

RESEARCH ARTICLE

Israel's Associated Regime: Exceptionalism, Human Rights and Alternative Legality

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In the context of Israel's declared permanent state of exception, this article focuses on the legal protection awarded to the Palestinian populations under Israeli control. To broaden the discussion over Palestinian people's rights, which generally focuses on the confiscation of land and the right to return, the author consciously focuses on anti-terrorism and security measures, which contribute to the creation of what the International Court of Justice has defined as an 'associated regime' of occupation. The article is divided into three parts. In the first part, the author discusses Israel's domestic obligations towards Palestinians (arguing the case of both Palestinian citizens of Israel, and Palestinian residents) and their *de jure* and *de facto* discrimination. The second part discusses the applicability of humanitarian law, specifically the applicability of the Fourth Geneva Convention. This section discusses the applicability of the Convention to both territories and people under Israeli control. The third part discusses the applicability of international human rights law to all territories under Israeli control and delves into the issue of the mutual relationship between the two international legal regimes in the territories under occupation. The article posits that Israel's rationale for the non-applicability of such legislation to the Palestinian territories and populations it controls constitutes a form of 'alternative legality'. The article concludes that Israel's disproportionate application of security practices and anti-terrorism measures to the Palestinian segment of its population violates Palestinian rights protected under Israel's domestic and international legal obligations.

Keywords: Israel; Occupied Palestinian Territories; Palestine; Arab; occupation; Human Rights; Right to Life; Humanitarian Law; distinction; military necessity; proportionality

Introduction

'The rights of every man are diminished when the rights of one man are threatened'. — John F. Kennedy

The Israeli government is criticised by most of the international community for widespread human rights violations that take place in the territories under its control.¹ To justify its policies, Israel has cited a permanent

¹ In 2013, the UN adopted 21 resolutions against Israel, of which 17 relative specifically to the Palestinian situation, (the rest took a broader look at the Syria situation). Among these resolutions: UN General Assembly, *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*, UN Doc. A/C.2/68/L.27; UN General Assembly, *The right of the Palestinian people to self-determination*, UN Doc. A/C.3/68/L.68; UN General Assembly, *Assistance to Palestine refugees*, UN Doc. A/RES/68/76; UNGA, *Persons displaced as a result of the June 1967 and subsequent hostilities*, UN Doc. A/RES/68/77; UNGA, *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, UN Doc. A/RES/68/78; UNGA, *Palestine refugees' properties and their revenues*, UN Doc. A/RES/68/79; UNGA, *Work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, UN Doc. A/RES/68/80, which 'Deplores those policies and practices of Israel that violate the human rights of the Palestinian people and other Arabs of the occupied territories', receiving votes in favor, 8 against, and 73 abstentions, and: UN General Assembly, *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories*, UN Doc. A/RES/68/81, and many others available at: <http://blog.unwatch.org/index.php/2013/11/25/this-years-22-unga-resolutions-against-israel-4-on-rest-of-world/>, all accessed on March 4, 2014.

state of exception² and adopted a logic of 'alternative legality' that sees the application of human rights law valid only for its Jewish population, while Palestinians under Israeli control are kept under a regime of curtailment.³ Israeli municipal law distinguishes between the notions of 'citizenship' and 'nationality'; such that 'Jewish nationals' of Israel receive preferred treatment over non-Jewish citizens. The treatment of non-Jewish citizens further differs according to residence rights, which change frequently following settlement expansion and military regulations. Existing literature on Palestinian people's rights mostly focuses on land dispossession and issues of refugees' ability to return. In an effort to broaden the conversation, the author of this article consciously focuses on anti-terrorism and security measures, which contribute to the creation of what the International Court of Justice (ICJ) has defined as an 'associated regime' of occupation.

Palestinian people's rights to life and freedom of the person are constantly under attack by means of retaliatory actions and counter-terrorism incursions, which often lead to targeted assassinations and administrative detentions.⁴ These practices contravene Israel's laws on the sanctity of life and freedom from arbitrary searches. Likewise, the Israeli occupation's barricades and checkpoints prevent the Palestinian population from the enjoyment of the very same rights Israel protects for its Jewish population: the right to an education; the right to health; the right to water and sanitation; the right to freedom of profession; the right to dignity; and, most importantly, the right to the security of the person. Besides violating fundamental rights enshrined in Israel's municipal law, these violations contravene Israel's international legal obligations. While admitting the applicability of humanitarian law to the territories under military occupation, Israel's position of exceptionalism denies that the Fourth Geneva Convention is applicable. Most importantly, Israel denies its responsibility under international human rights instruments in the territories under occupation, advocating a separation of applicable legislation.⁵ After discussing the issue of human rights protected under Israeli municipal law, the article deals with the applicability of international legal instruments. Positing that both human rights and humanitarian law are applicable to the people and territories under Israeli control, this article aims to expose the invalidity of Israel's position concerning its domestic and international legal obligation.

1. On the Application of Domestic Legislation to the Territory of the State of Israel

1.1. Human Rights in Israel and the Basic Law on Human Dignity and Liberty

Israeli national law recognises the value of man, the sanctity of his life and individual freedom.⁶ The Basic Law on Human Dignity and Liberty (Basic Law) is Israel's domestic provision that protects human rights at the highest level of legislation. The Knesset (the legislative branch of the Israeli government) gave it 'super-legal status', giving Israeli courts the authority to disqualify any law contradicting it at any lower level.⁷ Among the rights protected there are the following: the right to life; the right to property; the right to privacy and intimacy; the freedom to leave and enter the country; and the freedom from arbitrary searches of the person and private premises.⁸ Despite the fact that several cardinal human rights are missing from the document (the right to equality, the freedom of speech, the freedom of religion and the freedom of protest, to name a few), the Basic Law's protection is interpreted as extending beyond its text. Some jurists, such as former President of The Supreme Court of Israel Aharon Barak, see these rights as directly derived from the right to dignity protected in the Basic Law under Sections 2 and 4 (respectively, 'preservation' and 'protection

² For a comprehensive discussion of Israel's constant state of exception, see: Shaid M. Alam, *Israeli Exceptionalism: The Destabilizing Logic of Zionism* (Palgrave Macmillan 2010). The author prefers the use of the expression 'alternative legality' to the more general term 'exceptionalism' because she believes the expression translates more figuratively the arbitrary nature of Israel's position concerning the application of the legislative norms discussed herein.

³ UN General Assembly, *Persons displaced as a result of the June 1967 and subsequent hostilities*, UN Doc. A/RES/68/77, UNGA, *Palestine refugees' properties and their revenues*, UN Doc. A/RES/68/79, UNGA, *Work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, UN Doc. A/RES/68/80, and others (n 1).

⁴ Administrative detention is the arrest and detention of individuals by the state without trial, usually for security reasons. The legal basis for Israel's use of administrative detention is the British Mandate 1945 Law on Authority in States of Emergency as amended in 1979, see: Amnesty International 'Administrative Detention in Israel/Occupied Territories'[1978] 32 Middle East Journal 3, 337.

⁵ From which the term 'alternative legality'.

⁶ Basic Law: Human Dignity and Liberty 1948, Israel <http://www.jewishvirtuallibrary.org/jsource/Politics/Basic_Law_Human_Dignity_and_Liberty.html?MFAH00hi0>. Retrieved April 20, 2013; the full text of the law can be found on the Israeli Knesset's website <http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm>.

⁷ Basic Law: Human Dignity (n 6) sec 8, 12.

⁸ Ibid sec. 2-7.

of life, body and dignity').⁹ In this sense, it has been said that the missing rights were given to the residents of Israel by general principles of law pre-dating the Basic Law.¹⁰

While the law does not specifically enumerate many protections, it seems farsighted in regulating its curtailing and suspension. Particularly, Section 8, which became known as the 'limiting paragraph on the violation of rights', bans all violations of the rights protected except for the ones authorised by laws 'befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required'.¹¹ While asserting the government's prohibition to change or suspend the Basic Law by enacting an emergency regulation,¹² another paragraph, Section 12, allows restrictions or denial of individual rights on the grounds of 'proper purpose' and 'extent' when a state of emergency is in place. In other words, the protection from emergency regulations is not *in toto*, and it is for the government and the Supreme Court to decide on the legitimacy of the restrictive measures. This flexibility allowed the Supreme Court to rule that the existence of checkpoints, carrying out of house searches and administrative detentions were legitimate.¹³ The rationale is that Islamist terrorist organizations defined by the Court,¹⁴ such as Hamas, Hezbollah and even Lebanese Fatah al-Islam, constitute a threat that justifies measures under a state of emergency. Further check points, random searches, and administrative detentions are all measures of 'proper purpose' to protect the 'befitted' values of Israel. The *de facto* permanent nature of these measures is justified in light of Section 8 and 12's temporal reference to a *period* and *extent* 'no greater than required'. The requirement that emergency regulations be made by virtue of a 'declaration under section 9 of the Law and Administration Ordinance, 5708-1948'¹⁵ basically allows the government to decide *how* and *for how long* rights can be restricted while a state of emergency is in place.¹⁶ This has become a controversial provision because Israel has been in protracted state of emergency since the first day of independence.¹⁷ The logic underlying the Basic Law's limiting paragraph is circular and the provision is open to abuse. It should come as no surprise then that the provision is used on a regular basis to restrict and violate the rights of Palestinian citizens of Israel and other Palestinian residents.

