Occupation (1994) are found in separate documents. The constitutional protection of human rights, primarily, appeared after the enactment the Basic Law: Human Dignity and Liberty in 1992 and the Basic Law: Freedom of Occupation in 1994. The adoption of both these basic laws prefigured an essential change in the status of human rights in Israel, lifted these rights to a constitutional level, and granted Israel a Constitutional Bill of Rights.[702] The Basic Law: Freedom of Occupation guarantees all Israel nationals or residents the right to engage in any occupation, profession or trade.[703] The Basic Law: Human Dignity and Liberty protects everyone's life, body, dignity, personal liberty, private property, privacy, and free movement.[704] It must be noted that the Basic Law: Human Dignity and Liberty does not include other important rights such as the right to equality, the right to freedom of expression, or the right to freedom of religion and social rights.[705]

The Israeli Supreme Court has had an important role in interpreting laws and their validity; its jurisprudence exceeds the extraterritoriality of the Israeli laws. The Supreme Court's stand on the applicability of constitutional rights in the West Bank and the Gaza Strip is inconsistent. In some of its rulings, the Court has concluded that the Gaza Strip and the West Bank, including the Israeli settlements, are controlled by the law of belligerent occupation where the Israeli law does not apply in these areas, and the military commander has the authority to ensure public order and safety to every person present in the area, which is not applicable only to protected persons, but also to Israeli settlers.[706] This, in fact, grants the unprotected persons extra protection, to

701 Id., 35.

702 CA 6821/93 Bank Mizrahi v. Migdal Cooperative Village. The Supreme Court Sitting as the Court of Civil Appeals (9 November 1995), Justice A. Barak, 352.

703 The Basic Law: Freedom of Occupation of 1994, passed by the Knesset on the 26th Adar, 5754 (9th March 1994) and published in Sefer Ha-Chukkim No. 1454 of the 27th Adar, 5754 (10th March 1994) 90, Article 3.

704 The Israeli Basic Law: Human Dignity and Freedom (5752-1992), Passed by the Knesset on 12 Adar 5752 (17 March 1992) and amended on 21 Adar, 5754 (9 March 1994). Amended law published in Sefer Ha-Chukkim No. 1454 of the 27th Adar 5754 (10th March 1994).

705 Navot, the Constitutional Law of Israel, 202.

706 *See* HCJ 351/80 *The Jerusalem District Electric Company v. The Minister of Energy and Infrastructure*. The Israeli High Court of Justice, 35(2) P.D. 673, 690; Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF and other (1983), 802; Beit Sourik Village Council v. The Government of Israel and Commander of the IDF in the West Bank (2004), 27.

which they are not entitled under the law of occupation. However, in the Mara'abe case, the Court ruled that "the Israelis living in the area are Israeli citizens… the constitutional rights which our Basic Laws and our common law grant to every person in Israel are also granted to Israelis who are located in territory under belligerent occupation which is under Israeli control."[707] This ruling granted Israeli settlers in the Occupied Territory constitutional protection, but has excluded the Palestinians who are living under the same military commander's control.

Israeli settlers, in fact, have always been de facto entitled to the protection and applicability of the Israeli laws.[708] The Israeli Supreme Court has confirmed that the laws apply in the West Bank and the Gaza Strip, but are meant to protect only Israelis. It stated that "many Israelis live, work, travel in [the West Bank], and have… relations with the local [Palestinian] residents… [this] involves both Israeli residents and local residents … [and] that the Israeli law shall be applied."[709] Eventually, the Israeli Knesset and the government interfered and adopted two systems to apply Israeli laws exclusively in the Jewish settlements. These systems involved criminal law, fiscal law, and elections of the Knesset. They further deemed that the military commanders in the Occupied Territory were obligated to enforce such laws in the Jewish settlements only.[710] The main reasons for such systems were to integrate the Israeli settlements in Israel, as well as to segregate the Palestinian population in the Occupied Territory.[711] Military orders were only imposed on Palestinians, while Israelis in the Occupied Territory enjoyed the protection of Israeli laws.[712]

The Israeli Basic Law: Human Dignity and Freedom are not applied explicitly to Palestinians living in the areas controlled by the Israeli military commander. Even though the Israeli Supreme Court cited the Basic Law on many occasions as part of the applicable principles,[713] in Mara'abe v. the Prime

707 HCJ 7957/04 Zahrana Mara'abe and 6 others v. the Prime Minister of Israel and 4 others, The Israeli High Court of Justice, (June 21, 2005), 21.

708 Shehadeh, Occupier's Law: Israel and the West Bank, 64–65.

709 National Insurance Institution v. Abu- Ata, 143.

710 Eyal Benvenisti, The International Law of Occupation. (New Jersey: Princeton University Press, 1992), 234–235.

711 Id., 233–239.

712 Shehadeh, Occupier's Law: Israel and the West Bank, 64–65.

713 Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005), 15.

Minister of Israel, it stated that "the Israeli law does not apply [referring to the Palestinian occupied territory]."[714] The Court did not clearly determine the applicability of the Basic Law. It stated, "We are not called upon to decide the question whether and to what extent the principles of Israeli constitutional law and the international human rights conventions apply in Judaea and Samaria… It is sufficient for us to say that within the framework of the duty of the military commander to exercise his discretion reasonably, he must also take into account… the interests and rights of the local population."[715] At the same time, the Court invoked the constitutional principles enshrined in Article 8 of the Basic Law: Human Dignity and Liberties, which considered these the basic values of the Israeli laws that applied to all actions of the Israeli administrative authorities.[716] Additionally, it "applies to the use of the military commander's authority pursuant to the law of belligerent occupation."[717] It is controversial to apply the laws of the occupying power on the occupied people. There is no representation, whatsoever, on behalf of the Palestinians in the Knesset, where Palestinians do not participate in the elections of the Knesset, and only Israeli citizens have the right to vote.[718] Thus, the passed laws would only serve to benefit Israelis, and there is a risk of deliberately applying laws that are harmful to Palestinians, as well as their protected rights and freedoms.

The indirect applicability of domestic Israeli laws to Palestinians might benefit the Palestinians petitioners, who had been harmed by Israelis, Israeli commanders, and government personnel.[719] Palestinians must not depend directly on the application of Israeli Basic Law, or any other laws. However, an indirect applicability exclusively for the benefit of Palestinians might be considered. In addition, the applicability of the Israeli constitutional norms to the Palestinians in the Occupied Territory might not grant Palestinians additional protection, but it would constitutionally guard the conformity of the applicable domestic regulations and laws, as well as the military orders with international human rights and humanitarian laws, such as the emergency regulations and military orders.

714 Zahrana Mara'abe v. the Prime Minister of Israel (2005), 14.
715 Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005), 15.
716 Beit Sourik Village Council v. The Government of Israel and Commander of the IDF in the West Bank (2004), 32.
717 Id.
718 The Israeli Basic Law: The Knesset of 1958, Article 5.
719 Benvenisti, The International Law of Occupation, 2nd ed., 232.

3.2.2. Emergency Regulations

Since its establishment in 1948, Israel declared a state of emergency, and has considered itself to be under a continuous state of emergency.[720] The Israeli government, incorrectly, deemed these regulations to be in force at the time of its establishment because the regulations were revoked by the British Mandate.[721] Yet, Israel has considered the British Defence (Emergency) Regulations of 1945 as a "primary Mandatory legislation, which upon the establishment of the State of Israel became – by virtue of section 11 of the Government Administration and Law Ordinance, 5708-1948 – incorporated into Israeli laws."[722]

The Regulations of 1945 were used against members of Jewish extremist groups, and against the Palestinian population who remained in the announced state and were placed under military control.[723] The Israel Provisional Council passed the Law and Administration Ordinance which states, "The law which existed in Palestine on the 5th Iyar, 5708 (14 May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws."[724] The Ordinance did not explicitly name the Defence Regulations of 1945. However, the Emergency was announced in accordance with the Law and Administration of 1948, Article 9 states:

> (9)(a) If the Provisional Council of State deems it expedient so to do, it may declare that a state of emergency exists in the State, and upon such declaration being published in the Official Gazette, the Provisional Government may authorise the Prime Minister or any other Minister to make such emergency regulations as may seem to him expedient in the interests of the defence of the State, public security and the maintenance of supplies and essential services. (b) An emergency regulation may alter any law, suspend its effect or modify it, and may also impose or

720 John Quigley, "Israel's Forty-five Year Emergency: Are There Time Limits to Derogation from Human Rights Obligations?" Michigan Journal of International Law, Vol. 15 (Winter 1994):491–518, 493.

721 John Quigley, Legal Consequences of the Demolition of Houses by Israel in the West Bank and Gaza Strip (The West Bank, Al-Haq, 1993), 2.

722 HCJ 5211/04 Mordechai Vanunu v. Head of the Home Front Command. The Israeli High Court of Justice (26 July 2004), 6.

723 Moffett, Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defense (Regulations), 1945, in the Occupied Territories, 17–18.

724 Law and Administration Ordinance No. 1 of 5708-1948 (19 May 1948), Published in the Official Gazette, No. 2 of the 12th Iyar, 5708 (21 May 1948), Article 11.

> increase taxes or other obligatory payments. (c) An emergency regulation shall expire three months after it is made, unless it is extended, or revoked at an earlier date, by an Ordinance of the Provisional Council of State, or revoked by the regulation-making authority.[725]

During the state of emergency, according to the stated article, the Israeli government has the power to alter or suspend any laws, where the period of the emergency shall not exceed more than three months.[726] In the Basic Law: The Government (2001), the proclamation of emergency must not exceed one year.[727] In all circumstances, the maximum period of emergency is one year. Several attempts were conducted to dismantle the regulations, but all were in vain. In 1949, the government itself introduced a bill to abolish the application of the regulations, but the Knesset did not pass it.[728] In 1951, the Israeli Knesset declared that the Defence Regulations opposed the basic principles of democracy, and directed the Justice Committee to draft a bill for their repeal, but the Regulations were not abolished because it was considered the legal basis for military control over the Palestinian population in Israel.[729] Simply put, all attempts to abolish the Regulations of 1945 have failed.

On October 3, 1991, in its declaration to the United Nations upon its ratification of the International Covenant on Civil and Political Rights (ICCPR), Israel derogated from its obligations under the named covenant.[730] Israel announced that:

> Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within

725 Id., Article 9.

726 Id.

727 Israeli Basic Law: The Government (2001). Article 38(b).

728 Moffett, Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defense (Regulations), 1945, in the Occupied Territories, 19.

729 See B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Legal Documents, Emergency Regulations.

730 Emergency clause was discussed previously in this chapter under Subsection: 2.1.1 Human Rights Conventions.

> the meaning of article 4 (1) of the Covenant. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.[731]

These provisions raise a question concerning the legality of the 69-year state of emergency in Israel under domestic and international laws. This study does not scrutinize or answer this question in detail.[732] The formal requirements of Article 4 of the ICCPR demand a situation that threatens the life of the nation because not every disturbance qualifies to announce the state of emergency, and the measures must be necessary and "strictly required by the exigencies of the situation."[733] The UN Human Rights Council affirmed that the Covenant, in cases of conflict, requires that "measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation… [where] the Committee has expressed its concern over States parties [including Israel] that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4."[734]

Israel has not proven that its permanent emergency constitutes a real public emergency that threatens the life of its nation.[735] Given the language used, Israel claims that it has been under a continuous attack that endangers the survival of the people. This is not the case, because in all wars in which Israel has been involved, it was the aggressor and the invader of other territories.[736]

731 Declaration of Israel at the United Nations High Committee for Human Rights, declarations and reservations as of August 8, 2000.

732 For information on the subject, see Neocleous, "The Problem with Normality: Taking Exception to Permanent Emergency"; and Quigley, "Israel's Forty-five Year Emergency: Are there Time Limits to Derogation from Human Rights Obligations?" 491–518.

733 The International Covenant on Civil and Political Rights of 1966, Article 4; The UN Human Rights Committee (HRC), General Comment No. 29 (2001) on Article *4 of Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11, § 5.

734 Id., 3.

735 Human Rights Committee, Concluding Observations: Israel (18 August 1998), CCPR/C/79/Add. 93, para 11.

736 Quigley, "Israel's Forty-five Year Emergency: Are there Time Limits to Derogation from Human Rights Obligations?" 508–509.

This is not to say that these wars did not qualify to announce a state of emergency, but to point out that these wars were temporary. The Israeli Supreme Court ruled in a petition, which sought for an annulment of the perpetual state of emergency. The petitioners argued that emergency posed a threat to civil rights, permitted the enactment of laws and regulations that imposed restrictions on freedoms of expression and of assembly, and violated individual property rights as the present circumstances were no longer vital.[737] Thirteen years after the petition, the Court stated:

> Israel is a normal country that isn't normal; it is normal in that it is an active democracy in which fundamental rights including free elections, freedom of expression, and independence of courts and legal advisers, are safeguarded. It essentially fulfills its mandate as a Jewish and democratic state. [Israel] is not normal in that its existential threats have yet to be quelled, the only democratic country in that position today; and has not properly settled its relations with its neighboring states, aside from peace accords with Egypt and Jordan and certain agreements with the Palestinians; and the battle against terror continues, and apparently will continue for the foreseeable future. . . The 'mass of normality' is sufficient to request that emergency legislation will be suited to the normal face and not normal face as one. This is an attainable goal; not in the clouds.[738]

Whether the Israeli everlasting emergency is legal or not, this study will examine the consequences of the state of emergency on the application of human rights, because the perpetual Israeli state of emergency has greatly affected the human rights of the Palestinians. The permanent emergency has become the norm of day-to-day life rather than the exception. The provisions of human rights must be protected in times of emergency because exceptions to the laws should not become the continuous practiced policies. According to the previous discussion of states of emergency under human rights law and its limitations, in this study, it is argued that limitations of the laws are only temporarily applicable and in a very narrow context. The permanent emergency situation in Israel and the recognition of the Court that Israel is living normally under such an exception actually affirms the illegality of the derogation of some human rights rather than others. There is no pick and choose

737 The Association for Civil Rights in Israel, Supreme Court Rejects to End Continual State of Emergency, (May 8, 2012). Seen on 15 August 2017, at 18:20.

738 HCJ 3091/99, the Association for Civil Rights in Israel v. The Knesset and the Government of Israel. The Israeli High Court of Justice (8 May 2012), 19.

in protecting human rights. If some fundamental rights, such as free elections and freedom of expression, are not limited due to the normality of the situation of emergency, then other fundamental rights, such as protection of private property and free movement, must not be limited. A permanent state of emergency cannot fall under the definition of emergency; neither can it justify the actions of the state.[739] Therefore, if emergency is not temporary, then there should be no suspension of laws or international obligations. The impact of a permanent state of emergency legislation "on those who are thereby empowered… this exceptional power as their inherited, indeed, natural prerogative and cease to look for alternative means; the society at large may come to view the consequential derogation from human rights as the norm rather than the exception, and, its democratic sensibility thus numb, fail to check the powers exercised by the administration."[740] In such a situation, the society, which is under the state of perpetual emergency, needs the protection of human rights provisions the most, because violations are very likely to occur or be committed by a state.

The discussion in the previous chapter pointed out that the British Mandate enacted a set of laws, including the Emergency Powers (Defence) Act of 1939 and the Defence (Emergency) Regulations of 1945. In addition, it highlighted that Israel kept the existing laws. Article 2 of the Law and Administration Proclamation of 1967 states, "The law that existed in the region on June 7, 1967 will remain in effect, to the extent that it contains no contradiction to this proclamation or to any proclamation or order issued by me [the military commander]."[741] Nothing in the proclamation explicitly mentions these regulations. Since 1967, Israel has reinforced the regulations of 1945 in the West Bank and the Gaza Strip, and re-announced their enforcement in Israel itself.[742] Israel has carried out the laws of the British Mandate in the Occupied

739 Hevener and Moshe, "General Principles of Law and the UN Covenant on Civil and Political Rights," 601.

740 Orna Ben-Naftali and Sean S. Gleichgevitch, Missing in Legal Action: Lebanese Hostages in Israel. Harvard International Law Journal, Vol. 41, Number 1, Winter 2000, 185–252, 220.

741 Proclamation No. 2 Proclamation Regarding Regulation of Administration and Law – the West Bank.

742 Quigley, "Israel's Forty-five Year Emergency: Are there Time Limits to Derogation from Human Rights Obligations?" 508-495.

Territory without any formal suspension of constitutional provisions.[743] Restrictions on movement, curfews, confiscation and expropriation of private property, administrative detention and arrest, deportation, house demolishing, summary military trials, trial of civilians for security offenses in the military courts, are all based on the Regulations of 1945.[744]

The legality of Israel's revival of the Defence Regulations in the Occupied Territory is questionable. Israel proclaims that first, the Defence Regulations were never effectively revoked and persist on being part of the local law in the Occupied Territory. Second, the measures that have been carried out under the conditions of these regulations do not violate the provisions of the applicable international laws.[745] There are a very few academics who have challenged the Israeli claims. In response to these claims, the question as to whether the British Defence Regulations were enforced and part of the laws in the West Bank and the Gaza Strip must be discussed. As previously mentioned, two days before the British withdrawal from Palestine, the King of England exercised his powers under the Foreign Jurisdiction Act of 1890, enacted the Palestine (Revocations) Order-in-Council of 1948, and revoked all Orders-in-Council until the last one, including the Palestine (Defence) Order-in-Council of 1937, under which the Defence (Emergency) Regulations of 1945 were enacted.[746] The revocation order went into effect on May 14, 1948.[747] This was in accordance with the Statutory Instruments Act of 1946,[748] as all such statutory

743 Joan Fitzpatrick, Human Right in Crisis: The International System for Protecting Rights during States of Emergency. Vol. 19, Procedural Aspects of International Law Series (Philadelphia: University of Pennsylvania Press, 1994), 6.

744 The Defence (Emergency) Regulation of 1945.

745 Moffett, Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defense (Regulations), 1945, in the Occupied Territories, 1.

746 See the Palestine (Revocations) Order-in-Council, 1948, No. 1004. Vol. I (in three parts).

747 See the Palestine (Revocations) Order-in-Council, 1948, No. 1004.

748 See Statutory Instruments Act, 1946. 9 & 10 GEO. 6 Chapter 36: Arrangement of Sections. Article 3: Supplementary provisions as to publication provides, (1) Regulations made for the purposes of this Act shall make provision for the publication by His Majesty's Stationery Office of lists showing the date upon which every statutory instrument printed and sold by or under the authority of the King's printer of Acts of Parliament was first issued by or under the authority of [that office; and in any legal proceedings a copy of any list so published purporting to bear the imprint of the King's printer] shall be received in evidence as a true copy, and an entry therein shall be conclusive evidence of the date on which any statutory instrument was first issued by or under the authority of His Majesty's Stationery Office. Article 9: Powers to extend Act to other orders, etc. and

orders-in-council issued by the King were required to be published in the British Statutory Instruments compiled under the authority of His Majesty's Stationery Office, not in the *Palestine Gazette* where the High Commissioner publishes his orders.[749] Thus, the Revocation Order-in-Council was published in "the Statutory Instruments Compilation."[750] This means that the Revocation order was published in the British Government *Gazette* in London, not in Palestine.[751] As a result, the British orders and regulations including the Defence Regulations were no longer valid or in existence in Palestine.

When Jordan and Egypt took over the West Bank and the Gaza Strip, respectively, they administrated Palestine differently.[752] The King of Jordan, on May 13, 1948, issued Appendix No. 20 to announce that the Trans-Jordan Defense Law of 1935 and all regulations issued thereunder were applicable in the areas where the Jordanian Army was present.[753] Additionally, the laws and regulations, including those enacted by the British Mandate, that contradict the provisions of the Trans-Jordan Defense Law of 1935 were invalidated.[754] It was explicit that the purpose of the Appendix (Addendum) was to apply the Trans-Jordan Defense Law to the West Bank. The Defense Law allowed the King to announce the effect of this law in situations that threatened public

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to modify application of certain provisions thereof provides, (1) If with respect to any power to confirm or approve orders, rules, regulations or other subordinate legislation conferred on a Minister of the Crown by any Act passed before the commencement of this Act, it appears to His Majesty in Council that, notwithstanding that the exercise of that power did not constitute the making of a statutory rule within the meaning of the Rules Publication Act 1893, it is expedient that the provisions of this Act should apply to documents by which that power is exercised, His Majesty may by Order-in-Council direct that any document by which that power is exercised after such date as may be specified in the Order shall be known as a "statutory instrument" and the provisions of this Act shall apply thereto accordingly.

749 Statutory Instruments Act, 1946. 9 & 10 GEO. 6 Chapter 36: Arrangement of Sections. Article 3.

750 Moffett, Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defence (Regulations), 1945, in the Occupied Territories, 13. Cited as Statutory Instruments, 1350.

751 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 121.

752 See Chapter II: Historical Background.

753 Schedule to the Trans-Jordan (Defence) Law, 1935 [Law (No. 20), 1948], published in the Jordanian Official Gazette on 16 May 1948, Issue No. 945, 183, Article 2.

754 Schedule to the Trans-Jordan (Defence) Law, 1935 [Law (No. 20), 1948], published in the Jordanian Official Gazette on 16 May 1948, Issue No. 945, 183, Article 4.

security or safety or necessitated an emergency to defend Jordan.[755] Jordan had never considered the Defence Regulations in effect and had not applied them during its administration of the West Bank. The Jordanian government had repealed the Defence Regulations of 1945 by the Appendix to the Trans-Jordan Defense Law.[756] Apparently, Jordan was not aware of the British Revocation Order-in-Council when it issued the Appendix and other Proclamations to revoke all laws and regulations in Palestine, which were inconsistent with any provisions of the Trans-Jordan Defense Law.[757] There are different provisions in the British Regulations of 1945, which are in contradiction with the Trans-Jordan Defense Law.[758] Ultimately, the Regulations of 1945 would have been annulled by Jordan, even if they had not been revoked by the British King.

In the Gaza Strip, the Egyptian Administration was definitely not aware of the Revocation Order-in-Council, and not interested in the legality of the laws and regulations in the Gaza Strip. Although Professor Quigley affirmed that the Defence Regulations had not been in force in the Gaza Strip under the Egyptian Administration,[759] in some of the Egyptian orders, regulations, and proclamations, related to the Gaza Strip, the Palestine (Defence) Order-in-Council of 1937 and the Defence (Emergency) Regulations of 1945 were cited.[760] The Egyptian Administrative Governor declared the state of emergency in the Gaza Strip in 1967 in accordance with the Proclamation of the Constitutional Regime of the Gaza Strip of 1962 and the British Defence (Emergency) Regulations of 1945.[761] The British Regulations were used earlier in other orders and decrees by the Administrative Governor General. For example, they were recalled in the decree related to importation of flour to the Gaza Strip and the conditions to be fulfilled on importation[762] and

755 Trans-Jordan (Defence) Law, 1935, published in the Jordanian Official Gazette on 19 March 1935. Issue No. 473, 599, Article 2.

756 Moffett, Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defense (Regulations), 1945, in the Occupied Territories, 9.

757 Id.

758 Id.

759 Quigley, Legal Consequences of the Demolition of Houses by Israel in the West Bank and Gaza Strip, 3.

760 Id.

761 Decree Relating to Declaration of the State of Emergency in Gaza Strip (No. 15), 1967, published in the Palestine Gazette – Gaza Strip, Issue No. 5, on 28 May 1967 (Text in Arabic).

762 Decree by the Administrative Governor General, Relating to Importation of Flour to Gaza Strip and the Conditions to be Fulfilled on Importation (No. 3), 1961, published in the Palestine-Gazette-Gaza Strip, Issue No. 161, on 4 January 1961, 74.

in the decree related to the special tribunal procedures.[763] According to the Revocation Order-in-Council, these decrees, regulations, and orders were null and void, because they were enacted after they had been revoked and were, therefore, invalid regulations.

Israel claimed that the Emergency Regulations of 1945 had never been effectively revoked by the British government, as the Revocation Order was never been published in the *Palestine Gazette*, and that the regulations did not contradict the international humanitarian provisions.[764] In response to these Israeli allegations, two points need to be clarified. First, the British government itself has attested that the Revocation Order-in-Council is still valid under the British laws, and that the Palestine (Defence) Order-in-Council of 1937 and the Emergency Regulations of 1945 are no longer in force.[765] In addition, according to the British Statutory Instruments Act of 1946, the Revocation Order-in-Council was published in the British Statutory Instruments Compilation, because a publication in the *Palestine Gazette* had not been a requirement by the named act of 1946.[766] This indicates that the Israeli allegations are false and have no legal basis. Indeed, the Israeli application of the Defence Regulations of 1945 to Israeli domestic laws and in the West Bank and the Gaza Strip is illegal and invalid. Second, as mentioned earlier, humanitarian law principles and human rights instruments are applicable in Occupied Palestine. The Fourth Geneva Convention provides a very unequivocal provision to protect civilians, where Article 47 states, "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying

763 Decree by the Administrative Governor General (No. 7), 1958, published in the Palestine-Gazette-Gaza Strip, Issue No. 99, on 12 June 1958, 389.

764 Moffett, Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defense (Regulations), 1945, in the Occupied Territories, 12–13.

765 Moffett, Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defense (Regulations), 1945, in the Occupied Territories, 14. Cited as Letter to Al-Haq from the British Foreign Office of 22 April 1987, Foreign and Common Wealth Office -Tim Renton.

766 See the aforementioned discussion on this issue, Statutory Instruments Act, 1946. 9 & 10 GEO. 6 Chapter 36: Arrangement of Sections, Article 3.

Power, nor by any annexation by the latter of the whole or part of the occupied territory."[767]

This means that civilians remain protected under the provisions of the convention at all times without exception and emergency regulations must not be used to deprive civilians under occupation from their rights. In order to answer the questions as to whether the Emergency (Defence) Regulations of 1945 are in contradiction with the principles of international human rights and humanitarian laws, it is necessary to study the articles of these regulations and compare them with the principles of the applicable international laws. In this research, this question will be answered through an exploration of the basic human rights: the right to free movement and the right to private property, which will be examined in the next chapters.

The status of emergency powers in Israel and the Occupied Territory is now integrated within the Israeli law and further endorsed by the Israeli Supreme Court.[768] The Court emphasized that these regulations continue to be enforced according to Section 11 of the Law and Administration Ordinance of 1948, which provides that the valid laws on the day of the establishment of Israel remain valid unless cancelled or amended by the Israeli Knesset.[769] Several Israeli laws are based on the Regulations of 1945 and the Law and Administration Ordinance of 1948. For example, the Emergency State Search Authorities Law allows the Israeli government to conduct searches of persons and their property without a judicial search warrant.[770] Another law that is still in effect is the State of Emergency Land Appropriation Administration Law, which enables the state to expropriate private lands on a large scale for different uses, including maintenance public services, Jewish immigrant

767 Convention (IV) relative to the Protection of Civilians Persons in Time of War. Geneva, 12 August 1949.

768 See HCJ 358/88 The Association for Civil Rights in Israel and others v. The Central District Commander and others. The Israeli High Court of Justice (30 July 1989); The Association for Civil Rights in Israel v. The Knesset and the Government of Israel (2012).

769 The Association for Civil Rights in Israel v. The Central District Commander (1989), 2.

770 The Emergency State Search Authorities Law (Temporary Order) -1969. For more information on this law, see also Adalah – the Legal Center for Arab Minority Rights in Israel, State of Emergency: Information Sheet No. 1 – Submitted by Adalah to the United Nations Human Rights Committee, ICCPR: Article 4 – State of Emergency and Derogation from International Standards (22 July 2003).

engagement, and rehabilitation of solider.[771] Other laws grant the Israeli government further powers such as the Emergency Powers (Detention) Law of 1979 and the Control of Products and Services Law of 1957.[772] The Emergency (Defence) Regulations were imposed by the British Mandate as exceptional laws in a very exceptional situation, and therefore, they should not be used by Israel to impose restrictions on the Palestinians.[773]

Although the Emergency Regulations of 1945 are legally invalid, their provisions will be taken into consideration in this research. These regulations have been applied by Israel in Occupied Palestine, and the continuous state of emergency has allowed the Israeli Knesset and the military commanders to unlimitedly enact laws, regulations, and military orders in Occupied Palestine. These military orders and regulations dominate the West Bank and the Gaza Strip. Whenever these laws or military orders come into force, the Israeli government considers them to be the only applicable law to the Palestinian locals. However, the legality of the Israeli military orders and regulations must be questioned, as well as their effect on the lives of Palestinians, and this will be examined.

3.2.3. Military Orders

The military commander is obliged to respect the applicable laws of belligerent occupancy in the West Bank, including East Jerusalem and the Gaza Strip.[774] The military of the Israeli occupation has issued vast orders to impose its administrative and legal control in the West Bank and the Gaza Strip.[775] The Israeli military commander is entitled to respect the provisions of international humanitarian law in the Occupied Palestinian Territory, and all orders must conform to the bounds and limitations of the named laws.[776] The Israeli military orders gravely affect the Palestinians. Yet, their legality depends on whether each military order meets the provisions of international

771 State of Emergency Land Appropriation Administration Law of 1949. For more information on this law, see also Adalah – the Legal Center for Arab Minority Rights in Israel, State of Emergency: Information Sheet No. 1 (2003).

772 Adalah – the Legal Center for Arab Minority Rights in Israel, State of Emergency: Information Sheet No. 1 (2003).

773 Quigley, Legal Consequences of the Demolition of Houses by Israel in the West Bank and Gaza Strip, 3.

774 Id., 2.

775 See Shehadeh, Occupier's Law: Israel and the West Bank.

776 See the previous discussion on international humanitarian law.

humanitarian law. In other words, it depends on the reasons for these military orders and whether these reasons are valid and necessary within the applicable international laws. In addition, as discussed previously, the practices of the Israeli military commanders in the Occupied Territory must respect the provisions of human rights without any distinction or discrimination. Accordingly, if these military orders are not enacted in accordance with these provisions, their legality is questioned. The legality of some of the Israeli military orders is examined in the next three chapters.

As defined in Chapter II, before 1967, Jordanian law was enforced in the West Bank, and the Egyptian administrative law was enforced in the Gaza Strip. When Israel occupied the West Bank and the Gaza Strip in 1967, the Israeli General Military Commander, in the proclamations concerning administration in the West Bank and the Gaza Strip of 1967,[777] gave himself the powers of governance, legislation, appointments, and administration and appointed the military commanders in the two areas.[778] Both the military commanders in the West Bank and the Gaza Strip derived their powers from the proclamation of the General Commander. Both military commanders enacted Proclamations No. 2 Regarding Regulation of Administration (West Bank) (Gaza Strip), and specified their jurisdiction. The Common Article 3 reads as follows:

> ...3. (A) All authority of government, legislation, appointment and administration pertaining to the region or its residents will now be exclusively in my hands and will be exercised only by me or by any person appointed therefore by me or acting on my behalf, (B) Without detracting from the generality of the aforementioned, it is hereby determined that any obligation to consult, receive authorization, etc. that is stipulated in any law as a prerequisite for legislation or appointment, or as a condition for granting validity to legislation or to an appointment – is hereby void.[779]

The military orders have interfered in all matters in Occupied Palestine and promulgated in wide-ranging areas, including judiciary, legislation, security, agriculture, tax, trade, land, movement, etc. The legal principle, in the Hague

777 For more information, see Chapter II: Historical Background.

778 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 27. Cited as Shamgar, ed., Military Government in the Territories, 450.

779 Proclamation Regarding Regulation of Administration of Rule and Justice No. 2 (1967).

Regulations of 1907, obligates an occupying power to respect all laws in force in the Occupied Territory.[780] However, "far-reaching changes were introduced into the laws that apply both in the West Bank and in Gaza"[781] by the Israeli Authorities. For example, Military Order No. 1091, concerning planning and zoning in the Gaza Strip in 1993, has changed and invalidated the Planning and Zoning Law of 1936.[782] In addition, Military Order No. 1573, concerning city, village, and building planning, has changed the existing planning and zoning laws in the West Bank.[783] Other military orders have imposed closures on different Palestinian areas,[784] such as the Announcement No. 2/03, concerning the closure of area (Confrontation Area- the West Bank) of 5764 – 2003, which is still in force in the West Bank and Gaza.[785] In addition, several military orders, laws, and regulations have been enacted to confiscate land for different purposes. Some of these military orders and laws will be elaborated in detail in Chapter IV: The Right to Movement and Chapter V: The Right to Property.

Through military orders, Israel also has also controlled the Palestinian economy, agriculture, transportation, and education. Imports and exports were not allowed without permission from the Israeli administration; driver's licenses, travel permits, and apprenticeships were also controlled and restricted by the Israeli administration.[786] Order No. 375 (Organization and Employment) has obstructed electricity and water services, allowing the military commander to control the work of all organizations and employees

780 The Hague Convention (IV) of 1907, Article 43.

781 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 61–62.

782 Military Order No. 1091 concerning city, planning and zoning laws of 1936 (ceasing planning procedures), 28 January 1993, Matan Felnay Aluf, Commander of the Israeli Defense Forces, Region of Gaza Strip (Text in Arabic). ١٩٩٣ / ١٠٩١ أمر عسكري رقم

783 Military Order No. 1573 Concerning city, village, and building planning laws (Amendment 17), 1 May 2005 Ya'er Nafyeh Aluf, Commander of the Israeli Defense Forces, Region of Judaea and Samaria (Text in Arabic). ٢٠٠٥ /١٥٧٣ أمر عسكري رقم

784 Such as Order No. 597 in 1975, Order No. 571 in 1975 and Order No. 590 in 1975.

785 Announcement concerning the closure of Area No. 2/03 (confrontation area) (Judea and Samaria) 5764 – 2003.

786 See Military Orders: Order concerning Disqualification and Suspension of Driving Licenses (West Bank) (No. 251), 1968 on 22 July 1968, and Order concerning Road Transport Law (West Bank Region) (No. 56), 1967 on 19 July 1967.

involving electricity production.[787] In addition, Order No. 92, concerning authorities of water legislation, allows the military commander to control the work of all water entities.[788] Order No. 2, (Decrease of Water for Agriculture) imposes reductions on the amount of water used for agricultural purposes.[789] Water, taxes, currency, and assets have also been strictly controlled.[790] As result of the massive military administration orders, the military commanders have also established administrative, military, and local courts.[791]

Palestinian farmers have been strictly subjected to Israel Military Order No. 47, concerning the transport of agricultural products, which prohibits the Palestinians from removing or bringing any agricultural products from or into the West Bank without a permit from the Israeli authority.[792] Israel Military Order No. 1015 of 1982 concerns monitoring and planting fruitful trees, and prohibits Palestinians from planting, preparing a seedling, or planting a fruit tree without a written permit from the Israeli authority.[793] Military Order No. 134 of 1967, concerns a prohibition on tractors and agricultural products from Israel, and Military Order No. 1002 of 1982 concerns prohibition on the sale of seeds without a license and places requirements on obtaining plant nurseries. All of these orders have imposed arbitrary measures on the Palestinian

787 Order No. (375), concerning Electricity (Organization and of Employment) (West Bank) 1970. See also Order concerning Dealing in Electricity (Regulation and Operation) (West Bank) (No. 427), 1971 Published in Proclamations, Orders and Appointments (West Bank), Issue No. 27; and Order concerning Electricity Supply Regulation (Temporary Provision) (Judaea and Samaria) (No. 1216), 1988, Published in Proclamations, Orders and Appointments (West Bank), Issue No. 76.

788 Order concerning authorities overseeing Water Legislation (West Bank Region) (No. 92), 1967 published in Proclamations, Orders and Appointments (Israeli Occupation – West Bank) Issue No. 6.

789 Order concerning Water (Decrease of Water Quotas for Agriculture) (Gaza Strip Region) (No. 2), 1986, Published in Proclamations, Orders and Appointments (Gaza Strip) Issue No. 79.

790 See Military Order No. 363, issued on *December 22, 1969,* concerning Occupied Land declared as Natural Reserves, and Military Order No. 393, was issued on June 14, 1970, concerning Supervision of Construction Works.

791 Benvenisti, The International Law of Occupation, 2nd ed., 116.

792 Israel Military Order No. 47 concerning the Transport of Agricultural Products, 9 July 1967, The West Bank Region.

793 Israel Military Order No. 1015 concerning Monitoring the Planting of Fruitful Trees, 27 August 1982, The West Bank Region.

farmers.[794] Transportation and movement were also restricted by Military Order No. 49 of 1967, concerning closed areas and prohibition on transportation of goods, and Military Order No. 1252, concerning merchandise transport, obligates Palestinians to get a permit from the Israeli Authority to transport merchandise into or out of the region of Judea and Samaria.[795] Some military orders interfered in the curriculum of schools and educational institutes, such as Order No. 107 of 1967, concerning the use of textbooks.[796]

The aforementioned orders are a few examples that show the ongoing Israeli policy to legitimize the practices of the occupation through such orders. These directives have extended the military jurisdiction over the West Bank and the Gaza Strip. They have also given the military government full control over public property, the movement of the Palestinians, collecting taxes, and the use of water and all other natural resources.[797] Moreover, these military orders have given Israeli military commanders the power to control the Palestinian civilians in their daily needs. On the one hand, the enactment of military orders does not reflect the legality of the Israeli practices, because they have been used widely against only the local population. Palestinians, on the other hand, have challenged many of these directives before the Israeli Supreme Court sitting as the High Court of Justice. The jurisdiction of the Court was disputed, but the Court has made a clear decision in this concern. This jurisdiction of the Court in seeing Palestinian petitions against Israeli personnel and entities will be discussed below.

3.2.4. The Jurisdiction of the Supreme Court Sitting as the High Court of Justice

While discussing the applicable legal resources in the Occupied Territories, it is necessary to examine the competence of Israel's High Court of Justice. The Court has played a significant role in formulating the legal resources in Israel and the Occupied Territory. The absence of a written constitution has opened a means for the Court to interpret, rule, and regulate within the common law

794 For more military orders, see the Palestinian legal and judicial system "Al-Muqtafi," Birzeit University- Institute of Law.

795 Israel Military Order No. 1252 concerning Merchandise Transport, (1 September 1988), The Region of the West Bank.

796 Order No. 107 of 1967 concerning use of textbooks (the West Bank Region) issued on 29 May 1967.

797 Shehadeh, Occupier's Law: Israel and the West Bank, 124.

system.[798] The decisions of courts, especially the Supreme Court, are resources to understanding the applicable laws in Israel and the Palestinian Territory. The Supreme Court has the power to interpreting legal norms enacted by other authorities, developing the common law, and filling lacunae in legislation.[799] The Israeli judiciary law regulates the jurisdiction of the High Court of Justice,[800] which is the first, last, and sole body with jurisdiction to rule in petitions challenging any legislation that violates the constitutionally protected principles, especially human rights provisions.[801] The Israeli Supreme Court sits in its capacity as a High Court of Justice and is considered a main player for developing justice, basic principles of democracy, and the rule of law.[802] Through its decisions, the Court has revised the legality of the government's practices, especially the military orders issued by the military commander in the West Bank and the Gaza Strip.[803]

In 1971, Christian Society for the Holy Places v. Minister of Defense was the first case in which the Court was faced by Palestinian petitioners challenging and questioning the practices of the military commander in the Occupied Territory. The respondent raised no objection,[804] and the Court did not mentioned the jurisdiction question in its decision.[805] In 1972, in the case of Abu Helou v. Government of Israel, Justice Vitkon explicitly stated that the practices of the military commander are absolutely beyond the Court's jurisdiction.[806] However, in same case, Justice Landau expressed that the Court scrutinizes the acts of the military commander in the Occupied Territory under Israeli municipal law.[807] In 1978, in the case of Ayub v. Minister of Defense, Justice Landau refrained from considering that the actions of the Israeli government were beyond the jurisdiction of the Court.[808] At the beginning, the Court hesitated to impose its jurisdiction over the actions of the military in the

798 Navot, The Constitution of Israel: A Contextual Analysis, 196.
799 Navot, The Constitutional Law of Israel, 35.
800 Id., 77.
801 Navot, the Constitutional Law of Israel, 37–47.
802 Navot, The Constitution of Israel: A Contextual Analysis, 196.
803 Id.
804 Shehadeh, Occupier's Law: Israel and the West Bank, 96.
805 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 20. Cited as PD 579 (1971) 26 (1), Summary of the case in English, 354.
806 Sheikh Suleiman Hsein Odeh Abu Helou and 3 others v. Government of Israel, 169–180.
807 Id., 176.
808 Saliman Ayub v. Minister of Defense and HCJ Jamil Mutawe'a v. Minister of Defense (1979), 3–10.

Occupied Territory.[809] Shortly after, the Israeli High Court of Justice declared that its jurisdiction was "extraterritorial over the persons of the military commanders and their subordinates, the underlying reason being that all organs of the Government of Israel are subject to the jurisdiction of the High Court of Justice in respect of all their acts and omissions, wherever they may have taken place."[810] In 1982, in the case of Jam'iat Iscan, the Court explicitly imposed its jurisdiction over actions committed in the Occupied Territory, and stated that there was no doubt that the Court was authorized to exercise its jurisdiction over the actions of the military in the Occupied Territories.[811] The Court stated that "the status of the military government has been clarified and now there is no doubt that under Article 7 of the Law of the Courts 5717-1957, this Court [the High Court of Justice] is entitled to the right of review."[812] This meant that the right of the Court to exercise its jurisdiction was based on the judicial accountability of the military commander under the Israeli laws. The jurisdiction of the Court did not depend on the consensus of the Israeli government itself; rather, it was imposed by the Court and the military actions in the West Bank and the Gaza Strip could not avoid the supervision of the Court.[813] The Court "accepted the government acquiescence as a sufficient basis for its jurisdiction."[814]

Shortly thereafter, as a result of the massive number of military orders and practices, Palestinians intensively petitioned before the Supreme Court, in its capacity as the High Court of Justice, and challenged the legality of the orders and acts of the military commander and other administrative actions.[815] The Court had handled thousands of petitions related to the acts of military,[816] including house demolitions, administrative detentions, buildings of settlements, deportations, buildings of highways, modifications in the local law, and the use of resources and land confiscation.[817] The judicial review of

809 Benvenisti, The International Law of Occupation, 2nd ed., 217.
810 Shehadeh, Occupier's Law: Israel and the West Bank, 95.
811 Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF and others (1983), 32.
812 Id.
813 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 21.
814 David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel," International Review of the Red Cross, Vol. 94, Number 885 (Spring 2012): 207–236, 208.
815 Id., 209.
816 Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel," 207.
817 Id.

the actions of the military commanders and the Israeli government in the Occupied Territory had become the accepted legal norm in the Supreme Court.[818] The Palestinian inhabitants of the Occupied Territory were allowed to file direct petitions to the Israeli High Court of Justice.[819] As mentioned previously, the Israeli Supreme Court accepted that the Palestinian areas held by Israel fell under belligerent occupation, and the powers of the military commander were governed under the rules of Israeli administrative law and public international law.[820] Given the fact that the military commander is part of the Israeli administration, the Court also considered that the military orders had to be consistent with the Israeli administrative law.[821] The Court later emphasized that the Israeli military commander "draws his authority from the rules of international law that govern belligerent occupation."[822] The Israeli Supreme Court must review each military order to rule on its legality and conformity with the humanitarian provisions and the Israeli administrative law. This means that Palestinians have the burden of litigation and petition before the Supreme Court in order to challenge each military order and its conformity with the applicable laws. Some might consider that the ability to petition before the Israeli court is a privilege, as it is the sole opportunity for Palestinians to challenge the actions of the military commander in the Occupied Territory. This is questionable and leads to further complications. These complications and their effects will be discussed later in the next chapters.

4. Conclusion

Not a single law is applicable to Palestinians in the Occupied Territory. The international law instruments and the domestic laws are conjointly brought together to protect the Palestinian people. The Israeli government and the Palestinian Authority must respect the provisions of international law and

818 Id., 20.

819 Shehadeh, Occupier's Law: Israel and the West Bank, 95.

820 Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF and other (1983), 10.

821 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 28.

822 HCJ 2150/07 Ali Hussein Mahmoud Abu Safiyeh, Beit Sira Village Council Head and 24 others v. Minister of Defense and IDF commander in the Judaea and Samaria. The Israeli High Court of Justice (5 March 2008), 18.

assure that the domestic laws are in line with international law principles. If one law leaves a gap in protecting the rights of Palestinians, other laws complement them. Although human rights and humanitarian values are based on equality, universality, and respect of the life of human beings, employing these principles is more problematic in the Palestinian situation under the prolonged Israeli occupation.

Israel has attempted to deviate from its obligations under the international human rights and the humanitarian laws in the Occupied Territory. However, the international community, most international organizations, and academic scholars have rejected its claims and have continued to consider Israel under obligation to respect its duties accordingly. Despite the Israeli position on this matter, the international community agrees that the customary and conventional international human rights and humanitarian laws apply to Palestinians in the Occupied Territory. If one arguably considers the view of the Israeli government on the applicable laws in Occupied Palestine, there would not be any applicable international provisions to protect the rights of the Palestinian locals. In fact, it would be a swamp of human rights violations, where only the extreme military orders and emergency regulations would be imposed. This logically and legally contradicts the main principles of the United Nations' Charter, human rights law, and humanitarian law, as the main purpose is to protect civilians, safeguard their human needs, and eliminate violence and violations. Israel should revise its laws to meet the provisions of international human rights and humanitarian laws and be committed to indiscriminately apply these laws and provisions in the Palestinian Territory.[823] The Palestinian government has been committed to respecting these laws in the areas under its control. Palestine, in addition, must stand to improve its laws, prove its commitment to its international obligations, and implement these obligations for all Palestinians.

The next three chapters of this study will be dedicated to highlighting the three main rights: the right to movement, the right to private property, and the right to equality and non-discrimination, respectively. Each right was chosen for different and certain reasons, and according to its effect on the Palestinian situation. The choice to examine these rights does not mean that they are more important than other rights. There are unlimited materials to study

823 Neocleous, "The Problem with Normality: Taking Exception to Permanent Emergency," 209.

concerning the human rights situation in Occupied Palestine. For example, house demolitions, the denial of residency and family unification, deportations, restrictions on the liberty of the persons, restrictions on the right to free expression, administrative detention, torture, denial of health care, restriction on education, restrictions on work, restrictions on trade and economy, and collective punishment are all present in Palestine. Yet, the main purpose of choosing the right to movement, the right to private property, and the right to equality and non-discrimination is that all of them affect a wide range of other basic rights. Therefore, the next three chapters will study the practices committed by the Israeli and the Palestinian authorities and examine the legality of such practices.

Part Two:
Selected Human Rights

Part Two consists of three chapters that focus on three main human rights. Chapter IV discusses the right to movement, Chapter V deliberates the right to private property, and Chapter VI examines the right to equality and non-discrimination. Each human right is scrutinized through its importance, its practical implementation in Palestine, and its accordance with international human rights and international humanitarian law. These chapters also include several decisions of the Israeli Supreme Court and the Palestinian High Court of Justice.

IV. The Right to Movement

1. Introduction

Freedom of movement is a protected fundamental right in most national and international laws. It can be generally defined as "the right to travel within the boundaries of a political entity."[824] The right to movement includes four manifestations in human rights law: 1) the right of individuals to freely move, travel, and choose their residence within a country, 2) the right to leave any country including one's own, 3) the right to return to one's country, and 4) the right to migrate and to seek asylum.[825] Each manifestation is distinguished, and constitutes an in-depth study. Although the focus in today's international community is shifting toward enhancing the regulations of migration, especially after the vast migration of the past few years, this chapter does not touch upon this issue.

The concern of this chapter is the movement of Palestinians within and throughout the West Bank, including East Jerusalem and the Gaza Strip, as well as the right to leave these areas. This study does not extend to those of other nationalities because different rules are applied, and their movement is usually not restricted.[826] In order to provide a cohesive understanding, this chapter illustrates the importance of the right to movement and the evolution of movement in Palestine. It examines the protection of the right to movement for Palestinians in international human right law and international humanitarian law. Finally, it elaborates on the protection and constitutionalization of the right to movement in both Palestinian and Israeli laws,

824 Garner, ed., Black's Law Dictionary, 779.

825 The Universal Declaration of Human Rights of 1948, Art. 13 and 14; International Covenant on Civil and Political Rights of 1966, Art. 12(4).

826 The movement of those of other nationalities, who are not Palestinians with a Palestinian identity card, is not restricted and they are allowed to move within in Israel and Occupied Palestine.

including an analysis of the de facto situation of Palestinian mobility through court decisions.

2. The Importance of the Right to Movement

The significance of the right to free movement is no less important than any other fundamental right, such as the right to life, the right to food, or the right to housing. Freedom of movement is one of the "first and the most fundamental of man's liberties."[827] Freedom of movement is a basic human need, and it reflects a necessity of a free life.[828] The right to movement is in the first rank of human rights and "as a rule … freedom of movement within the boundaries of the state [shall be replaced] on a similar constitutional level."[829]

The right to movement can also be associated with the "notion of individual self-determination,"[830] as it gives people the power to decide whatever they desire to achieve. It provides all people with the ability and the freedom to decide where, when, and why to travel or to move. It also contributes to living a meaningful life and to accommodating basic human needs on the basis of equality and non-discrimination. As all people have the right to enjoy free movement without any distinction or discrimination, movement is not only a personal right, it can also be a "sovereignal freedom"[831] that adds social, civil, political dimensions to people's lives. Without free movement, all other aspects of life are paralyzed. Free people, under extreme restrictions such as curfews, become prisoners.

The connection between freedom of movement and living standards is easily seen. Unrestricted and free movement allows many opportunities and benefits. Under natural and normal circumstances, healthy humans have the need

827 Satvinder S. Juss, "Free Movement and the World Order," International Journal of Refugee Law, Vol. 16, No. 3 (2004): 289–335, 289. Cited as Maurice Cranston, What are Human Rights? (United States: Taplinger Publishing Co., 1973), 33.

828 Id.

829 HCJ 5016/96 Lior Horev v. Minister of Transportation. The Israeli High Court of Justice (April 13, 1997), 53 and 94.

830 Colin Harvey and Robert P. Barnidge, Human Rights, Free Movement, and the Right to Leave in International Law (Oxford: Oxford University Press, 2007), 2.

831 Mimi Sheller, "Mobility, Freedom and Public Space," in The Ethics of Mobilities: Rethinking Place, Exclusion, Freedom and Environment, eds. Sigurd Bergmann and Tore Sager (USA: Routledge, 2008), 28.

for the freedom to move. A person cannot fulfill his/her needs without being able to travel within his/her country. The right to free movement is a basic element of liberty and "the realization of human aspirations often depends on it."[832] Free movement enables people to seek new challenges and experiences; it results in a redistribution of the economy, involvement in social life, and ambitions for a brighter future. If human beings are deprived of these values, their lives will be precarious and unworthy. All people throughout the world strive for mobility, travel, and freedom. The freedom of movement might be "one of the tolerant traditions common to all cultures based on peace and progress."[833] In particular, the mobility of all people without discrimination allows for cultural exchanges and enhances peacebuilding among nations and nationalities from different religious, racial, and linguistic backgrounds.[834] It promotes tolerance and interaction among citizens of the same country. Free movement affects the enjoyment of most of other rights in times of peace and war, and without it, other rights would not be achievable. "Freedom of movement [is] the very essence of our free society, setting us apart … it often makes all other rights meaningful-knowing, studying, arguing, exploring, conversing, observing and even thinking… [if] the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person."[835] Freedom of movement is certainty a means to access and enjoy other basic human rights, and it is a means that leads to better opportunities for people.[836] It creates a validity of the right to education, the right to health, the right to work, the right to social and family life, political rights, and the right to access justice as well as almost all other fundamental rights.

The right to movement implies the use of all means of transportation using vehicles or animals as well as utilizing all available roads, highways, or other public transportation systems at any time. There are some minor limitations that might be imposed on movement, which a state is empowered to undertake. However, if freedom of mobility and movement is severely restricted, grave consequences will occur. Elaborating on this freedom, the right to

832 Juss, "Free Movement and the World Order," 291.

833 Id. 293.

834 The United Nations Educational, Scientific and Cultural Organization (UNESCO) has been prompting the advantages or cultural diversity and interactions between nations. See UNESCO World Report, Investing in Cultural Diversity and Intercultural Dialogue, France (2009).

835 Aptheker v. Secretary of State, 378 U.S. 500–519 (22 June 1964).

836 Juss, "Free Movement and the World Order," 289.

education is internationally recognized as a basic human right.[837] However, individuals will not have access to their educational institutes if they are denied the right to travel to these learning institutions. For instance, primary school children need to have reliable and safe access to their schools, while secondary school children need access to schools that are typically far from their residence. University students usually need a larger radius of movement, which involves the opportunity to be able to freely choose their educational institution or university. International mobility is also important for students who have ambitions to study abroad, and they must have liberty to decide when to leave and return to their country and visit their family. Depriving people of free movement might put them in a situation where they are prevented from studying or continuing their education.[838]

All people also have the right and the need to be connected to their family and friends to maintain a proper social life. One's acquaintances and relatives are an essential part of a person's life. Severe restrictions on movement may avert individuals from marrying and raising a family. The concept of a family is not only confined to one's spouse, parents, and children, it is also extended to siblings and relatives. Restrictions on people's movement disturb the ability to regularly maintain the bonds with one another. If a person cannot move freely, he/she cannot have a normal social and family life. Without the right to movement, "a person may be unable to associate with his kith and kin, to obtain employment … and to achieve better standard of living."[839] In addition, work is a prevailing factor among the multiple reasons for relocating either countrywide and globally. The diverse array of work largely depends on free movement and mobility.[840] The mobility of people from one city or country to another depends, to a large extent, on the work opportunities. The day-to-day life of workers involves traveling to and from their work location. Restrictions

837 See the Universal Declaration of Human Rights of 1948, Article 26; and the International Covenant on Economic, Social and Cultural Rights of 16 December 1966, Article 13.

838 Jane McAdam, "An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty," Melbourne Journal of International Law, Vol. 12 (2011): 1–30, 21. Cited as Stig A F Jagerskiold, "Historical Aspects of the Right to Leave and to Return" in Karel Vasak and Sidney Liskofsky (eds), The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19–20 June 1972 (The American Jewish Committee, 1976) 1–3.

839 Id.

840 Tim Cresswell, "Towards a Politics of Mobility," Environment and Planning D: Society and Space, Vol. 28, Issue 1 (2010): 17–31, 17.

on their free movement prohibit workers from reaching their work, put their employment at risk, deteriorate their living standards, and ultimately weaken the country's economy.

Personal mobility certainly goes beyond family, education, and work. In circumstances where travel is restricted to work, school, and family, it is also restricted to hospitals or medical clinics. Furthermore, such restrictions interfere with associations and assembly and prevent access to justice. The right to health and the right to receive medical care are problematized under restrictions on movement. Great harm could befall patients who are in an urgent need of medical care. This might cause disability, health complications, or even death. In addition, the right of assembly and the right of association are influenced by free movement. If a person cannot move from one city to another or return to his/her own country, he/she cannot have a normal political life which involves going to assemblies, unions, and other political entities, including voting. Most importantly, freedom of movement, at that juncture, becomes an issue for justice.[841] Litigation before courts also necessitates free and continuous movement where litigants, judges, lawyers, prosecutors, and court employees are required to present before the courts of law. Daily restrictions on people's movement weaken the performance of the judiciary and the enforcement of the rule of law and justice.

The following subchapter examines the right to movement and its restrictions in Occupied Palestine as well as its evolution and its effect on other fundamental human rights.

3. Movement in Palestine

Within the Palestinian context, the dilemma of movement dates back to the British Mandate. In 1945, as discussed previously, the British High Commissioner enacted the Defence (Emergency) Regulations in Palestine.[842]

841 Martin Geiger and Antoine Pécoud, "International Organisations and the Politics of Migration," Journal of Ethnic and Migration Studies, Volume No. 40, Issue No. 6 (2014) 865–887, 882.

842 The Defence (Emergency) Regulations of 1945 are discussed in the previous chapters and their restriction on movement will be elaborated under the subsection- Israeli law, as they are integrated within the Israeli law and applied by the Israeli military in Occupied Palestine.

These regulations granted the military commander vast powers to "prohibit, restrict or regulate, or provide for prohibiting, restricting or regulating, the use of roads generally, or of the roads in any specified area or of any specified roads, or prescribe the routes to be followed, by vehicles or animals."[843] These regulations introduced different restrictions on the movement of persons collectively and individually. Israel, upon its establishment in 1948, declared a situation of emergency and incorporated the emergency regulations into its law.[844]

A division of population was created. Since 1948, the first category has included the Jewish population with Israeli citizenship and the Arab population within the announced Israeli state, who were exclusively put under the military administrative from 1948 to 1966 and then granted Israeli citizenship.[845] This category also includes since 1967, the Jewish population who hold Israeli citizenship and live in Israeli settlements in the West Bank.[846] This category of the population is ruled under the Israeli civil laws.[847] The citizenship for these three groups has been granted and registered under the Population Registry Law, where the registration is administered at the Israeli Ministry of Interior Affairs.[848] The second category consists of the Palestinian population in the West Bank, Gaza Strip, and East Jerusalem. The Palestinians in the West Bank and the Gaza Strip have a Palestinian identity card issued by the Palestinian Authority, while those in East Jerusalem have an Israeli residence permit and a Jordanian passport as travel documents. The Israeli citizens and the residents of Jerusalem have cars with yellow license plates, registered in the records of the Israeli Ministry of Transport and Road Safety. Palestinians with Palestinian identity cards have cars with green license plates, and they

843 Id. Part XIII: Movement of Persons, Traffic, Article 122 (1)(a).

844 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Defence (Emergency) Regulations.

845 Henry Rosenfeld and Majid Al-Haj, Arab Local Government in Israel (USA and UK: Westview Press, 1990), 23.

846 The settler population in the West Bank is estimated to be upward of 547,000: in late 2013, the population of the West Bank settlements was 350,010; in late 2012, there were 196,890 individuals living in Israeli neighborhoods in East Jerusalem. See B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Land Expropriation and Settlements, 23 November 2015. See also Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967," 85–86.

847 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 75.

848 Davis, Israel an Apartheid State, 26.

are registered in the records of the Palestinian Ministry of Transportation. Notably, Israel treats the populations differently and imposes restrictions as a collective punishment on the Palestinian population. For instance, Palestinians with green plates are subjected to security checks, not allowed to use certain roads in the Occupied Territory, and not allowed to enter Israel, Jewish settlements, or East Jerusalem.[849]

Israel has reinforced the British Emergency Regulations since 1967 and has used them in the West Bank and the Gaza Strip to impose restrictions on the movement of Palestinian locals.[850] Israel has also enacted different laws, military orders, and regulations to tighten its control over the movement of Palestinians in the West Bank and the Gaza Strip. In 1987, after 20 years of Israeli occupation of the West Bank and the Gaza Strip, confrontations between the Israeli Forces and the civilian Palestinians erupted, and the First Intifada took place.[851] Prior to this time, restrictions and curfews were imposed on Palestinians. During the Intifada, restrictions were intensified, curfews were the norm, and permission was not granted to deliver food or medical supplies.[852] For example, during the months of February and March of 1982, curfews were imposed several times. Some lasted for ten days in a row in the villages of Yatta and Halhool as well as the refugee camps of Jalazoun, Ballata, Amari, Dheisheh and Qalandya in the West Bank without permission to provide food or medical supplies.[853] Curfews and other restrictions were usually lifted after the Israeli Forces controlled and/or confiscated civilian houses in strategic positions in the Palestinian towns.[854] The presence and the control of the Israeli military were strong in the Palestinian towns, where they imposed checkpoints, searched houses, and arrested civilians in order to tighten their grip on a possible Palestinian resistance.[855]

Palestinians have been prohibited from using roads that connect their cities and villages as the pass system, which comprises highways, roads, and public

849 Human Right Watch, Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories (USA: Human Rights Watch, 2010).
850 Tobias Kelly, Law, Violence and Sovereignty Among West Bank Palestinians (UK: Cambridge University Press, 2006), 75.
851 Karkar, "The First Intifada 20 Years Later."
852 Shehadeh, Occupier's Law: Israel and the West Bank, 135.
853 Id., 135.
854 Id., 136.
855 Id.

transportation, was created only for Israeli citizens.[856] A closure policy has been imposed on Palestinians whereby they are prohibited from using such roads and highways. This closure "involves a pass system first introduced in early 1991 and which has been refined and perfected ever since … in the same Palestinian Territories where Palestinians need special permits to move around, Israeli citizens circulate freely."[857] With the strict closure policy introduced in 1991, all aspects of life were affected. Palestinians in the West Bank and Gaza Strip were denied visitations with each other. Almost all Gazans and later most West Bankers, found it difficult to move freely within both areas without Israeli permits, which were not being granted in most cases.[858]

Since the outbreak of the Al-Aqsa Intifada on September 29, 2000, the situation has worsened, and more restrictions have been imposed on the villages and cities in the West Bank and the Gaza Strip.[859] The Israeli military placed a number of checkpoints and restrictions on the movement of the Palestinian population in the West Bank and the Gaza Strip.[860] Checkpoints were imposed throughout the Occupied Palestinian Territory and strictly controlled Palestinians' movements and cut them off from their urban cities.[861] In 2002, Israel started building the separation wall in the West Bank and surrounded the Palestinian cities and villages with an 8-meter-high and more than 700-kilometer-long wall.[862] The construction of the wall imposed more restrictions on the movement of Palestinians, especially those who lived near its route. The International Court of Justice emphasized that the construction of a wall in the Occupied Palestinian Territory caused "requisition and

856 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank (Jerusalem: B'Tselem, 2004).

857 Amira Hass, "Israel's Closure Policy: An Ineffective Strategy of Containment and Repression," Journal of Palestine Studies, Vol. 31, No. 3 (Spring 2002): 5–20, 6.

858 Id., 10.

859 B'Tselem, Civilians under Siege: Restrictions on Freedom of Movement as Collective Punishment, 1.

860 Id.

861 Hass, "Israel's Closure Policy: An Ineffective Strategy of Containment and Repression," 6.

862 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, The Separation Barrier, 1 January 2011. See the map of the West Bank: Settlements and the Separation Barrier at https://www.btselem.org/download/separation_barrier_map_eng.pdf and the map of the Forbidden Roads Regime: The West Bank at https://www.btselem.org/download/forbidden_roads_map_eng.pdf

destruction of homes, businesses and agricultural holdings."[863] The construction also led to massive "destruction or requisition of properties … restrictions on the freedom to movement of the inhabitants of the Occupied Palestinian Territory."[864]

The construction of the separation wall put people in a situation where they were completely shut off from one another. Some villages were trapped and surrounded by the wall where the only way out was a gate that opened for a few hours or even minutes a day.[865] With the completion of the wall, Israel created what it calls the *Seam Zone*. The Zone constitutes more than 325,000 dunums, which makes up 9.4% of the West Bank, and surrounds the separation wall.[866] Although the Zone includes hundreds of Palestinian communities and more than half of the Seam Zone land is privately owned by Palestinians, it is closed to Palestinians and local inhabitants have to go through the permit regime to obtain advanced permission from the Israeli military.[867] More than 10,000 Palestinians are entangled in bureaucratic procedures and have been unable to enter their land. Their movement is extensively restricted,[868] while "Israeli citizens, including Palestinian citizens of Israel and residents of the 71 settlements between the barrier and the Green Line, foreign citizens visiting Israel, may enter any areas to the west of the barrier from Israel with no obstacles."[869] For example, the small Palestinian village of Khirbet Jubara was announced by the Israeli military as part of the Seam Zone. It is surrounded by a two-kilometer security margin, by the wall and the Jewish settlement Sal'it, which is built on the villagers' private land.[870] The villagers are required, by the Israeli military, to obtain a permit in order to continue residing in their

863 International Court of Justice, advisory opinion (2004), 66.

864 Id., 57.

865 Jamal Juma'a, "The Racist Separation Wall in the West Bank: A Look at the Economic and Social Effects and its Ramifications on the Future of the Palestinian People," Adalah's Newsletter, Vol. 3 (July 2004).

866 Aelad Cahana and Yonatan Kanonich, The Permit Regime Human Rights Violations in West Bank Areas Known as the Seam Zone, trans. Maya Johnston (Jerusalem: HaMoked – Center for the Defence of the Individuals, 2013), 9.

867 Id., 5–9.

868 Isabel Kershner, Barrier: The Seam of the Israeli-Palestinian Conflict (New York: Palgrave Macmillan, 2005), 14.

869 Human Rights Watch, Israel: Palestinians Cut Off from Farmlands – A Year After Court Ruling, a Worsening Situation. News Published on April 5, 2012, at 5:48 PM. Seen on 14, 2017 at 12:18. https://www.hrw.org/news/2012/04/05/israel-palestinians-cut-farmlands

870 Kershner, Barrier: The Seam of the Israeli-Palestinian Conflict, 14–15.

homes. Their children have no access to schools and are not allowed by Israel to build one. They have no access to health care, and 90% of the village is unemployed and controlled by a military checkpoint.[871] This means that Israel has created a non-livable situation for all those Palestinian communities in the Seam Zone around the West Bank and Jerusalem.

