

Human Rights and Alternative Legality in Israel and the Occupied Palestinian Territories*

Abstract

This working paper focuses on the legal protection awarded to the Arab populations under Israeli jurisdiction. In analyzing their legal protection, the author distinguishes between Arab Israelis and other Arab populations resident in territories under Israeli jurisdiction. The author does not deal with Israeli settlements or other discriminating laws such as marriage laws and the family reunification laws, but focuses on anti-terrorism measures. The working paper is divided in three parts: in the first part, the author discusses Israel's domestic obligations towards Arab Israelis and Palestinian residents, and their *de facto* discrimination. The second part discusses the applicability of the Fourth Geneva Convention to both the Occupied Palestinian Territories and Palestinian unlawful combatants. The third part discusses the applicability of human rights law to all territories under Israeli jurisdiction, and delves into the issue of the mutual relationship between the two international legal regimes in the territories under occupation. The working paper concludes that many Israeli anti-terrorism measures (such as check-points, night searches of Palestinian households, administrative detentions and targeted executions of Palestinian militants) violate individuals' rights protected under domestic and international law. Moreover, this working paper finds that Israel's rationale underpinning the non-applicability of such legislation to the Arab populations under its jurisdiction constitutes a form of 'alternative legality' and discrimination.

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Human Rights and Alternative Legality in Israel and the Occupied Palestinian Territories

Introduction

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

The Israeli government has been condemned and continues to be condemned by the United Nations for widespread human rights violations that take place in the territories under its jurisdiction.¹ Arab Israeli live under a regime of discrimination, while Palestinians’ right to life and to the freedom of the person are constantly under attack by means of retaliation actions and counter-terrorism incursions, which often lead to targeted assassinations and administrative detentions.² These violations contravene both Israel’s international legal obligations, and the fundamental right enshrined in Israel domestic legislation to freedom from arbitrary searches of the property and the person. Israeli occupation’s barricades and check points prevent the Palestinian population from the enjoyment of the very same rights Israel jealously protects for its Jewish population: the

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.

² 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.

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.

To justify these violations, Israel has adopted a logic of ‘alternative legality’ that sees the application of human rights law valid only for the Jewish part of its population, while all Arabs under Israeli jurisdiction –regardless of their status as Israeli citizen- are kept under a regime of deprivation.³ Barricades, check points, targeted assassinations and administrative detentions all are justified by the greatest necessities for security and military action. While admitting the applicability of humanitarian law to the territories under its occupation, Israel denies the applicability of the Fourth Geneva Convention on the protection of the civilian population. Most importantly, Israel denies its responsibility under international human rights instruments (such as the 1966 International Covenants and the 1989 UN Convention on the Rights of the Child) in the Occupied Palestinian Territories (OPTs), advocating for a separation of applicable legislation. After delving into the issue of human rights protected under Israeli domestic legislation, this working paper will expose the invalidity of Israel’s position on the non-applicability of international legal instruments to the territories under occupation.

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 recognizes the value of man, the sanctity of his life and individual freedom.⁴ The Basic Law on Human Dignity and Liberty 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

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 *supra* note 1.

⁴ 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>.

courts the authority to disqualify any law contradicting it at any lower level.⁵ Among the rights protected there are 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.⁶ Despite several cardinal human rights are missing from the document (such as the right to equality, the freedom of speech, freedom of religion, freedom of protest and others), 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 of life, body, and dignity').⁷ In this sense, it has been said the missing rights were given to the residents of Israel by general principles of law pre-existing the Basic Law.⁸ If short-handed in enumerating protections, the law seemed 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'.⁹ While asserting the government's prohibition to change or suspend the Basic Law by enacting an emergency regulation,¹⁰ another paragraph -Section 12- allows restrictions or denial of individual rights on the same 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 up to the government and the Supreme Court to decide on the legitimacy of the restriction measures.

It is in line with this flexibility that the Supreme Court, generally rather liberal in recognizing rights for the Israelis, ruled as legitimate the existence of check points and the carrying out of house searches and administrative detention.¹¹ The rationale is that Islamist terrorist organizations such as Hamas, Hezbollah and even Lebanese Fatah al-

⁵ Basic Law: Human Dignity, sec 8, 12, *see supra note 4*.