1.2. Alternative Legality, Nationality and Citizenship in the State of Israel

What allows for the institutionalisation of non-equality of rights and the discrimination of the Palestinian people is Israel's interpretation of nationality and citizenship as two different concepts, with different privileges to be awarded to different classes of beneficiaries. This legal fact became clear in the High Court case of *George Tamarin v. the State of Israel* (1971), wherein a Jewish Israeli had petitioned to have the official registration of his nationality changed from 'Jewish' to 'Israeli'.¹⁸ The High Court denied his request ruling that 'there is no Israeli nation separate from the Jewish nation [...] composed not only of those residing in Israel but also of Diaspora Jewry'.¹⁹ Shimon Agranat, then president of the Israeli High Court of Justice, explained that if Tamarin's plea were upheld, it 'would negate the very foundation upon which the State of Israel was formed'.²⁰ Israeli civil law confers full civil and human rights only upon a class of citizens deemed to be nationals of the 'Jewish State'.²¹ Starting in 1948, non-equality was codified through a series of laws, namely the following: The Law of Return of 1950 (creating the exclusive 'nationality right' for Jewish from anywhere to come to the lands Israel occupies to claim them);²² The Law of Citizenship

⁹ Ibid sec 2, 4.

¹⁰ Aharon Barak, 'Human Rights in Israel' [2006] 39 Israel Law Review 12, 2006.

¹¹ Emphasis added. Basic Law: Human Dignity (n 6) 8.

¹² Ibid sec. 12.

¹³ Barak, (n 10).

¹⁴ For a discussion concerning the Court's official designation of Palestinian militant organizations see: Susan M. Akram, Michael Lynk, 'The Wall and the Law: a Tale of two Judgements' [2006] Netherlands Quarterly of Human Rights 24, 61-106; Susan M. Akram, 'Do Constitutions make a Difference as Regards the Protection of Fundamental Human Rights?: Comparing the United States and Israel' in Mollyn Frishman and Samuel Muller, *The Dynamics of Constitutionalism in the Age of Globalisation* (Asser 2010), 89-109; Gad Barzilai, 'Courts as hegemonic institutions: The Israeli Supreme Court in a comparative perspective' [1998] *Israel Affairs* 5, 15-33.

¹⁵ Basic Law: Human Dignity (n 6) sec 12.

¹⁶ Ibid.

¹⁷ 2013 Human Rights Report: Israel and the occupied territories, Bureau of Democracy, Human Rights, and Labor 2013 Country Reports on Human Rights Practices <<http://www.state.gov/documents/organization/160463.pdf>> accessed on March 15, 2014.

¹⁸ *George Tamarin v. State of Israel* IsrSC 26(1) 197, Judgment [1972].

¹⁹ Oscar Kraines, *The Impossible Dilemma: Who Is a Jew in the State of Israel* (Bloch Publishing 1976) 14.

²⁰ Ibid.

²¹ Joseph Schechla, 'Ideological roots of population transfer' [1993] *Third World Quarterly* 142, p. 261.

²² Law of Return 1950, Israel <https://www.jewishvirtuallibrary.org/jsourc/Politics/Other_Law_Law_of_Return.html>.

(1948), which besides establishing eligibility for citizenship status also establishes that 'citizenship' without 'Jewish nationality' offers no basis for many fundamental rights protected by the State of Israel;²³ and The Status Law (1952),²⁴ recognising 'national' entities serving 'the Jewish people' exclusively as part of the government of Israel.²⁵ Institutionalisation of discrimination on the basis of nationality has been further reinforced through a series of non-revocable Basic Laws such as the Basic Law: Knesset (Amendment No. 7) of 1985,²⁶ preventing a candidate from participating in an election on a platform that does not coincide with the exclusionary definition of the state of Israel as 'the State of 'the Jewish people'',²⁷ and the Basic Law: Law of Absentee Property (1950), retroactively and prospectively providing for the State of Israel to confiscate properties from anyone it deems an 'absentee'.²⁸ By this legal criterion, those persons away from their property, whether engaged in fighting or fleeing the violence, can have their properties confiscated and the Jewish National Fund can then administer them for the benefit of Jewish immigrants.²⁹ While this provision applied *in absentia* to those refugees outside Jewish-occupied Palestine (whom the law termed 'absentees'), it also provided for the legal dispossession of those who never left the borders of the newly created State and those who were reabsorbed into Israel as a result of the armistice agreements.³⁰ Though dispossessed in the same way as other Palestinian refugees, these internally displaced persons obtained a status apart by virtue of not having crossed a recognized international border; they acquired Israeli citizenship without Jewish nationality, and became 'present absentees' or internally displaced persons (IDPs).³¹ Having remained in the country of their origin, these IDPs are ineligible for services rendered by international agencies such as the United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA),³² while at the same time remain subjected to all laws enacted by the government of Israel. Israeli citizenship has however not meant equality of treatment in a democratic state, and the Palestinian population continues to face discrimination and dispossession through incremental transfers, serial evictions, house demolitions and other practices.³³ The Israeli legal concept of 'Jewish nationality' has come to determine relations between groups of Israeli citizens and create the benchmark by which some citizens of Jewish nationality obtain rights and benefit from 'national' institutions providing services, while Israeli citizens of other nationalities are formally denied some basic rights and privileges.³⁴ 'Jewish nationality' status also serves as the principal criterion for immigration designed to dilute or supplant the Palestinian people's presence on 'Israeli' land.³⁵ This continuous expansion of settlements³⁶ implies a constant change in the regime of applicable legislation, shifting the relevant law from occupation/humanitarian (and human

²³ Citizenship 1948, Israel, as cited in: Joseph Schechla, 'Ideological roots of population transfer' [1993] *Third World Quarterly* 142, 261.

²⁴ See: Zionist Organization - Jewish Agency for Israel Status Law 1952, Israel <<http://www.jewishvirtuallibrary.org/jsource/Zionism/wzo.html>>.

²⁵ Of these, the most powerful is the World Zionist Organisation/Jewish Agency -which include the Jewish National Fund (JNF)- and its subsidiaries. Joseph Schechla, 'Ideological roots of population transfer' [1993] *Third World Quarterly* 142, 261.

²⁶ Basic Law: The Knesset 1958, Amendment no. 7 1985, Israel <https://www.jewishvirtuallibrary.org/jsource/Politics/Basic_Law_Knesset.html>.

²⁷ Schechla (n 21) 261.

²⁸ For the purposes of this law, the definition of absentee covers anyone who: '1. At any time during the period between 16 Kislev 5708 (29 November 1947) and the declaration published under Section 9(d) of the Law and Administrative Ordinance, 5708 (19 May 1948), has ceased to exist as a legal owner of any property situated in the area of Israel or enjoyed or held by it, whether by himself or through another and who, at any time during the said period, (i) was a national or citizen of the Lebanon, Egypt, Syria, Saudi Arabia, Transjordan, Iraq or the Yemen; or (ii) was in one of these countries or in any part of Palestine outside the area of Israel; or (iii) was a Palestinian citizen and left his ordinary place of residence in Palestine (a) for a place outside Palestine before 27th Av, 5708 (1st September 1948); or (b) for a place in Palestine held at the time by forces that sought to prevent the establishment of the state of Israel or that fought against its establishment.' See: Basic Law: Law of Absentee Property 1950, Israel <<http://unispal.un.org/UNISPAL.NSF/0/E0B719E95E3B494885256F9A005AB90A>>.

²⁹ Joseph Schechla, 'The invisible people come to light: Israel's 'internally displaced' and the 'unrecognized villages'' [2001] *Journal of Palestine Studies: a Quarterly on Palestinian Affairs and the Arab-Israeli Conflict* 31, 22.

³⁰ *Ibid.*

³¹ *Ibid* 23.

³² *Ibid.*

³³ *BBC* 'Israel announces plans for 1,400 new settlement homes' (January 10, 2014).

³⁴ Schechla (n 21) 261.