As mentioned previously, after 2005–2006, the situation in the Gaza Strip differed from the one in the West Bank. In the West Bank, tensions were reflected by the increased number of obstacles, such as roadblocks, earth-mounds, road gates, military blocks, and military checkpoints. Those obstacles, according to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) are "involving some kind of fixed infrastructure on the ground, thus excluding ad-hoc flying checkpoints."[872] Fixed infrastructure checkpoints are permanent with military-base-zones and guard-towers, while flying checkpoints are sudden and mobile. In 2010, OCHA counted 503 fixed and flying checkpoints and roadblocks and 522 on average in 2011 around the West Bank each month.[873] In April 2015, Israeli military imposed 96 fixed checkpoints in the West Bank, including 57 internal checkpoints; the internal checkpoints included 17 in the old city of Hebron alone where there are Israeli settlements, but the majority of inhabitants are Palestinian locals.[874]

Within the West Bank area, Israeli authorities allow Jewish settlers to travel freely but require Palestinians to present permits, usually for security reasons, which are often difficult to obtain."[875] There are 39 fixed checkpoints used as inspection points before entering Israel.[876] Some of these fixed checkpoints have been "privatized, and staffed by armed civilian guards employed by private security companies under supervision of the Administration of Border Crossings at the Ministry of Defense."[877] This privatization of checkpoints

871 Id., 15–22.

872 United Nations Office for the Coordination of Humanitarian Affairs (OCHA) humanitarian Bulletin- Occupied Palestinian Territory (January 2016), 6.

873 United Nations Office for the Coordination of Humanitarian Affairs (OCHA) – Occupied Palestinian Territory, Movement and Access in the West Bank (September 2011), 1.

874 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank.

875 Human Rights Watch, Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories.

876 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank.

877 Id.

actually reflects the Israeli policy of deviating from its obligations under international humanitarian and human rights laws. This enables the Israeli government, in cases of violations, to claim that its military forces have not committed any violations and they are not responsible for any wrongdoings. This is a debatable topic and will not be addressed in detail, but it must be noted that the state remains responsible for any activities committed directly by its forces or contractors.[878] Sixteen checkpoints are situated along the separation wall.[879] Palestinians, who are holders of a Palestinian identity card, are required to obtain permits issued by the Israeli military administration in order to enter Jerusalem, and are limited to use only four of the sixteen checkpoints along the wall.[880] Israel prohibits the crossing of private Palestinian vehicles through these checkpoints and only allows passage to public transportation and commercial vehicles with special permits.[881] At the checkpoints within the Palestinian cities, Palestinians do not need special permits, but they constantly face intensified security checks and prolonged delays,[882] often taking them several hours to go to their homes, work, schools, universities, hospitals, etc. Travel might take seven or eight hours, without a guarantee of reaching the sought destination. At some checkpoints, Palestinians are completely denied access,[883] and as a result, they live in uncertainty and instability. They are prohibited from using certain roads and are forced to use improper alternative routes.[884] These alternative roads are much longer, not paved, and controlled by further checkpoints; hence, traveling between village and city, village to village, and/or city to city has become more expensive, inconvenient, and humiliating.[885] These circumstances violate the respect of human rights as well as international peace and security.

878 Responsibility of States for Internationally Wrongful Acts adopted under General Assembly resolution 56/83 (2001).

879 United Nations Office for the Coordination of Humanitarian Affairs (OCHA) – Occupied Palestinian Territory, Movement and Access in the West Bank, 1.

880 Id.

881 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank.

882 United Nations Office for the Coordination of Humanitarian Affairs (OCHA) Humanitarian Bulletin – Occupied Palestinian Territory, 6.

883 Human Right Watch, Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories.

884 Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007).

885 See B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Restrictions on Movement: Effect of Restrictions on the Economy (1 January 2011).

Since 2005, after Israel carried out a plan of disengagement from the Gaza Strip,[886] residents no longer face internal checkpoints within the Gaza Strip. However, since 2007, 1.8 million Palestinians live under a sea, air, and land blockade and have been denied the right to leave Gaza.[887] The territorial waters and airspace of the Strip as well as the land crossing between Gaza and Israel are all under Israeli control.[888] There are two border crossings between the Gaza Strip and Israel: Erez Crossing for pedestrians and Kerem Shalom Crossing for transporting goods and fuel.[889] The Israeli authorities prohibit Palestinians from moving in and out of Gaza. Rare exceptions are made where Israeli permits are issued for certain categories, such as traders, medical patients, and employees of international organizations.[890] Education, family unification, and other purposes are usually denied. After obtaining a permit, traders, medical patients, and students with permits face interrogation, detention, and, in some cases, arrest by the Israeli security authorities at the Erez Crossing.[891] The import of goods into Gaza has not been adequate and has not offset the increasing needs of the Gaza population.[892] Jordan and Israel prohibit Gazans from entering the West Bank via the Allenby Bridge, and they are prohibited by Israel from entering the West Bank via the Erez Crossing.[893] This blockade on the Gaza Strip has continued for more than 12 years. Since March 30, 2018, Palestinians have been peacefully protesting along the fence with Israel, demanding their right to return to their homes and land from which they were expelled 70 years ago; this is known as the

886 B'Tselem – The Israeli Center for Human Rights in the Occupied Territories and HaMoked – Center for the Defence of the Individual, One Big Prison: Freedom of Movement to and from the Gaza Strip on the Eve of the Disengagement Plan (March 2005),12.

887 United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Access & Movement of People and Goods in 2015 (January- 31 December 2015).

888 Gisha – Legal Center for Freedom of Movement, Scale of Control: Israel's Continued Responsibility in the Gaza Strip, written by Sari Bashi and Tamar Feldman November 2011, 12–14.

889 United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Access & Movement of People and Goods in 2015.

890 United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Humanitarian Bulletin – Occupied Palestinian Territory, 1.

891 Id.

892 United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Access & Movement of People and Goods in 2015.

893 B'Tselem and HaMoked, One Big Prison: Freedom of Movement to and from the Gaza Strip on the Eve of the Disengagement Plan.

Great March Return.[894] From March 30 to August 24, 2018, Israeli snipers killed at least 166 Palestinians and wounded more than 2400 Palestinians, causing Turkey to officially accuse Israel of genocide and state terror.[895] The United Nations Security Council convened to discuss the killings in Gaza, as the peaceful protestors are not imposing an imminent threat to Israel. Consequently, U.N. Secretary-General Antonio Guterres has proposed four options to protect Palestinians living under Israeli occupation. One option would be a U.N.-led armed international mission to defend Palestinians in the occupied West Bank and Gaza from the Israeli army, and another would be an independent investigation into the Gaza deaths.[896] The UN General Assembly adopted a resolution "deploring the use of excessive, disproportionate and indiscriminate force by Israeli forces against Palestinian civilians in the Occupied Palestinian Territory, including East Jerusalem, and particularly the Gaza Strip [...] the Assembly demanded that Israel refrain from such actions and fully abide by its legal obligations under the Fourth Geneva Convention relating to the Protection of Civilian Persons in Time of War, of 12 August 1949."[897] Nevertheless, nothing has been de facto implemented to protect the Gazans against the brutality of the Israeli army.

There are only two ways for Palestinians to travel abroad, one for the West Bankers and the other for the Gazans. The only way for the West Bankers to travel outside their area is via the Allenby Bridge, which connects the West Bank and Jordan.[898] The travel from the West Bank to Jordan takes up to one full day, as Palestinians must enter through the Palestinian side, then go through Israeli control, and then through the Jordanian control. The bridge is only open during certain hours, and traveling to anywhere in the world compels Palestinians to leave for the airport in Jordan one or two days in advance of their flight.[899] Palestinian, Jordanian, and Israeli authorities are intro-

894 United Nations Security Council – 73 year – 8256th meeting, 15 May 2018, New York. Doc No. S/PV.8256, 2–3.

895 See Aljazeera News, Gaza Protests: All the Latest Updates, August 24, 2018. https://www.aljazeera.com/news/2018/04/gaza-protest-latest-updates-180406092506561.html.

896 Reuters News, UN Chief Suggests Options for Improved Palestinian Protection, August 18, 2018.

897 United Nations Meeting Coverage and Press Release, GA/12028, General Assembly, tenth Emergency Special Session, 38th Meeting, 13 June 2018.

898 Jennifer Loewenstein, "Identity and Movement Control in the OPT," Forced Migration Review, Vol. 26 (2006): 24–25.

899 Id.

ducing a service for those who are willing to pay 150 USD or 110 USD to receive VIP treatment, a significant increase from the original 50 USD.[900] This VIP service includes stamping the passports, carrying the luggage, and providing transportation to all sides. People who chose the normal service usually pay around 10 USD, but they have to wait several hours and sometimes days.

The only way for Gazans to travel outside Gaza is through the Rafah border crossing, which is controlled by Egypt. According to the Agreed Principles for Rafah Crossing (APRC), signed by Egypt, the Palestinian Authority, and the Israeli Government, Rafah is operated by the Palestinian Authority, controlled by Hamas on one side and Egypt on another side, according to international standards and supervised by the European Union.[901] Nevertheless, under the Agreement of Movement and Access (Rafah Agreement), since 2013, Egypt has been controlling the Rafah border crossing and imposing restrictions on the movement of the Gazans.[902] Egypt allows movement in and out of the Gaza Strip on very limited occasions. The crossing border opens two or three days every several months for only a few hours a day, ignoring the humanitarian necessity and needs of the Strip.[903] Thus, Egypt is also violating the right to free movement of the Palestinians in the Gaza Strip, and must be held accountable for such violations. Israel, from its side, "prevents residents of Gaza from operating an airport or a marine port and forbids them from crossing through Allenby Bridge."[904] Gazans are prohibited, by Jordan and Israel, from traveling to the other countries via the West Bank and then through Allenby Bridge

900 Véronique Bontemps, "Entre Cisjordanie et Jordanie, l'épreuve du passage frontalier au pont Allenby?" Revue européenne des migrations internationales, Vol. 30, No. 2 (2014): 69–90, 85.

901 B'Tselem and HaMoked, One Big Prison: Freedom of Movement to and from the Gaza Strip on the Eve of the Disengagement Plan.

902 United Nations Office for the Coordination of Humanitarian Affairs (OCHA) Gaza Crossings: Trends in Movement of People and Goods, December 2014, 1.

903 See United Nations News Center, Gaza, UN Envoy Welcomes Temporary Opening of Rafah Crossing, 11 June 2015. See also the Statement by the United Nations Special Coordinator for the Middle East Peace Process, Mr. Nickolay Mladenov, on the announcement of the opening of Rafah Crossing for three days Jerusalem, 11 June 2015.

904 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Palestinian Territories and HaMoked – Center for the Defence of the Individual, So Near and Yet So Far: Implications of the Israeli Imposed Seclusion of Gaza Strip on Palestinian's Right to Family Life, (January 2014), 31, 60.

to Jordan.[905] All residents of the West Bank and the Gaza Strip who want to leave these areas to go to Egypt or Jordan require Israeli approval as well as Palestinian, Egyptian, and/or Jordanian approvals.[906]

These restrictions from all sides have affected Palestinians' rights to movement as well as all other fundamental rights. The influence of the right to movement on other rights,, is crucial as discussed earlier. Restrictions of Palestinian movement have had grave consequences on all norms of Palestinian life and have caused a devastating effect on education, health, family and social life, the right to worship and practice religion, labor market, economy, agriculture, etc. Palestinian education has been affected by the restrictions on movement. There are universities in the cities of the West Bank and the Gaza Strip, but not in all of them. As for the elementary and secondary schools, educational institutions are available in a number of Palestinian cities and villages. The Palestinian Authority runs a number of governmental schools, elementary and secondary, in the West Bank and the Gaza Strip. The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) also manages a number of elementary UN schools, and there are a number of private schools.[907] A total of 2784 schools are located in the West Bank and the Gaza Strip.[908] Yet, schools and universities are not available in all cities and villages in Palestine. On a daily basis, teachers and students must reach their educational institutions in other villages and cities. However, most of the time, they are confronted with obstacles, and they are unable to reach their educational institutions.[909] Many class hours are wasted because of the absence of teachers. In some areas, classes are cancelled, and schools are closed and turned into Israeli military premises.[910] Many schools in the Occupied Territory have "restricted access to quality, protected education due to military checkpoints and settler harassment, and some of these communities are in need of urgent

905 B'Tselem and HaMoked, One Big Prison: Freedom of Movement to and from the Gaza Strip on the Eve of the Disengagement Plan, 12.

906 Id.

907 See the Distribution of Schools by Directorate, Supervising Authority and School Gender, 2013–2014. Available at the website of the Palestinian Ministry of Education and Higher Education- Educational Statistics.

908 Id.

909 B'Tselem, Civilians under Siege: Restrictions on Freedom of Movement as Collective Punishment, 36.

910 Id. 38.

humanitarian assistance to participate in protective education processes."[911] Palestinian students are forced to attend and enroll in the closest educational institute to their residence, which prohibits them from choosing the quality of their education. As a result, children have not had access to schools and educational institutions and have lost their right to education. In its report in 2003, the United Nations Economic and Social Council affirmed that:

> 170,000 children and over 6,650 teachers were unable to reach their regular classrooms and at least 580 schools were closed owing to curfews, closures and home confinement. Since September 2002, children and students from kindergarten to the university level in most areas have been unable to attend school for about half of the total school days due to closures and curfews. School closures, loss of employment and economic pressures contributed to an increase in child labour, especially for those under 15 years. Many secondary school students, including girls, failed to reach the examination centers in time for their yearly exams.[912]

Restrictions on movement prevent Palestinians from receiving proper health care. Sick persons are often denied access to medical treatment, hospital, and clinics.[913] Medical teams and ambulances are prohibited from moving freely to provide medical treatment.[914] Sick persons and medical teams face difficulties in their movement amongst the Palestinian cities and villages, checkpoints, roadblocks, and other physical obstacles; they are prevented from passing through these checkpoints or are allowed to pass after prolonged delays.[915] In cases when patients need to go to the Arab hospitals in Jerusalem, they also face delays. For example, more than 90% of Palestinian ambulances are denied direct entry to transfer patients to Jerusalem, and some

911 Commission of the Churches on International Affairs (CCIA) World Council of Churches, Education Under Occupation: Access to Education in the Occupied Palestinian Territory, Geneva (2013), 5.

912 United Nations Economic and Social Council, Commission on the Status of Women, 48th Session. E/CN.6/2004/4 on 22 December 2003. cited as (A/58/88-E/2003/84), 8.

913 B'Tselem, Civilians under Siege: Restrictions on Freedom of Movement as Collective Punishment, 27.

914 See the Palestinian Red Crescent Society, Quarterly Reports on Israeli Violations against Medical Crews in the Palestinian Territory. Report October-December 2012.

915 B'Tselem, Civilians under Siege: Restrictions on Freedom of Movement as Collective Punishment, 27–28.

of these ambulances are attacked by Israeli extremists.[916] The World Health Organization reported that access to health care facilities for more than the half of the patients in the West Bank and Gaza is subjected to delays due to the Israeli occupation.[917] In urgent cases, patients have died while waiting to pass at the Israeli checkpoints, being denied access, or facing blocked roads.[918] In other cases of serious injuries, people are left with disabilities.

At the Human Rights Council, Makarim Wibisono, a Special Rapporteur on human rights in the Palestinian Territory, reported that due to the Israeli blockade, Gaza suffers from lacks of access to health care, deficiency of health services, shortages of drugs and medical supplies, and restrictions imposed on doctors and medical personnel from receiving medical training abroad.[919] Notably, the United Nations Population Fund (UNFPA) reported that Palestinian women face child deliveries at checkpoints almost every day without any health care.[920] This phenomenon has put the life of the mothers and their children in danger. In fact, the Economic and Social Council reported that, in 2003, in the month of June alone, "a sharp increase was observed in number of births in ambulances or at home, causing distress and complications to mothers … delays at checkpoints had resulted in 46 women delivering their babies while waiting for permission to pass through, and as a result, 24 women and 27 newborn babies had died … psychosocial trauma continued to climb, and it was also reported that 43 per cent of Palestinian women had requested psychosocial support."[921] Accessibility to proper quality health service has also been impaired by the restrictions on the movement of doctors and other medical staff. Most Palestinians in the West Bank and the Gaza Strip require medical treatment and health care in East Jerusalem for

916 World Health Organization (WHO), Right to Health: Crossing Barriers to Access Health in the Occupied Palestinian Territories (Ramallah: Al-Nasher, 2013), 23.

917 Id. 16.

918 Id., 27–33.

919 Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied since 1967, Makarim Wibisono. United Nations General Assembly, Human Rights Council, 28th Session. A/HRC/28/78, 22 January 2015), 25–33.

920 United Nations Population Fund (UNFPA), Checkpoints Compound the Risks of Childbirth for Palestinian Women. Press release, Ramallah, (15 May 2007).

921 United Nations Economic and Social Council, E/CN.6/2004/4 (2003).

which they require a special Israeli permit; 15–30% of the permit applications are delayed, denied, or never approved.[922]

As in other aspects of life, the Palestinian family and social ties have also been affected by the Israeli restrictions on Palestinian movement. These restrictions harm family relations and the social life of Palestinians and impair their family unification. The restrictions on movement prevent family members from gathering or delay members from taking part in large family events and social gatherings.[923] One-third of the Palestinians in the Gaza Strip have relatives in the West Bank, East Jerusalem, and Israel. Family visit permits are rarely granted, while family reunifications are impossible.[924] Palestinian and Israeli mixed families are also denied reunification.[925] This has led to families being torn apart, as their relatives reside in different areas and cannot visit or see each other. Even the Palestinian social life is limited, as it is equally difficult for friends to gather. Similarly, the right to worship and practice religion is gravely affected. Palestinian Muslims and Christians, who wish to worship and visit their holy religious places in East Jerusalem or Bethlehem, incur many restrictions imposed by Israel. Access to East Jerusalem, as discussed earlier, is severely controlled by the separation wall, checkpoints, and a permit system, which cuts off the city completely from the West Bank. As the holiest Christian and Islamic sites, the Church of the Holy Sepulcher and Al-Aqsa Mosque Compound, are located in East Jerusalem, Palestinians tend to apply for Israeli permits to gain access to these places to worship during religious holidays.[926] Access of the Christian Gazans to the West Bank for purposes of worship is also restricted. Nevertheless, Israeli authorities are likely to grant permits to Palestinian Christians, but less likely to grant the same permits to

922 United Nations Human Rights Office of the High Commissioner, Freedom of Movement: Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem. Report of the Secretary-General to the United Nations Human Rights Council. UN Doc. No. A/HRC/34/38 (February 2016), 10.

923 B'Tselem – the Israeli Information Center for Human Rights in the Occupied Territories, Restriction of Movement: Impact of the Restrictions on the Palestinian Fabric of Life. 1 January 2017.

924 United Nations Human Rights Office of the High Commissioner, Freedom of Movement (UN Doc. No. A/HRC/34/38), 14.

925 Id.

926 The Palestinian Center for Human Rights, Violations of the Right to Freedom of Worship for Palestinians in the Gaza Strip. Briefing Note, (November 2012).

Palestinian Muslims.[927] In all cases, Palestinians in the West Bank and the Gaza Strip do not have the freedom to choose when to practice their right to worship and visit their holy sites.

Tens of thousands of Palestinians have lost their jobs in Israel, the West Bank, and the Gaza Strip.[928] Whenever Palestinian workers and businesspeople were given permits to enter Israel or move between the West Bank and the Gaza Strip, only the Israeli authority decided to whom and for what reasons to grant permits.[929] The Office United Nations Special Coordinator for the Middle East Peace Process, UNSCO, has reported that unemployment increased from 11% to 40% in the Occupied Territory in less than three months.[930] In its second quarterly report of 2016, UNSCO reported that the unemployment rate in the West Bank is 18.3%, while in the Gaza Strip, it is 41.7%. These rates are marginally higher than the rates of 2015.[931] Within the West Bank, it is challenging for Palestinians to travel to their jobs, as traveling from city to city or village to city takes several hours, including delays or complete denial. People lose their jobs because they cannot travel every day to urban cities to work. Some Palestinian inhabitants are forced to change their residence and move to urban areas to avoid restrictions imposed on them and to be close to their work, educational institutions, or medical services. However, not everyone is financially able to afford moving.[932] Local inhabitants have also closed their business and announced bankruptcy.[933]

The Palestinian economy has also deteriorated. Most of the imports of the West Bank and Gaza Strip come from Israel and all imports and exports are

927 Id.

928 B'Tselem, Civilians under Siege: Restrictions on Freedom of Movement as Collective Punishment, 14.

929 Hass, "Israel's Closure Policy: An Ineffective Strategy of Containment and Repression," 13.

930 The Office United Nations Special Coordinator for the Middle East Peace Process UNSCO, The Impact on the Palestinian Economy of Confrontation (28 September-26 November 2000), 5.

931 The Office United Nations Special Coordinator for the Middle East Peace Process UNSCO, UNSCO Socio-Economic Report: Overview of the Palestinian Economy in Q2/2016, 5.

932 Hass, "Israel's Closure Policy: An Ineffective Strategy of Containment and Repression," 6.

933 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Restriction of Movement: Route 443- West Bank Road for Israelis Only (1 January 2011).

controlled by Israel.[934] Israel has enforced restrictions on the trade crossing points between Israel and the West Bank. As Palestinians vastly depend on the transportation of goods from Israel, restrictions have caused devastation to the Palestinian economy. The transportation of goods has also become less profitable and uncertain for traders.[935] In the Gaza Strip, as Israel closed all roads with Israel and the West Bank and controlled all movement from and to the Strip,[936] the movement of persons and goods is very limited between Gaza and the West Bank and Gaza and Israel.[937] As a result, many trade sectors, companies, imports, and exports have been paralyzed. This, in turn, put Gaza's economy in a growing crisis.[938] For example, the Office of the United Nations Special Coordinator for the Middle East Peace Process (UNSCO) reported that zero exports from Gaza were recorded in the month of January 2008.[939] In 2016, it reported that exports of goods and services from the West Bank made up 24.5% while imports represented 64.4%. The Gaza Strip recorded 3.2% of exports, while imports amounted to 35.3%.[940] Both the West Bank and the Gaza Strip are witnessing a trade deficit and a decrease in their economic activities.[941] Agriculture and access to land have also been affected by the restrictions on movement and confiscation of the Palestinian land. This will be detailed in the following chapters.

The Palestinian Authority and Hamas have also imposed restrictions on the movement of the Palestinians in the West Bank and the Gaza Strip. The division between the political parties, Fatah and Hamas, in the Palestinian Territory has led to similar consequences on the movement of Palestinians.[942]

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934 The Office United Nations Special Coordinator for the Middle East Peace Process UNSCO, UNSCO Socio-Economic Report: Overview of the Palestinian Economy in Q2/2015, 3.

935 B'Tselem, Restrictions on Movement: Effect of Restrictions on the Economy.

936 B'Tselem, Civilians under Siege: Restrictions on Freedom of Movement as Collective Punishment, 10.

937 B'Tselem, Restrictions on Movement: Effect of Restrictions on the Economy.

938 Id.

939 The Office United Nations Special Coordinator for the Middle East Peace Process UNSCO, UNSCO Socio-Economic Report: Overview of the Palestinian Economy in January 2008, 5.

940 The Office United Nations Special Coordinator for the Middle East Peace Process, UNSCO Socio-Economic Report: Overview of the Palestinian Economy in Q2/2016, 2.

941 Id.

942 United Nations Human Rights Office of the High Commissioner, Freedom of Movement (UN Doc. No. A/HRC/34/38), 15.

Hamas, as a government, functions in the Gaza Strip and controls the movement of the Gazans, since the Israeli withdrawal from Gaza, including the Rafah border crossing. Egypt and Hamas have control over both sides of the Rafah Crossing.[943] On those rare occasions that Egypt opens the Rafah border crossing, the Hamas government and then the Egyptian authorities decide who leaves or enters the Strip.[944] At the Rafah Crossing, Hamas, on many occasions, has denied residents from traveling. Similarly, at the Erez Crossing, Hamas controls the Gazan residents before they reach the crossing. Hamas security officers have prevented some Palestinians from traveling with no reasons.[945] The Palestinian Authority has also committed similar practices. In 2010, for example, the Ministry of the Interior-Palestinian Authority, as the sole governmental entity that issues official recognized documents, refused to issue passports for the Palestinian residents of Gaza. Likewise, the Internal Security Agency in Gaza confiscated passports from members of Fatah in the Strip.[946] In the same year, 10 patients died and 320 students could not attend their universities outside Gaza due to their inability to obtain passports.[947] In April 2017, the President of the Palestinian Authority, Mahmoud Abbas, approved the Criminal Procedures Law, without the approval of the Legislative Council. This allows the prosecution to prevent any Palestinian from traveling outside the Palestinian Territory. The law is good for six months and renewable upon expiration.[948] "The continuation of arbitrary detention [by the Palestinian security forces] is an important indicator of the deterioration of human rights in Palestine … arbitrary detention still takes place [against Hamas affiliates in the West Bank, against Fatah affiliates in the Gaza Strip, or against activists] without formal charges against detainees or proper procedures for detention … detainees also face delays in the enforcement of court rulings regarding their detention."[949]

943 Human Rights Watch, Unwilling or Unable: Israeli Restrictions on Access to and from Gaza for Human Rights workers (USA: Human Rights Watch, 2017), 12.

944 Id.

945 The Independent Commission for Human Rights, 16th Annual Report, 34.

946 Id.

947 Id., 149.

948 See the Presidential Decree (law) No. 17 of 2014 concerning the amendment of the Criminal Procedures Law No. 3 of 2001. (Text in Arabic); see also Al-Quds News, The Prevention from Travelling: The First Step Towards a Police State, published on 25, April 2017 (Text in Arabic).

949 The Independent Commission for Human Rights, 21st Annual Report, 27–28.

In the West Bank, increasing numbers of complaints against the Ministry of Interior Affairs and security agencies of the Palestinian Authority have been reported to the Independent Commission for Human Rights (ICHR).[950] In 2012–2013, ICHR received 70 complaints related to violations of the right to free movement.[951] Some people were denied passport renewals; others were denied access to cross the borders into Jordan.[952] The Palestinian Authority has prevented a number of Palestinians from traveling to Jordan because they participated in peaceful protests.[953] The Gazan population is prohibited from traveling and unable to exercise their right to movement.[954] The Internal Security of the Ministry of Interior in the Gaza Strip, in cooperation with the Egyptian authorities, has prohibited many Gazan residents from exiting the Gaza Strip through Rafah's border crossing.[955] According to the Palestinian Independent Commission for Human Rights, even if Israel grants a limited number of permits for Gazans to pass through the Erez Crossing, Hamas repeatedly refuses to let them pass to reach Erez, while some are denied crossing by Israel even with a permit.[956]

The practices of the Israeli Government and the Palestinian Authority have jointly impaired and caused deterioration of the Palestinian situation. In order to answer the question of whether these extreme practices violate the right to movement, a comprehensive examination of the provisions of international human rights and international humanitarian laws as well as domestic laws will be conducted.

4. The Right to Movement in International Law

Freedom of movement is internationally recognized as a basic and fundamental right in both human rights instruments and humanitarian law principles. Although the right to free movement is a basic element of liberty, international law allows states to restrict the right to freedom of movement,

950 The Independent Commission for Human Rights, 19th Annual Report, 99.
951 Id.
952 Id.
953 The Independent Commission for Human Rights, 23rd Annual Report, 72.
954 The Independent Commission for Human Rights, 21st Annual Report, 27.
955 The Independent Commission for Human Rights, 19th Annual Report, 100; and The Independent Commission for Human Rights, 20th Annual Report, 18.
956 Id.

but only under limited circumstances.[957] It has been internationally agreed upon that international law principles to protect Palestinians and their right to movement within and outside the Occupied Territory should apply. The right to movement refers to different aspects of mobility within and outside of one's country, including the right to choose one's residence. The right to movement in Palestine will be examined within the principles of international human rights law, international humanitarian law, and international customary law.

4.1. The Right to Movement in International Human Rights Law

Throughout history, movement has been internationally seen as a personal liberty and a life necessity.[958] Several international human rights instruments have protected the right to free movement where such rights extend to citizens, immigrants, women, children, nationals and residents. In regard to international human rights, the International Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other international human rights instruments emphasize the prominence of the right to free movement.[959] As mentioned earlier, these instruments allow for restrictions on the right to movement in some cases. Although the right to movement is fundamental and should be respected, states can limit or restrict people's movement in certain cases, such as emergency situations, national security, and public order. Although human rights instruments do allow limitations, these must be conducted in a very narrow context and be used in temporary and exceptional cases.[960]

Through its articles, The Universal Declaration of Human Rights (UDHR) establishes the right to movement as a basic need and indicates the importance of this right.[961] Among the different distinct rights, Article 13 states that

957 International Covenant on Civil and Political Rights of 1966, Article 12 (3).

958 McAdam, "An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty," 12.

959 The Universal Declaration of Human Rights of 1948; International Convention on the Elimination of All Forms of Racial Discrimination of 1965; International Covenant on Civil and Political Rights of 1966.

960 International Covenant on Civil and Political Rights of 1966, Articles 13 -14.

961 The Universal Declaration of Human Rights of 1948, Article 13: (1) Everyone has the right to freedom of movement and residence within the borders of each state; (2) Everyone

everyone has the right to move freely within a state, leave and return to his/her country, and the freedom to choose a residence.[962] The right to movement in the UDHR is not restricted or limited. The article, in fact, does not limit the applicability of absolute mobility; yet, it grants a person the right to return only to his/her own country.[963] Fundamentally, people have the right to move freely within their state without hindrance. The exception here is entering other states' territories, which involves migration issues, as states control or prohibit the entry of individuals of certain nationalities.[964] This is due to state's policies and the power of their decision makers in identifying the implications of the right to movement. It encompasses an interruption with the state sovereignty; thus, a state might restrict movement along its borders to secure its territories.[965] This limitation is, however, beyond the scope of this study.[966] The focus here is the protection of the right to movement that includes the right to move freely within a state and to leave one's country and to return to it, which is unlimited according to the UDHR.

In 1965, the International Convention on the Elimination of all Forms of Racial Discrimination, entered into force on 4 January 1969. It has protected

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has the right to leave any country, including his own, and to return to his country.

962 Id.

963 Id.

964 Atle Grahl-Madsen, "Article 13," in The Universal Declaration of Human Rights: A Commentary, ed. Asbjorn Edie, Gudmundur Alfredsson, Goran Melander, Lars Adam Rehof and Allan Rosas (Oslo: Scandinavian University Press, 1992), 211.

965 Id., 207.

966 In its 116th plenary meeting, the General Assembly adapted the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live. It stresses the importance of the right to leave the country and protects the right to liberty of movement and freedom to choose the place of residence, but only for those who are "lawfully in the territory of a State." The right to movement is an individual need; nevertheless, it is not guaranteed unconditionally. See, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live, Adopted by General Assembly 116th plenary meeting, Resolution 40/144 of 13 December 1985. Article 5, 1. Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligations of the State in which they are present, in particular the following rights: ... 2. (a) The right to leave the country; ... 3. Subject to the provisions referred to in paragraph 2, aliens lawfully in the territory of a State shall enjoy the right to liberty of movement and freedom to choose their residence within the borders of the State. ...

freedom of movement as a fundamental right which everyone enjoys without discrimination.[967] Article 5 reads:

> In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: … (d) other civil rights, in particular: (i) The right to freedom of movement and residence within the border of the State; (ii) The right to leave any country, including one's own, and to return to one's country ….” The article assures equality to all people to move freely and to choose their residence. People cannot be prohibited from entering their own country.

A year later, the International Covenant on Civil and Political Rights (ICCPR) emphasized the people's right to liberty of movement, freedom to choose their residence, and their right to leave any country.[968] Article 12 reads:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public) … and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country.[969]

It is unquestionable that citizens of a country have the right to movement and to choose their residence within their country. Within the Palestinian context, the situation is different. The right to movement of Palestinians who reside in the Occupied Territory is restricted in many ways by the Israeli occupation. There are different dimensions to understand the rules of international human rights law and apply them to the Palestinian case. Israel has the duty to respect the fundamental rights and principles as a negative aspect and the duty to protect them as a positive aspect. The obligation to respect the right to movement is described as “negative in the sense of being hands-off

967 International Convention on the Elimination of All Forms of Racial Discrimination of 1965.

968 International Covenant on Civil and Political Rights of 1966, Article 12.

969 Id.

duty."[970] The duty to respect is implemented by allowing Palestinians to enjoy their rights and move freely without any intervention or interruption. The duty to protect is implemented by acting to prohibit any violations, which might be committed against Palestinians by any party. The International Court of Justice has ruled that the imposed restrictions on the freedom to movement of the local Palestinians have deprived a number of Palestinians of their freedom to choose residence and compelled many to leave from certain areas.[971] These issues "constitute violations under Article 12 of the International Covenant on Civil and Political Rights."[972]

Citizens and legal residents of a state are unconditionally entitled to enjoy their movement freely; yet, non-citizens are restricted from entering another foreign country.[973] State parties are prohibited from depriving individuals of the enjoyment of their declared rights, except for national security and public order and under proportionality tests.[974] States, hence, should not interfere or restrict movement or travel granted to people which are "lawfully within the territory of a State."[975] The precondition of the right to movement and the right to choose one's residence is that the person should be a legal resident in the country.[976]

970 Steiner, Alston, and Goodman, International Human Rights in Context: Law Politics Morals, 187.

971 International Court of Justice, Advisory Opinion (2004), 11.

972 United Nations General Assembly, Report by Secretary-General, Israeli practices affecting human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem No. A/67/372. Sixty-seventh session, Item 53 of the provisional Agenda A/67/150, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories. 14 September 2012, 42.

973 Id.

974 Henry J. Steiner, Philip Alston, and Ryan Goodman, International Human Rights in Context: Law, Politics, Morals, 3rd edition (Oxford: Oxford University Press, 2007), 187.

975 International Covenant on Civil and Political Rights of 1966, *Article 12* "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country."

976 Christoph Grabenwarter, European Convention on Human Rights: Commentary (Germany: C.H. Beck. Hart. Nomos/ Helbing Lichtenhahn Verlag, 2014), 412.

The right to movement is not absolute. The principles of international human rights law have allowed state parties to restrict and limit the enjoyment of the right to movement.[977] Such restrictions and limitations, nonetheless, must not be the rule and must not be implemented as a policy.[978] State parties should, whenever possible, minimize imposing any restrictions.[979] Limitations on freedom of movement might take different forms, such as security checks, closed areas, and curfews. The extremist restriction "takes the form of a curfew that restricts the right to all people in a given area to leave their homes during stipulated times."[980] These restrictions should be the exception, which means that they must, whenever applicable, be temporary and geographically limited. The interference "should be limited to a certain geographical area, the restriction may only be imposed for certain area such as a military zone, customs district, nature reserve or industrial zone."[981] In other words, the general rule is that limitations on movement must be very minimal, but some zones might be permanently closed such as military zones. To reach the necessary aims that are set forth in the provisions of international law, intervention in the right to free movement must be regulated by the law. The limits of interference should be "in accordance with the law and necessary in a domestic society—restrictions must be proportionate."[982] This means that the states should, before imposing any limitations, enact laws that regulate the restrictions of free movement. These laws must respect the principle of

977 See articles stated in notes 20, 21, 22, 23, and 24.

978 The Convention on the Rights of the Child, which is ratified by the Israeli Government and the Palestinian Authority, has also emphasized the importance of right to movement and its impact on other rights. The convention protects the rights of children and their parents to enter and leave a country for the purpose of family reunions. In addition, the parents of a child who are residents in another country have the right to maintain visits on a regular basis. The convention emphasizes the importance of the social and parental relations among family members. It has gone farther to protect children against violations of their movement and family ties. In fact, it has given a special importance to the right to movement as an essential element to raise children in a healthy environment. See the Convention on the Rights of the Child Ratification and Accession by General Assembly Resolution 44/25 of 20 November 1989.

979 Hurst Hannum and Richard B. Lillich, International Human Rights: Problems of Law, Policy and Practice, 3rd ed. (Canada: Little, Brown and Company, 1995), 253.

980 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 127.

981 Grabenwarter, European Convention on Human Rights: Commentary, 415.

982 Id.

proportionality to the pursued outcome or benefit.[983] Simply put, states must make sure that there is a balance between the measures taken and the purpose sought.

The ICCPR precisely lists the exceptions of right to movement. The most elaborate enumeration of exception is the "national security and public order"[984] It is important to understand the meaning and the use of these terms. National security is defined as "the safety of a country and its governmental secrets, together with the strength and integrity of its military, seen as being necessary to the protection of its citizens."[985] Public order is also defined as "the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded."[986] The vague language in the definitions could be used by the states to deviate from their international obligations.[987] In other words, both terms as exceptions are very broad; in fact, states are left to speculate on circumstances and surroundings to decide when and how to impose restrictions on the right to movement. National security and public order can be interpreted differently and broadly imposed. Public health, morals or the rights and freedoms of others are also very extensive, and it is very likely they are interpreted differently in each situation. This leads to a massive implementation of such restrictions which could be justified randomly without actual reasons. Nonetheless, the genuine boundary to prevent misuse of powers is the principle of proportionality, which will be examined later.

The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights elaborates the circumstances where the use of national security is limited. They state, "National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force."[988] It is clear that a state should protect the existence of the nation against threats; this

983 United Nations Human Rights Committee, General Comment No. 27 on Article 12 of the Convention: Freedom of Movement, UN Doc CCPR/C/21/Rev.1/Add. 9 (2 November 1999), § 13–14.

984 International Covenant on Civil and Political Rights of 1966, *Article 12*.

985 Garner, ed., Black's Law Dictionary, 1187.

986 Economic and Social Council; The Siracusa Principles, 22.

987 Hitoshi Nasu, "The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System," Amsterdam Law Forum, Vol. 3, Issue No. 3 (2002): 15–33, 20.

988 Economic and Social Council, The Siracusa Principles, 29.

protection might be achieved by limiting specific rights. Nevertheless, national security must not be used at all times. The Siracusa Principles do limit the use of national security as it "cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order… [and] cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse."[989] This means that states must be very careful with their frequency of using national security as a justification to restrict some human rights, and any decision, order, or regulation must be well reasoned and detailed. Each decision, order, and regulation must be based on law and must present the circumstances that threaten the existence and the security of the nations, and such restriction on some human rights is a necessity and proportionate to the aim pursued. In this case, the limitations on human rights do not and must never become a policy.[990]

This leads to the last remark of the Siracusa Principles regarding national security, as a "systematic violation of human rights undermines true national security and may jeopardize international peace and security … [and a] state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population."[991] Orders and regulations that restrict human rights must not be permanent or systematic against certain population. It is also important to note that restrictions on some human rights must present a legitimate purpose and strike a proportionate balance. A state must use "no more restrictive means than are required for the achievement of the purpose of the limitation."[992] In other words, the states are not allowed to impose grave restrictions to restore non-serious situations in a small geographical area. These restrictions should be partial and extend only where the measures are necessary. When orders and regulations

989 Id., 30–31.

990 The measures of putting a person under special police supervision and restricting his or her movement without sufficient evidence was found disproportionate to the aim pursued; hence, it violated this person's right to free movement. See Grabenwarter, European Convention on Human Rights: Commentary, 416. Cited as ECtHR, 6/4/2000, Labita v. ITA, No. 26772/95, §§ 63, 196). Although crime restriction is not the focus here, the law protects suspects. This touches upon a conclusion that the movement of innocent people, not even suspects, should not be restricted or interrupted.

991 Economic and Social Council, The Siracusa Principles, 32.

992 Id., 11.

become severe and do not match the criteria, they violate the principles of international human rights. Remarkably, the United Nations Human Rights Committee confirmed that "the laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution … [and] it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them … [these] measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."[993]

Similarly, public order must be interpreted in the context of the purpose of the limitation on a specific human right and state entities "responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies."[994] The supervision of the parliament, courts, and independent bodies are important aspects to limit the state's misuse of powers. Whenever there is a conflict between national security and basic human rights, national security might be given the priority; in this instance, an extreme approach prevails.[995] This approach is accepted by a number of countries and not just Israel. It is also accepted by the Israeli Supreme Court where security "is likely to overshadow any other consideration, regardless of how weighty it might be."[996] That is to say, all efforts of the Israeli government and judiciary are directed to serve national security in a way that human rights, basic freedoms, fundamental liberties, and justice are less important. This raises the question as to whether the Court is obligated to find a proper balance, according to international and domestic laws, between human rights and security needs, public interests, or military necessities in order to protect all inhabitants with no distinction. In each case the Israeli Court examined, the Court has made it so explicit that there is no justification for the infringement of human rights.[997] Even if there is such justification, it should not be used as a day-to-day policy or a norm. In addition, can a restricted policy or

993 UN Human Rights Committee, *General Comment No 27 (1999),* CCPR/C/21/Rev.1/Add.9, § 13–14.

994 Economic and Social Council, The Siracusa Principles, 23–24.

995 Itzhak Zamir, "Human Rights and National Security," Israel Law Review, Vol. 23 (1989): 375–406, 377.

996 Chaya Kaufman v. Minister of the Interior (1953), 7 P.D. 534, 536.

997 Zamir, "Human Rights and National Security," 382.

a norm be justified during prolonged periods of occupation? The danger that threatens human rights is the extensive use of unwarranted and unnecessary oppression at the expense of other important human rights, national, and international principles.

Furthermore, the right to movement falls under the category of the derogable rights in situations of public emergency. As discussed previously, a state is allowed to take derogation measures under the International Covenant on Civil and Political Rights, pursuant to Article 4, only when it faces a situation of public emergency that threatens the life of the nations.[998] Under any circumstances, the restriction of freedom of movement must not be a means of collective punishment or a discriminatory policy against one group of people. Israel is using emergency regulations, derogation measures, national security, and public order as a means to impose restrictions on the movement of Palestinians in Occupied Palestine. The Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967, Richard Falk, states:

> The rights to work, to freedom of movement, and to leave and return to one's country, are particularly relevant to Gaza. In the West Bank, the denial of rights to Palestinians is made possible by the existence of parallel legal systems operating in the same territory: one set of civil and criminal laws for Israeli settlers and another for Palestinian Arabs, subject to Israeli military orders, as well as other laws. While the Israeli High Court of Justice formally exercises judicial oversight of the Israeli administration in occupied Palestine, according to NGOs, case law illustrates a trend whereby major policy decisions of government, e.g. relating to the wall and settlements, tend to be immune from judicial intervention, and that human rights and protection under international humanitarian law have not been adequately upheld by the High Court in its rulings. The creation of Israeli legal zones for settlers and the resulting segregation was noted in the 2013 report by the independent fact-finding mission on settlements (A/HRC/22/63). The Committee on the Elimination of Racial Discrimination in 2012 expressed that it was 'extremely concerned' at policies and practices amounting to de facto segregation and that it was 'particularly appalled at the hermetic character of the separation of the two groups.[999]

998 See Chapter III: Subsection: International Human Rights Law.

999 Falk, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, UN Doc. No. A/HRC/25/67.

The protection and the limitations of the right to movement under the provisions of international human rights are explicit. As Palestinians are protected under the umbrella of these provisions, both the Palestinian Authority and the Israeli government are obliged to respect their obligations as state parties. Even in case of emergency and threats to national security and public order, neither government has absolute powers to impose restrictions on this very fundamental right, the right to movement. The practices of the Israeli and the Palestinian governments, which have become deliberate and continuous policies, constitute a violation of the applicable international human rights provisions. First, the International Court of Justice has ruled that the Israeli restrictions on the movement of Palestinians, which are a result of construction of the wall, have led to increasing difficulties for Palestinians in enjoying their basic rights, and, therefore, it is are a breach of the provisions of human rights law particularly the articles of the International Covenant on Civil and Political Rights (ICCPR).[1000] Secondly, the Human Rights Council has continually reported that Israel and the Palestinian Authority have imposed policies on the movement of the Palestinian population in the West Bank and the Gaza Strip and concluded that these policies constitute severe violations and are contrary to the international human rights conventions, to which Israel and Palestine are state parties.[1001] International, Israeli, and Palestinian human rights organizations have repeatedly concluded that the restrictions imposed by Israel and the Palestinian governments on the movement of the Palestinians violate human rights law provisions.[1002]

International humanitarian law imposes different obligations on the Israeli government, as an occupying power in Palestine. More precisely, the right to movement of Palestinians, who are living in their land under the Israeli occupation, is being collectively and deliberately restricted by the Israeli occupying powers. As discussed earlier, Palestinians in Occupied Palestine are protected under the principles of international humanitarian law. Accordingly, the right to movement under the named law will be examined.

1000 International Court of Justice, Advisory Opinion (2004), 191.

1001 United Nations Human Rights Office of the High Commissioner, Freedom of Movement (UN Doc. No. A/HRC/34/38), 14.

1002 See annual and other reports on Human Rights Watch, B'tselem, Gish, HaMoked, Yesh Din, Adalah, Palestinian Center for Human Rights, Al-Mazen Center for Human Rights, the Independent Commission for Human Rights, Al-Haq.

4.2. The Right to Movement in International Humanitarian Law

The laws of war were created to regulate the relations between combatants.[1003] They were also formed to safeguard those who do not participate in the conflicts or are no longer a part of these conflicts. Civilians are protected individually and collectively in armed conflicts.[1004] The customary principles of international humanitarian law provide for civilians and stress that their rights must be respected.[1005] Palestinians, who are living in the Occupied Territory under Israeli occupation, are protected persons under the provisions of the Hague Regulations as well as the Geneva Conventions and their additional protocols. According to the earlier discussion on the applicability of human rights laws in times of conflicts, the right to movement, as a basic human right, is guaranteed in situations of occupation or armed conflicts and its applicability does not cease in times of war. There is no explicit protection for the right to free movement as such. Neither the principles of the Hague Regulations nor the Geneva Conventions of 1949 and their additional protocols of 1977 have precisely protected the rights of the civilians to move freely within their territory. Nevertheless, the implicit protection is interpreted for the benefit of the protected persons. In fact, "the principles of freedom of movement and freedom of residence had to be stressed at that moment when the war and the resulting upheavals has demonstrated to what point that principle could be trodden underfoot."[1006] Stated another way, the absence of the protection of the right to movement for civilians under international humanitarian law reflects that this right is axiomatic and undeniable. It goes without saying that it is an internationally protected right.

The right to free movement is still an internationally protected fundamental right. Thus, the movement of the local population must not be restricted unless for their own security or benefits. The general provisions of international humanitarian law and their exceptions, which guarantee general protection for civilians, can be applied to the right to movement. The Hague Regulations

1003 Benvenisti, The International Law of Occupation, 2nd ed., 1.

1004 The Geneva Conventions I, II, III, and IV of 1949 and their Additional Protocols (Protocols I and II), 8 June 1977; also The Hague Regulations 1899 and 1907 and their additional protocols.

1005 The Hague Regulations 1899 and 1907 and their additional protocols.

1006 Summary Record of the 120th Meeting, the Universal Declaration of Human Rights Drafting Process, UN Doc A/C.3/SR.120 (2 November 1948), 322.

and the four Geneva Conventions and their additional protocols accentuate the importance of the protection of civilians and their fundamental rights. Article 51, in an additional protocol from August 12, 1949, relates to the protection of victims of international armed conflicts (Protocol I),[1007] protects civilian population against military operations. It states:

> 1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances. … 7. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.[1008]

First and foremost, civilians must be protected in all circumstances against any danger that might occur from military operations. Measures or restrictions to restore or ensure public order and safety are governed by domestic laws and international human rights law.[1009] Public order and safety, as discussed earlier, must not be invoked without a real threat to the life of the nation. Humanitarian provisions have a similar approach, but different regulations. Article 43 of The Hague Regulations delimits the obligations of the occupying power. It states, "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."[1010] The first obligation is to ensure public order and the safety of the occupied population, and the second obligation is to respect the laws in force in the country unless absolutely prevented from doing so. Public order and safety are aims to which the occupying power is obligated to take measures with available, proportionate, and lawful revenues. The available way to restore public order and safety must be conducted under the penal laws of the Occupied Territory except in cases where they generate a threat to security

1007 Additional Protocol to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

1008 Id., Article 51.

1009 See definitions under the previous subsection: The right to movement under international human rights law.

1010 The Hague Convention (IV) of 1907, Article 43.

or an obstacle to the application of the Convention IV.[1011] Under the quoted article, changing the laws of the Occupied Territory must be within the provisions of international law. The occupying power must be very careful while stepping into the procedures of changing some of the provisions of the laws in the Occupied Territory, as they must concur with the imperative necessity of such step.

Comparatively, Article 78 of the Fourth Geneva Convention allows the occupying power to take security measures, but for the safety of the protected persons in the Occupied Territory. The Article reads:

> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power. Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.[1012]

Necessary measures for security might be taken by the occupying powers for the safety of the protected persons. This article, in fact, relates to those who are guilty of breaching the penal law in the Occupied Territory, noting that the occupying power might find, under its sole discretion, that such provisions constitute a threat to its security.[1013] In criminal cases, restrictions on personal liberties are part the punishment on persons who were proven, through regular procedures, to be guilty of a certain crime. Arguably, if one considers the meaning of the quoted article to be applied to all protected persons, then these measures must be prescribed by the law and in accordance

1011 Id., Article 64 also assures that "the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."

1012 The Geneva Convention (IV) of 1949. Security measures. Internment and assigned residence. Article 78.

1013 Pictet, Commentary: IV Geneva Convention, 368.

with the provisions of the Geneva Convention IV. The taken measures must be subject to appeal, and the decisions must also be reviewed every six months by a competent body. In all cases, "such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved."[1014] Even while applying domestic law in the Occupied Territory, "the implementation of the Geneva Convention is not contingent on compatibility with domestic law, on the contrary, contracting parties have to enact any enabling domestic legislations required to give effect the conventions."[1015]

If the occupier seeks to impose restrictions on the occupied people, these restrictions must be for imperative reasons of security concerning the protected persons. Similarly, the exception to military necessity is determined in the customary rules, prepared by the International Committee of Red Cross. Rule 56 states, "The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions[,o]nly in case of imperative military necessity may their movements be temporarily restricted."[1016] The concept of military necessity will be elaborated on in the next chapter under customary rules, 50 and 51. The obligation under Rule 56 is to insure free movement of humanitarian relief personnel. The purpose behind this obligation is "to provide access to civilians in need and the prohibition on deliberately impeding the delivery of humanitarian assistance."[1017] It is not facile or fair to compare the freedom of movement of humanitarian relief personnel and the movement of the civilians, because the first mission is to supply the second mission with basic welfare and medical needs. However, instead of putting local inhabitants under the relief of certain organizations and the occupying powers, these locals should be enabled to pursue their lives without restriction. Article 49 of the Fourth Geneva Convention prohibits deportations, transfers, and evacuations of protected persons.[1018] Such actions are considered to be restrictions on free

1014 Id.

1015 Yoram Dinstein, "Legislation Under Article 43 of The Hague Regulations: Belligerent Occupation and Peacebuilding," Program on Humanitarian Policy and Conflict Research-Harvard University, Occasional paper Series No. 1 (Fall 2004): 1–18, 7.

1016 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol. I: Rules, 200.

1017 Id.

1018 Geneva Conventions (IV) of 1949, Article 49 sates: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited,

movement but constitute a study beyond the scope of this research. In all circumstances, these restrictions must be taken as security measures concerning protected persons.

Israel, as an occupying power, has obligations under the provisions of customary humanitarian law as well as the Fourth Geneva Convention to protect Palestinian civilians and to prohibit violations against them. For instance, the Israeli occupying power is obligated to provide civilians with food and medical supplies,[1019] to ensure the establishment of hospitals,[1020] and to facilitate supplies by all possible means.[1021] The balance between the benefit and the safety of the local Palestinians and the absolute military necessity must be priority in all conducted measures in the Occupied Territory. It must be noted that measures, which might be taken by the occupying power, must not include restrictions on the right to movement except for the security of the local population or imperative military reasons.[1022] Hence, restrictions imposed on the local population that are not necessary for their own security and/or

regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased. The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are affected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated. The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place. The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand. The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

1019 Id., Article 55: "… The Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."

1020 Id., Article 56: "… The Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory …"

1021 Id., Article 59: "If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal …"

1022 The Geneva Convention (IV) of 1949, Article 78.

benefits are prohibited. Nothing, in the Fourth Geneva Convention, explicitly indicates the protection of free movement within and out of a country. Yet, Article 35 ensures the right to leave, It states:

> All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use … .[1023]

The article demonstrates a similar approach to one indicated in the UDHR, in which people have the right to leave the territory occupied. During an armed conflict or in case of an occupation, all civilians have the right to leave the territory.[1024] It is understood that when protected persons desire to leave their territory during the conflict, this desire must be respected. People's decisions to leave their country should be based on their own will. It is important to note that people shall not be forced to leave their homeland because "civilians do not wish to leave a country where they have lived for many years and to which they are attached."[1025] Nevertheless, if their departure contradicts or threatens the national interests of the state, this state should decide rapidly and according to its lawful procedures and grant permission to those who wish to leave. Permission should be given by the state unless there are serious security reasons preventing them from doing so.[1026] This principle applies to all protected persons.[1027] It should be noted that "the right to leave the territory is not in any way conditional, so that no one could be prevented from leaving as a measure of reprisals."[1028] In fact, this approach does not satisfy the need of the civilian population to be granted the protection to move freely

1023 Id., Article 35.
1024 Id.
1025 Commentary of the International Committee of the Red Cross Geneva Conventions (IV) of 1949, Art. 35. Part III: Status and Treatment of Protected Persons Section II: Aliens in the Territory of a Party to the Conflict, the Right to Leave the Territory.
1026 Geneva Conventions (IV) of 1949, Article 35.
1027 Id., Article 4.
1028 Commentary of the International Committee of the Red Cross Geneva Conventions (IV) of 1949, Art. 35.

within their occupied land. Protected persons, whose right to leave the territory is recognized specifically in Article 35, must also be able to move in order to meet their basic needs. Therefore, deliberate restrictions on their movement within their territory are prohibited.[1029]

Even under the exceptions of military necessities and public order and safety, the measures must be balanced and proportionate with the sought purpose. It is repeated that the principle of proportionality must be respected.[1030] This raises the question on the meaning of proportionality. Generally, this refers to "a belligerent's response to a grievance and, in the latter, to the balance between the achievement of a military goal and the cost in terms of lives."[1031] The perception of proportionality is to limit the use of military and to avoid unnecessary damages.[1032] Proportionality in international humanitarian law is substantial and serves civilians against military operations.[1033] The customary Rule 14, prepared by the International Committee of the Red Cross, focuses on proportionality in attack and that causing damages to civilians' objects is prohibited.[1034] This rule strikes a balance between the achievement of a military goal and the harm caused to civilians. In international humanitarian law, proportionality has not been directly applied to civilians' enjoyment of the right to movement: however, the principle of proportionality must be applied in all actions that are conducted by the occupying powers. Simply stated, unnecessary measures against civilians and their movement are not allowed. Most importantly, the aforementioned Article 78 of the Fourth Geneva Convention obligates the occupying power to conduct security measures for the benefit of the protected persons. This means that imposing

1029 Id.

1030 Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007), 34.

1031 Judith Gardam, "Proportionality and Force in International Law," The American Journal of International Law, Vol. 87, Issue No. 3 (July 1993): 391–413, 391.

1032 Id., 391.

1033 Bernard Brown, "The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification," Cornell International Law Journal, Vol. 10 (1976): 134–155, 137.

1034 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol. I: Rules, 46. Rule 14. Proportionality in Attack. "Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited."

restrictions on the movement of the local population must be for their own benefit and proportionate to the sought purpose.

In particular, in long-term occupations, such as the Palestinian case, civilians are in need of daily transport from one city to another for work, education, health, etc. The long-term occupation, as discussed earlier, was not foreseen by the provisions of international humanitarian law. The principles of the customary international humanitarian law have generally guaranteed the right to free movement for medical teams and paramedic personnel, but not in the same explicit language for civilians. The Fourth Geneva Convention protects the movement of medical supplies, food, and clothing.[1035] If it is logical to oblige the occupying powers to supply the occupied civilians with food, then it is also reasonable to assume that the occupier's obligations toward civilians includes guaranteed and unhindered free movement. The negative obligations of unrestricting the movement of the local residents do not constitute a burden for the occupying power in the Occupied Territory. Especially, the concerns "shown by the Occupying Power for the welfare of the population in the Occupied Territory is not above suspicion … humanitarian motives of the occupying power serve as a ruse for hidden agenda."[1036] Free movement is not

1035 The Geneva Convention (IV) of 1949, Article 23 states: "Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases. The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing: (a) that the consignments may be diverted from their destination, (b) that the control may not be effective, or (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods. The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers. Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed."

1036 Dinstein, "Legislation Under Article 43 of The Hague Regulations: Belligerent Occupation and Peacebuilding, 8.

only an individual right, it is also a collective right. The Hague Regulations state that no penalty can be inflicted on persons for acts which they are not responsible.[1037] No one is punished except on the basis of individual responsibility. Therefore, collective punishment is prohibited.[1038] In an analogical way, restrictions on local residents' movement by the occupying power in an Occupied Territory must not be imposed on all people. It should be imposed, if necessary and according to international law, individually and based on criminal responsibility.

It has been established that international law human rights law and international humanitarian law have protected the right to free movement for all Palestinians. It is important to follow the discussion and examine the protection of the right to free movement in the Palestinian and Israeli domestic laws.

5. The Right to Movement in Domestic Law

Constitutions and other national laws should reflect the international law provisions vis-à-vis fundamental and basic human rights.[1039] Although these rights are listed in Israeli and Palestinian laws, there are surely differences in their principles and implications as well as their contribution to the protection of constitutionalized human rights. The right to free movement in both countries' laws will be examined accordingly.

5.1. Palestinian Law

Palestine Basic Law includes some provisions of the internationally protected human rights. In Article 20, the Basic Law states, "Freedom of residence and movement shall be guaranteed within the limits of the law."[1040] The law itself

1037 The Hague Convention (IV) of 1907, Article 50: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

1038 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol. I: Rules, 374.

1039 Colm O'Cinneide, "The Constitutionalization of Social and Economic Rights," in Social and Economic Rights in Theory and Practice: Critical Inquiries, ed. Helena Garcia, Karl Klare and Lucy Williams (New York: Routledge, 2015), 258.

1040 The Amended Palestinian Basic Law of 2003, Article 20.

is controlled by the provisions of the Oslo Accords. In the Oslo Accords between the Israeli Government and the Palestinian Authority, the border issue was one of the remaining matters under sole Israeli control.[1041] Thus, it is not surprising that the Basic Law has only vaguely protected freedom of residence and movement and has not specified that everyone has the right to move or travel within the territory and the right to leave and return to his/her own country. It is understood that the Palestinian Authority cannot impose restrictions on the movement of the Palestinians within the territory that is not under its de facto control because Israel has exclusively preserved the power to do so.[1042] The only two Palestinian laws which regulate restrictions on liberties (not on free movement) are the Code of Civil and Commercial Procedure Promulgated by Law No. 2 of 2001[1043] and the Penal Procedure Law No. 3 of 2001.[1044] It is important to mention the draft of the constitution of the State of Palestine is more detailed in Article 31. The Article states, "Citizens shall have the right to choose their place of residence and to travel within the

1041 Declaration of Principles on Interim Self-Government Arrangements of 1993, Article V: Transitional period and permanent status negotiations: "3. It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations."

1042 See Oslo Accord Declaration of Principles on Interim Self-Government Arrangements of 1993; The Interim Arrangement on the West Bank and the Gaza Strip of 1995.

1043 The Law of Civil and Commercial Procedures No. 2 of 2001, Article (277) states: "If the court is convinced, on the basis of the evidence presented to it, that the defendant or the plaintiff against whom a counterclaim was filed has disposed of all his assets or has smuggled them out of Palestine and that he is about to leave the country in the aim of obstructing execution of any decision that may be issued against him, it may issue a memorandum ordering him to appear before it and instruct him to present a pecuniary bond to guarantee any amount that may be awarded against him. If he refuses to present the bond, the court shall prohibit him from leaving the country until the case is adjudicated."

1044 The Penal Procedure Law No. 3 of 2001, Palestine Gazette No. 38 (5 September 2001), 94, Article 30 states: "The judicial officer may, without a warrant, arrest any person present when there is evidence sufficient to charge him in the following cases: 1. The case of a flagrant felony or of a flagrant misdemeanor punishable by imprisonment for a term of more than six months. 2. If he resists the judicial officer during the latter's performance of the duties of his post, or if he was legally detained and escaped or tried to escape from the place of detention. 3. If he commits or is accused of committing a crime before the judicial officer and refuses to give his name and address or if he has no known or permanent residence in Palestine."

state of Palestine."[1045] Persons must not be denied the right to leave Palestine except by a court order, and Palestinians may not be deported or prevented from returning to Palestine.[1046] Whenever the draft is approved, the protection of the right to movement becomes more precise than the protection granted by the Basic Law of 2002. It promises to include a strongly worded constitution to emphasize the importance of such fundamental rights.

Palestinians' common understanding of the right to movement is traveling within their country and among their cities.[1047] It is seen as driving a car from Ramallah to Bethlehem without being stopped by an Israeli checkpoint. Freedom of movement for Palestinians means the ability to go to work, schools, and hospitals without facing the risk of being prevented from passing through or using certain roads or being prohibited from traveling abroad or having an airport. The practices of the Palestinian Government, represented by Fatah and Hamas, as political parties, have actually not respected the provisions of the Basic Law. The aforementioned practices against the population in the West Bank and the Gaza Strip violate the constitutionally protected right to movement, as they are imposed without judicial ruling and are not based on legitimate reasons. The non-compliance of the authorities in the West Bank and the Gaza Strip with the Palestinian law is a concern that affects the compliance with the norms of international human rights. Seemingly, Fatah and Hamas continuously disregard the fundamental right to movement within the Palestinian Territory as well as the right to leave and return to Palestine.[1048]

Since its establishment, the Palestinian High Court of Justice, in the cities of Ramallah and Gaza, has ruled in a number of petitions concerning the right to personal liberty and the right to choose residency. For example, the High Court of Justice in Ramallah ruled, in the Attieh case, that the General Intelligence of the Palestinian Authority does not have the authority to prevent any person from traveling abroad because it contradicts the principles of the Palestinian

1045 The Draft Constitution of the Palestinian State of 2003. The draft is publicly available as 2003 Permanent Constitution draft at http://www.palestinianbasiclaw.org/basic-law/2003-permanent-constitution-draft, Article 31.

1046 Id.

1047 Hass, "Israel's Closure Policy: An Ineffective Strategy of Containment and Repression," 6.

1048 The Independent Commission for Human Rights, 16th Annual Report, 150–152. See also the 17th, 18th, 19th, 20th, 21st Annual Reports of the commission.

Basic Law.[1049] It emphasized that the right to travel might only be restricted by a final judicial decision.[1050] Most importantly, in the Al-Ashqar case, the Court ruled that every citizen has the right to free movement and the right to choose residence as internationally protected and constitutionally guaranteed human rights.[1051] Accordingly, the Director General of the Civil Status is unauthorized to refuse residence-changing applications.[1052] The High Court of Justice in Gaza has also dealt with cases concerning personal liberty. In the Khatab case, the Court ruled that the continuous practice of holding persons in custody without charges violates their fundamental and constitutional liberties and contradicts their basic human rights and dignity.[1053] The Preventive Security Forces of the Palestinian Authority should respect the rules set forth in the Basic Law and the principles of personal liberty and dignity.[1054] Accordingly, restriction of the right to personal liberty and movement should conform to the applied laws. The Palestinian Judiciary has dealt with different petitions concerning the right to personal liberty; most of these petitions have challenged the legality of the procedures of several restrictions on the right to personal liberty.[1055] The petitions concerning the right to free movement are usually concerning detention and restrictions on the right to personal liberties. Hamas presides in the West Bank, while Fatah governs in the Gaza Strip, and other activists are still subjected to detention without formal charges only because of their political affiliation or political views.[1056] In fact, the majority of the petitions before the Palestinian High Court of Justice

1049 PHCJ 258/2008 Mohamad Attieh v. The General Intelligence Directorate. The Palestinian High Court of Justice, Ramallah (23 February 2009).

1050 Id.

1051 PHCJ 359/2009 Ihab Al-Ashqar and Reem Al-Ashqar v. the Director General of the Civil Status at the Palestinian Interior Ministry. The Palestinian High Court of Justice, Ramallah (13 October 2010).

1052 Id.

1053 PHCJ 37/2002 Sarhan Khatab v. The Preventive Security Forces of the Palestinian Authority. The Palestinian High Court of Justice, Gaza (22 February 2003).

1054 PHCJ 142/2002 Kamees Al-Masri v. The Preventive Security Forces of the Palestinian Authority. The Palestinian High Court of Justice, Gaza (24 November 2002).

1055 PHCJ 81/2002 Ahmad Sadaat v. The Preventive Security Forces of the Palestinian Authority. The Palestinian Court of Justice, Gaza (3 June 2002); PHCJ 19/2002 Mohamad Abu-Eid v. The General Intelligence Directorate. The Palestinian High Court of Justice, Gaza (21 April 2002).