⁶ Basic Law: Human Dignity, sec. 2-7.

⁷ Basic Law: Human Dignity, sec. 2, 4.

⁸ Aharon Barak, 'Human Rights in Israel' [2006] 39 *Israel Law Review* 12, 2006.

⁹ Emphasis added. See: Basic Law: Human Dignity, sec. 8.

¹⁰ See: Basic Law: Human Dignity, sec. 12.

¹¹ Barak, A. *Human Rights in Israel*.

Islam, constitute a threat that justifies measures under a state of emergency, and that 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’,¹² basically leaves it up to the government to decide *how* and *for how long* rights can be restricted, as long as a state of emergency is in place.¹³ In a country that has been in state of emergency since day one of independence,¹⁴ this has become a controversial provision. It appears clear that the logic underlying the Basic Law’s limiting paragraph is circular, and that 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 Arab Israeli citizens or other Palestinian residents.

1.2. Arab Deprivation and Discrimination

Israel national territory is home to 1,682,000 Arab Israelis (meaning that 20.6% of Israel overall population has Arab descendants).¹⁵ In addition, there are about 278,000 Arab residents of occupied East Jerusalem and the Golan Heights. The majority has refused citizenship, but maintains Israeli residency.¹⁶ About 80% of Israeli Arabs are Muslim, the rest is divided, roughly equally, between Christians and Druze. The majority of them identifies very closely with the Palestinians in Gaza and the West Bank, and they often describe themselves as ‘Palestinian citizens of Israel’ (or ‘1948 Palestinians’).¹⁷ Arab Israelis are citizens of the State of Israel; as such, they are entitled to the same rights protected under domestic legislation. This precept was sanctioned in all Israeli

¹² Basic Law: Human Dignity, sec. 12.

¹³ Ibidem.

¹⁴ 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.

¹⁵ Jewish Virtual Library, ‘Vital Statistics: Latest Population, Updated April 2013’ <http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/newpop.html>.

¹⁶ Sarih Nusseibeh, *What is a Palestinian State Worth?* (Harvard, 2011)

¹⁷ Ilan Peleg, and Dov Waxman, *Israel's Palestinians: The Conflict Within* (Cambridge, 2011).

Independence Declaration's 'equality for all' claims.¹⁸ The truth differs, however, and some commentators have described Israel as 'democratic for Jews and Jewish for the Arabs'.¹⁹

Many Israeli Arabs frequently describe themselves as second class citizens,²⁰ and this is not only because their civic duty differs (as they are exempt from compulsory military service). Allegations of discrimination have come from multiple entities, government and non-governmental organisations, within and outside of the UN;²¹ all have been accused of bias, partisanship, and anti-semitism.²² While true that Israel might be subjected to a more vigilant inspection than many of its neighbors,²³ the discrimination of its Arab population has been acknowledged both by domestic inquiries

¹⁸ 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.

¹⁹ 'Tibi: Israel is democratic for Jews but Jewish for Arabs' [2011] *The Jerusalem Post* <<http://www.jpost.com/Israel/Tibi-Israel-is-democratic-for-Jews-but-Jewish-for-Arabs>>.

²⁰ Nusseibeh, S. *What is a Palestinian State Worth*.

²¹ For all UN Resolutions condemning Israel, see *supra note 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.

²² 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/jsourc/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'.

²³ '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>.

and by its very same indisputable allies. In 2003, the *Orr Commission*, a government inquiry appointed to investigate the events of the Second Intifada, in which 12 Arab Israeli and one Palestinian were killed by Israeli police amid several demonstrations,²⁴ concluded that ‘government handling of the Arab sector has been primarily neglectful and discriminatory’.²⁵ More recently, in its 2013 report to the Under-Secretary on Human Rights, Democracy, and Labor, the US State Department said Israeli Arabs face ‘institutional, legal, and societal discrimination’;²⁶ such discrimination materialises in terms of access to equal education and employment opportunities.²⁷ In the annex to the report, the State Department analyzes human rights problems related to Israeli authorities in the OTPs, and Israeli authorities *vis-à-vis* the Palestinian population (including Arab Palestinians residents of Israel). The report acknowledges 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.²⁸ The report also recognises that Israeli Defense Forces maintain restrictions on Palestinians’ movement into and out of the Gaza Strip, and registered violence by settlers against the Palestinian population as an ongoing problem, magnified by inconsistent punishment of these acts by Israeli authorities.²⁹ Besides the obvious violations of the right to life and personal freedom constituted by targeted assassinations and administrative detentions, Israeli check points daily violate Palestinian and Arab’s rights to ‘human freedom’ intended in the Basic Law as freedom

²⁴ Jewish Virtual Library, ‘The Official Summation of the Or Commission Report’ <http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/OrCommissionReport.html> accessed March 13, 2014.