³⁵ *Ibid.*

³⁶ The last 1,500 of which were disclosed on 4 June 2014, see: Barak Ravid 'Israeli response to Palestinian unity cabinet: 1,500 new housing units in the settlements' *Haaretz* (June 5, 2014) <<http://www.haaretz.com/news/diplomacy-defense/.premium-1.597084>>. Concerning the resolution of Hamas/Fatah feud earlier this year, see: Mary Casey 'Palestinian Factions Hamas and Fatah Announce Reconciliation Deal' *Foreign Policy* (April 24, 2014) <http://mideastafrica.foreignpolicy.com/posts/2014/04/24/palestinian_factions_hamas_and_fatah_announce_reconciliation_deal>.

rights law as argued in this article) to municipal. The ICJ has described both such population transfers and codified discrimination as an 'associated regime' that infringes upon the rights of the Palestinian population, regardless of their citizenship status.³⁷

Israel national territory is home to 1,682,000 Palestinians, (meaning that between 20.6% and 20.7% of Israel's overall population has Arab descendants).³⁸ Of these, about 285,500 Palestinians are residents of East Jerusalem.³⁹ About 80% of Israeli Palestinians are Muslim; the rest are divided, roughly equally, between Christians and Druze. The majority of them identify very closely with the Palestinians in Gaza and the West Bank, and are described as 'Palestinian citizens of Israel'.⁴⁰ They are nominally (at least partially) entitled to the same rights protected under domestic legislation, as was sanctioned in all Israeli Independence Declaration's 'equality for all' claims.⁴¹ The truth, however, differs. While special laws have, in fact, been passed to justify Israel's confiscation of Palestinian land,⁴² other Palestinians' individual and collective rights are arbitrarily violated on discriminatory religious or ethnic basis. Many Palestinian citizens of Israel in fact frequently describe themselves as second class citizens.⁴³ Allegations of discrimination have come from multiple entities, government and non-governmental organisations, within and outside of the UN⁴⁴ and all have been accused of bias, partisanship, and anti-semitism by Israel.⁴⁵ While it may be true that Israel is subjected to a more vigilant inspection than many of its neighbors,⁴⁶ the discrimination of its Palestinian population has been acknowledged both by domestic inquiries and by its indisputable allies. In 2003, the *Orr Commission*, a government inquiry appointed to investigate the events of the Second Intifada, in which Israeli police killed 12 Palestinian citizens of Israel and one other Palestinian resident amid several demonstrations,⁴⁷

³⁷ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ para 134 <<http://www.refworld.org/docid/414ad9a719.html>> accessed June 5, 2014.

³⁸ 1,694,000 according to other estimates. See: Jewish Virtual Library, Demographics of Israel: Population of Israel/Palestine (1533-Present) <<http://www.jewishvirtuallibrary.org/jsource/History/demograhics.html>> for the former statistic, and Jewish Virtual Library, 'Vital Statistics: Latest Population, Updated April 2013' <http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/newpop.html> for the latter.

³⁹ The latest statistics on Israel demography were available on Israel's Central Bureau of Statistics for the year 2010. These statistics do not provide for Palestinian residents' demographic distribution in the West Bank, see: Central Bureau of Statistics, Sources of Population Growth by District, Population Growth, and Religion: <http://www1.cbs.gov.il/reader/shnaton/templ_shnaton_e.html?num_tab=st02_04&CYear=2010>.

⁴⁰ Ilan Peleg, and Dov Waxman, *Israel's Palestinians: The Conflict Within* (Cambridge, 2011).

⁴¹ 1948 Declaration of Establishment of State of Israel <<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx>> accessed March 12, 2014.

⁴² See above para. 1.2. Nationality v. Citizenship.

⁴³ This is not only because their civic duty differs (as they are exempt from compulsory military service See: Nusseibeh, S. *What is a Palestinian State Worth*, 128.

⁴⁴ For all UN Resolutions condemning Israel, see (n 1). Also see: Human Rights Watch, 'Forget About Him, He's Not Here: Israel's Control of Palestinian Residency in the West Bank and Gaza' [2012] <<http://www.hrw.org/reports/2012/02/05/forget-about-him-he-s-not-here>>; Human Rights Watch, 'Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories' [2010] <<http://www.hrw.org/reports/2010/12/19/separate-and-unequal-0>>; Human Rights Watch, 'I Lost Everything: Israel's Unlawful Destruction of Property during Operation Cast Lead' [2010] <<http://www.hrw.org/reports/2010/05/13/i-lost-everything>>; Amnesty International, 'Annual Report: Israel and the Occupied Palestinian Territories' [2013] <<http://www.amnesty.org/en/region/israel-occupied-palestinian-territories/report-2013>>; Amnesty International, 'Annual Report: Israel and the Occupied Palestinian Territories' [2012] <<http://www.amnesty.org/en/region/israel-occupied-palestinian-territories/report-2012>>; Amnesty International, 'Annual Report: Israel and the Occupied Palestinian Territories' [2011] <<http://www.amnesty.org/en/region/israel-occupied-palestinian-territories/report-2011>>; Amnesty International, 'Annual Report: Israel and the Occupied Palestinian Territories' [2010] <<http://www.amnesty.org/en/region/israel-occupied-palestinian-territories/report-2010>>, and many others.

⁴⁵ As noted: 'The campaign to demonize and delegitimize Israel in every UN and international forum was initiated by the Arab states together with the Soviet Union, and supported by what has become known as an 'automatic majority' of Third World member states'. See: UN Watch, 'UN, Israel & Anti-Semitism' <http://www.unwatch.org/site/c.bdKKISNqEmG/b.1359197/k.6748/UN_Israel_AntiSemitism.htm>. Also see: Jewish Virtual Library, 'United Nations: The UN Relationship with Israel' <http://www.jewishvirtuallibrary.org/jsource/UN/israel_un.html> (both accessed on March 16, 2014): 'Despite being the only democracy in the Middle East, Israel routinely faces more criticism and condemnation at the United Nations than any other country, including those that systematically kill their citizens or deny them the most basic of human rights. Even today, both the General Assembly and Security Council continue to pass one-sided resolutions that single out and condemn the Jewish State. Additionally, an overwhelmingly powerful bloc led by the Arab nations promotes a narrow and slanderous agenda meant to isolate Israel that has met little resistance'.

⁴⁶ 'On one side, supporters of Israel feel it is harshly judged, by standards that are not applied to its enemies – and too often this is true, particularly in some UN bodies.' United Nations Secretary General Address to the General Assembly (New York, 2006) 3 <http://www.un.org/webcast/ga/61/pdfs/sgstatement_to_the_ga06.pdf>.

⁴⁷ Jewish Virtual Library, 'The Official Summation of the Orr Commission Report' <http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/OrrCommissionReport.html> accessed March 13, 2014.

concluded that 'government handling of the Arab sector has been primarily neglectful and discriminatory'.⁴⁸ More recently, in its 2013 report to the Under-Secretary on Human Rights, Democracy and Labor, the US State Department said Palestinian citizens of Israel 'face institutional, legal, and societal discrimination',⁴⁹ and that such discrimination materialises in terms of access to equal education and employment opportunities.⁵⁰ In the annex to the report, the State Department analysed human rights problems related to Israeli authorities in the Occupied Palestinian Territories, and Israeli authorities *vis-à-vis* the Palestinian population (including Palestinians residents/citizens of Israel). The report acknowledged excessive use of force against civilians including: killings; abuse of Palestinian detainees, particularly during arrest and interrogation; austere and overcrowded detention facilities; improper use of security detention procedures; demolition and confiscation of Palestinian property; limitations on freedom of expression, assembly and association; and severe restrictions on Palestinians' internal and external freedom of movement.⁵¹ The report also recognises that Israeli Defence Forces maintain restrictions on Palestinians' movement into and out of the Gaza Strip and that registered violence by settlers against the Palestinian population is an ongoing problem, magnified by inconsistent punishment of these acts by Israeli authorities.⁵² Besides the obvious violations of the right to life and personal freedom created by targeted assassinations and administrative detentions, Israeli check points violate Palestinians' rights to 'human freedom' intended in the Basic Law as freedom to leave and enter the country.⁵³ As a consequence of this daily violation, the checkpoints also violate the Palestinians' right to an occupation, to an education, to proper health and to family life. Nighttime Israeli raids in Palestinian households, and the subsequent property confiscation, violate Palestinian citizens and residents of Israel's rights to privacy, property, and freedom from arbitrary searches. While apparently justified by emergency regulations, the disproportionate concentration of such violations on Palestinian citizens of Israel (whose 'Arab' nationality is indicated on Israeli government issued ID cards) and other Palestinian populations remains without justification, and contributes to the creation of an 'associated regime' of separation and discrimination.