1056 The Independent Commission for Human Rights, 21st Annual Report, 27–28.

challenge the legality of political detention and restrictions on personal liberties including free movement.[1057]

More severe restrictions on the Palestinians' right to movement are imposed by the Israeli forces in the Occupied Territories. These restrictions are usually carried out by the Israeli forces collectively against the Palestinian locals. The Israeli laws are often used in imposing such restrictions. The right to movement under the Israeli laws will be elaborated on in the following subsection.

5.2. Israeli Law

The right to move freely within a country and to choose a place of residence is not included in the Israeli Basic Law as they are known in international human rights law. Nevertheless, the Israeli Supreme Court has implicitly referred to the protection of basic human rights, including movement.[1058] The Basic Law: Human Dignity and Liberty (Article 6) exclusively grants the right to return to Israel only for its nationals. At the same time, it gives all people, who physically exist in Israel whether nationals or not, the right to leave Israel, where such a right is not restricted.[1059] The protected rights should not be restricted except by the law. Article 8 states, "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required." Restrictions on the rights might be imposed by the law in certain cases.

The Emergency Regulations of 1945 granted the military commander vast authority and powers to regulate the movement of people and traffic. As discussed previously, Israel reinforced these regulations in the West Bank and the Gaza Strip. Following the discussion on these regulations, through the study of Part XIII of the Emergency Regulations, it will be determined whether the provisions of these regulations are contradictory to international human rights and humanitarian laws. The regulations allow the military commander to an absolute and arbitrary control over his assigned areas. Articles 122–126,

1057 See Sarhan Khatab v. The Preventive Security Forces of the Palestinian Authority (2003); Kamees Al-Masri v. The Preventive Security Forces of the Palestinian Authority (2002).

1058 Navot, the Constitutional Law of Israel, 202–203.

1059 The Israeli Basic Law: Human Dignity and Liberty of 1992, Article 6: Leaving and entering Israel (a) All persons are free to leave Israel; (b) Every Israeli national has the right of entry into Israel from abroad.

respectively, permit the military commander, or a person acting under the general or special authority of the military commander, to impose restrictions on transport and traffic and prohibit and regulate the movement of persons, vehicles, and animals; give powers of the inspector general of the Palestine Police concerning traffic; obligate locals to remove obstructions on roads; impose curfews; announce closed areas; and control the highways.[1060] It is crucial and essential to carefully read the texts of these articles to realize the danger that is produced by the implementation of such provisions. An explanation of such articles would not be sufficient to fully picture their arbitrariness. These articles state:

> 122. — (1) A Military Commander, or a person acting under the general or special authority of a Military Commander, may, by order or by the giving of directions of otherwise (a) prohibit, restrict or regulate, or provide for prohibiting, restricting or regulating, the use of roads generally, or of the roads in any specified area or of any specified roads, or prescribe the routes to be followed, by vehicles or animals generally or by any specified class or description of vehicle or animal or by specified vehicles or animals or by persons generally or by persons of any specified class or description or by specified persons; (b) require, or provide for requiring, persons owning or having in their possession or under their control any vehicle to use the vehicle for the conveyance of such goods at such times and by such routes as may be specified; (c) prohibit, restrict or regulate, or provide for prohibiting, restricting or regulating, either generally or in specified areas, the traveling by persons generally or by persons of any specified class or description or by specified persons, in aircraft, trains, motor cars, motor buses or other vehicles or classes of vehicles, or in vessels going between places in Palestine. (2) Any person who contravenes any order, direction or requirement made or given by virtue of this regulation shall be guilty of an offence against these Regulations.
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> 123. Any member of His Majesty's forces or of the Police Force may by order require all or any of the inhabitants of any town, village, area or quarter to remove from any road situated in such town, village, area or quarter any barricade or any glass, nails or other obstruction or impediment to the proper use by traffic or otherwise of such road and any person who contravenes any such order shall be guilty of an offence against these Regulations.

1060 The Defense (Emergency) Regulations of 1945, Article 122–126.

> 124. A Military Commander may by order require every person within any area specified in the order to remain within doors between such hours as may be specified in the order, and in such case, if any person is or remains out of doors within that area between such hours without a permit in writing issued by or on behalf of the Military Commander or some person duly authorised by the Military Commander to issue such permits, he shall be guilty of an offence against these Regulations.
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> 125. A Military Commander may by order declare any area or place to be a closed area for the purposes of these Regulations. Any person who, during any period in which any such order is in force in relation to any area or place, enters or leaves that area or place without a permit in writing issued by or on behalf of the Military Commander shall be guilty of an offence against these Regulations.
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> 126. A Military Commander, if he considers it necessary in the interests of the public safety, the defence of Palestine, or the maintenance of public order so to do, may by order provide for the stopping up or diversion of any highway, or for prohibiting or restricting the exercise of any right of way or the use of any waterway, and any person who contravenes any such order shall be guilty of an offence against these Regulations.[1061]

The articles, quoted above, grant extensive powers with no limitations to the military commander, including whomever he assigns. The military commander and the police forces, within their complete discretion, can impose unlimited restrictions and prohibitions on the movement of persons, cars, and animals in any area or road.[1062] The military commander also has vast authorities to impose curfews and announce blockades and closed zones in certain areas.[1063] Limitations on the military commander's powers are not present in these provisions. That is to say, restrictions on the right to movement are the exception, and the exception must always be narrow.[1064] The military commander, according to these regulations, has the discretion to impose restrictions on any highway if he perceives that it is necessary to maintain public order and safety.[1065] The unlimited and broad articles granted the British High Commissioner, and later the Israeli military, extraordinary powers over civilian movement in Palestine. The commissioner has total discretion to impose restrictions as well.

1061 Id.
1062 Id. Articles 122–123.
1063 Id. Articles 124–125.
1064 Economic and Social Council, The Siracusa Principles, 29.
1065 The Defence (Emergency) Regulations of 1945, Article 126.

The Israeli government, unsurprisingly, considered the Regulations of 1945 as a valuable resource of powers of administration and punishment that have been almost unrestricted in Occupied Palestine since 1967. The previous discussion on the legality of the Israeli revival of the British Emergency Regulations of 1945 proves that they are legally invalid. Even under the assumption that these regulations are valid, they have extreme provisions that contradict the norms of international human rights and humanitarian laws regarding the rights to free movement and its limitations. The provisions of the articles do not comply with the principle of proportionality nor do they respect the benefits and the interests of the local population. International human rights norms and humanitarian principles protect the right to movement, but in certain circumstances, movement might be restricted to some degree. In these Regulations, the exception has become the rule.

While international human rights laws and international humanitarian laws allow temporary restrictions on movement under very restrict circumstances,[1066] the Regulations of 1945 allow limitations disregarding the necessity of the taken measures and their proportionality and threatening the life of the nation or public order and security of the local population. In addition, they permit restrictions that are not based on any law. The regulations are neither precise in determining the conditions that require such action nor accurate in shaping the taken measures, which clearly violate Article 4 of the International Covenant on Civil and Political Rights as well as the Siracusa Principles. Additionally, Article 124 of the Regulations allows the military commander to exempt some people with permits or authorized persons from being restricted, which constitutes discrimination based on gender and age. These actions contradict Article 4 as well as the norms of international law concerning non-discrimination.

One might ask why Israel insists on applying the Emergency Regulations, claiming that they are part of the laws in the West Bank and the Gaza Strip, knowing that they contradict the provisions of international law. The answer is that Israel, as a member of the Charter of the United Nations as well as several human rights and humanitarian conventions, tries to avoid international criticism. Outwardly, "it was convenient for the [Israeli] Government

1066 United Nations Human Rights Committee (HRC), CCPR General Comment No. 29 on Article 4 of Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, (31 August 2001), § 6.

to attribute the blame for these Regulations adversely affecting individual liberties on the doorstep of Mandatory Legislation and thus declare itself innocent."[1067] Under Article 7 of the Vienna Convention on the Law of Treaties, however, a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[1068] In order to analyze this article regarding the obligation of the occupying power, it must be connected with Article 43 of The Hague Regulations. This means that the law in force in the Occupied Territory must not be changed and must be adopted where necessary to meet the provisions of the Geneva Conventions and all other binding principles of international law. The Israeli reliance on the Emergency Regulations to restrict the movement of Palestinians violates these principles. The occupying power is, in fact, "bound to repeal or suspend these regulations and certainly it could not legitimately rely on them."[1069]

As in 1970, The Israeli military commander issued Military Order No. 378 concerning security provisions, which allows imposing further restrictions on Palestinians movement.[1070] Among many others, military Order No. 378 was replaced by the Order regarding Security Provisions of 2009.[1071] The Security

1067 Moffett, Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defense (Regulations), 1945, in the Occupied Territories, 20. Cited as B. Bracha, Restrictions of Persons Freedom, 318.

1068 Vienna Convention on the Law of Treaties of 1969.

1069 Yoram Dinstein, "The Israeli Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing Off of Houses," Israel Yearbook on Human Rights, Volume 29 (1999): 285–304, 7.

1070 Military Order No. 378 (5730-1970), Order Concerning Security Provisions, the West Bank (20 April 1970).

1071 Military Order regarding Security Provisions No. 1651 (5770-2009). This order replaces the following: A. Order regarding Security Provisions (Judea and Samaria) (No. 378), 5730-1970; B. Order regarding Authorization of Persons to Conduct Preliminary Questioning of Witnesses (Judea and Samaria) (No. 17), 5727-1967; C. Order regarding Judicial Authorities in Criminal Offenses (Judea and Samaria) (No. 30), 5727-1967; D. Order regarding Police Forces Operating in Cooperation with the IDF (Judea and Samaria) (No. 52), 5727-1967; E. Order regarding Security Service Personnel Operating in the Region (Judea and Samaria) (No. 121), 5727-1967; F. Order regarding Adjudication of Juvenile Delinquents (Judea and Samaria) (No. 132), 5727-1967; G. Order regarding Rules of Responsibility for an Offense (Judea and Samaria) (No. 225), 5728-1968; H. Order regarding Prohibition of Commerce in War Materiel (Judea and Samaria) (No. 243), 5728-1968; I. Order regarding Prohibition of Training and Contact with a Hostile Organization Outside the Region (Judea and Samaria) (No. 284), 5729-1968; J. Order regarding Methods of Punishment (Judea and Samaria) (No. 322), 5729-1969; K. Order

Provisions of 2009 imposed massive restrictions on the right to free movement; these provisions were similar to those in the Emergency Regulations of 1945. The security provisions granted the military commander different administrative powers to control the movement of the local inhabitants in the areas under Israeli military occupation. Under these provisions, the military commander, or a person acting with the general or special authorization of a military commander, is empowered to "(1) Prohibit, limit or regulate the use of certain roads or to determine lanes on which vehicles or animals or persons shall pass, whether in general or in particular … (3) Prohibit, limit or regulate the movement of persons, generally, or of a certain gender or type, or of certain persons in airplanes, trains, cars, buses, in other vehicles or on sea crafts."[1072] The first paragraph determines the powers that the military commander can prohibit or restrict, including the movement of any vehicles, animals, or persons on roads, highways, bypasses, or unsealed roads. The third paragraph allows restrictions on all means of transportation on the land and in the sea, which could be enforced on certain gender or persons. This paragraph, by no means, complies with Article 4 of the ICCPR. It outspokenly allows discrimination based on grounds of *certain gender, type, or persons*, which opposes the provisions of almost all international norms, particularly the International Convention on the Elimination of All Forms of Racial Discrimination of 1965.[1073] The convention will be examined in Chapter VI: the Right to Equality and Non-Discrimination.

Articles 317–318 of the Security Provisions of 2009 authorize the military commander to impose curfews and declare closed zones, respectively and authorize him to grant a personal or general permit to exempt a person from the

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regarding Prevention of Infiltration (Judea and Samaria) (No. 329), 5729-1969; L. Order regarding Obligation to Identify Oneself (Judea and Samaria) (No. 332), 5729-1969; M. Order regarding Prohibition of Paying Wages to a Security Offender (Judea and Samaria) (No. 369), 5730-1969; N. Order regarding Supervision of Construction (Judea and Samaria) (No. 393), 5730-1970; O. Order regarding Legal Defense in Military Courts (Judea and Samaria) (No. 400), 5730-1970; P. Order regarding Prohibition of Construction (Judea and Samaria) (No. 465), 5732-1972; Q. Order regarding Closing of Files (Judea and Samaria) (No. 841), 5740-1980; R. Order regarding Transfer of Prisoners (Judea and Samaria) (No. 1435), 5756-1996; S. Order regarding Adoption of Security Measures (Judea and Samaria) (No. 1447), 5757-1996; T. Order regarding Personnel of the Masada Unit (Judea and Samaria) (No. 1558), 5765-2005.

1072 Military Order regarding Security Provisions No. 1651 (5770-2009), Article 316 (A).

1073 International Convention on the Elimination of All Forms of Racial Discrimination of 1965.

provisions of these two articles.[1074] Article 319 empowers the commander, if he decides that it is necessary to maintain public order and the security of the area or the military, to demand persons to close their shops, stores, businesses, and educational institutions for a period to be determined in the closure order.[1075] In the view of this very broad discretion, the articles do not set forth limitations on the powers of the military commander. This, for instance, authorizes the military commander or any person acting on his behalf to impose an absolute curfew or closure on the West Bank and the Gaza Strip. The 2009 Order has replaced other old orders that were less extreme such as Military Order No. 378, which did not allow an absolute ban or closure. This will be discussed shortly in the case of Abu Safiyeh. There is nothing in these articles that indicates that the powers of the military commander are restricted to military necessity or the safety of the local population. The same conclusion could also be drawn concerning the legality of the Israeli Security Provisions of 2009, because they also contradict and ignore the aforesaid principles of international human rights and international humanitarian law, including the Siracusa Principles.

Not only do the British Emergency Regulations of 1945 and Israeli Security Provisions of 2009 violate the principles of the international laws, all laws and practices that are based on these regulations and provisions also constitute a breach of international law. For example, the Order on Movement and Travel (Restrictions on Travel in an Israeli Vehicle) of 2006 bans Israelis from transporting Palestinians in their vehicles in the West Bank.[1076] This reflects a policy that targets Palestinians collectively, and violates their basic right to movement. Simply put, the implementation of these provisions is legally invalid. Even though the Israeli military commander is empowered by these laws to restrict the movement of Palestinians, these powers do not represent the minimum provisions of international human rights and humanitarian laws. In fact, there is "no valid legislation by an Occupying Power without necessity … any new legislation in the course of belligerent occupation should

1074 Id., Article 317-318.

1075 Id., Article 319.

1076 Military Order No. 5767-2009 on Movement and Travel (Restrictions on Travel in an Israeli Vehicle, the West Bank (19 November 2006); see also the Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination No. CERD/C/ISR/CO/13 (14 June 2007), 34.

be subject to some qualifications."[1077] The Israeli military regulations do not specify the necessity and the benefits, meaning that they have not met the qualifications. As defined in Article 64 of the Fourth Geneva Convention, the penal laws applicable in the Occupied Territory must remain in force. This means that Israel must respect and apply the Jordanian Criminal Code No. 16 of 1960, which is still applied in the West Bank, and the Egyptian Penal Law No. 58 of 1937, which is still in force in the Gaza Strip.[1078] Neither law contains any regulations that are similar to those in the Israeli laws, military orders, and regulations.

5.2.1. The Israeli Supreme Court on the Right to Movement

The Israeli Supreme Court, as discussed earlier, has ruled in Palestinian petitions. The Court has examined whether the Israeli military orders regarding restrictions on movement in the West Bank and the Gaza strip conform to international and Israeli applicable laws. Some of its rulings are examined below.

Palestinians are subject to military orders that restrict their movement and interrupt their basic rights.[1079] Some Palestinians have challenged the imposed restrictions and military orders and filed petitions before the Israeli Supreme Court concerning their right to free movement and other fundamental rights. In most cases, which are petitioned before the Court to challenge the military restrictions, the response of the Israeli authorities was similar, i.e., the authorities expressed their fear of serious breaks of public order.[1080]

In 1982, Jamieat Iscan Al-Mualmoun, an association aimed at building houses for its members, who were teachers and resided in the West Bank, petitioned before the Supreme Court of Israel concerning the decisions of the Supreme Planning Committee and the military commander.[1081] The association challenged the expropriation of the land that belonged

1077 Dinstein, "Legislation under Article 43 of The Hague Regulations: Belligerent Occupation and Peacebuilding, 12.

1078 See Jordanian Criminal Code No. 16 of 1960; the Egyptian Penal Law No. 58 of 1937.

1079 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, 47 Years of Temporary Occupation, June 2014.

1080 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 127.

1081 Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF and other (1983), 1.

to its members. The military commander's plan was to build a highway (Road 443), which would run primarily through the West Bank, to connect the Israeli settlements to the cities of Jerusalem and Tel-Aviv.[1082] The petitioner argued that the expropriation of the land and the building of the road were in discrepancy with the customary provisions of international law, while the respondents claimed that the purpose of the road was to serve the need of the Palestinian local inhabitants, while also benefiting Israeli residents.[1083] The respondents claimed that the role of the military government in the area was not restricted to security; rather, it was responsible for insuring a normal life to the local population.[1084] The petitioner counter-argued that firstly, the actual purpose of the road was not to serve the local inhabitants, but the needs of the Israeli settlers and provide them with a wider transportation system, which connected the illegal Israeli settlements with the major cities. Furthermore, the needs of the Palestinian did not require a massive lavish road system that caused an unnecessary land expropriation. Secondly, the petitioner argued that the Israeli military government, which is temporary by nature, was not permitted to implement long-term ramifications.[1085] Although the Hague Regulations ensure the security interests of the occupiers and safeguard the needs of the occupied population in an Occupied Territory,[1086] the Court stated that the regulations did not set a time limit occupation as the temporariness may last and continue as long as the military government controls the occupied area, and that the military commander was empowered to instigate infrastructural long-term plans for the benefit of the local population.[1087]

Given this background, the Court agreed that the transportation needs of the local population had increased and there was no harm in the Israelis using the planned roads for faster and more convenient connections amongst the cities.[1088] The Court stated, "The military government may not plan and implement a road system in an area held under belligerent occupation if the purposes of this planning and implementation are simply to constitute a service

1082 Id., 1–3.
1083 Id., 5.
1084 Id., 6.
1085 Id., 7.
1086 The Hague Convention (IV) of 1907, Article 43.
1087 Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF and other (1983), 12.
1088 Id., 36.

road for its own state."[1089] It, nevertheless, believed the unproven allegations of the respondents, which stated that the purpose of the road was not for the advantage of the Israeli state and its population. Finally, the Court stated, "The petitioner will receive a compensation for the damages"[1090] that its members suffered, neither indicating the amount of money nor the means of payment. This meant that the compensation was marginalized and given as a non-compulsory remedy in the Court's ruling. The Court should have taken into its consideration the importance of the values of Palestinians. For instance, the Court could have ruled for an alternative land compensation for the petitioner, identifying a method and a time limit for implementation. This case affected the right to property of Palestinians and served, to some extent, their right to movement. The legality of the expropriation was given under the condition that Road 443 would serve all Palestinian inhabitants.

Twenty-five years after the case of Jamieat Iscan Al-Mualmoun, the case of Abu Safiyeh challenged the order of the military commander of the area concerning the closure of Road 443, which was built on the Palestinian expropriated land to serve Palestinians and Beituniya Road. The closure prohibited all Palestinians and allowed only Israelis to utilize the road. The road served the inhabitants of both Ramallah and Jerusalem cities and all surrounding villages; more than 780,000 Palestinians were using the road.[1091] Ali Abu Safiyeh, Beit Sira Village Council Head, and 24 others petitioned against the Minister of Defense, the military commander in the West Bank, and 123 others. The petitioners were residents of the villages near Ramallah city in Occupied Palestine (Beit Sira, Safa, Beit Liqiya, Khirbet al-Masbah, Beit Ur al-Tehta, and Beit Ur al-Fawqa).[1092] In 2002, Road 443, which connects the aforementioned villages with Ramallah city, was completely closed to all Palestinians.[1093] Notably, the road was predominantly designed to serve the Palestinian local

1089 Id., 13.

1090 Id., 37.

1091 See the Palestinian Central Bureau of Statistics, State of Palestine, the local inhabitants of the Palestinian Territory 1997–2016. The number of the Palestinian inhabitants of Ramallah and Jerusalem through the year 2015 was 784, 502.

1092 See the map of the villages and Road 443 at: https://www.btselem.org/download/road_443_map_eng.pdf

1093 The number of the local inhabitants of these villages prior to 2016 was approximately 31,618. See the Palestinian Central Bureau of Statistics, State of Palestine, the local inhabitants of the Palestinian Territory 1997–2016. The number of the Palestinian inhabitants of Ramallah prior to year 2016 was 357,969.

population from the villages, and it was assumed that there would be no harm that this road would also serve Israelis who wished to travel between the West Bank area and Jerusalem and Tel Aviv. Israel proclaimed that the restrictions were imposed for security reasons. The petitioners argued that the military commander failed to obey the law by issuing an order to prohibit Palestinians from using Road 443 and failed to adopt new arrangements that would help Palestinians.[1094] Petitioners demanded the free movement of all Palestinian residents and their vehicles along Road 443 and Beituniya Road; they also questioned the legality of the practices of the military commander and their compatibility to the applicable Israeli laws and the international law.[1095]

This road closure gravely affected the lives of the Palestinian residents in the area. It discriminated against them in favor of the Israelis, and it imposed segregation based on nationality. It deprived tens of thousands of Palestinians, who were not suspected of anything and presented no danger to anyone, of their right to movement.[1096] The restrictions on the freedom of movement, in the context of closing roads, had an impact on their other rights.[1097] It, in fact, affected their right to live with dignity, their right to education, their right to maintain contact with family members, their right to worship, their right to receive medical treatment, and their right to health. Accordingly, the Court ruled that the military order was illegal and violated the basic human needs of Palestinians; hence, it must be void and annulled as it is unsatisfactory to justify the military commander's decision in closing Road 443 for security reasons, and it is not proportionate to international humanitarian law.[1098] The opinion states, "We found that the closing of the road had led to significant violation of the human rights of the local Palestinians residents and their ability to maintain a normal daily life routine."[1099] The Court stated that according to the damages sustained to the petitioners, the imposed travel restrictions were not satisfactorily proportional and the damages were not equally balanced with the security needs.[1100] While the petitioners opposed the Fabric of Life project because it did not fulfill the needs of the local population,[1101] the

1094 B'Tselem, Restriction of Movement: Route 443 – West Bank Road for Israelis Only (2011).
1095 Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007), 1.
1096 Id., 32.
1097 Id., 37.
1098 Id., 2.
1099 Id., 47.
1100 Id.
1101 Id., 17.

Court affirmed that the Fabric of Life roads project was not adequate to deprive people of their rights to use Road 443.[1102]

As mentioned previously, freedom of movement is one of the basic human needs in international humanitarian and human rights laws and is recognized in the Israeli law.[1103] The military commander has an obligation to ensure the safety of the users of the road. However, the measures taken by the military commander comply only with the purpose of order and security to Israelis.[1104] The Fourth Hague Convention of 1907, the Regulations Respecting the Laws and Customs of War and Land 1907 appended to the Fourth Hague Convention of 1907, which reflect customary international humanitarian law (referring to Article 43), and the Fourth Geneva Convention Relative to the Protection of Civilians Persons in Time of War 1949 are all applicable in this case in Occupied Palestine.[1105] Therefore, the military commander, who is in charge of the Occupied Territories, is obliged to respect these laws.

As described earlier, restrictions on the movement for the security of the local residents might be implemented but must be temporary, or at least, they must be subject to periodic review. Hence, the permanent closure of the road violates the provisions of the aforementioned laws and that the Court had no other choice than to adopt its decisions. More explicitly, the International

1102 Fabric of Life in this case refers to the roads that were being built at that time. During the trial, the Fabric of Life Roads progressed, and some of them have been completed and opened to traffic. These are roads newly established for the use of Palestinians, as a response to humanitarian needs. The petitioners argue that there is no need for the Fabric of Life roads because they do not satisfy the need of the population and the lands, for both Road 443 and the Fabric of Life Roads were previously expropriated from the local population, 17.

1103 Right to movement for Palestinians is recognized by the Israeli High Court of Justice: "[the military commander] must also take into his consideration the interests and rights of the local population, including the need to minimize the violation of its freedom of movement" Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005), 755-756.

1104 Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007), 33.

1105 The Israeli Supreme Court has consistently accepted Israel's status as an Occupying Power and both the Israeli Government and the Court agree that only the humanitarian provisions of the Geneva Convention apply de facto to the West Bank. See Yoram Dinstein, The International Law of Belligerent Occupation (UK: Cambridge University Press, 2009) 23–24.

Covenant on Civil and Political Rights[1106] and the Universal Declaration of Human Rights[1107] protect the right to movement for everyone. The authority of the military commander in the occupied territories is limited.[1108] That is to say, preventing Palestinians from using Road 443 had undesirable consequences, such as fueling discrimination and segregation. The military commander, therefore, was obliged to prevent severe harm and discrimination.[1109] In addition, the closure of the road contradicted the Israeli Basic Law: Human Dignity and Liberty and applicable Israeli laws.[1110] According to Military Order No. 378, the commander is only allowed to impose restrictions, not an absolute ban, on transport and traffic.[1111] According to Articles 88 and 90 of Section VI of the Security Provisions Order, the military commander may issue an order prohibiting, restricting or regulating the use of certain roads.[1112] However, he should declare the closed area or place as temporary and in a written order.[1113] Moreover, the Court stated that the military commander is "not authorized to impose an absolute ban on the travel of the local residents."[1114] The Israeli local law contains the laws in force prior to the military occupation and new local legislation enacted by the military government and from the principles of the Israeli law.[1115]

Freedom of movement must be guaranteed for everyone even in the Palestinian Territory under Israeli Occupation. However, certain restrictions and measures are allowed in some circumstances. In this case, the military commander's duty is to ensure safe travels on Road 443 for every user irrespective Palestinian or Israeli. The Court claims that the military commander is authorized to enforce restrictions specifically on Palestinians applying the "subject to specific provisions" in order to ensure the security of the State of Israel.[1116] The court provision was that it would remain un-

1106 International Covenant on Civil and Political Rights of 1966, Article 12.
1107 The Universal Declaration of Human Rights of 1948, Article 13.
1108 See the discussion in Chapter II.
1109 Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007), 46.
1110 Id., 5.
1111 Israel Military Order No. 378, Order Concerning Security Provisions of 1970, Article 88.
1112 Id.
1113 Id., Article 90.
1114 Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007), 40.
1115 Id., 18.
1116 Id., 27.

questionable that Israeli vehicles would use the road at the same time; it is not legal to prohibit Palestinian vehicles from using the same road. The legal argument is that if the military commander is concerned vis-à-vis the security of Israel, the movement of Israelis is to be restricted because the road serves Palestinians and is located in the Occupied Territory, not within the Israeli territory. The road was built for the use of local Palestinian residents and Israelis were not supposed to use it. For the Israelis' safety, the Israeli government, therefore, should forbid its citizens from using Road 443 and build alternative means of traveling for them.[1117] The Court did not examine the fact that Israelis do not have the right to use the road, but only examined the notion that the military commander exercised his authority on the basis of security considerations. The Court acknowledged again that the land on which the road was constructed was confiscated by the military government from residents in the area, and this land was owned by local Palestinians, but it did not question the legality of the Israeli use of the road nor the practices of segregation. In accordance with the examined international principles, this road should be used for the benefit of the local population. The prohibition of travel that has been imposed on Palestinians is no longer benefiting the local population; rather, it is helping the citizens of the occupying state and harming the occupied population, which goes beyond the authority of the military commander.

However, the Court maintained an ambiguous and undetermined ruling so the military commander could issue a new order indicating that there was a possibility of taking alternative measures that would reduce the harm caused to the petitioners (the local population) and achieve the needed security.[1118] For example, the Court suggested that the military commander could have made a decision to check all Palestinian vehicles before using the road, which could have been less harmful to the local residents;[1119] such measures were not taken into the military commander's consideration. The Court and the parties examined the legality of the alternative measures. These included establishing new checkpoints and restrictions on Palestinians, yet, the legality of checkpoints was already questionable. Similarly, in the Morar case, which is described in Chapter IV, the Court held that denying Palestinian farmers the

1117 B'Tselem, Restriction of Movement: Route 443 – West Bank Road for Israelis Only (2011).

1118 Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel," 225.

1119 Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007), 34.

right to access their agricultural land and restricting their right to freely move for their protection was a disproportionate measure, because the military commander should protect the Palestinian farmers by providing proper security arrangements and imposing restrictions on those who carry out unlawful and criminal acts.[1120] The military commander usually justifies his orders concerning imposing restrictions based on the movement of Palestinians for permanent security reasons, but not based on an exception. Notably, the exception must be used in a very narrow concept, and only in cases of imperative necessities.

The Court did not discuss all arguments raised by the petitioners in a deliberative framework. Although the petitioners argued that closing Road 443 was a collective punishment, the Court did not examine this argument. As all local Palestinian inhabitants were prohibited from using Road 443 and only Israelis were allowed to use the road, the Court, nevertheless, noted that segregation leads to discrimination.[1121] It stated that "the use of security measures of this type, which create a total segregation between different population groups in the use of roads and prevent an entire population group from using the road, gives a rise to a sense of inequality and even the association of improper motives."[1122] The Court made a very significant conclusion concerning discrimination against local residents, which will be examined later. It pointed out that the fact of banning all Palestinians from using Road 443 while it is opened for Israelis leads to segregation between different populations in the Occupied Territory. As a result, this creates a situation of inequality.[1123] This exclusion of certain population from the use of public resources is "extremely grave,"[1124] and undoubtedly leads to discrimination. Segregation, discrimination, and all forms of apartheid are explicitly prohibited in international human rights and humanitarian laws with no exceptions whatsoever.[1125]

1120 HCJ 9593/04 Rashed Morar and others v. Israeli Military Commander in Judaea and Samaria and others. The Israeli High Court of Justice (26 June 2006), 1.

1121 Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007), 46.

1122 Id., 48.

1123 Id.

1124 Id.

1125 International Convention on the Elimination of All Forms of Racial Discrimination of 1965, Article 3: States parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

In summary, the Israeli military commander has undoubtedly imposed discriminatory and disproportionate restrictions on Palestinians, while Israelis have been allowed to move freely between cities and settlements. Road 443 is still closed for local residents and there are no alternative roads serving Palestinians.[1126] These court decisions are compulsory for the Israeli military authorities and should be respected as an enforcement of the rule of law. The closure of Road 443 has precluded Palestinian population in the West Bank from enjoying their essential life needs. The problem remains in finding a way to enforce the Court's decisions that are in favor of Palestinians.

In some cases, the Israeli Supreme Court has ignored the basic rights and needs of Palestinians. In the case of Shawe v. Israeli Defense Forces Commander in Gaza, the petitioners challenged the night curfew, which was imposed on the entire Gaza area because it was broad and seen as a collective punishment.[1127] The curfew had been in force for over two years by the time the petition was submitted and heard by the Court.[1128] Although the Court concluded that the curfew should not be used as a collective measure, it relied on the military commander's statement, as he stated that the curfew was necessary to ensure security and public order.[1129] Accordingly, the Court concluded that there was no basis for interfering in the military commander's measures, but he still had to take into consideration the harm caused to the local inhabitants.[1130] It is obvious that the Court, at that time, did not want to make it clear to the military commander that curfew as a collective punishment was violating international law. Although the Court was "not prepared to take the responsibility for ending the curfew, it made it more difficult for the military authorities to renew it."[1131] This might be a logical point of view, but so far, the decisions of the Supreme Court have not been an obstacle to the military authority and they continue to issue new orders to restrict movement of Palestinians. Since the beginning of 1983, "the use of curfew as a collective punishment has been on the increase."[1132] Recently, internal closures, including checkpoints and

1126 B'Tselem, Restriction of Movement: Route 443 – West Bank Road for Israelis Only (2011).

1127 Shawe v. Israeli Defense Forces Commander in Gaza, (1990) 44 (4) PD 590.

1128 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 127.

1129 Shawe v. Israeli Defense Forces Commander in Gaza (1990).

1130 Id.

1131 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 128.

1132 Shehadeh, Occupier's Law: Israel and the West Bank, 133.

roadblocks, have been imposed as a siege on Palestinian towns and villages in the area of the West Bank, and there has been an absolute siege on the Gaza Strip.[1133]

In 2012, The Supreme Court refused to interfere in the measures taken by the Israeli commander because they fell under the grounds of security reasons. In the case of Kishawi v. The Israeli Minister of Interior, the Court stated that the "entry permits to Israel are given to residents of the Gaza Strip in exceptional humanitarian cases only, such as visits for medical purposes."[1134] The Court emphasized that there was no humanitarian grounds for interfering in the restrictions imposed on the residents of Gaza and prohibiting them from traveling to the West Bank. It stated, "Entry into Israel for the purpose of visiting imprisoned family members, passage through Israel for the purpose of study in the West Bank and visits to family in the West Bank do not constitute grounds for the humanitarian exception, which justifies entry into Israel in the framework of the customary policy."[1135] The Court has empowered the military commander and the Israeli government to impose punitive policies on Palestinian movement between the West Bank and the Gaza Strip. The Office of the Deputy Attorney General has continually recalled the Court stance on this issue insisting that allowing Gazans passage into the West Bank or Israel is only for exceptional humanitarian cases such as urgent medical treatment.[1136] The policy of the Israeli government and the judgment of the Israeli Supreme Court do, in fact, violate several provisions of international human rights and humanitarian laws. They violate the right to life, the right to health and access to medical care, the right to social life, the right to movement, and the right to live in dignity.

The Israeli Court of Justice has always been reluctant to rule on the validity of a law or a military order that creates regulations. It puts forth its judgments in a way to avoid such confrontations with the Israeli government or

1133 B'Tselem, Civilians under Siege: Restrictions on Freedom of Movement as Collective Punishment, 7.

1134 HCJ 4620/11 Omiama Hamed Mohamad Kishawi et al. v. The Minister of Interior et al. The Israeli High Court of Justice, (7 August 12).

1135 Id.

1136 The Office of the Deputy Attorney General (International Law) – Ministry of Justice – Israel – Assaf Radzyner, Response to a draft report of the Organizations B'Tselem and the Center for the Defense of the Individuals – Beyond the Dark Mountains, No. 1077 (5 December 2013), 3.

the Knesset, on the one hand. On the other hand, in most petitions, the Court reviews whether some military orders, which impose individual or collective restrictions, conform to international humanitarian principles. In some crucial cases, it ignores the Palestinians' basic human rights. The Court's refusal to rule in some cases such as the emergency regulations and the state of emergency grants the Israeli government the immunity and the power to impose further restrictions in the West Bank and the Gaza Strip. The Court often accepts the arguments of the Israeli government and the military commander that Israel has no obligation to allow free movement in the Occupied Territory because it is the state of the enemy.[1137] Israel uses and interprets the provisions of international humanitarian law to serve its own benefits, and it intentionally refuses to apply these provisions to protect the basic rights of Palestinians.

6. Conclusion

Both the Palestinian Authority and the Israeli government are obligated to respect the right to movement in the Occupied Territory. In addition, the Israelis' and the Palestinians' constitutional protection of the right to free movement compels all governmental bodies, police, and individuals to respect this obligation. The Israeli Supreme Court has, on some occasions, reached a clear conclusion on the illegality of the restrictions on the right to movement. However, it has "consistently refrained from interfering in these restrictions."[1138] The Abu Safiyeh case was an example that the Supreme Court's willingness to incorporate protection for Israeli residents traveling on Road 443. This was done within the scope of the authority and the duties of the military commander under the laws of belligerent occupation.[1139] The court decision must be seen as "developments that run contrary to the letter and spirit of the laws of belligerent occupation."[1140] However, in other crucial situations, the Court ignored the Palestinians' right to movement.

1137 Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel," 196.

1138 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 127.

1139 Guy Harpaz and Yuval Shany, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law," Israel Law Review, Vol. 43, Issue No. 3 (2010): 514–550, 515.

1140 Id., 516.

Palestinians must address ways to repair such violations, which are committed against them and interrupt their lives. As the decision in Abu Safiyeh was never implemented, and if it is hypothetically assumed that the military commander was forced to implement it, he still has the power to issue other new orders and impose closures on Palestinians. The legislative power in the Occupied Territory is "in the hands of the military commander."[1141] This will definitely pull local inhabitants back to the starting point where they have to go through the expensive and prolonged litigation process before the Israeli courts. Such results do not serve the local inhabitants nor respect the provisions of the applicable international and constitutional laws.

1141 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 143.

V. The Right to Property

1. Introduction

The question of property and its limits has complicated repercussions in both national and international laws. The concept of property in law is very broad. It is, therefore, necessary to limit the focus of this chapter and define what constitutes property and determine the extent of the right to property. Property, in fact, is "anything tradable or exchangeable that may be of value to persons."[1142] Property includes immovable items, such as land, houses, or estates, as well as movable items, such as furniture, cars, or any other physical items.[1143] In other words, it includes the possession of any physical property, movable or immovable. Private property refers to any valuable belongings owned, enjoyed, administrated, and controlled by individuals, group or entity, and it includes physical and legal ownership.[1144] In addition, "the concept of right to private property presupposes a moral standpoint."[1145] Property might also be intellectual to include thoughts, inventions, trademarks, and produced texts.[1146] The concept of property even includes "real property (e.g., land ownership or tenure) and personal property (e.g., intellectual property, goods and chattels, and income.)"[1147]

1142 Tibor R. Machan, Individuals and Their Rights (USA: Open Court Publishing Company, 1989) 140.

1143 Id.

1144 Michael A. Heller, "The Boundaries of Private Property," The Yale Law Journal, Vol. 108, No. 6 (April 1999): 1163–1223, 1169.

1145 Id.

1146 This is what intellectual property includes but this will not be the focus of this study.

1147 The Committee on Economic, Social and Cultural Rights, General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights, (Article 2.2 of the International Covenant of Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/20 (2 July 2009), § 25.

The right to property is not exclusive to the possession of tangible items; it extends to involve that which follows the enjoyment. This includes the right to own, possess, hold, use, access, manage, obtain, and transfer a defined physical land or property.[1148] In general, the right to property refers to the rights in valued resources.[1149] It is defined as, "the rights in a valued resources such as land, chattel, or an intangible … these rights include the right to possess and use, the rights to exclude, and the right to transfer … any external thing over which the rights of possession, use, and enjoyment are exercised. …"[1150] It is essential to define the concept of land. In general, land refers to "real property."[1151] The Ottoman Land Law, which is valid in Palestine, refers to private land as property that is owned and administrated by private people, while public land refers to land that belongs to and is administrated by the government.[1152] Land is defined in the Israeli Basic Law as, "land, houses, buildings and anything permanently fixed to land."[1153]

This chapter examines the importance of the right to property in the Palestinian Territory and highlights the restrictions of the right to private property including land expropriation, confiscation, destruction, and denial of access to land. This chapter will not elaborate on other forms of restrictions such as home demolitions, forced evictions, or confiscation of movable private belongings. The focus will be on the examination of land as a basic asset of property in Palestine. It explores the protection and the limitations of this right in both international humanitarian law and international human rights law. The right to property, as a constitutional right, is protected by domestic laws. This chapter, thus, scrutinizes the right to property under Palestinian law and the Israeli law. It highlights examples of cases which were petitioned before the Palestinian High Court of Justice and the Israeli Supreme Court concerning land and its confiscation and expropriation.

1148 Edella Schlager and Elinor Ostrom, "Property Rights Regimes and Natural Resources: A Conceptual Analysis," University of Wisconsin Press, Vol. 68, Issue No. 3 (August 1992): 249–262, 250–254.

1149 Garner, ed., Black's Law Dictionary, 1410.

1150 Id., 1410.

1151 Garner, ed., Black's Law Dictionary, 1011.

1152 The Ottoman Land Law of 1858, قانون الأراضي العثماني لسنة ٨٥٨١, Articles 1–15.

1153 The Basic Law: Israel Lands – 1960–5720 (19th July 1960), published in Sefer Ha-Chukkim No. 312 of the 5th Av, 5720 (29 July 1960), 56.

2. The Importance of the Right to Property

Property is a basic human need, and the right to property is of intrinsic value.[1154] Right to property assures a peaceful enjoyment of possessions for individuals and legal entities. This fundamental right provides shelter, dignity, a means for accumulation, and an important channel for a proper livelihood.[1155] The right to property is also needed for moral practices.[1156] Property is a significant asset for both individuals and society. "For individuals, property ownership entails opportunity, responsibility, and economic freedom, [and] [f]or society, these features translate into investment, innovation, the possibility of wide-scale exchange, and even improved governance."[1157] This statement actually sums up the substantial weight of property. It creates opportunities for individuals to work, assume responsibility, and develop themselves economically, thereby developing their society. Simply stated, property is a great economic strength for people. The economic development of individuals certainly contributes to the prosperity of the society itself, not only economically, but also socially and politically.

A full validity of the right to property means a proper enjoyment of other human rights. The most fundamental rights, including the right to property, are crucial to guarantee the right to live with dignity. Significantly, the right to property affects other fundamental human rights and any violations against property can feasibly violate the right to live in dignity, the right to housing, and the right to a proper livelihood. For example, ownership is a means of production for economic and social stability. Property, whether collective or individual, has a first-hand effect on the distribution of wealth and consumption as well as on production.[1158] For instance, the nature of the markets depends on the development of property rights. Such rights also affect the

1154 Amartya Sen, "Property and Hunger," Economics and Philosophy, Vol. 4, Issue No. 1 (1988), 57–68, 59.

1155 Ruth Meinzen-Dick, Property Rights for Poverty Reduction? United Nations, Department of Economic and Social Affairs. DESA Working Paper No. 9. 2009, 1.

1156 Machan, Individuals and Their Rights, 147.

1157 John D. Sullivan, Jean Rogers, and Kim Eric Bettcher, "The Importance of Property Rights to Development," SAIS Review of International Affairs, Volume 27, Issue No. 2 (2007): 31–43, 32.

1158 Timothy Besley and Maitreesh Ghatak, "Property Rights and Economic Development," in Handbook of Development Economics: Vol. 5, eds. Dani Rodrik and Mark Rosenzweig (The Netherlands: North Holland Publisher, 2010), 4527.

inter-generational evolution of wealth.[1159] The deprivation of private property changes the distribution of incomes and deteriorates economic growth.[1160] Stated another way, the deprivation of private property leads individuals to conditions whereby they may lose their jobs, their housing, and their proper livelihood. It may prevent individuals from marrying and having a family if they become unable to financially afford it. In its life-threatening consequences, deprivation of property might lead to starvation and hunger.[1161] According to the International Fund for Agricultural Development (IFAD), 70% of the 1.3 billion extremely poor people in the world do not have protected tenure rights and are landless.[1162] The Special Rapporteur on adequate housing affirms that "land constitutes the main asset from which the rural poor are able to derive a livelihood."[1163] Land ownership is undoubtedly a remarkable asset and vital resource of income, and this provides social and economic safety.[1164] The Vancouver Declaration on Human Settlements described land by stating that it "is one of the fundamental elements in human settlements."[1165] Land rights involve an effective and productive use.[1166] Access to land is the key element to benefit from it and the only way to develop its rewards and increase its potential. Access to land involves a basic human shelter, agriculture and food production, and all other activities related to economic and industrial development. Effective access to land leads to growth and better investment in its resources.[1167]

1159 Id.

1160 Gary D. Libecap, Property Rights in Economic History: Implications for Research (USA: Academic Press Inc., 1986), 229.

1161 Sen, "Property and Hunger," 60.

1162 The International Fund for Agricultural Development (IFAD), Land Tenure Security and Poverty Reduction, 2009. Available on IFAD webpage at https://www.ifad.org/en/topic/tags/land/1952296. Accessed 21 July 2017 at 18:30.

1163 Human Rights Council, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari, U.N. Doc. A/HRC/7/16 (Feb. 13, 2008), 67.

1164 Alain de Janvry, Gustavo Gordillo, Elisabeth Sadoulet, and Jean-Philippe Platteau, eds., Access to Land, Rural Poverty, and Public Action (Oxford: Oxford University Press, 2001), 17.

1165 The Vancouver Declaration on Human Settlements, United Nations Conference on Human Settlements, *Adopted* June 11, 1976, A/CONF.70/15, 10.

1166 United Nations Human Settlement Programme – HABITAT, Secure Land Rights for All. Kenya, 2008, 4.

1167 Id.

Property, especially land, in Occupied Palestine has a special consideration and prominence, yet, it suffers different restrictions. Accordingly, it is essential to elaborate on the situation of property in Occupied Palestine before moving on to examine its protection under international and domestic laws.

3. Property in Palestine

In a Palestinian context, property derives its importance from the significance of the land of Palestine, where land has a substantial impact. The right to private property is undoubtedly one of the great concerns for Palestinians, as its importance maintains the traditions of the Palestinian society and helps it maintain its own identity.[1168] For Palestinians, land is their dismal scenery, where they have lived and/or were expelled; it reflects the patriotic sensitivity among all Palestinians under Israeli occupation, and it is associated with the land of Palestine which was lost and torn apart.[1169]

The 1948 War caused displacement of almost a million Palestinians (internal and external refugees), in addition to the demolition and depopulation of hundreds of Palestinian villages.[1170] The displaced Palestinians were forbidden to return to their original lands. As a result, this left approximately 20,000 square kilometers of land, which constitutes what is today known as the State of Israel. Arab Palestinian resources were controlled and confiscated for the benefit of the Jewish communities and Israel seized 70% of the Arab land during the first year of its establishment.[1171] Most of the Arab communities were denied the use of their land and forced to relocate in designated areas.[1172] In addition, the 1967 War forced hundreds of thousands of Palestinians to flee and leave their lands and homes.[1173] From 1967 to 1973, Israel confiscated 678,021 dunums of privately owned land and 160,000 dunums of unregistered land for military reasons, considered government-owned land, and used this

1168 Adrien Katherine Wing, "Healing Spirit Injuries: Human Rights in the Palestinian Basic Law," Rutgers Law Review, Vol. 54 (2002): 1087–1100, 1091.

1169 Pappe, The Ethnic Cleansing of Palestine, Partition and Destruction: UN Resolution 181 and its Impact – Palestine's Population.

1170 Davis, Israel an Apartheid State, 18.

1171 Id., 25.

1172 Adalah: Israeli Plan to Demolish Palestinian Homes in Negev, the Galilee and the Triangle is Illegal (Jerusalem: Adallah Press release, 14 October 2003).

1173 Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999, 328.

land to build communities for Jewish Israelis.[1174] From 1979 to 1992, Israel declared more than 908,000 dunums in the West Bank as state land; this property had not been recorded as government property.[1175] In addition, 35% of the land in East Jerusalem was expropriated and confiscated, at least 90% of which was privately owned by Palestinians.[1176]

Over the years, Israel has broadly used these laws to expropriate the maximum amount of lands within its legal capacity. Israel passed different laws to expropriate, confiscate, and control lands.[1177] The main purpose of the expropriation was to control lands, build settlements, extend Jewish towns, and build infrastructure systems including highways and road passes.[1178] In this regard, Israel's primary legal mechanism to carry out these acts consisted of declaring Palestinian land as abandoned, or deeming the land as an absentee property or state land. The major land laws, which Israel used to achieve this goal, will be discussed later in this chapter. It has used a set of laws to facilitate the confiscation of Palestinian lands, some of which were announced to be state land. Other land was expropriated for public interest but used for the benefit of the Israelis only. Some were expropriated as absentee property, and some were announced as military property under the amendment on land ordinance of 1943.[1179]

In the early stages of land expropriation and confiscation, Israel justified these seizures for reasons of military necessity, security, and/or public purposes. Around 33% of the settlements were built on private Palestinian lands, which were confiscated by Israel on asserted grounds of military necessity.[1180]

1174 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Under the Guise of Legality: Israeli's Declarations of State Land in the West Bank (February 2012), 9–13.

1175 Id., 15.

1176 Coon, Israel and the Occupied Territories: Demolition and Dispossession, 33.

1177 Id., 47.

1178 Izzat Muhammad Duweikat and 16 others v. Government of Israel (1979).

1179 See Land (Acquisition for Public Purposes) Ordinance – Amendment No. 10 (2010) Article 7 (Text in Hebrew) 2010), (רכישה לצורכי ציבור) חוק לתיקון פקודת הקרקעות התש"ע-3 2010 'מס)), Abandoned Areas Ordinance No. 12 of 5708—1948, Published in the *Official Gazette*, No. 7 of the 23rd Sivan, 5708 (30th June, 1948), and Absentees' Property Law, (No. 20) 5710–1950, Passed by the Israeli Knesset on the 25 Adar (14 March 1950) and published in Sefer Ho-Chukkim No. 37 of the 2nd Nisan, 5710 (20 March, 1950).

1180 United Nations General Assembly, Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict. Human Rights Council, UN Doc. No. A/HRC/12/48 (25 September 2009), 53.

In 1979, Israel took its confiscation policy to another level. It began confiscating lands for security reasons and declaring the land as state land.[1181] As a result, the current Jewish settlements were established on more than 90% of the Palestinian expropriated lands, which were declared state land.[1182] The Israeli government announced 26.7% of the West Bank as state land; at the same time, it transferred some confiscated land to the Israeli settlers.[1183] Additionally, Israel facilitated the purchase of the Palestinian land to its Jewish citizens.[1184] More than two-thirds of all land in 1967 Occupied Palestine was expropriated or controlled by Israel by the 1990s.[1185]

The Oslo agreements eased the situation for Israel and increased their land confiscation as 60% of West Bank and 40% of Gaza remained under full Israeli military control.[1186] As discussed in the previous chapters, the Oslo agreements categorized the land in the West Bank into three areas: A, B, and C. Area A comprises 18% and area B covers 22% of the West Bank.[1187] The lands in areas A and B are very limited. Area C, on which building is prohibited, constitutes 60% of the West Bank and contains most of the land that is necessary for development in the Palestinian cities and villages.[1188] In all areas, Israel has seized a massive scope of land, not only for the benefit of the Israeli illegal settlements, but also for building high passes and military bases, which has become the Israeli government's policy in Palestine, as well as building the separation wall.[1189] For example, in 1995, to pave the Elon Moreh Jewish

1181 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 90.

1182 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Land Grab: Israel's Settlement Policy in the West Bank (Jerusalem, B'Tselem, May 2002), 51.

1183 Human Right Watch, Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories, 20.

1184 Id., 47.

1185 Badil, Occasional Bulletin No. 19, the Continuing Catastroppe: 1967 and Beyond, (June 2014).

1186 Badil, Occasional Bulletin No. 19 (2014).

1187 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Human Rights in the Occupied Territories: The Annual Report of 2011 (Jerusalem: B'tselem, 2011), 11.

1188 Id., 54.

1189 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Human Rights in the Occupied Territories: The Annual Report of 2007 (Jerusalem B'tselem, 2008), 47.

settlement,[1190] which is located in the West Bank on the outskirts of Nablus city, Israel built Route 557 to connect it with the Jewish settlement of Itamar. In so doing, they confiscated 23 hectares of Palestinian land that belonged to the villages of Salem, Deir Al-Hatab, and Azmut.[1191] The Israeli government built the route to enable settlers and their guests to avoid driving through the area of Salem, while Palestinians in these villages were not been allowed to use this road, neither driving nor crossing on foot.[1192] Now, the road separates the Palestinian villagers from 70% of their reaming land.[1193] Another example is the expropriation of the Palestinian land to build Road 443 to connect Israeli settlements to the cities of Jerusalem and Tel-Aviv.[1194] Although the land was expropriated for public purpose to benefit the local Palestinians, Palestinians are prohibited from using this road, which serves only Israelis.[1195]

Several military orders have been issued for security reasons and military necessity. Military Order No. 9 concerning acquisitions for public purposes was issued on December 22, 1968, and is still in force in the West Bank.[1196] Military Order No. 59 was issued on July 31, 1967, concerning state property.[1197] The

1190 The case of Elon Moreh Settlement will be discussed later.

1191 B'Tselem, Expel and Exploit: the Israeli Practice of Taking Over Rural Palestinian Land, 14.

1192 Id.

1193 Id.

1194 Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF and other (1983), 1–3. See Chapter IV: Right to Movement.

1195 Id.

1196 Also, Military Order No. 58 of *July 23, 1967*, concerning absentee Property, Military Order No. 14/75, 1975 concerning land confiscation, Order concerning abandoned assets (private property) (Amendment No. 5) (West Bank) (No. 562), 1974 and Order No. 15/75, 1975. See the database of the Palestinian Legal and Judicial System, Al Muqtafi. Search Israeli Military Orders.

1197 This military order defines state property as any movable or immovable property, which prior to June 7, 1967, belonged to a hostile state. In 1984, Military Order No. 1091 defined state land as follows: "State property is now interpreted as including any property subject to an expropriation order. It is defined as: 1. Property that on the date of occupation or afterwards was registered in the name of an enemy state or any organization or company linked or controlled directly or indirectly by a hostile state. 2. Land that has been confiscated in the public interest in accordance with legislation or security legislation through or for one of the sectors/authorities of the Israeli military forces which is not necessarily local. 3. All property which belongs to individuals who have requested that the official authorities administer and manage their properties, and which the official has consented to administer." For further discussion, see Chapter V: The Right to Property.

order states, "Any land not individually registered or registered as the property of the Islamic Waqf, is subject to the designation as state land."[1198] This means that the military commander has collectively transferred Palestinian land to the ownership of the Israeli government for purposes other than security or military necessity. Furthermore, the military commander expropriated the Palestinian lands for public purposes through Military Order No. 321 (Land Expropriation for Public Purposes) issued on March 28, 1969, which grants the military commander full discretion to expropriate land for public interests. Most military orders, which were based on Order No. 321, confiscated lands for the profit of the Israelis, i.e., expanding settlements and building a network of roads and highways.[1199] The Jordanian Law of Expropriation of the Land for Public Purposes of 1953,[1200] which is still enforced in the West Bank, regulates specific procedures for expropriating private land; however, there are military orders amending this law.[1201] The orders have changed the expropriation procedures, allowing an appeal before an Israeli committee instead of the local courts, and imposing heavy punishments on those who resist such expropriation orders.[1202] These amendments aim at facilitating land expropriation with a quiet and easy implementation as well as avoiding possible disputes.[1203] On June 5, 1979, the military commander of the West Bank issued Order No. 16/79 concerning seizure of land for military purposes. He ordered a confiscation of approximately 700 dunums of land from Palestinians, but the actual purpose was to extend the Elon Moreh settlement.[1204] Other military orders concerning land seizure were justified for security reasons. The military commander issued other orders for security reasons without indicating the actual security necessity.[1205]

1198 Military Order No. 59 concerning state property (July 31, 1967).

1199 See Chapter IV: The Right to Movement, Abu Safiyeh case.

1200 The Law of Land (Acquisition for Public Schemes) (No. 2), 1953, Official Gazette, 1130, 1 January 1953.

1201 Law (Acquisition for Public Needs) No. 2 of 1953, as amended in the Order Regarding the Land Law (Acquisition for Public Needs) (Order No. 321) (Judea and Samaria), 5729-1969.

1202 Shehadeh, Occupier's Law: Israel and the West Bank, 37–38.

1203 Id.

1204 Izzat Muhammad Duweikat and 16 others v. Government of Israel (1979).

1205 See Military Order No. 14/03/T (Judaea and Samaria) 5763-2003 on 9 February 2003 and its amendment 5733-20033 on 17 August 2004 concerning requisition of land.

Since the outbreak of the Second Intifada, the construction of the wall in the West Bank was started for security purposes.[1206] The separation wall has contributed to an excessive land confiscation. For instance, the city of Qalqiliyah is now surrounded by the barrier on four sides, is cut off from more than half of its agricultural land, around 2500 dunums, and controlled by military checkpoints.[1207] The inhabitants of the city are prohibited from constructing in the city's land that lies on a 200 meter strip along the wall.[1208] In addition, in the village of Jayus, the military commander, for the purposes of constructing the wall, confiscated around 550 dunums and uprooted 4000 trees separating the villagers from 70% of their agricultural lands.[1209] The impact of the separation wall will be discussed in detail later in this chapter.

The expropriation and confiscation of the Palestinian land constitutes a major issue for Palestinians on many levels. Many Palestinians "have been deprived of their property that was inherited in their family for generations, due to Israel's confiscation of large areas of the West Bank and Gaza."[1210] The impact of the land expropriation or confiscation in Palestine has greater effects beyond losing one's ownership. When the Israeli military implements a confiscation order or law in a certain village, it might "follow futile protests, [which are] often answered by violence and arrest."[1211] Since 1967, on March 30 of every year, Palestinians and pro-Palestinians march in the towns and villages across Palestine and Israel against the evacuation of Palestinians and the confiscation of their land.[1212] On one occasion, in the village of Madama, 50 Palestinians were injured by Israeli rubber-bullets and dozens suffered from tear-gas inhalation.[1213] Some lost their lives. For example, on March 16, 2003, an Israeli bulldozer killed an American peace activist while protesting

1206 International Court of Justice, Advisory Opinion (2004), 65.

1207 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Arrested Development: The Long-Term Impact of Israel's Separation Barrier in the West Bank (October 2012), 53.

1208 Id., 54.

1209 Id., 49.

1210 Wing, "Healing Spirit Injuries: Human Rights in the Palestinian Basic Law, 1098.

1211 Coon, Israel and the Occupied Territories: Demolition and Dispossession, 18.

1212 Ali Abunimah, What is Palestine's Land Day? The Electronic Intifada, 30 March 2014.

1213 Ma'an News Agency, Dozens injured as Palestinians Commemorate Land Day across West Bank, Gaza, Israel. Published March 30, 2017 at 6:58 pm. and updated April 3, 2017 at 6:43 pm.

against bulldozing a Palestinian home in Gaza.[1214] In another incident, on December 10, 2014, a Palestinian minister died after exposure to tear gas used by Israeli soldiers while protesting against land confiscation.[1215]

Property is a significant economic asset for Palestinians. Palestine has traditionally been an agricultural society and almost all of the cultivated land was held by the indigenous population.[1216] In fact, "approximately 65% of the Palestinian Arabs were agricultural people who lived in about 500 villages where ground crops as well as fruits and vegetables were grown."[1217] Agriculture has been the main income for many Palestinian families until recently, and, as a result, their economic development has been badly affected and limited.[1218] The World Bank warned that the Palestinian economy is suffering and being hurt as a result of Israeli policies.[1219] Farmland expropriation and confiscation, denial and restrictions on the access to land, and restrictions on movement have deteriorated the growth of the Palestinian economy.[1220] Thousands of Palestinians have difficulty in reaching their agricultural land, cultivating it, and marketing their products to other areas of the West Bank.[1221] They are facing a gate system that restricts their access to their land and obligates them to obtain permits from the Israeli military, and the gates are only opened very few times a year.[1222] The Israeli forces declared that the Palestinian farmers were prohibited from getting closer than 100 meters from the separation wall, while residents of Gaza were prohibited from getting closer than 300 meters.[1223] Farmers were denied access to their land for

1214 Nigel Parry and Arjan El Fassed, Photostory: Israeli bulldozer murders American peace activist. The Electronicintifada, 16 March 2003.

1215 NPR News, Palestinian Minister Dies in West Bank Protest against Israeli, December 10, 2014, reported by Krishnadev Calamur, seen at 10:55 am.

1216 Pappe, the Ethnic Cleansing of Palestine, Partition and Destruction: UN Resolution 181 and its Impact- Palestine's Population.

1217 Edward Said, The Question of Palestine (New York: Vintage Books, 1979), 12.

1218 B'Tselem – The Annual Report of 2007, 47.

1219 The World Bank, Fiscal Challenges and Long-Term Economic Costs: Economic Monitoring Report to the Ad Hoc Liaison Committee, (19 March 2013).

1220 Id. 26–31.

1221 B'Tselem, the Separation Barrier (2011).

1222 Id.

1223 United Nations General Assembly, Human Rights Council, Human rights situation in the Occupied Palestinian Territory, including East Jerusalem: Report by the Secretary-General. A/HRC/24/30, Twenty-fourth session, Agenda items 2 and 7, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of

many years.[1224] Normally, Palestinians would query the District Coordination Office (DCO)[1225] to be granted access permission by the military commander.[1226] During the olive harvest season, Israeli settlers would most likely attack and harm Palestinians, and hence, a closure would be imposed with the main purpose of protecting Palestinian residents.[1227]

Damage to the agricultural sector means that Palestinian farmers cannot get supplementary income and this makes it impossible to increase the number of workers in the primary sector of the Palestinian economy.[1228] According to the World Bank report of 2013, agriculture in the West Bank contributed to over 14% in the 1990s economy, while only 5.1% in 2011.[1229] In August 2014, the Israeli authority expropriated "large land areas from the Bethlehem Governorate, including the declaration of 400 hectares of 'state land' earmarked for the expansion of the Gva'ot settlement … [in] Wadi Fukin alone, the confiscated land represents between a third and a half of the village land, including land used for agricultural purposes, as well as land in the immediate vicinity of the local school."[1230] These are only a few examples that have been used to worsen the situation in the Occupied Territory. Further study will be conducted while examining the laws, which Israel has used to expropriate, confiscate, and destruct Palestinian lands. The Palestinian Central Bureau of Statistics published, on March 30, 2018, that Israel, since 1948, has controlled

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the High Commissioner and the Secretary-General: Human Rights Situation in Palestine and Other Occupied Arab Territories. 22 August 2013, para 14.

1224 United Nations General Assembly, Human Rights Council, Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem: Report by the Secretary-General. A/HRC/24/30, Twenty-fourth session, Agenda items 2 and 7, Annual report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Human rights Situation in Palestine and Oher Occupied Arab Territories. 22 August 2013, para 15.

1225 The District Coordination Offices (DCOs) are Israeli-Palestinian military coordination offices established in each district of the West Bank and Gaza Strip as a part of the 1994 Gaza-Jericho Agreement.

1226 Rashed Morar v. Israeli Commander in Judaea and Samaria (2006), 61.

1227 Id. 63.

1228 B'Tselem, the Separation Barrier (2011).

1229 The World Bank, West Bank and Gaza: Area C and the Future of the Palestinian Economy, Report No. AUS2922 (2 October 2013), 7.

1230 Human Rights Council, Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan, A/HRC/31/43, 20 January 2016, 62.

and taken over more than 85% of the land of the historical Palestine, whose size comprises about 27,000 km2.[1231]

The Palestinian Authority has become a de facto actor in some parts of the Occupied Territory since 1994 and has acted as a government in the areas under its control. It confiscates land, in areas under its control and municipal jurisdiction for public interest. However, it does not fully respect the applicable laws and procedures. As mentioned previously, it only has control of Area A, and it might expropriate or confiscate privately owned land for necessary public purpose with just compensation according to the applicable law. In 2010, for example, complaints were filed against the Palestinian Preventive Security for violating the rights of citizens to private property.[1232] According to the 23rd annual report of the Palestinian Independent Commission for Human Rights, policies of confiscation and expropriation of private property in the West Bank, including East Jerusalem, and the Gaza Strip, were mainly exercised by the Israeli authorities.[1233] Confiscations of private land by the Palestinian Authorities did occur; some cases presented before the Palestinian High Court of Justice will be discussed later.

The protection of the right to property is an important part in international law principles. In order to determine whether the practices and policies of the Israeli government and the Palestinian Authority constitute violation of international applicable laws, the right to property in international law shall be examined.

4. The Right to Property in International Law

International human rights law and international humanitarian law protect the right to property; however, these laws have not granted an absolute protection to property. The next analysis highlights the protection of the right to property and its exceptions in international human right law and international humanitarian laws. It also examines the legality of the Israeli and the Palestinian practices under such laws.

1231 Palestinian Central Bureau of Statistics, Press-Release, March 30, 2018.

1232 The Independent Commission for Human Rights, 16th Annual Report; and The Independent Commission for Human Rights, 20th Annual Report.

1233 The Independent Commission for Human Rights, 23rd Annual Report (2018).

4.1. The Right to Property in International Human Rights Law

The main questions are: Do international human rights instruments protect the right to property, and if so, what are the limitations on private property? and What are the governments' obligations in imposing restrictions? In order to answer these questions, human rights instruments will be examined in regard to the right to property.

Surprisingly, the right to property is neither included in the International Covenant on Economic, Social and Cultural Rights (ICESCR) nor in the International Covenant on Civil and Political Rights (ICCPR).[1234] It is explicit that there is a gap in the protection of the right to property in the named covenants. This gap, perhaps, reflects the domination of the powerful countries during *les travaux préparatoires* and their colonial ambitions in different regions, but it is not sufficient in ignoring the right to property as a fundamental human right.[1235] One might claim that the right to property is not internationally protected. Despite this flaw, the right to property remains an internationally guaranteed right. The International Convention on the Elimination of All Forms of Racial Discrimination has unambiguously protected the right to property in its Article 5.[1236] The article reads, "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: … (d) [o]ther civil rights, in particular: … (v) [t]he right to own property alone as well as in association with others."[1237] The right to property is not only guaranteed as such, the convention also grants a protection against any kind of racial discrimination. Everyone, without distinction, has the right to possess property as well as enjoy it peacefully. The Committee on Economic, Social and Cultural Rights, in its General Comment

1234 Catarina Krause and Gudmundur Alfredsson, Article 17, in Gudmundur Alfredsson and Asbjorn Eide, eds. The Universal Declaration of Human Rights: A Common Standard of Achievement (The Hague: Martinus Nijhoff Publishers, 1999), 359–378, 359.

