

University of the Western Cape

Faculty of Law



**INTERNATIONAL HUMANITARIAN LAW VIOLATIONS OCCURRING
WITHIN THE OCCUPIED PALESTINIAN TERRITORIES
DURING THE YEARS 1982-2012**

**Mini-thesis submitted in partial fulfilment
of the requirements for the M.Phil degree**

By

Thakira Desai

(Student Number: 2831418)

Supervisor: Professor L van der Poll


Date: November 2015



Declaration

I, Thakira Desai, hereby declare that this dissertation 'International Humanitarian Law Violations Occurring Within the Occupied Palestinian Territories During the Years 1982-2012' is my original work and has never been presented in any other institution. I also declare that where another person's work is used, it has been acknowledged in this dissertation.

Student: Thakira Desai

Signature: 

Date: 2015.11.27

Supervisor: Professor Letetia van der Poll

Signature: 

Date: 2015.11.27



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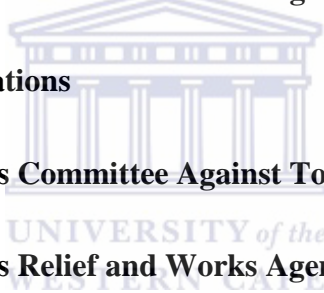
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LIST OF ABBREVIATIONS

AOA	Independent Monitor for the Agreement on the Operational Arrangements
BDS	Boycott, Divestment, and Sanctions
CAT	Convention Against Torture
CESCR	International Committee on Economic, Social and Cultural Rights
CoD	Council of Delegates
EMG	East Mediterranean Gas
EMS	Emergency Medical Services
GDP	Gross Domestic Product
GSS	General Security Service
HCJ	High Court of Justice
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Convention on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDF	Israeli Defence Force
IHL	International Humanitarian Law
IHRL	International Human Rights Law



ISA	Israeli Security Agency
MDA	Magen David Adom in Israel
MoD	Ministry of Defence
MoU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization
OTP	Office of the Protector
PLO	Palestinian Liberation Organization
PRCS	Palestinian Red Crescent Society
UDHR	Universal Declaration of Human Rights
UN	The United Nations
UNCAT	United Nations Committee Against Torture
UNRWA	United Nations Relief and Works Agency
USA	United States of America



KEY WORDS

- Armed Conflict
- Civilian Persons
- IHL
- Israel
- Occupied Territory
- Palestine
- Protection
- Violations



CHAPTER 1

INTRODUCTION

1.1 Introduction

Chapter 1 provides an outline of the research. The Chapter establishes the existence of an international armed conflict and provides a background to the study. Importantly, this Chapter outlines the: problem statement; research question; significance of the research, literature review, and methodology. In conclusion, Chapter 1 provides a chapter outline for the succeeding five chapters.

1.1.1 The existence of an international armed conflict

Common Art 2 of the Fourth Geneva Convention of 1949 states that the Convention is to apply to all cases of declared war or armed conflict between two or more high-ranking parties. The state of war does not have to be recognized by both parties. Furthermore, the state of war applies to cases of partial or total occupation of the territory of a high contracting party, even if the occupation is not met with armed resistance. The context of an international armed conflict is extended by Protocol I, Art 2, to the Geneva Conventions of 1949 to armed conflicts in which individuals are fighting against colonial domination, racist regimes, and (applicable to this current mini-thesis) alien occupation.¹

Within the context of the Israeli and Palestinian conflict, the conflict as prescribed by the Fourth Geneva Convention is of an international nature.² Israel has since 1948 taken over Palestinian land, thus both usurping territory, as well as acting as an alien occupant, therefore fulfilling both requirements of an international armed conflict. This has resulted in two Intifadas and many deaths.³

¹ UN Human Rights Office of the High Commissioner (2011) 'International Legal Protection of Human Rights in Armed Conflict'.

² Paulus A and Vashakmadze M 'Asymmetrical war and the notion of armed conflict- a tentative conceptualization' (2009) 91 *International Review of the Red Cross* 873 111-115.

³ Hammami R and Salim T 'The Second Uprising: end or new beginning?' (2001) 30 *Journal of Palestinian Studies* 12-16.

1.1.2 The Israeli Occupied Territories

At the start of the 1967 war Israel was in control of the following areas:

- The West Bank: The area of Samaria and Judea that lies between Israel proper⁴ and the river Jordan. This area was previously under Jordanian rule and was granted the singular title of 'the West Bank ' by the Israeli military government in December 1967.
- The Gaza Strip: Though having made no claim over it, Egypt had managed the Gaza Strip from 1948 to 1967.
- East Jerusalem: Annexed on 30 June 1980, this area formed part of the West Bank.
- The Golan Heights: An area which today forms part of Syria.
- The Sinai Peninsula: Part of Egypt, this area came under Israeli control in the year 1967. Israel began moving out of the Sinai Peninsula in 1974 and 1975, and again in 1979 with the establishment of the 1979 peace Treaty that made provision for the phased withdrawal of Israeli troops, to be completed on April 25, 1982.⁵

1.1.3 Background to the study

At the end of World War II, the preservation of human dignity had become an integral element of international law. International humanitarian Law (IHL) is a set of rules that seeks to limit the effects of armed conflict on civilians and combatants alike. This objective is outlined in two areas of concern, namely, the protection of persons, and the restrictions on the means and methods of warfare. IHL is framed within treaties and customary international law and are outlined within a multitude of conventions and protocols, inclusive of the four Geneva Conventions and their Additional Protocols and the Hague Regulations Respecting the Laws and Customs of War on Land considered binding on all states independently of their acceptance of them.⁶ In addition, international treaties dealing with the use and stockpiling of certain

⁴ 'Israel Proper' refers to the territory of Israel prior to 1967.

⁵ Playfair E *International Law And The Administration Of Occupied Territories: Two Decades Of Israeli Occupation Of The West Bank And Gaza Strip* (1992).

⁶ UN Human Rights Office of the High Commissioner (2011) 12.

weapons, regulating the conduct of armed conflict, and subsequently imposing limitations on the use of certain weapons, are all considered part of IHL.

The Third Geneva Convention stipulates the unique role played by the International Committee of the Red Cross (ICRC), which includes the duty of the ICRC to visit prisoners, organize relief operations, and to contribute to family reunification both during international and non-international armed conflict.⁷ Furthermore, the ICRC enjoys the role of interpreting IHL, working towards its application within armed conflict, taking cognizance of breaches of IHL, including contributing to the overall understanding and development of the law.⁸

IHL primarily addresses states parties to an armed conflict, imposing obligations on states, as well as their forces participating in the conflict. Furthermore, IHL extends responsibility directly to the parties to the conflict and the civilian leadership. State obligations are extended to the investigation of possible violations of IHL, and prosecuting and punishing offenders. These obligations imposed on states are to be observed in all situations, including those in which states delegate governmental functions to various individuals, groups and/or companies.⁹

Under IHL the deliberate killing of combatants, who do not surrender, is not prohibited. It does however prohibit parties to the conflict from killing or injuring civilians, furthermore emphasizing the duty of combatants to prevent the accidental death of and injury to civilians.¹⁰ These directives therefore relay the need for recognition of violations against civilians, as well as examining the context in which violations had occurred. In examining the legality of an attack, three principles to be observed are established within IHL, namely: distinction; proportionality; and precaution. The objective of these principles is to establish and maintain respect for civilians and civilian structures.¹¹

⁷ICRC Newsletter (2004) 'Protecting Persons Deprived of their Freedom is Necessary' 2-6.

⁸ UN Human Rights Office of the High Commissioner (2011) 14.

⁹ Geneva Convention ,1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949).

¹⁰ Geneva Convention, 1977 Protocol II Additional to the Geneva Conventions 13-14 (1977).

¹¹ Henchaerts M 'Study on Customary IHL' (2005) *International Review of the Red Cross* 198-200.

The first principle, distinction, establishes the duty placed upon combatants to distinguish between combatants and civilians, with attacks only to be directed at combatants and military objectives. 'Distinction' is to be achieved with the use of distinctive uniforms and various forms of identification.¹² The second principle, proportionality, maintains that initiating an attack expected to cause incidental loss of life and injury to civilians or civilian objects, excessive in nature as compared to a direct attack on military objectives, is prohibited.¹³ The third and final principle, precaution, establishes the duty of combatants to take special care in protecting the lives of civilians.¹⁴ It therefore emphasizes the need to prevent the deaths of civilians, and minimize the incidental loss of life and injury to civilians and civilian objects by verifying the nature of the object that is to be attacked. Importantly, assuring that the objective is in fact a military objective. Furthermore, providing a warning to civilians within the vicinity of an impending attack that subsequently provides ample time for evacuation of civilian populations.

The Human Rights Committee in its General Comments No. 29 (2001) and No. 31 (2004), states that the International Covenant on Civil and Political Rights (ICCPR) is applicable in cases of armed conflict, complementary to IHL.¹⁵ This is important, noting that the norms of *jus cogens*, or customary international law, prohibit derogation from certain rights as stipulated by Art 4 of the ICCPR. Rights, which are considered non-derogable, include: freedom from torture, freedom from slavery, genocide, racial discrimination, crimes against humanity, and the right to self-determination.¹⁶ The Committee has further stated that a state may not arbitrarily arrest or detain individuals, and may not presume a person's guilt without providing the right of a person to prove their innocence.¹⁷ Furthermore, the UN Convention against Torture (CAT) has addressed the issue of torture. Art 2 of the CAT specifies that all parties to the Convention are to take all necessary steps to prevent acts of

¹² Henchaerts M (2005) 198.

¹³ Henchaerts M (2005) 199.

¹⁴ Henchaerts M (2005) 199-200.

¹⁵ De Zayas A 'Human Rights and Indefinite Detention' (2005) 87 *International Review of the Red Cross* 18-22.

¹⁶ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 4.

¹⁷ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 4.

torture. A 'state of war' or 'threat of war', according to the CAT does not justify any form of torture.¹⁸

For the purpose of this mini-thesis, a special focus will be placed on 'crimes against humanity' and 'war crimes'. The definition of crimes against humanity is derived from the Rome Statute. The Rome Statute states that 'crimes against humanity' refers to any act when committed as part of a widespread or systematic attack is directed against any civilian population.¹⁹ Crimes against humanity to be discussed include:

'Murder; extermination; deportation or forcible transfer of populations; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Persecution against any identifiable group or collectively on political; racial; national; ethnic; cultural; religious; gender; or other grounds that are universally recognized as impermissible under international law; in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; the crime of apartheid; and lastly, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'²⁰

The definition of 'war crimes' for the purpose of this mini-thesis is derived from the Rome Statute and is defined as 'acts against persons or property protected under the Geneva Conventions' that are in breach of the Geneva Conventions of 12 August 1949.²¹ This mini-thesis will focus on the following war crimes:

'Torture or inhuman treatment; including biological experiments; willfully causing great suffering; or serious injury to body or health; extensive destruction and appropriation of property; not justified by military necessity and carried out unlawfully and wantonly; unlawful deportation or transfer or unlawful confinement.'²²

Furthermore, consideration will be given to Art 8(b) of the Rome Statute that asserts the duty of combatants to protect both civilians and civilian structures within armed

¹⁸ UN General Assembly Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 United Nations Treaty Series 1465 2 (1987).

¹⁹ UN General Assembly, Rome Statute of the International Criminal Court, 1998 Art 7 (1).

²⁰ Rome Statute (1998) Arts 7 (1a, b, d, e, f, h, l, j, k).

²¹ Rome Statute (1998) Art 8 (2)a.

²² Rome Statute (1998) Arts 8 (2) a (l, ii, iii, iv, vi, vii, viii).

conflict.²³ With regards to crimes against humanity, this mini-thesis will focus on the crimes of extermination and the crime of Apartheid.

1.2 Problem Statement

The purpose of this mini-thesis is to address IHL violations occurring within the Occupied Palestinian Territories relative to the protection of civilian persons in time of war. Importantly, various IHL violations that occur within the Green Line will be expanded upon. The mini-thesis will shed light on the lack of international action, specifically the inaction of the UN and the ICRC, in ending the decades of IHL violations by both the Israeli and Palestinian forces. As a means to an end, further destruction of property and loss of life that inhibits the quality of life of Palestinians and Israeli citizens trapped within the ongoing conflict, this mini-thesis will endeavour to provide solutions to ending the occupation. These solutions include: a UN Resolution directed toward the demolition of the wall; establishing permanent means of access to all basic needs; and lastly, addressing the influence of The United States of America (USA) and Egypt, respectively.

1.3 Research Question

Have IHL violations relative to the protection of civilian persons occurred within the Occupied Palestinian Territories during the years 1982-2012?

1.4 Significance of the Research

A study focusing on IHL violations within the context of the Israeli/Palestinian armed conflict may shed light on the apparent lack of control which both states' and various international bodies have in their attempts to broker a truce. It is also to address the need for increased international attention with regard to the quality of life of Palestinian and Israeli citizens caught within the armed conflict.

The objective of this mini-thesis is to understand the purpose of the doctrine of IHL, and subsequent IHL violations, within the context of the Israeli/Palestine international armed conflict. This mini-thesis will focus on war crimes and crimes against humanity as defined by the Rome Statute. It will seek to understand the applicability

²³ Rome Statute (1998) Art 8(2) b.

of the Geneva Conventions, their Additional Protocols and the Rome Statute. Furthermore, it will attempt to understand the efficiency of both the Israeli and Palestinian forces in implementing the principles of distinction, proportionality, and precaution with regard to the protection of civilians and civilian property in the context of an armed conflict.

As a member of the greater international community, witnessing daily atrocities carried out by regimes against their own, as well as foreign counterparts, it has become apparent that instruments established for the preservation and protection of civilians found within armed conflict situations are not made use of or may not be as efficient as may have been initially hoped. This mini-thesis therefore aims to understand the efficiency and applicability of IHL within the arena of the Israeli/Palestinian armed conflict. With the objective of highlighting the shortcomings of the applicability of IHL and possibly improve the understanding and subsequent implementation of IHL within the context of an international armed conflict.

1.5 Argument

This mini-thesis will argue that IHL has been violated relative to the protection of civilian persons in the Occupied Palestinian Territories. Furthermore, this mini-thesis will argue that the United Nations (UN) and its respective organs, the ICRC, and the international community at large have not fulfilled their duty to protect the rights of civilians caught within the armed conflict.

1.6 Literature Review

Berkowitz, assessing the Goldstone Reports, asserts that Israel has implemented a policy that enforced the terrorization of Palestinian civilians. Israeli forces have targeted civilian non-combatants and civilian infrastructure, in contravention of the Fourth Geneva Convention.²⁴ Furthermore, Stephen Zunes asserts that with the increased insurgency against the Palestinian population in Gaza in 2008,²⁵ the USA Speaker of the House of Representatives, Nancy Pelosi, insisted: ‘When Israel is

²⁴ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949).

²⁵ Reidman P.A ‘West Bank struggle: A Call for Human Rights’ (2012) 17 *Human Rights* 1.

attacked, the United States must continue to stand strongly with its friend'. Various other members of Congress who deny that large-scale attacks against Palestinian civilians had taken place affirmed this sentiment. President Bush reinforced this sentiment. Zunes states the fact that the foreign policy by the USA was in contravention of IHL.²⁶

According to Weill, thousands of Palestinians have been judged in Israeli military courts.²⁷ The first five of these was established in 1967 and were situated in Hebron, Nablus, Jenin, Jericho, and Ramallah. It has been recorded that between 1993 and 2000, the period of the Oslo peace process, over 124 000 Palestinians were prosecuted within the Israeli military courts. Today only two courts are functioning, namely, the Court of Appeals, and the Court of First Instance.

Consequently, Weill emphasizes IHL regulations with regard to Occupied Territories. The local legal system is to remain intact, as it was prior to occupation, thus reflecting the temporary nature of occupation. Importantly, Weill notes that the occupying power is not to be considered as the new sovereign of the territory.²⁸ Civilian life should therefore be conducted in the same manner as it was prior to occupation, without the interference of the legal system of the occupying power.²⁹ This is emphasized by Art 43 of the Hague Regulations, which imposes the obligation on occupying powers to ensure public order whilst respecting the legal system in existence prior to the occupation³⁰.

Art 64(1) of the Fourth Geneva Convention of 1949 provides two exceptions to Art 43 of the Hague Regulations. The occupying power may revoke local penal legislation if the local legal system is a threat to security or an obstacle to the application of the Convention.³¹ Furthermore, though the legislative capacities of the occupying power are very extensive and complex, ICRC Commentary 51 emphasizes

²⁶ Zunes S 'The Gaza war, Congress and IHL' (2010) 17 *Middle East Policy* 69-72.

²⁷ Weill S 'The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories' (2007) 89 *International Review of the Red Cross* 395-397.

²⁸ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 64.

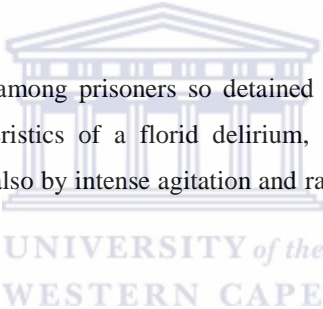
²⁹ Weill S (2007) 397.

³⁰ Sassoli M Art 43 of The Hague Regulations and Peace Operations in the Twenty-First Century (IHL Mini-thesis, University of Geneva, 2004) 2-4.

³¹ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 64(1).

that these measures may not be used as a means to oppress the occupied population. This is emphasized through the analysis of the presence of border crossings that regulate the movement of Palestinians into territories deemed to be Israel territory.³²

Reyes correctly notes that torture under interrogation does not specifically entail physical assault or pain, but may also pertain to severe psychological pain and suffering, affecting the senses and personality of the victim.³³ This has been emphasized in the Istanbul Protocol, which states that the definition of torture does require the presence of visible scars, and therefore has severe consequences, affirming that the “absence of evidence is not the evidence of absence”.³⁴ A popular method of psychological torture is solitary confinement, described by Reyes as confinement alone in a cell for days, with little environmental or social stimulation. This form of psychological torture is said to be the most difficult to withstand.³⁵ This has been described by Grassian as follows:



‘The mental disturbances among prisoners so detained ... [include] ... an agitated confusional state, characteristics of a florid delirium, [with] severe paranoid and hallucinatory features and also by intense agitation and random, impulsive, often self-directed violence.’³⁶

Mills asserts that the UN Fact-Finding Mission, the Goldstone Report, concluded that: Art 5 crimes; crimes against humanity (Art 7) inclusive of persecution and intentionally causing great suffering; and war crimes (Art 8) have occurred within the Occupied Palestinian Territories. Furthermore, he emphasizes that war crimes relative to the Fourth Geneva Convention, inclusive of willful killing; attack on civilians; severe beatings of prisoners; and torture, have all taken place within the armed conflict between Israel and Palestine. This Mills correctly asserts may fail to obtain

³² Refer to appendix no.2 Weill S (2007) 395-397.

³³ Reyes H ‘The Worst Scars are in the Mind: Psychological Torture’ (2007) *International Review of the Red Cross* 598-600.

³⁴ Reyes H ‘The Worst Scars are in the Mind: Psychological Torture’ (2007) *International Review of the Red Cross* 598-600.

³⁵ Reyes H (2007) 606-607.

³⁶ Stuart G ‘Psychiatric effects of solitary confinement’ (2006) 22 *Journal of Law and Policy* 327–80.

the attention of the International Criminal Court (ICC) as the USA veto rights has previously proved to inhibit Security Council action against these violations.³⁷

Relating to the situation in Jerusalem, Ambassador Thalmann's³⁸ mission has highlighted the increased control enjoyed by Israel over east Jerusalem. Ambassador Thalmann's mission has importantly emphasizes the expansion of west Jerusalem by 60 square kilometers since Israel has usurped control of east Jerusalem, which has in total exceeded 100 square kilometers.³⁹ Furthermore, it is to be noted that of the 70 000 people residing within east Jerusalem 28 000 (40 per cent) reside in the old city, whilst 42 000 (60 per cent) reside outside of the walls.⁴⁰

In Para 120 of the Advisory Opinion on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territories , the International Court of Justice (ICJ) concluded that Israeli settlements constructed within the Occupied Territories are in breach of international law, and prohibited under Art 49(6) of the Fourth Geneva Convention.⁴¹ This has been reiterated by the UN Charter, Art 2(5), which prohibits the “use of force against territorial integrity”⁴² and is emphasized by General Assembly Resolution 2625 (XXV) which states that “no territorial acquisition resulting from the threat or use of force shall be recognized as legal”.⁴³

³⁷ Mills S's 'The Gaza conflict (2008-09) and the International Criminal Court' Available at <http://israelandpalestinediary.blogspot.com/2012/04/qaza-armed-conflict-2008-09-and.html> (accessed 24 October 2012).

³⁸ Former Ambassador of Switzerland to the United Kingdom.

³⁹ Measures taken by Israel to change the status of the City of Jerusalem, 1967 UN General Assembly Resolution 2254 (ES-V) (1967) 1.

⁴⁰ UN General Assembly Resolution 2254 (ES-V) (1967) 2.

⁴¹ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

⁴² UN Charter [1945] Art 2 (4).

⁴³ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

In *Nicaragua v. USA*, the Court found that consent to Resolution s, such as the UN charter, which prohibits the use of territorial integrity or political independence of a state is regarded as an understanding of *opinio juris* with regards to the use of force, and should therefore be regarded as customary international law. Furthermore, establishing an understanding that though there are exceptions to the rule, importantly the right to individual or collective self-defence, parties to the conflict need to observe 'the criteria of the necessity and the proportionality of the measures taken in self-defence'.⁴³

Annex 1 to the ICJ opinion, notes:

'Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the Occupied Palestinian Territories. It asserts that humanitarian law is the protection granted in a conflict situation 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.'⁴⁴

The Court however recalled a previous judgment⁴⁵ in which it asserts the principle that the protection of the ICCPR does not cease in conflict situations.⁴⁶ The exception to this judgment is the rules of derogation as stipulated under Art 4 of the ICCPR.⁴⁷ The construction of the wall, the Court noted, establishes closed areas between the Green Line and the wall itself, creating enclaves imposing restrictions on the freedom of movement of Palestinians. The infringement of the freedom of movement enshrined within Art 12 of the ICCPR,⁴⁸ and Art 35 of the Fourth Geneva Convention, consequently highlight contravention by Israel of Art 23 of the Fourth Geneva Convention, relating to the access to healthcare.⁴⁹

Scobbie correctly notes the court's assertion that since Israel's justification for the wall is a security measure, the wall should be considered a temporary measure.⁵⁰ This would be due to the fact that the route of the wall trails through occupied territory. Part of the West Bank lies between the Green Line and the wall. The wall is therefore structured in such a way so as to include 80 per cent of Israeli settlements within occupied Palestine.⁵¹ This is in contravention of Art 49(6) of the Fourth Geneva

⁴⁴ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

⁴⁵ ICJ Reports 1996 (1) 240.

⁴⁶ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

⁴⁷ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 4.

⁴⁸ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 12.

⁴⁹ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Arts 23, 35.

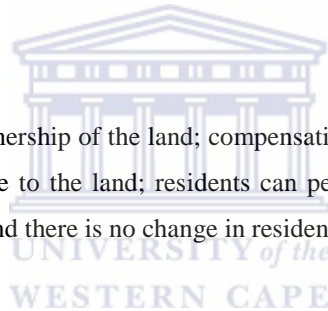
⁵⁰ Iain S 'Smoke, Mirrors and Killer Whales: the International Court's Opinion on the Israeli Barrier Wall' (2004) 5 *European Journal of International Law* 1113.

⁵¹ Referring to the demarcated line set forth in the 1949 armistice agreements between Israel and its respective neighbouring countries, the Green Line also outlines the territories captured by Israel in the Six Day War. (Refer to appendix 2)

Convention.⁵² The Court further asserts that since the threat originates within the territory and not from an outside source Israel does not have the justification to invoke the Resolutions in support of its claim to the right to self-defence.⁵³

Judge Buergenthal incorrectly asserts the admissibility of the use of Art 51 of the UN Charter by Israel.⁵⁴ The Green Line accepted as the dividing line by the Court between Israel and Palestine, renders Palestine an external territory to Israel. The ‘terrorist’ attacks, Buergenthal notes, stem from an external threat and not from an internal threat. These attacks, he asserts, should therefore provide Israel with the right to exercise its right to self-defence. Israel’s defence should however be consistent with the ‘legitimate exercise of the right’.⁵⁵ Judge Buergenthal continues by noting the court’s inability to address the argument of compensation with regards to damage to Palestinian property. Making reference to the Secretary-General’s assertion of Israel’s position with regards to destroyed property in the course of the construction of the wall, he states:

‘There is no change in ownership of the land; compensation is available for the use of land, crop yield or damage to the land; residents can petition the Supreme Court to halt or alter construction and there is no change in resident status.’⁵⁶



1.7 Methodology

Subsequent to establishing this framework, the sources used in the compilation of this mini-thesis, include: the Fourth Geneva Convention; the Rome Statute; the ICCPR; and the CAT. Other sources to be used include: journal article which focus on the origins of these instruments, as well as journal Art which focus on the use of IHL, inclusive of case law. Furthermore, this mini-thesis will make use of primary and secondary research materials in establishing the occurrence of IHL violations within the Occupied Palestinian Territories. This mini-thesis will therefore make use of qualitative research, with a special focus on secondary sources.

⁵² Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 49(6).

⁵³ *Iain S (2004) 1108-1113.*

⁵⁴ ICJ Buergenthal S, Declaration of Judge Buergenthal 243.

⁵⁵ ICJ Buergenthal S, Declaration of Judge Buergenthal 243.

⁵⁶ ICJ Buergenthal S, Declaration of Judge Buergenthal 244.

1.8 Chapter Outline

Chapter 2 provides a historic account of the conflict. Focussing on the various periods of annexation, it will highlight important events that led to the present day structure of the respective territories. In conclusion, Chapter 2 will aim to create a clear understanding of the various territorial divisions. In doing so this chapter includes an analysis of the UN Partition plan, the 1947-1949 War, and the 1967 War.