2. On the Applicability of International Humanitarian Law in Gaza, East Jerusalem and the West Bank

2.1. Alternative Legality and the Applicability of the Fourth Geneva Convention to the Territories Under Israeli Control

It is widely acknowledged that humanitarian law applies to both situations of armed conflict and belligerent occupation.⁵⁴ As the occupying power in the West Bank and Gaza Strip, Israel's obligations are set out in the Hague Regulations annexed to the Fourth Hague Convention with respect to the Laws and Customs of War on Land (Hague Regulations),⁵⁵ and the Fourth Geneva Convention Concerning the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).⁵⁶ While maintaining the applicability of the Hague Regulations due to their customary nature, Israel contests the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territories.⁵⁷ Although Israel ratified the Geneva Conventions in 1951, it refuses to recognise their *de jure* applicability, maintaining that because they took the Palestinian territories back from other occupying forces such as Jordan, Syria and Egypt in 1967, these territories have

⁴⁸ Ibid.

⁴⁹ 2013 Human Rights Report: Israel and the occupied territories, Bureau of Democracy, Human Rights, and Labor 2013 Country Reports on Human Rights Practices, updated on March 05, 2014 <<http://www.state.gov/documents/organization/220568.pdf>> last accessed March 13, 2014.

⁵⁰ Ibid.

⁵¹ 2013 Human Rights Report: Israel and the occupied territories, including areas subject to the jurisdiction of the Palestinian Authorities' Bureau of Democracy, Human Rights, and Labor 2013 Country Reports on Human Rights Practices, updated on March 05, 2014, available online <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=220358&year=2013#wrapper> accessed on March 13, 2014.

⁵² Ibid.

⁵³ Basic Law: Human Dignity (n 6) sec 6.

⁵⁴ Dieter Fleck, *The Handbook of International Humanitarian Law* (2nd Edition, Oxford 2009) 47.

⁵⁵ 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 <<http://www.icrc.org/ihl/INTRO/195>>.

⁵⁶ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 <<http://www.icrc.org/ihl/INTRO/380>>.

⁵⁷ *United Nations*, Israel's Report to the UN Human Rights Committee 1998, UN Doc. CCPR/C/SR.1675. Also see: State of Israel *International Covenant on Civil and Political Rights - Second Periodic Report*, 20 Nov. 2001, para. 8, UN Doc. CCPR/CIISR/2001/2 (2001). See also State of Israel *Implementation of the International Covenant on Economic, Social and Cultural Rights - Additional Information*, 20 April 2001, para. 2-5, UN Doc. E/1989/5/Add.14 (2001).

no official status under the Geneva Conventions due to a lack of previous sovereignty, and do not therefore constitute a High Contracting Party to the Convention.⁵⁸ Yehuda Z. Blum, former Israeli Ambassador to the UN, successfully sums up Israel's position of exceptionalism on the matter: he claims that Jordan never acquired sovereignty over Judea and Samaria (what is today called the West Bank).⁵⁹ Transjordan (the Arab Emirate today named the Hashemite Kingdom of Jordan) was, in fact, a belligerent occupant of the West Bank, in the most favorable of hypothesis,⁶⁰ because its 1948 annexation of Judea and Samaria was illegal under international law. Whether conducted as the initiative of a sovereign state obliged to 'protect unarmed Arabs against massacres',⁶¹ to halt 'brutal crimes against humanity in a contiguous country and against the Arabs of Palestine',⁶² or as an action of the League of Arab States conducted as a regional arrangement pursuant article 52 of the UN Charter,⁶³ the invasion lacked the approval of the UN Security Council, and was therefore void of any legality.⁶⁴ The key point of the Israeli argument is that belligerent occupation does not mean transfer of sovereignty, and that, regardless of the fact that international legal scholars still ought to decide to whom sovereignty belonged after the British Mandate expired,⁶⁵ Jordan never acquired it as an occupying power in the first place.⁶⁶ Israel, furthermore, claims that the legal status of those territories has never been settled in any document agreed by both parties, despite the fact that the settlement of this issue was part of the main agenda of the Oslo Agreements of 1995.⁶⁷ On the contrary, Israeli claims that the Geneva Conventions are not applicable have increased following the signing of the Oslo Agreements. Israel claims that it could no longer be considered an occupying presence with obligations toward the Palestinian territories and its civilian population because the Israeli military presence in the occupied territories was progressively diminishing (at least insofar as Area A is concerned),⁶⁸ and Palestinians were assuming broadened responsibilities and powers with respect to internal affairs.⁶⁹

Despite such claims, Israel has occupied Palestinian territories since 1967. Article 42 of the Hague Regulations stipulates that a 'territory is considered occupied when it is actually placed under the authority of the hostile army', and that the occupation extends 'to the territory where such authority has been established and can be exercised'.⁷⁰ In *The United States of America vs. Wilhelm List, et al.* (hereinafter *Hostage case*),⁷¹ the Nuremberg Tribunal held that, 'the test for application of the legal regime of occupation is not whether the occupying power fails to exercise effective control over the territory, but whether it has the ability to exercise such power'.⁷² This test continues to apply to Israel's relationship to the Gaza Strip and the West Bank. Repeated resolutions by both the UN General Assembly and the Security Council, and statements issued by governments worldwide, have all affirmed the *de jure* applicability of the Fourth Geneva Convention, and called upon Israel to abide by its obligations as an occupying power.⁷³ This has been the voice (almost in unison) of the international community since in 2001 High Contracting Parties to the Fourth Geneva Convention reaffirmed 'the applicability of the Convention to the Occupied Palestinian Territories,

⁵⁸ Ibid.

⁵⁹ Yehuda Z. Blum, 'The Missing Reversioner : Reflections on the Status of Judea and Samaria' [1968] 3 Israel Law Review 279.

⁶⁰ Ibid 279, 292.

⁶¹ U.N. Doc. S/748 as cited in: Yehuda Z. Blum, 'The Missing Reversioner : Reflections on the Status of Judea and Samaria' [1968] 3 Israel Law Review 279, 292.

⁶² U.N. Doc. S/743, as cited in (n 60).

⁶³ S.C.O.R., 299th meeting of May 21, 1948, pp. 13-15, as cited above.

⁶⁴ Blum (n 60) 279, 286.

⁶⁵ See: Ramendra Nath Chowdhuri, *International Mandates and Trusteeship Systems* (Washington University Press 1955) 230, as cited in: Yehuda Z. Blum, 'The Missing Reversioner : Reflections on the Status of Judea and Samaria' [1968] 3 Israel Law Review 279, 282.

⁶⁶ Blum (n 60) 279, 294.

⁶⁷ See: Israeli-Palestinian Negotiations: Interim Agreement on the West Bank and the Gaza Strip (Oslo II) [1995] Washington, D.C., <<http://www.jewishvirtuallibrary.org/jsourc/Peace/interim.html>> retrieved on February 12, 2014.

⁶⁸ Area A is the area of the Occupied Palestinian Territories that with the Agreement Oslo II was to be 100% fully under Palestinian control and jurisdiction. See: Gvirtzman Haim, 'Maps of Israeli Interests in Judea and Samaria Determining the Extent of the Additional Withdrawals' Begin-Sadat Center for Strategic Studies Bar-Ilan University, Mideast Security and Policy Studies 34, <<http://www.biu.ac.il/SOC/besa/publications/maps/>>.

⁶⁹ Ibid.

⁷⁰ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. Annex to the Convention: Regulations respecting the laws and customs of war on land, Section III : Military authority over the territory of the hostile state [1907] (42), <<http://www.icrc.org/ihl/WebART/195-200052?OpenDocument>>.

⁷¹ Hostage Case, *United States v List (Wilhelm) and ors*, Trial Judgment, Case No 7, (1948) 8 LRTWC 34, (1948) 7 LRTWC 444, (1948) 11 LRTWC 1230, (1948) 11 TWC 757, (1948) 15 ILR 632, ICL 491 (US 1948), 19th February 1948, Nuremberg Military Tribunal.

⁷² Eyal Benvenisti, *The International Law of Occupation* (Oxford 2012) 47.