²⁵ Ibid.

²⁶ 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.

²⁷ Ibid.

²⁸ 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/hmprt/humanrightsreport/index.htm?dynamic_load_id=220358&year=2013#wrapper> accessed on March 13, 2014.

²⁹ Ibid.

to leave and enter the country,³⁰ consequently violating their right to an occupation, to an education, to proper health and to family life. Nighttime Israeli's blitzes in Palestinian households, and the subsequent property confiscation, violate Arab Israeli and Palestinians' rights to privacy, to property and freedom from arbitrary searches. While namely justified by emergency regulations, the disproportionate concentration of such violations on Arab Israeli and other Palestinian populations remains without justification, and contribute to the creation of a regime of separation and discrimination.

2. On the Applicability of International Humanitarian Law in the Occupied Palestinian Territories

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.³¹ 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 respecting the Laws and Customs of War on Land (Hague Regulations), and the Fourth Geneva Convention Concerning the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).³² While maintaining the applicability of the Hague Regulations due to their customary nature, Israel contests the inapplicability of the Fourth Geneva Convention to the OPTs.³³ Although Israel ratified the Geneva Conventions in 1951, it indeed refuses to recognize 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 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.³⁴ Israel, in fact, claims that the

³⁰ Basic Law: Human Dignity, sec. 6.

³¹ Dieter Fleck, *The Handbook of International Humanitarian Law* (2nd Edition, Oxford 2009) 47.

³² Ibid.

³³ Permanent Observer Mission of the State of Palestine to the United Nations, 'Fourth Geneva Convention and the Hague Regulations' <<http://www.un.int/wcm/content/site/palestine/cache/offonce/pid/11619;jsessionid=099EECCCE67262BDAE3649318C1A41625>> retrieved February 12, 2014.

³⁴ Permanent Observer Mission of Palestine to the United Nations, 'Paper presented to the Conference of the High Contracting Parties to the Fourth Geneva Convention on Measures to Enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, Geneva' [1999]

legal status of those territories has never been settled in any document agreed by both parties, despite the settlement of this issue was part of the main agenda of the Oslo Agreements of 1995.³⁵ On the contrary, Israeli claims regarding the non-applicability of the Geneva Conventions have even increased following the signing of the Oslo Agreements: since Israeli military presence in the OPTs was progressively diminishing (at least insofar as Area A is concerned),³⁶ and Palestinians were assuming broadened responsibilities and powers with respect to internal affairs, Israel claimed it could no longer be considered an occupying power with obligations towards the Palestinian territories and its civilian population.³⁷

Israel, however, has *de facto* occupied the OPTs since 1967. As Working paper 42 of the Hague Regulations stipulates, 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'.³⁸ In the *Hostage* case, the Nuremburg 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'.³⁹ This test continues to apply to Israel's relation *vis-à-vis* 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.⁴⁰ This has been the voice (almost at unison) of the

<<http://unispal.un.org/UNISPAL.NSF/0/6B939C57EA9EF32785256F33006B9F8D>> retrieved February 12, 2014.

³⁵ See: Israeli-Palestinian Negotiations: Interim Agreement on the West Bank and the Gaza Strip (Oslo II) [1995] Washington, D.C., <<http://www.jewishvirtuallibrary.org/jsource/Peace/interim.html>> retrieved on February 12, 2014.

³⁶ Area A is the area of the OPT 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/>>.

³⁷ Ibid.

³⁸ 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>>.

³⁹ Eyal Benvenisti, *The International Law of Occupation* (Oxford 2012) 47.