Chapter 3 addresses the duty of the UN in the protection of civilians caught within an international armed conflict. It seeks to articulate the duties of the UN specific to civilians residing within the *Green Line*. This curtails unwrapping UN Resolutions 181 (II) and 242, as well as the Oslo Accords. Chapter 3 concludes addressing the responsibility of the International Committee of the Red Cross (ICRC). Importantly, Chapter 3 addresses the ICRC's inaction in calling to the attention of the international community the ongoing IHL violations within the Occupied Palestinian Territories.

In Chapter 4 it is argued that Israel as an occupying state has not fulfilled its duty to protect the structures, as well as the quality of life of civilians residing within both Israeli and Palestinian territory. Subsequently, this chapter addresses the rights of the Palestinian citizens as *protected persons* residing within an occupied territory. In conclusion, Chapter 4 seeks to address the failure of the occupying power, as well as possible solutions to the conflict. These solutions include: approaching the UN Security Council, approaching the ICC, increased economic sanctions against Israel, increased pressure by Egypt, and finally, increased pressure by the USA.

Chapter 5 outlines the various IHL violations that have occurred within the Occupied Palestinian Territories. Focussing on only a selected few violations, Chapter 5 will argue that IHL has been completely disregarded, as well as the basic human rights enjoyed by all human beings. In doing so, this chapter discusses: illegal arrests, prolonged periods of detention, demolition of homes, restricted access to basic needs, and torture. Importantly, Chapter 5 discusses: the construction of the wall, Israel's justification for the construction of the wall, international response to the construction of the wall, as well as the subsequent consequences with regards to the quality of life of civilians as a result of barrier.

As the concluding chapter, Chapter 6 argues that IHL violations relative to the protection of civilian persons have occurred within the Occupied Palestinian Territories between the years 1992-2012. Furthermore, this Chapter argues that the UN and its respective organs, the ICRC, and the international community at large have not fulfilled their duty to protect the rights of the civilians caught within the international armed conflict between Israeli and Palestinian forces. Importantly, Chapter 6 provides recommendations that are aimed at alleviating the continued suffering of those residing within the Occupied Territories.

Chapter 2 will discuss the background of the conflict.



CHAPTER 2

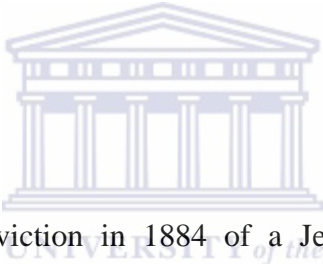
BACKGROUND TO THE CONFLICT

2.1 Introduction

A discussion of the Israeli/Palestinian conflict within any discipline could not be entered into without a clear understanding of the origin and subsequent stages through which the conflict has transformed. This Chapter therefore provides a historic account of the conflict. Focussing on the various periods of annexation, it will highlight important events that led to the present day structure of the respective territories. In conclusion, Chapter 2 will create a clear understanding of the various territorial divisions.

2.2 Background to the Conflict

2.2.1 The rise of Zionism



Following the wrongful conviction in 1884 of a Jewish military officer, Alfred Dreyfus, Jews across Europe became aware that anti-Semitism had worsened. The belief that Jews would be safe residing within a sovereign Jewish nation led to the Zionist movement promoting the return of Jews to their historic homeland. This movement was later led by Theodore Herzl.⁵⁷ At the first Zionist Congress in August 1897, Herzl was named the first President of the Congress. The aim of the Zionists was clearly stated in the 'Basle declaration': *'The aim of Zionism is to create for the Jewish people a home in Palestine secured by public law'*.⁵⁸

⁵⁷ Maymey B 'Zionism: A Critical Account 1897-1948. The Development of Israel and the Exodus of Palestine from A "New Historian" Perspective' (2010) 4 POLIS Journal 1-10.

⁵⁸ Dean L The Middle East and North Africa: 2004 (2004) 525.

2.2.2 The Partition of the Occupied Palestinian Territories

2.2.2.1 *The Balfour Declaration*

During the First World War, Great Britain promised the independence of the Arab regions. The Arabs residing within the Levantine provinces of the Ottoman Empire were promised independence if they were to initiate a revolt against the Ottomans.⁵⁹ This pledge was enclosed in a series of letters between Sir Henry McMahon, who was at the time the British High Commissioner to Cairo, and the Sharif of Makah, King Hussein Ibn Ali. The areas included within the discussions were Lebanon, Iraq, Jordan, much of present day Syria, and Israel/Palestine. At the time of the negotiations Palestine was approximately 92 per cent Palestinian Arab.⁶⁰

In secret agreements Great Britain and France elected to divide the Arab nations among themselves with the close of the war. Negotiated under the 'Syke-Picot Agreement' Britain obtained Transjordan, Northern Arabia, Gaza, and parts of Mesopotamia, whilst France was granted the Syrian and Lebanese coast, Mosul, Aleppo, Cilicia, and Damascus. Palestine was however defined as being internationally administered 'in consultation with Russia'. These negotiations did not however speak of the independence of the Arabs residing within these territories.⁶¹

A further promise made by Great Britain was respecting the territory of Palestine. In November 1917 the British Foreign Secretary, Lord Balfour, wrote a letter to Lord Rothschild, a well known Zionist figure in England. Commonly known as the Balfour Declaration, the letter stipulated that Britain was determined to establish a national home for Jewish people in the territory of Palestine. The Declaration made clear that: 'Nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.'⁶²

⁵⁹ Wilner R 'Nationalist Movements and the Middle East Peace Process: Exercises in Self Determination' (1995) 1 U.C. *Davis Journal of International Law and Policy* 308-317.

⁶⁰ Kedourie E In *The Anglo-Arab Labyrinth: The McMahon-Husayn Correspondence and its Interpretations* (2000) 140.

⁶¹ Kedourie E In *The Anglo-Arab Labyrinth: The McMahon-Husayn Correspondence and its Interpretations* (2000) 159-160.

⁶² Balfour AJ Balfour Declaration (1917).

Following the First World War, the League of Nations granted Great Britain and France mandates over the Arab lands. Great Britain was granted the mandate for Palestine, and attached to the mandate were the terms of the Balfour Declaration. Under the administration of the British, European Jewish immigration thrived. Consequently the Jewish population of the Palestinian territory noticeably altered from 8 per cent in 1917 to 31 per cent by 1946, thus leading to Arab unrest as European mandates increased the Zionist threat to Arab independence. The McMahon-Hussein negotiations, the Sykes-Picot Agreement, and the Balfour Declaration have each respectively contributed to the reshaping of Palestine and the Middle East.⁶³

By 1939 the threat of a second world war forced the British to initiate a partition plan of Palestine into Jewish and Arab states.⁶⁴ The British ended their commitments under the Balfour declaration in the same year with the release of a White Paper. This new undertaking of the British was in direct contradiction to the Balfour Declaration. The White Paper, in contrast, supported the establishment of a Palestinian state. This new position of Great Britain came at a period when Jews were under threat from Nazism and therefore desperate to immigrate to Palestine. The goal of establishing an independent Jewish state became an essential element of Jewish identity and religious motivation.⁶⁵

2.2.2.2 The UN Partition Plan

Being granted control of ‘the administration of the territory of Palestine’ under the League of Nations, Great Britain found itself unable to control the surge of violence, with the right to self-determination of the Palestinian people at the foreground of the conflict.⁶⁶ Despite Britain’s intention to develop a single state of Palestine, its policies committed toward a Jewish national home in Palestine and liberal Jewish immigration policies in the course of establishing the mandate increased civil unrest between Jews and Arabs. The eruption of conflict caused the British Peel Commission to

⁶³ Lynk M ‘From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949, by Victor Kattan’ (2010) 48 *Osgoode Hall Law Journal* 669-674.

⁶⁴ Lynk M ‘From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949, by Victor Kattan’ (2010) 48 *Osgoode Hall Law Journal* 670. .

⁶⁵ Wilner R ‘Nationalist Movements and the Middle East Peace Process: Exercises in Self Determination’ (1995) 1 U.C. *Davis Journal of International Law and Policy* 308-317.

⁶⁶ Maymey B ‘Zionism: A Critical Account 1897-1948. The Development of Israel and the Exodus of Palestine from A “New Historian” Perspective’ (2010) 4 *POLIS Journal* 11.

recommend the partition of Palestine into Jewish and Arab states, with the Arab state to be integrated into Transjordan.⁶⁷ This proposed plan aggravated both the Zionists, who felt that the area granted to them was too small, as well as the Arabs, who felt that the British did not have the right to divide their territory. The British eventually abandoned this suggestion, rather exchanging the goal to ‘the establishment within ten years of an independent Palestine state’.⁶⁸

It was only in 1947 that the British recommended the matter to the UN. The UN established a committee that was composed of delegates from 11 of its Member States. The committee was to evaluate the situation within the Palestinian territory in order to recommend a solution to the conflict. In August 1947 the committee recommended the partition of Palestine. This partition plan was to divide Palestine into three territories: a Jewish state; an Arab state; and the internationally administered area of Jerusalem.⁶⁹ The plan was to come into force with the evacuation of British armed forces from the territory by no later than 1 October 1948. A transition period was then established which would allow each state the opportunity to develop interim governmental institutions. This time period also allowed for the international recognition of each state, as well as the declared commitment to protect religious sites and minority rights.

Although Zionists officials accepted the plan, the Arabs rejected it, questioning the right of the UN to allocate the majority of their land to the Jews. In March 1947 the Zionists claimed less than 7 per cent of the land, and ownership of only 5.66 per cent, representing less than one-third of the territory’s population.⁷⁰ However, by a vote of 33 to 13, with ten abstentions, the UN authorized the plan on 29 November 1947. On 14 May 1948, the Zionist National Council established the state of Israel. The Zionist state now controlled the territory granted to it in the partition plan, as well as territory gained through the conflict from the Palestinians after independence. As a result of

⁶⁷ Maymev B ‘Zionism: A Critical Account 1897-1948. The Development of Israel and the Exodus of Palestine from A “New Historian” Perspective’ (2010) 4 POLIS Journal 11-13.

⁶⁸ Dajani OM ‘stalled Between Seasons: The International Legal Status of Palestine During the Interim Period’ (1997) 26 *Denver Journal of International Law and Policy* 27.

⁶⁹ Ball DJ ‘Toss the Travaux? Application of the Fourth Geneva Convention to the Middle East Conflict-A Modern (Re) Assessment’ (2004) 79 *New York University Law Review* 990-994.

⁷⁰ Ball DJ ‘Toss the Travaux? Application of the Fourth Geneva Convention to the Middle East Conflict-A Modern (Re) Assessment’ (2004) 79 *New York University Law Review* 993.

the conflict, in 1949, Israel had control of 80 per cent of Palestinian territory. After the conflict an estimated 500 000 to 800 000 Palestinians were left as refugees.⁷¹

2.2.2.3 The 1967 War

As a result of the occupation of Palestinian land by the state of Israel, the international community began to regard Palestine individually rather than communally, as the British mandate had envisioned. This was largely due to the invigorated sense of self-determination of the people of Palestine. As refugees the Palestinians were entitled to either repatriation or compensation.⁷²

The Suez Crisis agreement of 1956-1957 set the stage for the impending Arab onslaught against Israel. The agreement required Israel to withdraw from the Sinai. This provided Israel with protection against any attacks from the territory of Egypt, the use of the straits of Tiran, and a promised peace Treaty in due time. The agreement explicitly made reference to the right of Israel to use force in the event that Egypt should use force in closing the Straits of Tiran to Israeli shipping. As a public agreement between Egypt and Israel was not possible, the agreement was established privately. The terms of the agreement were only released as public statements.⁷³ When President Nasser of Egypt requested the withdrawal of United Nations personnel from the Sinai in 1967, Secretary-General U Thant complied without following the procedure set forth under his predecessor, Hammarskjöld.

President Nasser's expulsion of peacekeeping troops and subsequent deployment of troops to the Straits of Tiran resulted in the closure of the route from the Red Sea to the Israeli port of Eilat, making the Six Day War inevitable. The USA, a feeling that their its effort in attaining Israeli agreement to departing from the Sinai was considerable, did not favour the decision of President Nasser. The USA consequently prepared, together with Great Britain, The Netherlands, Australia, and Iran, to send a convoy of merchant ships escorted by an allied naval flotilla in an attempt to re-open

⁷¹ Ball DJ 'Toss the Travaux? Application of the Fourth Geneva Convention to the Middle East Conflict-A Modern (Re) Assessment' (2004) 79 *New York University Law Review* 990-994.

⁷² Dunstan S *The Six-Day War 1967: Jordan and Syria* (2013) 1-86.

⁷³ Rostow ER 'The perils of Positivism: A Response to Professor Quigley' (1992) 2 *Duke Journal of Comparative and International law* 228-230.

the Straits of Tiran.⁷⁴ Egypt and Jordan consequently formed a military pact, which was followed by a combined Arab call for the destruction of Israel.

On 5 June 1967, Egypt released attacks against Israel, later to be attacked by Syria along the mutual border. Jordan attacked Jewish Jerusalem and Tel-Aviv. Israel now found itself defending itself on all three fronts. Following the Six Day War, Israeli forces were deployed along the Suez Canal, the Jordan River and on the Golan Heights.⁷⁵

2.3. Synopsis of the Dividing lines Between Israeli and Palestinian Territory

2.3.1 The development of the West Bank

The West Bank is a relatively new name for the biblical names Judea and Samaria; the east bank of the Jordan river being the capital of Jordan, Amman, as well as the traditional area of the Hashemite Kingdom. "The West Bank " therefore became the title of the area under Jordanian rule that began in 1948. At the time of the conflict the West Bank, an area of approximately 6 000 square kilometers, was home to about 850 000 people. Afraid that they may be separated from their families on the east bank, many fled to the east bank, Kuwait and Saudi Arabia. With the end of the war, the Israeli government sought to establish a military government in the Occupied Territories. Since no training had been provided for this task, officers were forced to act according to their best judgment.⁷⁶

On 6 July 1967, a political advisor to the Samaria military command submitted a memorandum on the views of the population inhabiting the West Bank. He analyzed a possible solution that entailed the modification of a Palestinian state within the boundaries of the West Bank. His findings showed that the idea of a Palestinian state within the West Bank did not seem viable for the people. The two main reasons were

⁷⁴ Rostow ER 'The perils of Positivism: A Response to Professor Quigley' (1992) 2 *Duke Journal of Comparative and International law* 229.

⁷⁵ Rostow ER 'The perils of Positivism: A Response to Professor Quigley' (1992) 2 *Duke Journal of Comparative and International law* 229.

⁷⁶ Gazit S 'Early Attempts at Establishing West Bank Autonomy' (1980) 3 *Harvard Journal of Law and Public Policy* 129.

the lack of economic viability and the fact that the idea would not be accepted by any Arab state. The Palestinian population therefore rejected the memorandum.⁷⁷

Various negotiations relating to the autonomy of the West Bank took place. The notion of a self-administered West Bank appealed to the Israeli defence force, as they would be dismissed of their duties to oversee the local population, whilst also creating hope that a new Arab-Israeli relationship may be established extending beyond the borders of the Occupied Palestinian Territories. A political solution also prevented the annexation of the West Bank by Israel, as had been done with Jerusalem. This would allow for an independent Palestine state territory in the West Bank. For the Israelis the idea of a locally administered West Bank solution meant that a totally independent Palestine state on the West Bank could be prevented. Israeli politicians therefore envisioned an integrated West Bank economy with Israel. It was therefore commonly understood that an Israeli administered West Bank would only escalate the violence. By December 1967 Minister of defence, Moshe Dayan, withdrew most Israeli functionaries out of the West Bank territories.⁷⁸

2.3.2 The Development of the Gaza Strip

Gaza, a tiny strip of land on the Mediterranean, is approximately 360 square miles of land. The southern border of the area is Egypt, and along with the rest of the territory is surrounded by a 25-foot fence that separates Gaza from Israel.⁷⁹ With more than 9 000 people per square mile, the territory of Gaza currently has the highest population density in the world. The recommendation of a partition plan made by the Peel Commission, creating Arab and Jewish states cited Nablus, Ramallah, Jericho, Hebron, Gaza, and Beersheba as, namely Arab sub-districts. The partition plan created a map of interconnected Arab and Jewish territories. This sentiment is emphasized in a remark made by a member of the British House of Lords, relating to

⁷⁷ Gazit S 'Early Attempts at Establishing West Bank Autonomy' (1980) 3 *Harvard Journal of Law and Public Policy* 129.

⁷⁸ Gazit S 'Early Attempts at Establishing West Bank Autonomy' (1980) 3 *Harvard Journal of Law and Public Policy* 129.

⁷⁹ CIA World Fact Book 'Gaza Strip' (2004) np.

the new partition plan which he described as: 'Entwined in an inimical embrace like two fighting serpents.'⁸⁰

The partition plan of 1947 made provision for a Jewish territory within the eastern part of the Gaza sub-district.⁸¹ The first Arab-Israeli war in 1948 provided Israel with an opportunity to negotiate with Egypt in an attempt to withdraw Egyptian troops from the Gaza Strip. With the adoption of the Egyptian-Israeli Armistice Agreement the conflict came to a close. In terms of the agreement, Egypt retained control of the Gaza Strip. The control of the Gaza Strip by Egypt provided Palestinian Arabs with access to the sea and therefore became an important territory to gain.⁸²

In the Six Day War of 1967, Israel attempted by all means to frustrate the military campaign of the Egyptian forces. Strongly committed to its military campaign, Israel closed the Gaza Strip to Egyptian access. At the end of the conflict, Israeli forces found themselves in control of the Gaza Strip. The neglect of the Gaza Strip under Egyptian control left the area in economic and social turmoil. With the purpose of both improving the social and economic structure of the area, as well as promoting its own security interests, Israel began the development of settlements. One of the main architects of the proposal was the Israeli general, Ariel Sharon. These settlements therefore reflected the extension of Israel's future borders. The 1973 Yom Kippur War, in which Israel was attacked from the north and south by Egypt and Syria, respectively, increased Israeli security concerns. As a result, by 1977, roughly 17 Israeli settlements were established between Egypt and the Gaza Strip acting as a defence against Egyptian attacks.⁸³

The 1979 Camp David peace accords between Egypt and Israel stipulated the withdrawal of Israeli forces from the Sinai. This however led to an increase in the number of settlements constructed within the Gaza Strip. The various settlements that were increasingly under construction within the Gaza Strip led many critics to question the initial security concerns of Israel. Israeli Prime Minister Yitzhak Rabin in

⁸⁰ Tessler M A *History of the Israeli-Palestinian Conflict* (1994) 259.

⁸¹ Tessler M A *History of the Israeli-Palestinian Conflict* (1994) 259-256.

⁸² Tessler M A *History of the Israeli-Palestinian Conflict* (1994) 259-256.

⁸³ Caplen RA 'Rules of "Disengagement": Relating the Establishment of Palestinian Gaza to Israel's Right to Exercise Self-Defence as Interpreted by the International Court of Justice at the Hague' (2006) 18 *Florida Journal of International Law* 679.

1992 established a new Israel position that was intended to alter the government's settlement policy. This was emphasized in the Oslo Accords, as the talks considered the withdrawal of Israeli forces from the Gaza Strip.⁸⁴ The new stance of the Israeli government stemmed from the first two Intifadas or Palestinian resistance movements. Brought about through the continued construction, as well as the increased military presence, Palestinian Arabs began their revolt in 1987. The death of six Palestinians thought to have been a revenge attack for the death of two Israelis within the Gaza Strip paved the road for the first Intifada. The uprising proved to Israeli forces that the Gaza Strip could be indefinitely under Israeli rule. The first Intifada came to an end in 1993.⁸⁵

The second Intifada commenced in 2000. As the Israeli and Palestinian peace process regressed, and conflict on the ground increased. The number of suicide bombings against Israeli civilians escalated, and included an attack upon a religious service that resulted in the highest death toll of Israelis during the conflict.⁸⁶ Israel's response to the increased violence was the construction of a temporary solution in the form of a security structure separating the territories of Israel from both the Gaza Strip and the West Bank. In December 2003 Israeli Prime Minister, Ariel Sharon, declared Israel's physical withdrawal from the Gaza Strip.⁸⁷ The disengagement of Israel within the Gaza Strip witnessed the expulsion of approximately 9000 Israeli settlers. By 15 August 2005, with the exception of armed forces, no Israeli could enter the Gaza Strip.⁸⁸

Following tense negotiation in light of Israel's withdrawal from the West Bank, the new plan for Palestinian territory partitioning had taken place at the second round of the Oslo Peace Process. The new plan, known as the 'Swiss Cheese' map, reflected a geographically divided Palestinian community within the West Bank. The Oslo Peace Process, based on Security Council Resolutions 242 and 338 and its demand for Israel's withdrawal from the West Bank, divided the territory into three areas: A, B,

⁸⁴ Tessler M A *History of the Israeli-Palestinian Conflict* (1994) 529.

⁸⁵ Caplen RA 'Rules of "Disengagement": Relating the Establishment of Palestinian Gaza to Israel's Right to Exercise Self-Defence as Interpreted by the International Court of Justice at the Hague' (2006) 18 *Florida Journal of International Law* 679-671.

⁸⁶ Caplen RA 'Rules of "Disengagement": Relating the Establishment of Palestinian Gaza to Israel's Right to Exercise Self-Defence as Interpreted by the International Court of Justice at the Hague' (2006) 18 *Florida Journal of International Law* 679-684.

⁸⁷ Golan G *Israel and Palestine: Peace Plans and Proposals from Oslo to Disengagement* 119.

⁸⁸ Sommers M.A *Ehud Olmert: Prime Minister of Israel* (2008) 66.

and C. Area A, which housed the larger population, was only allocated 3 per cent of the territory, which came under full Palestinian control. Area B, an area that included more sparsely populated Palestinian communities, was granted 29 per cent of the territory and came under joint Palestinian and Israeli control. The rest of the West Bank, Area C, remained under Israeli control, and would be gradually transferred back to the Palestinian authorities.

2.3.3 The legal status of the Gaza Strip and the West Bank

The question relating to the status of the Gaza Strip as either part of sovereign Palestine or part of the Occupied Palestinian Territories has long been ignored by Israel. The official position of Israel is that the Gaza Strip belongs to neither of the categories. Israel's status of the Gaza Strip and the West Bank as 'disputed territories' rather than 'occupied' denies Palestinians the protection of the Fourth Geneva Convention. The denial of Palestinian sovereignty provides Israel with the right to ignore the rules that govern international relations between two sovereign states. Furthermore, Israel's unwillingness to sign the 1977 Additional Protocol to the Geneva Conventions defining military and civilian targets provides Israel with the claim that it is not bound by the said provisions.⁸⁹ In 1967, during the Six Day War, Israeli Defence forces (IDF) entered the Gaza Strip. Israeli forces established a military administration with the purpose of governing the territory. This system came to a close in 2005. Israel withdrew both its armed forces, as well as Israeli civilians residing within the area. Today the Gaza Strip is under the control of Hamas, an Islamic Resistance Movement.⁹⁰

The withdrawal of Israeli forces from the Gaza Strip, as had been noted within the Disengagement Plan, reflected the Israeli opinion that withdrawal meant the end to the claim that the Gaza Strip is occupied. This sentiment of the Israeli government suggested its unwillingness to respect its obligations as an occupying power towards the population within the occupied territory. The actions of the Israeli government and its forces, not having completely separated itself from the governance of the area, suggests otherwise. Israel, through its control of the Gaza Strip's air space, coastline,

⁸⁹ *White Paper on the legal issues implicated in the Most Recent Israeli Attacks on Gaza* (Published in NLG3 of 2008)

⁹⁰ Goff R 'The legality of Israel's Blockade of Gaza' (2011) 8 *Regent Journal of International Law* 83-85.

electricity, population registry, phone networks, and water sewage, and its continued control of most export crossings, suggests the hidden system with which Israel controls the territory of the Gaza Strip. Furthermore, included within the revised Disengagement Plan, is the secured right of Israel to use force in “self-defence” within the Gaza Strip.⁹¹

2.4 Conclusion

In consideration of the biblical and historical account of the events that are presently unfolding in the Occupied Palestinian Territories one is able to understand the complexity of the situation. Furthermore, the analysis of the 1967 borders provides a platform to adequately understand the implementation of IHL in a conflict that after complete study reveals itself as an international armed conflict.

Chapter 3 will discuss the duties of the United Nations and the International Committee of the Red Cross.



⁹¹ James C 'Mere Words: The 'Enemy Entity' Designation of the Gaza Strip' (2009) 32 *Hastings International and Comparative Law* 643-646.

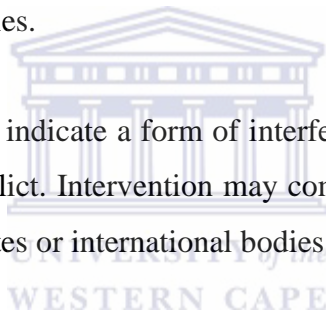
CHAPTER 3

THE DUTIES OF THE UNITED NATIONS AND THE INTERNATIONAL COMMITTEE OF THE RED CROSS

3.1 Introduction

This chapter will address the duty of the UN in the protection of civilians caught within an international armed conflict. It will seek to articulate the duties of the UN specific to civilians residing within the Green Line. Consequently, unwrapping UN Resolutions 181 (II) and 242, as well as the Oslo Accords, Chapter 3 will conclude by addressing the responsibility of the International Committee of the Red Cross (ICRC). Importantly, Chapter 3 will address the ICRC's inaction in bringing to the attention of the international community the ongoing IHL violations within the Occupied Palestinian Territories.