⁷³ The latest being: UN General Assembly, *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories*, UN Doc. A/RES/68/81, see (n 1).

including East Jerusalem, and reiterate[d] the need for full respect for the provisions of the said Convention in that territory'.⁷⁴ This position was confirmed in July 2004 by the ICJ in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. The ICJ referenced the agreements between Israel and the Palestinian Liberation Organisation which resulted in the transfer of certain powers and responsibilities to the Palestinian National Authority, highlighting that these events, 'have done nothing to alter this situation, [and that] all these territories (including East Jerusalem) remain occupied territories [in which] Israel has continued to have the status of occupying power'.⁷⁵ In this regard, the Opinion also states that 'civilians who find themselves in *whatever way* in the hands of the occupying power' must remain protected persons '*regardless* of changes to the status of the occupied territory'.⁷⁶ In reference to Israel's occupation of the West Bank and Gaza Strip in the 1967 War, the ICJ recalled Article 2, paragraph 1 of the Convention, noting that this convention applies 'to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties [...]'.⁷⁷ Once these conditions have been met, the Convention is deemed to apply 'in *any territory* [emphasis added] occupied in the course of the conflict by one of the contracting parties',⁷⁸ therefore including all occupied territories. Disquisitions over sovereignty of one of the High Contracting Parties aside, Article 1 of the Convention itself requires to 'respect and ensure respect' for the Convention 'in all circumstances'.⁷⁹ Moreover, Article 4 stipulates that 'persons protected by the Convention are those who, at any 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'.⁸⁰ Thus, the Convention applies regardless of whether or not Israel has acknowledged Jordan's prior sovereignty, because civilians in the West Bank find themselves in the hands of 'a Party to the conflict or occupying power of which they are not nationals', that is, Israel.

This is not surprising, considering that the Israeli authorities had themselves initially recognised the applicability of the Fourth Geneva Convention. Article 35 of the Proclamation No. 3, promulgated shortly after the 1967 June War stated that: 'the military court [...] must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures'.⁸¹ In light of the Convention *erga omnes* character, the document even went one step further stating that 'in case of conflict between this Order and the said Convention, the Convention [was to] prevail'.⁸² In October 1967, however, this military proclamation was amended by Military Order 144 to exclude the reference to the Convention's applicability.⁸³ Since then, Israel has been claiming that its presence in the occupied territories is as an *administrator*, and that it would abide to the Fourth Geneva Convention by force of its 'humanitarian provisions'.⁸⁴ Despite claiming its presence as a mere administrator, Israeli military authorities have issued over 1,500 military orders since the beginning of the occupation, to alter pre-existing laws and to effectively extend military jurisdiction over the occupied territories;⁸⁵ this is an obvious contradiction.

2.2. Alternative Legality and the Applicability of the Fourth Geneva Convention to Persons Under Israeli Control

Another knot of Israeli's alternative legality, which extends beyond the issue of the *de jure* applicability of the Fourth Geneva Convention is the status of Palestinian fighters. Admitting it would *de facto* respect the Geneva Conventions, Israel seemingly agreed to respect the inviolability of the principle of distinction. In light of its 'alternative legality' interpretation and of its 'sovereignty argument', however, Israel refused to recognise

⁷⁴ Conference of High Contracting Parties to the Fourth Geneva Convention Declaration [2001] <<http://unispal.un.org/UNISPAL.NSF/0/8FC4F064B9BE5BAD85256C1400722951>>.

⁷⁵ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ para 78 <<http://www.refworld.org/docid/414ad9a719.html>> accessed February 15, 2014.

⁷⁶ Emphasis added. *Ibid.* para 98.

⁷⁷ *Ibid.* para 92.

⁷⁸ *Ibid.* para 95.

⁷⁹ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* [1949] ICRC, Art. 1 <<http://www.icrc.org/ihl/INTRO/380>> accessed June 6, 2014.

⁸⁰ Emphasis added. *Ibid.* art 4.

⁸¹ *Settlement in the Administered Territories 1967, IMFA 3*, retrieved from <<http://www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf>> on March 2, 2014.

⁸² *Ibid.*

⁸³ See: Military Order 144: Repeals Military Proclamation 3, Article 35 concerning protection of civilians as per the Geneva Conventions, IMD [1967] <<http://www.israellawresourcecenter.org/internationallaw/studyguides/sgil3k.htm>>.

⁸⁴ Geneva Academy, Rule of Law in Armed Conflict Project, *Applicable International Law, Israel*, <http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=113>.

⁸⁵ See online database: <<http://www.israellawresourcecenter.org/internationallaw/studyguides/sgil3k.htm>>.

Palestinian fighters their combatant status.⁸⁶ Reading the definition of combatant provided in Article 43 of Additional Protocol I, Israel argues that Palestinian fighters do not qualify as combatants since they are not associated with the armed forces of a 'Party' to the conflict.⁸⁷ Following the dualistic humanitarian law division between combatants and non-combatants, that means however that every Palestinian is then a civilian for the purpose of hostilities. This dualistic vision has nevertheless largely been contested with the transformation of traditional warfare, as it does not take into account the grey area in which terrorists, guerrillas, saboteurs, private contractors and other 'unlawful combatants' actually fall. The debate is still open on the legal status of these persons, although it tends to align towards the applicability of the Convention.⁸⁸ The Israeli position is that Palestinian fighters are to be considered civilians who temporarily lose the protection accorded by the Geneva Conventions for the fact that they temporarily engage in hostilities.⁸⁹ This argument, however, raised the question of what is the temporal horizon over which the suspension of such protection spreads. More specifically, whether these persons are to be considered military targets only in the specific moment in which they are engaged in such conduct, or if their membership to groups that pursue an overall combat strategy is sufficient to render them military targets –and therefore deprive them of their right to life, for example. If the latter is the case, the question arises then as to whether they are also entitled to combatants' privileges, such as prisoners of war status, and if not, whether their detention constitutes an infringement of their right to freedom of the person.⁹⁰ The Israeli High Court of Justice tried to answer these questions when, on 14 January 2002, the Israeli Public Committee Against Torture submitted a petition to the Court to halt the government's policy of named killings of alleged Palestinians militants, and to issue an interim order to suspend its implementation.⁹¹ The Court, which ultimately refused to issue the requested order, neither banned nor justified the policy *per se*, but ruled that the lawfulness of targeted killings must be examined for each operation separately.⁹² The relevant considerations of its judgment on 14 December 2006, nevertheless recognised that Israel holds the Palestinian territories in belligerent occupation within the framework of an international armed conflict, however continuing to endorse the official position of the government against the *de jure* applicability of the Fourth Geneva Convention.⁹³ In this respect, it argued that even though Israel signed and ratified the Convention, it was not bound by it, because it 'generates new norms whose application in Israel demands an act of legislation'.⁹⁴ In addition, and despite the fact that the court has considered dozens of petitions related to Israeli military practices in the occupied territories, its rulings continue to choose 'deference to the discretion of the military authorities whenever it invoked military considerations'.⁹⁵

3. On the Application of Relevant Instruments of International Human Rights Law

3.1. Alternative Legality and International Human Rights Treaties

Israel's alternative legal interpretation does not only concern provisions of international humanitarian law, but also principles of application of international human rights law. Despite being part to both International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), as

⁸⁶ UN General Assembly, *Applicability of the Geneva Convention*, (n 1).

⁸⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I, 1977) 1125 UNTS 3 <<http://www.refworld.org/docid/3ae6b36b4.html>> accessed February 15, 2014.

⁸⁸ For further details on the debate see: International Committee of the Red Cross 'The relevance of IHL in the context of terrorism' [2011] ICRC Resource Center; Derek Jinks 'The Applicability of the Geneva Conventions to the Global War on Terrorism' [2006] Virginia Journal International Law 40; Esther K. Watkin, 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy,' [2005] Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Winter 2, Harvard. Also see: K. Dormann, 'The legal situation of 'unlawful/unprivileged combatants'' [2003] International Review of the Red Cross 85, 849. Scholarship has not much evolved in this sense, and positions have remained the same as addressed in these papers.

⁸⁹ See: *The Public Committee Against Torture et al. v The Government of Israel et al.* HCJ 769/02, Petition for a conditional order (Order Nisi) and for an interim order, submitted January 2002, Judgment [2006] (hereinafter Israel HCJ, *PCATI v Israel*), at para 26, 28, 30, emphasis added, <<http://iilah.unimelb.edu.au/files/dmfile/download51921.pdf>>.

⁹⁰ 2013 Human Rights Report (n 52).

⁹¹ Israel HCJ, *PCATI v Israel*, *supra* note 54. In this case, the Supreme Court of Israel sits as the High Court of Justice (HCJ), that is to say, as a court of first (and last) instance. Note that the Israeli government has issued numerous statements confirming the existence of such policy. Instead of many, see: Press Briefing by Colonel Daniel Reisner, Head of the International Law Branch of the Israeli Defense Force Legal Division, IMFA [2000], Questions and Answers; and Cabinet Communique, IMFA (September 2003), both at <<http://www.mfa.gov.il>>. See also: Israel HCJ, *PCATI v Israel* (full reference at n 29), para 2, 10.