1235 Golay, Christophe and Cismas, Ioana, Legal Opinion: The Right to Property from a Human Rights Perspective (2010). Available at SSRN:http://dx.doi.org/10.2139/ssrn.1635359.

1236 International Convention on the Elimination of All Forms of Racial Discrimination of 1965, Article 5.

1237 Id.

No. 20, upholds property as a prohibited ground of discrimination.[1238] A detailed study on the right to equality and non-discrimination is conducted in the following chapter.[1239]

The Universal Declaration of Human Rights (UDHR) sets forth human rights and fundamental freedoms to which all men and women, everywhere, are entitled, equally and without discrimination.[1240] The UDHR protects the right to property but fails to provide a complete and comprehensive regulation. The right to property is specifically guaranteed in Article 17. It states, "Everyone has the right to own property … no one shall be arbitrarily deprived of his property."[1241] The article allows everyone, without discrimination, to exercise and enjoy the right to privately own property. Given the importance of the right to property as a fundamental right, all people are entitled to the peaceful enjoyment of their property. In addition, the article restricts the government or any other power to impose any infringements of this right. States are not permitted to arbitrarily deprive people, citizens, or foreigners, from their

1238 The Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009) E/C.12/GC/20, § 25.

1239 This will be examined in the next chapter on the right to equality and non-discrimination. It is also worth noting that the Convention on the Elimination of All Forms of Discrimination against Women, which was ratified by the Palestinian Authority and the Israeli government, has emphasized women's right to property equally with men before the law, which includes enjoyment of private property. (Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, Articles 15&16) State Parties must grant women "equal rights to conclude contracts and to administer property … [and to] take all appropriate measures to eliminate discrimination against women in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration." (Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, Article 15&16) Some groups, such as women and children, usually need a special protection. This convention protects women to assure that they are treated equally. Although the convention excludes men from its protection, it guarantees the right to property for women to be equal with men. This means that men, internationally, have the right to property and are entitled to the advantages granted to women. This convention emphasizes that women are entitled to enjoy all human rights including the right to property, which men also enjoy. Remarkably, both the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women signifies the substance of the right to property.

1240 Universal Declaration of Human Rights of 1948, Article 2.

1241 Id. Article 17.

right to property. The UDHR has not granted an absolute right to property and ownership, and Article 17 provides that persons can be deprived of the ownership rights.[1242] Nevertheless, expropriation and confiscation of any property must not be arbitrary.

The United Nations, in some of its resolutions, has interpreted the general regulations on this matter. The General Assembly Resolution No. 1803 of 1962, in case of permanent sovereignty over natural resources, declares that expropriating and confiscation are justifiable only if they are based on the grounds of public utility or national interest.[1243] In cases of expropriating or confiscation, the owner shall be paid appropriate compensation in accordance with domestic and international laws.[1244] Firstly, the compensation, internationally, is required to be an adequate and just.[1245] The states are undoubtedly obliged to compensate for the legally expropriated property.[1246] Compensation, as a national and international remedy, is not the focus of this study. This study rather argues that a systematic land confiscation against one group of people is illegal, and, therefore, a focus on the obligations and limitations of a state is more vital at this stage. Secondly, with the aim of examining the limitations on the right to property, the departure point will be the UDHR and Resolution No. 1803.

The duties of a state are usually common for all human rights. States, as elaborated in detail in Chapter III, have the obligation to respect and protect the rights of individuals and to raise no obstacles during the enjoyment of these rights. The states have negative and positive obligations. While negative obligations mean that a state must not violate the right to property and let individuals enjoy their rights tranquilly, positive obligations refer to the responsibility to protect the rights of all individuals from any harm and prevent all actions that might violate such rights.[1247] States must allow people to peacefully use and enjoy their own property through cultivating it, constructing

1242 Krause and Alfredsson, "Article 17," 356.

1243 The General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent Sovereignty over Natural Resources."

1244 Id.

1245 Stanley D. Metzger, "Property in International Law," Virginia Law Review, Vol. 50, No. 4 (May 1964): 594–627, 600.

1246 Amir Rafat, "Compensation for Expropriated Property in Recent International Law," Villanov Law Review, Vol. 14, Issue No. 2 (1969): 199–259, 201.

1247 Hampson, "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body," 567.

on it, renting it, or even neglecting it, and they must not infringe upon these rights. States also have the duties to protect people from any interventions by any third party, individuals, or entities. Under certain circumstances, the state may restrict the right to property. This leads to the examination of the limitation on the right to property.

Limitations of the rights to property do exist. Property might be taken away from its owners in certain cases.[1248] The terms that are used in such process are varying and confusing; hence, it is important to differentiate between their meanings and usage. Seizure is "the act or an instance of taking possession of a person or property by legal right or process."[1249] Confiscation is defined as "seizure of property by actual or supposed authority."[1250] Expropriation is defined as "governmental taking or modification of an individual's property rights."[1251] It also might be defined as "the deprivation of any of an owner's rights."[1252] Requisition is "an authoritative, formal demand, usually on the basis of some official right or authority … [and is] a series of inquiries or requests about land title made by the prospective buyer's attorney, the seller being called on to satisfy them."[1253] According to these definitions, in all cases, taking possession must be conducted by a legal government or authority in a territory. Requisition seems to exclusively involve two parties expressing their discretion, which makes this term beyond the scope of the referred practices in this research. None of the definitions indicate whether taking property changes the ownership or whether it is time limited or use-specified. In some of the United Nations reports, the terms *confiscation* and *seizure* are used indistinguishably.[1254] The International Court of Justice, in its advisory opinion, used the term confiscation.[1255] Scholars and human rights organizations use the four terms (confiscation, seizure, expropriation, and requisition)

1248 The limitations on the right to property will be discussed later in this chapter.

1249 Garner, ed., Black's Law Dictionary, 1564.

1250 Id., 362.

1251 Id., 702.

1252 B. A. Wortley, G. C. Cheshire, R. K. Kuratowski, Alfred Drucker, Erwin H. Loewenfeld, W. Adamkiewicz and Alexander Weinreb, "Expropriation in International law," Transactions of the Grotius Society, Vol. 33, (1947): 25–48, 25.

1253 Garner, ed., Black's Law Dictionary, 1498.

1254 See Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, A/HRC/34/70, 13 April 2017; See also Human Rights Council, Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan, A/HRC/31/43 (2016).

1255 International Court of Justice, Advisory Opinion (2004).

synonymously.[1256] Due to the importance of the proper use of terminologies, this research draws a line between expropriation and confiscation because, from the author's understanding, confiscation transfers the right to use the property (retain possession of land or property), while expropriation transfers the ownership (take ownership of land or property).[1257] Therefore, these two terms are used to refer to different practices.

Recalling Resolution No. 1803 of 1962, expropriation and confiscation of private property can be conducted only in the public interest and an adequate compensation must be paid.[1258] Public interest refers to a general welfare that benefits an entire society.[1259] International law has not regulated public purposes; thus, it has a broad meaning. This actually allows scholars and domestic laws to regulate the implications of the term. According to international scholars, a public interest can be "used in a manner to make it of public consequence, and affect the community at large."[1260] It includes highways, roads, parks, hospitals, schools; it even comprises railways, "the services they [railway companies] provided were sufficiently important to constitute

1256 Ghazi-Walid Falah, War, Peace and Land Seizure in Palestine's Border Area, Third World Quarterly, Vol. 25, No. 5 (2004), 955–975; Hanna Dib Nakkara, Israeli Land Seizure under Various Defense and Emergency Regulations, Journal of Palestine Studies, Vol. 14, No. 2, Special Issue: The Palestinians in Israel and the Occupied Territories (Winter, 1985), 13–34; Sabri Jiryis, The Arabs in Israel, 1973–79, Journal of Palestine Studies, Vol. 8, No. 4 (Summer, 1979), 31–56; Wortley, Cheshire, Kuratowski, Drucker, Loewenfeld, Adamkiewicz, and Weinreb, Expropriation in International Law." Cambridge University Press, Transactions of the Grotius Society, Vol. 33, Problems of Public and Private International Law (1947), 25–48; Geremy Forman and Alexandre Kedar, From Arab Land to "Israel Lands": The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948, Environment and Planning D: Society and Space Vol. 22, (2004) 809 – 830; B'tselem, Expel and Exploit: the Israeli Practice of Taking Over Rural Palestinian Land, December 2016.

1257 This conclusion came after a careful reading of the texts of the regulations of international humanitarian law and Ottoman, British, Jordanian, Israeli and the Palestinians laws as well as the rulings of the High Court of Justice in Israel and Palestine. Although it hard to determine the correct translation of a term from Arabic and Hebrew to English, the British Emergency Regulations differ between taking possession of any land or retain possession of any land.

1258 The General Assembly Resolution 1803 (XVII) of 1962. "Permanent Sovereignty over Natural Resources."

1259 Garner, ed., Black's Law Dictionary, 1425.

1260 Walton H. Hamilton, "Affectation with Public Interest," The Yale Law Journal, Vol. 39, No. 8 (Jun. 1930): 1089–1112, 1097.

a public interest."[1261] The expropriation and confiscation of a land for public interests has been regulated as a legal act; henceforth, the legal procedures must be followed by the governmental bodies according to the law in order to be able to confiscate private land for public interests.[1262] At the domestic level, public interest or purposes are regulated in the applicable laws in Palestine and interpreted by the domestic courts. This matter is discussed under the section on domestic law.

Confiscation and expropriation might raise the concern of property taken illegally by the occupying power; however, in all circumstances, they must not do so arbitrarily. For example, when "a state expropriates [a property] for political reasons without any justification, such expropriation may be rightly considered invalid extraterritorially, whenever it has to depend on the recognition of courts and other bodies, situated outside the expropriating state."[1263] It is understood from this quotation that whenever expropriations and confiscations are conducted for political reasons, they are illegal, especially if they are executed by illegitimate power outside its territory. In addition, expropriation and/or confiscation of private property do not necessarily stand valid and legal under international law. In fact, the question is whether confiscation of a property amounts to grounds under international law provisions.[1264] Expropriation authority must be recognized according to the principles of the international public law which binds the courts to accept the legality of the power of the state authority to expropriate.[1265] States should be reasonable in assessing the necessity of expropriation. The necessary confiscation or expropriation must not become the policy of a government. Governments cannot, by any possible means, abuse and/or exaggerate the use of this exception.[1266] Most importantly, confiscation shall not be directed against lands that belong to one group of people to benefit another group of people. The states do not have the authority or power to confiscate land without a need to do so. In cases of expropriation or confiscation, states must provide a law that regulates valid purposes that prevent arbitrariness. If these motives, such as political

1261 Tom Allen, The Right to Property in Commonwealth Constitutions (UK: Cambridge University Press, 2000), 16.

1262 Id.,15.

1263 Wortley, Cheshire, Kuratowski, Drucker, Loewenfeld, Adamkiewicz, and Weinreb, "Expropriation in International Law," 31.

1264 Id., 28.

1265 Id., 27.

1266 Id.

motives, are illegitimate, the expropriated land must be returned to its owners.[1267] This means that an authorized confiscation must be generated in accordance with the purpose of human rights, which is to protect all people.

The United Nations Security Council, in Resolution 465 (1980), emphasized the need to take measures to protect public and private land and property as well as water resources in the Arab occupied territories including East Jerusalem.[1268] Compensation from the Israeli authorities is a very controversial matter in the Occupied Territory. Compensation for expropriating the Palestinian land, which refers to dispossession of ownership, is controversial to the Palestinian patriot faith and culture, as the acceptable compensation for Palestinians is to return their lands and to compensate them for the damage caused. Compensation is an obtainable remedy in international and domestic laws. The appropriate and prompt compensation, for Palestinians, in international law is answered in the UN General Assembly Resolution 194 (III), adopted on December 11, 1948. Paragraph 11 reads: "... and that compensation should be paid for the property ... and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible."[1269] Under occupation there are risks for Palestinians who might be involved. First: "The threat of a death ... against Palestinians who sold lands to Israelis also contributed to the decline of private sales."[1270] Second: the threat of death sentence against Palestinians who cooperates with Israel.[1271] Accepting money from the Israeli government is not even on the Palestinian people's agenda, because Palestinians believe that this makes a difference in the resolution of the Palestinian-Israeli conflict, clinging to their land, their belief that they will repossess the illegally confiscated property, and in the protection of their future state and generations. They think that if they accept compensation, it would be impossible for them to reclaim their lands, and that it would be recognition of Israeli policies that are directed against Palestinian local inhabitants.

1267 International Court of Justice, advisory opinion (2004), 153.

1268 United Nations Security Council, Resolution 465 (1980), S/RES/465 (1980), 1 March 1980.

1269 United Nation General Assembly Resolution No. 194 (III), adopted by the General Assembly during its third session on December 11, 1948.

1270 Eyal Benvenisti and Eyal Zamir, "Private Claims to Property rights in the Future Israeli-Palestinian Settlement," American Society of International Law, The American Journal of International Law, Vol. 89, No. 2 (Apr. 1995): 295–340, 315.

1271 Jordanian Penal Code No. 16 of 1960.

Genuinely, compensation for damages accruing from land confiscation is a right and never deprives victims from their right of ownership, where accepting compensation does not give legitimacy to the occupying authorities because compensation must be paid for the caused damages. Compensation for Palestinians was never implemented, as after 1967, Israel started to build settlements on the land which was confiscated for military purposes or illegal and fraudulently purchased lands.[1272] The Court, in the Beit Sourik case, suggested that the respondents might compensate the petitioners by providing an alternative land. However, the Court has not received a satisfactory answer from the respondents regarding paying compensation to the petitioners by offering them other lands in exchange for their confiscated lands.[1273] The Court emphasized that confiscation of locals' lands obligates the respondents to find another alternative land for the petitioners; at the same time, compensation may only be offered if there are no substitute lands for the petitioners.[1274] Yet, the Court was not precise regarding compensation and did not give a satisfactory explicit ruling. The International Committee of the Red Cross (ICRC) suggests that the compensation must be paid for in cash or in a payment receipt as soon as possible.[1275] Human Rights Watch, in its report, "Separate and Unequal," stated that confiscation was never paid to Palestinians as the "Israeli authorities had confiscated their lands without compensation and transferred their ownership to settlements, or protected and supported settlers who had taken their lands without official authorization or recognition."[1276] This might be argued as selling a land, where the ownership is transferred. On occasions when Israel proposes compensation, and Palestinians accept it, Israel has never paid. This deviates from its obligations to pay compensation and does not act in a good faith.

The Israeli Government and Palestinian Authority are obligated under the provisions of international human rights to respect the right to property in the territories under their control. On the one hand, the Palestinian Authority is obligated to protect and respect the right of Palestinians to own, enjoy, and

1272 Benvenisti and Zamir, "Private Claims to Property Rights in the Future Israeli-Palestinian Settlement," 314–315.

1273 Beit Sourik Village Council v. The Government of Israel (2004), 44.

1274 Id.

1275 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol. I: Rules, 181.

1276 Human Right Watch, Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories, 19–20.

use their private property and to some extent public property, where expropriation of land must be for public purposes only. On the other hand, the Israeli government has the same obligations under international human rights instruments and additional duties as an occupying power under the principles of international humanitarian law. Palestinians, under the Israeli occupation, require more than the protection of international human rights law, even though this protection is defective and further needs a detailed study to point out the vagueness of international human rights. The Israeli government has been confiscating Palestinian land and justifying these expropriations and confiscations for reasons of military necessities or public purposes; nevertheless, most of the confiscated lands were used to build settlements and extend Jewish towns, which do not constitute a public purpose or interest for the inhabitants of the Occupied Territory.[1277] There is a difference between the expropriations of property by a state within its lawful jurisdiction and extraterritoriality or in situations of occupation. The method and motive of the expropriation must be conducted in conformity with the principles of international law and justice in order to determine whether the land confiscation executed by the Israeli authorities is necessary. To determine this, it is necessary to examine the principles of humanitarian law. Unlike international human rights, international humanitarian law guarantees wider protection to the right to property and regulates its limitations. The right to property in humanitarian law is addressed below.

4.2. The Right to Property in International Humanitarian Law

The protection of civilians during armed conflict is one of the cornerstones of international humanitarian law. Property, both public and private, is a deep-rooted concern and safeguarded right in international humanitarian law. The principles of customary international humanitarian law, as part of the binding rules in the Occupied Territory, explicitly protect the right to property.[1278] These principles differentiate between public, private, and cultural property as well as movable and immovable property. The law of wars grants supremacy to private over public property.[1279]

1277 Izzat Muhammad Duweikat and 16 others v. Government of Israel (1979).

1278 See Chapter III on the Applicable law.

1279 Yutaka Arai-Takahashi, The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law (Leiden &

The protection and prohibition of confiscation of private property has long been recognized and codified in the Hague Regulations.[1280] Article 46 of the Convention (IV) respecting the Laws and Customs of War on Land of 1907 states, "Family honour and rights, the lives of persons, and private property … must be respected … [p]rivate property cannot be confiscated."[1281] The protection of private property and the prohibition of confiscation and expropriation are derived from the protection of civilians, their honor and family. Private property is granted a special protection, and confiscation of private property is prohibited as there are no exceptions in Article 46, but the entire picture of this protection is found in other conventions and rules. In contrast, public property is treated differently in the same regulations. Article 53 allows the occupying power to:

> only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations … appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.[1282]

The two articles distinguish between public and private properties. The public moveable property that belongs to the adverse state might be used only for military operations. The use of this property must not be for a benefit or for the interest of the occupying state or its citizens. Notably, immovable public property is not included within Article 53. Property can be confiscated or used whether public or private; however, after peace is stored, the property must be returned with compensation.[1283] Article 55 of the same convention completes this provision and regulates the powers of the occupier in regard to public property. It reads "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

Boston: Martinus Nijhoff Publishers, 2009), 195.

1280 The Hague Convention (IV) of 1907, Section III.

1281 Id., Article, 46.

1282 Id., Article, 53.

1283 Id.

occupied country. … [and] [i]t must safeguard the capital of these properties and administer them in accordance with the rules of usufruct."[1284] This article ensures that the resources and properties of the Occupied Territory are not exhausted, and the duty of the occupying power is to safeguard these properties. The administrator and/or usufructuary role does not allow the occupying powers to wantonly exploit the natural economic resources of the Occupied Territory.[1285] Therefore, the status of Israel in Occupied Palestine is only as an administrator; it has limits and temporary rights.[1286]

The customary rules, prepared by the International Committee of Red Cross, further explain the details behind property protection in Rules 50, 51 and 56. Rule 50 states, "The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity."[1287] Destruction or confiscation of property that belongs to the opponent in a war is explicitly prevented, except for imperative military necessity. This rule has not defined the type of property, but it refers to property that belongs to the adversary. Rule 51 completes the provisions and distinguishes between movable and immovable public property as private property. It undoubtedly protects public and private property.[1288] It states, "In occupied territory: (a) movable public property that can be used for military operations may be confiscated; (b) immovable public property must be administered according to the rule of usufruct; and (c) private property must be respected and may not be confiscated except where destruction or seizure of such property is required by imperative military necessity."[1289]

Three points are important in light of this rule. First, movable public property that belongs to the opponent is allowed to be used for military operations, and this property may be conducted only for the use of the military. This point is also clear in the aforementioned Article 53 of the Hague Regulations, where movable property of an adversary state might be used for military operations

1284 Id., Article 55.

1285 Arai-Takahashi, The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law, 213.

1286 W. Thomas Mallison and Sally V. Mallison, "A Juridical Analysis of the Israeli Settlements in the Occupied Territories," in The Palestine Yearbook of International Law: 1998–1999, ed. Anis F. Kassim (The Netherland: Kluwer Law International, 2000), 17.

1287 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol. I: Rules, 175.

1288 Id., 178.

1289 Id.

and then returned to its owners. Second, immovable public property is only to be administrated by the occupying power, which functions only as an administrator and usufructuary. This means that the occupier's rule is limited to safeguard and administrate this property but entitled to use it only for military operations. Third, private property must be respected at all times. The provisions are harsher regarding private property, as destruction or confiscation of private property must only be conducted for imperative military necessity. Certain public property is protected as if it were private property. Article 56 states, "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property … seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."[1290] The article clarifies the importance of private property, granting the utmost protection to places of worship, educational, charity and science institutions, museums and historic monuments, and placing them in the same category as private property.[1291] The article uses strong language where it forbids deliberate destruction or damage as well as confiscation or expropriation.

The protection of public and private property is mainly set forth in the Hague Regulations of 1907. The Fourth Geneva Convention is relatively silent on the protection of the right to property as such. However, destruction of property is prevented, as Article 53 of the convention protects public and private property owned individually or collectively from destruction except for absolute military needs.[1292] It reads, "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."[1293] This article only refers to destruction. The prohibition of the destruction of property is clear, whether it is the private property of individuals, cooperative organizations, or state-owned property.

1290 The Hague Convention (IV) of 1907, Article 56.

1291 Brian Farrell, "Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119," Brook Journal for International Law, Vol. 28, Issue No. 3 (2003): 871–936, 911.

1292 The Geneva Convention (IV) of, Article 53.

1293 Id.

The unnecessary destructions or appropriations of property that do not meet the imperative military necessity requirements violate the Hague Regulations and Geneva Conventions.[1294] Thus, destruction, as an exception, must not become the norm and must be for imperative military necessity. The prohibition of destruction in this article can be compared with the prohibition against pillage and reprisals in Article 33 of the same convention. Pillaging and reprisals against protected persons and their property are prohibited.[1295] This means that any actions for which the purpose is to punish the protected persons or loot their property by the occupying powers are prohibited.

Imperative military necessity is repeated and emphasized in the aforementioned articles. It is, therefore, essential to examine it in the process of answering when the occupier has the power to destruct, confiscate, or expropriate private property in an Occupied Territory and whether the Israeli practices conform to the international principles. Military necessity might be defined as "a principle of warfare allowing coercive force, subject to the laws of war, to achieve a desired end, as long as the force used is not more than is called for by the situation."[1296] Imperative military necessity under the customary international humanitarian rules operates exclusively as an exception.[1297] This means that the conducted measures must not be more than what is required or needed to accomplish a particular military goal, which is necessary to win the war.[1298] In other words, there must be no other less harmful ways for achieving this military purpose. The occupier, in fact, has the authority to determine what the needed military action is and to judge

1294 Nobuo Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law," Boston University International Law Journal, Vol. 28, Issue No. 39 (2010): 39–140. The author divides the notion into four requirements, *viz*.: 1) That the measure was taken primarily for some specific military purpose; 2) That the measure was required for the attainment of the military purpose; 3) That the military purpose for which the measure was taken was in conformity with international humanitarian law; and 4) That the measure itself was in conformity with international humanitarian law.

1295 The Geneva Convention (IV) of, Article 33.

1296 Garner, ed., Black's Law Dictionary, 1143.

1297 Nobuo Hayashi, "Military Necessity as Normative Indifference," Georgetown Journal of International Law, 44 Georgetown Journal of International Law, Vol. 44 (2013): 675–782, 684.

1298 Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law, 43.

the necessity of such action.[1299] In his commentary on the Fourth Geneva Convention, Pictet insists that "bad faith in the application of the reservation may render the proposed safeguard valueless; for unscrupulous recourse to the clause concerning military necessity would allow the Occupying powers of the occupier to circumvent the prohibition set forth in the Convention."[1300]

Accordingly, the judgment of the imperative necessary military action and interpretation of the exception must be based on good faith and "used in a reasonable manner."[1301] The International Committee of the Red Cross (ICRC), in its commentary on the rules of customary humanitarian law, emphasized that the "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, is a grave breach under the Geneva Conventions."[1302] This means that this exception must not occur often and must be strictly regulated to prevent extensive expropriation, confiscation, or destruction. The ICRC has also expressed its opinion in regard to the expression of military operation and noted that it "must be construed to mean movements, maneuvers and other action taken by armed forces with a view to fighting."[1303] Hostilities must be present in order to require a military necessity. Military necessity requires that the confiscation of private property must be essential to win the war.[1304] The doctrine of military necessity is uncertain, but it must be used in a manner that strikes a balance between success in a war and humanitarian need.[1305] In situations of clear imperative military necessity, confiscation, expropriation, or destruction of property might be compatible with humanitarian principles where such measures are proportionate to the gained military advantage.[1306]

1299 Pictet, Commentary: IV Geneva Convention, 302.

1300 Id.

1301 Id.

1302 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol. I: Rules, 176.

1303 Shehadeh, Occupier's Law: Israel and the West Bank, 155. Cited as from a letter by Mr. Moreillon dated 25 November 1981.

1304 Garner, ed., Black's Law Dictionary, 114. Cited as Yoram Dinstein, "Military Necessity," in 7 The Max Planck Encyclopedia of Public International Law 201, 201 (Rudiger Wolfrum ed., 2012).

1305 Judith Gardam, Necessity, Proportionality and the Use of Force by States (USA: Cambridge University Press, 2004), 2–3.

1306 Pictet, Commentary: IV Geneva Convention, 302.

In fact, the balance between military need and humanitarian considerations is one of the concerns of international humanitarian law. While military necessity allows the belligerent parties to take measures to win the war, the humanitarian considerations are ways to minimize the destruction, the harm, and the suffering.[1307] States, accordingly, must balance between these two elements, respecting their obligations to consider the interests of the local population in the Occupied Territories. Recalling the aforementioned Article 78 of the Fourth Geneva Convention, which allows the occupying power to take security measures for the safety of the protected persons as well as Rule 14, which focuses on proportionality in attack, proportionality principles are meant to protect civilians and their property against military operation where unnecessary suffering must not occur.[1308] This principle is applicable to protect private property from being damaged or expropriated and to ensure that state property can be temporarily used as long as the imperative necessity requires. In both cases, the safety of protected persons and the balance to minimize suffering must be considered in all military operations.

It is clear from the language of the aforesaid articles that transferring property ownership to the occupier is strictly forbidden, because there is nothing that allows the occupier's authority to transfer the ownership of private or public property in the Occupied Territory. Von Glahn has actually made this clear. He writes, "Under normal circumstances an occupier may not appropriate or seize on a permanent basis any immovable private property but on the other hand a temporary use of land and buildings for various purposes appears permissible under a plea of military necessity."[1309] This means that the imperative military necessity only allows the occupiers to put their hands on the property in the Occupied Territory temporarily, and whenever the military necessity ceases to exist, the property must be returned to its owners. This approach is essentially logical and makes perfect sense.

1307 Garner, ed., Black's Law Dictionary, 114, cited as Yoram Dinstein, "Military Necessity," in 7 The Max Planck Encyclopedia of Public International Law 201, 201 (Rudiger Wolfrum ed., 2012).

1308 *Brown*, "The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification," 137.

1309 Gerhard von Glahn, The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation (Minneapolis, the University of Minneapolis Press, 1957), 186.

The articles in the Hague Regulations and the Fourth Geneva Convention refer to destruction as a less vicious practice than taking the possession of a land for use of the military. Expropriation becomes very extreme and permanently deprives people from their land, which is not permitted in light of these articles.[1310] Destruction of crops or trees, for instance, is serious, but might be reparable by re-cultivation, although it is hard to prove that such destruction could be required by imperative military necessity. Confiscation is more serious because it interrupts the rights to use, access, manage, obtain property for a defined period of time, but keeps the right to own and possess. The extreme interference occurs through expropriating one's property and depriving him/her of the right to own and possess, use, hold, or manage property. The last case does not fall under the permitted powers, which are granted to the occupier under the aforementioned provisions of international humanitarian law because imperative military necessity constitutes a temporary condition.

The vagueness in the law remains because of the lack of a definition that precisely describes the imperative military necessity. This is a broad term that can be used in countless occasions. There should be an explicit definition that limits the cases where military justification or need can be legally used. Thus, there must be a serious initiative from the ICRC to identify the exact fundamentals and conditions that qualify imperative military necessity to lessen the full discretion of the occupier. As long as there is a full discretion that allows the occupier to violate the right to property, it remains difficult to determine what meets the requirements of imperative military operations. In order to solve this dilemma, an initiative that limits the use of the exception of the imperative military necessity might be the answer. For instance, scholars, and international humanitarian lawyers must gather and draw the lines in an internationally recognized protocol that clearly and unambiguously regulates imperative military necessity and absolute military need and weakens the powers of the occupying powers.

As discussed earlier, occupation occurs when a territory is placed under the authority of the hostile army.[1311] The Israeli long-term occupation in the Palestinian occupied land is a special case. Confiscation and expropriation of land has been used for purposes of building Jewish towns, and constructing

1310 Zahrana Mara'abe v. the Prime Minister of Israel (2005), 16.

1311 The Hague Convention (IV) of 1907, Article 42.

highways, road passes, and other infrastructure services for these towns.[1312] These practices have been carried out by the Israeli authorities under the exception of military necessity or public purposes. If these practices had been carried out for the actual reason of imperative military necessity, where Israel has had no other choice, or for benefiting the protected persons this would be considered in compliance with international principles. However, the Israeli practices of implementing extensive land confiscation, expropriation, and destruction in the West Bank and the Gaza Strip do not fall under the permitted exceptions of imperative military necessity or public purposes. These practices have been conducted for the purpose of benefiting the non-protected persons, who are citizens of the occupying power, while there is no proof that these practices are directed to win a war or to gain a military advantage in Occupied Palestine.

Several scholars, human rights organizations, and the United Nations reports agree with this conclusion as they pointed out that the Israeli practices violate the principles of humanitarian provisions.[1313] For instance, the Report of the United Nations Fact-Finding Mission on the Gaza Conflict stated that the actions of the Israeli government are "crimes against property[,] including extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly, destroying or seizing property of the enemy, pillaging, and declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party[, and] crimes relating to the use of prohibited methods and means of warfare (including directing an attack against civilians or civilian objects."[1314] The International

1312 B'Tselem, Human Rights in the Occupied Territories, Annual Report 2007, (B'Tselem, Jerusalem, 2008).

1313 Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel," 207–236; Raja Shehadeh, Occupier's Law: Israel and the West Bank. (Washington D. C: Institute For Palestine Studies, 1985; B'Tselem, Human Rights in the Occupied Territories, Annual Report 2007, 2008, 2009, 2010; The Independent Commission for Human Rights the 16th, 17th, 18th, 19th, and 20th Annual Reports; Human Rights Council, Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan, A/HRC/31/43 (2016); UN Security Council Resolution 1973(2011), adopted by the Security Council UN doc. No. S/RES/1973 (2011), at 6498th meeting (17 March 2011); United Nations Security Council, Resolution 465 (1980), S/RES/465 (1980), 1 March 1980; International Court of Justice, advisory opinion, (2004).

1314 Human Rights Council, Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48 (2009), 29.

Court of Justice also concluded that massive confiscation, expropriation, and destruction of Palestinian lands are contrary to the provisions of both international human rights and humanitarian law, and it further states that Israel is "under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory."[1315]

The right to property of Palestinians is not only protected by the international human rights and humanitarian principles, it might be also protected by the domestic applicable laws in Palestine. The protection of the right to property under the applicable domestic laws is examined in the following section.

5. The Right to Property in Domestic Law

Governments have the obligation to protect property. Domestic law, in most countries, enumerates the provisions, which reflect the values of societies. The right to property is protected under domestic laws, including the constitution. It is subject to a substantial degree of regulation under domestic law, as reflected by the formulation of the right in international conventions.[1316] The constitutional protection of the right to property is the guarantee for individuals to enjoy this right. Both Israeli and Palestinian laws indicate the importance of human rights, including the right to property. In this section, the protection of the right to property and its exceptions under Palestinian and Israeli laws will be examined. In addition, this section will cite several judgments of the Palestinian High Court of Justice and the Israeli High Court of Justice.

5.1. Palestinian Law

The Palestinian Basic Law of 2002 protects the right to property as a constitutional human right. Article 21 assures the importance of protection to private property including movable and immovable properties.[1317] This property must

1315 International Court of Justice, advisory opinion (2004), 153.

1316 John G. Sprankling, The International Law of Property (Oxford University Press, UK, 2014), 206.

1317 The 2003 Amended Basic Law, Article 21: ... . 3) Private property, both real estate and movable assets, shall be protected and may not be expropriated except in the public interest and for fair compensation in accordance with the law or pursuant to a judicial

not be expropriated except for the public interests with fair compensation in accordance with the provisions of the law.[1318] The Palestinian constitutional provisions obligate the Palestinian Authority and its entities to regulate the expropriation for public interest. The Ottoman Land Law of 1858 and the Jordanian Acquisition Law No. 2 (1953) are the valid laws in the Palestinian Territory that regulate land expropriation. As previously discussed, the Ottoman law sets forth the general principles of the land, while the Jordanian law regulates all means and conditions of expropriation for public purposes. However, the laws do not define the meaning of public interest.[1319] Although it might refer to a road, public space, or any public facility, the law of acquisition does not specify such intent. This, in fact, grants the government a wide-range of authority to expropriate private property. The law emphasizes that fair compensation must be paid. It also defines compensation as the value of the property at the time of taking as it is sold openly in the Palestinian market.[1320] The Palestinian Authority is required to follow certain procedures, which are set forth in Ottoman and Jordanian laws.[1321] The Jordanian Acquisition Law No. 2 (1953) obligates the government to use the expropriated land for the named public purpose within three years; otherwise, the government loses its right and is obligated to return the land to its owner(s) with a compensation regarding the titled period.[1322] Simply put, if the purpose of the expropriation ceases to exist, the land must be returned.

A number of cases have been petitioned before the Palestinian High Court of Justice concerning expropriation against the Palestinian Authority.[1323] The High Court of Justice has complete jurisdiction to review the decisions of the Palestinian Authority regarding expropriation. In the Al-Masri case,[1324] the Palestinian High Court of Justice declared that a decision of requisition, which

ruling. 4) Confiscation shall be in accordance with a judicial ruling. 2003 Amended Palestinian Basic Law, Issued in Ramallah on March 18, 2003.

1318 The Amended Palestinian Basic Law of 2003.

1319 The Acquisition Law No. 2 (1953), published on December 18, 1952, Jordan. Article 15(c). (Text in Arabic).

1320 Id.

1321 For detailed information on requisitions, see Jordanian Acquisition Law No. 2 of Year 1953.

1322 Jordanian Acquisition Law No. 2 of Year 1953, Article 20.

1323 See the Palestinian Legal and Judicial System – Al-Muqtafi, Birzeit University, Institute of Law – the list of decisions of the Palestinian High Court of Justice.

1324 PHCJ 13/1997 Mohmad-Hashem Al-Masrri v. Qaliqilya Municipality. The Palestinian High Court of Justice (2004).

is not in conformity with the Land Acquisition law,[1325] is null and void.[1326] The Qaliqilya municipality was not granted the authority to dispossess private lands without the approval of the Palestinian Cabinet.[1327] Only the Cabinet of Palestine has the authority to approve acquisition decisions, and this acquisition must be for public interests.[1328] This case concerns the legal procedures of the expropriation of a land that belongs to the petitioners. The petitioner challenged the decision because the Palestinian Cabinet did not approve the municipality's proposal of the land expropriation.[1329] According to the valid Acquisition Law in the Palestinian Territory, the Cabinet is the authorized body of the Palestinian Authority and has the power to approve decisions of expropriation.[1330] Hence, without this approval, the expropriation becomes illegal. The Court ruled that the expropriation of the land was annulled;[1331] therefore, the Court's ruling means that the land must be returned to its owners. The ruling, nevertheless, does not immune the land from being expropriated. Following this judgment, the municipality of Qilqilya still had the opportunity to confiscate the same land, but in conformity with the applicable laws.

In the Al-Khayat case,[1332] the petitioners challenged the decision of the Palestinian President in which an expropriation of private property was approved, stating that the President did not have the authority to expropriate, and the Cabinet of Palestine is the only body that should approve such decisions.[1333] The Court denied a petition challenging an expropriation decision signed by the President of the Palestinian Authority.[1334] The Court concluded in 2001 that Palestine did not have the newly established Prime Minister position. The President of the Palestinian Authority had the power to sign acquisition decisions on behalf of Palestinian Cabinet at that time, and thus, the

1325 Jordanian Acquisition Law No. 2 of 1953.
1326 Mohmad-Hashem Al-Masrri v. Qaliqilya Municipality. The Palestinian High Court of Justice (2004), 3.
1327 Id.
1328 Jordanian Acquisition Law No. 2 of 1953, Article 2.
1329 Mohmad-Hashem Al-Masrri v. Qaliqilya Municipality (2004), 3.
1330 Jordanian Acquisition Law No. 2 of 1953, Article 2.
1331 Mohmad-Hashem Al-Masrri v. Qaliqilya municipality Municipality (2004).
1332 PHCJ 138/2005 Mohmad-Ishaq Al-Khayat v. the President of the Palestinian Authority, the Palestine Cabinet and Hebron Municipality. The Palestinian High Court of Justice (2008).
1333 Id., 2.
1334 Id.,1.

expropriation remained in effect.[1335] Although the Court has the jurisdiction to review the legality of expropriation decisions, it was in error to legalize a procedure which contradicted the applicable acquisition laws, the Ottoman and Jordanian laws.

In the Al-Zuhiri case, the petitioners challenged the decision of the local authorities concerning an expropriation of their private property claiming that it was arbitrary.[1336] The Court ruled that expropriation and public interest fall under the full discretion of the Palestinian local authorities and that there is no controller over their discretion.[1337] Seemingly, the Court had forgotten that it is, as the high judiciary body, the controller of the legality of such expropriation of private property. The decisions of the Palestinian High Court of Justice are not subject to appeal.[1338] Thus, petitioners have only one chance to challenge the decisions of the Palestinian government regarding expropriation. Yet, the problem remains with the ongoing Israeli abuses against Palestinians' rights to property in the Palestinian Territory. According to the Oslo Accords, the Palestinian judiciary system does not have jurisdiction over Israeli violations against Palestinians.[1339] the Israeli Courts, however, imposed their jurisdiction over such violations according to the Israeli laws. This is the examined further in the next subsection.

5.2. Israeli Law

The Israeli Basic Law: Human Dignity and Liberty, Article 3 protects the right to private property as a constitutional right. It states, "There shall be no violation of a property of a person."[1340] The article is clear in guaranteeing the right to possess property, yet it does not explicitly grant people the right to enjoy their property peacefully and equally. The right to enjoy property is, by legal interpretation, included because possessing property cannot be separated from enjoying it. The article sets forth the general rule to constitutionally protect private property; the protection is broad and includes all property rights.

1335 Id., 3.

1336 PHCJ 253/2008 Zuher Al-Zuhiri v. the President of the Palestinian Authority and the Cabinet of Palestine. The Palestinian High Court of Justice (2009), 4.

1337 Id.

1338 Palestinian Civil Procedures law, No 2 of the Year 2001.

1339 The Declaration of Principles on Interim Self-Government Arrangements of 1995 (Oslo II), Article XX.

1340 The Israeli Basic Law: Human Dignity and Liberty of 1992, Article 3.

This means that the right to property is protected, and expropriating an asset violates this right.[1341] However, Article 8 of the same law limits this protection. It reads, "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."[1342]

The right to property might be limited only by a law that regulates the limitation on private property. Furthermore, the restrictions on the right to private property must serve a proper purpose and the implementation of such restriction must balance between the sought purpose and the taken measures. A proper purpose is not defined in the Basic Law. This indicates that the definition is left vague, and the enacted law can define the purpose of the limitation on private property. The right to property was recognized by the Israeli Supreme Court as a basic right even before it was granted in the Basic Law and gained the constitutional protection.[1343] The Israeli High Court of Justice limited the expropriation of private land with a just compensation only for public purposes. This included building roads, parks, public spheres, and making it unsatisfactory to have a public purpose to expropriate private land. It was determined, in fact, to be the duty of the authority to prove that land expropriation was necessary for public purpose and the only possible way to achieve the sought results.[1344] It is clear to the Court that the Israeli government has the powers to hold the expropriated or confiscated land as long as the purpose serves as a basis of such powers; whenever the public purpose ceases to exist, the land must be returned.[1345]

Restrictions on the right to property in the Occupied Territory varied as Israel, upon its establishment, implemented and enacted a number of laws that legalized and regulated land expropriation and confiscation. Since its occupation of the West Bank, including East Jerusalem, and the Gaza Strip, Israel has used the Ottoman Land Law.[1346] Israel benefited from this law as it categorized the land in Palestine. Although Palestinians were cultivating some of these lands and gaining ownership rights under the named law, state land,

1341 Navot, The Constitutional Law of Israel, 208. Cited as HCJ 5091/91 Nusseiba v. Minister of Finance, Tak-El 94(3), 1765.

1342 The Israeli Basic Law: Human Dignity and Liberty of 1992, Article 8.

1343 Navot, The Constitutional Law of Israel, 208.

1344 HCJ 2390/96 Karsik v. State of Israel – Israel Land Authority, 13 February 2001.

1345 Id.

1346 The Ottoman Land Law of 1858, قانون الأراضي العثماني لسنة ٨٥٨١.

endowment land, abandoned land, and waste land were declared to be government land by the Israeli authorities.[1347]

During its mandate in Palestine, the British government enacted a number of laws. The Land (Acquisition for Public Purposes) Ordinance of 1943 was enacted by the British Mandate in Palestine.[1348] Israel applied the Land Ordinance of 1943,[1349] and it has used it as the main tool for massive confiscation of Palestinian lands.[1350] In this Ordinance, public purposes are referred to any purpose that the High Commissioner is certified to qualify as such.[1351] The powers given by this ordinance are very broad, far reaching, and allowing the High Commissioner to impose arbitrary land confiscation. The Israeli Supreme Court concluded that the full discretion of the High Commissioner, later the Israeli Minster of Finance and the military commander, to determine that a certain purpose constitutes a public necessity or need is, in fact, arbitrary.[1352] The ordinance was amended in 2010 by the Israeli government. Amendment No. 10 affirms the legality of the state ownership of the expropriated land under the 1943 ordinance.[1353] In other words, the government legalized and alleged that the Israeli government is the owner of all the lands, which were expropriated by Israel under this ordinance. The amendment, further, extends the powers of the Minister of Finance and enables land expropriation for purposes of establishment and development of towns. Most importantly, the amendment allows the government to use the land, which originally was expropriated for public purposes, for any other practices.[1354] This fundamentally changes the objective of the law and enables the government to use the land, which is confiscated for public purposes, for other purposes. Stated another way, Israel allowed itself to use the land for political purposes and to choose a certain group of people to benefit from this land.

1347 B'Tselem, Under the Guise of Legality: Israeli's Declarations of State Land in the West Bank, 19–26, 58–59.

1348 Land (Acquisition for Public Purposes) Ordinance (1943), Official Gazette 32 (1943), British Mandate in Palestine.

1349 Id.

1350 David Kretzmer, the Legal Status of the Arabs in Israel (USA and UK: Westview Press, 1990), 51.

1351 Land (Acquisition for Public Purposes) Ordinance of 1943, Section 2.

1352 Karsik v. State of Israel – Israel Land Authority (2001), 10.

1353 Land (Acquisition for Public Purposes) Ordinance – Amendment No. 10 of 201, Article 7.

1354 Id.

The extreme British Emergency Defence Regulations of 1948 have been used by the Israeli government in the West Bank and Gaza Strip including East Jerusalem as well as in Israel itself to confiscate the Palestinian lands. The Regulations of 1945 have not only granted the military commander vast powers to restrict the movement, they have also empowered him to confiscate private property whether movable or immovable. Part XI – Requisitioning gives the military commander power to confiscate any land or retain possession of any land. Regulation No. 114 reads:

> Taking possessions of land: 114. —(1) A District Commissioner may, if it appears to him to be necessary or expedient so to do in the interests of the public safety, the defence of Palestine, the maintenance of public order or the maintenance of supplies and services essential to the life of the community, take possession of any land, or retain possession of any land of which possession was previously taken under regulation 48 of the Defence Regulations, 1939, and may at the same time or from time to time thereafter; give such directions as appear to him to be necessary or expedient in connection with, or for the purpose of, the taking, retention or recovery of possession of the land. (2) Any police officer or member of His Majesty's forces may enforce any directions given under sub-regulation (1). (3) While any land is in the possession of the District Commissioner by virtue or by sub-regulation (1), the land may; notwithstanding, any restriction imposed on the use thereof by any enactment or by any instrument or otherwise, be used by or under the authority of the District Commissioner for such purposes and in such manner as the District Commissioner thinks expedient in the interests of the public safety, the defence of Palestine, the maintenance of public order or the maintenance of supplies and services essential to the life of the community; and of the avoidance of doubt it is hereby declared that the power of a District Commissioner under this sub-regulation to authorise the use of land includes power to authorise any persons carrying on any business or undertaking to occupy and use the land for the purposes of that business or undertaking on such terms as may be agreed between the District Commissioner and such persons if the District Commissioner thinks it expedient in any of the interests aforesaid that the land should be so occupied and used.[1355]

Under these regulations, vast powers are granted to the commissioner or the military commander. Any land might be confiscated and/or expropriated for

1355 Emergency (Defense) Regulations of 1948, Article 114.

public safety, defense of Palestine, or maintenance of essential public supplies and services. These purposes are broader than those which are found in the Land (Acquisition for Public Purposes) Ordinance of 1943, as they include vague terms that would lead to further arbitrary land confiscation and expropriation. The protection of the right to property is de facto absent from the provisions of the above-quoted articles. As discussed earlier, the question on whether the Emergency (Defense) Regulations of 1945 contradict the principles of international human rights and humanitarian laws remains to be answered.

It was indicated previously that the full discretion of the military commander is arbitrary, which violates the examined international human rights and humanitarian provisions. In this chapter, part of this question shall be answered through the examination of the articles concerning confiscation of private property. In Chapter III, it was concluded that the Regulations of 1945 are invalid, and that any laws, regulations, or orders that are based on these regulations are also illegal. Even under the assumption of the legality of these regulations, the vast power, which is granted to the High Commissioner and the purposes of land expropriation and/or confiscation are beyond the limitations that are set forth in international law human rights and humanitarian law, where a law must reasonably regulate these limitations. Public purposes and imperative military necessity are exclusively the exceptions. The regulations go beyond these two exceptions; they include "public safety, the defense of Palestine, the maintenance of public order or the maintenance of supplies and services essential to the life of the community."[1356] These exceptions actually cover all possible situations in all circumstances and they no longer allow for the merit of exceptions. By comparison, Article 46 of the Hague Regulations forbids confiscations or expropriation of private property, whereas Article 23 prohibits destroying and seizing property unless for imperative military necessity.[1357] Article 53 of the Fourth Geneva Convention prevents destruction of public and private property unless for absolute military necessity.[1358] The purposes of the confiscation or expropriation in the Emergency Regulations constitute neither imperative nor absolute military necessity. In addition, it is explicitly concluded that expropriation of property by the occupier is prohibited, because confiscation of private property is limited to imperative

1356 Id.

1357 The Hague Convention (IV), Articles 46 and 23.

1358 The Geneva Conventions (IV) of 1949, Article 53.

military necessity during war, not prolonged occupation. In other words, the Emergency Regulations grant the occupier greater powers than the limits in international law; in this case, these regulations fail to meet the provisions of the aforementioned articles.

Israel has not relied solely on the Ottoman Land Law, the 1943 Ordinance, or the Emergency Regulations of 1945. It has enacted and used additional laws, ordinances and regulations on this matter. It enacted the June 1948 Abandoned Areas Ordinance[1359] and the September 1948 Area of Jurisdiction and Power Ordinance.[1360] The June 1948 Abandoned Areas Ordinance assumes that the land, which was caught by or surrendered to the Israeli armed forces, or deserted by all or parts of its inhabitants, is an abandoned land.[1361] Abandoned property is the "property that the owner voluntarily surrenders, relinquishes or disclaims."[1362] However, the abandoned ordinance does not consider the voluntary element. Reading through its articles shows that Israel actually planned to expropriate the Arab lands since its establishment. All Palestinians, who left their land and homes, were displaced or expelled by Israel against their will and beyond their choice to leave their homes.[1363] This ordinance provides the Israeli government an extensive jurisdiction, which includes "expropriation and confiscation [authorization over] movable and immovable property, within any abandoned area."[1364] According to the provisions of this ordinance, inhabitants, displaced, and expelled Palestinians are prohibited from returning and claiming their property, which by Israeli law is no longer theirs.

The September 1948 Area of Jurisdiction and Powers Ordinance extends the realm of the jurisdiction of Israeli law. It reads "Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defense has defined by proclamation as being held by the

1359 Abandoned Areas Ordinance No. 12 of 1948.

1360 Area of Jurisdiction and Power Ordinance No. 29 of 5708-1948, Published in the Official Gazette, No. 23 of the 18th Elul, 5708 (22nd September 1948).

1361 Abandoned Areas Ordinance No. 12 of 1948.

1362 A. Garner ed., Black's Law Dictionary, 1411.

1363 Ir Amim – for an Equitable and Stable Jerusalem with an Agreed Political Future, Absentees against Their Will: Property Expropriation in East Jerusalem under the Absentee Property Law (July 2010).

1364 Abandoned Areas Ordinance No. 12 of 1948.

Defense Army of Israel."[1365] Both ordinances aim at facilitating land expropriation for Israel from the time of its establishment until the present day. While the Abandoned Areas Ordinance grants extensive powers to the Minister of Defense to expropriate land, the Jurisdiction and Powers Ordinance extends the territorial jurisdiction of the Minister of Defense to annex more land at will. On the one hand, the displacement of Palestinians caused by Israel, internally and externally, has formed a profitable ground for Israel to control and expropriate Palestinian lands. On the other hand, the prohibition of Palestinians to return to their land has enlarged the likelihood of Israel to deem the expropriated land as state land without disputes. Nothing in international law indicates that the occupier is allowed to declare the land in the Occupied Territory as the occupier's state land.[1366] This means that declaring a land to become under the ownership of the occupier is forbidden and contradicts Article 55 of the Hague Convention (IV) because it goes beyond the occupier's function as an administrator in the Occupied Territory. The state land in the West Bank that Israel classified as such was privately owned by Palestinians, even though this land did not have the status of public property under Jordanian rule.[1367] This means that Israel was stealing Palestinian land and depriving Palestinians of their rights and properties using its own arbitrary laws.[1368] Following up on the implementation of the policy of declaring Palestinian land as Israeli state land, the land ownership and administration devolved to another level in 1960 upon the establishment of Israel Lands Administration (ILA) and the Israel Lands Council.[1369] The administration and the council have the authority to manage and formulate the land policies, respectively.[1370] Israel Lands Administration was entitled to control all state lands, and thus, every act in respect to the land was conducted through this administration.[1371]

1365 Area of Jurisdiction and Power Ordinance No. 29 of 1948, Article 1.

1366 See the analysis of Izzat Muhammad Duweikat and 16 others v. Government of Israel (1979) under the section "The Israeli Supreme Court on the Right to Property."

1367 B'Tselem, Under the Guise of Legality: Israeli's Declarations of State Land in the West Bank, 5.

1368 Id.

1369 Israel Lands Administration Law, (No. 33) 5720 – 1960 passed by the Knesset on 1 Av, 5720 (25th July 1960) and published in Sefer-Ha-Chukkim No. 312 of the 5, Av, 5720 (29 July, 1960), 57. Articles 2–3.

1370 Israel Lands Administration Law (1960); Basic Law: Israel Lands (1960).

1371 Israel Lands Administration Law, (No. 33), Article 6.3.

Shortly thereafter, Israel enacted another set of major laws to confiscate, control, manage and administrate Arab land. In 1950, the Israeli Knesset passed the Absentees' Property Law. The law allows the custodian of an Absentee's Property to confiscate and transfer property rights at will. An absentee is defined as "a person who at any time during the period between November 29, 1947 and May 19, 1948 … has ceased to exist [and] was a legal owner of any property."[1372] The Minister of Finance appoints the custodian, who has the powers to seize any land considered as an absentee's property.[1373] The law also allows the custodian to seize all land owned by Palestinians who fled and/or were expelled during the 1948 war. Even those who remained on their land were considered as present absentees.[1374] Videlicet, the property of any person, who is considered as an absentee, becomes absentee property, irrespective of whether the legal owner is absent or present.[1375] Palestinians, who left their homes only during the Israeli military operations, were considered as present absentees, and thus could not rebut the decision of the custodian regarding their absentee status.[1376] Practically, this law has permitted Israel to expropriate Palestinian properties, to justify the expropriation for various purposes, and to transfer these properties to be used by the Jewish population where private property is no longer confiscated for public purposes or interests of the local Palestinians. The Israeli government applied the absentee law within the areas captured in 1948, i.e., the West Bank, the Gaza Strip, and East Jerusalem, and the residents of these areas were designated as absentees.[1377] The law gives the custodian a wide-ranging power to expropriate Palestinian lands.[1378] The law was even amended on February 2, 1965 to extend the

1372 Absentees' Property Law No. 20 of 1950, Article 1. (b).1. The Article continues in limiting the persons who were (i) Nationals or citizens of Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq or Yemen or (ii) Were in one of these countries or in any part of Palestine outside the area of Israel, or (iii) Palestinian citizens and left their ordinary place of residence in Palestine.

1373 Absentees' Property Law No. 20 of 1950, Article 2.

1374 Id. Article 1. (b).1.

1375 David Kretzmer, the Legal Status of the Arabs in Israel, 57.

1376 Id.

1377 Adalah – the Legal Center for Arab Minority Rights in Israel, Amicus Curiae Opinion – submitted to the Israeli Supreme Court 4 August 2013, in Civil Appeal case HCJ 2250/06, case HCJ 5931/06, case HCJ 6580/07, and HCJ case 2038/09.

1378 The Absentees' Property (Amendment No. 3) (Release and Use Endowment Property) Law 5725-1965. Passed by the Knesset on the 30th Shevat, 5725 (2nd February 1965) and published in *Sefer Ha-Chukkim* No. 445 of the 3rd Adar Alef, 5725 (5th February 1965), 58.

amount of the confiscated land. The amendment, the Absentees' Property (Amendment No. 3) (Release and Use Endowment Property) Law 5725-1965, allows expropriation of the endowment land. The endowment property is the Muslims Waqf immovable property. The amendment has provided the right to the custodian to expropriate the Waqf property, if the beneficiary is assumed to be an absentee, and this property is transferred under the management of the custodian and is subject to use for any purpose.[1379] As a result, more than 80% of the total Israeli areas, around 20,850 square kilometers, were seized from Palestinians as absentees' or abandoned property.[1380] By 1960, more than 90% of the lands were confiscated and controlled by the state.[1381]

The Absentees' Property Law prohibits selling the confiscated property. However, the property may be transferred to an entity under the Transfer of Property Law in 1950,[1382] called the Development Authority.[1383] The Development Authority is authorized to buy, rent, build, manage, develop, and maintain the seized property.[1384] Nevertheless, the authority is not authorized to sell or transfer the right of ownership except to the state of Israel, the Jewish National Fund (JNF) or other Jewish institutions approved by the government.[1385] The JNF was established as a Zionist company to purchase, take on leases, develop, and acquire property for the purpose of settling Jews on Palestinians' land.[1386] The Jewish National Fund Law has given a distinct status to the JNF as a non-governmental entity.[1387] Under the said law, the Israeli government facilitated the JNF's main purpose. By 1953, the Jewish National Fund possessed more than two million dunums of the confiscated land which belonged to Arabs.[1388] Currently, more than 25 million dunums, approximately 13% of the total land, which is reserved exclusively for the use

1379 Id.
1380 Davis, Israel an Apartheid State, 20.
1381 Kretzmer, the Legal Status of the Arabs in Israel, 63.
1382 The Development Authority (Transfer of Property) Law (No. 62) 5710-1950, passed by the Knesset on 31 July 1950, Article 2.
1383 Absentees' Property Law No. 20 of 1950, Article 19.
1384 The Development Authority (Transfer of Property) Law No. 62 of 1950, Article 3.
1385 Id.
1386 Kretzmer, the Legal Status of the Arabs in Israel, 61.
1387 Keren Kayemet Le-Israel Law (No. 3) 7514-1953, passed by the Knesset on 16 Kislev, 5714 (23 November 1953) in Sefer-Ha-Chukkim No. 138 of 26 Kislev, 5714, (3 December 1953), 34.
1388 Kretzmer, the Legal Status of the Arabs in Israel, 63.

of the Jewish people, are owned by the JNF[1389] and were transferred to it by the state.[1390] Likewise, in 1953, the Land Acquisition (Validation of Acts and Compensation) Law created more opportunities for the Israeli government to confiscate lands, which did not fall under any of the previous laws' categories. This law allowed Israel to confiscate any property that was used or assigned for purposes of development, settlement, or security.[1391] These reasons are very broad and general; notably, the definition of security reasons is not specified in the law. The law, essentially, does not obligate the government to justify the necessity of such confiscation, which creates easy unrestricted circumstances to seize and expropriate lands. According to this law, any land is subject to be expropriation for indeterminate necessities and unknown purposes.

Additionally, Israeli Military Order No. 378, which was enacted in 1970, also imposed restrictions on Palestinians concerning their rights to property. Article 80 states, "Any soldier may seize and detain any goods, articles, documents or things which, he has reasonable grounds to suspect, prove that an offence against this order has been committed."[1392] Obviously, this order grants any Israeli soldier the power to confiscate any moveable goods, at will. Most of the order's articles protect the property that is controlled by the Israeli military and punish those who cause any damages.[1393] The Order, however, does not regulate confiscation and expropriation of immoveable property, especially land. Apparently, the issues related to land and property were dealt with at the level of the Israeli government, not the military commander.

The remaining question is whether the aforementioned laws conform to international standards. The answer is that these laws do not meet the compatibility of international law standards. In order to clarify this answer, three arguments must be pointed out. First, the powers that are granted by such laws are being used frequently, but they are implemented for different purposes than the actual ways they were intended to be used.. This will be clarified below in the discussion citing some cases before the Israeli Supreme Court. Second, all the laws grant the military commander extensive and

1389 Adalah – The Legal Center for Arab Minority Rights in Israel, The Inequality Report: The Palestinian Arab Minority in Israel (March 2011), 33.

1390 Id. 34.

1391 Land Acquisition (Validation of Acts and Compensation) Law No. 25 (5713-1953), Article 2.1.

1392 Israeli Military Order No. 378, Order Concerning Security Provisions of 1970, Article 80.

1393 Id.

imprecise power to confiscate land, and some grant power to expropriate land and transfer its ownership to the State of Israel and Israeli Jews.[1394] Each one legalizes the expropriation and the confiscation for certain purposes and under certain conditions, which extend beyond the imperative military necessity and public purposes. This means that Israel has given itself, within its legal capacity, more power that international humanitarian law allows. For instance, neither international humanitarian law nor human rights conventions allow confiscation of land to be declared as state land or as an absentee's land, which itself transfers the ownership to the Israeli occupier. Third, the Israeli government passes laws in favor of the Israeli government and Jewish communities through the Knesset, which is a political entity in Israel, or enacting military orders and ordinance by the military commander, which presents the occupier in the Palestinian Territory. The Israeli Knesset has never passed a law that benefits Palestinians; these laws are usually enacted arbitrarily and are discriminatory to Palestinians.[1395]

Recently, on February 6, 2017, the Israeli Knesset passed the Law of the Regularization of Settlements in the West Bank.[1396] This controversial legislation legalizes the confiscation of private Palestinian lands to build roughly 3,000 housing units for Israeli settlers in 16 settlements in the West Bank.[1397] These settlements are specifically named in the addendum of the law.[1398] All are built on Palestinian confiscated lands, and this law permits the Israeli authorities to register the land as a government property and allows Israeli settlers to use and hold the land permanently.[1399] The regularization bill opposes the international community's stance on the illegality of Israeli settlements in the West Bank, and it was approved by the Knesset shortly after adoption

1394 See the previously examined Israeli laws.

1395 See the database available by Adalah – the Legal Center for Arab Minority Rights in Israel, discriminatory laws. This point will be the focus of the following chapter.

1396 Law for the Regularization of Settlement in Judea and Samaria, 5777-2017, Approved by the Knesset on 10 Shevat 5777 (6 February 2017).

1397 Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories since 1967, 13 April 2017, A/HRC/34/70, 3.

1398 These settlements are 1) Ofra, 2) Netiv Ha'avot, 3) Eli, 4) Kochav Hashachar, 5) Mitzpe Kramim, 6) Elon Moreh, 7) Ma'ale Michmas, 8) Shavei Shomron, 9) Kedumim, 10) Psagot, 11) Beit El, 12) Yitzhar, 13) Har Bracha, 14) Modi'in Illit, 15) Nokdim, and 16) Kochav Ya'akov. See Addendum of the Law for the Regularization of Settlement in Judea and Samaria, 5777-2017.

1399 Law for the Regularization of Settlement in Judea and Samaria, 5777-2017, Section 3.

of the Security Council Resolution 2334 (2016).[1400] The legality of the Israeli settlements in the West Bank is not within the scope of this research, but it is important to know that the Israeli Knesset is driven by politics and does not consider the obligations of the Israeli government under international law.[1401] The named bill is in contradiction with the principles of the Geneva Convention IV, as the military commander has the obligation to protect the private property of the local population with the constitutional protection of the right to private property where it can only be confiscated for public purposes.[1402] Accordingly, 17 Palestinian municipalities and 3 human rights organizations from the West Bank, Israel, and the Gaza Strip, on 8 February 2017, challenged this bill before the Israeli Supreme Court; the case is still pending.[1403] The Israeli Supreme Court, in this petition, must apply the applicable international norms including the Geneva Convention IV as well as the domestic laws, because such application would lead to illegalization of this bill. The bill would fail to meet the requirements of military necessity, public purposes, proportionality, and the interests of the Palestinian population. This, in fact, affirms the Court's important role, as its function extends to ruling on the legality of such laws as well as military orders and military practices.

Palestinians in Jerusalem are continuously targeted by discriminatory Israeli laws. On March 7, 2018, the Israeli Knesset approved a law allowing the Israeli government to revoke the residency of Palestinian Jerusalemites if they were suspected of not being loyal to the state, which leads to their eviction from

1400 United Nations Security Council, Resolution 2334 (2016), 7853rd meeting, 23 December 2016.

1401 For information on the legality of the Israeli Settlement, see Security Council Resolutions 242 (1967), 338 (1973), 446 (1979), 452 (1979), 465 (1980), 476 (1980), 478 (1980), 1397 (2002), 1515 (2003), and 1850 (2008); see also Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v. The International Court of Justice," 1425–1521; Idith Zertal and Akiva Eldar, Lords of the Land: The War Over Israel's Settlments in the Occupied Territories, 1967–2007; International Court of Justice, Advisory Opinion (2004).

1402 The Israeli Basic Law: Human Dignity and Liberty of 1992, Article 3.

1403 Adalah Adalah – the Legal Center for Arab Minority Rights in Israel, Knesset Approves Law that Lets Israel Expropriate Vast Tracts of Private Palestinian Land: Adalah to File Supreme Court Petition against Sweeping and Dangerous Validation Law that Violates International Law and Palestinian Property Rights in West Bank. Published on February 5, 2017; See Also the petition HCJ 1308/17 Silwad Municipality, et al. v. The Knesset et al. filed on 8 February 2017 and still pending.

the city of their birth.[1404] The Minister of Interior Affairs is given, under this law, full discretion to evict Palestinian Jerusalemites.[1405] The law was introduced after the Israeli Supreme Court delivered a decision on September 13, 2017, stating that the Minister of Interior Affairs does not have the authority to revoke the permanent residency of a Jerusalemite mother and her daughter.[1406] The law, in fact, contradicts international humanitarian law and human rights that protect the rights of Palestinians, including their rights as an indigenous population on their land. Human Rights Watch stated that stripping Palestinians in Jerusalem from their residency status is a discriminatory act and part of the Israeli policies that have shifted the demographics in Jerusalem.[1407] The Israeli policies that target Palestinians in Jerusalem also include: 1) "Expropriating land and property, denying building permits, and demolishing houses of Palestinian in a systematically discriminatory manner; 2) Severely restricting family (re)unification Recent Documents Punitive Residency Revocation: The Most Recent Tool of Forcible Transfer …; and 3) Physically isolating East Jerusalem from the rest of the West Bank, in part by building the annexation wall."[1408]

In many incidents, the Israeli Supreme Court has ruled on the legality of confiscating Palestinian land. A few different cases before the Court and their impact are examined in the following section.

1404 Entry into Israel Law (Amendment No. 30), 5778-2018, approved by the Knesset on March 7, 2018, Section 11 "Cancelation of Permanent Residency Status Due to Breach of Allegiance." English translation available by the HaMoked: Center for the Defence of the Individual.

1405 Id.

1406 HCJ 7803/06 Khalid abu Arafah et 25 others v. Minister of Interior Affairs, Israeli High Court of Justice on 12 September 2017. Decision available in Hebrew.

1407 Human Rights Watch, Israel: Jerusalem Palestinians Stripped of their Status, August 8, 2018, available at: https://www.hrw.org/news/2017/08/08/israel-jerusalem-palestinians-stripped-status.

1408 The Community Action Center at al-Quds University, in cooperation with al-Haq, Society of St. Yves, Jerusalem Legal Aid and Human Rights Center, Civil Coalition for Palestinian Rights in Jerusalem, and BADIL Resource Center for Palestinian Residency and Refugee, Punitive Residency Revocation: The Most Recent Tool of Forcible Transfer. The Journal for Palestine Studies, a Quarterly on Palestinian Affairs and the Arab-Israeli Conflict, Jerusalem Quarterly 66. University of California Press: 114–120, 114.