Intervention is a term used to indicate a form of interference in the internal affairs of another state or states in conflict. Intervention may come in the form of economic or political exertion made by states or international bodies external to the conflict.⁹²



3.2 What is the duty of the UN Relative to the protection of Civilians in an International Armed Conflict?

A highly sought after method of intervention is the call for discussion of intervention within the UN.⁹³ The right of intervention of the UN is however restricted under Art 2(7) of the Charter of the United Nations. Art 2(7) addresses the prohibition of the UN intervening in matters that 'are essentially within the jurisdiction of any state'.⁹⁴ States that are bound by the Charter would, however, in some sense have renounced their right to exclusive domestic jurisdiction. These states are therefore expected to abide by certain enforcement action in the event that world peace is threatened.⁹⁵

⁹² Glennon MJ 'The New Intervention' (1999) 78 *Foreign affairs* 2-7.

⁹³ Tannam E 'International Intervention in Ethnic Conflict: Competition Approaches' (2012) 11 *Ethnopolitics* 341-353.

⁹⁴ Charter of the United Nations (1945) Art 2(7).

⁹⁵ Glennon MJ 'The New Intervention' (1999) 78 *Foreign affairs* 2-7.

Drawing on the above description of Member States of the UN, it could be concluded that states that have not joined the membership of the UN would be exempt from any UN action. The laws of peremptory *jus cogens* norms would however remain in effect.⁹⁶ These laws in their prohibition of gross violations of human rights allow for intervention in any state (A member or non-member of the UN) if the rights enshrined within the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR) and the like are violated. An exemplary example is the intervention of the North Atlantic Treaty Organization (NATO) in Kosovo in light of various human rights abuses that had occurred.⁹⁷

An important aspect of intervention is the duality of its nature, taking both the form of cohesion and involvement in the domestic affairs of a state.⁹⁸ An all-important means by which war is prevented begins with condemnation by the international community and by declarations of the UN. The lack of condemnation was witnessed in 1980 with the invasion of Iran by Iraq. Both France and the United Kingdom remained silent as the conflict escalated. The reason for the silence was a direct result of the large-scale investments made by France and the United Kingdom in Iraq. The Security Council of the UN did not propose any considerable steps in ending the conflict.⁹⁹ Equally tragic is the conflict that plagued the population of East Timor for 25 years. The ultimate genocide of the people at the hands of Indonesia finally gained the attention of the international community in 1999.¹⁰⁰ These conflicts are indicative of the character of many other conflicts emphasizing the need for early stage condemnation in an attempt to prevent prolonged fighting.

In relation to the severity of conflict the need for negotiation at an international level should be emphasized. The UN being the forum through which negotiation takes place houses the means by which a settlement may be reached. The 'Hot Line'

⁹⁶ The laws of the peremptory *jus cogens* (translated as 'compelling law') refer to a principle of international law as a 'norm' from which no derogation may take place. These laws are generally inclusive of maritime piracy, genocide, slavery, torture, and wars of aggression. Unlike customary law, laws of the peremptory *jus cogens* may not be altered by states through international treaties or customary rules. The Vienna Convention on the Law of Treaties further emphasizes the scope of the peremptory norms of *jus cogens* by making void any Treaty that is conflict with its laws.

⁹⁷ Reisman MM 'Kosovo's Antinomies' (1999) 93 *American Journal of International Law* 960.

⁹⁸ Brzoska M 'Profiteering on the Iran-Iraq War' (1987) 43 *Bulletin of the Atomic Scientists* 42-45.

⁹⁹ Brzoska M 'Profiteering on the Iran-Iraq War' (1987) 43 *Bulletin of the Atomic Scientists* 42-45.

¹⁰⁰ Silove D 'Conflict in East Timor: Genocide or Expansionist Occupation?' (2000) 1 *Human Rights Review* 18-62.

Agreement¹⁰¹ may therefore eliminate an unplanned eruption of conflict. A specific body within the UN with the sole responsibility of mediating within a specific conflict situation may also reduce tension between the parties involved. Subsequently, the UN may make use of institutional mechanisms in order to eliminate the effects of armed conflict. This may be reached through ‘quiet diplomacy’, on the spot observation, and surveillance.¹⁰²

Furthermore, The failure of the international judicial system has in many cases prolonged the state of war. The United States in *Nicaragua v. United States of America* argued that the ICJ did not have jurisdiction over the matter, finding that the case fell within the scope of the Security Council.¹⁰³ The United States, however, changed its view in *United States v Iran* too. Within the proceedings of the Iranian hostage case the lack of acknowledgement of the international judicial system was emphasized when Iran neither presented itself before the court nor adhered to the interim order.¹⁰⁴ This was also witnessed in *Nicaragua v. United States of America* when the United States abandoned the proceedings halfway.¹⁰⁵ A forceful intervention in matters by the ICJ may therefore reinforce respect for the international judicial system, with no leeway for the undermining of international law.

3.2.1 The Role of Disarmament and Arms Trade

An important aspect that affects the stability of relations between nations is the role of disarmament. A distinction is generally made between arms control, arms limitation and disarmament. Arms control refers to restraint in the use, manufacturing, testing, or deploying of a specific type of weapon. Disarmament, however, refers to the reduction in or the complete disallowance of a type of weapon.¹⁰⁶ Arms limitation, along with its accompanying laws, entails the inevitable ‘reduction’ or ‘renunciation’ of certain kinds of weapons, or weapon usage. The rules related to both arms control and disarmament enshrined within various Conventions, such as the En-Mod convention, has however not been granted its due place within the law of war.¹⁰⁷

¹⁰¹ Detter I *The Law of War* 2 ed (2000) 109-112.

¹⁰² Detter I *The Law of War* 2 ed (2000) 109-112.

¹⁰³ *Nicaragua v. United States of America* (1986) ICJ 14.

¹⁰⁴ *United States v Iran* (1980) ICJ Rep 3.

¹⁰⁵ *Nicaragua v. United States of America* (1986) ICJ 14.

¹⁰⁶ Detter I *The Law of War* 2 ed (2000) 109-112.

¹⁰⁷ Detter I *The Law of War* 2 ed (2000) 109-112.

Early attempts at disarmament can be traced back to 1902 in the Treaty between Chile and Argentina. Both parties involved cancelled all orders for warships and were to notify each other in the event of any new construction. The contemporary scene of disarmament radically changed with the fall of communism as it reduced the notion of disarmament to a secondary issue in conflict.¹⁰⁸ This is evident in the proceedings of the Geneva disarmament conference. Previously housing special full-time ambassadors with substantial staff, the conference was reduced to States' Ambassadors to the UN acting as delegates to the conference. The absence of substantial analytical studies in recent years by the conference is a further indication of a lack of efficiency by the international community in addressing the fundamental issue of the use of weaponry within armed conflict.¹⁰⁹

Complementary to the issue of disarmament is the issue of arms trade. The restriction of arms trade has a direct effect on the number of parties that have conflict waging capabilities. This sentiment was dually noted by the US in 1939 with its condemnation of air raids on civilians.¹¹⁰ The sentiment held that the manufacturers and exporters of aeroplanes should not underestimate the effect of air raids on civilians when negotiating sales with nations who were synonymous with leading unprovoked bombings.¹¹¹

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3.3 Has the UN Fulfilled its obligations as enshrined within:

3.3.1 Resolution 181 (II)

Art 22 of the Covenant of the League of Nations States:

‘Certain communities formerly belonging to the Turkish empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.’¹¹²

¹⁰⁸ Detter I *The Law of War* 2 ed (2000) 109-112.

¹⁰⁹ Detter I *The Law of War* 2 ed (2000) 109-112.

¹¹⁰ Tanaka Y, Young MB *Bombing Civilians: A Twentieth Century History* (2009) np.

¹¹¹ Detter I *The Law of War* 2 ed (2000) 109-112.

¹¹² Covenant of the League of Nations, 1919, Art 22 (1919).

The League of Nations in its affirmation of the applicability of the right to self-determination to the people of Palestine established a temporary mandatory system in order to facilitate the independence of Palestine. This was reaffirmed by the UN in the adoption of General Assembly Resolution 181, the partition plan of Palestine. The implementation of the Resolution acts as recognition of the national heterogeneity of both the 'Arab' and 'Jewish' states.¹¹³

Resolution 181 (II) of 29 November 1947 outlines the renewed government of Palestine. It begins by emphasizing the requirement for the establishment of independent Arab and Jewish States. This is extended to the establishment of a Special International Regime for the City of Jerusalem. The boundaries of the territories (as described in part II of this plan) are to be modified in such a way that village areas are not separated by state boundaries, unless no other alternative exists. The Resolution extends the obligations of the two parties to the settlement of its duties in a manner that does not infringe on international peace and security. This therefore guarantees each citizen residing within both territories their equal civil, political, economic, and religious rights.¹¹⁴ Importantly, the Resolution emphasizes the freedoms of 'transit' and 'visit' for all residents and citizens of the other state in Palestine and the City of Jerusalem.¹¹⁵ Furthermore, it emphasizes that respect that is to be observed when engaging in areas that house religious structures. The Resolution also calls for the prohibition of discrimination on the grounds of 'race, religion, language, or sex', and extends this prohibition to discrimination, interference, or obstruction against 'charitable bodies'.¹¹⁶

Policies established by the State of Israel are, however, in contradiction to Resolution 181. Antonio Cassesse renders the right to self-determination as an anti-racist claim in his statement: 'Internal' self-determination amounts to the right of an ethnic, racial, or religious segment of the population in a sovereign country not to be oppressed by a

¹¹³ Resolution 181 on the Future Government of Palestine, 1947, General Assembly Resolution 181 (1947).

¹¹⁴ Resolution 181 on the Future Government of Palestine, 1947, General Assembly Resolution 181 (1947) Chapter 1-3.

¹¹⁵ Resolution 181 on the Future Government of Palestine, 1947, General Assembly Resolution 181 (1947) Chapter 4.

¹¹⁶ Resolution 181 on the Future Government of Palestine, 1947, General Assembly Resolution 181 (1947) Chapter 1.

discriminatory government.’¹¹⁷ This statement therefore addresses the lack of recognition of Palestinian citizens residing within the territory of Israel. This unpronounced second-class status granted to the Palestinian citizens therefore denies them access to the right of self-determination. This is emphasized by the inability of the UN to deter the transfer of populations in the establishment of settlements within the territory of Palestine. The UN in its admission of the state of Israel as a Member State on 11 May 1949 declared Israel a ‘peace-loving state that accepts the obligations contained in the Charter’. The UN made this declaration in light of both violations against Palestinian citizens, as well as Resolution 181 (1947).¹¹⁸

3.3.2 Resolution 242

In a second instance the UN has failed to safeguard the absolute rights defined by Resolution 242. Adopted on 22 November 1967 Resolution 242 endeavours to address the continued concern for the situation in Palestine following the Six Day War.¹¹⁹ In reference to Art VI of the UN Charter, the Resolution was one of five drafts under consideration. In consultation with the UN Special Representative, Egypt, Jordan, Israel, and Lebanon embarked on a peace settlement. Resolution 242 begins by stipulating the complete inadmissibility of the acquisition of territory through war, and therefore requires the withdrawal of armed forces from territories occupied during the Six Day War.¹²⁰ Art 2 of the UN Charter requires that members abstain from territorial acquisition and threatening the political independence of any state through the use of force.¹²¹ It is apparent that ‘no title by conquest’ may occur. It is therefore important to note the limits of warfare. A war originating within the confines of self-defence would, as the Israeli/Palestinian conflict has been defined, not legitimize the usurpation of territory.

Furthermore, the duty of the Israeli Government is extended to ending the state of ‘belligerency’ by the acknowledgement of the sovereignty and political independence

¹¹⁷ Cassese A’s Self-Determination of Peoples (1995) 101-133.

¹¹⁸ Badil Staff Setting the Legal Context: The Palestinian Right to Self-Determination’ Available at <http://www.badil.org/en/component/k2/item/1690-art2> (accessed 22 August 2013).

¹¹⁹ Resolution 242, 1967, General assembly Resolution 242 (1967).

¹²⁰ Resolution 242, 1967, General assembly Resolution 242 (1967) Part 1.

¹²¹ Charter of the United Nations, 1945, General Assembly Charter of the United Nations (1945) Chapter 2.

of states. The Resolution specifically makes mention of the ‘right to live in peace within secure boundaries free from threats or acts of force’.¹²² This therefore indicates that defined boundaries have been stipulated. Furthermore, the scope of the issue is extended to the refugee problem and it should acknowledge it as an undeniable problem resulting from the ongoing usurpation of land through conflict.¹²³ The Israeli Ambassador to the UN Security Council conveyed on 1 May 1968 the official position of Israel as the:

‘Acceptance of the Security Council Resolution for the promotion of agreement on the establishment of a just and lasting peace. I am also authorized to reaffirm that we are willing to seek agreement with each Arab State on all matters included in that Resolution’

After much debate, the Palestine Liberation Organization (PLO) in September 1993 signed the Declaration Principles, agreeing that Resolution 242 and Resolution 338 would be the foundation for negotiations with Israel.¹²⁴ The vague language used in reference to the withdrawal of troops from the territories by Israel, suggests that the concealed loophole benefits a lengthy withdrawal.¹²⁵ The UN through its revision of the document undertook to improve the standards by which to achieve a peace settlement. It is therefore unacceptable that the absence of certainty within the language be accepted by those involved.

3.3.3 The Oslo Accords

Known as the Declaration of Principles on the Interim Self-Government Arrangements, the negotiations were constructed in what became known as Oslo I, II and III. The framework of Oslo I, completed in 1993, was an attempt to establish a state of peace within Israel and the Occupied Palestinian Territories.¹²⁶ The discourse addressed major outstanding issues after an interim period during which the PLO would govern parts of the Occupied Palestinian Territories. The Declaration begins

¹²² Resolution 242, 1967, General assembly Resolution 242 (1967) Part 1(ii).

¹²³ Resolution 242, 1967, General assembly Resolution 242 (1967) Part 2(b).

¹²⁴ Jewish Virtual Library’s the meaning of Resolution 242 Available at http://www.jewishvirtuallibrary.org/jsourc/UN/meaning_of_242.html (accessed 11 February 2014).

¹²⁵ Resolution 242, 1967, General assembly Resolution 242 (1967) Part 1(i).

¹²⁶ Hallward M ‘Pursuing “Peace” in Israel/Palestine’ (2011) 28 *Journal of Third World Studies* 1 185.

with the recognition by both the state of Israel and the PLO of the mutual legitimacy and political rights of their respective citizens, promising a future free of threat to the dignity and security of its peoples as a result of the ongoing conflict. The parties both agree to the following principles as enshrined within the Oslo Accords.¹²⁷ Art 1 emphasizes the purposes of the negotiations as being in part to institute a Palestinian Interim Self-Government Authority. This Authority is to administer the territory of the Gaza Strip and the West Bank, for a period not exceeding five years,¹²⁸ thereafter leading to the implementation of Resolutions 242 and 338. Annex III to the Declaration establishes an all-important protocol which emphasizes the expected cooperation of the state of Israel, as well as the PLO in the development of water, electricity, energy, finance, transport, trade promotion, industrial development, and environmental and media programmes.¹²⁹ Annex IV provides for a protocol focussing on the regional and developmental programs, further ensuring that the program initiated for the Gaza Strip and the West Bank will include social rehabilitation, housing, and construction.¹³⁰

Oslo II outlines the conditions under which the PLO will conduct partial administration.¹³¹ Art XVI and VII of the Oslo II agreements discuss the terms under which administrative detainees and sentenced prisoners are to be released.¹³² This negotiation, in contrast to the Gaza-Jericho Agreement¹³³ that was signed a year

¹²⁷ Oslo I Accords 'Declaration of the Principles on the Interim Self-Government Arrangements' (1993).

¹²⁸ Oslo I Accords 'Declaration of the Principles on the Interim Self-Government Arrangements' (1993) Art 1.

¹²⁹ Oslo I Accords 'Declaration of the Principles on the Interim Self-Government Arrangements' (1993) Annex III.

¹³⁰ Oslo I Accords 'Declaration of the Principles on the Interim Self-Government Arrangements' (1993) Annex IV.

¹³¹ Oslo II Accords 'Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip' (1995)

¹³² Oslo II Accords 'Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip' (1995) Annex XVI and VII.

¹³³ The PLO and the state of Israel signed the Gaza-Jericho Agreement on 4 May 1994 in Cairo, Egypt. The terms of the Agreement stipulated that Israel withdraw from the Gaza Strip and the area of Jericho. The agreement provides further provisions relating to the maintenance of the safe passage of citizens between: the Gaza Strip and Jericho, the Gaza Strip and Egypt, as well as agreed upon international crossings. Art XIV of the Agreement encourages respect for international Human Rights Standards, as well as international law. The Agreement made further stipulations calling for the release of 5000 Palestinian prisoners by the state of Israel within five weeks of the signing of the Agreement. Israel however, made the releases conditional by instituting an individual declaration that encouraged the peace process. Since these negotiations were not agreed upon in Cairo, the Agreement was met with considerable unrest. This resulted in the refusal by Palestinian political parties to allow their imprisoned members to sign the declaration. On 6 June 1994, a number of Hamas prisoners signed the declaration as a show of support for the terms therein, they were however not released but transferred to a different prison. July of 1994 witnessed the release of

before the Oslo II negotiations, called for the release of prisoners based on criteria rather than quantity. Furthermore, Oslo II asserted respect for the rights of released prisoners to return to their homes in the Gaza Strip and The West Bank, rather than have the prisoners remain within Jericho as stipulated by the Gaza-Jericho Agreement. Art XIX of Oslo II stipulates that Israel and the PLO act with due respect for the principles of human rights and the rule of law.¹³⁴ Oslo III, addresses the terms under which Israel's partial withdrawal from Hebron will take place. Oslo III further demarcates areas of withdrawal described under Oslo II.¹³⁵ With the establishment of the Madrid-Oslo Accords the assumption was made that the Palestinian citizens would be granted the freedom to access their rights by means of statehood within Occupied Palestinian Territories.¹³⁶

Despite the agreed upon terms, continued construction of settlements within the Occupied Palestinian Territories has taken place. With the curtain drawn on the accords, Israeli settlements grew by 3 850 units between 1994-1995 and 3 570 units in 1996-1997,¹³⁷ whilst Palestinians built throughout area C of the West Bank that today are known as Palestinian outposts/settlements within Israel. The situation following the signing of the Accords intensified with continued attacks on both sides. The fighting by Palestinians erupted as a result of mistrust of Israel's intention to evacuate the said area,¹³⁸ whilst Israelis feared that the process may result in the loss of their homes. Furthermore, an important aspect relating to the interpretation of the document was neglected. In a video recorded in 2001, Israeli Prime Minister, Benjamin Netanyahu, unaware that he was being recorded, stated the following:

4,450 prisoners. Unrest however continued to surge as the remaining 550 prisoners were placed in the custody of the Palestinian Authority and remained confined to the city of Jericho. (Addameer 'Reaching the 'No-Peace' Agreement: The Role of Palestinian Prisoner Releases in the Permanent status Negotiations' (2009) Addameer Prisoner Support and Human Rights Association.)

¹³⁴ Addameer 'Reaching the 'No-Peace' Agreement: The Role of Palestinian Prisoner Releases in the Permanent status Negotiations' (2009) Addameer Prisoner Support and Human Rights Association.

¹³⁵ Oslo II Accords 'Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip' (1997).

¹³⁶ Oslo II Accords 'Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip' (1997).

¹³⁷ Badil Staff Setting the Legal Context: The Palestinian Right to Self-Determination (2010) Available at <http://www.badil.org/en/component/k2/item/1690-art2> (accessed 22 August 2013).

¹³⁸ Quraishy S 'Reviewing the Middle East Peace Process: Two Decades of Empty Negotiations [1992-2012]' (2012) Middle East Monitor.

‘They asked me before the election if I’d honour [the Oslo Accords]... I said I would, but [that] I’m going to interpret the Accords in such a way that would allow me to put an end to this galloping forward to the ‘67 borders. How did we do it? Nobody said what defined military zones were. Defined military zones are security zones; as far as I’m concerned, the entire Jordan Valley is a defined military zone.’¹³⁹

This statement is an indication of the important nature of the terminology used, as well as the lack of an official interpretation of the Accords. The PLO in accepting a territorial compromise in the interests of national independence and sovereignty had made the assumption that the UN would assist in assuring the freedom of access to rights by the Palestinian citizens and refugees.¹⁴⁰ This has however not materialized in the self-determination of Palestinians both within the Occupied Palestinian Territories as well as within Israel.

3.4 What is the duty of the ICRC relative to the Protection of Civilian Persons caught within an International Armed Conflict?

The mission of the ICRC is of a purely humanitarian nature. Considering itself as being ‘impartial, neutral, and independent’ the organization endeavours to protect the lives of victims caught within an armed conflict situation. Furthermore, the scope of the ICRC duties is extended to the prevention and alleviation of the effect of warfare on the quality of life of victims by improving the standards of humanitarian law. After writing on his experience in the conflict in his book, ‘A Memory of Solferino’, Dunant subsequently provided two proposals that gained considerable attention.¹⁴¹

The first proposal called for the neutrality of army medical vehicles in order that they may be able to function on the battlefield. Furthermore, that the army medical services be provided with a distinctive emblem. The second proposal called for the formation, in peacetime, of ‘voluntary relief societies’ that could act as support in wartime in assisting the army medical services. As a result of the proposal made by

¹³⁹ Quraishy S ‘Reviewing the Middle East Peace Process: Two Decades of Empty Negotiations [1992-2012]’ (2012) Middle East Monitor.

¹⁴⁰ Badil Staff Setting the Legal Context: The Palestinian Right to Self-Determination (2010) Available at <http://www.badil.org/en/component/k2/item/1690-art2> accessed 22 August 2013.

¹⁴¹ Bernard V (ed-in-chief) *International Review of the Red Cross. Humanitarian Debate: Law, Policy, Action* 94(885) (2012) 50-53.

Dunant, the ICRC was established in 1963. Subsequently on 22 August of the following year the Convention for the Amelioration of the Wounded in Armies was adopted, acting as the source of IHL. With its constant reporting on armed conflict situations the ICRC has made useful proposals for the improvement of IHL. This has resulted in the revision and extension of the discipline, notably in 1901, 1929, 1949, and 1977.¹⁴²

As the ‘guardian’ of IHL, the ICRC’s role provides the organization with numerous functions within armed conflict situations. The first function to be discussed is the ‘monitoring function’, described as being the ‘constant reappraisal of humanitarian rules’ in order to understand the means available for the enforcement of the law within armed conflict situations. This will consequently lead to the understanding of the sociological aspect of conflict, providing possible preventative measures. It is therefore apparent that even though much has been done to improve the discipline there is a continued need to improve and understand IHL. The second function, the ‘catalyst function’, encourages discussions within governmental groups and experts regarding the problems encountered during warfare in an attempt to attain possible solutions. The third function is the ‘promotion function’. This allows the ICRC to advocate in favour of the law by propagating its teachings in order to encourage the adoption of the laws by states on a national level.¹⁴³

States would therefore be encouraged to agree to the ratification of instruments at diplomatic conferences, implement IHL at a national level by means of legislations, and apply IHL to all. The ‘guardian angel’ function encourages the defence of IHL in light of those who disregard the law, or in instances in which the law is weakened by the exclusion of important issues in ratified documents. The ‘direct action’ function encourages the direct contribution of the ICRC in the application of the law. This can be done through direct communication with parties to the conflict, and assistance to victims. The final function is the ‘watchdog’ function that promotes the dissemination

¹⁴² Bernard V (ed-in-chief) *International Review of the Red Cross. Humanitarian Debate: Law, Policy, Action* 94(885) (2012) 50-58.

¹⁴³ Bernard V (ed-in-chief) *International Review of the Red Cross. Humanitarian Debate: Law, Policy, Action* 94(885) (2012) 53-58.

of awareness of violations amongst states, the parties to the conflict, and finally the international community.¹⁴⁴

The ICRC, following its initiative to adopt the original Geneva Convention of 1864, encouraged governments to adapt to the changing nature of warfare. With close consideration of the means and methods of warfare that have increased the death toll, as well as the level of destruction to territories exposed to conflict, the Geneva Convention of 1949 is today ratified by all states.

3.4.1 The legal Basis for ICRC Intervention

The four Geneva Conventions and Additional Protocol I provide the ICRC with a specific mandate under which it is to act in the event of an international armed conflict. The ICRC is therefore mandated to visit prisoners of war and civilian detainees, taking the initiative in the maintenance of IHL. The ICRC shares in the right to humanitarian intervention in non-international armed conflicts. This has been stipulated within Common Art 3 to the Geneva Conventions.¹⁴⁵ The ICRC may also provide humanitarian services in areas in which IHL does not apply without their assistance being constituted as interference in the internal affairs of the state concerned.¹⁴⁶

3.4.2 Has the ICRC upheld its duties in the protection of civilians in the Israeli/Palestinian conflict?

The 2007 International Conference requested that all concerned parties support the implementation of the Memorandum of Understanding (MoU). In conjunction with the Council of Delegates Resolution of 2009 that ‘requests National Societies to favourably respond to any request for Help and support that the Monitor may ask of them in the fulfilment of his task up to the next Council of Delegates’, the MoU is required to inform national societies and the governments concerned about the

¹⁴⁴ Bernard V (ed-in-chief) *International Review of the Red Cross. Humanitarian Debate: Law, Policy, Action* 94(885) (2012) 50-58.

¹⁴⁵ Geneva Convention, 1949 Additional Protocol 1 (1949).