⁹² *PCATI v Israel*, HCJ [2006] 60.

⁹³ *PCATI v Israel*, HCJ [2006] 16-21.

⁹⁴ *A Teachers' Housing Cooperative Society v The Military Commander of the Judea and Samaria Region*, HCJ [1983] Doc. No. 393/82 793 (Opinion of Judge Barak). Note also the opinion of Judge Witkon in the *Elan Mareh* case: 'It is a mistake to think that the Geneva Convention does not apply to Judea and Samaria. It does apply, even though ... it is not within the jurisdiction of this court', HCJ [1983] Doc. No. 390/79 29.

⁹⁵ *The Public Committee against Torture in Israel et al. v The Government of Israel*, HCJ [2005] Doc. No. 769/02 11.

well as the 1989 UN Convention on the Rights of the Child and many other international human rights treaties,⁹⁶ Israel denies their applicability to the Occupied Palestinian Territories. The claim is, again, put forward on grounds of a too literal 'well established distinction between human rights and humanitarian law'.⁹⁷ Israel's argument is based on the assumption that humanitarian law is the 'protection granted in a *conflict situation*'⁹⁸ such as the one in Gaza and the West Bank, whereas human rights treaties were intended for the protection of citizens *from their own Government in times of peace*.⁹⁹ Concerning the applicability of the human rights conventions, Israel first claimed that since humanitarian law is *de jure* applicable, human rights law could therefore not be applied.¹⁰⁰ In its Second Periodic Report submitted to the UN Committee on Economic, Social and Cultural Rights the State of Israel concluded that 'based on the well-established distinction between human rights and humanitarian law under international law' the Covenant does not apply to 'areas that are not subject to its sovereign territory and jurisdiction'.¹⁰¹ According to this position, East Jerusalem, the Gaza Strip, and the West Bank would be excluded by the Committee's human rights mandate 'inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights'.¹⁰² Israel reiterated exactly the same position in its Second Periodic Report to the Human Rights Committee with regard to the ICCPR in the occupied territories.¹⁰³ This was also the position taken by the Israeli delegation before the International Committee on the Rights of the Child and the International Committee on the Elimination of Racial Discrimination.¹⁰⁴ Following the Oslo Agreements and the transfer of specific responsibilities to the Palestinian Authorities, Israel claimed instead it no longer exercises military control in the occupied territories, and was therefore no longer accountable for human rights violations in the Gaza Strip and the West Bank.¹⁰⁵ In sum, Israel's position regarding the applicability of the treaties comprises three arguments: (a) the *mutual exclusivity argument*, according to which the simultaneous application of human rights law and international humanitarian law is a contradiction in terms, and the applicability of the latter in the occupied territories excludes the applicability of the former; (b) the *treaty interpretation argument*, according to which the jurisdictional clauses of the human rights treaties to which Israel is a party should be construed as limited to the sovereign territory of the State parties; and, (c) the *effective control argument*, according to which the creation of the Palestinian Authority, and the transfer of governmental authorities thereto under the Oslo Accords absolves the State of Israel from any responsibilities it might have had for the human rights of Palestinians living in areas subject to the control of the Palestinian Authority.¹⁰⁶

As presented by Naftali and Shani in their often-cited article 'Living in Denial', Israel's 'mutual exclusivity' argument moves from five assumptions: (1) a theoretical substantiation, according to which human rights law is the law of peace, it is truly *jus contra bellum*, developed pursuant to the outlawing of war in the United Nations Charter - a distinction that was recognised in the International Conference on Human Rights in Teheran, when it was acknowledged that '[p]eace is the underlying condition for the full observance of

⁹⁶ Israel is party to the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), and International Convention for the Elimination of All Forms of Racial Discrimination (CERD).

⁹⁷ Emphasis added. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* ICJ [2004] para 112.

⁹⁸ Or in belligerent occupation for that matters, see above, Section 1. *International Humanitarian Law and the Occupied Palestinian Territories*.

⁹⁹ Emphasis added. *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 102–13, 127–31. Residents of the Golan Heights are indeed entitled to citizenship, voting rights and residency that allows them to travel within Israel's borders, see: Scott Wilson 'Golan Heights Land, Lifestyle Lure Settlers' *The Washington Post*, (October 30, 2006). The situation of these citizens vis-à-vis their own state will be discussed at a later stage.

¹⁰⁰ Natan Lerner, 'Human Rights, Humanitarian Law and the Occupied Territories' [2003] *Palestine-Israel Journal of Politics, Economic and Culture* 10, 3.

¹⁰¹ Orna Ben-Naftali, and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' 2 *Israel Law Review* 37, 18-19.

¹⁰² State of Israel, *Implementation of the International Covenant on Economic, Social and Cultural Rights - Second Periodic Report* [2001], para. 5-8, UN Doc. E/1990/6/Add.32 (2001).

¹⁰³ State of Israel *International Covenant on Civil and Political Rights - Second Periodic Report*, 20 Nov. 2001, para. 8, UN Doc. CCPR/CIISR/2001/2 (2001). See also State of Israel *Implementation of the International Covenant on Economic, Social and Cultural Rights - Additional Information*, 20 April 2001, para 2-5, UN Doc. E/1989/5/Add.14 (2001).

¹⁰⁴ Committee on the Rights of the Child *Summary Record of the 829th meeting: Israel*, 10 Oct. 2002, para. 39-42, UN Doc. CRC/C/SR.829 (2002); *Note Verbaledated 8August 1994 from the PermanentRepresentativeofIsrael to the United Nations Office at Geneva*, UN Doc. CERD/C/282 (1995).

¹⁰⁵ *United Nations*, Israel's Report to the UN Human Rights Committee 1998, UN Doc. CCPR/C/SR.1675, para 27.

¹⁰⁶ Orna Ben-Naftali, and Yuval Shany (n 102) 26.

human rights and war is their negation';¹⁰⁷ (2) A historical substantiation, that sees humanitarian law and human rights law having distinct historical origins (the former deriving from the medieval culture of chivalry, an inter-state law 'forever cognizant of military considerations',¹⁰⁸ the latter inspired by post-Enlightenment domestic constitutional law, informed by the *erga omnes* principle); (3) an institutional substantiation, whereas the simultaneous inapplicability of the two bodies of law is tied back to the intrinsically irreconcilable nature of their monitoring bodies: the International Committee of the Red Cross is an 'incorruptible guardian' of a 'neutral' international humanitarian law, whereas the United Nations -- and other human rights monitoring bodies -- are concerned with a politicised application of human rights law;¹⁰⁹ (4) a practical substantiation, arguing that precisely because it has been formulated with military considerations in mind, humanitarian law is likely to be complied with, thereby ensuring a more effective protection of individuals in times of war than that offered by the derogable and rather vague human rights norms;¹¹⁰ and, finally, (5) a legal substantiation pursuant to which humanitarian law is concerned with 'duties' of a party to the conflict, while human rights law is concerned with certain 'privileges'. From this distinction, it follows that humanitarian law is formulated as a series of detailed provisions which apply conditionally on nationality or other statuses rendering an individual a 'protected person'; while human rights law (formulated as a series of rights) has a less detailed, and therefore more vague, character. The fact that it nominally applies to all individuals by virtue of their human nature makes it harder for an occupying power -- that has no information on the identity, needs, and motives of nationals of the occupied territories -- to comply.¹¹¹ The 'mutual exclusivity' argument can coexist with the 'treaty interpretation' argument. The latter moves from Article 29 of the Vienna Convention stating that '[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect to its entire territory'.¹¹² As a result, human rights treaties, which do not have any jurisdictional clause should be construed as having a territorial applicability, for example, over persons situated within Israel's territory.¹¹³ In the same vein, the specific jurisdictional clauses found in the other treaties should be interpreted in light of the aforementioned jurisdictional principle, which, when coupled with the above-discussed 'mutual exclusivity' argument, means that the treaties to the occupied territories are inapplicable.¹¹⁴ Again, the argument is presented on theoretical, historical, and practical grounds. Historically, while international human rights laws have sought to protect the rights of individuals against their own states, and the rights of the stateless, there seems to be no indication that the body of law was developed to protect individuals against foreign states within the territories of their own country.¹¹⁵ Theoretically, human rights law is based on 'intra-societal' relations, grounded in the notion of 'social contract' between the individuals beneficiaries and their government. A situation of occupation, with its inherent hostility between the occupier and the occupied, undercuts the transferability of human rights law from the intra-societal to the 'extra-societal' sphere.¹¹⁶ Practically, some argue, insisting on the application of human rights treaties on occupying powers would place a burden far too high for most states to meet, as states possess very little information on the identity of foreign individuals.¹¹⁷ Last but not least, even if one accepts the notion that international human rights treaties apply in occupied territories, Israel's rebuttal on 'effective control' grounds warrants that most of the people in East Jerusalem, Gaza and the West Bank would not benefit from the protection thereby afforded, as they are no longer subject to Israel's effective control following the Oslo Accords.¹¹⁸ This treaty makes Israel exempt from assuming obligations with

¹⁰⁷ Resolution XXIII (Human Rights in Armed Conflicts), Final Act of the International Conference on Human Rights, 13 May 1968, UN Doc. A/Conf.32/41, reprinted in 63 *A.J.L.L.* (1969) 680 (Resolution ad Occupied Palestinian Territories ed on 12 May 1968).