⁴⁰ The latest being: UN General Assembly, *Applicability of the Geneva Convention relative to the*

international community since in 2001 High Contracting Parties to the Fourth Geneva Convention reaffirmed ‘the applicability of the Convention to the OPTs, including East Jerusalem, and reiterate[d] the need for full respect for the provisions of the said Convention in that territory’.⁴¹ This position was confirmed in July 2004 by 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. The ICJ referenced the agreements between Israel and the Palestinian Liberation Organization 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’.⁴² 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’.⁴³ In reference to Israel’s occupation of the West Bank and Gaza Strip in the 1967 War, the ICJ recalled Working paper 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...’⁴⁴ 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’,⁴⁵ including therefore all OPTs.

This should not come as a surprise, considering that the Israeli authorities had themselves initially recognised the applicability of the Fourth Geneva Convention. Working paper 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

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, *supra* note 1.

⁴¹ Conference of High Contracting Parties to the Fourth Geneva Convention Declaration [2001] <<http://unispal.un.org/UNISPAL.NSF/0/8FC4F064B9BE5BAD85256C1400722951>>.

⁴² *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.

⁴³ *Ibid.* para 98.

⁴⁴ *Ibid.* para 92.

⁴⁵ *Ibid.* para 95.

dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures'.⁴⁶ 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'.⁴⁷ However, in October 1967, this military proclamation was amended by Military Order 144 to exclude the reference to the Convention's applicability.⁴⁸ Since then, Israel has been claiming that its presence in the OPT is as an *administrator*, and that despite it would abide to the Fourth Geneva Convention by force of its 'humanitarian provisions',⁴⁹ that it officially maintained Israeli authorities non-accountable to their responsibilities under the Convention.⁵⁰

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 and the legitimacy of their targeting. 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 recognize Palestinian fighters their combatant status.⁵¹ Reading the definition of combatant provided in Working paper 43 of AP I from an Israeli perspective, Palestinian fighters do not qualify as combatants since they are not associated with the armed forces of a 'Party' to the conflict.⁵² That means, following the biunivocal humanitarian law division between combatants and non-combatants, that

⁴⁶Settlement in the Administered Territories 1967, IMFA 3, retrieved from <<http://www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf>> on March 2, 2014.

⁴⁷ Ibid.

⁴⁸ See: Military Order 144: Repeals Military Proclamation 3, Working paper 35 concerning protection of civilians as per the Geneva Conventions, IMD [1967] <<http://www.israelawresourcecenter.org/internationallaw/studyguides/sgil3k.htm>>.

⁴⁹ 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>.

⁵⁰ Despite claiming its presence as a mere administrator, since the beginning of its occupation of the West Bank and Gaza Strip, Israel's military authorities have issued over 1,500 military orders to alter pre-existing laws, and to effectively extend military jurisdiction over the OPT. See online database: <<http://www.israelawresourcecenter.org/internationallaw/studyguides/sgil3k.htm>>.

⁵¹ UN General Assembly, *Applicability of the Geneva Convention*, *supra note 1*.

⁵² 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.

every Palestinian is then a civilian, which also means an illegitimate target. This biunivocal vision has indeed 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 combatant’ actually fall. The debate is still open on the legal status of these persons.⁵³ 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.⁵⁴ 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. If the latter is the case then, the question arises as 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.⁵⁵ The Israeli High Court of Justice tried to answer these questions when, on January 14 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.⁵⁶ The Court, which ultimately refused to

⁵³ 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.

⁵⁴ 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>>.

⁵⁵ *Supra note 53*.

⁵⁶ 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

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.⁵⁷ The relevant considerations of its judgment on 14 December 2006, nevertheless, recognised that Israel holds the OPT 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.⁵⁸ In this respect, it has 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’.⁵⁹ In addition, and despite the fact that the court has considered dozens of petitions related to Israeli military practices in the OPTs, its rulings continue to choose ‘deference to the discretion of the military authorities whenever it invoked military considerations’.⁶⁰

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

3.1. Alternative Legality and the 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. Particularly, despite being part to both the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), as well as the 1989 UN Convention on the Rights of the Child, Israel denies their applicability to OPTs. The claim is, again, put forward on grounds of a too literal ‘well established distinction between human rights and humanitarian law’.⁶¹ Israel’s argument is based on the assumption that humanitarian law is the ‘protection granted in a *conflict*

2003), both at <<http://www.mfa.gov.il>>. See also: Israel HCJ, *PCATI v Israel* (full reference *infra* n. 29), at para 2, 10.