¹⁴⁶ Matthias S ‘Reflections on the ICRC’s Present and Future Role in Addressing Humanitarian Crises’ (2012) 94 *International Review of the Review Cross* 888.

outcome of the implementation and monitoring process.¹⁴⁷ With respect to the Israeli/Palestinian conflict decision made in 2007, and again at the international conference in 2009 at the Council of Delegates (CoD), Minister (Hon) Par Stenback has continued to function as the Independent Monitor for the implementation of the (MoU). Minister Stenback also functions as the Independent Monitor for the Agreement on the Operational Arrangements (AOA) between the Palestinian Red Crescent Society (PRCS) and Magen David Adom in Israel (MDA).¹⁴⁸

The CoD in 2009 in reference to the MoU stated that admirable results had been achieved between the PRCS and MDA, The only setback was the presence of MDA marked ambulances in the Occupied Palestinian Territories as has been required by the MoU. The 2009 CoD, which took place in Nairobi, noted that five PRCS ambulances were operational by June 2009. This process is confirmed with the MDA's installation of GPS systems in the ambulances, granting them access to hospitals in West Jerusalem. The report also notes that the same five ambulances continue to attend to the needs of the residents of East Jerusalem and also respond to the residents who reside on the opposite end of the West Bank. They therefore have access to all hospitals within the area. The operation of the five ambulances requires the service of both West Bank and East Jerusalem staff. The West Bank staff requires permits to enter East Jerusalem. These permits are granted by the Israeli government authorities, and have a three-month validated period. However, between October and September of 2010 the organization was unable to acquire permit renewals for 32 of its West Bank employees. As a result the service remained defective for 19 days. The process was however accelerated with the intervention of the MDA at the request of the ICRC. The consequences of the necessity for the renewal of permits for the service delivery of the PRCS emphasizes the need for the improvement of the system. This had subsequently highlighted the inconsistent nature of administrative bureaucracy. The intervention of the MDA however showcased the willingness of the two societies to work together. As a result of the interruption of the PRCS's service to

¹⁴⁷ Minister (Hon.) Par Stenback 'Interim Report on the Implementation of the Memorandum of the Understanding and the Agreement on the Operational Arrangements dated 28 November 2005 Between Magen David Adom in Israel and the Palestinian Red Crescent Society' (2011) *The International Committee of the Red Cross* 1.

¹⁴⁸ Minister (Hon.) Par Stenback 'Interim Report on the Implementation of the Memorandum of the Understanding and the Agreement on the Operational Arrangements dated 28 November 2005 Between Magen David Adom in Israel and the Palestinian Red Crescent Society' (2011) *The International Committee of the Red Cross* 1.

East Jerusalem both the MDA and PRCS have agreed that permits with an access period of six months would be requested.¹⁴⁹

The 2009 report of the Ministry of Defence (MoD) also describes the access of the PRCS through checkpoints. The main area noted as being problematic to enter is Nablus. Other areas include Ramallah, as the PRSC experiences difficulties in accessing the area through the Beit El checkpoint. Accessing the enclave of Barta'aresh Shamiya in the northwestern area of the West Bank also remains problematic. The enclave is home to a village of 5 000, with a neighbouring population of 15 000.¹⁵⁰ The PRSC not being able to access the area via the Reikhan Barta checkpoint creates a situation in which community members requiring medical care rely on private transport to the checkpoint. Once at the checkpoint they may then be collected on the other side of the checkpoint by the PRSC's emergency medical services (EMS) from Jenin. A third area that is problematic to enter is the old city of the H2¹⁵¹ area of the southern West Bank city of Hebron. This restriction is extended to both the EMS of the PRSC, as well as to vehicles of Palestinian registration. Despite the entry of ambulances into the H2 areas without requiring Israeli authority, extensive detours need to be travelled from H1 to parts of H2, as well as within the area of H2. This is due to the restriction in certain areas that hinder the movement of certain vehicles and of the population. The PRCS in response to these restrictions is attempting to station a temporary ambulance within the area of H2.¹⁵²

The MoD further acknowledges the difficulties faced by EMS vehicles carrying patients holding West Bank IDs into the area of East Jerusalem. This issue is a result of complex and time-consuming protocols made by the Israeli Government for the transfer of trauma patients. The situation has improved with the transfer of patients being made the responsibility of Jerusalem registered ambulances. The MDA and

¹⁴⁹ Bernard V (ed-in-chief) *International Review of the Red Cross. Humanitarian Debate: Law, Policy, Action* 94(885) (2012) 50-58.

¹⁵⁰ Minister (Hon.) Par Stenback 'Interim Report on the Implementation of the Memorandum of the Understanding and the Agreement on the Operational Arrangements dated 28 November 2005 Between Magen David Adom in Israel and the Palestinian Red Crescent Society' (2011) *The International Committee of the Red Cross* 5.

¹⁵¹ The city of Hebron is divided into H1 and H2.

¹⁵² Minister (Hon.) Par Stenback 'Interim Report on the Implementation of the Memorandum of the Understanding and the Agreement on the Operational Arrangements dated 28 November 2005 Between Magen David Adom in Israel and the Palestinian Red Crescent Society' (2011) *The International Committee of the Red Cross* 6-8.

PRSC have in 2010 agreed upon the definition of emergency cases, as well as the manner in which emergency cases will be treated. The MDA with the support of the MoD has in reaction to the difficulties encountered by the PRSC appealed to the Israeli authorities to promote respect for the protocol concerning the treatment of emergency cases agreed upon with the PRCS. This plea has however not been granted the required attention. The Israeli Government has continued to insist on the strict control of all patients not holding Jerusalem IDs whilst granting no special status on the basis of the severity of the situation.¹⁵³

With regards to the transportation of patients from the Gaza Strip to east Jerusalem the PRSC has not had an active role outside the realm of using their five ambulances for the transportation of patients. The MDA has therefore called for the increased role of the PRSC's EMS staff when transporting patients.¹⁵⁴ The Monitor in numerous reports notably commends the co-operation between the two societies. The nature of the relations is however not without fault, and much is needed to be done in the full implementation of the MoU. An important cause of the problematic implementation of the MoU is the lack of influence of the MDA in the improvement of the working conditions of the PRCS. Secondly, the effect of the restrictions enforced by the Israeli government on the PRCS's ability to perform its duties hinders the process. This problem is further exacerbated by the misuse of the emblems. This problem finds its roots in both the Israeli administration, as well as Palestinian legislation. Since the Israeli Government has not amended the MDA law, the revisions of 2006 of the statute that allows for improved protection of the emblem have not been instituted. The Palestinian Legislative Council has not sat since 2007 and this has resulted in the 'law' (decree) being left unsigned. The protection of the emblem has therefore no legal basis. The responsibility to propagate the doctrine of protection of the emblems has therefore fallen on the MDA and PRCS.¹⁵⁵

¹⁵³ Minister (Hon.) Par Stenback 'Interim Report on the Implementation of the Memorandum of the Understanding and the Agreement on the Operational Arrangements dated 28 November 2005 Between Magen David Adom in Israel and the Palestinian Red Crescent Society' (2011) *The International Committee of the Red Cross* 3.

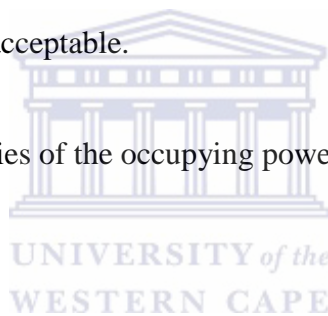
¹⁵⁴ Minister (Hon.) Par Stenback 'Interim Report on the Implementation of the Memorandum of the Understanding and the Agreement on the Operational Arrangements dated 28 November 2005 Between Magen David Adom in Israel and the Palestinian Red Crescent Society' (2011) *The International Committee of the Red Cross* 8.

¹⁵⁵ Minister (Hon.) Par Stenback 'Interim Report on the Implementation of the Memorandum of the Understanding and the Agreement on the Operational Arrangements dated 28 November 2005

3.5 Conclusion

The analysis of the duties of the UN and the ICRC provides a compelling indication that more needs to be done in order to establish respect for IHL within the Occupied Palestinian Territories. The various methods of intervention mentioned have not been sufficiently implemented as a means of deterrence. Furthermore, obligations set forth within Resolution 181 (II), Resolution 242, and the Oslo Accords have not materialized. Importantly, no real engagement on the lack of implementation of the various peace agreements has taken place. This lack of repercussion emphasizes the UN's lack of control and ability to implement agreements. The insufficient availability of medical supplies, vehicles, and personal within the Occupied Palestine Territories establishes a need for improved healthcare structures. With the increase in casualties, injuries, and illnesses within an existing crippled healthcare system the failure on the part of the ICRC and the lack of communication by the Israeli and Palestinian authorities are unacceptable.

Chapter 4 will discuss the duties of the occupying power.



Between Magen David Adom in Israel and the Palestinian Red Crescent Society' (2011) *The International Committee of the Red Cross* 8.

CHAPTER 4

THE DUTIES OF THE OCCUPYING POWER

4.1 Introduction

The Enlightenment period witnessed the engagement of numerous scholars with understanding the laws of war.¹⁵⁶ Jean-Jacques Rousseau's argument encouraged the notion that warfare existed between states. This idea excluded the 'private' person as having to be subjected to the onslaught of warfare.¹⁵⁷ George F. Von Martens advocated for the protection of women, children, and the aged, against the atrocities that are caused by warfare.¹⁵⁸ An important aspect of the views of these scholars is, therefore, the distinction between combatants and non-combatants, with the aspiration of providing a means by which the property and person of non-combatants are to be protected. The discourse of laws of war, therefore, shifted the narrative from a state-centric one to a discourse that promoted the rights of the individual.

Laws pertaining to occupation were established as an extension of the law of war. The Lieber Code, often regarded as the genesis of the laws of belligerent occupation, prioritized military considerations over humanitarian interests.¹⁵⁹ The first codification of the laws of belligerent occupation occurred in Brussels in 1874 with the drafting of comprehensive regulations on war.¹⁶⁰ The more powerful nations perceived the draft as humanitarian in nature, whilst less powerful nations considered the regulations to leave them militarily vulnerable. The nations that participated agreed on the definition of occupation; a territory placed under the occupation of a hostile army bounded by the territories around which it could establish and exercise authority. The Brussels Declaration did, however, assert that occupation is of a temporary nature, and that the laws of the occupied population are not terminated. The Declaration, furthermore, established that the laws of occupation confers upon

¹⁵⁶ These scholars include: Jean- Jacques Rousseau, Jean Etienne-Marie Portalis, George F. Von Martens.

¹⁵⁷ Rousseau JJ, Coleman P *Discourse of the Origin of Inequality* (1994).

¹⁵⁸ Fleck Dieter 'Friedrick von Martens: A Great International Lawyer from Parnu' (2003) 2 *Baltic Defence Review* 19-26.

¹⁵⁹ Graber DA *The Development Of The Law Of Belligerent Occupation 1863-1914-A Historical Survey* (1949) 15.

¹⁶⁰ Ben-Naftali O, Gross AM, Michaeli K 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkley Journal of International Law* 561.

the occupying power the duty to manage the occupied territory for the duration of occupation, but does not grant the occupier sovereignty. Laws of belligerent occupation, therefore, codify the interest of the state, and are often asserted at the expense of the individual.¹⁶¹

In this chapter it will be argued that Israel as an occupying state has not fulfilled its duty to protect the structures, as well as the quality of life of civilians residing within both Israeli and Palestinian territory. Subsequently, this chapter will address the rights of the Palestinian citizens as *protected persons* residing within an occupied territory. In conclusion, Chapter 4 will address the failure of the occupying power, as well as possible solutions to the conflict.

4.2 What is the duty of the occupying power as stated in the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War?

Relative to Art 43 of The Hague Regulations, Art 64 of the Fourth Geneva Convention law states:

‘The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute threat to its security or an obstacle to the application of the present convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said law. The occupying power may, however, subject the population of the occupying territory to the provisions which are essential to enable the occupying power to fulfil its obligations under the present convention, to maintain the orderly government of the territory, and to ensure the security of the occupying power, of the members and the property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.’¹⁶²

Though restricting the full capacity of the right to administer a territory, Art 64 makes provision for full administration by the occupying power under special circumstances. Art

¹⁶¹ Ben-Naftali O, Gross AM, Michaeli K ‘Illegal Occupation: Framing the Occupied Palestinian Territory’ (2005) 23 *Berkley Journal of International Law* 562.

¹⁶² Geneva Convention, 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) Art 64.

64 is applied if the occupying power fulfils its positive duties relative to the protection of the occupied population. It is complemented by the provisions that give primacy to the rights of the population under occupation by the Fourth Geneva Convention.¹⁶³ It is therefore imperative that the occupying power acknowledges the sovereign rights of the occupied population set out in the Fourth Geneva Convention.

Section III of the Fourth Geneva Convention establishes the laws by which the occupying power is to abide. The foremost law established under Art 47 speaks to the rights of the ‘protected persons’ who find themselves in the Occupied Territories. These persons are to enjoy their rights set out in the Fourth Geneva Convention irrespective of changes introduced by the existence of an occupation.¹⁶⁴ Protected persons who are not nationals of the territory occupied may reserve the right to leave the territory as prescribed in Art 48¹⁶⁵ in respect to the provisions under Art 35.¹⁶⁶ Mass deportations of protected persons are prohibited unless the security of the territory is challenged requiring the total or partial evacuation of the occupied territory. The standard of the housing of the protected persons is to consider hygiene, safety, health and nutrition.¹⁶⁷ Furthermore, family members may not be separated.¹⁶⁸

Art 49 extends the duty of the occupying power to the protection of the territory occupied against the deportation or transfer of the population of the occupying power into the occupied lands.¹⁶⁹ Furthermore, Art 50 makes provision that the occupying powers aid the national and local administrations of the territory in improving the education and medical systems, taking into account the state of hygiene and public health within the Occupied Territories. With the exemption of exceptional cases of military necessity, the destruction of ‘real or personal’ property belonging to the occupied population (individual or group) or state, is prohibited. The occupying power also has the duty of ‘ensuring the food and

¹⁶³ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 64.

¹⁶⁴ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 47.

¹⁶⁵ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 48.

¹⁶⁶ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 35.

¹⁶⁷ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 36.

¹⁶⁸ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 36.

¹⁶⁹ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 49.

medical supplies of the population' are provided.¹⁷⁰

Art 55 makes further provision detailing the right to medical and food supplies of both the occupation forces and the administration personal, with due payment. This is only to be provided with the certainty that the occupied population has been granted adequate supplies.¹⁷¹ The occupying power may make use of the hospitals of the Occupied Territories in order to facilitate the care of wounded or sick military personal. The temporary appropriation of the hospitals can only take place once due consideration has been given to the patients of the occupied population.¹⁷² Art 59 obliges the occupying power to allow aid to the occupied population from relief schemes, and furthermore emphasizes the duty of the occupying power to assist in the distribution of the goods to the population within the occupied territory. These goods may consist, in part, of clothing, medical supplies, and food supplies.

The use of the phrase 'all contracting parties... shall guarantee their protection' asserts the right of the occupied population to their human rights in accessing their basic needs. 'A power granting free passage' of the goods does however retain the right to search the supplies whilst also monitoring their passage into the territory.¹⁷³ Any diversion of the supplies from the occupied territory, including cases of necessity, requires the consent of the protecting power.¹⁷⁴ The distribution of the supplies is therefore to be done under the supervision of the protecting power, and may with due consent by both the occupying power and the protecting power be delegated to a neutral power.¹⁷⁵

Art 63 emphasizes the duty of the occupying power to safeguard the work of the ICRC, as well as other relief agencies working to improve the humanitarian standards within the occupied territory. Except when deemed necessary, the occupying power may not request a change of personnel or in the structure of the society that may affect the activities of the

¹⁷⁰ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 50.

¹⁷¹ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 55.

¹⁷² Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 57.

¹⁷³ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 59.

¹⁷⁴ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 60.

¹⁷⁵ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 61.

society.¹⁷⁶ With regard to the penal laws of the occupied territory, the occupying power may not make alterations except in cases in which the security of the occupied territory is placed at risk or if the laws are ‘contradictory’ to the four Geneva Conventions creating difficulty in the enforcement of the standards of IHL. The courts of the Occupied Territories may therefore be deemed functional. Penal provisions made by the occupied power may not come into force without the knowledge of the occupied population of the law to be disseminated to them in their own language. These laws are not be retroactive.¹⁷⁷ For any breach of the law as stipulated by Art 64 of the Convention provides that the occupying power may hand over the accused to its ‘properly constituted, non-military courts’ in the occupied territory.¹⁷⁸ Furthermore, the Fourth Geneva Convention extends the duty of the courts to look to the fact that the accused is not a national of the occupying power. The penalty imposed is to be proportionate to the crime.¹⁷⁹ Art 71 asserts the duty of the occupying power to establish regular trials before the sentencing of an accused. The accused is to be notified in writing, in a language that they understand, of the charge against them.¹⁸⁰ This provision under Art 71 draws attention to Art 9 and Art 14 of the ICCPR¹⁸¹ and Art 9 and Art 10 of the UDHR.¹⁸²

4.2.1 Israel’s position with regards to its duty as occupying power

With the acquisition of the West Bank and the Gaza Strip in 1967 by Israel, the status of the territories came into question. Acting as the High Court of Justice (HCJ) reviewing the administrative action of the military within the two territories, the Supreme Court of Israel was petitioned by Palestinian citizens to review incidents involving the actions of the military against them. Meir Shamgar, in 1967 the Advocate General of the IDF, accepted the petition on the basis of agreement by the Government of Israel. However with the increase of cases brought before the Court, the HCJ’s legal power to issue orders against ‘all bodies that perform public functions under law’ became the basis of jurisdiction. With

¹⁷⁶ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 63.

¹⁷⁷ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 67.

¹⁷⁸ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Arts 64, 65.

¹⁷⁹ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 67.

¹⁸⁰ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 71.

¹⁸¹ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 14.

¹⁸² Universal Declaration of Human Rights (1948) Art 9, 10.

courts handing down judgments in hundreds of cases following the Six Day War a large body of law relating to the Occupied Territories has been established.¹⁸³

With the entry of the military into the Occupied Territories in the Six Day War numerous military tribunals were established with the objective of trying local residents who were accused of security offences. The military order indicated that the provisions of the Fourth Geneva Convention should be applied. The inclusion of these provisions thus created an understanding that the territories of the West Bank and the Gaza Strip were to be treated as being under 'belligerent occupation'. However, with the end of the Six Day War, the status of the territories came under scrutiny. Under the influence of both political and legal factions the provisions of the Fourth Geneva Convention were deleted from the military order, even though it was declared that the IDF respects the 'humanitarian provisions of the convention'. The Government based this decision on the uncertainty of the nature of the status of the territories of the West Bank and the Gaza Strip.¹⁸⁴

Following the change in the military order, petitions challenging the exclusion of the Fourth Geneva Convention and, by extension, the 'uncertain status' of the territories, emerged. The petitioners argued that the norms of belligerent occupation stated in The Hague Regulations and the Fourth Geneva Convention act as evidence that the two territories fall within the scope of these provisions. Though the Government argued for the status of the territories to be clarified, the military acted in terms of the provisions relating to belligerent occupation. After a period of time the provisions of the belligerent occupation became the standard by which authorities were evaluated within the Occupied Territories. Israel, in the absence of officially acknowledging the status of the territories, has referred to the territories as 'administered territories' rather than 'Occupied Territories'.¹⁸⁵

Yoram Dinstein has stated the argument made by Israeli lawyers, in 1978, that 'belligerent occupation continues for as long as the occupant remains in the area and the war goes on.'¹⁸⁶ A war is therefore said to terminate with the end of the conflict. This was noted on 15 March 1979, when the Supreme Court noted that a judgment was directly linked to the state of belligerency. However with the enforcement of the 1979 Peace

¹⁸³ Shehadeh R *Occupiers Law: Israel and the West Bank* (1988) Art 95.

¹⁸⁴ Shehadeh R *Occupiers Law: Israel and the West Bank* (1988) Art 98.

¹⁸⁵ Shehadeh R *Occupiers Law: Israel and the West Bank* (1988) 98.

¹⁸⁶ Roberts A's 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 *American Journal of International Law* 592-593.

Treaty between Egypt and Israel the state of belligerency no longer existed. In the same manner that the Gaza Strip has not been part of the 'territory of the hostile state', Israel makes use of the provisions of 'belligerent occupation' when deems fit.¹⁸⁷

Drawing on the above it is imperative that the nature of the Israeli legal system be examined. The system, which is a dualist one, requires that domestic courts enforce norms of international law only if they are compatible with the primary legislation.¹⁸⁸ The provisions of international conventions will only be imposed by the courts if they have been made part of customary international law or enacted as parliamentary legislation. In cases in which a clash exists between parliamentary legislation and customary international law, parliamentary legislation will take precedence.¹⁸⁹ It is therefore important to note, that despite the ratification of the four Geneva Conventions by the Israeli government in 1951, their provisions have not formally been included into parliamentary legislation. Despite this discrepancy, the HCJ has continued to make use of the Fourth Geneva Convention in its proceedings. The basis for its actions in many cases is the encouragement of the Government of Israel toward respecting the humanitarian provisions of the Convention. It is therefore evident that in spite of the fact that the Fourth Geneva Convention has never been included in customary international law, in cases relating to the Occupied Territories the standard practice of the HCJ has been to cite the provisions of the Convention.¹⁹⁰

A further evaluation of the laws that bind the Israeli Government to the protection of international norms relates to international human rights law (IHRL). As evidence of the applicability of IHRL, the construction of the 'separation barriers' by Israel saw the ICJ include in its decision the jurisprudence of both the provisions relating to belligerent occupation, as well as IHRL. Though the government of Israel has formally rejected this argument, the HCJ has relied on the provisions of IHRL in cases relating to the Occupied Territories. The HCJ has justified this position by concluding that the norms of IHRL are within the framework of the law of belligerent occupation, and furthermore, by asserting the fact that as a party to the human rights treaties, Israel is bound by their provisions.¹⁹¹

¹⁸⁷ Shehadeh R *Occupiers Law: Israel and the West Bank* (1988) 100.

¹⁸⁸ Metz HC's *Israel: A Country Study* (1988) Washington: GPO for the Library of Congress, 1988.

¹⁸⁹ Metz HC's *Israel: A Country Study* (1988) Washington: GPO for the Library of Congress, 1988.

¹⁹⁰ Bernard V (ed-in-chief) *International Review of the Red Cross. Humanitarian Debate: Law, Policy, Action* 94(885) (2012) 210.

¹⁹¹ Bernard V (ed-in-chief) *International Review of the Red Cross. Humanitarian Debate: Law, Policy, Action* 94(885) (2012) 211.

4.3 What are the Rights of the Occupied Civilians as Stated by the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War?

Part II of the Fourth Geneva Convention relates to the protection of the whole of the populations of countries in conflict. These provisions apply without any distinction of race, nationality, religion or political opinion. Art 14 of the Convention speaks to the construction of hospitals and ‘safety zones’ during periods in which no outbreak of hostilities take place. These ‘safety zones’ are to be recognized by all high contracting parties to the conflict. Furthermore, Art 14 makes provision for the use of the ICRC in the establishment of these hospitals and safety zones.¹⁹² Art 15 of the Convention ascribes the right to any of the contracting parties to propose to an adverse party the intention to establish ‘neutralized zones’ with the intention of protecting the wounded and sick combatants and non-combatants, as well as civilians who have no part in the conflict. These ‘neutralized zones’ will be provided with a food supply.¹⁹³

Furthermore, Arts 16 and Art 17 of the Convention make imperative the respect for and the protection of the wounded and sick, the aged, children and expecting mothers.¹⁹⁴ Arts 17, 21, 22 and 23 make provision for the protection of religious leaders, medical personal and equipment, and essential foodstuff and clothing in hostile areas.¹⁹⁵ Arts 18 to 22 refer to the protection of hospitals. Civilian hospitals are to be certified by both high contracting parties, and shall not be the object of attacks.¹⁹⁶ These hospitals shall be marked by an emblem as indicted by Art 38 of the First Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. These emblems are to be made distinctive to the ‘enemy land, air and naval forces’. All persons engaged with civilian hospitals are to be provided with certification indicating their status, their photograph, and a stamp of the responsible authority. These persons are also to be provided with a waterproof bracelet showcasing the emblem indicted in Art 38

¹⁹² Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) 14.

¹⁹³ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 15.

¹⁹⁴ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Arts 16, 17.

¹⁹⁵ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Arts 17, 21, 22, 23.

¹⁹⁶ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Arts 18-22.

of the First Geneva Convention, and are to be worn on the left arm while on duty.¹⁹⁷

Art 24 of the Fourth Geneva Convention makes reference to the protection of children under the age of 15 who as a result of conflict have been orphaned or separated from their families. These children are to be granted access to education and the practice of their respective religions. These children may be sent to a neutral country by the contracting parties with the consent of the protecting power with due regard to the previous provisions. Furthermore, the provision of identity discs to children under 12 should be made.¹⁹⁸ Art 25 and 26 of the Convention make provision for the notification of family members. Individuals may send and receive information of a 'strictly personal nature'. If for security reasons the parties to the conflict wish to limit contact, individuals may be allowed to communicate 25 freely chosen words per month. If the communication by ordinary post is not possible, then it is the duty of the parties to the conflict to ensure that the communication is transacted. Furthermore, Arts 25 and 26 makes provision for the unification of families as a result of the conflict by the high contracting parties to the conflict. These duties may be granted to organizations that are engaged with this task.¹⁹⁹

4.4 Appropriate Means that May Aid in Conflict Resolution

4.4.1 Approaching the International Criminal Court

As a test of the true judicial independence and legitimacy of the ICC, in the wake of escalating violence within the Occupied Territories there has been increased pressure by the international community. Though not formally recognizing Palestine as a state, the ICC, as well as its 133 members, is yet to act, and furthermore to address the situation in light of the fact that Israel is not a Member State of the ICC, having withdrawn its signature in 2002.²⁰⁰ The ICC could however act in accordance with formal requests by State Parties and the availability of the accused. The war crimes that have recently been brought to the attention of the ICC are the crimes committed by Israel and Hamas in 'Operation Cast Lead' that began on 7 December 2008. The aim of the operation, as

¹⁹⁷ Geneva Convention, 1949 Geneva Convention (I) relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) Art 38.

¹⁹⁸ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 24.

¹⁹⁹ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Arts 25, 26.

²⁰⁰ On 1 April 2015, Palestine became a State Party to the ICC.