¹⁰⁸ Orna Ben-Naftali, and Yuval Shany (n 102) 30.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* 32.

¹¹² Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 <<http://www.worldtradelaw.net/misc/viennaconvention.pdf>>.

¹¹³ Orna Ben-Naftali, and Yuval Shany, (n 102) 33.

¹¹⁴ *Ibid.* 34.

¹¹⁵ *Ibid.* 36.

¹¹⁶ Henri Meyrowitz, 'Le Droit de la guerre et les droit de l'homme' (1972) 88 *Revue de droit public et de science politique en France et en l'Étranger* 1059, at 1098-1099, and Yoram Dinstein, 'Human Rights in Armed Conflict: International Humanitarian Law' in Theodor Meron, ed., *Human Rights in International Law* (Oxford, Clarendon Press, 1984) 345, 355 as cited in: Orna Ben-Naftali, and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' 2 *Israel Law Review* 37, 37.

¹¹⁷ Comm. R.12/52 *Lopez Burgos v. Uruguay*, UN Doc. A/36/40 (1981) 176 (Individual Opinion, Tomuschat); Comm.56/1979 *Casariégov. Uruguay*, UN Doc. CCPR/C/OP/1 (1984) 92 (Views ad Occupied Palestinian Territories ed in 1981) (Individual Opinion, Tomuschat), as cited in Orna Ben-Naftali, and Yuval Shany, above.

¹¹⁸ Orna Ben-Naftali, and Yuval Shany, (n 102) 37, 39.

respect to persons subject to the rule of the Palestinian Authority, and demand that both parties exercise their respective authorities 'with due regard to internationally accepted norms and principles of human rights and the rule of law'.¹¹⁹

The validity of Israel's position has been argued at both a judicial as well as a scholarly level. Possibly the most authoritative argument came from the ICJ: in its Advisory Opinion on the Legality of the Wall,¹²⁰ the ICJ replied *in primis* that protection granted under human rights law is not lifted in times of armed conflict.¹²¹ The Court subsequently rebutted Israel's 'treaty interpretation' argument discussing the applicability of the Covenants to both the 'persons' and 'territories' subjected to the Party's jurisdiction. The ICJ analysis on the applicability of international human rights law is particularly relevant because it deals in turn with human rights treaties (such as the ICCPR, and the Convention on the Rights of the Child) that contain territorial provisions on the scope of their application, as well as treaties (such as the ICESCR) that do not contain such provision. In both cases the ICJ exposed the invalidity of Israel's exceptionalism argument and reversed the logic of its alternative legality.

Concerning the ICCPR, the ICJ maintained that Article 2, paragraph 1, of the Convention, recognises that 'all individuals' within the territorial jurisdiction of the State Party are entitled to the rights protected in the document without distinctions of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.¹²² The Court also noted that while the jurisdiction of States is primarily territorial, it may at times be exercised outside the national territory.¹²³ The Court specified that when looking at the *travaux préparatoires* of the Covenant, no doubt is left as to whether the application of the Convention is constrained by territorial limits the interpretation of Article 2 of that instrument (and the choice of wording thereof) is consistent with the purpose of compelling States Parties to abide to their international law obligations regardless of whether they are exercising jurisdiction in or outside of their national territory.¹²⁴ The only purpose for a territorial reference in the text was to prevent persons residing abroad from asserting *vis-à-vis* their State of origin rights that do not fall within the competence of that State, but of that of the State of residence.¹²⁵ The UN Human Rights Council, successor to the Human Rights Commission, has followed suit with its interpretation of the Conventions: it has also found the ICCPR applicable wherever the State exercises its jurisdiction on a foreign territory.¹²⁶ In 2003, confronted with Israel's consistent position, the Committee reiterated that the Covenant applies 'to the benefit of the population of the Occupied Territories' and 'for all conduct by the State Party's authorities or agents' in those territories that 'fall within the ambit of State responsibility of Israel'.¹²⁷ This means that regardless of whether Palestinian territories are under the jurisdiction of Israel, the Covenant remains applicable for the protection of those rights enshrined in the Convention. A similar reasoning applies to the 1989 Convention on the Rights of the Child,¹²⁸ and any other human rights instruments to which Israel is Party and that contain specific territorial provisions on the scope of its application.

A different case was made for the ICESCR. The Covenant does not contain any provisions on its scope of application. This may be explained by the fact that the Covenant guarantees rights that are essentially territorial.¹²⁹ Israel has taken pride in acknowledging its compliance with the obligations laid out in the ICESCR. Once again, however, its conception of legality and the interpretation of its legal obligations have been quite problematic. In its initial report to the UN Human Rights Committee of 4 December 1998, Israel provided 'statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the

¹¹⁹ Interim Agreement on the West Bank and the Gaza Strip, 28 Sept. 1995, art. XIX, 36 I.L.M. (1997) 551; Wye River Memorandum, 23 Oct. 1998, art. II(c)(4) 37 I.L.M. (1998) 1251.

¹²⁰ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004 <http://www.refworld.org/docid/414ad9a719.html>.

¹²¹ More details on this aspect will be discussed in the section 3. *On the Interaction of the Two Regimes of Law*.

¹²² (n 63) para 108-9, citing rulings related to the cases of confiscation of Uruguayan passports in Germany, and the arrests carried out by Uruguay in Brazil and Argentina.

¹²³ *Lopez Burgos v Uruguay* [1981] ICJ 52/79; *Lilian Celiherti de Cusariego v. Uruguay* [1980] ICJ 56/79.

¹²⁴ *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 109.

¹²⁵ See the Discussion of the Preliminary Draft in the Commission on Human Rights [1947] EICN.41SR.194, para 46; and Official record of the General Assembly, Tenth Session, Annexes [1955] UN A12929 Part II (V) (4).

¹²⁶ *Ibid.*

¹²⁷ Concluding observations of the Human Rights Committee [2003] UN Doc. CCPR/CO/78/1SR, para 11 <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument)>.

¹²⁸ Convention on the Rights of the Child 1989, 1577 3 <<http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>> accessed April 25, 2013. Article 2 cites that: 'States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .' Also see: *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 113.

¹²⁹ *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 112.

occupied territories'.¹³⁰ The Committee noted however, that as even Israel acknowledged, 'the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant'.¹³¹ Israel justified this position by again maintaining that the areas populated by Palestinians were 'part and parcel of the context of armed conflict', and that as such their mutual relations and obligations were regulated by humanitarian law and 'distinct from a relationship of human rights', which is consequently inapplicable.¹³² As in a circular game, the Court referred Israel back to its position over the occupation and the Israeli *de facto* jurisdiction as an occupying power. The Court stated that the people and territories in question have been under Israeli 'effective control' since 1967 and that, in the exercise of the powers available to Israel on this basis, Israel is bound by the provisions of the ICESCR.¹³³ As for the competencies transferred to the Palestinian authorities after the Oslo Agreements, the Court ruled that the situation had not *de facto* changed,¹³⁴ and that if it did, Israel would then be under an obligation 'not to raise any obstacle' to the exercise of such rights 'in those fields where competence has been transferred to the Palestinian authorities'.¹³⁵ This once again voided any doubt concerning the Palestinian people's enjoyment of the rights enshrined in the Convention.