5.2.1. The Israeli Supreme Court on the Right to Property

Since the beginning of the Israeli occupation, Palestinians have petitioned before the Israeli Supreme Court to challenge the legality of the orders of the military commander. The Court has ruled in many cases and set forth principles concerning the right to property and the prohibition of land confiscation in the Occupied Territory and Israel. In 1978, in Ayub v. Minister of Defense and Mutawe'a v. Minister of Defense,[1409] hereinafter the Beit El case and the Bekaot case, respectively, Palestinians petitioned against the confiscation of their lands, the prohibition to enter their lands and cultivate them, and the establishment of civilian Jewish settlements.[1410] In the Beit El case, the military commander confiscated the entire area between the Jerusalem-Nablus route and the Jericho-Jordan Valley, while in the Bekaot case, 300 dunum of land were confiscated.[1411] In both cases, the orders of the confiscation were based on the Order of Security Provisions No. 378, and they stated that the land of the petitioners was confiscated for necessary military and security needs.[1412] Nevertheless, the confiscated lands were used for the purpose of erecting settlements for Israeli Jewish communities. One settlement was already constructed,[1413] which does not in any case constitute a military necessity. In fact, this contradicts the provisions of several principles of the applicable international laws, namely, Articles 23, 46 and 53 of the Convention (IV) respecting the Laws and Customs of War on Land of 1907 and Articles 46, 49, 53 and 78 of the Fourth Geneva Convention.[1414]

Despite these international principles, the Court, in both cases, ruled that the establishment of two civilian communities, Beit El and Bekaot, on the Palestinian private land near Ramallah and Tubas involved security of the Occupied Territory and served genuine military needs; thus, it did not constitute a violation of international law provisions.[1415] The Court appears to be mistaken in its conclusion. It cited Article 49 of the Geneva Convention

1409 The Court heard both cases jointly, as both petitions share the same questions in Saliman Ayub v. Minister of Defense & HCJ Jamil Mutawe'a v. Minister of Defense (1979).

1410 Id., 1.

1411 Id., The opinion of Deputy President (Lundau).

1412 Id., 8.

1413 Id., 4.

1414 In regard to Articles 53 and 78, see the previous chapter on the Right to Movement, The Geneva Convention (IV) of 1949.

1415 Saliman Ayub v. Minister of Defense & HCJ Jamil Mutawe'a v. Minister of Defense (1979), 9 and 14.

(IV) that prevents the Occupying Power from transferring parts of its own population to the Occupied Territory, but it explicitly denies its applicability. Even though it repudiated the applicability of the Geneva Conventions in the Occupied Territory and applied the provisions of customary international law as part of domestic law, it actually did not discuss all the aspects that international customary law provides. It completely ignored Article 46 of the Hague Convention (IV) that prohibits confiscation of private property. It also disregarded the principles of proportionality, where the military commander must balance between the sought military purpose and the harm caused to local inhabitants. If one argues that the confiscation of private land to build Jewish settlements and transfer the civilian population of the occupier into the Occupied Territory are based on security reasons, then, it would be also argued that expropriation of more lands to protect the security of these settlements would be also legal. These arguments are not grounded in any legal basis and explicitly refute the provisions of international humanitarian law.

In 1979, in Duweikat v. Government of Israel, the Minister of Defense, hereinafter the Elon Moreh case, the Court was faced with the same questions. Apparently, the conclusion in the Beit El and Bekaot cases had encouraged Israeli civilians, with the assistance of the Israeli military, to carry out acts to occupy the Palestinian private lands in order to establish residential communities. On June 7, 1979, some Israeli civilians with the help of the military marked the establishment of a settlement in an area located between the cities of Jerusalem and Nablus. Two days later, the military commander in the area issued the land confiscation Order No. 16/79 and they occupied the site.[1416] In the order, the military commander confiscated 700 dunum and claimed that the confiscation was required for military necessity.[1417] Palestinian owners of this land petitioned before the same Court and raised the question as to whether the establishment of a Jewish community on private land in this area was legal.[1418] This time, the Court examined Article 46 of the Hague Convention (IV), and stated that the military commander must present a legal resource and valid purpose according to principles of protecting private property in the Occupied Territory, because private property is a legal and basic right.[1419] It pointed out that the seizure order based on military needs

1416 Izzat Muhammad Duweikat and 16 others v. Government of Israel (1979), 2 &4.
1417 Id., 4.
1418 Id.
1419 Id., 21.

and security grounds on confiscated Palestinian land was not acceptable.[1420] It declared that confiscation of land for the establishment of Elon Moreh was null and void. The Court ordered the military commander to return the confiscated land to its owners, which the government implemented.[1421] The Elon Moreh case presented the capacity of the Supreme Court and the Court had found that its duty was to rule according to the law, not the political interests of the government and the military in the Occupied Territory. Nevertheless, the Israeli government started to find new means to circumvent the decision of the Court and to continue expropriating Palestinian lands.

The Court's ruling clearly opposed the Israeli government's policy and its attempts to establish Jewish communities on Palestinian private lands that had been confiscated for military purposes. Deceptively, it was easier for the Israeli authorities to circumvent the ruling instead of implementing it, as Israeli settlers were already occupying the site. Upon delivering the decision in the case of Elon More, Israeli settlers announced their intention to not evacuate the settlement. Their supporters suggested enacting new laws to legalize other expropriations of Palestinian lands for the expansion of Elon Moreh.[1422] The immediate reaction of the Israeli authority to the Court's ruling was to find an alternative justification for the establishment of the settlement of Elon Moreh. In response to that decision, the Israeli government took further steps to confiscate Palestinian land for purposes other than military necessity. The government implemented Order No. 59 and declared private Palestinian land as state land for building roads and other uses. The Israeli Cabinet decided, "All uncultivated rural land [are to be] declared state land."[1423] Order No. 59 relating to government property has regulated state land, and empowered the military commander of the West Bank and the Gaza Strip to confiscate Palestinian property.[1424] Military Order No. 1091 defined "state land" in the following: "State property is now interpreted as including any property subject to an expropriation order."[1425] This means that any land, whether private

1420 Izzat Muhammad Duweikat and 16 others v. Government of Israel (1979), 60.

1421 Ronen Shamir, "Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice," Law & Society Review, Vol. 24, Issue No. 3 (1990): 781–806, 786.

1422 Ian Lustick, "Israel and the West Bank after Elon Moreh: The Mechanics of De Facto Annexation," Middle East Journal, Vol. 35, Issue No. 4 (Autumn 1981): 557–577, 563.

1423 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 90. Cited as M. Benvenisti, The West Bank Date Project, 43.

1424 Order relating to government property (Area of Judea and Samaria) No. 59 of 1967.

1425 Order concerning government property (Amendment No. 7) (Judaea and Samaria) (No. 1091), 1984.

or public, is subjected to confiscation under the named orders.[1426] The Israeli government passed a set of laws to declare the Palestinian land as the *Land of Israel*; these laws have led to practices that deprived Palestinians from their land and prevented them from accessing the High Court of Justice concerning land confiscation and expropriation.[1427]

A few years after the Court's ruling, the Occupied Territory witnessed "an unprecedented growth of the settlement."[1428] This policy was made to fulfill the occupier's interests and needs.[1429] Expressly, Israel had been using the Palestinian confiscated land to transfer its inhabitants to the Occupied Territory to work on the projects of planning and building roads and highways in the Occupied Territory, which are all "connected with the settlement policy."[1430] In other words, declaring the Palestinian land as Israeli state land for the sole benefit of Israel and its own citizens does not comply with the provisions of the Fourth Geneva Convention or the Hague Regulations because it was not declared for the benefit of the internationally protected local population. This is especially true since the confiscated land had been a "resource to be used for settlements for nationals of the occupying power."[1431] This means that the purposes neither constituted a military necessity nor benefitted Palestinians. Notably, the Elon Moreh settlement is still on the Palestinian lands, which were declared as Israeli state lands after the Court's ruling. Thus, in practice, the ruling of the Court has never been respected.[1432] As emphasized previously, the imperative military necessity and the public interests are exceptions under international law rules, and must not be used to implement a certain policy for the benefit of the occupier. Although the military necessity in international humanitarian law requires that the confiscation of

1426 See the subsection of this chapter: Property in Palestine.

1427 Lustick, "Israel and the West Bank after Elon Moreh: The Mechanics of De Facto Annexation," 563.

1428 B'Tselem, Under the Guise of Legality: Israeli's Declarations of State Land in the West Bank, 12.

1429 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 91.

1430 Id., 94. See also B'Tselem, Under the Guise of Legality: Israeli's Declarations of State Land in the West Bank.

1431 B'Tselem, Under the Guise of Legality: Israeli's Declarations of State Land in the West Bank; B'Tselem The Israeli Information Center for Human Rights in the Occupied Territories, By Hook and by Crook: Israeli Settlement Policy in the West Bank (July 2010).

1432 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Settlements: Seizure for Military Need and the Elon Moreh Ruling (13 March 2013).

the private property is essential to win the war and must not be for the occupier's political interests,[1433] none of the Israeli military orders have shown that a land confiscation is vital to win a war.

On April 14, 2002, the Israeli Ministers' Committee for National Security reached a decision to construct the separation wall.[1434] The claimed purpose of this wall was to improve the security measures for Israel as the military and police forces were given the green light to prevent all Palestinians from entering Israel.[1435] In Beit Sourik Village Council v. The Government of Israel, Palestinians, living in the villages to the west and northwest of Jerusalem, challenged the confiscation of their private land, as part of the route of the wall.[1436] The case of Beit Sourik, is the first petition before the Israeli Supreme Court that was filed to challenge the legality of the separation barrier,[1437] its route, and the land confiscation for the purpose of its constructions in the Occupied Territory under the principles of the Hague Regulations and the Fourth Geneva Convention.

The wall, only in those villages, caused harm to the lives of more than 35,000 local inhabitants.[1438] Four thousand dunums were confiscated, 30,000 dunums were cut off from their owners, thousands of olive trees were uprooted, and thousands of fruit trees and other agricultural crops were also uprooted and damaged.[1439] In fact, "About 85 per cent of the planned route of the wall lies within the West Bank, and would cut off and isolate 9.4 per cent of the West Bank territory, including East Jerusalem … Palestinian communities affected

1433 Garner, ed., Black's Law Dictionary, 114. Cited as Yoram Dinstein, "Military Necessity," in 7 The Max Planck Encyclopedia of Public International Law 201, 201 (Rudiger Wolfrum ed., 2012).

1434 Beit Sourik Village Council v. The Government of Israel (2004), 3.

1435 Id.

1436 These villages are Beit Sourik, Bidu, El Kabiba, Katane, Beit A'nan, Beit Likia, Beit Ajaza and Beit Daku, See the map using the Interactive Map of B'Tselem at https://www.btselem.org/map

1437 After Beit Sourik ruling, On 15 September 2005, an expanded panel of nine justices ordered the state "to reconsider, within a reasonable time, alternatives to the route of the Barrier by Alfe Menashe." See B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Separation Barrier: 16 Sept. 2005: High Court in precedent-making decision: Dismantle section of the Separation Barrier, published 16 September 2005.

1438 Beit Sourik Village Council v. The Government of Israel (2004), 44.

1439 Id.

by the wall experience varying degrees of isolation and restrictions on their freedom of movement."[1440] Locals have been restricted from accessing their land, since their access depends on the possibilities of opening the crossing gates and security checks prevent passing vehicles. They wait hours to be allowed to access their land. The restrictions affect the farmers' ability to cultivate their land and this lack of access has deteriorated their daily lives.[1441] This harm, in fact, is wide and strikes across the fabric of life of the entire population.

In Beit Sourik, for example, the wall surrounds the village and passes by the houses and cuts all villagers, including petitioners, from their urban center (the city of Ramallah).[1442] The petitioners have stated that the route of the wall has damages the villages, as thousands of inhabitants and thousands of dunums of land have been affected. Ninety percent of the cultivated seized land is planted with olive and fruit trees; 18,000 trees have been uprooted and 70,000 trees have been separated from their owners. As a result, the livelihood of hundreds of families has been destroyed.[1443] According to Order No. Tav/107/03, this route affects more than 6,000 dunums of land of the Katana village and 2700 dunums of land of the El-Kabiba village. The wall cuts off the land from inhabitants and causes tremendous harm to them.[1444] As for Order No. Tav/108/03, in the Beit Sourik Bidu villages, at least 500 dunums of land will be damaged and 6000 additional dunums will be separated from their owners by the route of the wall. The consequences will present a major life obstacle for the population, and the wall will surround the villages and border it tightly.[1445] In addition, checkpoints will be built on the road. Israeli authorities have implemented restrictive measures and have imposed closures on Palestinians in all cities in the West Bank; these measures include checkpoints, roadblocks, and physical obstacles.[1446] The access of Palestinians to their lands is subject to serious violations, as their right to live in dignity, right to movement and right to access to private property will all be violated.[1447] As

1440 Falk, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Doc. No. A/HRC/25/67, 14.

1441 Beit Sourik Village Council v. The Government of Israel, 44.

1442 Id.

1443 Id., 32.

1444 Id., 36–37.

1445 Id., 38–39.

1446 United Nations General Assembly, Report by Secretary-General, No. A/67/372 (2012), 42.

1447 Beit Sourik Village Council v. The Government of Israel, 39.

a result of the Israeli policies, thousands of Palestinians are having difficulties in reaching their lands and the damage to the agricultural sector, the primary sector for the Palestinian economy, is grave.[1448]

The duties of the occupier, as examined previously, are set forth under international humanitarian law. The military commander does not have the authority to order the construction of the separation wall for political reasons and the wall cannot be built to draw the political borders of Israel.[1449] In fact, the military commander is "not permitted to take the national, economic, or social interests of his own country into account … even the needs of the army are military and not the national security interest."[1450] The occupying power is prohibited from taking any measures that are not "in the interests of the population of the Occupied Territory and with the consent of the Protecting Power."[1451] Article 51 of the Hague Regulations forbids, under any circumstances, the Occupying Power to confiscate lands owned by local residents.[1452] Under Article 60 of the Fourth Geneva Convention, Israel, as an occupying power, is obligated to consider the interests of the population of the Occupied Territory.[1453] This means that Palestinian lands must not be confiscated unless such confiscation is only for the benefit of the local Palestinians. The Israeli use of such land is, therefore, illegal.[1454] In this context, the Israeli government and its military commanders must first and foremost respect the interests of the Palestinian local population rather than the interest of the Israeli population and the Israeli government, noting that the Israeli civilians do not have the right to use public and natural resources in the occupied territories. Destruction of property is also prohibited under Article 53 of the Geneva Conventions (IV) of 1949. It reads: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."[1455] According to this article, a

1448 B'Tselem, the Separation Barrier (2011).
1449 Beit Sourik Village Council v. The Government of Israel, 15.
1450 Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF and other (1983).
1451 Geneva Conventions (IV) of 1949, Article 60.
1452 The Hague Convention (IV) of 1907, Article 51.
1453 Geneva Conventions (IV) of 1949, Article 60.
1454 Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel," 225.
1455 Geneva Conventions (IV) of 1949, Article 53.

military commander is not allowed to destruct property unless for absolute military necessity.

It has not been proven that the construction of the separation walls should be classified under the category of an absolute military necessity, as this "can only be accepted on an exceptional basis … can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met."[1456] The law of belligerent occupation "recognizes the military commander right to ensure security of his country. It creates a balance between the military necessity and humanitarian consideration."[1457] International humanitarian law rules, in fact, have been created to strike a balance between the two, and they anticipate a potential collision between military necessity and humanitarian considerations. The aforementioned Article 23 of the Hague Regulations imposes such a balance.[1458] In addition, Article 27 of the Fourth Geneva Convention insists on the obligations of the military commander in finding this balance.[1459] The military commander has an obligation to abstain from actions that harm the locals and violate their human rights and to take required actions to prevent harm to the locals.[1460] The Israeli Court agreed that the route of the separation wall has harmed a wide-range of the fundamental rights of the Palestinian inhabitants, namely, the right to private property, the right to movement, the access to their agriculture land, the right to education, and the right to freedom of religion, and these violations are disproportionate and reflect collective punishment.[1461] Yet, it ignores the fact that the wall has political dimension and might be in contradiction with international law.

The Court has only reached such a conclusion because it has not employed the articles of the Fourth Geneva Convention, especially Article 49, which prohibits the occupier from transferring part of its civilian population into

1456 International Court of Justice, Advisory Opinion (2004), 63. Cited as ICJ *Reports IY97,* 40, para.51).

1457 Beit Sourik Village Council v. The Government of Israel, 18.

1458 The Hague Convention (IV) of 1907, Articles 23 & 46.

1459 Id., Article, 27.

1460 Beit Sourik Village Council v. The Government of Israel, 21.

1461 Id. 7.

the Occupied Territory.[1462] Actually, the Court began with legalizing the construction of the separation wall itself and justifying that the construction of the wall falls under the provisions of international law.[1463] It states in its conclusion that "only a separation wall built on a base of law will grant security to the state and its citizens … and will lead to the security yearned for."[1464] The Court concluded that the construction of the separation wall is "intended to realize a security objective, which the military commander is authorized to achieve, therefore,"[1465] and it is proportionate. It bears to the mind that the Israeli bodies including the High Court of Justice are creating new extended provisions of the military necessity and security.

In summary, although the Court, in the Beit Sourik case, ruled that the route of the separation wall is not in conformity with international law and causes harm to the Palestinian population, the only legal responsibility on the government of Israel was changing the routes, and allowing the military commander to issue new orders, although the new routes were still causing damages to the local Palestinians. After the Court's judgment, the Prime Minster directed the Defense Ministry to change the route of the separation wall in conformity with the Court's ruling.[1466] Yet, the separation wall as such has affected the daily lives of Palestinians. The UN Rapporteur, Richard Falk, states that "Palestinian communities affected by the wall experience varying degrees of isolation and restrictions on their freedom of movement."[1467]

Two months after the ruling in Beit Sourik, the separation wall was examined at the international judicial level. The International Court of Justice (ICJ) gave an advisory opinion on the legality of a separation wall in the West Bank. The Court concluded that the construction of the wall in the occupied Palestinian Territory is in contradiction with the rules of international law and must be halted and deconstructed.[1468] The ICJ affirmed that the wall construction is a breach of Israel's obligation to respect Palestinian people's right

1462 Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v. The International Court of Justice," 1430.

1463 Beit Sourik Village Council v. The Government of Israel, 18.

1464 Id., 45.

1465 Id., 25.

1466 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Separation Barrier: Judgment of the High Court of Justice in Beit Sourik (January 2011).

1467 Falk, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Doc. No. A/HRC/25/67, 14.

1468 International Court of Justice, Advisory Opinion (2004), 14.

to self-determination.[1469] It also raised a number of issues concerning international law; the wall led to the destruction and confiscation of properties, and there have also been "repercussions of agricultural production and increasing difficulties for the population regarding access to health services, educational establishments, and primary sources of water … It [violates the Palestinians'] right to work and right to an adequate standard of living."[1470] The construction, therefore, violates the International Covenant on Economic, Social, and Cultural Rights[1471] and the International Covenant on Civil and Political Rights.[1472] In fact, 92 Palestinian towns have been affected by the present route of the wall. Residents of 17 towns and villages require permits to live in their homes, and they are able to leave their communities only through a gate at certain times.[1473] The ICJ was not convinced that the wall was necessary to attain Israel's security objectives,[1474] and thus, the wall violates provisions of the Hague Regulations and the Fourth Geneva Convention. The ICJ, undoubtedly, stated that because the wall is contrary to international law, its construction should be brought to an end.[1475] Thus, Israel is under an obligation to repair all damages caused to Palestinians.[1476]

As a result of this advisory opinion, the United Nations General Assembly established a Register of Damage arising from construction of the separation wall by Israel in the Occupied Palestinian Territory.[1477] A decade after the advisory opinion, the Palestinian Rights Committee (the Committee on the Exercise of the Inalienable Rights of Palestinian People) called, on Israel, before the General Assembly, to dismantle the separation wall and to compensate the Palestinians for the continuous damages.[1478] However, Israel

1469 Id. 10.

1470 Id. 11.

1471 International Covenant on Economic, Social and Cultural Rights of 1976.

1472 International Covenant on Civil and Political Rights of 1966.

1473 B'Tselem, the Separation Barrier (2011), Figure No. 4. The figure does not include three communities that are presently situated west of the barrier but lie east of the barrier according to the currently approved route.

1474 International Court of Justice, Advisory Opinion (2004), 11.

1475 Id. 13–15.

1476 Id. 15.

1477 United Nation General Assembly Resolution No. GA/10560, Tenth Emergency Sepecial Session, 30th &and 31st Meetings (a.m. & p.m.) on 15 December 2006.

1478 The Palestinian Right Committee, 10 years after International Court of Justice Advisory Opinion Urges Removal of Barrier Wall, General Assembly, Meetings Coverage, 362nd meeting (a.m.) on 9 July 2014.

continues to disregard the advisory opinion by its "systematic and deliberate violations of international law."[1479]

Shortly after, in Mara'abe v. the Prime Minister of Israel, some Palestinians confronted the Israeli Supreme Court with a number of questions arising from the ICJ Advisory Opinion. The main question was: Is the separation wall legal? The petitioners are Palestinians living in a number of villages in the West Bank that are surrounded by the route of the wall and cut off from their land and other villages and urban cities.[1480] The wall surrounds five Palestinian villages, which are near the Israeli Jewish settlement of Alfei Menashe, and encircles the Palestinian city of Qalqilia, passing north of the highway that connects the Israeli settlement to Israel.[1481] The Israeli authorities claimed that the construction of the wall was based on security reasons and to protect Israelis from Palestinian attacks, while the petitioners argued that it is in contrary to international human rights and humanitarian laws, as it severely and disproportionality affects their lives including their education, health, employment, property, movement, and social ties.[1482] The Palestinian villagers are unable to attend schools in the other neighboring towns, cannot go to hospitals, medical clinics, or work, are not able to move freely to the urban cities as they must go through restricted gate systems that opens 2–3 times a day; their relatives and friends are not able to visit them.[1483] In addition, the construction of the wall separates them from their agricultural lands and causes financial and economic destruction.[1484]

The Court, again, was unwilling to examine the applicability of the Fourth Geneva Convention. It ruled, according to its interpretation of humanitarian provisions regarding belligerent occupation that the construction of the wall falls under the powers of the military commander, which exercised proportionately.[1485] More specifically, the Israeli Court distinguished between confiscation and expropriation. It stated that the construction of the wall did not transfer the ownership of the Palestinian lands and that the construction is

1479 Id.

1480 Zahrana Mara'abe v. the Prime Minister of Israel (2005).

1481 These five villages are: Arab Abu-Farda, Wadi Al-Rasha, Magarat al-Daba, and Gherbet Ras Al-Tira, see Zahrana Mara'abe v. the Prime Minister of Israel (2005), 8.

1482 Id., 102.

1483 Id., 103, 104, and 106.

1484 Id., 105 and 107.

1485 Id., 14 and 101.

temporarily taking possession, which is not related in any way to expropriation that transfers the ownership of the land.[1486] This conclusion, calling the wall a temporary measure, reveals preposterous logic. The wall consists of concrete, razor wires, and electronic monitoring system; its total length is approximately 708 km, allowing Israel to control the Palestinian lands; and it has intensely changed the character of the occupied West Bank.[1487] Such physical construction, which is accompanied by a strict administrative régime, is not likely to disappear or to be temporary. Such a ruling was easily expected as the Court has invoked very few international resources, especially on the manner of self-determination, the legality of the Jewish settlements, and human rights law.[1488] In addition, this conclusion is contrary to the ICJ Advisory Opinion. At the same time, it concluded that the route of the wall does not present a decisive security justification and that it should be rerouted to remove these villages from the enclave of the Israeli settlement.[1489] Seemingly, the real problem did not actually occur to the understanding of the Court. It did not consider the wall as a problem, but the problem was with its route, which severely damaged the lives of Palestinians.

It appears that the three judicial rulings, the International Court of Justice and the Israeli Supreme, concerning the separation wall are clashing. The Israeli court, in the Beit Sourik case, did not examine the legality of the wall as such, but ruled as to whether some parts of its route were proportionate to the damages caused to Palestinians. The ICJ, examined the legality of the wall and its impact on the life of the Palestinian locals. The Israeli court, in the Mara'abe case, examined the legality of the wall and its route, but controverted the ICJ Advisory Opinion. Although the conclusion of the Israeli court reflected some international protection, the Court was biased. The unfairness in the decision is explicit as the Court stated that "as any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror."[1490] It is legitimate that the Court recognizes the need of the Israelis, but it is not legal under international law to ignore the need and the interests of Palestinians, who are the protected persons. The ICJ

1486 Id., 16.

1487 International Court of Justice, Advisory Opinion (2004), 34–35.

1488 Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v. The International Court of Justice," 1431.

1489 Zahrana Mara'abe v. the Prime Minister of Israel (2005), 113.

1490 Beit Sourik Village Council v. The Government of Israel, 44.

is a neutral judicial body; it examined the legality of the separation wall from an international perspective and ruled accordingly. Although the opinion is advisory and not legally binding, it has created a moral value at the international level and applied this value through establishing a Register of Damage arising from construction of the wall.[1491] This shows that the opinions of the Israeli Court have not served the benefit of Palestinians, and, therefore, must be updated to meet the norms of international law.

6. Conclusion

International human rights law and international humanitarian law have not fully protected private property. The former has not included the right to property under its protection, and the latter has used broad and undefined terms. The ambiguity in protecting the right to property has allowed the Israeli government to misinterpret the humanitarian provisions and has opened doors to expropriate, confiscate, and destruct property under certain conditions. These conditions are not strict enough to prevent the Israeli military to circumvent the rules. The international community must take appropriate legal effort to include the right to property into the International Covenant on Economic, Social and Cultural Rights (ICESCR) nor in the International Covenant on Civil and Political Rights (ICCPR). Similarly, the International Committee of the Red Cross must step in to include proper protection in the Geneva Convention IV, where the right to property is clearly guaranteed and liberated from the military and political goals of the occupying powers.

The Ottoman, British, and Israeli laws have widened the exceptions and granted the Israeli government more extensive powers than those that exist in the aforementioned international law provisions. They do protect the right to property as an important asset, yet, broad powers are granted to the authorities. This allows government to arbitrarily confiscate private property to fulfill their own interests. In fact, the violations that are committed by the Israeli occupation in accordance with the Israeli laws make two main points: first, the illegality of the British and the Israeli laws in regard to the confiscation and expropriation of property, and second, the arbitrary practices of the Israeli authorities against Palestinians and their property. These laws and practices have been challenged before the Israeli judiciary to rule in

1491 United Nation General Assembly Resolution No. GA/10560 (2006).

cases of expropriation, confiscation, and destruction, but the Israeli Supreme Court has been misguided in some cases. In addition, it has poorly and defectively applied international principles, which has greatly affected the locals in the Occupied Territory. As concluded in the previous chapter, it is important to address new ways to repair such violations and enforce such rights in Occupied Palestine. Before examining remedies, the next chapter highlights the right to equality and non-discrimination in Palestine.

VI. The Right to Equality and Non-Discrimination

1. Introduction

The principles of equality and non-discrimination are different in their approach, but they are closely intertwined. There is no common definition of equality or non-discrimination in the international human rights conventions.[1492] Equality requires the same treatment of equals and the consideration of their differences.[1493] Simply stated, equality means that people, who are in the same situation, must be treated equally. However, those who are disadvantaged in the society and have special needs that require further attention, such as children and handicapped persons, should be treated differently. Equal protection means that "legislation that discriminates must have a rational basis for doing so."[1494] The term discrimination has various definitions. It may be defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[1495] Discrimination is any distinction, segregation, exclusion, preference or restriction based on race, color, sex, language, religion, political or other opinion, national or social

1492 Wouter Vandenhole, Non-Discrimination and Equality in the View of the UN Human Rights Treaty Body (Antwerpen and Oxford: Intersentia, 2005), 33.

1493 Stephanie Farrior, ed., Equality and Non-Discrimination under International Law, Vol. II (New York: Routledge, 2016), Introduction.

1494 Garner, ed., Black's Law Dictionary, 654.

1495 International Convention on the Elimination of All Forms of Racial Discrimination of 1965, Article 1(1).

origin, property, birth or other status.[1496] Discrimination is "the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability."[1497]

The right to non-discrimination has two features, First, it ensures that all people are treated equally before national and international law and that the laws do not discriminate by any means; second, it ensures that all people are equal in the enjoyment of the protected rights.[1498] All people have equal rights to enjoy their life, dignity, health, free movement, property, etc. These rights must also be equally protected, and all people must be enabled to enjoy their rights. Yet, equality "does not require all persons to be dealt with identically, but it does require that a distinction made has some relevance to the purpose for which the classification is made."[1499] This means that there are some people who need special treatment such as children and people with disabilities and providing this special treatment does not constitute discrimination against other people. For example, when a state builds a highway or road to connect different cities to serve all population, this is equality. When the state builds a special lane, on that highway or road, for school buses that transport children, this might be referred to as equity. If the state announces that only certain religion, race or color could use this highway, then this is discrimination.

In the Palestinian-Israeli context, Palestinians are faced with different treatment by the practiced Israeli government and the Palestinian Authority in the Occupied Palestinian Territory. The question remains whether this treatment constitutes discrimination according to international human rights and humanitarian laws as well as Palestinian and Israeli laws. This question will be investigated in this chapter while examining the importance of the right to equality and non-discrimination and the practices of discrimination against the Palestinians in the Occupied Territory.

1496 United Nations Human Rights Committee, CCPR General Comment No. 18 on Non-discrimination, (10 November 1989), § 7.

1497 Garner, ed., Black's Law Dictionary, 566.

1498 UN Human Rights Committee General Comment No. 18 (1989), § 2.

1499 Garner, ed., Black's Law Dictionary, 654, cited as Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 763 (1966).

2. The Importance of the Right to Equality and Non-Discrimination

The principle of non-discrimination is not only a right that must be respected; it is also a right that must be protected at all times and prevented from being violated. The international community sets forth a departure point for understating the importance of human rights, as they all are universal, interdependent, and interrelated.[1500] Human beings are entitled to enjoy human rights without distinction or racial discrimination. The universal respect of human rights and fundamental freedoms for all people is based on non-discrimination as to race, religion, or sex.[1501] The right to be treated equally and without discrimination is "the manifestation … of deep-rooted value."[1502] Non-discrimination is one of the most important and significant basic rights.[1503] Discrimination is an obstacle to peace among peoples and is repugnant to all societies.[1504]

The principles of equality and non-discrimination do not only necessitate that all protected rights should be available to everyone equally and without any distinction, but they also obligate the state parties to regulate national polices, laws, and services in conformity with these principles. These principles apply to all aspects of life. This means that law, policies, and services are to be established according to the norms of justice. The importance of these two principles is not only prohibition, it is also the emphasis of the obligation of the states to ensure that their laws, policies and services are not discriminatory

1500 Vienna Declaration and Program of Action, No 5 (Part 1, para. 5), adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (A/CONF. 157/24 (Part 1), Chap. III). "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

1501 The Charter of the United Nations of 1945, Article 55.

1502 Sir Nigel Rodley, "Civil and Political Rights," in Krause and Scheinin eds. International Protection of Human Rights: A Textbook, 114.

1503 Non-discrimination and Equality before the law were used in the same context by the United Nations.

1504 International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Preamble.

in impact, and whenever discrimination and inequality occur, states should take all measures to prevent such occurrences.[1505] Thus, state parties are not allowed to discriminate on any grounds.[1506] For example, people must not be denied access to public roads, heath facilities, educational institutes, or their private land based on their race, color, sex, language, religion, political view, national or social origin, property, birth or other status. This is referred to as all other rights as they should be enjoyed without discrimination, distinction, exclusion, or preference. Regardless of the circumstances, all people are entitled to enjoy their protected rights, and must not be treated inversely on the basis of racial differentiation or inferiority. The right to equality and non-discrimination is a crucial element in human rights protection.[1507]

The principles of equality and non-discrimination are "fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights."[1508] It is the only right which other human rights presuppose for their full enjoyment.[1509] The Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance described racism, racial discrimination, xenophobia, and related intolerance as "devastating evils of humanity."[1510] Non-discrimination is a prerequisite for the enjoyment of other human rights, and whenever discrimination and inequality occur, they interrupt the enjoyment of all rights. The principles of equality and non-discrimination affect all aspects of people's lives and are at the core of the enjoyment of a full human life.

1505 Report of the United Nations High Commissioner for Human Rights Human Rights Council Nineteenth session, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Follow-up and implementation of the Vienna Declaration and Programme of Action: Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, UN doc. No. A/HRC/19/41 (17 November 2011), 4–5.

1506 Manisuli Ssenyonjo, Economic, Social and Cultural Rights in International Law (USA: Hart Publishing, 2009), 87.

1507 Id., 84.

1508 The Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009) E/C.12/GC/20, § 2.

1509 W. T. Blackstone, Equality and Human Rights. The Monist, Vol. 52, No. 4, Human Rights (October 1968), 616–639 Published by: Hegeler Institute. At p. 617.

1510 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Declaration, Durban, South Africa, 31 August–8 September 2001, Article 3.

First and foremost, discrimination clashes with the right to dignity, which serves as a valuable foundation for human rights.[1511] Human dignity is the basis of self-worth and is reflected in every human right; thus, it is a global right, from which no one can be deprived.[1512] The right to non-discrimination, as such, directly safeguards the right to dignity. Discrimination "assaults the inner being or personhood of the individual in profound but inexpressible ways."[1513] Simply put, discrimination leads to destructive consequences that impact individuals and threaten their existence and productivity. Inequality and discrimination become tangible and further affect people's rights to life, education, health and medical services, movement, employment, fair trial, property, etc. Policies of discrimination disturb all political, civil, social, cultural, and economic rights. It even affects the judiciary system, law enforcement, and the administration of justice. The existence of discrimination, for example, in any health and medical care system, directly affects the right to health, the right to medical care, and the right to life. Discrimination by imposing restrictions on a certain group's right to movement and favoring other groups, ultimately affects the former's right to education, right to social life, etc. The question is whether inequality and discrimination are practiced against Palestinians in the Occupied Territory. This will be our next discussion.

3. Equality and Non-Discrimination in Palestine

For Palestinians, there are two cases in which discrimination may occur. The first is that the Palestinian Authority discriminates among the Palestinians within its jurisdiction. In this case, Palestinian Basic Law and international human rights provisions are applicable. The second is that the Israeli government, as an occupying power, practices discrimination against the Palestinian inhabitants in favor of its citizens and Israeli Jewish population in the areas

1511 Aharon Barak, Human Dignity: The Constitutional Value and the Constitutional Right, translated by Daniel Kayros. (UK: Cambridge University press, 2015), xviii.

1512 Rex D. Glensy, The Right to Dignity. Columbia Human Rights Law Review, Vol. 43 (2011): 56–142, 86.

1513 Bruce Abramson, A Commentary on the United Nations Convention on the Rights of the Child – Article 2: The Right of Non-Discrimination, Vol. 2 (Leiden: Brill, 2008), 33; see also Barak, Human Dignity: The Constitutional Value and the Constitutional Right, 1–16.

which are controlled by the Israeli military forces. In this situation, the international law norms as well as the Israeli laws are applicable. Whether the two cases occur on the basis of different grounds is a questing that will be elaborated on in the following discussion.

The division that was created in Palestine by the British Mandate paved the way for Israel to adopt certain policies that have led to discrimination based on different grounds. Diverse Israeli policies have been implemented against Palestinians since 1948; these policies include house demolitions, deportations, restrictions on residency and family unification, confiscation and expropriation of lands, restriction on movement, and limitations on liberty of the Palestinians for the benefit of the Israeli Jewish communities and building settlements in the West Bank and the Gaza Strip.[1514] Israel has continuously justified the restrictions on Palestinians as based on security considerations, not as a result of racist motives.[1515] As "hundreds of thousands of Israeli citizens live in Settlements throughout the Occupied West Bank, all were established in contravention of international humanitarian law, some even in contravention of Israeli law"[1516] and the lands have been expropriated or confiscated from the Palestinians for the purpose of building settlements.[1517] In the same areas, Palestinians and Israelis are de facto treated differently.

The separation of Palestinians and Israeli settlers, who live in the Occupied Territory, has led to inequality in using roads, infrastructures, and basic services.[1518] The system of roads for Israelis only has spread throughout the West Bank. Palestinians are completely prohibited from using several main roads and highways, which have been built on privately owned Palestinian lands, such as Route 60 and Route 443. Israelis travel on these roads freely without any restrictions.[1519] Palestinians are prohibited from using most roads and are faced with a strict complex system of checkpoints, physical constraints,

1514 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem. Comprehensive Report, written by Eitan Felner, (May 1995), 3.

1515 Id.

1516 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, 47 Years of Temporary Occupation, June 2014.

1517 Id.

1518 The Committee on the Elimination of Racial Discrimination, Consideration of Reports No. CERD/C/ISR/14-16 (2012), 24.

1519 B'Tselem – Annual Report 2011, 56.

and blockades.[1520] Israel's discriminatory road regime has become a policy that is followed by the military commanders in the areas of the West Bank and the Gaza Strip.[1521] The implementation of the roads policies in the West Bank "was never put on paper, neither in military legislation nor in any official decision … the regime by [Israeli] soldiers and border police officers is based solely on verbal orders given to the security forces."[1522] In justifying its policy, Israel contends that "the restrictions on Palestinian travel along these roads result from imperative security considerations and not from racist motives."[1523] Moreover, the forbidden road policy is based on the grounds that "all Palestinians are security risks and therefore it is justifiable to restrict their movement."[1524] This policy has been implemented as a collective punishment against all Palestinians.

All resources are disproportionately distributed, where Palestinian cities, towns, and villages lack water and electricity in the West Bank, and the Gazans have immense shortages of water and electricity.[1525] In the Gaza Strip, for several years, Palestinians received around eight hours of electricity per day; since the beginning of the year of 2017, they have received only two to four hours of electricity per day.[1526] This crisis started with the shutdown of the Gaza Power Plant, and the Gaza Strip functions on minimum capacity.[1527] Water remains the ongoing and unsolvable dilemma as Israel controls more than 80% of the water resources of the West Bank, and the consumption of water actually reflects direct inequalities.[1528] It is important to bear in mind that these resources are the natural resources of Palestinians, which are

1520 United Nations Human Rights Office of the High Commissioner, Freedom of Movement (UN Doc. No. A/HRC/34/38), 61.

1521 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank, 4.

1522 Id., 3.

1523 Id.

1524 Id.

1525 Human Rights Council, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan, A/HRC/31/43 (2016).

1526 Haaretz, Gaza Power Watch: How Many Hours of Electricity Did Gaza Get Yesterday? July 13, 2017.

1527 UNSCO, Remarks by United Nations Special Coordinator for the Middle East Peace Process, Nickolay Mladenov, at the Ad Hoc Liaison Committee (AHLC) meeting in Brussels, Brussels, May 4, 2017.

1528 European Parliament, Water in the Israeli-Palestinian Conflict. Briefing, January 2016.

protect by the Hague Regulations.[1529] The average daily Palestinian consumption of water in the West Bank for domestic, commercial, and industrial use is 39–79 liters per person, while the Israeli settlers' consumption is 287 liters per person.[1530] Every year, especially in the summer, Palestinians in the West Bank suffer from "harsh effects of a drastic cut in the water supplied" to them by Israel.[1531] In the Gaza Strip, the water situation constitutes a crisis because "90 to 95% of Gaza's main water supply is unfit for drinking and problematic even in terms of agricultural use."[1532]

For example, the small Palestinian village of Jubbet al-Dhib, which is located in Area C south of Bethlehem, is only accessible by foot on a 1.5-kilometer dirt road.[1533] It has no school, no water, and no electricity; furthermore, the Israeli authorities do not invest in building any infrastructure and continuously prevent the inhabitants from doing so.[1534] The Israeli authorities have rejected several requests to connect the village to the Israeli electric grid and rejected an international fund to provide the village with solar-powered lights.[1535] Only 350 meters away, the Israeli Jewish settlement of Sde Bar, which was built on Palestinian land, has a multi-million dollar highway, unlimited electricity power, a high school, swimming pools, and several medical clinics, which the Palestinian inhabitants of Jubbet al-Dihb are prohibited from using.[1536]

Such policies not only involve forbidden roads and resources, but they also comprise extensive land expropriations, limited buildings for the Palestinian population, and demolition of Palestinian houses.[1537] At the same time, extensive planning and construction are implemented to build Israeli Jewish

1529 The Fourth Hague Convention of 1907, Article 55.

1530 B'Tselem, Water Crisis: Discriminatory Water Supply, 27 September 2016.

1531 Amira Hass, Israel Admits Cutting West Bank Water Supply, but Blames Palestinian Authority. Haaretz, June 21, 2016 9:40 a.m. Accessed on 19 July 2017 at 17:23.

1532 B'Tselem, Gaza Strip: Water Crisis in Gaza Strip – Over 90 % of Water Un-potable, 6 February 2014.

1533 Human Right Watch, Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories, 1–2.

1534 Id.

1535 Id.

1536 Id.

1537 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem. Comprehensive Report (May 1995), 38.

neighborhoods in the West Bank, including East Jerusalem.[1538] The Palestinian land is exhausted by the use of the Israeli settlers. As of the outset of Oslo Accords, more than "1 million Palestinians in the West Bank had access to 273 sq. km or less than 5 percent of the West Bank … [while] 114,600 Jewish settlers had access to 3,850 sq. km … [Similarly] [i]n the Gaza Strip 4,800 Jewish settlers had access to 148 sq. km while 717,000 Palestinians had access to 222 sq. km."[1539] The Israeli authority has prohibited Palestinians from building on more than 60% of the West Bank, which has caused a critical housing shortage, while it implements extensive plans to extend the Israeli settlements and the Israeli industrial areas.[1540]

Some settlements in the West Bank are built on privately-owned Palestinian land without an official approval of the Israeli authorities. Even though the construction of some Jewish settlements was not necessarily aided and carried out by the Israeli government and the military, the Israeli authorities decided to approve some of these settlements and declared the land, on which these settlements are built, as state land.[1541] To the contrary, in the same areas, the Israeli authorities have demolished hundreds of Palestinian homes every year leaving thousands of Palestinians homeless. In 2010 and 2011, 108 and 176 housing units, respectively, were demolished leaving 1,801 Palestinians homeless.[1542] In comparison, the Israeli government has approved the construction of several thousand settlements in January 2017, of which 566 units will be built in East Jerusalem. They have announced plans for the approval of 11,000 additional units, while Israel executed demolitions of 88 Palestinian homes in East Jerusalem in 2016.[1543]

Two separate legal systems have been enforced in the West Bank. One serves the Israeli settlers and the other militarily controls the Palestinian civilians. Palestinians live under the Israeli military laws and regulations, while Israeli settlers are protected under the domestic Israeli law. Israel implements "two entirely separate legal systems and sets of institutions for Jewish communities grouped in illegal settlements on the one hand, Palestinian populations living

1538 Id.

1539 Badil, Occasional Bulletin No. 19 (2014).

1540 B'Tselem, Human Rights in the Occupied Territories, 2011 Annual Report, 54.

1541 Id., 35.

1542 Id., 52.

1543 United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/34/70, 13 April 2017, Para 13.

in Palestinian towns and villages on the other hand."[1544] Israeli extremist settlers have harassed and committed violent acts against the Palestinian civilians, such as physically harassing the local villagers, uprooting and burning their crops, damaging their land, and burning and attacking Palestinian houses and mosques.[1545] For instance, on the first day of 2015, around 5,000 olive trees were uprooted by Israeli settlers in the village of Turmus'ayya near the city of Ramallah.[1546]

Israeli authorities systematically fail to respond to and stop the Israeli settlers' aggression against Palestinians.[1547] When Israeli security forces intervene in these attacks, their purpose is to disperse the Palestinians, instead of protect them from the settlers' attacks.[1548] This means that the law enforcement in the occupied Territory only serves the Israelis, even in cases where violent acts are committed by them. The Human Rights Council, in its report on the human rights situation in Palestine and other occupied Arab territories,[1549] indicated that whenever acts of violence are directed to Palestinians by Israeli settlers, there is a failure to carry out effective and proper investigations and prosecutions against the perpetrators.[1550] However, whenever there are acts of violence committed by the Palestinians against settlers, these violations are promptly and immediately investigated and properly addressed.[1551] In 2012, according to the Committee on the Elimination of Racial Discrimination, the

1544 The Committee on the Elimination of Racial Discrimination, Concluding Observations No. CERD/C/ISR/14-16 (2012), 24.

1545 United Nations, Office for the Coordination of Humanitarian Affairs, Israeli Settler Violence in the West Bank, November 2011.

1546 United Nations Office for the Coordination of humanitarian Affairs, the Occupied Palestinian Territory, West Bank: Largest Number of Trees Recorded Vandalized by Israeli Settlers in a Single Incident since 2005. The Monthly Humanitarian Bulletin, January 2015.

1547 United Nations, Office for the Coordination of Humanitarian Affairs, Israeli Settler Violence in the West Bank, November 2011.

1548 United Nations Human Rights Office of the High Commissioner, Update on Settler Violence in the West Bank, including East Jerusalem, October 2013.

1549 Human Rights Council, Human Rights Situation in Palestine and other Occupied Arab Territories: 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, UN Doc. No. A/HRC/22/63 (7 February 2012).

1550 Id., 44.

1551 Id., 43.

number of violations intensified in all aspects of Palestinian lives. There were increases in "racist and xenophobic acts, manifestations and discourse,"[1552] in particular against Palestinians residing in the Occupied Territory, including East Jerusalem. The Committee on the Elimination of Racial Discrimination concluded that the policies and practices of the Israeli government constituted a de facto segregation in the Occupied Palestinian Territory.[1553]

In addition to the aforementioned Israeli discriminatory practices, the question remains whether the Palestinian Authority has committed practices that constitute discrimination. The Fatah-led Palestinian Authority in the West Bank and the Hamas government in the Gaza Strip have implemented discriminatory policies against certain groups within the Palestinian population. Hamas affiliates in the West Bank; Fatah affiliates in the Gaza Strip. Other activists are still subjected to detention without formal charges only because of their political affiliation or political views.[1554] Some Palestinians are discriminated against on the ground of their political affiliation, especially regarding employment in the public sector.[1555] Several petitions were filed before the Palestinian High Court of Justice in Ramallah and Gaza, which challenged the legality of political detentions and restrictions on personal liberties.[1556] Some of the Court decisions have been discussed in the previous chapters on the right to movement. In addition, women are disadvantaged in the job market, where preference is usually given to males. The Palestinian Authority has not taken any measures to enhance women's participation in the job market.[1557] The policies of the Palestinian and the Israeli governments in the Palestinian Territory raise the question of whether they constitute discrimination against the Palestinian local inhabitants under the provisions of international law. The following sections will examine the obligations of states to ensure equality and prohibit discrimination under the applicable principles of international law.

1552 The Committee on the Elimination of Racial Discrimination, Concluding Observations No. CERD/C/ISR/14-16 (2012), 23.

1553 Id., 24.

1554 The Independent Commission for Human Rights, 21st Annual Report, 27–28.

1555 The Independent Commission for Human Rights, 22nd Annual Report, 94.

1556 See Sarhan Khatab v. The Preventive Security Forces of the Palestinian Authority (2003); Kamees Al-Masri v. The Preventive Security Forces of the Palestinian Authority (2002).

1557 The Independent Commission for Human Rights, 22nd Annual Report, 105.

4. The Right to Equality and Non-Discrimination in International Law

The principles of equality and non-discrimination are enshrined in international human rights and international humanitarian laws. These laws have been given special weight to protect such principles and have steered their attention to defend and protect them as fundamental basic rights. This section examines the protection of the right to equality and non-discrimination and underlines the obligations of the Israeli government and the Palestinian Authority under the applicable international human rights and humanitarian laws. It continues to employ these laws in order to answer the question on whether the practices of Israel and Palestinian Authority are discriminatory.

4.1. The Right to Equality and Non-Discrimination in International Human Rights Law

The Charter of the United Nations highly considers the significance of equality and non-discrimination. The Charter is, in fact, based on the principles of dignity and equality for all human beings.[1558] These principles are repeatedly emphasized in several articles. Notably, the charter reaffirms in its preamble that the fundamental human rights must be enjoyed in dignity and equality among men, women, and nations.[1559] In Article 1, the UN Charter also underlines equality as a fundamental principle of enjoying all rights among nations.[1560] The UN Charter has laid down the cornerstone for the principle of equality and non-discrimination, as it assured that all nations have equal rights. Although non-discrimination is broadly included in the Charter and is "the only unambiguous provision,"[1561] the United Nations Declaration on the Elimination of All Forms of Racial Discrimination has explicitly focused on protecting all people from all forms of discrimination. The Declaration has based its provisions on the principles of dignity and equality. In Article 1, the Declaration prohibits all forms of discrimination between human beings

1558 The Charter of the United Nations of 1945.

1559 Id.

1560 Id. Article 1.2 To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

1561 Thomas Buergenthal, The Normative and Institutional Evolution of International Human Rights. Human Rights Quarterly Vol. 19, Number 4, November 1997.

based on any ground.[1562] The UN declaration not only prohibits discrimination committed by states, but it also prohibits all other actors, groups, or individuals to commit acts of discrimination. Article 2 states, "Any institution, group, or individual shall not make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups, or institutions on the ground of race, colour or ethnic origin."[1563] The UN Declaration is not legally binding; however, it sets the fundamental principles upon which other international conventions on discrimination are built.

The principles of equality and non-discrimination in international human rights are also enriched in the Universal Declaration of Human Rights (UDHR). The preamble starts by affirming "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."[1564] The first article reflects the fundamental fact of the normative standard of international human rights.[1565] Article 1 reads: "All human beings are born free and equal in dignity and rights."[1566] All individuals, regardless of their race, color, nationality, origin, and religion, have the right to live in equality without any forms of discrimination. This article emphasizes the equality as it should be derived from the spirit of all human beings because "[t]hey are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."[1567] Article 2 explicitly provides that all people are entitled to enjoy all rights which are set forth in the declaration without any distinction on the basis of race, language, religion, national, or birth.[1568] Furthermore, no distinction "shall be made on the basis of the

1562 The United Nations Declaration on the Elimination of All Forms of Racial Discrimination Proclaimed by General Assembly resolution 1904 (XVIII) of 20 November 1963, Article 1 "Discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples."

1563 The United Nations Declaration on the Elimination of All Forms of Racial Discrimination Proclaimed by General Assembly resolution 1904 (XVIII) of 20 November 1963, Article 2.

1564 The Universal Declaration of Human Rights of 1948, the Preamble.

1565 Sigrun Skogly, "Article 2," in Edie, Alfredsson, Melander, Rehof and Rosas, eds. The Universal Declaration of Human Rights: A Commentary, 57.

1566 The Universal Declaration of Human Rights of 1948, Article 1.

1567 Id.

1568 Id., Article 2.

political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."[1569]

The preamble of the UDHR and its first and second articles set forth the basic provisions of the protection against discrimination and define the basic assumption of equality, non-discrimination, and fundamental freedoms of all human beings, which cannot be denied a person. The enjoyment of the granted rights and freedoms on the basis of equality and non-discrimination is the core of the UDHR protection. Equality and non-discrimination in the UDHR is not exclusively bound to ensure the respect of dignity and human rights; it extends to guaranteeing equality before the law, courts, and tribunals. Article 7 ensures non-discrimination before the law as "[all persons are] equal before the law and are entitled without any discrimination to equal protection of the law."[1570] In addition to equality, people are protected against discrimination: "[all people] are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[1571] Article 10 states, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations …"[1572] The number of Articles dealing with non-discrimination and equality indicate the significance and the importance of these principles. The philosophy of the UDHR relies primarily on the rights to and the principles of equality and non-discrimination.

Two other aspects of equality in the UDHR are equality before the law and equal protection by the law. Equality before the law is the "status or condition of being treated fairly according to regularly established norms of justice."[1573] This view indicates that the laws must treat all people without any distinction. Equal protection by the laws means that "legislation that discriminates must have a rational basis for doing so, and if the legislation affects a fundamental right or involves a suspect classification (such as race) is unconstitutional …"[1574] Therefore, equal protection under the law is granted to persons

1569 Id.
1570 The Universal Declaration of Human Rights of 1948, Article 7.
1571 Id.
1572 Id., Article 10.
1573 Garner, ed., Black's Law Dictionary, 653.
1574 Id., 654.

so they will be treated the same as other persons or classes in like circumstances.[1575] Those who are disadvantaged in the society, must be granted protection to ensure integration. This refers to the importance of the principle that "human rights are equal rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or not at all) … [and] inalienable rights: one cannot stop being human, not matter how badly one behaves."[1576] To elaborate, all people must be equally treated and must not be deprived from their guaranteed rights under any circumstances. Those who need special treatments, such as children, pregnant women, handicapped persons, must be enabled to fully enjoy their rights in accordance with the international human rights provisions.

Conventional human rights instruments have reflected the principles of equality and non-discrimination. The International Covenant on Civil and Political Rights (ICCPR) obligates each state party to respect and protect all rights without any discrimination on any ground. Article 2(1) states, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[1577] It is common for a state party to be obligated to respect individuals' rights in its territories or under its jurisdiction whether citizens or foreigners. Discrimination must not be practiced in any situation, neither in times of war nor in times of peace. Article 4 of the ICCPR asserts that the principles of equality and non-discrimination should be respected at all times including times of emergency.[1578] In light of Article 4(1), in cases of emergency, measures "do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."[1579]

The Declaration of Minimum Humanitarian Standards affirms that measures of derogations from human rights obligations are restricted and limited; such

1575 Id.
1576 Jack Donnelly, Universal Human Rights in Theory and Practice, 2nd ed. (USA: Cornell University Press, 2003), 10.
1577 International Covenant on Civil and Political Rights of 1966, Article 2 (1).
1578 Id., Article 4.
1579 Id., Article 4(1).

measures must not involve any discriminatory acts on any grounds.[1580] States might face situations of emergency or fall "under a serious or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm."[1581] Even under such circumstances, states should not involve any discriminatory acts based on any grounds.[1582] Discrimination has no exception whatsoever that justifies or allows distinction. Article 26 of the same covenant assures that all people should be equally and without any discrimination protected by the law, it states, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law … the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[1583] This article obligates states to regulate their laws and policies on the basis of equality and non-discrimination. Similarly, all people are entitled to equal protection by the law. Thus, all political and civil rights should be safeguarded without discrimination of any kind.

By comparison, the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the enjoyment of all rights with no discrimination or distinction repeating the similar language that is found in the UDHR and the ICCPR. Article 2(2) of the ICESCR states, "The States Parties … undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[1584] The ICESCR does not adopt the right to non-discrimination as a separate protected right; however, it provides an absolute guarantee to enjoy the protected fundamental rights without any discrimination. State parties must undertake all measures to ensure that the protected economic, social, and cultural rights are exercised and enjoyed without discrimination. State parties, in both conventions, undertake principles of the Charter of the United Nations and the Universal Declaration of Human Rights, which were

1580 Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Abo Akademi University, in Turku/ Abo Finland, 2 December 1990.

1581 Garner, ed., Black's Law Dictionary, 636.

1582 International Covenant on Civil and Political Rights of 1966.

1583 Id., Article 26.

1584 International Covenant on Economic, Social and Cultural Rights, Article 27. Article 2(2).

cited in the conventions' preamble in order to provide "an expression of objectives of the treaty."[1585]

Equality and non-discrimination attracted the attention of the international treaty-makers, and efforts were successful to create special conventions vis-à-vis equality and non-discrimination. The International Convention on the Elimination of All Forms of Racial Discrimination is the turning point that highlights the significance of the prohibition of all racial discrimination. It is considered "the most important of the general instruments … that develop the fundamental norm of the United Nations Charter."[1586] One of the main purposes of the convention is to assure that all human beings are protected equally before and by the law with no distinction or discrimination, as in its preamble, the convention reads, "Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation … [and] [r]esolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations."[1587] The preamble reflects the fundamental values of the convention, emphasizes its aim to eliminate all forms of discrimination, and supports the enjoyment of the protected rights.[1588] It presents the Convention as a logical and crucial development of the principles of human rights.[1589]

In addition, the main purposes and functions of the de facto equality are essential for the interpretation and comprehension of the Convention. Article 5 lists the rights "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone."[1590] The

1585 Egon Schwelb, The International Convention on the Elimination of All Forms of Racial Discrimination. The International and Comparative Law Quarterly, Vol. 15, No. 4 (Oct. 1966), 996–1068, 1030.

1586 Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination." The American Journal of International Law, Vol. 79, No. 2 (Apr. 1985): 283–318, 318.

1587 International Convention on the Elimination of All Forms of Racial Discrimination of 1965.

1588 Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination," 288.

1589 Patrick Thornberry The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary. (UK: Oxford University Press, 2016), 93.

1590 International Convention on the Elimination of All Forms of Racial Discrimination of 1965, Article 5.

article, in fact, offers wide protection to eliminate all forms of discrimination. It protects the right to equality before the tribunals, the right to protection against violence, the protection of all political and civil and rights, the right to movement, the right to property, the right to freedom of expression, economic and social rights, the right to health and medical care, the right to access to public services, etc.[1591] The convention also obligates state parties to undertake and enact measures to prohibit racial discrimination acts, laws and policies, condemn such discrimination, protect people against it, and assure that these states and their institutions are not involved in any kind of discrimination.[1592] Article 3 particularly prevents states to undertake polices of segregation and apartheid. It states, "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."[1593]

The article covers three main elements regarding the prevention of discrimination and segregation. First, state parties must condemn all acts of segregation or discrimination, protect all people against such acts, and assure that the state party and its institutions are not involved in any form of racial

1591 Id., Article 5 "(a) The right to equal treatment before the tribunals and all other organs administering justice; (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service; (d) Other civil rights, in particular: (i) The right to freedom of movement and residence within the border of the State; (ii) The right to leave any country, including one's own, and to return to one's country; (iii) The right to nationality; (iv) The right to marriage and choice of spouse; (v) The right to own property alone as well as in association with others; (vi) The right to inherit; (vii) The right to freedom of thought, conscience and religion; (viii) The right to freedom of opinion and expression; (ix) The right to freedom of peaceful assembly and association; (e) Economic, social and cultural rights, in particular: (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) The right to form and join trade unions; (iii) The right to housing; (iv) The right to public health, medical care, social security and social services; (v) The right to education and training; (vi) The right to equal participation in cultural activities; (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks."

1592 Id.

1593 Id., Article 3.

discrimination. Second, the state parties must undertake to prevent any actions that constitute racial discrimination by taking measures to stop discrimination from occurring. Third, the state parties must prohibit and eradicate all discriminatory practices by enacting laws that criminalize such practices. State parties are obligated to ensure that discrimination, segregation, or apartheid policies do not fall within their territory and the territory under their jurisdiction. In fact, "each party would have assumed the obligation to respect and ensure the rights recognized in the Covenant both to all individuals within its territory and to all individuals subject to its jurisdiction."[1594] According to the aforementioned conventions, the state party should ensure that all institutions, bodies and entities whether governmental or private, respect the principles of equality and non-discrimination. Other international human rights instruments have gone further in protecting certain groups against racial discrimination such as the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.[1595]

1594 Meron, "Extraterritoriality of Human Rights Treaties," 79.

1595 The Convention on the Elimination of All Forms of Discrimination against Women, in its preamble, states that nothing within the international human rights Covenants obligates state parties to guarantee "the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights." (Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with Article 27(1). Thus, there is a need to a special international covenant that protects women against discrimination based on sex "which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women … of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."(Convention on the Elimination of All Forms of Discrimination against Women). Similarly, the Convention on the Rights of the Child has assured that no discrimination shall be made against children based on any ground, and each child is entitled to enjoy his/her fundamental rights without any distinction. (Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49, Article 2 "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status, 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status,

The International Court of Justice affirmed that equality in law prevents the occurrence of discrimination of any kind.[1596] The grounds, upon which discrimination in law is prohibited, are similar in all the discussed international conventions and declarations, and include race, color, sex, language, religion, political or other opinion, nationality, social origin, property, birth, or other status. The list in human rights treaties does not confine the grounds upon which discriminations might occur, as the term *other status* allows for other grounds. For instance, discrimination on the grounds of race or religion is prohibited, which provides that a state is not allowed to apply any distinction, preference, or exclusion between any groups because of their racial and religious differences.[1597] Discrimination occurs whenever "a distinction is based upon the classification of persons by rubrics … without taking into account individual qualities."[1598] The state parties have the power to adopt and "determine appropriate measures to implement relative provisions"[1599] Yet, measures taken should conform with the principles of equality and non-discrimination and must guarantee equal treatment for all persons.[1600] The protecting measures should be within the laws, the legislations, the policies, the services and administration, and the Court decisions as discrimination might be practiced by the public authorities, the community, or private persons and bodies.[1601]

Discrimination consists of different characterized types. It might be (1) a formal discrimination that appears in law and policies,[1602] in a state's constitution, laws, and written policies. Formal discrimination is usually based on grounds such as race, gender, or religion, meaning that there are different laws for different groups.[1603] (2) Substantive discrimination which appears

activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

1596 Advisory opinion on Minority Schools in Albania, PCIJ Series A/B no 64, ICGJ 314 (PCIJ 1935), 6th April 1935, Permanent Court of International Justice (historical) [PCIJ].

1597 Yoram Dinstein, "Discrimination and International Human Rights," Israel Yearbook of Human Rights, Vol. 15 (1985): 11–27, 13.

1598 Id., 14.

1599 UN Human Rights Committee General Comment No. 18 (1989), § 4.

1600 Id.

1601 Id., § 9.

1602 Ssenyonjo, Economic, Social and Cultural Rights in International Law, 87.

1603 The Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009) E/C.12/GC/20.

in the state's law and polices that seek unequal enjoyment of rights,[1604] frequently affects persons who belong to a specific group and give advantages to other groups of people. (3) Direct discrimination occurs in situations whereby an individual is treated less favorably than others in a similar situation.[1605] Direct discrimination is defined as "treating one person less favorably than another person on the ground of race (or sex, etc.)."[1606] Finally, (4) indirect discrimination takes place in the implementation of law and polices,[1607] such as implementing human rights conventions disproportionately for the benefit of certain persons.[1608] Indirect discrimination is defined as "an apparently neutral provision that puts members of one race (or sex, etc.) at a disadvantage in comparison to members of the other race (or sex, etc.) and that cannot be objectively justified by having a legitimate aim, and by using a means that is appropriate and necessary for achieving that aim."[1609] In other words, direct discrimination occurs in explicit distinctions of the equals, while indirect discrimination mainly occurs when seemingly neutral norms disadvantage specific groups. It is a source of confusion to differentiate between types of discrimination, especially direct and indirect discrimination. However, all types of discrimination are prohibited. Discrimination may be systemic when it is directed against a certain group on a regular basis, where individuals and groups may be subjected to this repetitive discrimination in both the public and private spheres.[1610] At long last, such systematic discrimination becomes a policy and "can be understood as legal rules, policies, practices or predominant cultural attitudes."[1611] The Committee on the Elimination of Racial Discrimination, in its General Recommendation No. 32, focused on direct and indirect discrimination and stated, "Discrimination under the Convention

1604 Ssenyonjo, Economic, Social and Cultural Rights in International Law, 87.

1605 The Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009) E/C.12/GC/20.

1606 Bruce Abramson, "Article 2: The Right of Non-Discrimination," in A Commentary on the United Nations Convention on the Rights of the Child, eds. Andre Alen, Johan Vande Lanotte, Eugeen Verhellen, Fiona Ang, Eva Berghmans and Mieke Verheyde (Leiden and Boston: Martinus Nijhoff Publishers, 2008), 67.

1607 Ssenyonjo, Economic, Social and Cultural Rights in International Law, 87.

1608 The Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009) E/C.12/GC/20.

1609 Abramson, "Article 2: The Right of Non-Discrimination," 67.

1610 The Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009) E/C.12/GC/2, § 12.

1611 Id., § 24.

includes purposive or intentional discrimination and discrimination in effect, is constituted not simply by an unjustifiable 'distinction, exclusion or restriction' but also by an unjustifiable 'preference', making it especially important that States parties distinguish 'special measures' from unjustifiable preferences."[1612] More precisely, discrimination cannot be justified under any grounds or circumstances despite the type or the practice it takes.