Human Rights Watch's 'ICC: Palestine is Newest Member' available a

<https://www.hrw.org/news/2015/04/01/icc-palestine-newest-member> (accessed 10 June 2015).

stated by Israel, was to stop Hamas rocket launches into southern Israel, furthermore emphasizing the targeting of Hamas. International reaction called for an immediate ceasefire, resulting Resolution 1860 of the UN Security Council. The conflict has highlighted the indiscriminant use of force, as well as the general situation within the Gaza Strip. This has resulted in human rights groups and aid organizations calling for independent investigations into the conflict. Importantly, both Israel and Hamas found themselves accused of war crimes. The conflict ended on 18 January 2009, with the announcement of unilateral ceasefires.²⁰¹

As a means to a peaceful end of to the occupation the efficacy of the ICC should be challenged. In the period between 27 December 2008 and 13 February 2009, the ICC Office of the Prosecutor (OTP) received 326 communications from individuals, both independent and belonging to aid organizations that called for an investigation into the conflict. Though the ICC argued that it was unable to carry out such investigations, as Israel is not a Member State, the continued barrage by individuals changed the stance of the ICC. Art 12(3) of the Rome Statute asserts respect of the Court's jurisdiction on an ad hoc basis by states that are not party to the Rome Statute, as has been the case with Cote d'Ivoire.²⁰²

Following the outcry by the international community, Chief Prosecutor Luis Moreno-Ocampo announced that the ICC would investigate methods by which to prosecute Israeli commanders for their alleged war crimes. This may possibly result in a solution to the ongoing attack on civilians within the Occupied Territories. However, a more fitting solution in the advocacy of the ICC's relevance to the conflict could be the statehood of Palestine. In fulfilling the precondition for assessing jurisdiction the ICC may be required to advocate the statehood of the non-member party. Furthermore, the UN General Assembly may request an advisory opinion from the ICJ. This has been stipulated in Art 65(2) of the Statute of the ICJ. An advisory opinion on the conflict, such as the one being discussed, has been provided concerning the construction of the 'separation barrier' in the Occupied Palestinian Territories.²⁰³ Since the ICC's jurisdiction is only relevant in instances where the national authorities are unable to or unwilling to hold genuine

²⁰¹ Benoliel D, Perry R 'Israel, Palestine, and the ICC' (2010-2011) 73 *Michigan Journal of International Law* 78-108.

²⁰² Cote d'Ivoire, though having signed the Rome Statute has not ratified it. It is the first non-party state to accept ICC jurisdiction over war crimes committed within its borders.

²⁰³ Benoliel D, Perry R 'Israel, Palestine, and the ICC' (2010-2011) 73 *Michigan Journal of International Law* 78-108.

proceedings, the situation in Palestine seems to fit the context of its jurisdiction.²⁰⁴

4.4.2 Increased Economic Sanctions

The concept of economic sanctions successfully used against the Apartheid regime of South Africa has yet to affect the Israel/Palestinian conflict. Since the onset of the occupation in 1948 and again in 1973 Israel has faced economic sanctions by neighbouring Arab states. Today, the concept of economic sanctions against Israel has evolved into an international trend known as BDS, 'Boycott, Divestment, and Sanctions'. This discourages any trade or business with Israel. The purpose of the sanction is to brand Israel as an Apartheid state. As a result Israel stands to lose 20 per cent of Israeli exports to the European Union and possibly a halt to any foreign direct trade.²⁰⁵ Israel's trade with the European Union is not without restraint within the European Union since it has reinstated its decision to label products that are from the settlement areas. The overall amount of settlement products from the settlement areas to Europe is approximately 300 million shekels (\$90 million), most of the sales being generated by SodaStream.²⁰⁶ According to the Maariv newspaper, the current boycott of Israel is affecting the economy of Israel with losses amounting to 100 million shekels (\$30 million), most notably affecting the agricultural sector in the Jordan valley.²⁰⁷

Though Israel enjoys a flourishing economy, the increased anti-Israel sentiment both in the USA and the European Union, and the opposition of Jews the world over, has created a sense of unease in the economic sector of Israel. Of the divestments, the notable BDS decisions include the divestment of the \$200 billion Dutch pension fund PGGM.²⁰⁸ Furthermore, the Israeli company SodaStream, which has a factory in the West Bank, has seen plummeting share prices. The company's store in Brighton, England, has also closed

²⁰⁴ Benoliel D, Perry R 'Israel, Palestine, and the ICC' (2010-2011) 73 *Michigan Journal of International Law* 78-108.

²⁰⁵ Zuckerman, Mortimer B Arab 'Hostilities Enters the Marketplace' (2014) 6 *U.S News Digital Weekly* 22 24.

²⁰⁶ Middle East Monitor's 'BDS Cost Israel 100 Million Shekels in Losses' Available at <https://www.middleeastmonitor.com/news/middle-east/10165-bds-costs-israel-100-million-shekels-in-losses> (accessed June 2014).

²⁰⁷ Middle East Monitor's 'BDS Cost Israel 100 Million Shekels in Losses' Available at <https://www.middleeastmonitor.com/news/middle-east/10165-bds-costs-israel-100-million-shekels-in-losses> (accessed June 2014).

²⁰⁸ Barghouti O's 'Why Israel Fears the Boycott' Available at http://www.nytimes.com/2014/02/01/opinion/sunday/why-the-boycott-movement-scare-israel.html?_r=0&module=ArrowsNav&contentCollection=Opinion&action=keypress®ion=FixedLeft&pgtype=Art (accessed December 2013).

down.²⁰⁹ Sanctions as means to change the cause of the conflict from affecting civilians has proven to be effective to a degree. However, a much broader approach from the international community is required in order to exert maximum pressure on the parties involved.

As a means to place pressure on Hamas, Israel too has enlisted the use of economic sanctions on Palestinians, more notably within the Gaza Strip. Israel, in control of the passage of goods in both the Gaza Strip and the West Bank, has blocked any passage of goods into the Gaza Strip via sea, air or the Rafah crossing separating the Gaza Strip and Egypt.²¹⁰ Goods may be transported via the Karni crossing which separates Israel and the Gaza Strip. Israel has however instructed agents to deliver limited amounts of products into the Gaza Strip. These products include fuel, essential supplies and medicines.²¹¹

It is recorded that between 14 June and 12 July 2007, 65 000 jobs were lost due to closures within the private sector. Furthermore, of the data compiled by Gisha, it is evident that industries within the Gaza Strip are collapsing.²¹² Of the 3, 900 factories that produce food, pharmaceuticals, construction materials, wood, paper, craftwork, engineering material plastics, and rubber, more than 2 900 (75 per cent of the Gaza Strip's factories) have ceased to produce. Since it was estimated that 85 per cent of the Gaza Strip's residents are dependent on food aid, the sanctions imposed by Israel are sure to affect the general economic wellbeing of the Palestinian population.²¹³

This form of sanction may be deemed siege warfare. Well within the scope of military tactics, siege warfare has been stipulated within The Hague Regulations of 1907. Art 54 of Protocol 1 to the Geneva Conventions does not however provide for a siege that results in the starvation of the population and prohibits the removal of structures that are vital to the civilian population. Though some may argue that a siege may be morally permissible in the face of necessity, it is commonly understood that civilians are ensured exit from the besieged area at will. Civilians therefore retain the right to be refugees. Israel's blockade in co-ordination with the closing of the Rafah crossing by the Egyptian government does not constitute legal sanctions against Hamas. The blockade of the Gaza Strip places

²⁰⁹ Haaretz's 'BDS Bursts SodaStream's U.K. Bubble' Available at <http://www.haaretz.com/news/diplomacy-defence/.premium-1.603011> (accessed June 2014).

²¹⁰ Beinart P Israel's Fatal Game (2012) 160 *Newsweek* 22/23 42-47.

²¹¹ Beinart P Israel's Fatal Game (2012) 160 *Newsweek* 22/23 42-47.

²¹² Gisha is a non-profit organization that was founded in 2005. The goal of the organization is to protect the freedom of movement of Palestinians.

²¹³ Gisha 'Commercial Closure: Deleting Gaza's Economy from the Map' 14 (2007) *Palestine-Israel Journal of Politics, Economics and Culture* 111-116.

citizens in an inhumane situation, and legalizes the otherwise illegal act of targeting civilians.²¹⁴

4.4.2.1 Effectiveness of sanctions

Generally, the most notable issue with the imposition of sanctions is the inability or unwillingness of those who control the institutions of IHL. It is therefore common practice that sanctions that are imposed are deemed lenient toward the perpetrators.²¹⁵ This results in a discrepancy between the theory of IHL and critical action, more emphatically violating legal obligation. Jurisdiction for violations of IHL, begin with the state. The state is therefore entrusted with the task of upholding the legal requirements of IHL and to prosecute those who violate it. Secondly, third party states may also play an effective role in the implementation and protection of IHL. This falls within the scope of universal competence. In the event that these two divisions are unable to or unwilling to fulfil the duties established under IHL, the responsibility is generally accepted by the internationally community which has established various sanction mechanisms. These sanctions include the establishment of ad hoc international criminal courts.²¹⁶

Despite the Fourth Geneva Conventions of 1949 requiring the implementation of sanctions by State Parties against those who violate IHL, there is discrepancy with regards to how and to what extent such sanctions should be implemented by the state. States may impose sanctions using one of two mediums. The first, 'administrative sanctions', is imposed by the administrative superior. Secondly, military or judicial courts may impose the sanctions. States are therefore obligated to: established penal laws protecting IHL, punish those who violate the laws, take the necessary steps to discontinue any actions which are in violation of IHL, and finally to respect the perpetrators right to a fair trail. The problem with such institutionalization of IHLs is the fact that the courts and judges are ill equipped in dealing with such grave violations of law. Secondly, courts may not function during hostilities. Furthermore, where penal sanctions are enforced, little scope is provided for judicial review. IHL has therefore provided states with too large a range of duties with regard to grave violations of IHL. Importantly the role of national courts in the

²¹⁴ Meisels T 'Economic warfare-The Case of Gaza' (2011) *10 Journal of Military Ethics* 2 94-109.

²¹⁵ Philippe X 'Sanctions for the Violations of IHL: the Problem of the Division of Competences between National Authorities and International Authorities' (2008) *90 International Review of the Red Cross* 359-360.

²¹⁶ Philippe X 'Sanctions for the Violations of IHL: the Problem of the Division of Competences between National Authorities and International Authorities' (2008) *90 International Review of the Red Cross* 359-360.

prosecution of perpetrators of IHL results in limiting the scope of investigations and due compensation for victims.²¹⁷

Despite the continued violation of IHL in various parts of the world, the institutionalization of bodies obligated toward the protection of the said laws has not proven to be effective. Where national bodies have only marginally prosecuted perpetrators, the international community too has been unsuccessful. International courts have been unable to expedite trials and are often unsuccessful in prosecuting the main prosecutors. Furthermore, states have generally been forced to withdraw their support of the prosecution of perpetrators due to political and diplomatic pressures.²¹⁸ Importantly, the notion of an international body entrusted with the duty to protect IHL too is flawed. The first issue is evident in the establishment of ad hoc courts. Where courts are established, the courts need to have the means to fulfil its task and the capacity to pronounce sanctions. Also, the requirements of IHL must be taken into account when institutionalizing the sanctions. Furthermore, the necessary resources need to be made available to these institutions.²¹⁹

In consideration of sanctions against violations of IHL, it is inadequate to consider mere condemnation of these acts as a form of sanction, since it does not efficiently affect the military powers of the world.²²⁰

4.4.3 Increased Pressure on Egypt

In view of the 2011 revolution in Egypt it is evident that an emphatic call by Egyptians may be viewed as an end to the 1979 Peace Treaty between Egypt and Israel. In violation of the basic 'Arab tenets', Egypt witnessed its ousting from the Arab world under the leadership of President Sadat. This policy has framed much of the political diaspora of Egyptian politics. Solidary with Palestine is a clear facet of a stable Egypt. The Egyptian revolution has thus acted as a reminder that although governments may know how to deal with other governments, may know how to use

²¹⁷ Philippe X 'Sanctions for the Violations of IHL: the Problem of the Division of Competences between National Authorities and International Authorities' (2008) 90 *International Review of the Red Cross* 362-363.

²¹⁸ The Economist's 'Justice in Darfur' Available at <http://www.economist.com/node/3623735> (accessed July 2013).

²¹⁹ Owen M's 'The Limits of Economic Sanctions Under IHL: the Case of the Congo' (2012) 48 *Texas International Law Journal* 113-122.

²²⁰ Owen M's 'The Limits of Economic Sanctions Under IHL: the Case of the Congo' (2012) 48 *Texas International Law Journal* 113-122.

their military against another state or country, and they may know how to use their relations in order to enforce their interests, they, however, are not always in a position to know and foresee the actions of a unified mass of citizens striving to enforce their rights. This was emphasized by an Israeli MP when he stated that *'with Mubarak we could talk business; (but) with these masses we don't know how to talk.'*²²¹ This suggests that speaking of a mass of citizens is one thing, but to speak of a mass of Arab Muslims, who are characterized mainly by their hate of Zionism, is another. Israel has, therefore, made the assertion that even though neither Israel nor Palestine was directly on the agenda throughout the revolution, the revolution has to an extent caused a destabilization of Israeli public opinion. The general opinion generated through the Israeli media consequently forced the Israeli government to reassure citizens that there is no need to fear an Egyptian military onslaught.²²²

In order to understand whether the military or the current Egyptian leadership will continue Mubarak's policy, it is important to keep track of Egyptian policy subsequent to the revolution. During the revolution it seemed as though the army worked hand in hand with the citizens, especially the techno-friendly youth, in order to successfully rid Egypt of Mubarak. Yet, after the dismissal of Mubarak, it seems that the military adopted the same defining characteristics of the Mubarak regime. This was evident in the subjecting of female detainees to humiliating virginity tests, by the shooting of two protesters, the killing of others in Tahrir Square in early April 2011, and finally the arresting of journalists. This onslaught against civilians acts as proof that the military through its power has successfully maintained the same standard of leadership as its predecessors. The actions of the military following the revolution have resulted in the termination of the alliance between the youth and the military, consequently leaving Egypt uncertain of its intended democratic reform.²²³ The influence of Egypt, therefore, is dependent on the opinion of the public in relation to the governing authority, the governing body being the influencing factor of foreign policy.

²²¹ Abraham N *From Tahrir to Palestine* (2011) 14.

²²² Abraham N *From Tahrir to Palestine* (2011) 14.

²²³ Oliver P's 'Global' Available at <http://www.policymic.com/Arts/egypt-s-military-is-the-new-mubarak-regime> (accessed 20 June 2013).

With the new challenges that face the people of Egypt as a result of the revolution, one very important issue, the liberation of the Palestinians, is sure to be at the forefront of further negotiation.²²⁴ This is emphasized by the newly formulated requests by the Qatari government for Palestinian legitimacy. Based on its 1967 border, the government of Qatar would require the support of Egypt in its attempt to encourage the legitimization of Palestine on the world stage. Along with Qatar, the Palestinian government itself has requested the recognition of Palestine as an independent state in the UN in an attempt to build international concern for the plight of Palestine, which would subsequently place pressure on Israel to change its treatment of Palestinians. Egypt is regarded as one of the most influential Arab states in its relations with the US, the lack of Egyptian support for Palestine has become a pivotal area of concern. The US administration has vowed to veto any request for Palestinian legitimacy, rather requesting another round of talks between Israel and Palestine.²²⁵

Though Israel has the support of the US, it remains imperative that the Israeli authority now weighs the importance of the 1979 Treaty in its national security. This would entail that it assess their situation 40 years ago, as well as the understanding by the state that Israel's prosperity to date is in part dependent on its Treaty with Egypt. If Egypt wishes to maintain its current security, it would require the shift of power from the Mubarak regime to the next generation of military officers instead of the Muslim Brotherhood, which currently maintains its credibility within Egypt. It is therefore apparent that if the Treaty with Egypt were of utmost importance to the maintenance of Israel's security, it would stand to reason that the Israelis would do everything in their power to preserve the Treaty. The preservation of the 1979 Treaty may therefore require Israel's adjustment of its previous policies, including the surrendering of the Gaza Strip and the West Bank. However, since the controlling of Hamas in the Gaza Strip was in the interest of both Egypt and Israel, it would be understandable that even after the revolution the new military power would keep intact the control of the Gaza Strip by Israel. In the event that a new uprising, one that is more radically 'Islamist', was to occur, Israel would certainly have to rethink its

²²⁴ Abraham N *From Tahrir to Palestine* (2011) 16.

²²⁵ Abraham N *From Tahrir to Palestine* (2011) 16.

policy. In this instance an ideological settlement would thus outweigh a political one.²²⁶

Furthermore, it has become evident that public opinion of both Egyptians and its surrounding Arab nations in opposition of Israel has strengthened. This has become apparent in the attacking of the Israeli embassy in Cairo by Egyptian protestors, thus acting as an indication that no Egyptian government would be able to legitimately maintain cordial relations with Israel, unless Israel recognizes the plight of the Palestinian people.²²⁷ Israel's recognition of the opinion of the new generation of Egyptians toward its future relations with Egypt was clearly demonstrated when they ordered diplomats and their families to leave Egypt.²²⁸ This included the closure of the Israeli embassy, as well as the removal of the Israeli flag in an attempt to eliminate any further incitement against Israel by protestors. As a result of the attack on the Israeli embassy, the Egyptian military has since provided some leverage by opening up the Rafah crossing which separates Egypt and the Gaza Strip. This does not however imply that the Egyptian authorities will continue to comply with public opinion in the future. It is thus difficult to foresee the survival of the 1979 Peace Treaty, since the uprising has made it clear that all Arab nations are not marching toward 'moderation' with regards to their interests, nor with regard to the state of Israel. They have for many years stood by as their leaders maintained relations with Israel, but have found the strength to protest in an effort to have their voices heard. Public opinion may therefore affect the future of the 1979 Treaty and consequently affect Israel's policy toward Palestinian civilians and land.²²⁹

4.4.3.1 The Exporting of Natural Gas to Israel

Despite Egypt's law regarding the importing of Israeli goods, Israel's imports of Egyptian goods have grown to USD 355 million in 2011.²³⁰ These exports are, however, mainly concentrated on one product: natural gas that is supplied by East

²²⁶ Abraham N *From Tahrir to Palestine* (2011) 16.

²²⁷ Toameh K A 's *'Is the Peace Treaty Between Egypt and Israel Finished?'* Available at <http://www.hudson-ny.org/2039/peace-Treaty-israel-egypt> (accessed July 2013).

²²⁸ Toameh K A 's *'Is the Peace Treaty Between Egypt and Israel Finished?'* Available at <http://www.hudson-ny.org/2039/peace-Treaty-israel-egypt> (accessed July 2013).

²²⁹ Abraham N *From Tahrir to Palestine* (2011) 16-20.

²³⁰ Azulai Y's *'Cold peace, meager trade'* Available at <http://www.globes.co.il/serveen/globes/docview.asp?did=1000619189&fid=1725> (accessed July 2013).

Mediterranean Gas (EMG). The gas is supplied via a pipeline across the Sinai Peninsula founded by Hussein Salem and Israel Mehav Group, owned by Yossi Maimen, along with the Egyptian government who owns 10 per cent stake. Salem during 2008, sold 37 per cent of his stake, left with 28 per cent, he sold 25 per cent to PTT, Thailand's national oil company, and the remaining 12 per cent to American business, while Merhev's stake declined from 25 per cent to 20.6 per cent. Salem however fled Egypt on the fall of the Mubarak regime. The state subsequently froze his and his family's assets. In 2008 however EMG signed a 20 year contract with Israel, thus continuing to become the largest source of fuel for the Israeli economy,²³¹ much of which is supplied to Israel's Electric Corporation (IEC), which is in the process of converting its electric supply system to natural gas, a cheaper and cleaner option. Proof of Israel's reliance on Egypt's gas supply is evident in the fact that Israel was the recipient of 40 per cent of the IEC's generation at the beginning of 2011, which was powered by natural gas, 35 per cent being supplied by Egypt, 15 per cent of total production.²³²



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²³¹ Azulai Y's 'Cold peace, meager trade' Available at <http://www.globes.co.il/serveen/globes/docview.asp?did=1000619189&fid=1725> (accessed July 2013).

²³² Knowledge@Wharton's 'How Will Egypt's Political Upheaval affect Israel' Available at <http://knowledge.wharton.upenn.edu/article/how-will-egypts-political-upheaval-impact-israel-the-view-from-jerusalem/> (accessed July 2013).

²³³ Azulai Y's 'Cold peace, meager trade' Available at <http://www.globes.co.il/serveen/globes/docview.asp?did=1000619189&fid=1725> (accessed July 2013).

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4.4.3.2 *The Role of the Suez Canal*

Besides the trade in goods, Egypt and Israel have developed trade links through services.²³⁶ One important such business link is the Suez Canal²³⁷, which provides a shipping route for 20 per cent of Israeli goods; thus any interruptions in the use of the water way would have clear effects on Israeli shipping companies.²³⁸ The Egyptian ports of Alexandria, Damietta, and Port Said have developed into trans-shipment ports where large ships off-load goods which are then placed on smaller ships to Israel and other Mediterranean countries. Despite the important role of the Sinai with regard to maritime trade, if the shipping flow of the Sinai were to be disrupted, ports in Turkey and Israel would benefit.²³⁹

The Canal has been closed to shipping traffic five times in history, the final time in June 1975. Most notably it was closed between June 1967 and June 1975, due to the

²³⁴ Azulai Y's 'Cold peace, meager trade' Available at <http://www.globes.co.il/serveen/globes/docview.asp?did=1000619189&fid=1725> (accessed July 2013).

²³⁵ Knowledge@Wharton's 'How Will Egypt's Political Upheaval affect Israel' Available at <http://knowledge.wharton.upenn.edu/article/how-will-egypts-political-upheaval-impact-israel-the-view-from-jerusalem/> (accessed July 2013).

²³⁶ Deac WP 'Dual for the Suez Canal' (2001) 18 *Military History* 58-64.

²³⁷ The Suez Canal, a 129-mile waterway, is one of the most important waterways in the world, providing a short-cut from the Mediterranean Sea to the Red Sea, and Indian Ocean. Opened in 1967 to shipping, the Canal provides commercial ships with a cost-effective shipping route as apposed to travelling via the Cape of Good Hope. The Canal today has around 8 per cent of the worlds seaborne trade travelling through it, inclusive of which is 3 per cent of the USA's Gross Domestic Product (GDP).

²³⁸ Squire & Sanden's 'Maritime Alert. *Legal Council World Wide*' Available at http://www.squiresanders.com/legal_lessons_learned_the_last_time_the_suez_canal_closed/ (accessed July 2013).

²³⁹ Deac WP 'Dual for the Suez Canal' (2001) 18 *Military History* 58-64.

Israeli and Egyptian war.²⁴⁰ The closure of the Suez Canal proved to affect a vast number of industries. The closure of the Suez Canal would entail large insurance costs, as companies would now have to make concessions for vast areas of unprotected waters prone to piracy. Companies would also have to fork out increasingly large sums on fuel costs and travel costs for crew members. They would therefore be required to carefully determine which contracts are worthwhile.²⁴¹

On 26 July 1956, the Suez Canal Company Nationalization Law was established. The laws pertaining to the Suez Canal assert that the Suez Maritime Canal Company is not nationalized by the Egyptian government. All rights, money and obligations were therefore to be transferred to the state of Egypt, consequently calling for the dissolution of all organizations and committees previously operating the company. All shareholders were to be compensated for the value of their shares on the Paris stock market.²⁴² Furthermore, the management of the Suez Canal traffic utility was handed to the Ministry of Commerce. The said body has an independent budget to be decreed by the President, which is to commence on July 1 and end on the June 30 of every year.²⁴³ It is therefore clear that the control of the Suez Canal in the hands of the Egyptian authority grants Egypt a bargaining tool for the changing of Israeli policy for the Occupied Palestinian Territories.

4.5 Conclusion

As mentioned above, Section III of the Convention asserts the freedom of movement; freedom from mass deportation; access to housing, food, hygiene, healthcare, education, and safety; and non-separation of family members.²⁴⁴ After close analysis it is found that the duties of the occupying power as set forth by the Fourth Geneva Convention have not been respected. The duty of the occupying power furthermore establishes the rights of the occupied. These rights as enshrined in Part II of the

²⁴⁰ Eitan Barak 'On the Power of Tacit Understanding- Israel, Egypt and Freedom of Passage through the Suez Canal, 1957-1960' (2004) 58 *Middle East Journal* 15.

²⁴¹ Squire & Sanden's 'Maritime Alert. *Legal Council World Wide*' Available at http://www.squiresanders.com/legal_lessons_learned_the_last_time_the_suez_canal_closed/ (accessed July 2013).

²⁴² Nasser G A *The Suez Canal Nationalisation* (1956).

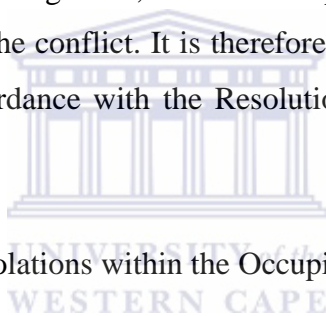
²⁴³ Nasser G A *The Suez Canal nationalisation* (1956).

²⁴⁴ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) S III.

Fourth Geneva Convention have proven to be violated.²⁴⁵ Consequently, the means by which IHL may be respected have been highlighted. The ICC's jurisdiction allows for its intervention in matters relating to the Occupied Territories.²⁴⁶ The body should therefore assert its authority in proceedings that may result in the implementation of the duties of the occupying power. Furthermore, the use of economic sanctions plays a vital role in exerting pressure on governments. Israel's losses in its agricultural sector as a result of international sanctions in the form of BDS acts as proof that it is an effective method to encourage stringent implementation of IHL.