3.2. On the Interaction between the Two Regimes of Law

Two theories have been mainly concerned with the interaction between international human rights and humanitarian law. On one hand, a separation theory, perfectly incarnated by Israeli officials, looks at the two bodies of laws as distinct from each other with human rights law being applicable only during peacetime¹³⁶ and on the other hand, a theory of complementarity affirms that humanitarian law and human rights law do exist as separate bodies of law, but that they nonetheless overlap under specific circumstances.¹³⁷ Such cumulative application of human rights and humanitarian law inevitably raises questions concerning the nature of their relationship, and their interaction. The ICJ had already confronted this question in the Nuclear Weapons Advisory Opinion of 1996.¹³⁸ The advocates of the illegality of the use of nuclear weapons had argued that such use violated the right to life laid down in Article 6 of the ICCPR.¹³⁹ The ICJ established that Article 6 contains a non-derogable right that consequently also applies in armed conflict, and that even during hostilities it is prohibited to 'arbitrarily' deprive someone of their life.¹⁴⁰ In this Opinion the ICJ stated the supremacy of humanitarian law over human rights law, designating humanitarian law as *lex specialis* and conceding that the human right to life might be derogated under humanitarian law.¹⁴¹ This *lex specialis* principle, however, should not be seen as applying to the general and overall relationship between the two branches of international law, but rather relating to specific rules in specific circumstances.¹⁴² In both the Nuclear Weapons Advisory Opinion and the Construction of a Wall Advisory Opinion, the ICJ made it clear that human rights continued to apply in time of war, furthering its assertion that the two bodies of law co-exist.¹⁴³ In the case *DRC v Uganda*,¹⁴⁴ the ICJ went one step further by listing violations

¹³⁰ Concluding observations of the Committee on Economic, Social and Cultural Rights [1998] UN Doc. E/C.12/1/Add.27, para 8 <<http://unispal.un.org/UNISPAL.NSF/0/0BC7883100A95730852569AF00575179>>.

¹³¹ *Ibid.*

¹³² Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant, Addendum: Israel [2002] UN Doc. E/1990/6/ Add.32, para 5 <[http://domino.un.org/unispal.NSF/9a798adbf322aff38525617b006d88d7/718aa6e95901651c85256c5500630447/\\$FILE/e90-6add32.pdf](http://domino.un.org/unispal.NSF/9a798adbf322aff38525617b006d88d7/718aa6e95901651c85256c5500630447/$FILE/e90-6add32.pdf)>.

¹³³ *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 115.

¹³⁴ *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 78.

¹³⁵ *Ibid.* para 112.

¹³⁶ Fleck (n 55) 75.

¹³⁷ Hans Peter Gasser, 'International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion?' [2002] German Yearbook of International Law 45, 162.

¹³⁸ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* ICJ [1996] <<http://www.icj-cij.org/docket/files/95/7495.pdf>>.

¹³⁹ Article 6 of the ICCPR stipulates that: 'No one shall be arbitrarily deprived of his life', International Covenant on Civil and Political Rights [1966] UN Doc. CCPR/C/74/CPR.4/Rev.6.

¹⁴⁰ *Ibid.*

¹⁴¹ Jan Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' [2004] International Review of the Red Cross 86, 790.

¹⁴² Fleck (n 55) 75.

¹⁴³ *Advisory Opinion on the Legal Consequences*, ICJ [2004]; Also see ICJ, *Legality of the Threat or Use of Nuclear Weapons* [1996].

¹⁴⁴ François Hampson and Ibrahim Salama, *Working Paper on the Relationship between Human Rights Law and International Humanitarian Law* [2001] UN Doc. E/CN.4/Sub.2/2005/14 para 57.

of both bodies of law without even considering whether one or the other should prevail.¹⁴⁵ This leveling approach, which seemed to have untied the ICJ from its earlier doctrine of *lex specialis*, is also the position adopted by the UN Human Rights Committee, which considers the two bodies of law to be additive. This approach, called 'belt and suspenders',¹⁴⁶ illustrates that since some matters are better regulated in human rights law than in humanitarian law and vice versa, there is no need to choose one branch of law over the other, but rather to look for their simultaneous and harmonising application.¹⁴⁷ Some influential Israeli scholars¹⁴⁸ have a similar idea and discuss that no matter whether there is a situation of direct conflict between humanitarian and international human rights law, whether a situation is unregulated or sparsely regulated by either one, or whether humanitarian law influences the interpretation of human rights law or vice versa, each case is to be determined on the basis of the co-application of both humanitarian and human rights legislation.¹⁴⁹ The Israeli Supreme Court itself reached a similar conclusion in *Beit Sourik Village Council v. The Government of Israel*¹⁵⁰ following the ICJ Advisory Opinion. The Court upheld all petitions concerning the construction of the wall except for one. When petitioners challenged the authority of the Israeli military to erect the wall the Court replied that the wall was being built out of military necessity, and due to security concerns.¹⁵¹ The Court observed that it could not substitute its judgment for that of the military, and that '[a]ll we can determine is whether a reasonable military commander would have set out the route as this military commander did'.¹⁵² The Court, however, also noted that even when done out of military necessity, the wall must take into account the rights and needs of the local population. The Court found that the

'relationship between the injury to the local inhabitants and the security benefit from the construction of the separation fence along the route, as determined by the military commander, is not proportionate. The route undermines the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants. [...] The route of the separation fence severely violates their right of property and their freedom of movement. Their livelihood is severely impaired. The difficult reality of life from which they have suffered (due, for example, to high unemployment in that area) will only become more severe'.¹⁵³

As in the *Public Committee Against Torture et al. v The Government of Israel*,¹⁵⁴ the Court deferred to the discretion of the military authorities on the necessity to implement the measure, however also recognised the need to balance that with local needs. The Court further recognised that 30 km of the 40 km wall in question resulted in disproportionate injury to the local population, and was in violation of human rights provisions embedded in both Israel's domestic as well as international obligations.¹⁵⁵

Conclusions

In light of what has been exposed thus far, this article concludes that Israel's 'associated regime' maintains the Palestinian population under Israeli control in a status of 'alternative legality' which contravenes both Israel's domestic and international legal obligations. This article finds that Israel's domestic legislation is discriminatory regarding issues related to citizenship and nationality, although it admits that some measures

¹⁴⁵ *Case Concerning Armed Activities on the Territory of the Congo*, ICJ [2005] 116 at para 216-217 [hereinafter *DRC v Uganda*, ICJ [2005].

¹⁴⁶ William Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum,' [2007] *Israel Law Review* 40.

¹⁴⁷ Geneva Academy, Rule of Law in Armed Conflict Project, Interaction between humanitarian law and human rights in armed conflict, available online <http://www.geneva-academy.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.php>.

¹⁴⁸ Orna Ben-Naftali, and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' 2 *Israel Law Review* 37, 105. Also see: Orna Ben-Naftali, 'The Extraterritorial Application of Human Rights to Occupied Territories' *Proceedings of the Annual Meeting of the American Society of International Law* 100, 90-95.

¹⁴⁹ *Ibid* 109.

¹⁵⁰ *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04, Israel: Supreme Court, 30 May 2004, <<http://www.icrc.org/applic/ihl/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/09d47365bd007706c12575c20046ec2a?openDocument>>.

¹⁵¹ *Ibid*.

¹⁵² *Ibid* para 46.

¹⁵³ *Ibid*.

¹⁵⁴ (n 87).

¹⁵⁵ *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04, para 86.

that infringe upon Palestinians' rights (such as land dispossession, and some security and anti-terrorism measures) are somewhat justifiable under Israeli municipal law. The article also concludes, however, that the disproportional concentration of such measures on Palestinian nationals (regardless of their citizenship status) contributes to a situation of segregation and discrimination, and is in violation of Israel's international legal obligations. With regards to the issue of applicable legislation over the territories under Israeli control, the article acknowledges Israel's position on the applicability of humanitarian law to the Occupied Palestinian Territories, but rejects its position on the non-applicability of the Fourth Geneva Convention. Israel's argument against the *de jure* application of the Fourth Geneva Convention is invalid because of the *de facto* effective control exercised by the Israeli authorities since 1967 on the territories under occupation. The claimed change of status of the contended territories after the Oslo Agreement (from occupation to administration) does not, as found by the ICJ, *de facto* change the status of the situation. The Convention therefore remains applicable in all the territories under Israel's control. Since Israel is bound by the Convention it remains under the obligation to respect the principle of distinction and therefore is obligated to recognise combatant status to Palestinian fighters, and respect the right to life and security of the civilian population. This article further posits that the distinction Israel makes between human rights law and humanitarian law is outdated and obsolete. It concludes that human rights law continues to exist and apply alongside humanitarian law in all territories under occupation. All ratified human rights instruments are, therefore, binding in all territories under Israeli control, regardless of whether or not they contain territorial provisions on the scope of their application. Last but not least, this article concludes that the relationship between human rights law and humanitarian law is one of *lex specialis*, with humanitarian law sometimes prevailing in times of war. This principle, however, is not extended to the overall relationship over the two bodies of law. The overall relationship should be seen as one of 'belt and suspenders', with the prevalence of one or the other depending on which one grants the highest protection in a particular situation. Finally, this article affirms that there is no legal explanation for the regime of deprivation the Palestinian population is experiencing under Israeli administration. Security reasons and military necessity, if legitimate, must be balanced with the individual's rights as recognised by the Israeli international legal obligations.

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