The Committee on the Elimination of Racial Discrimination has assured that the principles of equality and non-discrimination are applicable and must be implemented in the Occupied Palestinian Territory with full respect for human rights and international humanitarian law.[1613] It emphasized that Israel must not discriminate in purpose or in effect against the Palestinian population residing in the Occupied Territory.[1614] There is no legal doubt that the state of Israel, as a state party, is obligated to respect the principles of equality and non-discrimination among all people regardless religion or nationality. The policies of all entities and bodies must respect the constitutional and international principles of equality and non-discrimination. The International Convention on the Elimination of All Forms of Racial Discrimination obligates Israel to undertake measures to prohibit acts of racial discrimination, laws and policies, condemn such discrimination, protect people against discrimination, and assure that Israel, its institutions, and personnel are not involved in any forms of racial discrimination.[1615] Primarily, Article 3 prevents Israel from undertaking polices of segregation and apartheid. This provision applies to all Israeli entities and personnel where they are obligated not to take part of or support any racial discrimination. Likewise, Israel is obligated to prevent all forms of discrimination, segregation, or apartheid, and it is obliged to ensure that practices do not discriminate in purpose or in effect against the Palestinians in the Occupied Territory.[1616] In order to implement the provisions of Article 5, Israel, as a state party, must incorporate them in its domestic legislation. An effective implementation requires state

1612 The Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, Seventy-fifth session, August 2009, § 7.

1613 The Committee on the Elimination of Racial Discrimination, Concluding Observations No. CERD/C/ISR/14-16 (2012), 3. See also No. CERD/C/ISR/CO/13 (2007).

1614 Id.

1615 Id.

1616 The Committee on the Elimination of Racial Discrimination, Consideration of Reports No. CERD/C/ISR/14-16 (2012), 3.

parties, including Israeli, to report to the Committee on the Elimination of Racial Discrimination constantly and conscientiously.[1617]

In its report, the Committee on the Elimination of Racial Discrimination noted that the Israeli government preserves Jewish and non-Jewish policies in addition to the enactment of a number of discriminatory laws on land issues, which disproportionately affect non-Jewish communities.[1618] These policies contradict the provisions of the Conventions. Accordingly, the committee requested Israel to eradicate all forms of segregation and discrimination pointing out the main measures that Israel must follow in order to fulfill its obligations in the Convention.[1619] The Committee expressed its concerns regarding the enactment of the Israeli Land Administration Law of 2009; the 2010 Amendment to the Land (Acquisition for Public Purposes) Ordinance (1943), which discriminates against non-Jews, and strongly recommended Israel ensure equal access to land and property and amend any racist or discriminatory legislation.[1620] The committee stated that "the severe restrictions on the freedom of movement in Occupied Palestine, targeting a particular national or ethnic group, especially through the separation wall, checkpoints, restricted roads and permit system, have created hardship and have had a highly detrimental impact on the enjoyment of human rights by Palestinians, in particular their rights to freedom of movement, family life, work, education and health."[1621]

Numbers of United Nations resolutions and reports, as well as reports by international human rights organizations indicate that human rights are deteriorating as the ongoing violations against the Palestinian inhabitants in the Occupied Territory continually increase.[1622] For example, in Resolution

1617 Micheal Banton, International Discrimination against Racial Discrimination (Oxford: Clarendon Press Oxford, (1996), 318.

1618 The Committee on the Elimination of Racial Discrimination, Consideration of Reports No. CERD/C/ISR/14-16 (2012), 11 and 15.

1619 Id.

1620 Id., 15.

1621 Committee on the Elimination of Racial Discrimination, Concluding Observations No. CERD/C/ISR/CO/13, (2007), 34.

1622 Human Rights Council, Report of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements, UN Doc. No. A/HRC/22/63 (2012); and United Nations General Assembly, Israeli Settlements in the Occupied Territory, including East Jerusalem, and the Occupied Syrian Golan: Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the

No. 29/25, adopted by the Human Rights Council on July 3, 2015, ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem, the Human Rights Council expressed its grave concerns regarding the serious human rights violations and serious breaches of international humanitarian law and warned that the long-standing systematic international law violations against Palestinians allow graver violations without legal accountability.[1623] International humanitarian law is also protective regarding the right to equality and non-discrimination. Its protection is examined below.

4.2. The Right to Equality and Non-Discrimination in International Humanitarian Law

While examining the Palestinian situation under Israeli occupation, it is important to address the right to equality and non-discrimination in times of conflict and occupation. Non-discrimination is guaranteed under the principles of international humanitarian law. The Hague Regulations have not safeguarded equality and non-discrimination as such. However, the customary rules, prepared by the International Committee of the Red Cross, have dealt with non-discrimination and prohibited any distinction based on any grounds. Rule (88) states, "Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited."[1624] Protected persons must be treated equally regardless of their religion, language, race, or nationality.[1625] The rules go further in their prohibition of distinction and discrimination. Rule 87, for instance, obligates states to treat civilians and

Palestinian People and Other Arabs of the Occupied Territories, UN Doc. A/67/375 (18 September 2012).

1623 United Nations General Assembly, Resolution No. 29/25 on ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem, Human Rights Council, 29th session, UN Doc. A/HRC/RES/29/25 (22 July 2015).

1624 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, I: Rules, 308.

1625 Jelena Pejic, Non-Discrimination and Armed Conflict. International Review of Volume the Red Cross, No. 841. March 2001.

persons *hors de combat* humanely without any discrimination.[1626] Indeed, all rights protected by the principles of the customary humanitarian law must be enjoyed equally without distinction or discrimination. Rule 110 states: "No distinction may be made among them [the wounded, sick and shipwrecked] founded on any grounds other than medical ones."[1627] Discrimination based on any ground, while providing medical care, is prohibited.[1628] The principle of non-discrimination underlines all of the international humanitarian law with the essential aims of protecting those who are in need.[1629] The importance of the prohibition of discrimination in armed conflict embodied in statement of the International Committee of the Red Cross in the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the Committee noted, "The principle of non-discrimination is thus a basic tenet not only of international human rights law, but also of international humanitarian law, obliging parties to an armed conflict to treat victims without distinctions of any kind."[1630]

The prohibition of discrimination in the treatment of civilians is guaranteed in Common Article 3 to the Four Geneva Conventions.[1631] The article reads, "Persons taking no active part in the hostilities … shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. …"[1632] The article has protected the principle of non-discrimination and enumerates the "criteria which might be employed as a basis for discrimination against

1626 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, 306.

1627 Id., 400.

1628 Id., 402.

1629 International Committee of the Red Cross statement in the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Durban, South Africa, August 31- September 7, 2001.

1630 International Committee of the Red Cross statement in the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Durban, South Africa, August 31- September 7, 2001.

1631 See Article 3 in Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949. Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, and Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

1632 Id.

one class of persons or another."[1633] These criteria are similar to the ones mentioned in most of international human rights instruments, and are left in an open-ended list by referring to the term *other similar criteria*. This opens doors that allow including any other grounds upon which discrimination might fall. For example, nationality, language, political or other opinions, or social origin are not named in this article; however, the understating of the term *other similar criteria* certainly include them. Other articles in the Fourth Geneva Convention, such as Articles 13 and 27, include health, age, nationality and political opinion.[1634] For instance, disregarding nationality from the provisions of Article 3 "does not in any way mean that people of a given nationality may be treated in an arbitrary manner; everyone, whatever his nationality, is entitled to humane treatment."[1635]

In armed conflicts, protected persons must be treated humanely without any distinctions based on race, color, religion or faith, sex, birth or wealth, or any other basis.[1636] The Article is employed as a basis of the prohibition of discrimination, which is directed against one class of persons or another. The principle of non-discrimination has been given a vital weight in the Fourth Geneva Convention, particularly in Articles 13 and 27. Article 13 states, "The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war."[1637] While Article 27 protects, under all circumstances, a persons' honor and family rights without any distinction based on race, religion or political opinion.[1638] The article states, "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs …

1633 Pictet, Commentary: IV Geneva Convention, 40.

1634 Geneva Conventions (IV) of 1949, Article 27.

1635 Pictet, Commentary: IV Geneva Convention, 40.

1636 Geneva Conventions (IV) of 1949, Article 3: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria …"

1637 Id., Article 13.

1638 Id., Article 27.

[w]ithout prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."[1639] This means that regardless of their age, health, race, religion, political opinion, or sex, all protected persons must be treated equally and non-discriminatorily and are entitled to enjoy the protection of the Fourth Geneva Convention. Overall, "any discriminatory measure whatsoever is banned."[1640] It will be seen that nationality has not been included in Article 27. That does not in any way mean that people of a given nationality may be treated in an arbitrary manner because everyone, regardless of nationality, is entitled to humane treatment, on the one hand. On the other hand, it is quite possible that special security measures may be taken in the case of civilians of a given nationality, but such measures do not affect the treatment of individuals, which must be humane at all times.

Notably, the Geneva Conventions only prohibit adverse distinctions. According to the International Committee of the Red Cross, the concept of *adverse distinction* "implies that while discrimination between persons is prohibited, a distinction may be made to give priority to those in most urgent need of care."[1641] This is reasonable, because in some occasions related to medical care where injured and sick persons need immediate treatment. There are "distinctions … which must be made, such as those, in fact, which are based on suffering, distress, or the weakness of the protected person."[1642] It is a distinction to save lives and act immediately to assist suffering persons. Distinction in medical treatment is not prohibited, in fact, these distinctions do not accurately mean discrimination that disfavors or disregards other groups. It is intended to grant priority for those in crucial situations that affect their lives. At the same time, different elements might be considered. Such elements to be considered include, for example, "a person's age, state of health or sex … [i]t is normal and natural to favour children, old people and women; the Geneva Conventions expressly stipulate that women are to be treated with all the

1639 Id.

1640 Pictet, Commentary: IV Geneva Convention, 206.

1641 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol. I: Rules, 309.

1642 The International Committee of the Red Cross, Commentary of 1958, the Geneva Convention (IV) of 1949, Art. 13. Part II: General Protection of Populations against Certain Consequences of War. Available on the database of the Committee.

respect due to their sex."[1643] The principle of non-discrimination emphasizes the importance of protecting vulnerable persons and those who are the most in need of such protection such as children, the sick, and the wounded. However, this distinction is implemented to respect their special needs.

Israel, as an occupying power, is obligated to respect the rights of the Palestinian people in the Occupied Palestinian Territory. Recalling the protection of Rule 88, discrimination of any kind against Palestinians is prohibited. The Israeli government and the Israeli military commander are obliged to respect the principles of equality and non-discrimination. Hence, the policies of forbidding Palestinian from using certain roads, restricting their right to movement, and confiscating their land in favor of its Israeli citizens contradict the aforementioned rules. Under Israeli occupation, Palestinian people are in need of protection of the provisions of the humanitarian and human rights instruments. The domestic laws of Palestine and Israel are also applicable. They protect the fundamental human rights, but the question is whether these laws protect the right to non-discrimination and prohibit any practices that might constitute discrimination. Notably, the legality of the Israeli military orders and the practices of the Israeli government in the Occupied Territory have been questioned, these questions and issues are examined below.

5. The Right to Equality and Non-Discrimination in Domestic Law

The emphasis of equality in the constitutional provisions promises equal protection by the law. Equality and non-discrimination are the most basic and fundamental principles guaranteed to everyone. The provisions of international human rights and humanitarian law, as mentioned earlier, have set forth the principle of equality and prohibited discrimination on any grounds. Domestic laws must follow these provisions. Palestinian law considers fundamental and basic human rights as a part of the constitutional protection, including the right to equality and non-discrimination, but the Israeli law fails to protect this right. More specifically, the principles of equality and

1643 Id.

non-discrimination in the Palestinian and the Israeli laws will be discussed, respectively.

5.1. Palestinian Law

In its human rights provisions, the Palestinian Basic Law was inspired by the international law principles in general and the international human rights law in particular. The Palestinian Basic Law highlights the principles of non-discrimination and equality in its preamble. The Basic Law includes "personal rights and liberties in a manner that achieves justice and equality for all, without discrimination."[1644] This statement in the preamble indicates that these principles are essential for all people and that the constitution assures the legal protection of equality and non-discrimination. The preamble of the Basic Law has promoted a further provision concerning equality, it states, "The provisional character of the Basic Law shall not abrogate the right of any Palestinian, wherever residing, to exercise equal rights with his/her fellow citizens on the soil of the homeland."[1645] This provision basically does not exclude any Palestinian from its protection whether residing in the Palestinian Territory or outside. This might have implicitly considered the rights of all Palestinians in diasporas around the world. At the same time, the article mentions the right to equality among citizens in Palestine. This article raises the question of whether Palestinians who do not possess Palestinian citizenship have the same right to be treated equally in Palestine. Seemingly, it excludes Palestinians in the diaspora as well as non-Palestinians in Palestine.

The Basic Law, in Article 9, assures that all "Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, color, religion, political views or disability."[1646] This article prohibits discrimination before the law and the judiciary institutions. In fact, the consistent protection of these rights "is a condition for the personal security of all citizens … [this protection occurs] only if an independent judge can be called on."[1647] It indicates that laws, regulations and policies should not be discriminatory. In addition, all Palestinians should be equally treated before the judiciary. The

1644 The Amended Palestinian Basic Law of 2003, Preamble.

1645 Id.

1646 The Amended Palestinian Basic Law of 2003, Article 9.

1647 Ulrich Hafelin, Memorandum concerning the Draft of the Basic Law (summer 1996). Zurich, February 6, 1997. This paper is among documents concerning the Palestinian Basic Law that were collected from the Palestinian Legislative Council in 2014.

article, as it states, applies only to Palestinians in Palestine, which shows a legal and constitutional oddity. Although equality is an internationally guaranteed principle, the Basic Law uses the term *Palestinians* instead of *everyone*. In fact, it raises the question on whether non-Palestinians are protected by the Basic Law. This question is not the focus of this work, but it should be noted that all people should be equal with no distinction to nationality, religion, language, or origin. The Article, nevertheless, does not obligate the Palestinian Authority to take all measures to prevent discrimination. Non-discrimination is also guaranteed in participating in political life. The article states, "Palestinians shall have the right to participate in political life, both individually and in groups."[1648] All Palestinians are entitled to enjoy particular rights in respect with the principles of equality and non-discrimination; they shall have the right to "hold public office and positions, in accordance with the principle of equal opportunities."[1649] The Basic Law guarantees equality and non-discrimination in different circumstances such as employment and participation in political life. However, the Basic Law lacks protection and prevention mechanisms. It is essential that such mechanisms be regulated, because they require state's actions in order to reduce, prevent, and eliminate all forms of possible discrimination in accordance with international norms. Neither the Palestinian High Court of Justice nor the Constitutional Court have ruled yet in cases concerning the principles of equality and non-discrimination.[1650] However, the Palestinian High Court of Justice affirmed, as a general principle, that the principles of equality and non-discrimination on any grounds must be respected.[1651]

5.2. Israeli Law

Currently, in the Israeli basic laws, "The status of the primary rights, such as the right to equality and freedom of equality are not sufficiently clear."[1652] None of the Israeli basic laws guarantees equality and non-discrimination, nor do the Israeli legislations define racial discrimination in accordance with

1648 The Amended Palestinian Basic Law of 2003, Article 26.

1649 Id., Article 26 (4).

1650 No case was found on Al-Muqtafi, which was petitioned before the Courts concerning equality and non-discrimination.

1651 PCC 6/2014 The Palestinian High Court of Justice, sitting as a Constitutional Court, Palestine Gazette No. 119 (29 March 2016).

1652 Navot, the Constitutional Law of Israel, 203.

international law.[1653] The Israeli Basic Law: Human Dignity and Liberty does not include any of these principles. Article 1 states the purpose of this basic law "is to protect human dignity and liberty in order to establish in a basic law the values of the State of Israel as a Jewish and democratic state."[1654] The Basic Law: Human Dignity and Liberty adopts the dual character of the state as named in the Declaration of Independence and points out explicitly that the state is Jewish and democratic. The basic principles of the Basic Law: Freedom of Occupation assure that "fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment."[1655] These provisions might constitute a religion-based discrimination, especially since the protection of other religions is not considered within the provisions of the Basic Laws.

Although the Basic Law: Human Dignity and Liberty does not include the fundamental basic rights such as equality and non-discrimination, the Supreme Court of Israel has recognized the importance of these rights, such as the right to equality and the right to live in dignity.[1656] The Court previously ruled that not only Jews and Israeli citizens have the right to enjoy constitutional and international protected rights, local Palestinian inhabitants also have the same rights.[1657] Therefore, the principles of equality and non-discrimination should be guaranteed to all people in Israel and the Occupied Territory irrespective of their religion, nationality, race or background. The right to equality "dovetails with human dignity."[1658]

Palestinian inhabitants in the Occupied Territory are forbidden from using certain roads that only serve Israelis. They also face other restrictions such

1653 The Committee on the Elimination of Racial Discrimination, Concluding Observations No. CERD/C/ISR/14-16 (2012), 13.

1654 The Israeli Basic Law: Human Dignity and Liberty of 1992, Article 1.

1655 Basic Law: Freedom of Occupation of 1994, Article (1).

1656 Id.

1657 See Beit Sourik Village Council v. The Government of Israel; Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005).

1658 Aharon Barak, Human Dignity: The Constitutional Value and the Constitutional Rights. (Translated from Hebrew by Daniel Kayros), Cambridge University Press, UK (2015). 295, cited as HCJ 7426/08 Tebka v. Minister of Education, para. 12 of Justice Procaccia's opinion (6.2.2011) (Heb.).

as checkpoints, land confiscation, and daily discrimination.[1659] In the following three cases, a comparison will be drawn regarding the treatment of the Palestinians by the military commander and the Israeli Supreme Court in similar situations with Israelis. In the case of Bethlehem, the Israeli military commander restricted the Palestinians' right to movement and the right to property to protect the Israeli Jews' right to worship. In the case of Morar, the military commander limited the Palestinians' right to property and the right to movement because they were subject to violence by Israeli settlers. Irrespectively, whether Palestinians were suspects or victims, their rights have been collectively infringed upon by the military commander. However, Israeli settlers are protected by the military commander even when they are the perpetrators. Although the Israeli Supreme Court applied the principles of international law, in the case of Bethlehem, the Court allowed the military commander to violate two fundamental rights of the Palestinians in order to protect one right of Jews. In Horev, the Court did not allow the Minster of Transportation to partially infringe upon the right to movement of the Israeli secular population in order to protect the religious rights of the Israeli Ultra-Orthodox population. These cases are discussed in the following sections.

5.2.1. The Israeli Supreme Court on the Right to Equality and Non-Discrimination

The Israeli Supreme Court has reviewed petitions from Palestinian and Israeli litigants. In some cases, the Court faced the same question vis-à-vis the same basic human right(s). The case of Bethlehem Municipality v. Israeli Ministry of Defense tested the Israeli Supreme Court's ability in respect to the principle of equality and non-discrimination and to balance between the rights of the Palestinians and the Israelis. Rachel's tomb is a religious site of Judaism located in the occupied West Bank within the borders of the Palestinian City of Bethlehem and 500 meters away from the municipality boundary of Jerusalem.[1660] After September 2000 and following the discovery of an intended attack on a bus of worshippers on their way from Jerusalem to the tomb, the military commander in the West Bank issued an order to confiscate a strip of land in Bethlehem for the purpose of building a bypass road for Jews only who wished to go to Rachel's tomb, and built walls along both sides of the

1659 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank.

1660 Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005), 5.

road.[1661] As the order confiscated areas in the Palestinian cities of Bethlehem and Beit Jallah, and the planned walls would blockade and separate entire neighborhoods, the military commander claimed that the walls would prevent possible shootings from the direction of Bethlehem.[1662] Nevertheless, the petitioners stated that the local population would be harmed since the respondents did not give proper weight to the damage caused to their lives as closing the area constituted a grave violation against their right to movement and their right to property, cutting the petitioners off from their urban city and making their land inaccessible to them.[1663] The military commander changed the route at the end of the road and the respondents claimed that the walls would no longer surround buildings. The petitioners counter-argued that even with those changes, the order still harmed the local population, constituting extreme arbitrariness, and it did not create a balance between the Jews' right to worship and local inhabitants' right to movement, right to property, right to education, and right to health.[1664]

The circumstances of the case put three basic rights on the scale of justice. The right to worship, the right to movement, and the right to property: 1) freedom of worship is recognized as an expression of freedom of religion. The right to worship "is of special importance and weights on the scale of constitutional rights."[1665] Although this right is constitutionally protected, it is not an absolute right. It is, in fact, a right that might be restricted for public interests,[1666] or in order to protect the lives and safety of the worshipers themselves.[1667] In this case, the right to worship not only conflicts with public safety and the protection of lives of worshippers; it also conflicts with the Palestinians' right to movement and the right to property.[1668] The Court, thus, must find a balance between the Israelis' right to worship and the local Palestinians' rights to property as protected persons under international humanitarian law. 2) The right to movement, as discussed in detail in Chapter IV, is an independent basic right and one that is based on liberty and human dignity. Freedom to

1661 Id. See the map of the wall around the area of Bethlehem using the Interactive Map of B'Tselem: https://www.btselem.org/map

1662 Id., 7.

1663 Id., 8.

1664 Id., 7.

1665 HCJ 10356/02 Hass v. IDF Commander in West Bank (March 4, 2004), 19.

1666 Id., 22.

1667 Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005), 23.

1668 Id., 24.

worship is also a basic human right and carries the same weight as the right to movement. Neither of these rights is absolute; both might be exceptionally and temporarily restricted to maintain public order. 3) The right to property is also protected as a constitutional basic right.

Proportionality, as an international principle, must be applied in this case. This means that the balance should allow for the coexistence of the three rights. Yet, an explicit distinction has to be drawn between the holders of these rights and whether they are protected persons under the principles of international humanitarian law. The Court only examined the intensity of the violation in order to decide whether the military order considers the Jews' right to worship over the Palestinians' right to movement without severely harming the essence of the Palestinians' rights.[1669] It differentiated between curfew and/or denying the right to movement from one place to another, which it considers a serious violation, and restrictions on movement in certain areas, which it deems a non-serious violation.[1670] The Court insisted that the continuity of time, in which a restriction lasts, plays a great role in measuring the intensity of the violation and the longer the period of the restriction, the more serious the violation.[1671] The Court admitted that the military order still restricts the Palestinians' rights as they are affected to a certain degree; however, these are not considered significant violations of the right to movement or the right to property.[1672] In this case, the Court stated that there is no need to compare two constitutional rights of equal standing. They summed up the decision by pointing out that the petitioners had not clearly expressed any concern of their right to property, and that the violation was marginal and not serious.[1673] A fair and proportionate balance must be taken into consideration while imposing any restrictions on any right to favor others. In fact, the three rights must be not treated on equal footing regardless of nationality, race, or religion of the beneficiaries, because the Court must respect the benefit of the protected persons, the Palestinians. It is obligated to rule in accordance with the provisions of international humanitarian law without any distinction or discrimination.

1669 Id., 29.
1670 Id., 30.
1671 Id., 32.
1672 Id., 38.
1673 Id., 41–42.

In light of this ruling, three main arguments need to be clarified. First, the order of the military commander is divided into two parts. The first part concerns confiscations of privately-owned Palestinian land, while the second part concerns building walls and separating the Palestinian areas.[1674] That is to say, confiscation violating the right to property, building walls and high-passes, and separating the Palestinian areas are in violation of the right to movement and the right to equality and non-discrimination. The Court did not give a satisfactory reasoning for which the right to movement and the right to property could be restricted in order to assure the enjoyment of the right to worship. The balance is to make sure that all rights are not being violated or all rights are equally treated in the case of a crucial violation. The Court, however, prejudiced the right to worship over the right to property and right to movement. A sense of justice would be given by minimizing the violation on the three present rights.

Second, the Court did not consider the legality of confiscating Palestinian land to build a road in Bethlehem, which serves only Jews. The right to property is protected by international human rights and humanitarian law; yet, property may be confiscated for the public interest of the Palestinian inhabitants.[1675] In this case, the Court should have discussed the legality of the land confiscation. Instead, it decided not to interfere.[1676] The requirements of fairness and impartiality necessitate that the Court deal with all aspects of human rights violations. Third, the authority of the military commander was not disputed. Yet, the military commander justified his order on the basis of security reasons.[1677] Although security necessity has specific elements and conditions,[1678] it was accepted as a reason for an expropriation order. In its deliberation, the Court indicated that the military commander has the authority and the petitioners did not rebut the respondent argument concerning security.[1679] The military commander usually justifies his orders by security reasons. It is quite inflexible that the petitioners have the burden to rebut the military order justification; instead, the military commander should have proven the security necessity that led to such an order. The order of the Israeli

1674 Id., 44.
1675 The Geneva Convention (IV) of 1949.
1676 Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005), 42.
1677 Id., 17.
1678 See Chapter IV: The Right to Movement.
1679 Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005), 17.

military commander has separated and disadvantaged the Palestinian people as a group in favor of Israelis. This military order and the de facto practices constitute direct and indirect discrimination.

The Court concluded that the measures adopted by the military commander to protect worshippers assured the right to worship without serious violations of the local population's right to movement and right to property; therefore, the petition was denied.[1680] The advantage, which was given by the Court to Israelis, was found on the basis of inequality and discrimination. Arguably, the acceptance of the conclusion of the Supreme Court in the case of Bethlehem Municipality shows the contradictions of the balance in basic rights, which are guaranteed under international human rights law, and the protection of the Palestinian civilians and their property under the principles of international humanitarian law.

Under the principles of international humanitarian law, Palestinians must be granted the advantage in this situation, Article 4 of the Fourth Geneva Convention states, "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[1681] Thus, the Israeli military commander has the duty to protect the Palestinian population, and has the authority to impose some restrictions for their safety or in cases of imperative military necessity, not solely for the benefit of the Israeli citizens in the Occupied Territory. The severity of the violations is more important than the number of the rights violated, a principle that the Court has adopted in its decision in the case of Bethlehem Municipality. This principle might be logical. However, what are the reasons behind accepting the violation of different human rights of one group of people to protect the other? The criticism here is not about the severity of the violated human rights, nor on the number of the rights violated. The argument here is that the Palestinians have suffered severe damages and serious violations of their right to property, a right that the Court did not examine, and their right to free movement. The division of the rights, the rights of Palestinians and the rights of Israelis has actually

1680 Id. 2.

1681 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Article 4.

created a sense of discrimination and inequality practices by the military commander, which were adopted by the Court.

Overall, the decision of the Court has legalized the actions of the military commander and severely restricted human rights of Palestinian inhabitants. This poses the question of whether the Court was biased in this case; this will be elaborated on through comparing a similar case. As previously described, equality requires the same treatment of equals considering their differences. That is to say, the government must treat a group the same as it treats other groups in like circumstances. The military commander clearly did not treat Palestinian civilians the same as Israelis, and the Israeli Supreme Court upheld the unequal practices against Palestinians. The unequal treatment by the military commander and the Israeli Supreme Court will be clarified through studying the other cases. The proportionate measure, which could have been implemented, would have imposed temporary restrictions in the area surrounding the tomb during worship times only, considering that the military order came after a planned unexecuted attack. Notably, international humanitarian rules stipulate that land confiscation must be for imperative military necessity, which is the way to win the war.[1682] The confiscation was issued on the basis of religious needs.[1683] These needs neither rely on the grounds of imperative military necessity to win the war, nor grant the Israeli authorities the power to confiscate Palestinian private lands. A restrictive point of view would suggest that the Court should have made the balance under the perspective of protecting the rights of Palestinians without causing serious harm to the Jewish worshipers. The protection of the Jewish worshipers and the violation of the Palestinians' rights contradict the rules of international humanitarian law and human rights law because the occupier's actions must first and foremost benefit the protected persons who are living under the occupation.[1684] This case is presented as a discrimination case because the Court weighted and favored the Jews' right to worship against the Palestinians' right to property and right to movement. The question is whether the Court would have reached the same conclusion if the petitioners were Israelis. The case of Horev answers this question.

1682 The Hague Convention (IV) of 1907, Article. 46; The Geneva Convention (IV) of 1949, Article 53.

1683 Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005), 29–42.

1684 International Court of Justice, advisory opinion (2004), 110. Cited as (CCPR/Co/78/1SR, para.11).

The case of Horev v. the Minister of Transportation posed a question before the same Israeli Supreme Court concerning two conflicting rights, the right to worship and the right to movement. The dispute began when the Israeli Ministry of Transportation closed Bar-Ilan Street to residents to facilitate traffic during the praying time of the Sabbath. Bar-Ilan, approximately 1.2 kilometers long, is a main traffic artery in Jerusalem that connects the entrance of the city to its northern neighborhoods and serves residents of this neighborhood to and from the city and all the traffic to and from the northern part and the entrance of the city, including those who exit the city.[1685] Traffic on this street during weekdays is significant, but, the traffic on Sabbaths and holidays is less than 28% of the weekday traffic.[1686] It has social importance and reflects a deep ongoing political dispute between the Ultra-Orthodox and the secular inhabitants, where tensions and clashes have taken place between the two in Jerusalem over traffic flow on the Sabbath.[1687]

In 1994, the Mayor of Jerusalem assigned a committee to investigate actions of violence and the committee recommended that a number of streets including Bar-Ilan Street be closed during times of prayer on Sabbaths and the Jewish holidays.[1688] The National Traffic Controller followed the order of the Minister of Transportation and closed the street during these times.[1689] Petitioners, who were Israeli residents of the area in Jerusalem, challenged the decision of the Minister on the basis that it interfered with their right to movement.[1690] The respondent stated that the freedom of movement of those who chose to use Bar-Ilan Street was balanced against the possible injury from traffic and the closing was instituted for the safety of their lives.[1691] According to data of the Traffic Controller, the alternative trip would be lengthened by only 1.5 kilometers and the time difference would be only two minutes. The essential purpose was to find the balance between the strictly traffic-related aspects and the attention to the scope of the offense to the Ultra-Orthodox public's sensibilities.[1692]

1685 Lior Horev v. The Minister of Transportation (1997), 3.
1686 Id.
1687 Id., 5.
1688 Id.
1689 Id.
1690 Id., 1.
1691 Id.
1692 Id., 21.

The Court struck down the Traffic Controller's decision and held that the Minister of Transportation, in his capacity as the Traffic Controller, did not adequately consider the interests of the local Israeli residents of Bar-Ilan Street.[1693] Although the Traffic Controller stated that the restriction was imposed for a few hours for the safety of the residents and for the prevention of violence, in its conclusion, the Court stated that the considerations of human feelings including religious feelings have complex connotations in a democratic society, and the protection of human feelings cannot be justified to infringe on human rights, as human rights are prioritized, particularly, that the freedom of movement is of a greater constitutional significance.[1694] Restrictions on the right to movement must not be implemented unless there is a strict and necessary need.[1695] Even in the presence of such a necessity, the restriction should balance between the two conflicting rights. Such a balance is often challenging, given the difficulty involved in identifying the proper weight that must be given to each individual value.[1696] In addition, the harm caused to the feelings of the religious public must also be taken into consideration.[1697] When imposed, the closure prevented the inhabitants of the street from reaching their homes throughout the Sabbath.[1698] Although the travel time difference is only two minutes, the Court believed, "The two extra minutes it takes to arrive through the alternate routes are crucial when it comes to saving human lives."[1699] Unlike the military commander, the Traffic Controller did not involve security reasons in his defense, even though his purpose was to prevent violence and potentially save lives.

Part of the Court's reasoning rested on the principle of proportionality in applying the provisions of international human rights law. The Court considered whether the right to movement was restricted for a proper purpose in a democratic society, for the purpose of protecting religious feelings and the right to worship.[1700] Although democracy recognizes the possibility of restricting human rights to prevent harm to human feelings, the Israeli government must be most careful with legitimizing violations of human rights

1693 Id., 1.
1694 Id., 56–60.
1695 International Covenant on Civil and Political Rights of 1966, Article 12 (3).
1696 Lior Horev v. The Minister of Transportation (1997),19.
1697 Id., 18.
1698 Id., 83.
1699 Id., 84.
1700 Id., 64.

for the purpose of protecting feelings and other rights.[1701] Most importantly, "human rights are not to be infringed … restrictions that are prescribed by statute and enacted for a proper purpose"[1702] should be in conformity with the Basic Law: Human Dignity and Liberty.[1703] According to this reasoning, the Court concluded, "The Minister of Transportation did not make an appropriate factual assessment of the impact of the closure on the secular residents living in the Bar-Ilan Street […] instead, the Minister related to Bar-Ilan Street as a main traffic artery that did not provide direct access to adjacent land owners, whereas the street also provides direct access to adjacent lands."[1704]

In this case, the decision was balanced between the right to movement and the right to worship as closing the street to Israeli residents for a few hours during the Sabbath on Saturday is not proportionate and violates the residents' right to movement since each Israeli citizen is entitled to and guaranteed this basic right. The key issue is the balance between freedom of movement and religious considerations. Although the closure of Bar-Ilan Street would be implemented for a few hours on Saturdays, it would still be opened to security and emergency vehicles during these hours. The Court acknowledged that the partial closure severely infringed upon the right to movement of the secular residents as well as their families and their guests.[1705] The Court, in its decision, was very cautious about legitimizing a restriction on a fundamental human right regardless of whether this restriction was partial or complete.

Although the Court dealt with a similar question in the case of Bethlehem, it reached an opposite conclusion. The two minutes difference was considered a major interference and infringement on the right to movement. The difference is that the Court, in the case of Bethlehem, weighted the right to worship in favor of the Jews and allowed violations against the Palestinians' right to movement and their right to property where it did not hesitate to legitimize violations against Palestinians. In contrast, the Court, in the case of Horev, did not allow a minimal partial violation to the Israelis' right to movement. It should be noted that the Horev and Bethlehem cases were ruled on

1701 Id., 61.

1702 Id., 64.

1703 The Israeli Basic Law: Human Dignity and Liberty of 1992, Article 8: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."

1704 Lior Horev v. The Minister of Transportation (1997), 90.

1705 Id., 85.

in 1997 and 2005, respectively. The Court could have followed its precedent in the Horev case. This conclusion of the comparison between the two cases, indeed, gives a sense of injustice and inequality.

In another case brought before the Israeli Supreme Court, the military commander used different measures to impose restrictions that possibly discriminate against Palestinians. In the case of Morar v. IDF Commander, the petitioners were Palestinian inhabitants of five villages (Yanun, Aynabus, Burin, Al-Tuani, and Al-Jania) near the city of Nablus in the Occupied Territory, who have been separated from their lands by the separation wall that was built according to Israeli military orders.[1706] The petitioners challenged the military commander's decision. They stated that he had unlawfully denied the Palestinian villagers access to their agricultural land without taking necessary measures to prevent attacks and harassments committed against the Palestinian locals by Israeli settlers and without enforcing the law on Israelis in the territory.[1707] The Palestinians sought free access to their land in order to cultivate it in accordance with the provisions of human rights and humanitarian laws.[1708] The respondents claimed that the petitioners had been prohibited access to their land as it was necessary to protect the Palestinians farmers from the attacks committed by Israeli settlers. The respondents brought to the Court's attention that they had been working on law enforcement in the West Bank.[1709] The purpose of the closure, the military commander alleged, was to minimize the possible danger and to protect Palestinians and Israeli settlers.[1710] He claimed that there was a need to impose balanced restrictions on both groups to avoid the loss of human lives of both sides.[1711] The respondents continued their response stating that the closure was imposed because Israeli settlers were harassing Palestinians villagers and the presence of Palestinians on their land constituted a danger to Israelis.[1712] The respondents claimed that

1706 Rashed Morar v. Israeli Commander in Judaea and Samaria (2006), 56. See the map of the villages area using the Interactive Map of B'Tselem at: https://www.btselem.org/map

1707 Id. 65 and 83.

1708 The Hague Convention (IV) of 1907, Article 46; Universal Declaration of Human Rights of 1948, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination of 1965, Article 5.

1709 Rashed Morar v. Israeli Commander in Judaea and Samaria (2006), 83.

1710 Id.

1711 Id.

1712 Id., 61.

the closure, however, would not be absolute. The Palestinian farmers would allowed to access their land during the harvest season only by arranging that with the military commander.[1713] This meant that the Palestinians would have to apply for permission from the military commander, where the latter decided to grant Palestinians permissions concerning access to their land at certain times. The Court held that the measures of denying Palestinians their rights to access their lands for their own protection were not proportionate.[1714] The proper measures, which should have been taken by the military commander, would have been to protect the Palestinian local inhabitants from the attacks by Israeli settlers, provide security arrangements for Palestinians, and impose restrictions on those who broke the law.[1715]

The military commander also has the duty to assure safety, security, and public order in the area.[1716] According to the respondents, the purpose of the closure imposed on Palestinians was to maintain public order in the territory for the security of both Palestinians and Israelis.[1717] The commander has the habit of ordering closures on the Palestinian agricultural areas and imposing restrictions on Palestinians. There have been several incidents where Israeli settlers have harassed Palestinian villagers and farmers, cut down olive trees, and destroyed their privately-owned lands.[1718] The Israeli military commander does not hesitate to impose restrictions on Palestinian villagers, although they use their land as a means of livelihood, and this denies their right to access their agricultural land, especially during the harvest seasons. Simply stated, the Israeli military commander has purposely prohibited Palestinians from their only means of survival.

Two main concerns within this context are 1) the security of Israelis from attacks that might be directed against them, and 2) the security of Palestinians from attacks that are directed against them by Israeli settlers.[1719] Although the military commander has the power to impose restrictions, these must be proportionate and conform with the principles of international human rights and humanitarian law. Israelis and Palestinians are equally entitled

1713 Id.
1714 Id.
1715 Id.
1716 The Hague Convention (IV) of 1907, Article 43.
1717 Rashed Morar v. Israeli Commander in Judaea and Samaria (2006), 68.
1718 Id., 64.
1719 Id.

to enjoy the right to life. The Israeli Basic Law: Human Dignity and Liberty, Articles 2 and 4, protects the right to life, dignity, and physical safety.[1720] In this case, the right to movement and the right to property are the main focus. The importance of the right to movement was examined in Chapter IV and highlighted in the cases of Bethlehem Municipality as a constitutional right. The right to movement is undoubtedly recognized in international law.[1721] It was emphasized by the Court in the following statement: "In our case, we are not speaking of the movement of Palestinians residents in nonspecific areas throughout [the West Bank] but of the access of the residents to land that belongs to them."[1722] In this case, the right to movement was considered as within a private property, and so, restrictions were as minimal as possible and examined inversely from restrictions imposed in general.[1723] The Basic Law: Human Dignity and Liberty constitutionally protects private property. Article 7 explicitly points out, "(b) There shall be no entry into the private premises of a person who has not consented thereto, (c) No search shall be conducted on the private premises of a person, nor in the body or personal effects."[1724] Restrictions on private property are, in fact, an interruption of the enjoyment of the property. Domestic and international laws have regulated property and allowed such interruptions for specific and limited purposes.[1725] The right to property is recognized in international law; thus, Palestinians should enjoy their internationally and constitutionally protected rights. The act of denying Palestinians their right to access to their own land, to cultivate it, and to enjoy their private property violates the Palestinian local residents' right to movement and their right to property.[1726]

Recalling the international principle of proportionality, it is important to answer whether the order of the military commander was proportionate to the harm caused to Palestinians and the gained military benefit. The military commander has the burden to prove the reasonable relation between the adopted measures and purpose. Furthermore, he must prove the adopted measures are not causing harm to local inhabitants, and the adopted

1720 The Israeli Basic Law: Human Dignity and Liberty of 1992.
1721 See Chapter IV: The Right to Movement.
1722 Rashed Morar v. Israeli Commander in Judaea and Samaria (2006), 56.
1723 Id., 69.
1724 The Israeli Basic Law: Human Dignity and Liberty of 1992, Article 7.
1725 See Chapter V: The Right to Property.
1726 The Hague Convention (IV) of 1907, Article 56.

measures are proportionate with the sought result.[1727] Proportionality in this case is detailed in a few points. First, the military commander must protect the security of Israeli inhabitants. The respondents claimed that the presence of the Palestinian farmers on their land, which includes Israeli settlements, increases the possibility of attack on the Israeli settlements.[1728] However, the closure of the area for the purpose of protecting Israelis does have a rational connection.[1729] The solution of the problem is rather simple. The prevention of violence and the protection of human lives can be solved by preventing the Israeli settlers from entering the Palestinian private property. If the violation of the rights of Palestinian farmers was only to protect them, it would have been less complex to provide serious protection for the Palestinians from the attacks of the Israeli settlers, as they threaten the public order and break the law. This leads to the conclusion that the measures adopted by the military commander are unfair, and that the rational connection between the measures and sought purpose is disproportionate. The victims should be entitled to protection rather than being punished and the law breakers should be brought to justice. Such legal procedures are the only way to enforce the rule of law. As the Court expressed its concern regarding the increase of the violations that are committed by Israeli settlers against Palestinian farmers, the Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories shows that "acts of violence committed by Israeli citizens living in the Occupied Palestinian Territory against Palestinians and their property continued to be perpetrated on a regular basis."[1730]

Secondly, a metaphoric example is given. Denying Palestinians access to their land and to cultivate it for the purpose of protecting these Palestinians from attacks directed against them is like a police demanding a person not enter his own house in order to protect him from being hurt by a robber.[1731] This excuse of the military commander was neither valid nor accepted. Thirdly, when the military commander protects Israelis against attacks, he immediately closes areas or restricts the movement of the local Palestinians. Nonetheless, when

1727 Id.

1728 Rashed Morar v. Israeli Commander in Judaea and Samaria (2006), 76.

1729 Id.

1730 United Nations General Assembly, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People, UN Doc. A/67/375 (18 September 2012), 15.

1731 Rashed Morar v. Israeli Commander in Judaea and Samaria (2006), 77.

the military commander seeks to protect Palestinian lives against harassments committed by Israeli settlers, he once again closes the Palestinian areas and restricts the Palestinians' right to movement. In both cases, the rights of the Palestinians are being violated. Therefore, it is clear that the policies of the military commander are discriminatory, disproportionate, and in contradiction with the sense of justice. Fourthly, law enforcement in the West Bank is one of the main duties of the military commander as he has the responsibility to protect Palestinians, as the protected persons in the Occupied Territory.[1732] Law enforcement on Israelis concerning Israeli harassments, including physical attacks, destruction of property, and uprooting trees, directed at Palestinians, has been a disturbing situation in the territory.[1733] These acts are not followed up with police investigations or by filing criminal charges.[1734] This reveals weak law enforcement and reflects a dangerous and unacceptable situation since law enforcement is a fundamental element of the rule of law.[1735] Fifthly, it must be mentioned that the closures of the Palestinian agricultural land by the military commander is overall not proportionate, not only in this case, but also in other cases such as the Seam Zone.[1736] The common sense of justice articulates that the Palestinians, in this matter, must be protected rather than collectively punished. The Court agreed that the military commander should ensure security for Palestinian farmers and protect them during their work on their land. Forces operating in the fields should be directed by special instructions to ensure Palestinians' safety and property. All complaints filed by Palestinian inhabitants should be taken seriously and immediately investigated, and hence, the respondents should act instantly on their initiative to identify lawbreakers and bring them to justice.[1737]

In the case of Road 443, which was discussed in Chapter IV, the military commander closed the road to Palestinians in order to protect the security of Israeli settlers. In the case of Morar, the military commander closed privately-owned Palestinian agricultural lands, and denied the access of its owners in order to protect the security of Palestinians. The principles of equality and non-discrimination articulate that the military commander should follow

1732 The Geneva Convention (IV) of 1949.
1733 Rashed Morar v. Israeli Commander in Judaea and Samaria (2006), 78.
1734 Id., 80.
1735 Id., 81–82.
1736 For details on Seam Zone, see Chapter IV: The Right to Movement.
1737 Id., 83.

the same measures in protecting the lives of Palestinians by prohibiting the Israelis from entering the Palestinian land. This proves that the military commander is adopting discriminatory measures against Palestinians and violating their rights even when they are the victims. The military commander directs severe measures against Palestinians while not taking action to prevent Israeli acts of violence. Although the Supreme Court and the Israeli government recognized that there is a serious need to address issue of violence of the Israeli settlers, "The response by the Israeli authorities to settler violence continues to be ineffectual."[1738] The military commander's decision concerning closing the agricultural Palestinian land to its owners constitutes discrimination; measures should be taken to protect Palestinians and their fundamental human rights. For example, attacks against Palestinians by the Israeli settlers have caused a number of deaths and injuries, and have taken the forms of "beating, throwing stones, and shooting … such repeated acts of violence are perceived by the victims to be a method of intimidation."[1739] This issue necessitates that the military commander and the Israeli authorities act, investigate, and bring to justice settlers who commit these crimes.

The military commander adopted measures of separation of Road 443 between Palestinians and Israelis and enabled only Israelis to enjoy their right to movement while preventing Palestinians from enjoying the same right.[1740] Although the military commander claimed that sharing the same road would lead to clashes and put human lives at risk, the Court disagreed since it constitutes segregation between two groups of people.[1741] This means that security measures involving segregation of travel on specific roads constitute serious violations of the basic human rights of the Palestinian local population. Indeed, the "total segregation … in the use of a road and prevent an entire population group from using the road, give rise to a sense of inequality and even association of improper motives … [it is] an extreme [,] undesirable outcome … [and also] based on improper foundation of racist and ethnic discrimination."[1742] The military commander adopted measures that

1738 United Nations General Assembly, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People, UN Doc. A/67/375 (18 September 2012), 15.

1739 Id., 16.

1740 Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007), 47.

1741 Rashed Morar v. Israeli Commander in Judaea and Samaria (2006), 47.

1742 Id., 48.

constitute a separation of two groups of people. Only Israelis are allowed to use certain roads, and he violated the basic rights of Palestinians, their right to movement, their right to education, their right to property, etc. These measures discriminate against Palestinians and consider them of inferior race or nationality, which is explicitly prohibited by the aforementioned international human rights and humanitarian law. To avoid segregation, in the case of Abu Safiyeh, the Court suggested that each individual case should be considered according to the degree of harm which is caused by the travel restrictions.[1743] The Court agreed that the military commander was imposing total segregation and discriminatory policies, which constituted a serious violation and contradicted the principles of international human rights law, international humanitarian law, and international criminal law.[1744]

In the case of Beit Sourik, although the Court explicitly stated that some parts of the wall's route violated the rights of the local Palestinian inhabitants, the judges stated that they were biased because they were part of the Israeli society and wanted to protect their country.[1745] The Court, in its conclusion, stated, "We are members of Israeli Society …[a]though we are sometimes in an ivory tower, that tower is in the heart of Jerusalem … as any other Israelis; we too recognize the need to defend the country and its citizens against the wounds …"[1746] The Court does not use the same scale in its rulings. In the Horev case, the Israeli petitioners, who live in Jerusalem, opposed the order concerning closing their neighborhood street to avoid traffic and possible injury during Jewish praying times, which would only last for a few hours. They argued that closing the street even for a couple of hours would interrupt their right to movement.[1747] Closing the street during worship time was considered by the Israeli Supreme Court to be illegal, as the Minister of Transportation did not consider the interests of the Israeli residents. Conversely, in the Bethlehem case, confiscating land and preventing Palestinian owners from moving or traveling was not considered by the same Court as a serious violation; therefore, the military commander had the authority to do so. Thus, the Court was

1743 Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007), 47.

1744 See the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; The Charter of the United Nations of 1945; The Geneva Convention (IV) of 1949.

1745 Beit Sourik Village Council v. The Government of Israel, 44.

1746 Id.

1747 Lior Horev v. The Minister of Transportation (1997).

explicitly biased in favor of the Israeli petitions and against the Palestinians and their petitions.

The Israeli Supreme Court did not offer Palestinians a clear avenue for recourse.[1748] The Court took years to accept the applicability of the customary international humanitarian principles.[1749] The Court is "security-minded and government oriented in its decisions relating to the OPT [Occupied Palestinian Territory] is also a view endorsed by Israeli lawyers and academics in Israeli Universities."[1750] Occasionally, the Court rules in favor of Palestinian petitioners. It has "substantially limited its oversight role and provided a legal space"[1751] in which the military commanders and/or the law-makers enact new biased legislations. The Israeli practices against the Palestinians and their rights constitute racism and discrimination that have led to "a policy that indiscriminately harms the entire Palestinian population, in violation of its human rights and of international law."[1752] Importantly, whenever the judicial rulings of the Supreme Court have favored Palestinians, there is a systematic lack of enforcement of these decisions.[1753] For instance, the decision of Road 443 was not implemented until recently and Palestinians are still prohibited from using the road, which is exclusively serving Israelis.[1754] This shows that there is discrimination directed against Palestinians in the Occupied Palestinian Territory. The Committee on the Elimination of Racial Discrimination recommended that Israeli must

1748 Human Rights Council, Report of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements, UN Doc. No. A/HRC/22/63 (2012), 45. Palestinians are not represented in the court fairly. Among all the fifteen Israeli judges in the Israeli Supreme Court, only one judge is of a Palestinian Arab origin. (See the database of the Israeli Supreme Court – Justices of the Court). In this research, the Arab-Israeli Justice, Salim Joubran, appeared in only one of the presented cases, Justice Joubran appeared as a third judge in the case of Morar v. IDF commander.

1749 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 22–23.

1750 Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v. The International Court of Justice," 1431.

1751 Human Rights Council, Report of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements, UN Doc. No. A/HRC/22/63 (2012), 45.

1752 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank, 3.

1753 Human Rights Council, Report of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements, UN Doc. No. A/HRC/22/63 (2012), 45.

1754 B'Tselem, Restriction of Movement: Route 443 – West Bank Road for Israelis Only (2011).

"abrogate or rescind any legislation that does not comply with the principle of non-discrimination."[1755] Although the committee raised such concerns, Israel has not changed any of its discriminatory laws and regulations and has never admitted that such laws are discriminatory.

Professor Dinstein makes his view on the distinction between the actions of the occupier in the Occupied Territory and its own territory. He argues that the distinction between the legitimate and illegitimate practices of the occupier concerning the welfare of the local population of the Occupied Territory can be determined by comparing the practices of the occupier concerning the welfare of its own population.[1756] Basically, discrimination against one person must be compared with the treatment of another person under the same circumstances.[1757] For example, if the occupier imposes ongoing restrictions on movement or continuous land confiscations or expropriations in the Occupied Territory for the safety and the interests of the local population, the core of the comparison is whether parallel practices exist within its own frontiers involving its own citizens. A negative answer means that "the ostensible concern for the welfare of the civilian population deserves being disbelieved."[1758]

This view might serve the benefit of the occupied population to determine the existence of discriminatory policies, but one must be careful not to apply such views on other human rights violations. Hypothetically, if the Israeli government is oppressive against its own people, it does not mean that it is allowed to be oppressive against the Palestinians. The de facto situation, which was established earlier, is that the Israeli authorities implement discriminatory policies against Palestinians in favor of Israelis. This means that whenever discrimination and unequal restrictions are imposed, whether in laws, regulations, policy, practices, or by the judiciary against the occupied Palestinian population in favor of the Israeli citizens, these acts violate the principles of international human rights and humanitarian law. For instance, the fact that the Israeli government confiscates Palestinian land and deprives Palestinians of their private property for the benefit of its citizens is considered discrimination. The comparison

1755 The Committee on the Elimination of Racial Discrimination, Concluding Observations No. CERD/C/ISR/14-16 (2012), 15.

1756 Dinstein, "Legislation Under Article 43 of The Hague Regulations: Belligerent Occupation and Peacebuilding, 9.

1757 Dinstein, "Discrimination and International Human Rights," 11.

1758 Dinstein, "Legislation Under Article 43 of The Hague Regulations: Belligerent Occupation and Peacebuilding, 9.

between the two populations, in fact, makes it more distinguishable and explicit to determine the de facto existence of discrimination and inequality.

6. Conclusion

All human rights are guaranteed and protected. Regardless of the significance of each human right, violations against any of them are prohibited. While human beings are entitled to enjoy their rights, they are guaranteed to enjoy these rights equally and without discrimination. International law has considered non-discrimination and equality as crucial principles for the enjoyment of all human rights. International humanitarian law and international human rights law have clearly forbidden any kind of discrimination.

The Israeli discriminatory strategy against Palestinians in the Occupied Territory was implemented in order to serve Israelis who are living in Occupied Palestine and to assure that they are treated advantageously, which has created a system or separation and segregation.[1759] This policy has steered the study toward more elaboration on the rights to equality and non-discrimination. Israeli residents in Occupied Palestine are subjected to Israeli laws and judiciary and distinguished from the local Palestinians.[1760] Systematic distinction and discriminatory policies have been implemented by the Israeli government, its personnel including the military commanders, and its entities against Palestinians in the Occupied Territory. All institutions in Israel and the military personnel should respect the principle of equality and non-discrimination and amend their laws accordingly. Israel, as an active part of the international community and a state party of a number of international conventions, continually denies that its policies are racist and discriminatory. However, the denial does not change the fact of such practices. Israel should take immediate measures to "prohibit and eradicate any such policies or practices which severely disproportionately affect the Palestinian population in the Occupied Palestinian Territory."[1761] Israel is obligated to change all laws and policies that are applicable in the Occupied Palestinian Territory and

1759 Marwan Bishara, Palestine/Israel: Peace or apartheid: Occupation, Terrorism and the Future. (London and New York ZED Books, 2002), 1–26.

1760 Shehadeh, Occupier's Law: Israel and the West Bank, 7.

1761 The Committee on the Elimination of Racial Discrimination, Concluding Observations No. CERD/C/ISR/14-16 (2012), 24.

contradict the international conventions and the constitutional provisions. It is obliged to include in the valid laws an explicit prohibition of any forms of racial and religious discrimination. It is internationally and constitutionally forbidden, as a state, to ignore or support any discriminatory laws, policies, and actions within its jurisdiction and territories under its effective control. These practiced policies and laws open the question of whether Israel is, in fact, an apartheid state. Although several studies have demonstrated that Israeli policies might constitute a system of apartheid,[1762] this research however, it is not appropriate for drawing conclusions without examining whether Israel is an apartheid state. Therefore, this question is left for further separate research.

1762 Uri Davis, Israel an Apartheid State (UK: Zed books limited, 1987); Marwan Bishara, Palestine/Israel: Peace or apartheid: Occupation, Terrorism and the Future. (London and New York ZED Books, 2002).

Part Three: Enforcement Mechanisms

Chapter VII in Part Three is devoted to proposing possible remedies and mechanisms for Palestinians to redress human rights violation. It also shows research results, which were conducted in field research using different questionnaires. Finally, general conclusions will be drawn in Chapter VIII.

VII. Enforcement Mechanisms for Palestinians to Redress Human Rights Violations: De Lege Lata and de Lege Ferenda

1. Introduction

In the previous three chapters, the discussion has not only focused on the principles of international human rights law and international humanitarian law, it has also highlighted the violations of the fundamental human rights of Palestinians and the practices of the Israeli government and the Palestinian Authority in the Occupied Territory. This discussion leads us to ask whether there are remedies and mechanisms to redress these violations. In this regard, the remedies to limit such violations necessitate a study that touches upon the international mechanisms as well as those available within the Palestinian Authority and Israel, but as different actors regarding their status. This chapter will first be descriptive; thus, it will discuss the right of effective remedy and examine the available mechanisms that Palestinians have at the international and domestic levels. It will further explain their weaknesses and impractical procedures and whether they are fit for the purpose of serving Palestinians. In addition, the results of the field research that was conducted for the purposes of this study will be presented. The questionnaire aims to highlight the Palestinian point of view regarding the Palestinian, Israeli, and international existing mechanisms and their efficiency. Second, this chapter will be normative as it will propose useful, trustworthy, and efficient new remedies and mechanisms to enable the Palestinian victims of human rights violations in the Occupied Territory in order to seek justice. The new suggested mechanisms consist of domestic institutions as well as international

complaint procedures for Palestinians. In addition, the proposed mechanisms highlight a judiciary body that has jurisdiction over human rights violations committed in the Palestinian Territory.

2. The Right to Effective Remedy

Before discussing the right to effective remedy, it is essential to discuss the obligations of states to respect, protect, and fulfill human rights. By ratifying international human rights norms, it is internationally agreed upon that states have obligations and duties to respect, protect, and fulfill human rights.[1763] The obligation to respect means that all States and their personnel must not interfere in the enjoyment of human rights and must not commit or be involved in any human rights violations.[1764] The obligation to protect ensures that other actors or individuals will not violate the enjoyment of the human rights of others, and this requires States to take all necessary measures to protect everyone from the impairment or nullification of their rights by third parties, including non-state actors such as business enterprises and individuals.[1765] It is the responsibility of the State to take appropriate measures, through enacting laws and regulations, to ensure that all persons, under its jurisdiction, are fully protected and violators are held accountable for their acts. The obligation to fulfill obligates states to take affirmative actions to ensure the respect of human rights.[1766] This means that the state must not only ensure the existence of a legal framework that gives effect to the human rights obligations by which it is bound,[1767] but it must also enable the recognition of rights in practice, including by taking effective and appropriate implementation measures to ensure that individuals fully enjoy their rights.[1768]

1763 See generally Human Rights Comm., General Comment No. 31: "The Nature of the General Legal Obligations Imposed on States Parties to the Covenant," 6, UN Doc. CCPR/C/2 1/Rev. I/Add. 13 (May 26, 2004) ("The legal obligation under Article 2, paragraph 1"); ICESCR, Art. 2.

1764 Id.

1765 Human Rights Council, General Comment No 31, para. 8.

1766 Id.

1767 See for example Article 2(2) ICCPR; Articles 2 (a)-(g) CEDAW.

1768 HRC, General Comment 3, Implementation at the National Level, HRI/GEN/1/Rev.1, 1981 (HRC General Comment 3); HRC General Comment No. 31, para. 7; Committee Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008 (hereinafter CAT General Comment No. 2.); CEDAW, General

A remedy is the resort of enforcing a right, preventing a violation, or redressing a wrong.[1769] According to the Doctrine of Justiciability, people should be enabled to "claim for a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur."[1770] This means that individuals must have access to a judiciary system to seek justice. Access to justice involves equality and fairness in the judicial and legal systems.[1771] The right to effective remedy, hence, refers to the ability to have accessible and efficient means to vindicate for one's rights before an independent and neutral entity to obtain satisfactory and equitable reparations.[1772] In cases of injuries or violation, the protection of the right to remedy assures the victims access to seek justice through the state's entities.[1773] The Human Rights Committee connects the right to remedy with establishing appropriate tribunals and administrative procedures in order to address human rights violations under domestic law, including applying international instruments, constitutional provisions, proper investigation of human rights violations, cessation of the perpetual violations, and entitlement to reparations.[1774] The remedies intend to protect the rights of the victims, where everyone has equal protection under the law, and thus, can practice the right to seek judicial remedy.[1775] The overall comprehension of the right to remedy, internationally and domestically, evolves around an effective judiciary and administrative mechanism

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Recommendation 28, The Core Obligations of States Parties under Article 2 of CEDAW, U.N. Doc. CEDAW/C/GC/28, 2010 (hereinafter CEDAW General Recommendation 28); Committee on the Rights of the Child, General Comment No. 5, General Measures of Implementation of CRC, CRC/GC/2003/5, 27 November 2003.

1769 Garner, ed., Black's Law Dictionary, 1485.

1770 Christian Courts, Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability. International Commission of Jurist, Geneva, 2008.

1771 Carolyn Mckay, "Face-to-Interface Communication: Accessing Justice by Video Link from Prison," in Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need, ed. Asher Flynn and Jacqueline Hodgson (USA: Hart Publishing, 2017), 107.

1772 UN Human Rights Committee, General Comment No. 31 (2004), CCPR/C/21/Rev.1/Add.13, §15.

1773 David Schuman, The Right to Remedy. Temple Law Review, Vol. 56 (1992): 1197–1227, 1201–1202.

1774 UN Human Rights Committee, General Comment No. 31 (2004), CCPR/C/21/Rev.1/Add.13, §15.

1775 Christopher c. Joyner, "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability." Denver Journal for International Law and Policy, Vol. 26, No. 4 (1998): 591–624, 592.

to redress violations, which means that a remedy has two potential probabilities, substantive and procedural. Stated another way, an effective remedy consists of a fair process and a judicious outcome.

Numerous international instruments have guaranteed the right to effective remedy for victims of human rights violations. In Article 8, the Universal Declaration of Human Rights guarantees that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[1776] This means that victims of violations of human and fundamental rights are entitled to challenge these violations before a proficient, impartial, and effective national judiciary. This Article does not include the rights that are guaranteed by international law or the declaration itself; rather, it refers to the rights that are protected by the constitution or by the law.[1777] In other words, a fundamental right should be granted to individuals by the national laws, where a victim can enjoy the right to seek a remedy. It raises the question of whether the internationally guaranteed rights qualify to grant victims the right to remedy. The International Covenant on Civil and Political Rights, in Article 2(3), answers this question as it has not specified which laws guarantee these basic rights.[1778] The Covenant obligates states to recognize the individual's right to effective remedy before a competent judiciary, administrative, or legislative authority and to ensure an effective enforcement of such remedies.[1779] The International Convention on the Elimination of All Forms of Racial Discrimination, in Article 6, guarantees the right to effective protection and remedy, through competent national tribunals, against any violation of all human rights and fundamental freedoms, which are protected by the Convention, as well as "the right to seek from such tribunals just and adequate

1776 The Universal Declaration of Human Rights of 1948, Article 8.

1777 Goran Melander, "Article 8," in Edie, Alfredsson, Melander, Rehof and Rosas, eds. The Universal Declaration of Human Rights: A Commentary, 144.

1778 The International Covenant on Civil and Political Rights of 1966, Article 2(3): "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

1779 Id.

reparation or satisfaction for any damage suffered."[1780] Reparations for human rights violations are necessary for any breach of an international duty.[1781] Actually, the Vienna Declaration and the Programme of Action of 1993 provide details on the efficacy of the remedies. Article 27 reads:

> Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programmes of advisory services on a priority basis for the achievement of a strong and independent administration of justice.[1782]

In order to grant victims of human rights violations ways to seek justice, the means must operate properly to achieve the goal of the protection of human rights. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms assures that every person has the right "to benefit from an effective remedy and to be protected in the event of the violation of [human rights and fundamental freedoms]."[1783] In other words, whenever and wherever a violation occurs against one human right or more, the

1780 The International Convention on the Elimination of All Forms of Racial Discrimination of 1965, Article 6: "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

1781 Patrick Thornberry, The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary. (UK: Oxford University Press, 2016), 399.

1782 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Article 27.

1783 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental

victims must be enabled to seek reparation. The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (The Durban Declaration) specifies the necessary measures to provide effective remedies under domestic laws. These measures include available and widely known access to remedies with no discrimination. Complaints must be carried out rapidly without delay, legal assistance must be provided, proper penalties must be taken against the violator, and just and adequate reparation and satisfaction for any damage must be enforced.[1784]

The right to remedy is also found in the provisions of the international humanitarian law. Article 3 of the Hague Convention IV of 1907 states, "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation … [a state] shall be responsible for all acts committed by persons forming part of its armed forces."[1785] In addition, Article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), states, "A party to the conflict which violates the provisions of the [four Geneva] Conventions or of this Protocol shall, if the case demands, be liable to pay compensation … [a state] shall be responsible for all acts committed by persons forming part of its armed forces."[1786] In both articles, a state is responsible for reparations including compensation for the wrong acts that are committed by its forces. Nevertheless, neither of the articles clarifies the means of compensation and who is entitled to such compensation.[1787] In 2000, the President of the International Tribunal for Former Yugoslavia suggested that compensation must be paid to individual victims.[1788] Article 3 of the Hague Convention requires a demand of reparation on compensation but does not obligate states to offer available and accessible mechanisms. In such

Freedoms, adopted by the General Assembly Resolution 53/144 of 9 December 1998, Article 9.

1784 The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance -Durban Declaration, (31 August–8 September 2001), Article 164.

1785 The Hague Convention (IV) of 1907, Article 3.

1786 Protocol Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 91.

1787 Paola Gaeta, "Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?" in International Humanitarian Law and International Human Rights, ed. Orna Ben-Naftali (UK: Oxford University Press, 2011), 308.

1788 See United Nations Press Release, The President of the International Tribunal for the Former Yugoslavia Briefs Security Council, Asks for Change in Court's Statute, SC/6879, 20 June 2000.

cases, individuals can benefit from the revenues and mechanisms that are specified in the Basic Principles on the Right to Remedy and Reparation.

In its 61st Session on April 13, 2005, the Commission on Human Rights drafted and adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, and it recommended adoption by the Economic and Social Council.[1789] The principles present, for the first time at the international level, comprehensive arrangements to "identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law."[1790] Soon after, on March 21, 2006, the UN General Assembly officially adopted the Basic Principles and recommended that all states take these principles into account and bring them into consideration of "law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general."[1791]

The principles are non-derogable and non-discriminatory, and they demand that all victims of human rights violations have the right to remedy, which includes equal and effective access to justice, adequate and prompt reparation for the harm caused, and access to information regarding reparation mechanisms.[1792] The principles acknowledged *gross* violations of international human rights and *serious* violations of international humanitarian law, which means that the views of the principles focus only on the worst

1789 Commission on Human Rights, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, E/CN.4/2005/L.48, 61st session, 13 April 2005.

1790 Id.

1791 General Assembly, Resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. A/RES/60/147, 60th session, Agenda item 71 (a), 21 March 2006.