The continued blockade of the Gaza Strip by Israel as a means to place pressure on Hamas violates the basic rights of the citizens of the Gaza Strip. Consequently, the continued sanctions of Israel may encourage Israel to end the blockade. The mere condemnation against the blockade is therefore not sufficient. Though Egypt holds considerable economic bargaining tools, it does not appear likely that the Egyptian authorities may intervene in the conflict. It is therefore imperative that the UN as the only viable body act in accordance with the Resolution discouraging the continued violations of IHL.

Chapter 5 will discuss IHL violations within the Occupied Palestinian Territories.



²⁴⁵ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Part II.

²⁴⁶ Benoliel D, Perry R 'Israel, Palestine, and the ICC' (2010-2011) 73 *Michigan Journal of International Law* 78-108

CHAPTER 5

IHL VIOLATIONS WITHIN THE OCCUPIED PALESTINIAN TERRITORIES

5.1 Introduction

This chapter will outline the various IHL violations that have occurred within the Occupied Palestinian Territories. Focussing on only selected violations, Chapter 5 will argue that IHL and IHRL have been completely disregarded.

IHL regulating the legal system governing the occupied population asserts the notion that the legal system of the occupied territory remains intact. This principle reflects the temporary nature of occupation, as well as amplifying the role of ‘occupier’ as distinct from ‘sovereign’. The lives of those who reside within the Occupied Territory should therefore remain unaltered, as it was prior to the occupation.²⁴⁷ This is clearly stipulated under Art 64(1) of the Fourth Geneva Convention, which states that ‘the penal laws of the occupied territory shall remain in force’.²⁴⁸ The provision however allows for the ‘suspension’ of the penal laws by the occupying power in cases in which the laws constitute a threat to security or they act as an obstacle to the application of the Fourth Geneva Convention.²⁴⁹ Art 43 of The Hague Regulations similarly emphasizes this view.²⁵⁰ Therefore, if the penal laws of the occupied territory do not constitute a threat to the security, the laws are to remain intact, so too emphasizing the fact the lives of those residing within an occupied territory remain unaltered.

²⁴⁷ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949).

²⁴⁸ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 64 (1).

²⁴⁹ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 64 (3).

²⁵⁰ Sassoli M Art 43 of The Hague Regulations and Peace Operations in the Twenty-First Century (IHL Mini-thesis, University of Geneva, 2004) 2-4.

5.2 Actions Against Civilians and Civilian Objects that are in Contravention of the Fourth Geneva Conventions

5.2.1 Illegal Arrests

The second military order issued on 7 June 1967, proclaimed that Israel had occupied the West Bank and the Gaza Strip, taking control of the administrative duties of the territory. This Israel asserts was done ‘in the interests of security and public order’.²⁵¹ Though more than 25 000 military orders exist today, with the inclusion of amendments, a compilation of the laws governing those occupied within the Occupied Territories was only made available to the public in the 1980s. It should be noted that these laws govern Palestinian citizens and not Israeli settlers.²⁵² This is asserted in Art 78 and Art 81 of the Israeli Military Order 378 that provides that an Israeli soldier retains the power to search premises, as well as arrest individuals upon suspicion without the issuing of a warrant.²⁵³ In 1999 it was found that an estimated 200 000 individuals, who comprised 20 per cent of the Palestinian population, had been imprisoned in Israeli prisons. The powers granted to soldiers makes possible the stopping of any person at the request of the soldier, whose right is then extended to the entering and searching of Palestinian homes. These individuals may then be arrested without any cause provided. This is emphasized in Art 85 of the Military Order that states that the military commander of any area may restrict the movements and activities of individuals, including issuing their confinement to a specific area or their place of residence.²⁵⁴ Furthermore, Arts 78 and 87 of the Military Order provide that the court may order the detention of individuals for six months without trial, referred to as administrative detention.²⁵⁵ These individuals may be imprisoned for an extended period without the issuing of a new arrest warrant.²⁵⁶

²⁵¹ Weill S ‘The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories’ (2007) 89 *International Review of the Red Cross* 401-403.

²⁵² 40 Years of Israeli Occupation 1967-2007 ‘Status of Palestinian Territories and the Palestinian Society Under Israeli Occupation’ Available at <http://www.arij.org/atlas40/chapter2.2.html> (accessed 15 January 2014)

²⁵³ Israel Military Order 378 *Order Concerning Security Provisions* Arts 78 and 81.

²⁵⁴ Israel Military Order 378 *Order Concerning Security Provisions* Art 85.

²⁵⁵ Israel Military Order 378 *Order Concerning Security Provisions* Arts 78 and 87.

²⁵⁶ Weill S ‘The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories’ (2007) 89 *International Review of the Red Cross* 401-403.

With the arrest of groups of individuals, generally as a result of protests, courts have made use of ‘quick trials’.²⁵⁷ In many instances these cases are brought before the court before the detainees have had an opportunity to meet with their lawyers, or before their family members have been notified of their arrest. The accused are in some cases presented with a lighter sentence if they agree to admit to the crime(s). Such cases were prevalent during the 1980s in which individuals, aged 13-21, were tried. Though Military Order 29 does allow for the legal representation of the accused, it is at the discretion of the prison commander.²⁵⁸ Furthermore, the lawyer of the accused may only obtain access to the accused once interrogation has been completed. The accused are generally granted a judgment based on a confession. The confession is in most cases written in Hebrew, a language that is not understood by a large percentage of Palestinians. Furthermore, judgments handed down by military courts are not subject to appeal. The accused may only make a plea for mercy to the military governor of the area in which they reside. This plea will not release the accused from a jail sentence or a fine.²⁵⁹

5.2.1.1 *Illegal Arrest of Minors*

Despite the fact that both international and Israeli law prohibits the arrest and detainment of minors, approximately 700 Palestinian children under the age of 18 are prosecuted annually.²⁶⁰ These children are generally charged with the throwing of stones, which under military law is punishable by up to 20 years imprisonment. Currently 176 children are imprisoned, and are to be tried as adults once they reach 16 years of age. Children within the Israeli prison system are subjected to torture, solitary confinement, and overcrowded cells, to name but a few violations.²⁶¹

It has been noted by Issa that between January 2013 to July 2013 170 children have been arrested.²⁶² These arrests have been said to take place at night in the

²⁵⁷ These may be distinguished from normal trials by the speed with which the trial is completed. These trials are generally known to end within a matter of minutes.

²⁵⁸ Israel Military Order 378 *Order Concerning Security Provisions* Art 29.

²⁵⁹ Weill S ‘The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories’ (2007) 89 *International Review of the Red Cross* 405.

²⁶⁰ Weill S ‘The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories’ (2007) 89 *International Review of the Red Cross* 405-406.

²⁶¹ Weill S ‘The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories’ (2007) 89 *International Review of the Red Cross* 405-406.

²⁶² The Voice of Palestine ‘Israel arrested 170 Jerusalemite children since the start of the year’ Available at <http://www.palestine-info.co.uk> (accessed 10 January 2014).

neighbourhoods of Tur, Silwan, and the Old City. Both the arrest of children, as well as the house arrest imposed on some of them, changes the dynamics of their childhood. In most cases these arrests strip away their right to access education, as well as disrupting their family life. It came to light that these children, who are arrested under abnormal circumstances, find themselves suffering from psychological and mental trauma, as well as hair loss. These problems are said to be a result of the inability of the parents to protect their children, who are left at the mercy of the military courts. Issa further notes that these children, once arrested, are exposed to methods of psychological and physical torture in an attempt to have them confess to the throwing of stones.²⁶³

Cases in which children have been arrested for the throwing of stones have been evident throughout the years following the affirmation of occupation in 1967. One such case was submitted to the High Court of Israel in 1983. Three 13-year-old girls were brought before the Court after being accused of throwing stones at a 'mechanized' patrol of the security forces'. Though Israeli law regarding the trial of a minor obliges the court to provide a defence lawyer for the individual, military law under a military government deems otherwise. The girls without a defence lawyer were faced with: a military prosecutor, a witness for the prosecution, and Judge Hanoch Keinan. In the absence of a defence lawyer, under Israeli law, the judge has to aid in the interrogation of the witnesses.²⁶⁴

The girls, though they did not admit that they were guilty of the charge, were fined. One of the girls were fined 700 000 Israeli pounds, whilst the two sisters, were fined a total of 1 million pounds. Judge Keinan ordered that the fines be paid within seven days of the judgment. In the event that the fines are not paid, the judge ordered that the fathers of the girls be imprisoned for six months. As noted earlier, no appeal is granted against these judgments. The sentence may only be annulled or reduced by appeal to the High Court of Justice. In handing down the judgment against the girls, the Judge had made no inquiry about the family of the girls. It had later been understood that the father of the girl fined 700 000 pounds was chronically ill and

²⁶³ The Voice of Palestine 'Israel arrested 170 Jerusalemite children since the start of the year' Available at <http://www.palestine-info.co.uk> (accessed 10 January 2014).

²⁶⁴ Mills S's 'The Gaza conflict (2008-09) and the International Criminal Court' Available at <http://israelandpalestinediary.blogspot.com/2012/04/gaza-armed-conflict-2008-09-and.html> (accessed 2 October 2013).

only worked two days a week as a baker. Considered destitute, he was in no position to pay the fine. In the appeal to the High Court (194/83) it was argued that: ‘This is not justice but injustice, the judge may fine the father but not send him to jail’, and lastly, the judge had a duty, which he did not fulfil, to summon the father and hear him, and not send him to prison in absentia’. The HCJ ordered the postponement of the implementation of the sentence.²⁶⁵

5.2.1.2 Prolonged Periods of Detention

From the Six Day War (1967) to the first Intifada (1988), over 600 000 Palestinians were held captive in Israeli prisons for one week or more. Estimates showed that at one time one-fifth of the Palestinian population have spent time in an Israeli prison. Though numbers declined in 1998 and 1999, the second Intifada, which began in the year 2000, witnessed an influx of Palestinians taken into Israeli captivity, increasing from less than 20 from 1999 to October 2001 to more than 28 000 in April 2003.²⁶⁶ By 2007, there were on average 830 Palestinians under administrative detention, inclusive of women and children below the age of 18. In 2008, more than 8400 Palestinians were held by Israeli civilian and military authorities, of which 5148 were serving sentences. The remaining 2167 were facing legal proceedings and 790 were under administrative detention. Many of these prisoners were not informed of the charges against them. Furthermore, statistics have shown that between 2000-2009, Israeli prisons housed 6700 Palestinians between the ages of 12 and 18, 423 of whom were held in Israeli detention and interrogation centres.²⁶⁷ There are currently 25 prisons and military detention camps in which Palestinians are being held. Of these, four are interrogation centres, 20 are located outside of occupied the Gaza Strip and the West Bank.²⁶⁸

Estimates show that since the beginning of the occupation an estimated 10 000 Palestinian women have been arrested and/or detained. After arrest they are transferred to one of two prisons: Damon or Hasharon-Telmond Prison, located

²⁶⁵ Mills S’s ‘The Gaza conflict (2008-09) and the International Criminal Court’ Available at <http://israelandpalestinediary.blogspot.com/2012/04/qaza-armed-conflict-2008-09-and.html> (accessed 2 October 2013).

²⁶⁶ Amnesty International ‘Starved of Justice: Palestinians detained without Trial by Israel’ (2012) 1-33.

²⁶⁷ Amnesty International ‘Starved of Justice: Palestinians detained without Trial by Israel’ (2012) 1-33.

²⁶⁸ MIFTAH ‘Palestinian Prisoners’ (2012).

outside of the 1967 Occupied Territories. This is in direct contravention of Art 76 of the Fourth Geneva Convention. Both prisons are known for their actions against Palestinian female prisoners, which include the forced stripping of clothes in front of prison guards, being subjected to brutal body searches, and the firing of tear gas into cells. Furthermore, it has been found that many female arrests had been ordered as a means of pressurizing their husbands into confessing.²⁶⁹

Palestinian activists have accused Israeli authorities of neglecting to recognize Palestinian prisoners as having the status of prisoners of war. This was emphasized in July 2003 by the International Federation for Human Rights. The Israeli military sets the standard of detention that allows for the imprisonment of an individual for up to six months, which may be extended without the approval of a judge. Given that evidence is inaccessible, the requirement of fair trial proceedings has not been met. Furthermore, until the 1990s Palestinian prisoners were held in the West Bank and Gaza Strip, but thereafter they were held in Israeli territory.²⁷⁰ Such movement of prisoners, in breach of the Fourth Geneva Convention, violates the right of detainees to be held in occupied territories during all stages of detention, as well as being granted the right to serve the duration of their sentences in the occupied territory if convicted.²⁷¹ Though human rights group Yesh Din have protested against this conduct, the Supreme Court of Israel has rejected their petition.²⁷²

With regards to the right to a fair trial, it was found that Israeli officials detained prisoners for prolonged periods without charge or trial. Such conduct that Israel justifies, as being a mere security measure used to avoid exposing confidential information in trials, is a widely criticized policy.²⁷³ Furthermore, the Defence Minister has the right to order administrative detention for up to six months in cases where a person poses a possible security threat, an order that may be renewed. Administrative detention is the practice by which individuals are sent to prison without trial, or the continuation of imprisonment following the completion of a

²⁶⁹ MIFTAH 'Palestinian Prisoners' (2012).

²⁷⁰ Amnesty International 'Starved of Justice: Palestinians detained without Trial by Israel' (2012) 1-45.

²⁷¹ General Assembly of the United Nations (n 14 above) Art 76.

²⁷² Schwarts R (2012) 'Supreme Court: West Bank Quarries Ruling does not Constitute Precedent' Np.

²⁷³ MIFTAH 'Palestinian Prisoners' (2012).

prison sentence.²⁷⁴ Within the areas of the Gaza Strip and the West Bank any local commander can issue an administrative order, which is valid for six months. In its defence of the use of administrative detention, Israel makes reference to Art 78 of the Fourth Geneva Convention, which states: “If the occupied power considers it necessary, for imperative reasons of security to take safety measures concerning protected persons, it may at the most, subject them to assigned residence or to internment”.²⁷⁵

5.2.2 Demolition of Homes

Since the beginning of the occupation the demolition of homes has been one of the main characteristics of the Israeli/Palestinian conflict. A fact was made evident in the 1968 annual report of the ICRC in which it is stated:

‘The International Committee delegates in Israel repeatedly petitioned the Israeli civilian and military authorities to cease these practices which are contrary to Art 33, 53 and 147 of the IV Geneva Convention and to ask for the reconstruction of the houses or for financial compensation to be paid’.

Art 53 of the Convention clearly prohibits any destruction of ‘real or personal property belonging individually or collectively to private persons...except where such destruction is rendered absolutely necessary by military operations.’²⁷⁶ It is the opinion of the ICRC that the phrase ‘military operations’ be understood as: ‘Movement, maneuvers, and other actions taken by the armed forces with a view to fighting’.²⁷⁷ This explanation therefore indicates that the destruction of property cannot be regarded as falling within the scope of Art 53 of the Convention since it is not ‘absolutely necessary’. Contravention of this provision was clearly evident in the 1980s in cases in which the demolition of a home in many instances was the direct result of an allegation of stone throwing by one or more members of a family.

²⁷⁴ MIFTAH ‘Palestinian Prisoners’ (2012).

²⁷⁵ Amnesty International ‘Starved of Justice: Palestinians detained without Trial by Israel’ (2012) 1-45.

²⁷⁶ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 53.

²⁷⁷ Kretzmer D *Occupation of Justice, The: Supreme Court of Israel and the Occupied Territories* (2002) 148.

Relevant to the discussion of house demolitions is a 1982 case in which a boy, aged 16, had been accused of throwing stones, only to find that his home would be demolished the very next day.²⁷⁸ The following is an account of the events surrounding the demolition of the family's home by the boy's father, George Mickael Comsieh:

'On 14 November 1982, at 2:00 a.m., a number of Israeli Soldiers rushed into our house and began to search. They did not find anything. They then said that they wanted my son Waleed who is a 16-year-old school student. They took him with them to the police station in Jerusalem [known as] the Russian compound. The following night, we were surprised to see a large number of Israeli soldiers enter the house with an army officer. The officer told me to listen and began reading an order, which stated that they wanted to abolish our house because our son, Waleed, had been accused of throwing stones at an Israeli patrol. We were given 30 minutes to evacuate our house. We were surprised and could not do much in half an hour, as most of the family was still asleep. The soldiers began throwing some the furniture out of the house causing a lot of it to break. The rest of the furniture remained in the house. The soldiers placed explosives and blew up the house. So, in a few minutes, my house, which was 14 metres by 14 metres with two floors, and on each floor there were four nice rooms, a sitting room, a veranda, a bathroom and a kitchen, had been destroyed. This quick action did not give us the opportunity to ask the injunction at the High Court of Justice. I believe this action is against any human law. This house does not belong to my son but is my property, and now the whole family is in need of a home to live in.²⁷⁹

Following the demolition of the home, the military governor granted permission for the rebuilding of Mr. Comsieh's home. The family stayed in a tent as a result of the demolition, which after gaining much publicity was subsequently burned down. The son was tried and convicted of throwing petrol bombs and sentenced to three and a half years in prison. The case of Mr. Comsieh and his family illustrates that this method of punishment is in contravention of Art 33 of the Fourth Geneva Convention in its prohibition of collective punishment. Furthermore, there is the fact that 'no

²⁷⁸ President A. Barack (2005) Petition for Order Nisi and Interlocutory order, High Court of Justice. (the original case cannot be allocated).

²⁷⁹ President A. Barack (2005) Petition for Order Nisi and Interlocutory order, High Court of Justice. (the original case cannot be allocated).

protected person may be punished for an offence he or she has not personally committed'.²⁸⁰

Following mass house demolitions, a petition was brought before the HCJ on 14 June 2005 by human rights organizations and Palestinian residents.²⁸¹ The petition was aimed at bringing to an end the demolition of homes in the areas of Judea, Samaria, and the Gaza Strip. The petitioners argued that Art 53 of the Fourth Geneva Convention and Art 23(g) of The Hague Regulations had been contravened by the military. The respondents²⁸² requested that the petition be ignored. Their argument was based on the fact that the petition is 'general' and ignores the security circumstances within the areas, and that the areas under discussion are fuelled by hostilities and therefore require the methods used by the armed forces. Furthermore, they stated that it is not within the jurisdiction of the Court to determine which methods are used to defuse hostilities. The respondents further stated that the IDF takes necessary steps to respect the principle of proportionality, taking care that the civilians have left the premises before demolition takes place. A practice that is based on the cessation of hostilities by Israel at the conference of 8 February 2005 in Sharm el-sheikh in which the Prime Minister stated that Israel would stop its military activity against the Palestinians in every place the petition was regarded as moot.²⁸³

5.2.2.1 Demolition as a Means to Colonisation

It has been argued that the demolition of homes has been a direct result of Israel's wish to increase its settlements within the West Bank. This policy has been accepted by all Israeli administrations after 1967.²⁸⁴ Evidence of Israel's wish to increase settlements is the fact that in 1967 only 250 Jewish settlements had been constructed within the West Bank and were only found within Nablus. This number has increased to over 300, 000 and has now spread throughout the West Bank. It is unofficially noted that since occupation began land confiscation in the West Bank amounted to: 41 per cent in 1984, 60 per cent in 1991, and 71 per cent in 1998. Today, as a result of

²⁸⁰ General Assembly (1949) Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, Art 33.

²⁸¹ President A. Barack (2005) Petition for Order Nisi and Interlocutory order, High Court of Justice.

²⁸² DF OC Southern Command, Dan Harel, IDF OC Central Command, Moshe Kaplinsky IDF Chief of Staff, Moshe Ya'alon the Minister of Defence, Shaul Mofaz, and The Prime Minister, Ariel Sharon.

²⁸³ President A. Barack (2005) Petition for Order Nisi and Interlocutory order, High Court of Justice.

²⁸⁴ Aronson G 'Settlement Monitor' (2002) 31 *Journal of Palestinian Studies* 124.

limited space it has been found that the area allotted for the expansion of settlements is decreasing. Since the 1970s the Israeli military authorities have posted notices in the Arabic press announcing the preparation of plans with an opportunity to object. With the exclusion of exceptional cases, no objections by Palestinians have been successful. This process of the annexation of land by the Israeli government is referred to by the World Zionist Organization as 'seizure' of land.²⁸⁵

In a much more obvious manner the Israeli government has barred Palestinians from what is regarded as 'state' land, thereby depriving Palestinians of large portions of the West Bank. State land may only be rented or built upon by one of the following categories: an Israeli citizen; one who has immigrated (to Israel) under the (Israeli) law of return; one who is entitled to the status of immigration under the law of return; and a company controlled by the mentioned categories. Those outside the scope of this definition are referred to as 'alien persons'. It has therefore become apparent from the mere siting of a bulldozer on Palestinian property that land confiscation has taken place. These actions are carried despite the fact that Palestinians have owned the land and homes for generations. Residents therefore reside within their villages and homes under the impression that they are the rightful owners of the land.²⁸⁶

Furthermore, it is found that the reason for the demolition of a home occurs in the absence of a building permit for the construction of the home. The general procedure, which has remained unchanged for the past 20 years, by which permits are granted, is said to have resulted in the current situation. It has been found that from the Oslo talks until 2006 not a single permit in area C has been granted.²⁸⁷ As a result of the constant demolition of homes it has been recorded that approximately 14 500 people have been left homeless since 1987, of whom 6 000 are children. A further 5 000, 2 000 of whom are children, have been rendered homeless since Oslo II.²⁸⁸

²⁸⁵ Qumseih V 'The Environmental Impact of Jewish Settlements in the West Bank ' (1998) 5 *Palestinian-Israel Journal* 1.

²⁸⁶ Playfair E *International Law And The Administration Of Occupied Territories: Two Decades Of Israeli Occupation Of The West Bank And Gaza Strip* (1992) 250.

²⁸⁷ 'Demolition and Dispossession: the Deconstruction of Palestinian Homes' *Le Monde diplomatique* Available at <http://www.monde-diplomatique.fr/cahier/proche-orient/colonies-3> (accessed 10 October 2013).

²⁸⁸ 'Demolition and Dispossession: the Deconstruction of Palestinian Homes' *Le Monde diplomatique* Available at <http://www.monde-diplomatique.fr/cahier/proche-orient/colonies-3> (accessed 10 October 2013).

The demolition of homes in the Occupied Palestinian Territories has been found to be in contravention of the provisions of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to housing being a basic need of each individual, is central to the enjoyment of other human rights enshrined in Art 11(1) of the ICESCR which states:

‘The State Parties to the Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.²⁸⁹ The authorities will take appropriate steps to ensure the realization of this right. Recognizing to this effect the essential importance of international co-operation based on free consent.’

This provision therefore emphasizes the fact that the right to have access to one’s home draws on the notion of living in a secure, peaceful and dignified establishment. Furthermore, the exclusion of Israeli Jews from the practice of house demolitions calls to attention the provision of Arts 2(1) and 26 of the ICCPR²⁹⁰ and Art 2(2) of the ICESCR.²⁹¹

These provisions provide that no individual should be discriminated against based on among other things: race, language, religion, political opinion, and social origin. This is emphasized in Art 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which stipulates that each individual enjoys the right to economic, social, and cultural rights, and in particular the right to housing.²⁹² The UN Committee on the Elimination of Racial Discrimination (CERD) formally announced the violation of the right to housing in March 1998 when it called for the “... halt to the demolition of Arab properties in East Jerusalem and for respect for property rights irrespective of the ethnic origin of the owner”,²⁹³ and expressed

²⁸⁹ International; Covenant on Economic, Social and Cultural Rights (1966) Art 11(1).

²⁹⁰ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Arts 2 (1) and 26.

²⁹¹ International; Covenant on Economic, Social and Cultural Rights (1966) Art 2(2).

²⁹² International Convention on the Elimination of All Forms of Racial Discrimination (1965) Art 5(e)(iii).

²⁹³ UN Committee On The Elimination Of Racial Discrimination ‘Concluding Observations Of The Committee On The Elimination Of Racial Discrimination: Israel’ (1998) C (11).

concern "... about ethnic inequalities, particularly those centering upon what are known as "unrecognized" Arab villages [in Israel]."²⁹⁴

5.2.3 Restricted Access to Basic Needs

The process of land occupancy by the state of Israel has not only involved the appropriation of land, but has included the appropriation of the water resources of Palestine. These water resources are then deemed for use exclusively by Jewish settlers.²⁹⁵ This has been emphasized in 1987 by the State Comptroller of the Israeli government.²⁹⁶ The report stated that the Jewish water company, Mekorot, has drilled more than 40 deep-bore wells per year, pumping approximately 42 million cubic meters from the West Bank water supplies. Furthermore, it has been found that Israeli water wells are being constructed close to springs. This practice is not in conformity with the Jordanian water authority regulations as the springs act as irrigation for Palestinian agricultural land. The effect is evident in the northern areas of the Jordan valley in Bardala and 'Ain El-Beida, in which all the springs belonging to Palestinian farmers have dried up. The farmers as result have suffered great loss. Mekorot agreed to supply the farmers with limited water, which left the farmers dependent on Israeli water supplies.²⁹⁷

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As a clear means to control the supply of water within the West Bank, Israel's water commissioner stated in 1981 that the West Bank consumption for use by Palestinians will not exceed 100 million cubic meters annually. It has been estimated that by the year 1992 Israel had extracted its need of 1.8 million cubic meters of water annually from the West Bank's underground water supply. This water would then be sent to Israeli settlements within the Palestinian borders, as well as Israel proper.²⁹⁸

²⁹⁴ UN Committee On The Elimination Of Racial Discrimination 'Concluding Observations Of The Committee On The Elimination Of Racial Discrimination: Israel' (1998) D (19).

²⁹⁵ Marei A, Abu-Kishk's 'Review of Water Legislation from the Pre-British Mandate Period through the Israeli Occupation' (2014) 20 *Palestine-Israel Journal of Politics, Economics and Culture* 1.