⁵⁷ *PCATI v Israel*, HCJ [2006] 60.

⁵⁸ *PCATI v Israel*, HCJ [2006] 16-21.

⁵⁹ *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.

⁶⁰ *The Public Committee against Torture in Israel et al. v The Government of Israel*, HCJ [2005] Doc. No. 769/02 11.

⁶¹ Emphasis added. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* ICJ [2004] para 112.

*situation*⁶² such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens *from their own Government in times of peace*'.⁶³ Concerning the applicability of the human rights conventions, Israel first claimed that being humanitarian law –read the Hague Regulations- *de jure* applicable, human rights law could therefore not be for the time the other regime was in force;⁶⁵ 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 OPTs, and was therefore no longer accountable for human rights violations in the Gaza Strip and the West Bank.⁶⁶ The ICJ was quick in dismantling this position, replying *in primis* that protection granted under human rights law is not lifted in times of armed conflict,⁶⁷ and subsequently breaking the argument discussing the applicability of the Covenants to the 'persons' and 'territories' subjected to the jurisdiction of the State Party. The ICJ analysis on the applicability of the two Covenants will hereby be discussed separately.

Concerning the ICCPR, the ICJ maintained that Working paper 2, paragraph 1, of the Convention, recognizes that 'all individuals' within the territory of 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'.⁶⁸ The court also noted that while the jurisdiction of States is primarily territorial, it may at times be exercised outside the national territory (citing rulings related to the cases of confiscation of Uruguayan passports in Germany, and the

⁶² Or in belligerent occupation for that matters, see above, Section 1. *International Humanitarian Law and the Occupied Palestinian Territories*.

⁶³ Emphasis added. *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 102–13 and para 127–31.

⁶⁴ 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.

⁶⁵ Natan Lerner, 'Human Rights, Humanitarian Law and the Occupied Territories' [2003] *Palestine-Israel Journal of Politics, Economic and Culture* 10, 3.

⁶⁶ *United Nations*, Israel's Report to the UN Human Rights Committee 1998, UN Doc. CCPR/C/SR.1675, para. 27.

⁶⁷ More details on this aspect will be discussed in the section 3. *On the Interaction of the Two Regimes of Law*.

⁶⁸ *Supra note 63*, para. 108-9.

arrests carried out by Uruguay in Brazil and Argentina).⁶⁹ The court specified that looking at the *travaux préparatoire* of the Covenant, no doubt is left as to whether the application of the Convention is constrained by territorial limits: the interpretation of Working paper 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.⁷⁰ 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.⁷¹ The Human Rights Commission's successor, the Human Rights Committee's at the UN, has followed suit with its interpretation of the Conventions: it has also constantly found the ICCPR applicable wherever the State exercises its jurisdiction on a foreign territory.⁷² 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',⁷³ which was paramount to saying 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,⁷⁴ 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, in fact, does not contain any provisions on its scope of application. This may be explicable by the fact that

⁶⁹ *Lopez Burgos v Uruguay* [1981] ICJ 52/79; *Lilian Celiherti de Cusariago v. Uruguay* [1980] ICJ 56/79.

⁷⁰ *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 109.

⁷¹ 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).

⁷² *Ibid.*

⁷³ Concluding observations of the Human Rights Committee [2003] UN Doc. CCPR/CO/78/1SR, para 11 <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument)>.

⁷⁴ Convention on the Rights of the Child 1989, 1577 3 <<http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>> accessed April 25, 2013. Working paper 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.

the Covenant guarantees rights that are essentially territorial.⁷⁵ Israel has taken pride in acknowledging its compliance with the obligations laid out in the ICESCR; however, once again, 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 Occupied Territories’.⁷⁶ The Committee noted however that, as even acknowledged by Israel, ‘the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant’.⁷⁷ Israel justified this position maintaining once again 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.⁷⁸ As in a circular game, the Court referred Israel back to its position over the occupation and Israeli *de facto* jurisdiction as an occupying power. The court compelled 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.⁷⁹ As for the competences transferred to the Palestinian authorities after the Oslo Agreements, the Court ruled that the situation had not *de facto* changed,⁸⁰ 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’,⁸¹ once again voiding any doubt concerning the Palestinian people’s enjoyment of the rights enshrined in the convention.