1792 General Assembly, Resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. A/RES/60/147, 60th Session, Agenda Item 71 (a), 21 March 2006.

violations, not all of them.[1793] In fact, there is nothing that defines gross and serious violations. This raises the question of whether the ongoing violations of several human rights qualify to be gross or serious. In addition, the principles strongly emphasize domestic law implications and contribute broad and symbolic means for victims.[1794] The different forms of reparations consist of restitution, compensation, and guarantees of non-repetition.[1795]

The right to effective remedy is the cornerstone of enforcing human rights and the basis of providing mechanisms to redress violations and hold those who violate the principles of international human rights and humanitarian laws accountable for their unlawful acts. Human rights violations in Palestine are a grave threat to international peace and security.[1796] Justice for all Palestinians in Occupied Palestine without distinction or discrimination must be available through reasonable, possible, and achievable means. On July 3, 2015, the Human Rights Council adopted a resolution to ensure accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem. The resolution warned that the "long-standing systemic impunity for international law violations has allowed for the recurrence of grave violations without consequence, and stressing the need to ensure accountability for all violations of international humanitarian law and international human rights law in order to end impunity, ensure justice, deter further violations, protect civilians and promote peace."[1797] That is to say, all Palestinians must be provided with a just remedy to redress all violations committed against them in the Occupied Territory.

1793 Theo van Boven, The United Nations, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. United Nations Audiovisual Library of International Law, 2010, 2.

1794 Id., 4.

1795 Commission on Human Rights, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, E/CN.4/2005/L.48, 61st session, 13 April 2005.

1796 United Nations Security Council Resolution 54 (1948) adopted at the 338th meeting (15 July 1948).

1797 United Nations General Assembly, Resolution 29/25 ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, UN Doc. A/HRC/RES/29/25 (2015).

International and domestic enforcement mechanisms depend on each other. International mechanisms require certain domestic preconditions, while domestic mechanisms apply international, constitutional, and national legal provisions. For this reason, the available remedies for Palestinians in the Occupied Territory within the national and the international law will be detailed below. It will be accordingly determined whether these remedies are effective, reasonable, and enforceable within the Palestinian context.

3. Enforcement Mechanisms de Lege Lata

3.1. Domestic Enforcement Mechanisms de Lege Lata

The available domestic remedies are the first haven to victims of human rights violations. They are the cornerstone for promoting human rights and preventing violations. Most international human rights conventions obligate state parties to incorporate the principles of human rights within their domestic laws in order to provide different mechanisms to obtain reparation for suffered damages of human rights violations. Palestinian and Israeli national laws partially protect fundamental human rights and freedoms.[1798] Enforcement mechanisms of human rights at the national level, as discussed previously, include constitutional protection and the judiciary. Therefore, the Palestinian and the Israeli legislative and judicial entities, as part of the enforcement mechanisms, should comply with the principles of international human rights law and international humanitarian law. The available domestic remedies in the Palestinian and Israeli systems differ. Human rights violations that are committed by the Palestinian Authority against Palestinians fall under the jurisdiction of the Palestinian judiciary. The violations, which are committed by the Israeli government and its military forces, fall under the jurisdiction of the Israeli High Court of Justice. Therefore, the Palestinian and the Israeli available mechanisms to redress human rights violations, especially the role of the judiciary and human rights organizations in Palestine and Israel, will be evaluated below.

1798 See Chapter III: The Applicable Law.

3.1.1. Domestic Enforcement Mechanisms de Lege Lata in the Palestinian Law

3.1.1.1. The Palestinian High Court of Justice

The Court represents a means for Palestinians to challenge the acts that are committed by the executive and administrative bodies of the Palestinian Authority. The Palestinian High Court of Justice has been established to resume all duties of the administrative court and temporarily sit as the constitutional court.[1799] It has delivered few constitutional judgments, yet, it has ruled in a large number of administrative cases.[1800] It is important to mention that the decisions of the High Court of Justice are not subject to appeal.[1801] In the Alwana v. the Chief of Sharia Courts case and Zeidat v. the President of the Palestinian Authority, the Palestinian High Court of Justice sitting as a Constitutional Court refused to revise the implementation of the constitution.[1802] It argued that any misconduct in implementing the laws does not rest within the scope of the Court's jurisdiction.[1803] This Court is the main entity that reviews the actions of the government. It is discussed below as an available mechanism for Palestinians. The question that remains to be answered is whether the Court plays an effective role and properly functions in enforcing human rights and redressing violations.

Although the judiciary system must be independent and only constituted by law,[1804] it still suffers from the ongoing political interference of the differ-

1799 The Amended Palestinian Basic Law of 2003, Article 98.

1800 See Al-Muqtafi – Palestinian Legal and Judicial System, The Judgments of the High Court of Justice sitting as a Constitutional Court and the Constitutional Court.

1801 The Law of Civil and Commercial Procedures No. 2 of 2001.

1802 3/2010 Mohammad Alwana v. the Chief of Sharia Courts and 2 others, the Palestinian High Court of Justice, 14 March 2011; 1/2011 Sami Zeidat v. the President of the Palestinian Authority and 8 others, the Palestinian High Court of Justice, 31 January 2012. See also 2/2011 Sufian Ejrawi v. the President of the Palestinian Authority and 7 others, the Palestinian High Court of Justice, 6 September 2011.

1803 Sami Zeidat v. the President of the Palestinian Authority and 8 others (2012).

1804 The Amended Palestinian Basic Law of 2003, Article 97: The judicial authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted and their jurisdiction. They shall issue their rulings in accordance with the law. Judicial rulings shall be announced and executed in the name of the Palestinian Arab people.

ent Palestinian political parties.[1805] Yasser Jaber, a Palestinian lawyer and a former judge, believes that all indicators articulate a lack of independency of the Palestinian judiciary.[1806] Mostly, the Palestinian judiciary has gotten increasingly worse throughout the years. The violent and aggressive executive police forces and the preventive security forces as well as the executive authority are continuously interfering in the work of the judiciary.[1807] The political situation in Palestine affects the performance of the judiciary as Fatah and Hamas have fought over controlling the judiciary. Since Hamas took over the judiciary in Gaza and Fatah dominated the judiciary in the West Bank, the Palestinian judiciaries have been functioning separately.[1808] The political dispute and the separation of the judiciary in Occupied Palestine have degraded the situation of justice and distorted the judgments of the courts. The practical situation within the Palestinian Council is not promising, as the council even refused a request to provide the Court's rulings which are publicly accessible by the Palestinian law, which is very discouraging for researchers.[1809] The judicial council, in addition, has prevented judges from expressing their opinions, and this constitutes a violation of the judges' independence as well as their right to freedom of opinion.

Palestinian judges, in general, still lack experience.[1810] In addition, the combination of the appointment of unqualified, young, and inexperienced judges and thousands of accumulated cases and their adjudication is slow-moving. Implementation of the court decisions is weak.[1811] Ahmed Qandil, who has been a practicing lawyer for more than 40 years in the West Bank, insisted that the situation of the judiciary has been deteriorating, in particular the appointments of young, unskilled, and inexperienced judges.[1812] He stated

1805 For more details, see Milhem and Salem, Building the Rule of Law in Palestine: Rule of Law without Freedom, 14.

1806 Phone Interview with Lawyer Yasser Jaber, 3 August 2017.

1807 The Palestinian Center for the Independence of the Judiciary and the Legal Profession – MUSAWA, The Second Legal Monitor, 20–22.

1808 The Palestinian Center for the Independence of the Judiciary and the Legal Profession – MUSAWA, The First Legal Observatory on the Status of Justice in Palestine, 46.

1809 See Chapter I: Introduction.

1810 The collection of the decisions of the Palestinian High Court of Justice. Years of 2003 -2013 (In Arabic).

1811 The Palestinian Center for the Independence of the Judiciary and the Legal Profession – MUSAWA, The First Legal Observatory on the Status of Justice in Palestine, 83.

1812 Interview with Ahmed Qandil, a Palestinian Lawyer for 40 years, 24 December 2016, Ramallah.

that the year 2017 reflected the worst period and indicated that it had become impossible to seek for justice under the current conditions.[1813] In addition, he noted that litigation before the courts takes a long time, which in some cases exceeds 15–18 years. Hani Al-Natour, a Judge at the High Court of Justice, criticized the unreasonable delays; petitions take a long time to be decided upon.[1814] He insisted that these delays are not only because of the judges, but lawyers also contribute in the problem.[1815]

The Palestinian courts are not fully formed, and judges do not have the capacity or qualifications to prepare rulings.[1816] Most of the Court decisions, which were examined in this research, were denied because of the absence of the petitioners. Notably, this has affected the quality of the judgments. Most of the judgments are poorly written, and they lack legal analysis and interpretation.[1817] They are, in fact, less than one-page rulings without applying the laws properly, and none of these decisions were sufficient to give a full understanding of the facts, the claims and arguments, or the reasoning. Many of the decisions of the Palestinian High Court of Justice, for different reasons, are dismissed without a judgment on the merits, as these decisions have not been based on the fundamental issues, but on inconsequential technical and procedural incidents. This leaves no other resort for petitioners to claim for their rights before the Palestinian judicial system, as the decisions of the Court are final, which is in contradiction with the principles of justice which guarantee the two-litigation degrees.[1818]

Legally, the petitioners' lawyers are the only representatives before the Palestinian High Court of Justice and are obligated to attend the Court's sessions.[1819] This custom, which the courts follow, does not indicate a time to appear before the Court. Although the exact date is usually fixed, an exact time is not given, and lawyers must be in the Court in the morning at 9:00 a.m.; however, Court does not start before 10:15 a.m.[1820] If the lawyer is not in

1813 Id.
1814 Interview with Hani al-Natour, Justice at the Palestinian High Court of Justice, 9 March 2015, Ramallah.
1815 Id.
1816 Interview with Lawyer Ahmed Qandil (2016).
1817 Phone Interview Yasser Jaber, Palestinian lawyer and Former Judge, 3 August 2017.
1818 Law of Civil and Commercial Procedures No 2 (2001).
1819 Id., Article 285.
1820 Interview with Lawyer Ahmed Qandil (2016).

the court hall the moment the Court opens the file, the petition is denied and dismissed. Often times, lawyers appear before more than one Court on the same day.[1821] This means that a lawyer might be present before another Court in the same building while the other case is being dismissed. It is outrageous to deny a petition at 10:30 in the morning because the lawyers of the petitioner are not present.

Disregarding the Court's rulings is a big issue that breaks down the judicial system. In fact, the Israeli military starved the Palestinian courts of resources.[1822] The protected human rights are "to be enforced by an appointed [Palestinian] judiciary with guarantees of independence and tenure … up to now [2002], the judiciary has been undermined by both the Israelis and the [Palestinian National Authority]."[1823] While the Palestinian Authority police forces do not have territorial control over all the West Bank and Gaza Strip, the Palestinian Courts have jurisdiction over all people living in these areas.[1824] This means that the rulings of the Palestinian Courts are facing difficulties in implementation. In 2014, complaints of disregard of the Court's rulings (especially decisions of the High Court of Justice and Court of First Instance) and delays in monitoring the enforcement of the Court's rulings remained a big concern. The independent Commission for Human Rights ICHR received "87 complaints concerning disregard of Court's rulings by civil and security authorities."[1825] The year of 2014 was not different than the previous years. In 2013, ICHR received 123 complaints against civil and security authorities concerning disregarding Court rulings, compared to 102 complaints in 2012.[1826] This means that when petitioners have rulings, the decisions of the Courts might not be rapidly implemented. Simply put, the judiciary has problems, but it is partially functioning.

Implementation of the Court's decisions constitutes another challenge to petitioners. According to Article 106, "Judicial rulings shall be implemented, refraining from or obstructing the implementation of a judicial ruling in any manner whatsoever shall be considered a crime carrying a penalty of

1821 Id.

1822 Brown, Palestinian Politics after the Oslo Accords: Resuming Arab Palestine, 19.

1823 Wing, Healing Spirit Injuries: Human Rights in the Palestinian Basic Law, 1093.

1824 See Oslo Accords Declaration of Principles on Interim Self-Government Arrangements of 1993; the Interim Arrangement on the West Bank and the Gaza Strip of 1995.

1825 The Independent Commission for Human Rights, 20th Annual Report, 17.

1826 The Independent Commission for Human Rights, 19th Annual Report, 38.

imprisonment or dismissal"[1827] The rulings of the Court must be respected under all circumstances, and enforced without delay. The Palestinian executive department in the judiciary has thousands of accumulated files, and the implementation of Court's ruling requires a long time, and it might even be longer than the litigation process.[1828] In the questionnaire, 80% of Palestinian lawyers believed that Courts have the obligation to interfere in the process of implementing their decisions. Stated another way, they believed that the Court's function must be extended to ensure that the executive authorities are implementing and respecting the Court's rulings. Judge Hani Al-Natour and a judge who filled in the questionnaire disagreed with this and insisted that the Courts have no obligation to supervise the implementation of their decisions; the parties are obliged to follow up with the concerned executive authorities.[1829] In fact, it is uncommon for judges to interfere in the implementation of their decisions, because usually the concerned parties are obligated to start the process at the concerned authorities. This should be the first step in rebuilding the lost trust among Palestinians.

The questionnaire revealed that 40% of the lawyers who participated did not trust judges or the Palestinian judicial system. Ninety-five percent of them believed that the Palestinian judiciary was a quagmire of problems. Notably, 55% of disputants did not trust the Palestinian judiciary nor did they trust the judiciary in implementing the fundamental constitutional principles. The question of whether Palestinians are enabled to litigate before the Palestinian judiciary to seek constitutional protection of basic human rights such as the right to property and the right to personal liberty reveals concerning results. Only 30% of Palestinians agreed, 20% did not know, and surprisingly 50% of the participants did not agree and thought that they cannot even seek justice before the Palestinian judiciary because they do not trust it. The decision of the Palestinian Judiciary Council to prevent judges from filling in a questionnaire to evaluate the role of the Palestinian Court in the Occupied Territory reflects the exploitation and misuse of power by those who are in charge in

1827 The Amended Palestinian Basic Law of 2003, Article 106.

1828 See Aman, Report No. 6: Problem in Separation of Powers in the Palestinian Political System (2007); Jihad Harb and Ahmed Abu Dyeh, The Judiciary in the Frame of the Separation of Powers in Palestine (Coalition for Accountability and Integrity-Aman, (January 2007).

1829 Interview with Justice Hani al-Natour (2015); this is also taken from the answers of a judge who filled in the questionnaire.

the judiciary.[1830] It raises doubts concerning the credibility and the transparency of the judiciary. The questionnaire's results were predictable because the Palestinian judiciary is neither transparent nor effective, which has affected the trust of the Palestinian people in the judiciary.

In fact, enhancements and developments in the justice sector in Palestine are connected to the rule of law, social justice, and fundamental freedoms and basic human rights. Improvement in the Palestinian judiciary, especially the High Court of Justice, could be possible. In order to enhance Palestinian trust in the judiciary and to develop its effectiveness, remedies could comprise six main points: 1) appoint highly qualified judges, steering away from cronyism, nepotism, and political affiliation, 2) assure the independence of judges and the judiciary through financial and administrative autonomy, 3) appoint judges through the Judicial Council, not by the executive branch of the Palestinian Authority especially its President, 4) guarantee a minimal period to rule in cases and implement Court decisions without delay, 5) treat all people equally, transparently, and non-discriminatorily, and 6) organize training workshops for lawyers, judges, and the prosecution to respect the law and develop mutual understanding and respect. These remedies should be implemented through a legislative initiative in order to obligate all concerned parties to cooperate in order to achieve tangible improvements.

Most importantly, it is essential to ensure the independency of the judiciary without the interference of the executive branch of the Palestinian Authority. The judiciary has to put effort into improving and developing its performance. Acceptable performance by the Courts requires independent, highly qualified, and trained judges. This burden falls under the duties of the Palestinian Judicial Council. The Judiciary Council should work on developing the judicial system in general. The Council must regulate minimum standards that every judge should follow in his/her rulings. It should speed up the litigation process and the implementation of judgments. The Judiciary Council must adopt a time limit to rule in petitions and to implement the judgments of the Courts where it does not drag on for months or even years. A national strategy for the Palestinian judiciary system and the rule of law should be prepared professionally and implemented accordingly. The crucial point is that the Palestinian Courts, especially the High Court of Justice, should work on development to achieve proper rulings. An establishment of a follow-up

1830 See Chapter I: Introduction.

unit on the implementation of the Courts' decisions is also significant. This will be discussed later in the proposed remedies within the Palestinian judiciary. The Palestinian judiciary should have significant predictive power in constitutional law and also substantial normative implications in international human rights law. Judicial competence and independence must be the main interests of the Palestinian Judiciary Council. Certainly, it is crucial to have a full understanding of the powers of the judiciary and the change that it could actually bring in order to gradually improve the way it functions, enforce human rights, and uphold the rule of law. At the constitutional level, it is also important to empower the Constitutional Court in order to enforce the internationally protected human rights. Thus, the function of the newly-established Palestinian Constitutional Court is examined below.

3.1.1.2. The Palestinian Constitutional Court

On April 3, 2016, the President of the Palestinian Authority issued a decree to establish the first Palestinian Constitutional Court and appointed nine justices,[1831] all of whom belonged to the President's political party, Fatah.[1832] There has been criticism on the independence of the Court. The opponents of the establishment emphasized that the Court was created in favor of the president and concentrated more power in his hands, especially given that the nine appointed judges are Fatah-affiliated which puts independency and neutrality of the Court at risk.[1833] MUSAWA – the Palestinian Center for the Independence of the Judiciary and the Legal Profession, along with several human rights organizations and civil society coalitions, demanded the President withdraw the decree of the formation of the Supreme Constitutional Court.[1834] These organizations considered this step as an overly hasty and inappropriate step. Carrying out presidential and legislative elections and

1831 Al-Hayette Al-Jdedah, A Presidential Decree to Establish the First Constitutional Court in Palestine (2016).

1832 Press Release, Jurist, Palestine President Established Controversial Constitutional Court, (11 April 2016), at 9:41 AM.

1833 Taylor Isaac, Palestine President Establishes Controversial Constitutional Court. Jurist News (1 April 2016).

1834 MUSAWA – the Palestinian Center for the Independence of the Judiciary and the Legal Profession, Demanding Withdrawal of the Constitutional Court Formation: Eyes on Political Parties and Community Forces to Raise their Voices Demanding the Withdrawal of the Decision to Form the Supreme Constitutional Court, (17 May 2016), available at http://www.musawa.ps/post/demanding-withdrawal-of-the-constitutional-court-formation.html.

reuniting the Palestinian judiciary created a danger in the formation of the Court as an extension of the executive branch of the Palestinian Authority under the control of the President.[1835] The Palestinian political situation definitely affects the function of the Court, but the danger lies in the formation of the Court as an extension of the executive branch of the Palestinian Authority under the control of the President. In other words, the Court would not enjoy any independence and it would most likely benefit the President.

On November 3, 2016, in fact, the independency of the Constitutional Court was tested. The Court ruled that the President of the Palestinian Authority can revoke, at any time, the parliamentary immunity of the members of the Legislative Council.[1836] This means that the Constitutional Court has already started serving the interests of the President and gave him the right to infringe on the independence of the Parliament. Some, including 154 human rights organizations, considered the ruling as a violation of the Basic Law and stated that the formation of the Court did not meet the necessary legal requirements.[1837]

According to Article 103 of the Palestinian Basic Law, the Constitutional Court should be established by law to consider "[t]he constitutionality of laws, regulations, and other enacted rules, [t]he interpretation of the Basic Law and legislation, and settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction."[1838] There is nothing to be found in the Palestinian Basic Law that grants a jurisdiction to the Constitutional Court to review human rights violations. Also, none of the articles in the law of the Supreme Constitutional Court No. (3) 2006 indicate that the Constitutional Court has powers to review human rights violations, Article 25 provides that the Court is "entitled to exercise all the powers of hearing and pronouncing on the unconstitutionality of any piece of legislation or act contravening the Constitution … [and] upon the pronouncement on the unconstitutionality of any law, decree, bylaw, regulation or decision partially or wholly, the legislative authority or the competent authority must amend such law, decree, bylaw, regulation or decision in

1835 Id.

1836 PCC 03/2016 Palestinian Constitutional Court, (3 November 2016), Palestine Gazette No. 126 (10 November 2016), 183.

1837 See Ahmed Melhem, Is Abbas Revoking Palestinian MPs' Immunity Legal? Al-Monitor, Palestine Pulse (21 December 2016).

1838 The Amended Palestinian Basic Law of 2003, Article 103.

a manner that conforms to the provisions of the Basic Law and the Law."[1839] This article implicitly applies to basic human rights that are included in the provisions of the Palestinian Basic Law. This means that the implication of the first function grants the Constitutional Court jurisdiction to review the constitutionality of the laws or acts that violate the protected fundamental rights and freedoms in the Basic Law. That is to say, all laws, legislations, regulations, rules, or practices, which contradict the constitutionally protected fundamental rights and freedoms, fall under the revision of the Court. It is understood that the article grants the Supreme Constitutional Court the power to review human rights violations committed by the Palestinian Authority and its personnel. Both articles, however, are not clear in granting victims of human rights violations the right to justiciability and the rights to seek a remedy.

At the same time, there is nothing that forbids individuals from petitioning before the Court. One hundred Jordanian dinars is an obligatory petition fee, and persons must be represented by a lawyer, who has at least ten consecutive years in the legal profession. The Palestinian Authority, the State of Palestine, or any of its entities must be represented by the General Attorney or his/her Assistants.[1840] The accessibility to and the proceedings before the Constitutional Court are examined in Articles 27–37 of the Law on the Palestinian Constitutional Court. Notably, the President of the Palestinian Authority has recently issued decree No. 19 (2017) on October 2, 2017 amending the Constitutional Court Law, including the procedure-related articles.[1841] According to Article 26 of the Supreme Constitutional Court Law, the proceedings before the Palestinian Constitutional Court are prescribed in the Law of the Civil and Commercial Procedure No. (2) of 2001.[1842] This means that the decisions of transfer, legal actions, requests, petitions and applications may be submitted to the Court by the concerned parties. Upon receiving the requests or legal actions, the Constitutional Court scrutinizes the manner without pleading procedures, unless the Court deems oral hearings necessary (Article 36 of the Supreme Constitutional Court Law). Nothing, in the two aforementioned Palestinian laws, refers to a time limit period for the

1839 The Law of the Supreme Constitutional Court No. (3) of 2006, Article 25.

1840 Decree No. 19 (2017) on October 2, 2017 amending the Constitutional Court Law.

1841 See the amended law No. 19 (2017), available in Arabic by Al-Muqtafi database at: http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?lnk=2&LegPath=2017&MID=16969

1842 Id.

proceedings, meaning that the Court might take years to rule in the manner of the constitutional petitions. Relatedly, the provisions of the Law of the Supreme Constitutional Court do not outline any practical guidance for publishing the Court's decisions.

To date, the newly established Palestinian Constitutional Court has not yet ruled on any petitions related to human rights manners or seen a petition that deals with a human rights violation.[1843] Perhaps such petitions have not been filed yet. The Palestinian High Court of Justice and the Constitutional Court have not integrated the scope of international human rights norms within their work frame, and they are still functioning according to the provisions of the Basic Law. It is still early to judge the performance of the Constitutional Court. However, as the Court was formulated, and the judges were appointed by the President of the Palestinians Authority, there is a high risk that the Court will be politically driven and not independent. It is important to note that although the Constitutional Court, in the Palestinian context, might be seen or deemed as a political tool, the independency, neutrality, and the transparency of the Court must be weighted over any political interests. Therefore, it is necessary to apply the system of "separation of powers" and to implement the law in accordance with its provisions that guarantee the independency of the judiciary.

3.1.1.3. The Palestinian Human Rights Organizations

The Palestinian Basic Law, in Article 31, calls upon the creation of an independent commission for human rights. A law "will specify its formation, duties and jurisdiction, [and] the commission shall submit its reports to the President of the National Authority and to the Palestinian Legislative Council."[1844] The Independent Commission for Human Rights (ICHR) was established in 1993 upon a Presidential Decree as the Palestinian national and constitutional human rights institution.[1845] It seeks to protect and promote human rights in accordance with the Palestinian Basic Law and the international principles of human rights.[1846] It operates, first, to monitor human

1843 See the database of the Palestinian Legal and Judicial System, Al Muqtafi; Search Constitutional Court judgments – Kashef.

1844 The Amended Palestinian Basic Law of 2003, Article 31.

1845 Presidential Decree – the President of the Palestinian Authority Yaser Arafat – an Establishment of the Independent Commission for Human Rights (30 September 1993), Palestine Gazette No. 59 of (1995).

1846 The Independent Commission for Human Rights – mission.

rights violations through receiving, documenting, following up individuals' complaints as well as bringing them to the attention of the authorities. Secondly it aims to enhance the respect for human rights through training of security and law enforcement officials as well as public awareness activities to educate and inform citizens of their rights. Thirdly, it promotes protection of human rights through proposing legislation in order to ensure legal protection and monitor the actions of the Palestinian National Authority and other public institutions.[1847]

The Commission issues annual reports concerning the Palestinian Authority compliance and implementation of the provisions of the international human rights instruments, and it documents human rights violations committed by the Palestinian Authority personnel in the territory under its control. The annual reports also highlight human rights violations as well as concerns regarding the Palestinian situation under Israeli occupation. The ICHR states that the governmental bodies are functioning without parliamentary control; this is due to the absence of the Palestinian Legislative Council (the Parliament) and the absence of monitoring mechanisms within the Palestinian Authority.[1848] In addition to the dysfunctional Palestinian judiciary, many examples of human rights violations are reported, including the restrictions on the right to personal liberty and the right to movement, which contradict the principles of the Basic Law and the international law. The commission brings issues of concern to the attention of the Palestinian Authority as well as to the international level. In fact, it acts as the ombudsman for the Palestinian victims of human rights, but its reports and recommendations do not create any obligations or binding forces on any party.

There are several Palestinian and international human rights organizations that defend, protect, and promote human rights in the occupied territories. For example, Al-Haq is an independent Palestinian human rights organization that promotes the rule of law, the international human rights law, and international humanitarian law.[1849] Al-Mezan Center for Human Rights is also a Palestinian human rights organization dedicated to promoting respect for all human rights in the Gaza Strip.[1850] Such organizations are continually persevering to protect, promote, and respect human rights through research, legal

1847 The Independent Commission for Human Rights – Modes of Operation.
1848 The Independent Commission for Human Rights, 20th Annual Report, 9.
1849 See Al-Haq / vision, mission, and goals.
1850 See Al Mezan / mission statement.

advocacy, awareness, and reports. Most, if not all, of these organizations have representatives to the ICC, the UN, and other international bodies where they report on the Palestinian situation concerning humanitarian and human rights violations in the Occupied Territory.

3.1.2. Domestic Enforcement Mechanisms de Lege Lata in the Israeli Law

3.1.2.1. The Israeli Supreme Court

The only available resort for Palestinians to redress human rights violations that are committed by the Israeli government and its personnel and military is the Israeli High Court of Justice. The decisions of the Israeli High Court of Justice are final and are not subject to appeal.[1851] The only credit that could be given to a judiciary is its neutrality, impartiality, credibility, and fairness in the law implications. Does the Israeli justice grant these merits to Palestinian disputants? This question will be subsequently discussed.

As examined previously, the Israeli Supreme Court has allowed Palestinians in Occupied Palestine to petition and challenge the legality of the government's practices, especially the military commanders and their military orders imposed in the West Bank and the Gaza Strip.[1852] As local Palestinian inhabitants have been permitted to petition before the Court, they have been represented mostly by Israeli human rights organizations, such as the Center for the Defense of the Individual, B'Tselem – The Israeli Information Center of Human Rights in the Occupied Territory, The Association for Human Rights in Israel, Physicians for Human Rights, and Adalah – The Legal Center for Arab Minority Rights in Israel.[1853]

1851 Yoav Dotan, "Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israel High Court of Justice During the Intifada," Law and Social Review, Vol. 33, Issue No. 2 (1999): 319–363, 323.

1852 Shehadeh, Occupier's Law: Israel and the West Bank, 96. See also Sheikh Suleiman Hsein 'Odeh Abu Helou and 3 others v. Government of Israel, 176; Saliman Tawfiq Ayub v. Minister of Defense and Jamil Aresm Mutawe'a v. Minister of Defense, 3–10.

1853 HCJ 2977/02, Adalah – the Legal Center for Arab Minority Rights in Israel, and Qanun – LAW v. Commander of the Israeli Army in the West Bank. The Israeli High Court of Justice (9 April 2002); HCJ 201/09 Physicians for Human Rights and others, et al. v. The Prime Minister of Israel, et al. The Israeli High Court of Justice (19 January 2009); Zahrana Mara'abe v. the Prime Minister of Israel (2005); HCJ 8276/05 Adalah – the Legal

Domestic Courts in Israel implement the applicable international law principles as long as they do not contradict the primary legislation, where "in the case of a clear clash between primary legislation and a norm of customary or conventional international law, the legislation prevails."[1854] The Court applied the provisions of the Israeli laws even though they contradicted the provisions of international humanitarian law.[1855] This means that the Court does not necessarily apply the provisions of international law; rather, it relies on domestic laws which are enacted by the military commanders or the Israeli Knesset. The Court accepted that the Palestinian areas held by Israel fall under belligerent occupation, and the powers of the military commander are governed under the rules of public international law applying only the humanitarian provisions of international humanitarian law.[1856] In reality, it followed the Israeli government's stance and never accepted the application of the Geneva Conventions or human rights instruments.[1857] In 1979, the Supreme Court explicitly refused to accept the applicability of the Fourth Geneva Convention in Occupied Palestine.[1858]

As discussed earlier, the Court, similarly, emphasized that the Hague Regulations, as a reflection of customary international law, are applicable in Israel, but refused to apply the principles of the Third Geneva Convention, relative to the treatment of prisoners of war, to the Occupied Palestinian Territory.[1859] The refusal to apply Geneva Conventions and human rights instruments has led the Court to deny most of the Palestinian petitions. The Court's stance on this manner, which was examined earlier, was depressing for petitioners in their process to seek justice before the Court of the occupying power. In fact, it has given the military commanders more extensive powers to expand their actions in the Occupied Territory. The rejection of the Supreme

Center for Arab Minority Rights in Israel v. Minister of Defence. The Israeli High Court of Justice (12 December 2006). Resource: Israel Law Reports [2006] (2) IsrLR 352.

1854 Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel," 212.

1855 HCJ 253/88 Sajedia v. Minister of Defence, 42(3) PD, (1988), 815–817, 829; See also David Kretzmer, "Israel," in The Role of Domestic Courts in Treaty Enforcement: A Comparative Study, ed. David Sloss (Cambridge: Cambridge University Press, 2009).

1856 Beit Sourik Village Council v. The Government of Israel (2004); Izzat Muhammad Duweikat and 16 others v. Government of Israel (1979); See National Insurance Institution v. Abu – Ata; International Court of Justice, advisory opinion, (2004).

1857 Id.

1858 Izzat Muhammad Duweikat and 16 others v. Government of Israel (1979), 14.

1859 Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF and other (1983), 11.

Court to criticize some actions and the practices of the Israeli government has put its credibility in question. For example, the house demolitions, deportations, and settlements and many other grave violations of international law in the West Bank and the Gaza Strip are all "incompatible with fundamental principles of international humanitarian law, human rights standards … the Court consistently ignored these principles or refused to apply them on the basis of highly questionable arguments."[1860]

The Court exclusively used international humanitarian provisions that only served the occupier and allowed certain actions, and interpreted these provisions to serve its interests. For instance, the Court, it its decisions, invoked a balance between military necessity and the national security of Israel and the humanitarian needs of the Palestinians, but employed such balance for the sake of security, even in cases of grave violations against Palestinians.[1861] In fact, the discretion of the Court is not to leave human rights in a very precarious position, but to permit several "non-disastrous"[1862] violations. In one incident, the Court delivered a ruling whereby it legitimized the killing of hundreds of Palestinian civilians and allowed massive destruction without a legal basis. In 2002, a petition against the Israeli military commander challenged house demolitions in Jenin Camp without announcing to residents to evacuate or giving them time to escape. This resulted in several hundred deaths and injuries to Palestinian civilians where some of them were buried under the rubble.[1863] The Supreme Court dismissed the petition accepting the commander's claim that such actions fell under military necessities.[1864] This ruling was delivered in favor of the Israeli government and its military, even though the military commander admitted that he gave orders of demolition knowing that civilians were inside their houses.[1865] The Court has not managed to maintain a purely legal dispute with Palestinians, as it has been extending the scope of its review over security matters. The overall outcome

1860 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 187.

1861 See Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005); Shahin v. IDF Commander in Judaea and Samaria (1987); and Beit Sourik Village Council v. The Government of Israel (2004).

1862 Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005).

1863 Adalah and Qanun – LAW v. Commander of the Israeli Army in the West Bank (2002), 1–2.

1864 Id., 4.

1865 Id.

of this judicial review was not encouraging for Palestinians, because they knew that the Israeli Supreme Court would favor the Israeli government and military.[1866]

In its decisions relating to the use of security matter measures against Palestinians, the Court has been very much politically driven. It has not conveniently and explicitly ruled on the insufficiency of the legal considerations, which have not taken to protect the basic rights of Palestinians. It rather adopted the dominant vague narrative that the state is being attacked and the Israeli authorities are only protecting it. It is natural that the "Israeli judges will not be neutral in judging the conflicting claims of the government and Palestinians subject to military rule … [i]n the struggle between government's politicians and Palestinian arguments of rights based on justice, international legal standards, or lofty legal principles, the Court has shown a marked preference for state arguments."[1867] In some of its decisions, the Court ignored the laws and hoped for a political solution. Although the arguments of the Palestinian petitioners were purely legal and challenged that Israel has a duty under international law, the Court left the solution for politicians stating that "it is the hope of all that peace will solve all these problems."[1868] If to argue that the Israeli Supreme Court is impartial and non-discriminatory, an important question must be asked: Why does the Court deliberately refuse to apply international humanitarian and human rights conventions to which Israel is a member state? The Court has the ability but is unwilling to rule to implement international human rights and humanitarian principles. This is especially true in that its precedents are legally binding and all the institutions of the state must implement those principles as part of national laws. It has rather chosen not to implement provisions that may favor Palestinians as protected persons under the Israeli belligerent occupation.

The conceded permission to the Palestinians to petition before the Israeli Supreme Court has not been substantiated to grant them a just remedy and a fair protection. The Israeli Court could have denied these petitions and never granted the Palestinians the right to justiciability or the right to remedy, especially since there is nothing in international humanitarian law which obligates the occupier to allow the occupied people to have access to its judiciary.

1866 Shehadeh, Occupier's Law: Israel and the West Bank, 97.

1867 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 196.

1868 Shahin v. IDF Commander in Judaea and Samaria (1987), 241.

However, the Court's willingness to review the Palestinian petitions has actually put Palestinians in a precarious and threatening situation. Stated another way, by dismissing the Palestinians' petitions, the Court has legitimized the actions of the military occupation forces in the Occupied Territory. Some scholars say that the jurisprudence of the decisions of the Israeli Supreme Court, relating to the Occupied Territory, is deliberately government-minded.[1869] It has applied vital interests of the state and has been biased and unfair to Palestinians.[1870] Its priority has always been the interest of the Israeli government rather than the human rights of Palestinians. Although the Israeli Supreme Court has recognized the right of Palestinians to petition, it has been reluctant to intervene in the actions of the Israeli forces in the Occupied Territories and has had the tendency to support the arguments of the Israeli authorities.[1871]

The denial of Palestinian rights has caused a situation of non-trustworthiness. The Palestinian people do not fully trust the Israeli Courts. According to the questionnaire, they believe that it is biased and unreliable, as 60% of the Palestinian lawyers thought that the Israeli judiciary was not fair to the Palestinian disputants. At the same time, 45% of the participants did not trust the Israeli judiciary while 30% were not aware of the nature of the litigation. Furthermore, 65% of the participants believed that the Israeli High Court of Justice were not neutral, and 95% believed that the Court discriminated against Palestinian disputants. The results reflect the disappointment of Palestinian victims of human rights violations and point toward a state of hopelessness in the Occupied Territory. The greatest likelihood is that these victims would not seek justice before the Supreme Court of the Occupied Territory.

The non-trustworthiness in the Israeli judiciary has forced Palestinians to be reluctant to seek justice, especially since litigation is costly and time consuming. This means that the Israeli High Court of Justice has not served Palestinians efficiently. Palestinians have lost their trust in the judiciary of the occupation and do not wish to seek justice from the biased opponent, which is

1869 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 188.

1870 Id.

1871 Gad Barzilai, "Courts as Hegemonic Institutions: The Israeli Supreme Court in a Comparative Perspective," Israel Affairs, Vol. 5 (1998): 15–33; Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories.

ironically predicted. Most probably, Palestinian confidence in the Israeli judiciary has never existed, and they have found themselves with only one choice to challenge the actions of the Israeli authorities in the Occupied Territory. The judgments of the Court, nevertheless, have explicitly proven that the Israeli judiciary is biased and predominantly considers Israeli interests. However, the involvement of Palestinians in the Israeli judiciary has highlighted the reality of the justice situation of the occupying power. This situation is sensitive and consequential for the Palestinians. The Israeli judiciary, at the same time, has created an actual assessment in which the Israeli government and its judiciary are controversial to the principle of justice for Palestinians. Despite the fact that there is a dilemma in dealing with Palestinian petitioners with the same level of respect and equality compared to Israeli petitioners, the problem remains with the implementation of the Court's rulings and the government's acceptance to implement rulings that favor Palestinians. This discrimination of the Court's judgments is a serious issue. In fact, a "judicial rule, regardless of how correct and just it may be, has no value if it cannot be implemented in Practice."[1872] Israeli enforcement mechanisms are not effective in cases involving Palestinians. Judgments of the Court that favor Palestinians are rarely implemented or respected by the Israeli authorities. Israeli government and its military have a problem in implementing the judgments of the Supreme Court whenever these judgments favor Palestinians.

The Israeli High Court of Justice, as a domestic Court, must be improved to serve all disputants to ensure that justice, equality, and protection are served to all people regardless of their nationality. First and foremost, it must apply the four Geneva Conventions as well as human rights instruments in the Occupied Territory. Most importantly, the Court should have more Arab judges to serve in cases related to violations of Palestinian human rights.[1873] Second, the executive branch of the judiciary in Israel must be improved to implement and carry out the Court's rulings without discrimination. There must be regulations within the executive branch to implement all Court decisions in a limited period of time where all decisions and rulings should be treated and proceeded with despite whom the decision favors. Third, the Court must introduce new regulations to explicitly illegalize all forms of discrimination

1872 Zamir, "Human Rights and National Security," 400.

1873 The Israeli Supreme Court consists of 15 judges, only one of whom is of Arab origin, Justice Salim Joubran. See the Israeli Supreme Court – the Judges. Seen on August 6, 2017, at 16:05. Available at http://elyon1.court.gov.il/eng/judges/judges.html#12.

in accordance with the international conventions. Improvements and change in the Israeli judiciary might gradually restore trust, justice, and fairness. Although these suggested recommendations are proposed to improve the Israeli judiciary, there is an essential question that must be asked: Why should Palestinians rely on the occupier's judiciary to seek their basic and fundamental rights? That is to say, Israel is the occupier under which the Israeli forces are violating the Palestinians' rights. Palestinians are protected under international human rights law and international humanitarian law in the Occupied Territory, but the Israeli Supreme Court remains the occupier's judicial entity that does not apply these laws. Consequently, the Israel authorities and the Israeli Supreme Court are two faces of the same coin. Both serve the benefits of the occupier, not the occupied people. The Israeli Court, even if it seems to, will not be neutral and serve Palestinians. Palestinians have the right to petition before a neutral and efficient entity that is not part of the Israeli occupying authorities and operates under the principles of neutrality, independency, impartiality, credibility, and fairness in the law's implications.

3.1.2.2. The Israeli Human Rights Organizations

The Israeli human rights organizations play an important role at many levels. They have the obligation of fighting for the human rights of Palestinians within the judiciary and documenting human rights violations. For example, Adalah, the Legal Center for Arab Minority Rights in Israel, is dedicated to defending human rights, documenting violations against Palestinians, and litigating before the Israeli Courts and authorities.[1874] B'Tselem, the Israeli Information Center for Human Rights in the Occupied Territories, as an Israeli human right organization, acts primarily to change the Israeli policies in the Palestinian Occupied Territory and to ensure the protection of the fundamental human rights of the local residents according to the principles of international human rights and humanitarian law.[1875] Such organizations actually have helped the Palestinians in many individual and collective cases. Their work has brought a progressive value to the protection of human rights.

In 2005, for instance, the Knesset passed amendments to the Civil Wrongs (Liability of the State) Law that deprives residents of the Occupied Palestinian Territory the right to seek compensation from Israel for damages caused by

1874 Adalah – the Legal Center for Arab Minority Rights in Israel/ About.

1875 B'Tselem – the Israeli Information Center for Human Rights in the Occupied Territories/ About.

Israeli forces.[1876] The Israeli Law of Torts limits the scope of the state's responsibility for tortious acts which were limited to combat activities and any activities that take a place in conflict zones.[1877] Adalah petitioned before the Israeli Supreme Court challenging these amendments, and it succeeded in canceling the amendments to the Law of Torts that prevented Palestinians from claiming compensation from Israel.[1878] The Court agreed, invalidated the amendments, and ruled that it is unconstitutional to exempt Israel from paying compensation to Palestinians in the Occupied Territory who have been harmed by Israeli forces.[1879] The initiative of these human rights organizations is a way to challenge the laws and regulations that contradict international human rights and humanitarian law before the Israeli Supreme Court. It is still effective concerning the laws that are issued by the Knesset, but does not address human rights violations. Simply stated, human rights organizations use the judicial mechanism and directly challenge the legality of the Israeli laws. They do not necessarily wait for such laws to be applied to Palestinians to seek reparation. This means that they use anticipatory means to prevent the Israeli government, the military forces, and the Knesset from applying unconstitutional laws or orders on Palestinians.

The importance of these human rights organizations is also in their ability to challenge the practices of the Israeli military commander and forces. As discussed previously, the Israeli Supreme Court does not fully offer satisfactory remedies for Palestinians, but the consistency of their arduous endeavors could achieve possible results. However, challenging the legality of the laws before the Israeli Court does not prevent Israeli lawmakers from enacting new laws. It, in fact, exposes those organizations for restrictions that might be imposed by the entities and personnel of the Israeli government. For example, in a dangerous precedent, on July 11, 2016, the Israeli Knesset approved an NGO bill that put financial restrictions on human rights organizations that receive more than 50% of their budget from foreign governments.[1880] Three human rights experts and UN special rapporteurs stated that this law targets NGOs that are critical to Israel and its policies. They also expressed their grave

1876 HCJ 8276/05, Adalah, et al. v. The Minister of Defense, et al., 12 December 2006, see Israel Law Reports [2006] (2) IsrLR, 352.

1877 For more information, see Adalah v. Minister of Defence (2006).

1878 Id.

1879 Id., 353.

1880 Adalah – the Legal Center for Arab Minority Rights in Israel, Approval of NGO Law Part of Grotesque Game Aimed at Human Rights Organizations, Press Releases (12 July 2016).

concerns that such laws will subject these organizations to harsh penalties and delegitimize them.[1881] This law, in fact, puts human rights organizations in danger because it has the evident intent of targeting human rights and civil rights organizations and preventing them from freely expressing their opinion by controlling their financial resources.[1882] The UN Special Rapporteur on the promotion of human rights defenders, Michel Forst, stated, "The discriminatory impact of new requirements [such as disclosing information regarding the donors names to be approved by the Israeli government] on NGOs would result in public shaming of certain organizations, eroding the democratic character of Israeli civil society."[1883] In other words, the Israeli Knesset has granted the Israeli government the power to supervise human rights organizations by imposing restrictions on their work and financial resources, which violates their independency, their right to hold opinions, and their right to freedom of expression.[1884]

Additionally, reporting and documenting human rights violations are important parts of the international and domestic protection as well as vital segments of the framework of human right organizations. Human rights organizations publish scores of reports that cover most human rights violations in the Occupied Territory. These reports are important to bring such violations to the attention of the international community. In fact, many reports, which are written by national human rights organizations, are published internationally, presented before the United Nations, and used by the United Nations special rapporteurs. Perhaps, in the future, they can be used as evidence before national and international judiciaries. They definitely have the potential for use in international remedies. These remedies are the subject of the following subsection.

3.2. International Enforcement Mechanisms de Lege Lata

The basic tenet of international human rights instruments and humanitarian law is to promote human rights for all and minimize the suffering of all people without any discrimination based on religion, race, color, and

1881 United Nations Human Rights Office of the High Commissioner-Display News, Israel: UN Experts Urge Knesset Not to Adopt Pending Legislation That Could Target Critical NGOs. Geneva June 24, 2016. The UN experts: Maina Kiai, Michel Forst, and David Kaye.

1882 Id.

1883 Id.

1884 International Covenant on Civil and Political Rights of 1966, Article 19.

national or ethnic origins. The available Israeli and the Palestinian mechanisms have not proven their efficiency; therefore, it is important to search within the available international mechanisms. International human rights and humanitarian laws provide different mechanisms for state parties and their citizens to seek remedies for human rights violations. Each mechanism has sets of conditions and requirements that must be fulfilled. The available mechanisms vary, but all are within the United Nations system. The existing or possibly accessible international mechanisms for Palestinians and their flaws, effectiveness, and implications in the Palestinian Territory will be elaborated on in the following sections.

3.2.1. The International High Court of Justice (ICJ)

In 1945, the principle judicial organ of the United Nations was established, and named the *International Court of Justice* (ICJ).[1885] The Statute of the International Court of Justice regulates its organizations, competence, and procedures.[1886] The ICJ has dual international jurisdiction. It decides in all legal disputes submitted by the state parties of the Statute of the International Court of Justice, and its judgments in these disputes are compulsory ipso facto and without special agreements.[1887] This means that a binding decision is exclusive to disputes between states. The Court also delivers advisory opinions, which are not legally binding, on any legal question upon the request of an authorized body or in accordance with the Charter of the United Nations.[1888] At the Palestinian level, the international legal status of Palestine has varied throughout time. In the detailed previous discussion, it was indicated that, in 1974, the General Assembly recognized the Palestinians' right to sovereignty and granted the Palestinian Liberation Organization observer status in the UN General Assembly as the representative of the Palestinian people.[1889] In 2011, the Palestinian Authority had not succeeded in its attempt to become a full member of the UN because the United States of America, as a permanent member in the Security Council, vetoed the Palestinian request to the Security Council.[1890] On November 29, 2012, the United Nations General

1885 The Statute of the International Court of Justice of 1946, Article 1.
1886 Id.
1887 Id., Article 36.
1888 Id., Article 65.
1889 UN Security Council Report, Chronology of Events: Israel/Palestine, 22 November 1974, General Assembly Resolutions 3236 and 3237.
1890 UN Security Council Report, Chronology of Events: Israel/Palestine. September 2011.

Assembly granted Palestine non-member observer state status.[1891] This means that Palestine can ratify international law instruments and be a party to the Statute of the International Court of Justice on determined conditions by the General Assembly upon the Security Council recommendations.[1892] The State of Palestine can "at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court."[1893] In accordance with Article 35(2) of ICJ Statute and pursuant to the Security Council Resolution 9 (1946), Palestine, as a non-party state, could file a declaration accepting the Court's jurisdiction.[1894] This declaration provides Palestine access to the ICJ in its jurisdictional capacity to review disputes in contentious cases because joining the ICJ Statute would still serve Palestine, even without a UN full membership.[1895]

As mentioned in previous chapters, the ICJ has delivered an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory. Giving the fact that this advisory opinion is not legally binding, Israel has not considered it. However, in case the Palestinian government, as the State of Palestine, decided to petition before the ICJ and dispute Israel for human rights violations, the judgment of the Court would be compulsory for both Palestine and Israel. Some issues might arise as to whether Israel would comply with the Court's judgment, but in this case, the enforcement mechanisms of the ICJ must apply. The possibility to join the Court might not be easy, especially with role that the Security Council plays in the process of admission and later the enforcement.[1896] This remedy is still unclear for the Palestinian State and needs special effort to be achieved. A study of the possible procedures that Palestine might face before the Security Council and the General Assembly as well as the matters that might arise are very complex and

1891 The United Nations General Assembly Resolution 67/19, Status of Palestine in the United Nations Sixty-Seventh General Assembly, 44th and 45th Meetings, on 29 November 2012.

1892 The Charter of the United Nations of 1945, Article 93 (2), and the Statute of the International Court of Justice of 1946, Article 35(1).

1893 The Statute of the International Court of Justice of 1946, Article 36(2).

1894 Id; United Nations Security Council Resolution 9 (1946) of 15 October 1946.

1895 Andreas Zimmerman, Christian Tomuschat, Karin Oellers-Frahm, and Christan Tams, eds. The Statute of the International Court of Justice: A Commentary, 2nd ed. (Oxford: Oxford University Press, 2012), 179–183.

1896 Id.

need a separate study that deals with the statehood of Palestine and its ability to litigate before the ICJ. This topic will not be examined at this point and will be left for future research. The other international tribunal that might offer a possible remedy for Palestinians is the International Criminal Court. It will be briefly noted, but not in detail, as it also constitutes a separate topic.

3.2.2. The International Criminal Court (ICC)

The International Criminal Court is the authorized judicial body that investigates crimes falling under its jurisdiction. In accordance with the Rome Statute, the International Criminal Court has jurisdiction over four crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.[1897] It must be noted that the Court's role is complementary to national criminal jurisdiction, where the admissibility of cases depends on the ability of a state to investigate or prosecute the alleged crimes.[1898]

On January 22, 2009, the Palestinian Minister of Justice, on behalf of the Palestinian Authority, lodged a declaration pursuant to Article 12(3) of the Rome Statute acknowledging the jurisdiction of the ICC for the purpose of investigating and prosecuting the acts committed in the Occupied Palestinian Territory since July 1, 2002.[1899] In 2012, the Office of the Prosecutor at the International Criminal Court denied the Palestinian request to investigate the committed violations in Palestine and determined that the Office does not have the jurisdiction to examine crimes, which were committed during the attack on Gaza 2008–2009.[1900] The reasoning was based on the legal status of the Palestinian Authority, as in 2012 the Palestinian Liberation Organization was recognized as an observer-organization in the United Nations.[1901] The Office concluded that Article 12 of the Rome Statute was not applicable in this case.[1902] Thus, the International Criminal Court did not have jurisdiction in

1897 Rome Statute of the International Criminal Court the Statute (17 July 1998), entered into force 1 July 2002, Article 5.

1898 Id., Articles 1 & 17.

1899 See the Letter of the Palestinian Minister of Justice, Ali Khashan, to the International Criminal Court – the Prosecution Office, The Netherlands, (21 January 2009).

1900 International Criminal Court the Office of the Prosecutor, The Situation in Palestine. Embargoed until Delivery (3 April 2012), 2.

1901 Id.

1902 International Criminal Court, the Office of the Prosecutor, The Situation in Palestine (2012), 2. The Rome Statute of the International Criminal Court of 1998 Article 12: "Preconditions to the exercise of jurisdiction 1. A State which becomes a Party to this

investigating crimes committed in Palestine.[1903] This conclusion put a precondition on the enforcement of international human rights and humanitarian laws, as a state must be recognized by the United Nations. This situation, however, changed on 29 November 2012, when the United Nations General Assembly voted to accord Palestine Non-Member Observer State Status in the United Nations.[1904]

On January 1, 2015, Palestine submitted a declaration accepting the jurisdiction of the International Criminal Court (ICC), acceded to the Rome Statute, and became the 123rd State Party to the ICC.[1905] Upon the request of the State of Palestine, the Office of the Prosecutor opened a preliminary examination to determine whether the Rome Statute criteria had been met for opening an investigation into the alleged crimes committed in the Occupied Palestinian Territory, including East Jerusalem, since June 13, 2014.[1906] The Office stated in its preliminary examination in 2015 that it was in the process of conducting a factual and legal assessment to decide whether to proceed with an investigation regarding the crimes, which fall under the jurisdiction of the ICC.[1907] In case the ICC decided to investigate and put Israeli forces, commanders, and

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Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5. 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national. 3. If the acceptance of a State, which is not a Party to this Statute, is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

1903 International Criminal Court, the Office of the Prosecutor, the situation in Palestine: Summary of Submissions on whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements (3 May 2010), 7.

1904 See United Nations: Meetings Coverage and Press Releases, General Assembly Votes Overwhelming to Accord Palestine "Non-Member Observer State" Status in United Nations (2012).

1905 Palestine deposited its instrument of accession with the UN Secretary-General under Article 12(3) of the Rome Statute, and the Rome Statute entered into force on 1 April 2015. The International Criminal Court – the Office of the Prosecutor, Report on Preliminary Examination Activities of 2015: Palestine (12 November 2015), 11.

1906 Id., 12–17.

1907 Id., 17.

leaders on trial, such decisions would be seen as a big step toward holding Israel accountable for its actions in the Occupied Territory. This process will need a long time to be executed. The matter of the jurisdiction, the capacity, and the decisions of the ICC to investigate and rule in the committed crimes in the Occupied Territory remain a contentious and argumentative subject of considerable discussion and constitute a separate research. Thus, this research shall not exhaust this matter in detail.[1908] The focus will be directed toward the possible United Nations complaints for individuals.

3.2.3. The United Nations Individual and State-to-State Complaints

Individual complaints are processed within the United Nations committees. These committees are either charter-based such as the Economic and Social Council,[1909] or treaty-based, such as the Committee on Economic, Social and Cultural Rights.[1910] A complaint under one of the nine treaties cannot be brought against the state party unless the state has recognized the competence of the concerned committees to receive and consider complaints from individuals.[1911] Currently, individuals can bring complaints under certain conditions before the Human Rights Committee (CCPR), the Committee on Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Rights of Persons

1908 For information on this topic, see International Criminal Court Report on Preliminary Examination Activities of 2016, on 14 November 2016; Daniel Benoliel and Ronen Perry, "Israel, Palestine and the ICC," Michigan Journal of International Law, Vol 32, (2010), 73; John Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?" Journal of International Criminal Justice, Vol. 11, Issue 3, (2013): 563–570; David Bosco (*2016*) Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court. Global Governance: A Review of Multilateralism and International Organizations: January-March, Vol. 22, No. 1, (2016): 155–171.

1909 See the Charter of the United Nations of 1945, Chapter X.

1910 Office of the High Commissioner for Human Rights, Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights: Economic and Social Council Resolution 1985/17 (28 May 1985).

1911 United Nations Human Rights Office of the High Commissioner, Individual Complaint Procedures under the United Nations Human Rights Treaties: Fact Sheet No. 7/Rev.2. (United Nations, New York and Geneva, 2013), 3.

with Disabilities (CRPD), the Committee of Enforced Disappearances (CED), the Committee on Economic, Social and Cultural Rights (CESCR), and the Committee on the Rights of the Child (CRC).[1912] Individual complaints allow each victim to report human rights violations. These complaints are accepted under certain criteria and after exhausting domestic remedies, which means that the individuals' claims must have been brought before the relevant domestic national authorities as a first step.[1913] Complaints may also be filed by a third party on behalf of individuals, with a written consent.[1914] Nevertheless, if it appears that these domestic remedies are ineffective or unreasonably delayed, the victims can proceed to report violations at the international level.[1915] The committees practically have two functions. The first function is to report all violations of human rights, and the second is to report the failure of the domestic mechanisms, including the judiciary.[1916] The Optional Protocol to the International Covenant on Civil and Political Rights of 1966 grants the Human Rights Committee, the body that monitors implementation of the covenant, the competence of the Committee to "receive and consider communications from individuals … who claim to be victims of a violation by [the] State Party of any of the rights set forth in the Covenant [on civil and political rights]."[1917] Similarly, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 2008 allows the Committee on Economic, Social and Cultural Rights to carry out the function to receive and consider communications submitted by individuals claiming to be victims of violations of human rights that are protected by the Covenant on Economic, Social and Cultural Rights.[1918] Israel and Palestine have ratified neither the Optional Protocol to the International Covenant on Civil and Political

1912 United Nations Human Right, The Office of the High Commissioner, human Rights Treaty Bodies -Individual Communications: Procedure for Complaints by Individuals under the Human Rights Treaties, available at the UN database.

1913 United Nations Human Right, The Office of the High Commissioner, human Rights Treaty Bodies -Individual Communications: Procedure for Complaints by Individuals under the Human Rights Treaties, available at the UN database.

1914 Id.

1915 United Nations Human Rights Office of the High Commissioner, Individual Complaint Procedures: Fact Sheet No. 7/Rev.2. (2013), 13.

1916 Id.

1917 Optional Protocol to the International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 16 December 1966, Article 1.

1918 The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Human Right Council Resolution 8/2 (18 June 2008), 1–2.

Rights of 1966 nor the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 2008.[1919] This means that Palestinians cannot benefit from these available United Nations mechanisms. However, in order to apply these mechanisms to the Palestinian situation, the Israeli and Palestinian governments must ratify both protocols and other United Nations committees' competencies. It must be noted that the UN committees submit their views together with their recommendations to the concerned parties, prepare reports, invite the state parties for a response and further information, and follow up the taken measures by the state parties.[1920] That is to say, these committees have no compulsory mechanisms to enforce their recommendations or their views on the state parties. Victims cannot ask for a remedy when using this complaint mechanism and the communication itself is only one piece of paper that the UN committees consider in preparing their reports.

The Human Rights Council offers other mechanisms, within the United Nations system, for victims of human rights violations, whether individuals or states. The Council was created in 2004 by the United Nations General Assembly to be responsible for promoting and protecting human rights around the world, addressing situations of human rights violations, making recommendations on them, and reporting annually to the General Assembly.[1921] The Human Rights Council adopted its institution-building plan and introduced new mechanisms, such as the Universal Periodic Review, the Advisory Committee, and the Complaint Procedure.[1922] These mechanisms were made available in 2007. The Universal Periodic Review improves human rights situations and enhances the states' capacity to fulfill their obligations, while the Advisory Committee provides expertise and advice for the Council.[1923] The Complaint Procedure allows individuals, groups, or non-governmental organizations that are victims of human rights violations or have knowledge of their manifestation to file complaints.[1924] The Complaint Procedure receives

1919 The United Nations Human Rights Office of the High Commissioner, see the ratification status by country or by treaty. Available on the United Nations official database.

1920 United Nations Human Rights Office of the High Commissioner, Individual Complaint Procedures: Fact Sheet No. 7/Rev.2. (2013), 15.

1921 See United Nations General Assembly Resolution No. 60/251 on 15 March 2006, Article 5.

1922 Human Rights Council, Institution-Building of the United Nations Human Rights Council, Resolution 5/1. At 9th meeting (18 June 2007).

1923 Id.

1924 Id.

communications related to human rights violations under certain circumstances; complaints should not be politically motivated and are only accepted if the available domestic remedies have been exhausted or unreasonably delayed.[1925] The basis of the review of such complaints is the UN Charter and human rights instruments to which the state is a party.[1926] There are no preconditions that limit the eligibility to citizens of certain states, which means that this measure is available for Palestinians. Notwithstanding, the results of such complaints do not exceed reporting, documentation, and following up with the victim and the state concerned. State-to-state complaints are also an available mechanism for the State of Palestine. Several human rights treaties allow state parties to complain to the relevant treaty body about alleged violations by another state party.[1927] Although the Office of the High Commissioner states that these procedures have never been used, they could be an efficient means for the Palestinian Authority to use against Israel regarding violations of human rights.[1928]

In addition, the Human Rights Council, with the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR), continues to work with the UN Special Procedures established by the former Commission on Human Rights, the procedures include special rapporteurs, special representatives, independent experts monitor and publicly report on human rights situations.[1929] The Occupied Palestinian Territory is included in the system of Special Procedures; therefore, special reports on Palestine are discussed below.

3.2.4. Special Reports

The Commission on Human Rights adopted Resolution No. 1993/2 to investigate Israeli practices that affect human rights in Occupied Palestine through the end of the Israeli occupation.[1930] Thus, United Nations commissions and organs lead the effort to speak out in the face of human rights violations in

1925 Id.

1926 Id.

1927 United Nations Human Rights the Office of the High Commissioner, Human Rights Bodies-Complaints Procedures, available at http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx.

1928 Id.

1929 See Human Rights Council, History.

1930 The Commission on Human Rights, Resolution No. 1993/2, E/CN.4/RES/1993/2A (19 February 1993).

Palestine. The national and international human rights organizations are, in their reports, identifying, documenting, and highlighting human rights violations on a large scale.[1931] In addition, the investigation and fact-finding missions of the United Nations play an important role in documenting human rights violations and endorsing penalties and essential measures, which are recommended for adoption.[1932] Fact-finding missions were sent in the past to investigate the crimes committed in the Palestinian Territory (the Gaza Strip, the West Bank and East Jerusalem). These missions were appointed to conduct case-by-case investigation. For instance, a UN fact-finding mission was assigned, in 2002, to investigate an attack on the Jenin refugee camp in the West Bank;[1933] however, Israel prevented the UN missions from entering the West Bank to deploy the investigation.[1934] Similar missions were sent to the Gaza Strip. The President of the Human Rights Council assigned a UN fact-finding mission on the Gaza conflict in 2009 to investigate all violations of international human rights law and international humanitarian law during the war on the Gaza Strip from December 27, 2008 to January 18, 2009.[1935] Israel, however, refused to cooperate with the mission.[1936] The mission reported its investigation to the Security Council; nonetheless, the UN has done nothing to deal with the committed violations. Again, in 2014, and after the brutal war in Gaza, the UN Human Rights Council requested the High Commissioner for Human Rights to assign an independent mission to investigate all violations of international human rights and international humanitarian law.[1937] The mission began its work on September 16, 2014, and although it repeatedly asked

1931 Id.

1932 Id.

1933 General Assembly Resolution ES-10/10, adopted on 7 May 2002; See also UN News Center, UN's Jenin Fact-Finding Team Set to Be in the Middle East Week's End – Ahtisaari. Published on 23 April 2002.

1934 UN News Center, Annan "Minded to Disband" Jenin mission, UN official tells Security Council, published on 30 April 2002.

1935 United Nations General Assembly Resolution S-9/1 on 12 January 2009; Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48 (2009), 13.

1936 See the Letter of the Ambassador of Israel to the United Nations dated 7 April 2009. Annexed to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48 (2009), 436.

1937 General Assembly, Human Rights Council Resolution S-21/1 (2014), A/HR/RES/S-21/1.

Israel to cooperate, Israel did not show any intention to do so.[1938] In fact, the mission was denied access to Israel and the Occupied Territory by Israel and Egypt.[1939] All of the aforementioned missions reported the scale of the devastation in death tolls and the enormous destruction of civilian infrastructure and human rights violations.[1940] Yet, they did not have a binding force.

In addition, other international organizations, such as Human Rights Watch, Amnesty International, The International Federation for Human Rights, and many others, produce reports quarterly and annually on human rights in the Occupied Territory through field missions and research.[1941] The reports of the United Nations committees and the international human rights organizations remain to be very important tools for continuously documenting human rights violations. These documents and reports could be used before the International Court of Justice and the International Criminal Court. In addition, the United Nations Security Council and General Assembly must adopt such reports, and consequently open investigations and hold Israel accountable for violating its obligations under international human rights law and humanitarian law. They must take necessary action after human rights violations are reported, documented, and proven. These actions might consist of legally binding resolutions by the United Nations. The possibility of adopting UN resolutions and their effects will be elaborated on in the next sections.

3.2.5. Resolutions

As discussed previously, the resolutions of the United Nations are legally binding if they create obligations on states. However, if they do not enjoy a binding force, they might still be considered as moral obligations, although

1938 Human Rights Council, Human Rights Situation in Palestine and other Occupied Arab Territories: Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, UN Doc. A/HRC/29/52 (24 June 2015).

1939 Id.

1940 Human Rights Council, Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48 (2009).

1941 See, Human Rights Watch, World Report 2015: Events of 2014, 308–318; Human Rights Watch, Unwilling or Unable: Israeli Restrictions on Access to and from Gaza for Human Rights Workers; Amnesty International, Israel and the Occupied Territories: Demolition and Dispossession – the Destruction of Palestinian Homes (December 1999); International Federation for Human Rights, Trapped and Punished: The Gaza Civilian Population Under Operation Protective Edge (October 2014).

these are still not legally binding unless they become part of customary international law.[1942] Thus, states have the obligation to respect and implement these resolutions. The United Nations Security Council and General Assembly have the capability to decide and adopt resolutions on manners that endanger international peace and security.[1943] The primary responsibility of the UN Security Council is to maintain international peace and security.[1944] The General Assembly considers principles of cooperation to promote international security and peace.[1945] The Security Council and the General Assembly, since 1948, have adopted resolutions concerning Palestine and Israel. There are several resolutions that addressed the situation in general. For example, the General Assembly adopted Resolution No. 67/229 affirming the permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, over their natural resources and demanded that Israel cease the exploitation, damage, and endangerment of the Palestinian natural resources.[1946] The Security Council adopted Resolution No. 54 (1948), which determined that the situation in Palestine constituted a threat to international peace and that the United Nations must take necessary actions in accordance with the Charter.[1947] Article 39 of the Charter reads, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security."[1948] This means that there are mechanisms and measures, which are available to be taken and implemented by the Security Council and the member states of the Charter of the United Nations. In fact, these actors have the obligation and the responsibility to

1942 See Chapter III: The Applicable Law in Occupied Palestine.

1943 The Charter of the United Nations of 1945, Chapter IV: The General Assembly and V: The Security Council.

1944 Id., Article 24.

1945 Id., Article 11.

1946 The General Assembly, Resolution No. 67/229, Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem and of the Arab Population in the Occupied Syrian Golan Over Their Natural Resources, A/RES/67/229 (21 December 2012); See also other General Assembly Resolution 66/225 of 22 December 2011, Resolutions 58/292 of 6 May 2004 and 59/251 of 22 December 2004.