²⁹⁶ Playfair E *International Law And The Administration Of Occupied Territories: Two Decades Of Israeli Occupation Of The West Bank And Gaza Strip* (1992) 250.

²⁹⁷ Playfair E *International Law And The Administration Of Occupied Territories: Two Decades Of Israeli Occupation Of The West Bank And Gaza Strip* (1992) 252.

²⁹⁸ Playfair E *International Law And The Administration Of Occupied Territories: Two Decades Of Israeli Occupation Of The West Bank And Gaza Strip* (1992) 252-254.

5.2.4 Torture

With regards to interrogation methods, the Israeli Shin Bet was permitted to make use of “moderate physical pressure” until 1999.²⁹⁹ The interrogation methods included binding prisoners in painful positions for a number of days so as to deprive him/her of sleep, playing loud music, and feeding the detainee insufficient quantities of food, to name but a few.³⁰⁰ The United Nations Committee against Torture (CAT) subsequently highlighted in 1997 that these actions were in violation of the CAT, which Israel ratified in 1991. This was again emphasized in September 1999, when Israel’s High Court ruled that the Israeli Security Agency (ISA) did not have legal authority to use physical means of interrogation that are not “reasonable and fair”. Such treatment may cause the detainee physical and mental suffering. The ruling came after 50 years of torture of Palestinian prisoners at the hands of Israeli authorities.³⁰¹ Though the ruling makes clear the illegality of torture, there is evidence that torture, both physical and psychological, has taken place. With new forms of torture being used, Israeli authorities justify their actions. These new interrogative measures have been used by Israel’s General Security Service (GSS) in order to extract information. Since 1987, the GSS has interrogated over 850 Palestinians by means of torture, under the authority of both the army and the Supreme Court, which have approved, developed and supervised the torture.³⁰²

As acts of solidarity and protest alike, hunger strikes were used as a means to address the treatment of prisoners. The most recent of these is the strike by Khader Adnan, who after being detained on 17 December 2011 embarked on a hunger strike against his alleged violent arrest. Adnan was subsequently released in April 2012 after fasting for 66 days. The demands of the protestors included: visits by family members, the release of extended solitary confinement inmates, and the release of those held under

²⁹⁹ Ziv H ‘Physicians and Torture- The Case of Israel’ (no year) 10-13.

³⁰⁰ Silver C’s ‘Israeli High Court Decision Enables Widespread torture of Palestinian Detainees’ Available at <http://electronicintifada.net/blogs/charlotte-silver/israeli-high-court-decision-enables-widespread-torture-palestinian-detainees> (accessed June 2014).

³⁰¹ Falah GW ‘Geography Intersection with Interrogation and Torture: Reflections on Detention in Israel’ (2008) 29 *Third World Quarterly* 749-766.

³⁰² Amnesty International ‘Starved of Justice: Palestinians detained without Trial by Israel’ (2012) 27.

administrative detention laws.³⁰³ These demands prove the absence of the basic rights of prisoners held within Israeli prisons.

5.2.4.1 Restricted Access to Basic Needs as a Means of Torture

The definition of torture is found in Art 1 of the UN CAT:

‘Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’³⁰⁴

The ICCPR bans completely any act that is degrading and inhumane.³⁰⁵ Whilst the UNDHR of 1975 defines torture as ‘an aggravated form of cruel inhumane or degrading treatment’.³⁰⁶

With regard to IHL the inflicted suffering does not have to be administered or instructed by an official.³⁰⁷ The action may therefore be done by/through an individual. Furthermore, the use of the word ‘act’ in this circumstance does not only entail physical actions but may also include the absence of action, or inaction. An example of this may be the forcible starvation of a population or individual. The term ‘psychological torture’ may therefore relate to different aspects of the same act. It may, therefore, refer to methods used to inflict physical pain and suffering, as well as methods that are non-physical in nature but affect the mind of the individual. Non-physical methods may include sleep deprivation, sensory deprivation, or witnessing

³⁰³ Amnesty International ‘Starved of Justice: Palestinians detained without Trial by Israel’ (2012) 27-29.

³⁰⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) Art 1.

³⁰⁵ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 7.

³⁰⁶ Universal Declaration of Human Rights (1948) Art 5.

³⁰⁷ Dugard J Bridging the Gap between Human Rights and Humanitarian Law: The Punishment of Offenders (1998) *International Review of the Red Cross* 324-448.

the torture of loved ones. The methods used by the state of Israel in its quest for settlements within the Occupied Territories therefore amount to acts of torture.³⁰⁸

5.2.5 The Construction of the Wall

Since the beginning of the Israeli occupation of Palestinian territory, the government of Israel has attempted through various techniques to control and manage the movement of both Arabs and Jews. The most notable technique to date is the construction of a separation barrier that began in 2002. The barrier, described as an 8m high fence, is meant to separate Israel proper from the West Bank. To Jews the wall is referred to as 'Geder HaHafrada' which means 'security fence', whilst Arabs refer to the barrier as 'Jidar al-fasl al-unsun' which means 'racial segregation wall'. Internationally critics of the wall have commonly referred to the wall as the 'apartheid wall'.

Approximately 95 per cent of the structure of the wall consists of three layers of fence, two of which are mounted with barbed wire, the third lightly wired with intrusion detection technology. Either side of the fence is lined with patrol roads. The West Bank side of the fence has an anti-vehicle ditch.³⁰⁹ The rest of the wall, approximately 5 per cent, consists of concrete slabs, which are 8m high and 3m wide.³¹⁰ The distance of the wall is expected to be at least 650km: the barrier is therefore planned to be four times as long and in certain areas twice as high as the Berlin Wall. These concrete walls are mostly found in urban areas, requiring less land, and because of the vulnerability of the area.³¹¹ The Israeli forces control access points along the wall and the fencing. Beyond the fencing the areas surrounding the wall are monitored by thermal imaging and video cameras, 'unmanned aerial vehicles', and sniper towers.³¹²

³⁰⁸ Reyes H 'The Worst Scars are in the Mind: Psychological Torture' 89 (2007) *International Review of the Red Cross* 598-600.

³⁰⁹ Middle East Monitor 'Israel's Separation Wall- the Death of Palestinian Statehood' Available at https://www.middleeastmonitor.com/Art_s/guest-writers/2306-israels-separation-wall-the-death-of-palestinian-statehood (accessed 8 January 2014). (Refer to Appendices 3 and 4)

³¹⁰ Middle East Monitor 'Israel's Separation Wall- the Death of Palestinian Statehood' Available at https://www.middleeastmonitor.com/Art_s/guest-writers/2306-israels-separation-wall-the-death-of-palestinian-statehood (accessed 8 January 2014). (Refer to Appendix 5)

³¹¹ The Electronic Intifada Available at <http://electronicintifada.net/content/it-fence-it-wall-no-its-separation-barrier/4715> (accessed 8 January 2014). (Refer to Appendix 6)

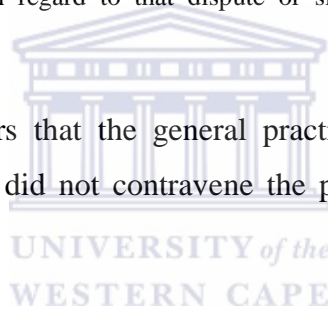
³¹² The Electronic Intifada Available at <http://electronicintifada.net/content/it-fence-it-wall-no-its-separation-barrier/4715> (accessed 8 January 2014). (Refer to Appendix 7)

5.2.5.1 The ICJ's Advisory Opinion on the Construction of the Wall

The in terms of Art 65(1) of its Statute may provide an advisory opinion. This is carried out in light of Art 96(1) of the Charter of UN that provides that the General Assembly may request the ICJ to give an advisory opinion on any legal question. The question of the construction of the wall in the Occupied Palestinian Territories was brought before the Court by the Member States under Resolution ES-10/2 of 25 April 1997. The request relates to issues that constitute a threat to international peace and security. Israel has however questioned the jurisdiction of the General Assembly. Furthermore, it asserted that the body acted *ultra vires*, and is therefore in violation of Art 12(1) that states:

‘While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.’³¹³

The Court however considers that the general practice of the General Assembly seeking an advisory opinion did not contravene the provisions of Art 12(1) of the Charter.³¹⁴



The Court conceded to use the term ‘wall’ since the terms fence and barrier are no longer accurate in the physical sense. The extent of the wall to be examined is inclusive of both the Occupied Palestinian Territories and the area of East Jerusalem in relation to the demarcated area called the Green Line. The court asserts that the laws that govern the conflict include: the United Nations Charter, General Assembly Resolution 2625 (XX25), IHL, and human rights law. The Court holds that Art 2 (4) of the UN Charter includes the actions of Israel in the construction of the wall. Art 2(4) states that:

‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.’³¹⁵

³¹³ UN Charter of the United Nations (1945) Art 12(1).

³¹⁴ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

³¹⁵ Charter of the United Nations (1945) Art 2(1).

Furthermore, Resolution 2625 (XXV) emphasizes the notion of friendly relations and co-operation between states, subsequently, stating that:

‘No territorial acquisition resulting from the threat or use of force shall be recognized as legal’.³¹⁶

With regard to IHL the Court acknowledges the fact that Israel is not party to the Hague Regulations. The Court does however note that the Hague Regulations have been defined as customary international law. The Court also asserts the fact that Art 154 of the Fourth Geneva Convention is supplementary to SS ii and iii of the Hague Regulations. Though Israel has ratified the Fourth Geneva Convention in 1951, Israel continues to object to the applicability *de jure* of the Convention to the Occupied Palestinian Territories. Israeli authorities assert that the Art 2 of the Fourth Geneva Convention is only applicable if two high contracting parties engage in conflict, further noting that on the occupation of Palestinian territory in 1967 Jordan was not in authority over the territory. The Court continued to assert that IHL is applicable in accordance with Art 2 of the Fourth Geneva Convention. With regard to IHRL, Israeli authorities assert that both the ICCPR and ICESCR do not apply in a conflict situation, furthermore, indicating that human rights treaties were established in an attempt to protect citizens from their own governments in times of peace.³¹⁷ In a separate opinion Judge Buergenthal concludes that the Court’s findings that establish Israel as having violated IHL and IHRL are not sufficiently supported.³¹⁸

In contrast the Court found, in consideration of a previous case, that the protection of IHRL does not cease in times of war. This is based on Art 4 of the ICCPR that addresses non-derogable rights.³¹⁹ The Court therefore stipulates that though there may exist situations that are purely matters of IHL or purely matters of IHRL. There are however situations which require both the assistance of international humanitarian and international human rights bodies. The Court concluded that the ICCPR and ICERSR are applicable to actions of a state acting against individuals outside of its

³¹⁶ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, 1970, In General Assembly Resolution 2625 (XXV) (1970).

³¹⁷ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

³¹⁸ ICJ Buergenthal S, declaration of Judge Buergenthal 243-244.

³¹⁹ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 4.

territory.³²⁰ The Court held, by 13 votes to 1, that *erga omnes* all states are responsible to respect to international law. States are consequently responsible for the protection of IHL within the Occupied Palestinian Territories.³²¹

The Court found that the construction of the wall is an attempt to annex territory contrary to the set boundaries of 1967. This annexation of the land threatens the territorial sovereignty and self-determination of those boundaries.³²² Israel has argued that the construction of the wall is for the purpose of protecting the territory of Israel proper from terrorist attacks that are launched from the West Bank, furthermore, asserted that the barrier is of a temporary nature, though not stipulating the time period for its existence. The Court however emphasized that the acquisition of land by means of force is a violation of IHL. In addition, the Court takes due recognition of Israel's acceptance of a Palestinian people, consequently, acknowledging the right to self-determination of the Palestinian people. The Court notes that the wall is structured in such a manner as to include the majority of the settlement areas. This conclusion indicates that the occupying power is in contravention of Art 49(6) of the Fourth Geneva Convention.³²³ Despite the fact the Israeli forces have indicated that the barrier is of a temporary measure, the Court has asserted that the construction and the regime create a *fait accompli* since it may in future become a fixed structure.³²⁴

The construction of the wall creates areas between itself and the Green Line that has resulted in enclaves. These enclaves have proven to inhibit the movement of the inhabitants of the Occupied Palestinian Territories, and secondly, affected the agricultural sector, access to healthcare, access to education, and access to water. The construction of the wall also restricts the 'freedom to choose residence'. The continued construction of the wall will force Palestinians to depart from their areas of residence in an attempt not to be separated from their families. This migration may

³²⁰ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

³²¹ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

³²² Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

³²³ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 49(6).

³²⁴ International Court of Justice Request for an Advisory Opinion from the 10th Emergency Special Session of the United Nations General Assembly on *the legal consequences arising from the construction of the wall being built by Israel*. Written Statement of the Government of Israel on Jurisdiction and Propriety (2004).

result in an increase in Israeli settlement development. The Court therefore held that the construction of the wall impedes the freedom of movement of the inhabitants of the Occupied Palestinian Territories.³²⁵

Furthermore, the construction of the wall impedes the rights to work, to healthcare, to education, and to an adequate standard of living as stipulated by both the ICESCR and the United Nations Convention on the Rights of the Child. The Court concludes that the demographic changes as a result of the construction of the wall contravene Art 49(6).³²⁶ Consequently, the construction may be assessed as not ‘rendered absolutely necessary by military operations’. Importantly, the Court notes that in acknowledging non-derogable rights, it finds that Israel by the construction of the wall did not respect the conditions as set forth by the derogable rights.³²⁷

With regard to the path of the wall, it is indicated by the Court that it is not of absolute necessity to Israel’s security objectives. The route infringes on the rights of those residing within the Occupied Palestinian Territories. Though Israel invokes Art 51 of the Charter of the United Nations, it does not constitute an adequate basis for the construction, since the threat stems from inside and not outside of its territories due to Israel’s control of the territory.³²⁸

In a separate opinion, Judge Higgins notes that while he agrees that the Art 53 of the Fourth Geneva Convention is being violated by Israel with the construction of the wall, the Judge does not agree on the reasoning of the Court, asserting that the wall does not constitute a ‘serious impediment’ to the exercise of the Palestinian right to self-determination.³²⁹

³²⁵ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 12.

³²⁶ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 49(6).

³²⁷ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

³²⁸ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

³²⁹ ICJ Higgins OP, Declaration of Judge Higgins 207-215.

5.2.5.2 Israel's Justification for the Wall

In a written statement to the ICJ in January 2004, the government of Israel relayed its justification for the construction of the separation barrier.³³⁰ The statement begins by stating that the situation within Israel is one in which the territory of Israel proper is faced with ongoing terrorist threats. The cases cited is the 'Park Hotel attack' in the town of Netanya in March of 2002 in which 30 people were killed and 145 were injured as a result of a suicide bombing by an individual from Tulkarem. Furthermore, there is the citing of 37 separate attacks in the same month of 2002 in which 135 individuals were killed and 721 injured. The Israeli government asserts that with the increased security measures the number of attacks have declined, but have not stopped. This assertion made by Israeli authorities is based on a case in October 2003 in which two families lost five family members each to a suicide bomber whilst dining at a restaurant in Haifa. A second case cited is a case where a woman stated that she was ill and had a prosthetic limb, and evaded Israeli security only to detonate a bomb that killed four Israelis. The statement furthermore asserts that in the 40 months prior to the request for an advisory opinion, in total, suicide attacks by Palestinians have resulted in the death of 916 people and the injury to 5 000.³³¹

These actions by the Palestinian people are purported by the Israeli government to be acts of terrorism. As proof, Israeli authorities cite Security Council Resolution 1373 (2001) in which acts of terrorism constitute a threat to international peace and security. Further, stating that the Resolution calls on all to denote acts of violence by refraining from 'organizing, instigating, assisting and participating in terrorist acts'. The Israeli government asserts that the PLO, Fatah, and Al-Aqsa Martyrs Brigades have been behind many of the attacks, yet the ICJ at the request of the PLO is questioning the government of Israel.³³² The state of Israel therefore asserts that the construction of the barrier is for the purpose of security, and is consistent with Art 51 of the UN Charter as well as Security Council Resolutions 1368 (2001) and 1373

³³⁰ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

³³¹ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

³³² International Court of Justice Request for an Advisory Opinion from the 10th Emergency Special Session of the United Nations General Assembly on "the legal consequences arising from the construction of the wall being built by Israel" Written Statement of the Government of Israel on Jurisdiction and Propriety (2004).

(2001) which rule that it is the inherent right of a state to defend itself. The barrier constituted a non-violent method of defence.³³³ The Israeli government subsequently affirms that the barrier is not for the purpose of affecting the political diaspora with regard to the borders of the various territories. The authorities further indicate that the fence is of a temporary nature, which in light of a peace agreement will be removed, citing the removal of fences on its borders with Egypt, Jordan and Lebanon as examples.³³⁴

The assertion of self-defence is supported by Judge Buergenthal who states that the Court's conclusion on the construction of the wall is not well supported. The Judge finds that Israel's continued need to protect itself from threats originating from within the Occupied Territories must be deemed to meet the requirements of Art 51 of the UN Charter.³³⁵

5.2.5.3 Psychological Effects of the Wall

The annexation of Palestinian land by the government of Israel evokes a sense of citizenship without its benefits, the Palestinian people having to unwillingly let go of their legal rights to property and land. The land in many instances is the economic source of sustenance. The annexation of land results in numerous changes affecting the quality of the lives of the Palestinian people. One such change is the psychological effects it may induce on a community level. In the first instance it is found that individuals, confined to their homes, within the confines of the family are excluded from the use of social support systems. On a second level, the individual is deprived of the support mechanism which their community provides through the annexation of the various areas. This reality has resulted in the division of communities; one section from the other. As a result of land annexation it was found in the area of Qalqiliya that many residents departed from the area back to their native village of Ras al-Tira

³³³ Iain S 'Smoke, Mirrors and Killer Whales: the International

Court's Opinion on the Israeli Barrier Wall' (2004) 5 *European Journal of International Law* 1113.

³³⁴ International Court of Justice Request for an Advisory Opinion from the 10th Emergency Special Session of the United Nations General Assembly on "the legal consequences arising from the construction of the wall being built by Israel" Written Statement of the Government of Israel on Jurisdiction and Propriety (2004).

³³⁵ ICJ Buergenthal S, Declaration of Judge Buergenthal 243.

in an attempt to retain ownership of their land,³³⁶ This is due to the fact that the Israeli authorities in the absence of an owner on a piece of land may deem the land 'state property'. The native villages are generally departed by villages in search of economic freedom. It is therefore economically taxing on the individual to return to a land which holds no prospects of a future. As a consequence the rate of unemployment and poverty increases.³³⁷

The border of the Ras al-Tira is surrounded by an electric fence that is opened at scheduled times. The school which is attended by children within Ras-al-Tira is based on the outskirts of the fence. Children attending the school, both enroute to school and returning home, therefore need to be on time for the scheduled opening of the gate. Students are consequently forced to miss school. As a result the rate of absenteeism increases the illiteracy levels, and also a sense of powerlessness is created by establishing a situation in which students stop attending school so as not to have to deal with the checkpoints.³³⁸

Between 2000 and 2004 the residents within the economy of Qalqilya increased their dependency on agriculture from 22 per cent to 45 per cent.³³⁹ This changed due to the lack of commercial goods being imported as well as the inability to travel beyond the wall. As a consequence, the confiscation of land by Israel makes it increasingly impossible for Palestinians to fend for their families, for those who own land on the outside of the fence find it difficult to access their land. Those who move back to their villages and harvest crops, subsequently find that the trading of their goods is made difficult through the various stringent laws. The area of Qalqilya acts as an example for the state of the Palestinian business centres.³⁴⁰ Having been the market centre for over 85 000 Palestinians from the West Bank and Israel per week, the market in 2004

³³⁶ Palestinian Counseling Centre 'The Psychological Implications of Israel's Separation Wall on Palestinians' Available at <http://electronicintifada.net/content/psychological-implications-israelis-separation-wall-palestinians/1538> (accessed 7 January 2014).

³³⁷ Makhool B, Abu-Qaud H, Nazal M 'The Economics of Agriculture in the Qalqiya and Tulkarem Districts: Improving the Profitability of Farmers Affected by the Separation Wall' *Palestinian Economic Policy Research Institute* (2005).

³³⁸ Abdul-Rahman M 'Impact of the Israeli Occupation on Palestinian Education' 18th Annual Conference of the Global Awareness Society International (2009).

³³⁹ Palestinian Counseling Centre 'The Psychological Implications of Israel's Separation Wall on Palestinians' Available at <http://electronicintifada.net/content/psychological-implications-israelis-separation-wall-palestinians/1538> (accessed 7 January 2014).

³⁴⁰ Makhool B, Abu-Qaud H, Nazal M 'The Economics of Agriculture in the Qalqiya and Tulkarem Districts: Improving the Profitability of Farmers Affected by the Separation Wall' *Palestinian Economic Policy Research Institute* (2005).

was under threat of closure, as a result of merchants moving to villages with the construction of the wall. It was found that between 2002 and 2004 4500 residents left the area of Qalqilya for better conditions. The study conducted on Qalqilya showed the unemployment among those who were able to work to be 72 per cent. The situation within Qalqilyah has been dubbed 'ghettoization', since it is ridden with poverty and displacement.³⁴¹ This discription of 'ghettoization' is based on the definition of the phenomenon by Walter Thabit:

'As a location designed to house, contain, and thin out entire groups of people deemed unwanted and parasitic by the powers that be, by isolating the people and giving them no jobs, education, and hope to move forward in life. Thabit also states 'ghettos are created by the apartheid policies of white society.'³⁴²

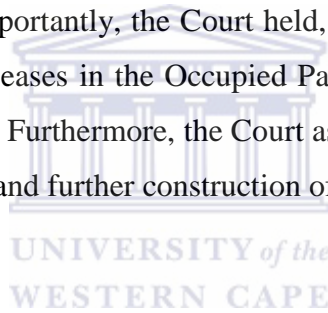
This definition rings true to the situation in Palestine in which residents are placed in dire circumstances not by poverty but rather as a result of policies enforced by the Israeli authorities. The closures and curfews create a sense of frustration, anger and insecurity, thus restricting the social and psychological advancement of people living under these circumstances. As a consequence, the rate of depression, suicide, and disassociation increases. Individuals are therefore only concerned with survival. This was displayed in a study conducted by the Palestinian Counselling Centre in 2003. The study surveyed 44 adult Palestinians aged 20-55 residing within the district of Qalqilya. The answers to the study identified five mental health issues: depression; anxiety; PTSD; somatization; and coping skills. Furthermore, it was found that much of the distress experienced is a result of the sense of being forgotten by the rest of the world, their problems unnoticed. A further 92 per cent indicated a sense of hopelessness for the future, whilst 52 per cent of the individuals wanted to end their lives. A further 91 per cent of the respondents indicated that they experience flashbacks of memory. Of those tested, 87 per cent of the respondents indicated that they experience headaches, whilst 82 per cent feel constant numbness and tingling feelings. Of the respondents, 70 per cent stated that they sometimes or always

³⁴¹ Palestinian Counseling Centre 'The Psychological Implications of Israelis Separation Wall on Palestinians' Available at <http://electronicintifada.net/content/psychological-implications-israelis-separation-wall-palestinians/1538> (accessed 7 January 2014).

³⁴² Palestinian Counseling Centre 'The Psychological Implications of Israelis Separation Wall on Palestinians' Available at <http://electronicintifada.net/content/psychological-implications-israelis-separation-wall-palestinians/1538> (accessed 7 January 2014).

experience trouble breathing, including heart and chest pains. Importantly, 81 per cent indicated that they sometimes or always feel helpless to the destruction of their property.³⁴³

The findings of the Court prove that the occupation by Israel is contrary to IHL and IHRL. Those residing within the Occupied Palestinian Territories do not have adequate access to: legal assistance; housing; healthcare; education; and water. Consequent to the construction of the wall, access to these basic human rights is further limited. The Court therefore concluded, by 14 votes to one, that the construction of the wall is contrary to international law. In addition, the Court asserts that reparations must as far as possible improve the consequences of the wall.³⁴⁴ Israel is therefore obligated to return the olive groves, land, and other immovable property seized as a result of the construction of the wall within the Occupied Territories. Consequently, Israel bears the responsibility to compensate any person who had suffered material damage. Importantly, the Court held, again by 14 votes to one, that the construction of the wall ceases in the Occupied Palestinian Territories, including in and around East Jerusalem. Furthermore, the Court asserted that all states recognize the illegality of the existence and further construction of the wall.³⁴⁵



³⁴³ Palestinian Counseling Centre 'The Psychological Implications of Israel's Separation Wall on Palestinians' Available at <http://electronicintifada.net/content/psychological-implications-israels-separation-wall-palestinians/1538> (accessed 7 January 2014).

³⁴⁴ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

³⁴⁵ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 131.

5.3 Conclusion

After close analysis of the IHL violations within the Occupied Palestinian Territories it is evident that the rights of the occupied have not been respected. Actions against civilians and civilian objects include of illegal arrests, illegal arrests of minors, prolonged periods of detention, demolition of homes, restricted access to basic needs, and torture. Furthermore, the construction of the separation wall places stringent limits on the residents within the Occupied Palestinian Territories and has proven to result in the collapse of social structures.³⁴⁶ Importantly, the continued actions carried out against civilians within the Occupied Territories have resulted in severe psychological problems.

The final chapter will conclude the previous five chapters and will provide recommendations aimed at alleviating the affects of the conflict and achieving lasting peace.



³⁴⁶ Palestinian Counseling Centre 'The Psychological Implications of Israelis Separation Wall on Palestinians' Available at <http://electronicintifada.net/content/psychological-implications-israels-separation-wall-palestinians/1538> (accessed 7 January 2014).

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

This mini-thesis sought to establish that IHL violations have occurred within the Occupied Palestinian Territories during the years 1982-2012. Furthermore, the UN and its respective organs, the ICRC and the international community at large have not fulfilled their duty to protect the rights of the civilians caught within the international conflict between Israeli and Palestinian Forces. This mini-thesis concludes that IHL violations have occurred within the Occupied Palestinian Territories.