⁷⁵ *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 112.

⁷⁶ 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>>.

⁷⁷ *Ibid.*

⁷⁸ Second periodic reports submitted by States parties under working papers 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)>.

⁷⁹ *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 115.

⁸⁰ *Advisory Opinion on the Legal Consequences*, ICJ [2004] para 78.

⁸¹ *Ibid.* para 112.

3.2. On the Interaction of 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) keeps looking at the two bodies of laws as separated (with human rights law being applicable only during peacetime)⁸² 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.⁸³ This cumulative application inevitably raises the question of their reciprocal interaction.

The ICJ had already confronted this question in the Nuclear Weapons Advisory Opinion of 1996.⁸⁴ The advocates of the illegality of the use of nuclear weapons had argued that such use violated the right to life laid down in Working paper 6 of the ICCPR.⁸⁵ The ICJ established that Working paper 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.⁸⁶ 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.⁸⁷ This *lex specialis* principle, however, should not be seen as applying to the general and overall relationship between the two branches of international law 'as such,' but rather relating to specific rules in specific circumstances.⁸⁸ 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

⁸² Fleck, *The Handbook*, p. 75.

⁸³ 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.

⁸⁴ *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>>.

⁸⁵ Working paper 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.

⁸⁶ *Ibid.*

⁸⁷ Jan Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' [2004] *International Review of the Red Cross* 86, 790.

⁸⁸ Fleck, *The Handbook*, p. 75.

conviction that the two bodies of law co-exist.⁸⁹ In the case *DRC v Uganda*,⁹⁰ the ICJ even went one step further, listing violations of both bodies of law without even considering whether one or the other should prevail.⁹¹ This leveling approach, which seemed to have untied the ICJ from its earlier doctrine of the *lex specialis*, is also the position adopted from the UN Human Rights Committee, which considers the two bodies of law as additive. This approach, called ‘belt and suspenders’,⁹² illustrates that since some matters are better regulated in human rights law than in humanitarian law and viceversa, there is no need to choose one branch of law over the other, but rather to look for their simultaneous and harmonizing application.⁹³ This view nullifies Israeli’s argument on the non-applicability of the human rights conventions, and proves Israel in violation of human rights provisions embedded in international legislation.

Conclusions

This working paper finds Israel’s alternative legality invalid in justifying the human rights violations perpetrated against the Palestinian and Arab populations residing in the territories under its occupation. Israel’s argument against the *de jure* application of the Fourth Geneva Conventions is invalid because of the *de facto* effective control exercised by 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 and jurisdiction. Since Israel is bound by the convention, it remains under the obligation to respect the principle of distinction, therefore recognizing combatant status to Palestinian fighters, and respecting the right to life and security of the civilian

⁸⁹ *Advisory Opinion on the Legal Consequences*, ICJ [2004]; Also see ICJ, *Legality of the Threat or Use of Nuclear Weapons* [1996].

⁹⁰ 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.

⁹¹ *Case Concerning Armed Activities on the Territory of the Congo*, ICJ [2005] 116 at para 216-217 [hereinafter *DRC v Uganda*, ICJ [2005].

⁹² 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.

⁹³ 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>

population. The distinction Israel makes between human rights law and humanitarian law is outdated and obsolete. Human rights law continues to exist and apply alongside humanitarian law. All ratified human rights instruments are, therefore, binding in all territories under Israeli jurisdiction, regardless of whether they contain or not territorial provisions on the scope of their application. The relationship between human rights law and humanitarian law is the 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 rather be seen as one of 'belt and suspenders', with the prevalence of one or the other depending on which one grants the highest protection to the individual. Israel is found in contravention not only of international human rights and humanitarian law, but also in violation of its own domestic legislation. There exist no legal explanation for the regime of deprivation under which the Arab and Palestinian population is living under Israeli administration. Security reasons and military necessity must be balanced with the individual's rights protected under international law. The 'belt and suspenders' approach is the only way to grant everyone, including all members of the Palestinian population, the enjoyment of their right to life, their right to liberty and personal freedom, their right to security of the person, to privacy, to mobility and their freedom from arbitrary search of the property and the person.

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