1947 United Nations Security Council Resolution 54 (1948).

1948 The Charter of the United Nations of 1945, Article 39.

protect people who suffer human rights violations in order to maintain international peace and security.[1949]

Likewise, the Principle of the Responsibility to Protect obligates the international community including the United Nations to help states to prevent crimes and violations and to protect populations through preventive and protective measures.[1950] This collective responsibility of the international community creates opportunities to prevent violations, rather than waiting for violations to happen and allow unilateral actions.[1951] In this manner, for instance, the adoption of the Security Council Resolution No. 1973 over Libya shows that UN-authorized intervention is a possibility.[1952] The UN was concerned about the human rights situation in Libya; thus, it interfered and enforced the rules of international law. The Resolution demanded that the Libyan authorities to comply with their obligations under international humanitarian law and international human rights law. They further imposed a ban on all flights, except humanitarian flights, over Libya, and enforced an arms embargo.[1953] Although Libya is not a member state to the North Atlantic Treaty Organization (NATO), NATO responded to the call of the United Nations to the international community to protect the human rights of the Libyan people, as in as of March 2011, a "coalition of NATO allies and partners began enforcing an arms embargo."[1954] This act was derived from the duty of the international community to protect the Libyan people from human rights violations. Accordingly, the international community through the United Nations must meet their responsibility to protect the Palestinians because the situation in Palestine threatens international peace and security.

A number of Security Council resolutions were also adopted concerning the Israeli occupation in Palestine. The Council called upon Israel to abide by its

1949 Gareth Evans and Mohamed Sahnoun, "The Responsibility to Protect," Foreign Affairs, Vol. 81, Issue No. 6 (2000): 99–110.

1950 United Nations General Assembly, Resolution 60/1 2005: World Summit Outcome, A/RES/60/1, at 60th Session (24 October 2005).

1951 The International Commission on the Intervention and State Sovereignty, The Responsibility to Protect (Canada: The International Development Research Center, 2001), 69.

1952 UN Security Council Resolution 1973, UN doc. No. S/RES/1973 (2011).

1953 Id. 3, 6, and 7.

1954 North Atlantic Treaty Organization NATO, NATO and Libya (Archive), 9 November 2015, available at the NATO official homepage.

obligations under international law and the Geneva Conventions.[1955] It called upon Israel to implement measures to prevent illegal acts of violence by Israeli forces and settlers against Palestinians,[1956] condemned the Israeli violence in the Occupied Territory, and requested Israel to take measures to prevent violations against Palestinian civilians.[1957] Most importantly, it stressed "the importance of establishing a mechanism for a speedy and objective inquiry … with the aim of preventing repetition."[1958] Recently, in 2016, the Security Council adopted Resolution No. 2334, which called on Israel to halt the settlements activities and reaffirm that the establishment of the Israeli settlements in Occupied Palestine, including East Jerusalem, "has no legal validity and constitutes a flagrant violation under international law."[1959] The Special Coordinator, Nickolay Mladenov, on June 20, 2017, reported and briefed the Security Council on the implementation of the Resolution 2334. He stated that Israel has been ignoring this Resolution and "there has been substantial increase in settlement-related announcements."[1960]

Although the resolutions of the Security Council discussed the human rights situation in Palestine, they have never enforced reports of the UN that Israel has ignored them.[1961] In fact, the Security Council, to date, "has not required that the [Israeli] Government take all appropriate steps to launch appropriate investigations into the serious violations of international humanitarian and international human rights law."[1962] Not only does Israel refuse to implement the resolutions of the Security Council, the latter is very inaccurate and imprecise concerning the language of its decisions and the measures taken against

1955 See United Nations Security Council Resolution 672 (1990) adopted unanimously at the 2948th meeting (12 October 1990); United Nations Security Council Resolution 237 (1967).

1956 United Nations Security Council Resolution 904 (1994) of 18 March 1994.

1957 United Nations Security Council Resolution 1322 (2000) of 7 October 2000.

1958 Id., see also Resolutions 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980, 672 (1990) of 12 October 1990, and 1073 (1996) of 28 September 1996.

1959 Security Council Resolution 2334 (2016).

1960 Briefing to the Security Council on the Situation in the Middle East – Report on UNSCR 2334 (2016), Special Coordinator Nickolay Mladenov, 20 June 2017.

1961 See for example, Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council Resolutions S-9/1 and S-12/1, Addendum – Implementation of the recommendations contained in the reports of the independent commission of inquiry on the 2014 Gaza conflict and of the United Nations fact-finding mission on the Gaza conflict, A/HRC/31/40/Add.1 (7 March 2016).

1962 Id., 13.

Israel. The capacity of the United Nations to adopt resolutions to promote human rights protection for Palestinians and take proper actions against Israel has not been fully used or implemented in the Occupied Territory. The United Nations, especially the Security Council, has the ability to explicitly adopt compulsory resolutions and hold Israel accountable for violations of international human rights law and international humanitarian law. A decade after the advisory opinion of the ICJ, the Committee on the Inalienable Rights of the Palestinian People demanded Israel immediately dismantle the separation wall and end its illegal practices.[1963] The Committee, in fact, stated that it is "deeply regretting that the Security Council had remained silent on the matter" calling on that body to act urgently and decisively to compel Israel to end its violations.[1964]

It is important to note that any Security Council decisions on all matters that are not procedural "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."[1965] According to Article 23 of the UN Charter, the permanent members of the Security Council are China, France, Russia, the United Kingdom, and the United States of America.[1966] The USA would most probably use its veto to block any resolutions that impose measures or sanctions on Israel. The required action within the United Nations must be purely derived from the responsibility to protect Palestinians and to prevent human rights and humanitarian violations. They must not be politically driven. If the USA vetoes the resolutions of the United Nations Security Council that obligate Israel to respect its obligations under international law and stop committing violations of human right and humanitarian law, it will be indirectly contributing to the ongoing human rights violations in the Occupied Territory. In fact, the veto power is not only hindering an adoption of solutions for Palestinians, it is also often failing to act in other serious circumstances. The suggested solution to bring the Security Council into competence is perhaps a Security Council reform,

1963 United Nations General Assembly, Committee on the Inalienable Rights of the Palestinian People, Palestinian Rights Committee, 10 Years after International Court of Justice Advisory Opinion, Urges Removal of Barrier Wall, UN Doc. GA/PAL/1308 9, at the 362nd Meeting (July 2014).

1964 Id.

1965 The Charter of the United Nations of 1945, Article 27.

1966 Id., Article 23.

eliminating the anachronistic veto.[1967] In addition, limiting the use of the available mechanisms for Palestinians actually prevents them from enjoying their protected human rights, their right to self-determination, and their right to self-defense.[1968] Resolutions might comprise imposing effective sanctions on Israel. The possible sanctions are provided below.

3.2.6. Sanctions

As discussed in the previous subsection, the United Nations has the capacity to impose measures on Israel for violating the principles of the UN Charter and the obligations under international human rights and humanitarian law. The Security Council, through its binding resolutions, has the power to take measures to promote international peace and security including the use of armed force.[1969] Such measures include sanctions, blockades, and other operations by air, sea, or land.[1970] International economic, trade, transport, diplomatic, and academic boycotts would be effective measures to force Israel to reconsider its obligations under international law principles. Sanctions of wrongdoing must be inflicted upon the violator in order to achieve the purposes of prevention, compulsion, and for retribution.[1971] This means that sanctions might be imposed in order to prevent future violations, to compel the offender to cease the ongoing violations, and to impose punishment on the offender.[1972] In addition, in case of imposing sanctions, all states of the international community must be committed to implement these actions, even domestically within their institutions and enterprises.[1973] The use of economic sanctions, for instance, has been used against different countries such as the United Nations sanctions against Zimbabwe in 1979 and South Africa in 1977.[1974] Another recent example is the imposed sanctions against Russia over

1967 Joseph E. Schwartzberg, Transforming the United Nations System: Designs for a Workable World (Tokyo-New York- Japan: United Nations University Press, 2013), 64–93.

1968 Evans and Sahnoun, "The Responsibility to Protect," 99–110.

1969 The Charter of the United Nations of 1945, Articles 41–42.

1970 Id.

1971 Kim Richard Nossal, "International Sanctions as International Punishment," International Organization, Vol. 43, Issue No. 2 (1989): 301–322, 313.

1972 Id., 314.

1973 James Barber, "Economic Sanctions as a Policy Instrument," International Affairs – Royal Institute of International Affairs, Vol. 55, Issue No. 3 (July 1979): 367–384, 377.

1974 Margaret P. Doxey, Economic Sanctions and International Enforcement, 2nd ed. (London: Macmillan-The Royal Institute of International Affairs, 1981), 1.

its occupation of the Ukrainian Crimea by the United States of America and the European Union.[1975]

The United Nations has not imposed any sanctions on Israel in any of the Security Council and the General Assembly resolutions. It usually condemns the Israeli actions and calls on Israel to obey the provisions of international human rights and humanitarian laws.[1976] Although Israel has been violating its obligations under the named laws, the UN and the international community recently elected it to chair the UN Legal Affair Sixth Committee with the support of 109 states.[1977] In 2015, Ban Ki-moon removed Israel from the list of shame following intense pressure from the United States and Israel.[1978] In 2011, the United States cut off its funding to UNESCO after the Palestinian Authority was granted full membership at the agency.[1979] Despite this disagreeable fact, the United Nations Organization remains the sole international body that has the power to impose, promote, and protect human rights. Seemingly, the international community does not intend to protect the Palestinians by imposing sanctions on Israel over the violations of the basic human rights of the Palestinian people. On the contrary, some countries have taken measures by imposing restrictions and criminalizing individuals, those who call for a boycott of Israel.[1980] The United Nations and its member states must take se-

1975 Iana Dreyer and Nicu Popescu, Do Sanctions Against Russia Work? The European Union for Security Studies, (December 2014).

1976 United Nations Security Council Resolution 1322 (2000); Resolutions 237 (1967), 252 (1968), 267 (1969), 271 (1969), 298 (1971), and 465 (1980); See also Security Council Resolution 2334 (2016).

1977 Al-Haq, PHROC Dismayed by Israel's Election to Chair General Assembly's Legal Sixth Committee (15 June 2016).

1978 Sarah Lazare, How the UN is Abetting Saudi War Crimes against Children: Ban Ki-Moon Admits He Bowed to Pressure to Remove the Saudi-led Military Coalition in Yemen from a Blacklist. Alternet News (10 July 2016).

1979 Independent News, US Cuts UNESCO Funding Over Palestinian Support (1 November 2011).

1980 As of the existence of the Boycott, Divestment, Sanctions (BDS), which is a Palestinian-led movement for freedom, justice and equality, some countries including France and the USA have imposed restrictions by enacting laws to criminalize those who call for an Israel boycott. (See France 24, France's Criminalization of Israel Boycotts Sparks Free-Speech Debate, text by Benjamin Dodman, 21 January 2016; Democracy Now News, Criminalizing Critics of Israel: Congress Considers Sweeping Bills to Fine & Jail Backers of BDS, text by Amy Goodman, 21 July 2017.) In 2015, Israel enacted Entry into Israel Law (Amendment) to prevent individuals or representatives of associations or organizations that call for a boycott of Israel from operating and entering the Israel or Palestine. (The

rious measures to impose sanctions on Israel in order to prevent, enforce, and protect the Palestinians in accordance with the UN Charter, human rights instruments, and humanitarian law. The purpose of these proposed sanctions is to lead Israel to change its behavior. Once there are tangible behavioral transformations, the sanctions can be lifted and nullified.

4. Enforcement Mechanisms de Lege Ferenda

4.1. Domestic Enforcement Mechanisms de Lege Ferenda

This section will propose recommendations to create new mechanisms in order to construct a system that protects human rights, prevents violations, and monitors implementation in the Palestinian Territory. In contempt of the political merit of the Palestinian situation under the Israeli occupation, the conflict is certainly in a need of a solution. On the Israeli level, the remedies within the Israeli government are limited and therefore, there will not be any proposed domestic recommendations except the suggested improvements that have been mentioned previously. In order to bring a solution for human rights violation committed by Israel against Palestinians, international remedies will be suggested. In this subchapter, the recommendations and suggestions will deal with the Palestinian national level in order to enforce human rights within the territory under the Palestinian Authority and will deal with international remedies in order to redress human rights violations committed by Israel as an occupying power in the Occupied Territory.

4.1.1. Enforcement Mechanisms de Lege Ferenda within the Palestinian Judiciary and the Palestinian Government

The proposed domestic remedies within the Palestinian context are solely related to the Palestinian judicial entities and the Palestinian Authority. These remedies deal with violations that are committed by the personnel of the Palestinian government such as the police forces. Improvements and developments within the judiciary system is a turning point to protect Palestinians and their human rights. Dissemination of the principles of human rights to

Law of Entry into Israel (Amendment – Not granting a visa or residency permit to any person who calls for a boycott of Israel), 5775-2015).

the government personnel and the civil society in the Palestinian Territory is also a milestone for change for a better livelihood for Palestinians.

4.1.1.1. The Palestinian Government and Legislation

In light of legislation, a set of laws must be enacted in accordance with international human rights law. First, serious penalties and punishments should be introduced and imposed against those who violate the internationally and constitutionally protected fundamental human rights. Second, new laws should aim at reforming the procedures of enforcement for the decisions of the Palestinian Courts, especially the High Court of Justice and the Supreme Constitutional Court. Although the existence of the Israeli Occupation in Palestine constitutes an obstruction, the Palestinian Authority is obligated to build its institutions and maintain law enforcement and respect the human rights of Palestinians in the territory under its control. Even in situations of crisis, many countries face demanding challenges. It is important to uphold the rule of law and protect basic human rights. Comparatively on this matter, Ukraine, for example, is a country in conflict with its neighbor Russia. Although Russia occupies parts of it, Ukraine has adopted new legislation concerning the enforcement of the Court's decisions.[1981] On July 2, 2016, Ukraine officially adopted the Law of Ukraine o*n Enforcement Proceedings* and the Law of Ukraine *on Authorities and Individuals Carrying Compulsory Enforcement of Court Decisions and Decisions of Other Authorities*.[1982] Both laws have introduced new initiatives to ensure the enforcement and implementation of the Courts' decisions in order to create a strong legal basis for efficient enforcement mechanisms.[1983] The new mechanisms that the laws have created are: 1. the establishment of the Institute of Private Enforcement Officers, who are entitled to enforce Court decisions and decisions of other competent authorities which are mainly related to civil and commercial disputes and have the same power of the government officers,[1984] 2. an introduction of the Electronic System of the Enforcement Proceedings, in which all documents in the proceedings shall be drafted, registered, and stored electronically by the enforcement officers in order to ensure the impartial allocation

1981 For more information see Paul Kirby, Ukraine Conflict: Why is East Hit by Conflict? BBC News on 18 February 2015.

1982 The Library Congress, Global Legal Monitor, Ukraine: New Law on State Attorneys. 4 November 2014.

1983 Maria Orlyk and Taras Tertychnyi, Ukraine: Reform of the System of enforcement of Court Decisions (Ukraine: CMS law, (9 June 2016).

1984 Id.

of enforcement,[1985] and 3. a determination of specific terms, in which certain actions can be taken in enforcement proceedings, such as seizure of funds and property, transfer of payment requests to banks, removal of arrest, so this provides comprehensive provisions on enforcement of decisions.[1986] In other words, it is essential to create a system that deals with the problems that a country suffers from and introduce mechanisms and institutions that best serve the needs of the society. This means that legal stability and predictability are the merits of a system where individuals are provided with sustainable norms and practices that would produce a rigid legal paradigm.

Likewise, the Palestinian Authority may adopt laws and mechanisms that fit its needs and situation to enhance the implementation of the Court decisions and create a strong law enforcement system. For instance, it could create an electronic system for the enforcement proceedings that is publicly accessible and benefits all victims of human rights violations. In addition, it should determine particular actions that can be taken against officials, individuals, and governmental personnel who violate human rights. This information must be publicly available and accessible to all people. Targeting the enforcement of the Court decisions in all cases is important. The Palestinian focal point must be the Courts' decisions in general and precisely human rights cases. This is the focus of the next proposed remedy: The Institution for Monitoring the Enforcement of Human Rights Decisions.

4.1.1.2. An Institute for Monitoring the Enforcement of Human Rights Decisions

In line with the Principles relating to the Status of National Institutions (The Paris Principles), "a national institution shall be vested with competence to promote and protect human rights."[1987] This national institution shall be empowered by the constitution and/or other legislative texts.[1988] A similar Palestinian institution exists and functions in Palestine: the Independent Commission for Human Rights.[1989] Its capacity, however, does not extend to

1985 Ihor Siusel and Kseniia Pogruzhalska, New Legislation on Enforcement of Courts Decision in Ukraine Baker and McKenzie Client Alert (20 July 2016).

1986 Id.

1987 The Principles relating to the Status of National Institutions (The Paris Principles), adopted by the General Assembly Resolution 48/134 (20 December 1993).

1988 Id.

1989 See the previous subsection: Available Domestic Remedies in the Palestine-Palestinian Human Rights Organizations.

supervise or monitor the implementation of the decisions of the Courts. Thus, the Palestinian Authority has the opportunity and the ability to establish an institute for enforcing Court decisions concerning human rights where it has its officers. These officers might be named human rights enforcement officers, who work only on the procedures of the implementation of the Courts' decisions. These officers must be highly trained, qualified, and empowered by the laws. They must have extraordinary values to respect and promote human rights. The benefit of such an institution would allow greater accountability within the law, provide objective commitment to human rights lawsuits, accredit law enforcement and the rule of law, and provide a clear direction about the litigants' expectations. This proposed institution would also be part of assessing the Effectiveness of National Human Rights Institutions.[1990]

This step would be very significant for the Palestinian judiciary. In order to create a strong and reliable legal and judicial system, law enforcement and respect of human rights must be upheld to enhance the trust of the Palestinian disputants in the judiciary. Upon adopting required laws, this monitoring institute shall have the power to scrutinize the work of the executive department of the judiciary and enforce the decisions of the Palestinian Courts. This institute could effectively deal with the delayed and unimplemented Court decisions related to human rights and force the judiciary executive institutions, bodies, and departments to implement these decisions instantly. The reason behind this suggestion is that the Palestine police forces are violating human rights laws on the one hand. On the other hand, they are the authorized personnel to promote and to enforce Court decisions. Giving the enforcement and implementation authorities to those who violate the law is rather controversial. In this suggested mechanism, human rights violators would be held accountable wherever and whenever they do not respect the laws and regulations and commit human rights violations against the Palestinian people. Notably, the Palestinian National Development Plan 2014–2016 adopted the vision of adopting good governance and institutional building;[1991] thus, the suggested institute would be part of the implementation of this. Palestine still has a long way to go to be able to implement such strategy. Nonetheless, such

1990 International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights, Assessing the Effectiveness of National Human Rights Institutions (Switzerland: International Council on Human Rights Policy, 2005).

1991 State of Palestine, The Palestinian National Development Plan 2014–2016: State Building to Sovereignty 2014, 49.

implementation would eventually improve its respect to international standards of human rights.

4.2. International Enforcement Mechanisms de Lege Ferenda

The absence of international actors and an international judiciary body to serve Palestinians has left the international legal situation in Palestine unclear. The questionable performance of the domestic judiciary has also put the protection of basic human rights at risk. The existing international and Israeli remedies that serve the Palestinians have flaws and weaknesses. In fact, they are not fit for protecting the human rights of the Palestinians. The United Nations system and institutions of human rights are not well equipped to be robust in dealing with human rights violations nor are they designed to provide a remedy to victims.[1992] Therefore, new remedies are proposed and described to find a reasonable way to put international law principles into force and hold Israeli authorities accountable for violating these principles. These solutions aim to empower the victims and enable them to seek remedies and justice challenging the practices of the Israeli occupation forces and personnel.

4.2.1. An International Human Rights Tribunal for Palestine

In compliance with the international standards, there must be a remedy for everyone without any distinction or discrimination. The right to remedy is internationally protected, and is determined by competent judicial, administrative, or legislative authorities. As discussed earlier, the Universal Declaration of Human Rights in Article 8, the International Convention on the Elimination of All Forms of Racial Discrimination in Article 6, and the International Covenant on Civil and Political Rights in Article 2(3) have protected the right to claim for an effective remedy in case of human rights violations.[1993] Palestinians, thus, have the right to and the need for a remedy to redress human rights violations as well as to enable them to seek protection before a judicial body. It is fundamental to create "an independent judiciary

1992 Surya P. Subedi, The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights (New York: Routledge, 2017), Introduction.

1993 Universal Declaration of Human Rights of 1948, Article 8; The International Convention on the Elimination of All Forms of Racial Discrimination of 1965, Article 6; The International Covenant on Civil and Political Rights of 1966, Article 2(3).

and legal profession in full conformity with applicable standards contained in international human rights instruments are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development."[1994] Judicial enforcement is certainly the most essential, powerful, and effective remedy for Palestinians. Therefore, a tribunal for Palestinians could formally create a basis of legal determination and an enforcement mechanism.

The major distinguishing element is that the judiciary is empowered to deliver compulsory judgments. These judgments are enforced, in most cases, by executive powers such as the police. Nevertheless, there should be a mechanism that allows Palestinians, as victims of human rights violations, to seek a just, reasonable, and enforceable remedy. This remedy is an International Human Rights Tribunal for Palestine.

First, the tribunal ought to have jurisdiction over Israeli violations of human rights that are committed by the Israeli authorities, military forces, and Israeli settlers against the Palestinians in the Occupied Territory. The tribunal would have full power to decide and enforce its decisions on Israel. A judicial tribunal for Palestine must be reliable and unbiased. Investigations, trials, and rulings must meet international standards and facts must be scrutinized closely and professionally. The international tribunal for Palestine would be an independent, non-political, neutral, and impartial judicial body. An independent judiciary means that it must not be subjected to the control or influence of another.[1995] The judgment of the tribunal shall have a binding force and must be implemented rapidly without delay. The mechanisms to enforce the tribunal's decisions must be empowered by its statute.

Second, judges and prosecution are the cornerstone of a well-functioning system that ensures the enforcement of the rule of law and the protection of human rights. The independence and impartiality of the judiciary and prosecutors as well as the independence of lawyers are the fundamental pillars that uphold effective implementation of constitutional and international human rights standards.[1996] Most importantly, the tribunal must be composed of judges who are autonomous, self-directed, and non-political.

1994 Vienna Declaration and Programme of Action (1993), 27.

1995 Garner, ed., Black's Law Dictionary, 887.

1996 The Office of the High Commissioner for Human Rights, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and

They must possess high qualifications and recognized competence in international law.[1997] They are required to meet standards of morality and professional qualifications to guarantee independence.[1998] For the purpose of this tribunal, personnel will be international, impartial, and have no interests in the conflict. It is fundamental that they can be relied on to carry out their duties independent of venal or political considerations.[1999] No power must interfere with the rulings of the Court. The future of an effective, independent, and impartial judiciary depends on judges. Therefore, judges shall be elected carefully, perhaps by the General Assembly, and in conformity with international standards.

Third, the United Nations Resolutions are a path that could solve the problem internationally. The possible next step to establishing the tribunal is a resolution adopted by the Security Council. The ad hoc international criminal tribunals: The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court for Rwanda have been established by United Nations Security Council's Resolutions. The Security Council has also been involved in establishing special tribunals, such as the Special Tribunal for Lebanon and the Special Court for Sierra Leone.[2000] For instance, the International Criminal Court for Rwanda was established according to the UN Security Council Resolution 955 (1994) to "prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States, between 1 January 1994 and 31 December 1994."[2001] The Tribunal, in fact, has convicted individuals who were responsible for serious violations of international humanitarian law committed in Rwanda in 1994.[2002] Those indicted personnel include high-ranking military and government officials, politicians, businessmen, as well

Lawyers – Professional Training Series No. 9 (New York and Geneva: United Nations, 2003), 113.

1997 These judges would be at the professional level of the judges at the International Court of Justice. See the Statute of the International Court of Justice, Article 2.

1998 The Statute of the International Court of Justice, Article 2.

1999 John Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence. 72 S. Cal. L. Rev. 353 1998–1999.

2000 See United Nations Security Council Resolution 1644 (2005), Adopted at the 5329th meeting (15 December 2005); and United Nations Security Council Resolution 1315 (2000), adopted by the Security Council at its 4186th meeting, on 14 August 2000.

2001 UN Security Council Resolution 955 (1994).

2002 See the International Criminal Tribunal for Rwanda, The ICTR in Brief.

as religious, militia, and media leaders.[2003] Another example is the Special Tribunal for Lebanon. It was established under Resolution 1644 on December 15, 2005 as an independent judicial organization.[2004] On February 14, 2005 a large explosion near the St. George Hotel in Beirut killed 22 people, including the former Lebanese Prime Minister, Rafik Hariri.[2005] The Lebanese government officially requested an international tribunal, and two days later the UN Security Council acknowledged the request by passing Resolution 1644.[2006] In this incident, it was not challenging for the Lebanese government to ask the United Nations to establish an international special tribunal for Lebanon to investigate the acts of terror. Despite the differences between Lebanon and Palestine, there is, indeed, room for a comparison. These examples are similar to the Palestinian case as human rights violations have taken place, which constituted a threat to international peace and security. They are different, however, in the ongoing circumstances that exist in Palestine under the Israeli occupation. It is possible to learn lessons from the international tribunals in dealing with grave human rights violations.

The argument behind this suggestion is based on the legal possibility of establishing this mechanism and on the potential of bringing the obligation to protect and fulfill into action. The question is whether it is conceivable to establish an international special tribunal for Palestine to investigate the ongoing human rights violations committed by the Israeli government. From a legal point of view, it is achievable to apply this mechanism to the Palestinian situation and establish a tribunal that has an international character and is granted vast jurisdiction over violations in the Palestinian Territory. The proposed tribunal is not categorized to replace the International Criminal Court or to review crimes that fall under the jurisdiction of an international criminal Court. Boyle, in his book *Palestine, Palestinians, and International Law*, has suggested the establishment of an international criminal tribunal for Palestine.[2007] The proposal of this study is different and new. The suggested tribunal is a human rights tribunal that is able to rule in violations against Palestinians, which are committed by Israel as an occupying power. The

2003 Id.

2004 United Nations Security Council Resolution 1644 (2005), Adopted at the 5329th meeting (15 December 2005).

2005 See the Special Tribunal for Lebanon, About the STL.

2006 United Nations Security Council Resolution 1644 (2005).

2007 Francis A. Boyle, Palestine, Palestinians, and International Law (USA: Clarity Press Inc., 2003), 158.

human rights violations that fall under its jurisdiction could be at any level and against any fundamental right. Punishments, compensation for damages, and most importantly ruling to return the confiscated land to its owners are possible Court outcomes.

An urgent need exists for the establishment of a human rights tribunal for Palestine for many reasons. First, the long-term Israeli military occupation has produced violence in the Palestinian Territory and caused instability. Israeli military occupation, the enduring violations and the ongoing breaches of international human rights and humanitarian laws have endangered international peace and security.[2008] Second, with the presence of the role of the Israeli Supreme Court, the lack of implementation of its decisions has created situations of injustice and unfairness to the victims of human rights violations. Third, the different events, which occurred in Palestine, have created entangled and unclear laws that contradict the international human rights standards. Fourth and most importantly, the United Nations, including the Security Council and the General Assembly, and the international community have the obligation to force Israel to respect its obligations under international human rights and humanitarian laws and create an effective remedy that serves the Palestinian victims of human rights violations.

4.2.2. United Nations Individual Complaints for Palestinians

It has been established that the United Nations individual complaint procedures, as an available mechanism for victims of human rights, are not applicable to Palestinians. Palestinian victims do not have an accessible remedy to redress human rights violations, which are committed by the Israeli forces. In order to enable them to seek effective remedy in Palestine, the establishment of a special United Nations complaint committee for Palestinians is suggested. This remedy is proposed to enable Palestinian individuals to seek assistance through the competence of an international commission. The recommended individual claims would be part of the enforcement process of human rights in Palestine and would allow Palestinian individuals to challenge human rights violations committed by the Israeli occupation forces. The proposed committee shall be empowered to request responses from the Israeli government concerning complaints that it receives. The committee would have powers to obligate the government to demonstrate the measures taken regarding

2008 United Nations Security Council Resolution 54 (1948).

every case and to estimate the compensation or suggest the measures that the government should take.

Although the United Nations complaint procedures, in general, do not have a compulsory force, these procedures can be empowered to solve primary problems vis-à-vis human rights violations. The suggested committee would have the power to change and influence the policies and practices of the Palestinian and Israeli governments. It would be enabled to monitor regulations, laws, orders, and any other issues concerning human rights. This committee shall be independent, neutral, and impartial. The same previous arguments and reasons also apply on this proposed mechanism. The right of the Palestinian people in the Occupied Territory to an effective remedy must be achieved under the Israeli belligerent occupation. This is not a far-reaching demand; it is legally possible to establish this mechanism through a resolution by the United Nations General Assembly or a decision by the Human Rights Council. It is within their capacity to promote human rights around the globe. If these two entities are not capable of making such decisions, then a General Assembly reform is needed, as well as a strengthened Human Rights Council in order to create a credible United Nations.[2009]

5. Conclusion

The available domestic remedies for Palestinian people are not efficient or fair. On the one side, the Palestinian judiciary is not properly functioning, lacks independency, and is controlled by the executive branch of the Fatah-led Palestinian Authority and Hamas in the West Bank and the Gaza Strip. Notably, the two political parties, which infringe upon the independency of the judiciary, violate the human rights of the Palestinian people in Palestine. On the other hand, the Israeli judiciary is biased and not attentive to finding a solution for Palestinian victims of human rights violations that are committed by the Israeli forces and personnel until a political solution is reached. The respect of human rights is not and must not be entangled with the political situation. Similarly, the judiciary must be independent, and judges should rule on the merits without distinction or discrimination on any grounds.

2009 Schwartzberg, Transforming the United Nations System: Designs for a Workable World, 13–35 and 110–128.

Internationally, although the United Nations Security Council and General Assembly adopted several resolutions, some of which are legally binding, proper measures were not taken to enforce such resolutions. Other United Nations bodies release annual reports and document human rights violations, but these reports have not led to any enforcement mechanisms. Ultimately, international mechanisms, de lege lata, to protect Palestinians in the Occupied Territory, simply do not fit Palestinians. The United Nations is not following a system that is promising. It is rather very political and driven by the rich and powerful countries and their allies.[2010] The international enforcement mechanisms, de lege ferenda, for Palestinians are derived from the competence of the United Nations system. They are achievable and internationally conceivable. The International Tribunal for Palestine would create, in its competence and capacity, an effective remedy for Palestinian victims of human rights. The suggested and proposed mechanisms, including the Court, are not exclusively meant to protect Palestinians, but in the context of this research, these mechanisms are proposed to address a solution for enforcing human rights and addressing violations. These mechanisms must not ignore all other human rights violations that are taking place in other locations. These mechanisms could serve all those who have no means to seek justice.

2010 The example of Saudi Arabia proves this statement, as in April 2016, the United Nations, after the release of the Children and Armed Conflict Report, put a Saudi-led coalition on the list of shame for violations against children in Yemen. Saudi Arabia and its allies threatened to withdraw millions of dollars in assistance to the UN in case the coalition was not removed from the list. The Secretary-General accepted the proposal of Saudi Arabia to delist the Saudi-led coalition and review jointly the cases in the report. See the Report of the Secretary-General on children and armed conflict (A/70/836–S/2016/360) (20 April 2016); Human Rights Watch, UN: Return Saudi-led Coalition to "List of Shame": Secretary-General's De-Listing Opens Door to Political Manipulation, 8 June 2016 at 12:51 EDT, seen on 17 August 2017 at 14:57. Available online at Human Rights Watch-webpage: https://www.hrw.org/news/2016/06/08/un-return-saudi-led-coalition-list-shame; United Nations Secretary-General Ban Ki-moon, Statement Attributable to the Spokesman for the Secretary-General on the Annual Report of the Secretary-General on Children and Armed Conflict. New York, (6 June 2016).

VIII. General Conclusions

In this study, four questions were posed and answered. The first question is whether international human rights and humanitarian laws are applicable in Palestine along with domestic laws. The second question is related to human rights violations against the Palestinians, particularly the right to movement, right to private property, and right to equality and non-discrimination. The third question is whether victims of human rights violations have access to the judicial systems, and international and national enforcement mechanisms. The fourth question is whether the international, the Israeli, and the Palestinian available remedies are functioning effectively in protecting and enforcing human rights for Palestinians in Palestine. In order to answer these questions in a comprehensive frame, this study provided a historical background of Palestine and its influence on the legal and judicial systems and the enforcement of human rights.

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The first part of this study began with a chronological-historical background that shaped the judicial and legal systems and human rights protection in Palestine. As Palestine was part of the Ottoman Empire, the study deliberated the laws of the Ottomans Empire, which were based on the Sharia and French laws.[2011] At that time, legal and judicial prosperity was not given priority. After four hundred years, Palestine fell under the British Mandate, which focused on creating a solid legal and judicial system that rooted the establishment of a state for Jews in Palestine, but it neglected the rights of the Palestinian people.[2012] In 1948, after withdrawal of the British forces, Palestine was divided into three parts: the West Bank including East Jerusalem, the Gaza Strip, and what is now Israel.[2013] The West Bank and the Gaza Strip fell under the control of Jordan and Egypt, respectively. Restrictions on basic liberties were carried

2011 Fleischer, Bureaucrat and Intellectual in the Ottoman Empire: The Historian Mustafa Ali (1541–1600).

2012 Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1881–1999.

2013 Smith, Palestine and the Arab-Israeli Conflict, 3rd ed.

out against the Palestinians. Most importantly, the West Bank and the Gaza Strip have become a swamp of legal multiplicity. Yet, in 1967, Israel occupied the West Bank and the Gaza Strip imposing a series of military laws and orders.[2014] In 1993, the Palestinian Authority entered the Occupied Territory, as the only representative of the Palestinian people, and further contributed to the multiplicity of laws.[2015] The Israeli lawmakers drowned the region with military orders, laws, and regulations to control Palestinians, while the Palestinian Authority continued the process and enacted laws in the West Bank and the Gaza Strip, as well as presidential decrees. The accumulation of laws has gravely affected the judiciary and its performance in Palestine. They have impacted the implication, respect, and enforcement of human rights and the rule of law. Today, the Ottoman, the British, the Jordanian in the West Bank, the Egyptian in the Gaza Strip, the Israeli, and the Palestinian laws are all applied in this small divided region. The chapter concluded that the Palestinian Authority must clearly state the applicable and valid laws which are implemented in Occupied Palestine.

The complexity in the multilayered laws has affected the applicability of international human rights and humanitarian laws. Israel, as an occupying power, has disputed the application of international law in the Occupied Territory. Israeli claims are centered on renouncing its duties and obligations under the Geneva Conventions and denying the Palestinians the protection of human rights instruments to which Israel and the Palestinian Authority are state parties.[2016] The Israeli arguments are based on extreme visions of the Israeli government providing that it only applies humanitarian provisions in Occupied Palestine, which is supported by the Israeli Supreme Court. Israel has attempted to diverge from its obligations; nonetheless, the international community, international organizations, and most academic scholars have rejected its claims and have continued to consider that the customary and conventional international human rights and humanitarian laws are de facto and de jure applicable in Occupied Palestine.[2017]

2014 Id.

2015 Oslo Accords Declaration of Principles on Interim Self-Government Arrangements of 1993.

2016 Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967," 69–70; Human Rights Committee, International Covenant on Civil and Political Rights-Second Periodic Report: State of Israel, UN doc. CCPR/C/ISR/2001/2 (2001).

2017 International Court of Justice, advisory opinion (2004); International Covenant on Civil and Political Rights-Second Periodic Report: State of Israel, UN doc. CCPR/C/ISR/2001/2 (2001);

This study highlighted the Israeli allegations upon which it disregarded the de facto and de jure applicability of the international human rights and humanitarian laws to the Occupied Territory. The study rebutted the Israeli claims and concluded that Israel, as an occupying power, is obligated to respect the provisions of the named laws under all circumstances without any exceptions. In addition, the Palestinian Authority is also obligated to respect the named laws, in its relationship with the Palestinians under its control.[2018] Domestically, both the Israeli government and the Palestinian Authority are imposing different laws, which affect the protection of human rights. For example, Israel still applies the British Emergency Regulations of 1945 along with its own Security Regulation of 2009, military orders, and other laws and regulations in the Occupied Territory, most of which contradict the provisions of human rights and humanitarian laws. The Palestinian Authority depends on its Basic Law as a constitutional guarantee for human rights together with a number of international human rights conventions.

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In its second part, this study examined the right to movement, the right to property, and the right to equality and non-discrimination in Occupied Palestine. It highlighted the existence of different human rights violations against Palestinians in Occupied Palestine, but in very diverse and arbitrary practices. First, the movement of the Palestinians in the West Bank is controlled by Israel through a complex and multi-layered system of physical constraints, roadblocks, military checkpoints, and forbidden roads. The separation wall, including its forbidden areas of the Seam Zone, and other physical obstacles impact almost every aspect of daily life.[2019] In

International Committee of the Red Cross, Implementation of the Fourth Geneva Convention in the Occupied Palestinian Territories: History of a Multilateral Process (1997–2001); The Security Council Resolution No. Resolution 242 (1967); United Nations Security Council Resolution No. 471 (1980); Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967."

2018 Palestine has directly joined the conventions and their additional protocols without any reservations; See the International Committee of the Red Cross, Treaties and States Parties to Such Treaties, Palestine; On April 2, 2014, ratified the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination and 11 other international human rights conventions.

2019 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, UN Doc No. A/HRC/34/70; United Nations

the Gaza Strip, a complete blockade is carried out creating an open prison for more than one and one-half million Palestinians, where permits are rarely granted to leave or enter the Strip.[2020] The movement of Palestinians is also restricted for various reasons by the personnel of the Palestinian Authority through the denial of issuing passports and the denial of entering or exiting the West Bank and the Gaza Strip.[2021] These restrictions violate the internationally protected basic human rights. Israel imposes these restrictions through the Israeli military orders and laws as well as the British Emergency Regulations, while the Palestinian Authority enforces such restrictions through its penal code and illegal practices; all are in conflict with international human rights and humanitarian laws. This section suggests that these laws, regulations, and orders must be abolished, and the restrictions must be lifted and precluded.

Secondly, the chapter on the right to property discusses the ongoing Israeli practices of confiscation, expropriation, and destruction of the Palestinian public and private property, particularly land. These practices are carried out by the Israeli authorities without an actual purpose that constitutes imperative military necessity or the public interest of the local Palestinians.[2022] In order to establish, develop, and maintain the Israeli settlements in the Occupied Territory, these practices are flagrant violations of the international humanitarian laws. The Israeli occupying power can only use public property temporarily without altering the character of this property.[2023] Private property cannot be confiscated, and the destruction of property by the occupying power is specifically prohibited by international humanitarian law.[2024] Israel, as an occupying power in Palestine, has intentionally misinterpreted and misused the exceptions in international humanitarian law and human rights. The problem is not only the Israeli exploitation of its powers and violations of international law, but it is also the enactment and use of laws, including the use of the British Emergency Regulations, that allow land confiscation and expropriation for different purposes, which are all arbitrary and serve to

Human Rights Office of the High Commissioner, Freedom of Movement (UN Doc. No. A/HRC/34/38).

2020 Id.

2021 The Independent Commission for Human Rights, 16th Annual Report.

2022 B'Tselem, Land Grab: Israel's Settlement Policy in the West Bank.

2023 The Hague Convention (IV) of 1907, Article 46, 55, and 56; The Geneva Convention (IV) of 1949, Article 53.

2024 Id.

benefit Israeli policies. These laws must be abolished. The confiscated land must be returned to its Palestinian owners, and a just compensation must be paid for damages.

Thirdly, the last chapter of this part examined the Palestinians' right to equality and non-discrimination. Systematic discrimination against the Palestinian people in the Occupied Territory is a great concern. The aforementioned Israeli violations of imposing restrictions on movement, massive land confiscation and expropriation, and many other violations are practiced by the Israeli authorities against the local Palestinian inhabitants in the Occupied Territory in favor of the Israeli citizens.[2025] The Israeli Supreme Court, in addition, has not treated Palestinian petitioners with the same concern as Israeli petitioners. It has inevitably acted as the primary institution whose duty it is to protect the interests of Israel and legitimize its actions, even when such actions involve serious violations on individual liberties and basic human rights for Palestinians.[2026] The deliberate policy of discrimination directed against the Palestinians by the Israeli government has violated several human rights, not only the aforementioned ones.

Although this study has focused on only three fundamental rights, it is crucial to remember the other violations that display the illegal policy of the Israeli occupation and contradict all norms and principles of international law. These include house demolitions, the denial of residency and family unification, deportations, restrictions on the liberty of the persons, restrictions on the right to expression, administrative detention, torture, denial of health care, restriction on the right to education, etc. The Palestinian government, the political parties of Fatah and Hamas, has also committed acts of discrimination against the Palestinians who are politically affiliated with the opposing party.[2027] The discriminatory actions of the Palestinian Authority and the Israeli government must come to an end. The recommendations on this chapter emphasize that the Israeli discriminatory laws, which benefit only Israelis and violate the rights of Palestinians, must be revoked and replaced

2025 B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem. Comprehensive Report (1995).

2026 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 191–192.

2027 The Independent Commission for Human Rights, 16th and 17th Annual Reports.

by new laws that meet the international human rights and humanitarian law standards.

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The last part examined the available remedies to redress human rights violations. Palestinians have the right to remedy, which means that in situations of human rights violations, there must be available venues to seek justice. Domestically, Palestinians have only one path to challenge the Israeli violations: the Israeli Supreme Court. However, the Court has not shown impartiality regarding Palestinian petitions. In many cases, the Court has allowed Israeli authorities to impose restrictions under diverse constraints, such as national security and military purposes, allowing ongoing violations of the human rights of the local Palestinians.[2028] The Israeli government has had the support of the Court in circumventing these constraints.[2029] Even in cases of grave violations of international humanitarian and human rights laws, the Court has often asked the authorities to reconsider their policies or to back down rather than ruling on the merits.[2030] The Court did not use its powers to impose obligations on the Israeli government. According to these findings, it should be noted that the Israeli Supreme Court must apply the provisions of international human rights and humanitarian law with no discrimination on any grounds. Similarly, Israel must incorporate human rights treaties within its domestic legislations, particularly the most fundamental and basic rights for all without any discrimination and unambiguously protect the Palestinians under occupation. It is essential to include human rights provisions into domestic laws.

Violations committed by the Palestinian Authority and its personnel can be challenged before the Palestinian Constitutional Court and the High Court of Justice of the West Bank and the High Court of Justice of Gaza. Both judiciaries function separately and are politically driven, as Fatah and Hamas have

2028 See Beit Sourik Village Council v. The Government of Israel (2004); Abu Safiyeh v. Minister of Defense and IDF Commander in Judaea and Samaria (2007); Bethlehem Municipality and 22 others v. State of Israel and 2 others (2005).

2029 Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 197.

2030 Dotan, "Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israel High Court of Justice During the Intifada, 339.

been fighting over controlling the judiciary.[2031] The Palestinian judiciary is not independent, and it is lacking experience and organization. On the one hand, the Palestinian Authority must entrench the notion of human rights among its personnel and police forces and educate them on human rights in order to create a presumptuous step toward respecting the principles of human rights. On the other hand, the Palestinian judiciary must take progressive steps to improve its function and eventually enforce the protection of human rights. Full incorporation of human rights treaties in domestic laws allows national courts to enforce fundamental human rights like any other laws.[2032] The Palestinian Authority, as a new party of several international treaties and conventions, has to fully incorporate international treaties into its domestic laws and draw mechanisms for their implementation. Although Palestinian Basic Law has provisions that protect some fundamental human rights, it lacks the mechanisms to enforce these constitutionally and internationally protected rights. On this matter, there must be no ambiguity in the Palestinian legislations concerning the protection of human rights.

Internationally, there are no clear available remedies for the Palestinian victims of human rights violations. The International Court of Justice does not yet have the competence to provide Palestine with a legally binding ruling, because the latter is not part of the Court's statute. The United Nations individuals and state-to-state complaints are remedies that do not provide compulsory and binding outcomes; this means that they cannot offer a solution for the Palestinian victims of human rights violations. All of the available remedies are concentrated in the hands of the United Nations, and they are not serving the Palestinian people for political and institutional reasons. The main proposal of this study suggests the establishment of a neutral international tribunal for Palestinians, which comprises international judges. This proposal could be the possible legal solution to redress human rights violations committed by the Israeli occupation forces. It might be complicated to agree upon the jurisdiction and the powers of the tribunal. However, upon the establishment of the proposed tribunal, powers and jurisdiction must be clearly and explicitly specified. In this regard, a resolution and a charter,

2031 The Palestinian Center for the Independence of the Judiciary and the Legal Profession-MUSAWA, The Second Legal Monitor: Report for the Situation of Justice in Palestine, 87; The Law of the Supreme Constitutional Court No. 3 of 2006.

2032 David Sloss, "Treaty Enforcement in Domestic Courts: A comparative Analysis," in Sloss, ed. The Role of Domestic Courts in Treaty Enforcement: A Comparative Study, 18.

within the United Nations, shall regulate the detailed functions of the tribunal. Strategical and special enforcement mechanisms for Palestine might be a way to create a fit international law mechanism for Palestinians. A pellucid remedy must be designed in accordance with the needs and the de facto situation of the Palestinians in the Occupied Palestinian Territory.

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Recognizing the need to respect human rights is essential and could develop and improve the ability to implement practices that conform to human rights. This contribution can help to build peace and prevent or minimize violations, and eventually lead to a respect of human rights.[2033] The concluding remarks of this study first and foremost concern the principles of international law and their ability to provide a remedy for victims. International law, at first glance, seems to be dealing with all possible violations and protecting victims everywhere with no distinction or discrimination based on race, religion, nationality, or origins. Recitation of international law principles might be seen as the only savior for all the victims of human rights and humanitarian violations. However, international mechanisms are not equipped to halt human rights violations nor do they offer a tangible remedy. The overall recommendations of this study evolve around finding a remedy for those Palestinians who suffer human rights violations under the Israeli occupation. It is, however, important to conclude that these violations and the misuse of international law are derived from the existence of the prolonged Israeli occupation in Palestine. In a statement to the Security Council, on March 12, 2002, the Secretary-General of the United Nations explicitly called on Israeli to end the illegal occupation in the Palestinian Territory.[2034] In order to find a solution to the ongoing human rights violations against Palestinians, the Israeli belligerent occupation must come to an end and the Palestinian Authority must respect its international obligations.

The applicable provisions of international human rights law and international humanitarian law are the main tools for Palestinians. Israel,

2033 Gerd Junne and Willemijn Verkoren, "The Challenge of Post-conflict Development," in Post-conflict Development: Meeting New Challenges, eds. Gerd Junne and Willemijn Verkoren (USA and UK: Lynne Rienner Publisher, 2005), 4.

2034 United Nations, Meetings Coverage and Press Releases. Secretary-General Tells Security Council Middle East Crisis Worst in Ten Years. Secretary-General: Press Release, UN, Doc No. SG/SM/8159-SC/7325 (2002).

nevertheless, continues to violate the most fundamental human rights of the Palestinians and justify these violations on the grounds of security, military necessity, and public interests. All resolutions, reports, and decisions that have been adopted by the international community remain under the complexity of the procedures of the United Nations. The resolutions of the Security Council and General Assembly are being confronted with the Israeli denial and ignorance. As long as the international community is unable to hold Israel responsible for its actions, the most probable outcome is that Israel will continue to commit human rights violations and ignore all international law principles. The different international modalities to enforce human rights might have been efficient in some cases, but not for the Palestinians. Ample mechanisms exist in international law; however, these have no substantial binding force.

Many international treaties create sets of rights without granting parties access to international dispute mechanisms.[2035] This, in fact, creates an international dilemma in providing remedies for parties and individuals. The lack of international enforcement weakens the credibility of international law and compels states to rely more on the domestic mechanisms.[2036] Even in the presence of international enforcement mechanisms, promoting compliance with the treaties' obligations is difficult. These mechanisms are neither practical nor reasonable. They are very complicated and depend on the United Nations where five main powers are in control. Although this study does not touch upon politics, it is important to note that the binding decisions of the United Nations Security Council depend on the veto power in the United Nations Security Council. Israel has continually been supported by the USA, which will most probably veto any measures against Israel. This has negative consequences to the protection of the Palestinian people and their fundamental freedoms and human rights, as Israel is committing violations without being legally and internationally held accountable. The United Nations Security Council resolutions on Israel's retaliation raids contained no cautionary language;[2037] they are neither explicit nor critical. This leads to the conclusion that human rights protection must be

2035 Sloss, "Treaty Enforcement in Domestic Courts: A comparative Analysis," in Sloss, ed. The Role of Domestic Courts in Treaty Enforcement: A Comparative Study, 5.

2036 Id., 6.

2037 Quigley, Palestine and Israel: A Challenge to Justice, 155.

separated from politics to open new doors for a proper protection of human rights.

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Laws usually face tension between change and stability, but a law does not stand still, and it never should.[2038] Many factors have a great impact on the development of the law, including the need for efficient ways to achieve justice. Most importantly, this development must include "shifting cultural postures of legal actors and change of political attitude and social values the most commonly agreed upon."[2039] With changing needs and circumstances, it is essential that legal norms be adapted to new developments, and this necessity is accomplished through the possibility of legislative intervention. If the provisions of international law continue to have flaws and to be unclear and insufficient to protect the Palestinian victims of human rights violations, Israel would continue to interpret these provisions for its benefits. New international laws and conventions should be introduced and must be up-to-date to fit the present times. The solution can be reached by "promoting best fit rather than best practice justice initiatives that are compatible with local complexities and earn the trust of the local population."[2040]

Some of the humanitarian and human rights provisions are poorly written. Although the focus of this research is on the enforcement of these provisions, this study revealed their core problems and their impracticality. The provisions and their implementation might seem reasonable in some situations, but the complexity of the Palestinian situation requires more austere and accurate laws. It is necessary to dramatically change the international legal framework in order to create reasonable regulations and mechanisms for Palestinians in Occupied Palestine. The applicability of international norms in Palestine does not grant Palestinians appropriate protection. International human rights and humanitarian laws are not clear in protecting the fundamental rights of individuals. They are broad and allow several interpretations, especially vis-à-vis the states' rights to limit human rights. The exceptions in the international humanitarian law and international human rights can be used as tool of certain arbitrary policies. Most of the claims that Israel uses to

2038 Bussani and Urscheler, eds. Comparisons in Legal Development: The Impact of Foreign and International Law on National Legal Systems, 7.

2039 Id.

2040 Id., 12.

deviate from its obligations in the Occupied Territory rely on the imprecision and vagueness in these laws.

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In the context of this research, the purpose is not to propose political solutions. A possible political solution might take decades or even centuries. This study can be summed up in the following four points: 1) The political complications in Palestine do not perpetually justify the violations of human rights. 2) Military necessity and public interests shall not be accepted as legitimate vindications to violate the very basic and fundamental rights of the Palestinian people for more than 56 years under the rule of the Israeli belligerent occupation. The severity of the continuous practices against the Palestinian inhabitants has led to a deliberate discriminatory policy in the Occupied Territory. 3) The Palestinian Authority has not respected human rights of its own people, and its judiciary has proven its ineffectiveness. 4) The available international and domestic remedies have no effective legal means to enforce human rights; henceforth, the efforts must be turned to create an independent and neutral judicial system that allows Palestinians to seek remedies and justice.

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The complexity of this study was actually underestimated. This necessitated moving beyond the questions of the actual focus of the research. Thus, it was impossible to keep the questions limited to one event, because all are interrelated and entangled with each other. One event opens wide doors to manifold discussions. There are a number of subjects left for further research and a number of challenges still remain, such as the legality of the implementation of the Oslo Accords in Palestine, the legality of the Israeli presence in Palestine as an occupying power, and the role of the United Nations and the International Committee of the Red Cross in Palestine. All of these issues require extensive further attention. The additional question is whether a Palestinian-Israeli federation could be the solution. Would a restoration of a conflict through a democratic federation give possible remedies to the Palestinian people? Would this federation include a joint human rights tribunal and/or a constitutional Court? And finally, on what legal basis should this Federation be established? The idea of federalism is derived from the possibility of incorporating international human rights into constitutional norms in a region of different religions, multilingualism, and diverse ethnicities and

origins, which could protect all persons without discrimination or distinction. Thus, these questions are very complicated to answer, but they might be an important step to find a long-lasting Palestinian-Israeli remedy. Thus, the federal question will be left for further research.

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Mais Qandeel

List of Appendixes

1. The Questionnaire for Lawyers in Arabic and Translated to English. Appendix No (1).

2. The Questionnaire for Disputants in Arabic and Translated to English. Appendix No (2).

3. The Questionnaire for Judges in Arabic and Translated to English. Appendix No (3).

مسح ميداني لجمع معلومات لرسالة الدكتوراه

استبيان لرسالة الدكتوراه

السادة المشاركين في الاستبيان،

آقوم حاليا بتحضير وكتابة رسالة الدكتوراة الخاصة بي والتي تحمل عنوان «فعالية دور القضاء في تطبيق وحماية المبادئ الدوليه لحقوق الانسان في فلسطين» وتناقش الاطروحة فيما إذا كانت الية تطبيق القوانين الدولية والوطنية كافية لحماية حقوق الانسان الفلسطيني. يركز البحث على ثلاثة حقوق اساسية وهي حرية التنقل والحق في التملك والحق في عدم التعرض للتمييز العنصري، والهدف من هذا المسح هو التعرف على الاراء المختلفة في فلسطين فيما يتعلق بدور القضاء الدولي والوطني لحماية حقوق الانسان الفلسطيني وتتمثل اهمية هذا البحث في القاء الضوء وايجاد بعض الحلول الممكنة والفعالة لتوفير أداة دولية ومحلية لحماية حقوق المواطن الفلسطيني وامكانية اللجوء الى جهة قضائية محايدة.

الرجاء الملاحظة ان المعلومات المتحصلة من هذا المسح سوف تكون سرية وستستخدم لآغراض البحث العلمي فقط.

في ٧١ نيسان ٢٠١٦

ميس قنديل
جامعة فريبورغ، سويسرا

Translation of the Appendix to the Questionnaires

Ph.D. Questionnaire

Dear Participants:

I am currently pursuing my PhD at the University of Fribourg, Switzerland. My thesis is titled: *The Effectiveness of the Judicial System in Enforcing Human Rights*. It examines whether the international and domestic human rights enforcement mechanisms are sufficient for Palestinians. I elaborate on three basic human rights: the right to movement, the right to property, and the right to equality and non-discrimination. The purpose of this questionnaire is to learn about the Palestinian point of view regarding the Palestinian, Israeli, and international judiciary in serving and protecting the fundamental human rights for Palestinians.

I believe that the results of this survey will not only be of value to this research, but will also contribute to helping Palestinians seek their rights efficiently in an independent and neutral judiciary body.

I recognize the value of your time and sincerely appreciate your efforts. Individual responses will be held anonymously and all data will be confidential.

Please take five minutes to answer this survey!

Best regards,

Mais Qandeel

ملحق رقم (١)

مسح ميداني للمحامين

الآسم (اختياري): .....

عدد سنوات العمل كمحامي: .....

اوافق على الاجابة عن الاسئلة التالية بصفتي محاميا في مدينة.....، فلسطين.

١. اثق بالقضاء الفلسطيني.

اوفق بشدة اوافق لا اعرف لا اوافق آعارض بشدة

٢. اثق بمصداقية القضاة واستقلالهم وعدم تحيزهم.

اوفق بشدة اوافق لا اعرف لا اوافق آعارض بشدة

٣. اشعر بالتمييز العنصري ضدي لاسباب مختلفة عند ممارستي لعملي كمحامي.

اوفق بشدة اوافق لا اعرف لا اوافق آعارض بشدة

٤. مجلس القضاء الآعلى الفلسطيني هو الجهة الوحيدة التي من الممكن ان تقوم بتطوير وتغيير ومعالجة النظام القضائي الفلسطيني.

اوفق بشدة اوافق لا اعرف لا اوافق آعارض بشدة

٥. يوجد اشكالية كبيرة في تطبيق القوانين الساريه في فلسطين.

اوفق بشدة اوافق لا اعرف لا اوافق آعارض بشدة

٦. هناك ثغرات في النظام القضائي الفلسطيني تتمنى ان يتم معالجتها.

اوفق بشدة اوافق لا اعرف لا اوافق آعارض بشدة

٧. يجب على المحكمه ان تتدخل في تطبيق القرارات الصادره عنها.

اوفق بشدة اوافق لا اعرف لا اوافق آعارض بشدة

٨. يجب على المحكمة آن تآخذ بعين الاعتبار المعايير الدولية لحقوق الانسان.

اوفق بشدة اوافق لا اعرف لا اوافق آعارض بشدة

٩. تشكيل المحكمة الدستورية سوف يساهم في تعزيز دور القضاء الفلسطيني ويساهم في تطويره.

اوفق بشد اوافق لا اعرف لا اوافق آعارض بشدة

١٠. اعتقد ان القضاء الاسرائيلي ينصف المتقاضين الفلسطينيين.

اوفق بشدة اوافق لا اعرف لا اوافق آعارض بشدة

١١. اعتقد ان القضاء الدولي سيوفر الحماية الدولية للشعب الفلسطيني.

آعارض بشدة لا اوافق لا اعرف اوافق اوفق بشدة

12. التعديلات التي طرأت على القوانين الفلسطينية في ظل السلطة الوطنية ادت الى تراجع اداء القضاء الفلسطيني.

اوفق بشدة　　اوافق　　لا اعرف　　لا اوافق　　آعارض بشدة

13. الدعم من الدول المانحة ساهم في تطوير القضاء الفلسطيني.

اوفق بشدة　　اوافق　　لا اعرف　　لا اوافق　　آعارض بشدة

……

١٤. كيف يمكن تعزيز ثقة المواطن الفلسطيني بالقضاء؟

Appendix No (1)

Translation of the Questionnaire for Lawyers

1. Do you trust the Palestinian judiciary?
2. Do you think that the Palestinian judiciary is independent and neutral?
3. Do you feel discriminated against, for any reason, as a lawyer?
4. Do you consider the High Judicial Council to be the main actor that could change and improve the work of the judiciary?
5. What are the obstacles that lawyers face in their work before the Palestinian Courts?
6. What are the problems in the judiciary that must be addressed?
7. Do you think that the Court must interfere in implementing its decisions?
8. Do you think that the Court is obligated to consider the provisions of human rights in its decisions?
9. Will the formation of the Constitutional Court enhance the role of the Palestinian judiciary to enforce human rights?
10. Do you think that the Israeli judiciary is fair, neutral, and non-discriminatory?
11. Do you believe that an international judiciary is an important means of protecting Palestinians against human rights violations?
12. Have the Palestinian Presidential Decrees contributed to worsening the performance of the judiciary?
13. How could Palestinian lawyers strengthen people's trust in the judiciary?
14. How could the judicial system be improved?

ملحق رقم (٢)

مسح ميداني

الآسم (اختياري): .....

المهنة: .....

اوافق على الاجابة عن الاسئلة التالية:

١. اثق بالقضاء الفلسطيني.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٢. اثق بالقضاء الفلسطيني كجهة لتطبيق الدستور.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٣. اعتقد باننى استطيع اللجوء الى القضاء الفلسطيني للمطالبة بحقوقي المحمية دوليا مثل حقي في الملكية وحقي في الحرية الشخصية.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٤. آعتقد ان السلطة الوطنية الفلسطينية تنتهك حقوق الفلسطينيين المحمية في المناطق الخاضعة تحت سيطرتها.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٥.اثق في القضاء الاسرائيلي.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٦. اعتقد آن القضاء الاسرائيلي عادل ومحايد.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٧. اعتقد ان القضاء الاسرائيلي يمارس التمييز العنصري ضد الشعب الفلسطيني.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٨. اعتقد ان القضاء الاسرائيلي ينصف المتقاضين الفلسطينيين.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٩. أؤمن بالحماية الدولية لحقوق المواطن الفلسطيني.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

١٠. اثق بالقضاء الدولي (المحاكم الدولية) للنظر في الانتهاكات التي يتعرض لها الشعب الفلسطيني.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

١١. اعتقد ان القضاء الدولي سيوفر الحماية الدولية للشعب الفلسطيني.

اوفق بشدة　　اوافق　　لا اعرف　　لا اوافق　　آعارض بشدة

١٢. اعتقد انه من واجب الحكومة الفلسطينية ان تتخذ اجراءات دولية لحماية الشعب الفلسطيني من الانتهاكات الاسرائيلية.

اوفق بشدة　　اوافق　　لا اعرف　　لا اوافق　　آعارض بشدة

١٣. اعتقد ان الاعتماد على المواثيق الدولية هو الحل وحيد لحماية الشعب الفلسطيني.

آعارض بشدة　　لا اوافق　　لا اعرف　　اوافق　　اوفق بشدة

Appendix No (2)

Translation of the Questionnaire for Palestinian Litigants

1. Do you trust the Palestinian judiciary in general?

2. Do you trust the Palestinian judiciary as a main actor to implement and respect the Palestinian constitution?

3. Do you think that you will be able to petition before the Palestinian courts to seek justice?

4. Do you think the Palestinian Authority violated the constitutionally and internationally protected human rights?

5. Do you trust the Israeli judiciary?

6. Do you think that the Israeli judiciary is fair, neutral, and non-discriminatory?

7. Do you think that the Israeli High Court of Justice protects the Palestinians' human rights?

8. Do you think that Israeli judges are neutral and do not discriminate in the process of hearing cases related to military violations against Palestinians?

9. Do you believe that an international judiciary is an important way to protect the Palestinians against human rights violations?

10. Do you trust the international judiciary to decide in cases concerning violations against the human rights of the Palestinians?

ملحق رقم (٣)

مسح ميداني للقضاة

الآسم (اختياري): .....

عدد سنوات العمل كقاضي: .....

اوافق على الاجابة عن الاسئلة التالية بصفتي قاضيا في محكمة .....، فلسطين.

١. القضاء يعمل باستقلالية تامة.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٢. القضاء لا يتمتع بآي استقلالية .

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٣. هناك تدخلات متعددة من جهات مختلفة بعمل القضاء.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٤. هناك اولويه في تعيين وترقية القضاة الذين ينتمون الى حزب سياسي معين.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٥. اشعر بالتمييز العنصري ضدي لاسباب مختلفة عند ممارستي لعملي كقاضي.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٦. مجلس القضاء الآعلى الفلسطيني هو الجهة الوحيدة التي من الممكن ان تقوم بتطوير وتغيير ومعالجة النظام القضائي الفلسطيني.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٧. يوجد اشكالية كبيرة في تطبيق القوانين الساريه في فلسطين.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٨. هناك ثغرات في النظام القضائي الفلسطيني تتمنى ان يتم معالجتها.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

٩. يجب على المحكمه ان تتدخل في تطبيق القرارات الصادره عنها.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

١٠. يجب على المحكمة آن تآخذ بعين الاعتبار المعايير الدولية لحقوق الانسان.

اوفق بشدة | اوافق | لا اعرف | لا اوافق | آعارض بشدة

١١. تشكيل المحكمة الدستورية سوف يساهم في تعزيز دور القضاء الفلسطيني ويساهم في تطويره.

آعارض بشدة　　لا اوافق　　لا اعرف　　اوافق　　اوفق بشدة

12. التعديلات التي طرأت على القوانين الفلسطينية في ظل السلطة الوطنية ادت الى تراجع اداء القضاء الفلسطيني.

اوفق بشدة　　اوافق　　لا اعرف　　لا اوافق　　آعارض بشدة

13. الدعم من الدول المانحة ساهم في تطوير القضاء الفلسطيني.

اوفق بشدة　　اوافق　　لا اعرف　　لا اوافق　　آعارض بشدة

……

١٤. كيف يمكن تعزيز ثقة المواطن الفلسطيني بالقضاء؟

Appendix No (3)

Translation of the Questionnaire for Judges

1. Do you think that the Palestinian judiciary is independent?

2. Is there any interference in the work of the judges?

3. Is there any priority in promotions and appointments of judges who belong to a particular political party?

4. Do you feel discriminated against, for any reason, as a judge?

5. Is the High Judicial Council considered to be the main actor that could change and improve the work of the judiciary?

6. Are there any problems facing judges in implementing and applying valid laws in Palestine?

7. Does the Court have an obligation to interfere in the implementation of its decisions?

8. Does the Court consider the international law instruments, especially human rights, in its decisions?

9. Will the formation of the Constitutional Court enhance the role of the Palestinian judiciary to enforce human rights?

10. Have the Palestinian Presidential Decrees contributed to worsening the performance of the judiciary?

11. How could the Palestinian judges strengthen the people's trust in the judiciary?

12. What are the problems from which the judiciary suffers?

13. Do you think that the judiciary could be improved?

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