With the partition and subsequent occupation violating the IHL of Palestine in the territories of the West Bank and the Gaza Strip, numerous conflicts have occurred. With regards to the international bodies obligated to managing the implementation of IHL, it is evident that insufficient steps have been taken to protect civilian lives. The ICRC, though it has managed to address the various concerns within the Occupied Territories, has not been successful in the implementation of IHL regulations. Due to limited access to resources within the Occupied Palestinian Territories, the ICRC has been unable to assure that adequate medical supplies and healthcare is available. Furthermore, the UN, in its attempt to restore respect for the safety of civilians with the establishment of Resolution 181(1), Resolution 242, and the Oslo Accords has not made any advance in establishing respect for IHL in the Occupied Palestinian Territories. Resolution 181(1), in its attempt to establish a two state solution, has to date not been realized. Consequently, the right to freedom of 'transit' and 'visit', and freedom from discrimination based on 'race, religion, and language' has been violated. The principle of self-determination advocated for within Resolution 181(1) has therefore been violated.³⁴⁷

Secondly, Resolution 242, which advocates the inadmissibility of the acquisition of territory through war, has not been respected. Furthermore, the increased construction of settlements within the Occupied Palestinian Territories violates the essence of this

³⁴⁷ Resolution 181 on the Future Government of Palestine, 1947, General Assembly Resolution 181 (1947).

Resolution. Additionally, the acquisition of territory threatens the political independence of civilians residing within the Occupied Palestinian Territories. The state of 'belligerency' in its continued existence and rule over the Occupied Palestinian Territories has not been dismantled violating the terms of Resolution 242.³⁴⁸ Thirdly, the terms of the Oslo Accords, though partially fulfilled with the handing over of the Gaza Strip to Palestinian authorities, have not been respected in their entirety. The basic amenities are therefore not accessible by the citizens of the Gaza Strip and the West Bank. Furthermore, the continued construction of settlements within Occupied Palestinian Territories is contrary to the terms of the Oslo Accords.

The duties of the occupier relative to the protection of civilians in time of war have not been fulfilled.³⁴⁹ The improvement of the medical, education, and hygiene sectors is not adequate. Importantly, in an attempt to sanction Hamas, access to food supplies has been directly controlled by the occupier who only allows a percentage of food into the Gaza Strip. The courts of the occupying power do not support the right to a fair trial. Prisoners therefore generally have no access to members of their families. Furthermore, the protection of IHRL has not been fulfilled. This has been stipulated in the briefing of the ICJ. The illegal arrest of both adults and minors, prolonged periods of detention, the demolition of homes, restricted access to basic needs, torture, and the construction of a separation barrier all violate the laws of IHL.

In its fact-finding mission into the situation in the Gaza Strip, the UN had concluded that Art 5 crimes of the Rome Statute had been committed. Crimes against humanity, stipulated in Art 7, included: persecution and intentionally causing great suffering. It was stipulated that individuals within Palestine are deprived of their sustenance, employment, housing, water, and freedom of movement. In the case of Israel it was found that Palestinian armed groups had fired rockets from the Gaza Strip that constitute 'indiscriminate attacks upon the civilian population of southern Israel'. War crimes (Art 8) included willful killing and torture.³⁵⁰ Evidence of war crimes was found in the targeting of a mosque, the killing of members of the al-Samouni family, the severe treatment and beatings of prisoners, and the attack on and destruction of the

³⁴⁸ Resolution 242, 1967 General assembly Resolution 242 (1967).

³⁴⁹ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949).

³⁵⁰ De Zayas A 'Human Rights and Indefinite Detention' (2005) 87 *International Review of the Red Cross* 18-22.

Gaza Prison and the Palestinian legislative council building. The firing of rockets into southern Israel by Palestinians was considered a war crime as well.³⁵¹

War crimes relative to the Fourth Geneva Convention included collective penalties; attacks against hospitals; and attacks against the civilian population.³⁵² The UN fact-finding mission held that the declaration intending to maintain the blockade of the Gaza Strip until the release of Gilad Shalit made by the Israeli authorities is to be considered a war crime. Furthermore, it concluded that the detention of legislative council, and the attacks against the Grand Mosque (*Masjid al-Quds*), the Al-Wafa hospitals, and the UNRWA compound with the use of white phosphorous were to be considered contraventions of the Fourth Geneva Convention. The UN Fact-Finding Mission clearly demonstrated that Art 5 of the Rome Statute relative to crimes within the jurisdiction of the ICC and the Fourth Geneva Convention had been contravened.³⁵³

6.2 Recommendations

In order to establish lasting peace that will be in favour of all parties to the conflict important measures need to be established. First, the ICC in an attempt to grant Palestinian authorities a voice should recognize the statehood of Palestinians. This would encourage an equal setting for further discussion. Furthermore, the ICRC should be granted adequate access to medical supplies in order to maintain international health standards within the Occupied Palestinian Territories. This should be accompanied by the full support of both Palestinian and Israeli officials. Importantly, a review of arrests of civilians should be established. In respect of international human rights law, adequate attention needs to be given to the basic needs of civilians.

³⁵¹ Mills S's 'The Gaza conflict (2008-09) and the International Criminal Court' Available at <http://israelandpalestinediary.blogspot.com/2012/04/qaza-armed-conflict-2008-09-and.html> (accessed 24 October 2012).

³⁵² Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 64 (1949).

³⁵³ Mills S's 'The Gaza conflict (2008-09) and the International Criminal Court' Available at <http://israelandpalestinediary.blogspot.com/2012/04/qaza-armed-conflict-2008-09-and.html> (accessed 24 October 2012).

6.2.1 Adjusting the Penal Laws of Israel In Order to Respect IHL and IHRL

1. IHL regulating the legal system of occupied territories asserts the notion that the legal system of the occupied territory remains intact. This principle reflects the temporary nature of occupation, as well as amplifying the role of the ‘occupier’ as distinct from ‘sovereign’. The lives of those who reside within the occupied territory should therefore remain unaltered, and remain as it was prior to occupation.³⁵⁴ This is clearly stipulated under Art 64(1) of the Fourth Geneva Convention, which states that ‘the penal laws of the occupied territory shall remain in force’.³⁵⁵ The provision however allows for the ‘suspension’ of the penal laws by the occupying power in cases in which the laws constitute a threat to security or act as an obstacle in the application of the Convention.³⁵⁶ Art 43 of the Hague Regulations echoes this sentiment.³⁵⁷
2. It is therefore apparent that the suspension or repeal of penal laws may only be done in three circumstances: for the application of the Convention; for the maintenance of order; and for the safety of the occupier.³⁵⁸ These conditions may not be used in the oppression of the occupied population. Furthermore, Art 66 of the Convention provides for three requirements for the functioning of military courts. The requirements are as follows: military courts have to be properly constituted; non-political; and should be located within the occupied territory. It is preferred that the court of appeal be situated within the occupied territory.³⁵⁹ It therefore stands to reason that the military courts established by the occupying power are to enforce the law in areas in which the local courts have proven inadequate. The inadequate nature of the local courts in Palestine stem from the fact that the salaries of judges and court officials remain

³⁵⁴ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949).

³⁵⁵ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 64 (1).

³⁵⁶ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 64 (3).

³⁵⁷ Sassoli M Art 43 of The Hague Regulations and Peace Operations in the Twenty-First Century (IHL Mini-thesis, University of Geneva, 2004) 2-4.

³⁵⁸ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 64.

³⁵⁹ Geneva Convention, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) Art 66.

modest, which results in the employment of ‘low’ quality employees. Also, the required number of employees remains inadequate, and thus renders the courts inefficient in dealing with cases promptly.³⁶⁰

3. With the objective of the provision of fair trials, IHL seemingly provides for the alteration of the legal system of occupied territories with the establishment of military courts. However, the use of judges of armed forces who seek promotion under the authority of the occupying power brings into question the impartiality and independence of the judgments passed by these courts.³⁶¹ It should therefore be understood that these courts be used in exceptional circumstances. The United Nations Special Rapporteur on the Independence of Judges and Lawyers has echoed this sentiment, furthermore, asserting that in cases in which civilians are being tried it should be understood that international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice’.³⁶²
4. Though a few provisions exist relative to the trials under military jurisdiction the principle of ‘fair trial’ is notably discussed under the discipline of human rights. The general principles of fair trial proceedings are discussed under Art 14 of the ICCPR³⁶³ and under Arts 7, 8, 9 and 10 of the UDHR.³⁶⁴ Though it is understood that the laws that govern international armed conflict is IHL, the applicability of human rights law has been addressed. This sentiment is emphasised by the Human Rights Committee in its General Comments No’s 29 (2001) and 31 (2004).³⁶⁵ The Committee argues that the ICCPR is applicable in international armed conflict, complementarily to IHL;

³⁶⁰ Shehadeh R *Occupiers Law: Israel and the West Bank* (1988) 80.

³⁶¹ Weill S ‘The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories’ (2007) 89 *International Review of the Red Cross* 395-397.

³⁶² United Nations Special Rapporteur, UN Doc. E/CN.4/1998/39/Add.1 para 78 cited in Federico Andreu-Guzman, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations* 1 International Commission of Jurists/Colombian Commission of Jurists, Geneva, (2004) 10.

³⁶³ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 14.

³⁶⁴ Universal Declaration of Human Rights (1948) Arts 7, 8, 9, and 10.

³⁶⁵ De Zayas A ‘Human Rights and Indefinite Detention’ (2005) 87 *International Review of the Red Cross* 18-22.

importantly, norms of *jus cogens*, or customary international law, prohibiting derogation from certain rights as stipulated by Art 4 of the ICCPR.³⁶⁶

5. Rights that are considered non-derogable include: freedom from torture; freedom from slavery; genocide; racial discrimination; crimes against humanity; and the right to self-determination.³⁶⁷ A state may therefore not arbitrarily arrest or detain individuals, and may not presume a person's guilt without providing the right of a person to prove their innocence.³⁶⁸ Moreover, the issue of torture has been addressed by the CAT. Art 2 specifies that all parties to the Convention are to take all necessary steps in preventing acts of torture. A 'state of war' or 'threat of war', according to the CAT, does not justify any form of torture.³⁶⁹ This emphasises the fact that IHL prevails over any general law deemed *lex specialis*. Human rights law does however remain relevant. The provisions of Art 64 and Art 66 concerning the trials of civilians in military courts in Occupied Palestinian Territories should be understood as prevailing over other rules of human rights. It should therefore be understood that beyond the constraints of warfare the doctrine of human rights law is to be applied. Thus, in principle, civilians under 'normal' circumstances should be tried in civil rather than military courts.³⁷⁰
6. Importantly, the accession of Palestine as a State Party to the ICC on 1 April 2015, emphasises the changing nature of the conflict. The ICC Treaty gave the Court jurisdiction to investigate crimes dating back to 13 June 2002.³⁷¹ These crimes include war crimes and crimes against humanity in or from the Occupied Palestinian Territories. The ICC's jurisdiction will therefore cover 'Operation Protective Edge', consequently shedding light on the extreme

³⁶⁶ De Zayas A 'Human Rights and Indefinite Detention' (2005) 87 *International Review of the Red Cross* 18-22.

³⁶⁷ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 4.

³⁶⁸ UN Office of the High Commissioner for Human Rights, 1966 International Covenant on Civil and Political Rights (1966) Art 4.

³⁶⁹ UN General Assembly Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 United Nations Treaty Series 1465 (1987) Art 2.

³⁷⁰ De Zayas A 'Human Rights and Indefinite Detention' (2005) 87 *International Review of the Red Cross* 18-20.

³⁷¹ Human Rights Watch's 'ICC: Palestine is Newest Member' available at <https://www.hrw.org/news/2015/04/01/icc-palestine-newest-member> (accessed 10 June 2015).

situations that both individuals within the Gaza Strip and Israel proper are subjected to. Furthermore, the investigation of the ICC may draw attention to the continued construction of Israeli settlements within the Occupied Palestinian Territories. The latest plan of Israeli settlements that was published on 30 January 2015, included the construction of a further 450 units.³⁷² The status of Palestine as a State Party to the ICC may therefore halt any further construction. Though Israel, the USA, and Canada have apposed the accession of Palestine as a State Party to the ICC, continued support by the international community for the assession may therefore improve transparency of the conflict.³⁷³



³⁷² Human Rights Watch's 'ICC: Palestine is Newest Member' available a <https://www.hrw.org/news/2015/04/01/icc-palestine-newest-member> (accessed 10 June 2015).

³⁷³ Kersten Mark's 'On Palestine, International Law and the International Criminal Court' Available at <http://justiceinconflict.org/2015/03/31/on-palestine-international-law-and-the-international-criminal-court/> (accessed 10 June 2015).

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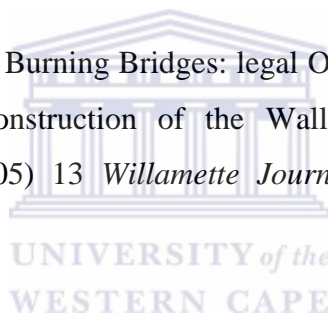
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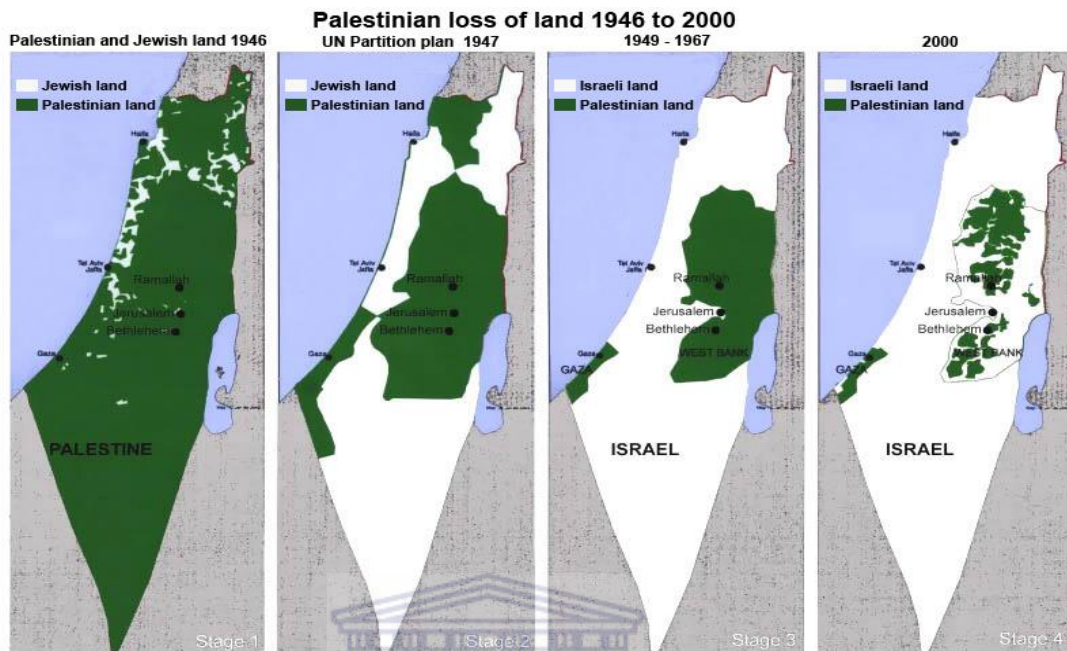
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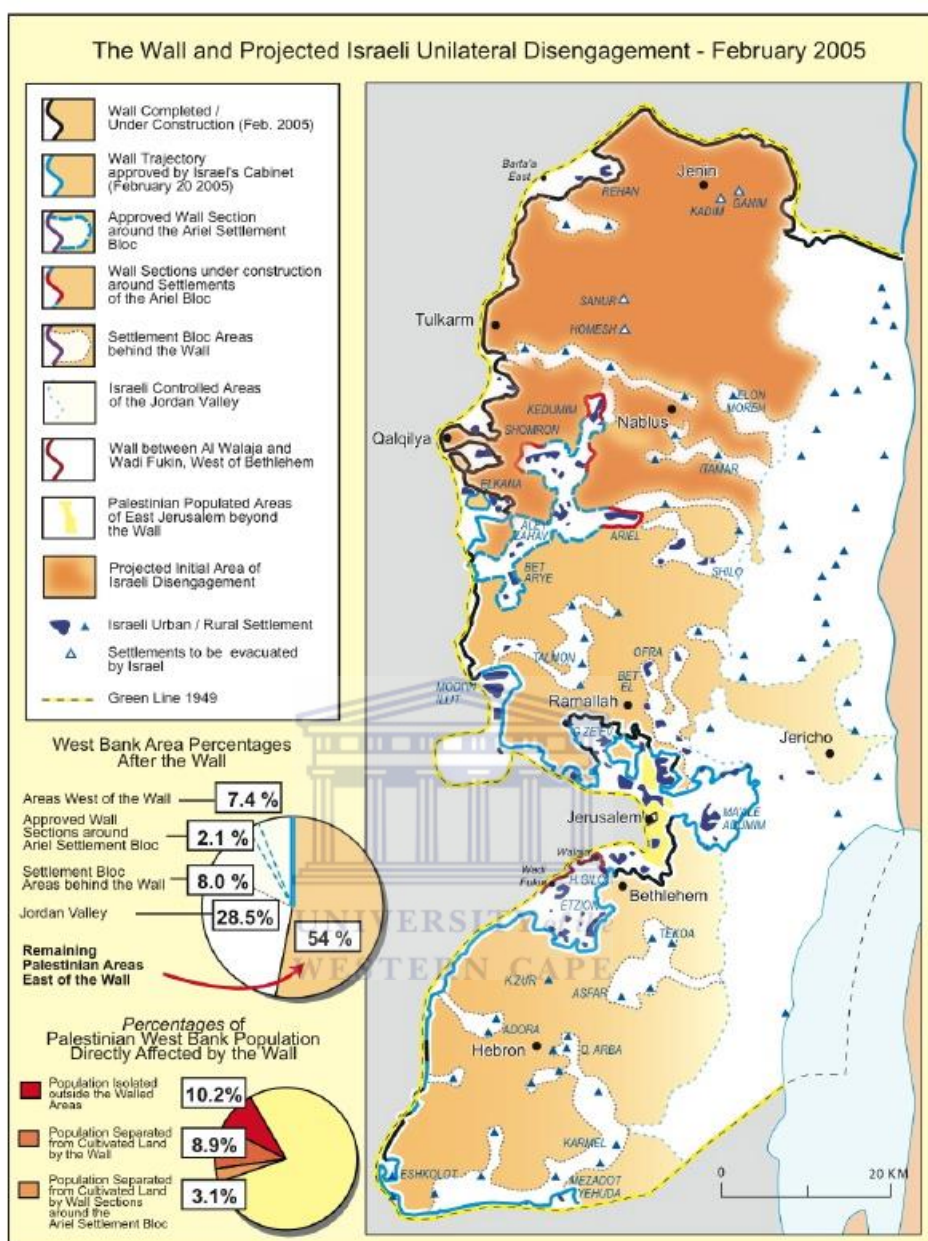
APPENDICES

1. Palestinian Loss of Land 1946 to 2000³⁷⁴



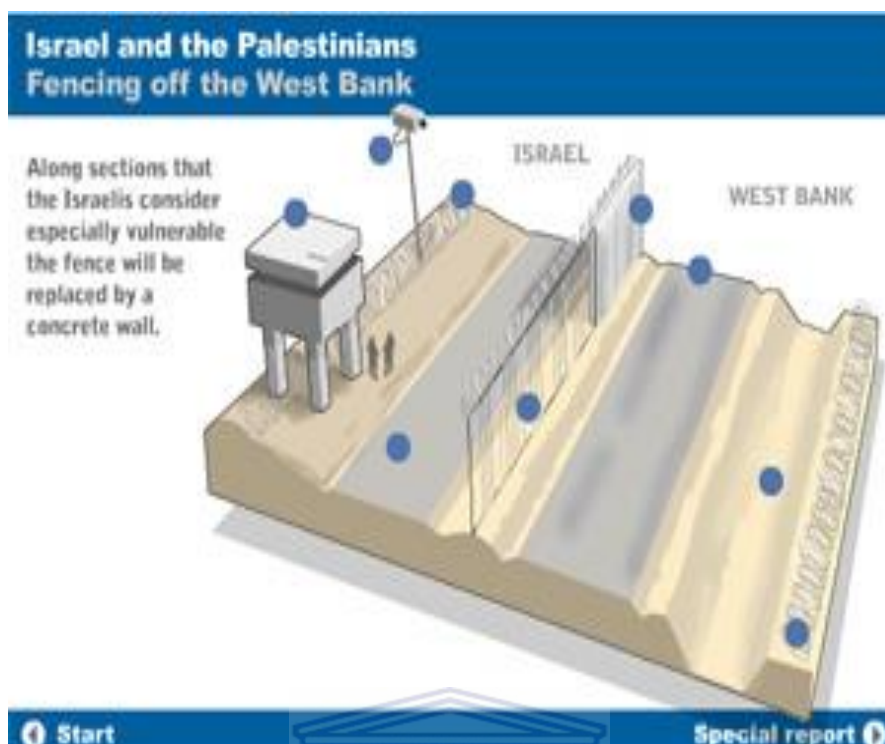
³⁷⁴ Heistein A's 'Palestinian Loss of Land 1946 to 2000 unexplained' Available at <http://blogs.timesofisrael.com/palestinian-loss-of-land-1946-2000-unexplained-2/> (accessed June 2013).

2. The Route of the Wall³⁷⁵



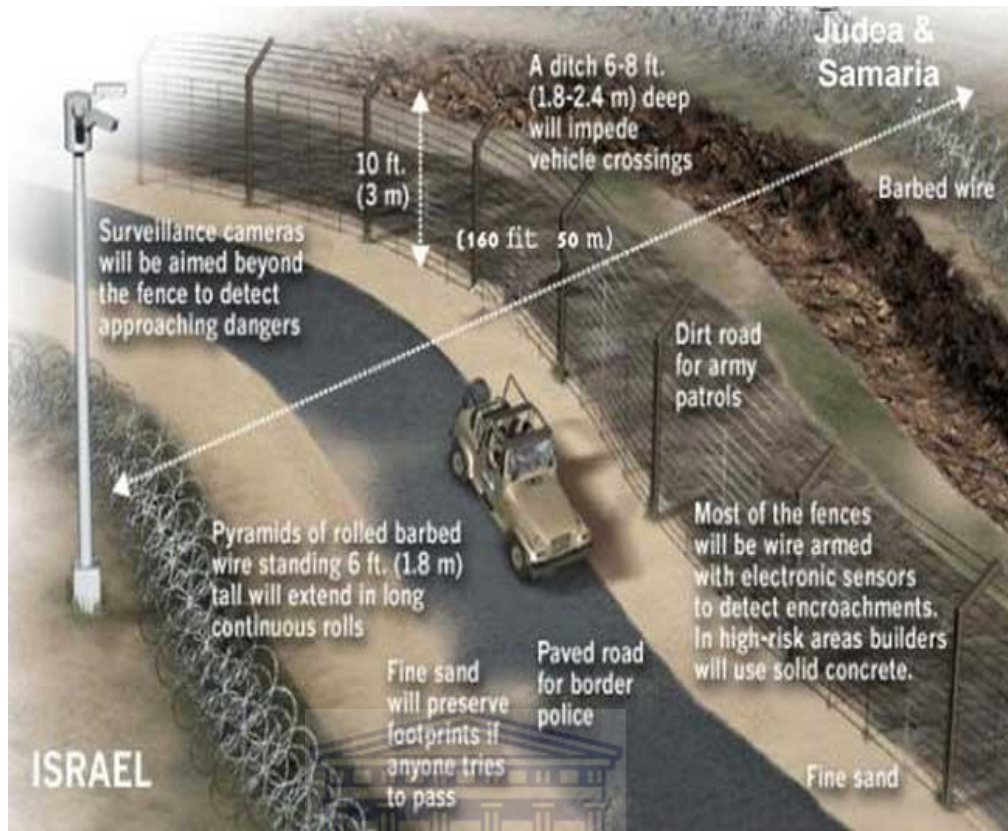
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3. The Structure of the Fence³⁷⁶



³⁷⁶ If Americans Knew's 'Israel's Confiscation Barrier through the Palestinian West Bank' Available at http://www.ifamericansknew.org/cur_sit/sep_barrier.html (accessed June 2013).

4. The Anti-Vehicle Ditch³⁷⁷



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³⁷⁷ Bard M's 'West Bank Security Fence: Background and Overview' Available at <http://www.jewishvirtuallibrary.org/jsource/Peace/fence.html> (accessed June 2013).

5. The Structure of the Wall³⁷⁸



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³⁷⁸ If Americans Knew's 'Israel's Confiscation Barrier through the Palestinian West Bank ' Available at http://www.ifamericansknew.org/cur_sit/sep_barrier.html (accessed June 2013).

6. The Israeli Wall in Relation to the Berlin Wall³⁷⁹

Relative sizes of the Berlin Wall and Israel's Apartheid Wall

This graphical representation accurately shows relative height and length of the Berlin Wall next to Israel's Wall, although the vertical/horizontal orientations within each graphic are not to scale.

Berlin Wall

96 miles long (155 kilometers). Average height 11.8 feet (3.6 metres).



Israel's Wall

To be at least 403 miles long (650 kilometers). Maximum* height 25 feet (8 metres).



*It is not clear whether the shorter fence sections are a first or final stage of construction

GRAPHIC: ELECTRONICINTIFADA.NET



³⁷⁹ The Electronic Intifada's 'Is it a Fence? Is it a Wall? No, it's a Separation Barrier' Available at <https://electronicintifada.net/content/it-fence-it-wall-no-its-separation-barrier/4715> (accessed July 2013).

7. Monitoring Sniper Towers³⁸⁰



³⁸⁰ Darkwater's 'Palestine Through an Australian's Eye' Available at <http://shooltzon-darkwater.blogspot.co.za/2008/12/palastine-through-australians-eye.html> (accessed July 2013).