

Key issues in the Israeli-Palestinian conflict from the viewpoint of international law:

**prepared for the independent panel appointed to review the
impartiality of the BBC's coverage of the conflict**

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Introduction

This paper aims to provide an overview of key aspects of the Israeli-Palestinian conflict, within the context of international law. The paper has been commissioned by the independent panel appointed by the BBC Board of Governors, to review the impartiality of the BBC's coverage of the Israeli-Palestinian conflict. For that purpose, this paper focuses upon those issues over which debate has regularly emerged, in particular with regard to use of legal terms and references to international law.

Discussion and the reporting of the conflict inevitably contain references to international law, and at times describes certain actions or events as being lawful or unlawful, or uses terms that have legal meaning. This paper will provide a certain amount of guidance as to when and how these legal references can be made, and when they should perhaps be avoided.

As will be seen, a large number of the issues are open to multiple interpretations and more than one view can be supported. In many of these areas of contention (but not all – it is impossible to cover all issues relating to the conflict within the current scope), this paper seeks to explain the differing sides to the debate, without necessarily supporting either view. In these cases, an understanding of the points of contention, can hopefully assist in the ability to accurately report them. Furthermore, in certain areas in which the dust of debate is relatively settled, or when the vast majority of opinion supports one particular conclusion, this will be pointed out as a strong indication of an approach that can likely be safely adopted in the context of reporting. There are many other debatable aspects to the conflict beyond the legal interpretations; this paper is however concerned only with questions of international law.

The format and style of this paper is not that of an academic article. Indeed, any one of the chapters presented here contains sufficient complexities to justify being the independent recipient of lengthy attention, and most of them are in fact subjects of articles and books. This paper has been written with a non-legal audience in mind, and assumes no prior knowledge of international law. While academic footnote style has not been adopted, at the end of each chapter there is a list of sources that have been relied upon, and which can provide further information for those who seek it.

Finally, it must be noted that on many of the issues it will be necessary to distinguish debates over the law from debates over the facts. There may well be matters in which there is agreement about the applicable legal principles but nevertheless the facts themselves are the subject of contention. Similarly to mathematics, the law often provides formulas with variable components, and the application of the law to the facts must take place before there can be a determination of legality.

The Framework of International Law

International law covers a wide array of subjects, ranging from rules of trade to regulation of armed conflict. It is therefore possible to further divide international law into those bodies of law designed for separate purposes, although they can sometimes cross over into each other's domain. With regard to the laws regulating armed conflict and military occupations, the primary frameworks of rules usually referred to, are international humanitarian law (IHL) and international human rights law (IHRL). Additional relevant rules may be found in international criminal law, and the rules and principles contained in the UN Charter.

The two most important sources of the law – where the specific rules are actually to be found, are treaties and customary international law. For a treaty to create binding obligations, a state must have ratified it, thereby becoming a party to the treaty. Rules of customary international law, in contrast, will generally bind states regardless of whether they have ratified a specific treaty. The formation of customary international law, depends on two elements: the practice of states and *opinio juris*. Briefly and (very) simply put, these elements amount to: what states do and say, and whether they believe they are doing it out of obligation. Customary international law is not easy to prove, and usually emerges over long periods and is given a stamp of authority in the statutes of international courts and other bodies, together with the views of prominent commentators.

International humanitarian law

Within IHL, the rules dealing directly with situations of occupation can be found in two sources: the Hague Regulations, annexed to the 4th Hague Convention of 1907; and the 4th Geneva Convention of 1949. Israel is a party to the Geneva Conventions, and bound by its obligations. There are however questions surrounding Israel's view of the applicability of the 4th Geneva Convention to the West Bank and Gaza – these will be dealt with in the following chapter on occupation. As for the Hague Regulations, although there is no Israeli ratification, the rules therein are accepted as customary international law, and therefore Israel is bound by the Regulations (and has recognised this).

The 4th Geneva Convention and the Hague Regulations contain detailed rules on the administration of occupied territory, including rules on issues such as detention and internment, responsibilities for medical needs, and interference with private property. The underlying assumptions of these rules, is that whilst the occupying power has overall responsibility for the welfare of the population, and also may at times need to use certain measures (but only those as prescribed in the laws) to ensure security concerns, the occupation is to be a temporary situation, and the occupying power is a temporary administrator.

Subject to certain specific debated issues, as outlined in the next chapter, the rules on occupation contained in IHL can generally be assumed to apply to the Israeli-Palestinian conflict, and form the backbone of the assessment carried out in this paper.

International human rights law

IHRL is a relatively new body of international law – its existence can be measured in decades, as opposed to centuries of IHL. The most well known instrument of human rights law, is probably the 1948 Universal Declaration of Human Rights. The two main binding treaties, are the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Other relevant treaties include the Convention on the Rights of the Child, and the Convention Against Torture.

The ICCPR contains rules on matters such as the required safeguards for a fair trial, freedom of expression, and freedom of movement. Some of the rights can be subjected to restrictions on grounds of security or national emergencies (e.g. freedom of movement), whilst others can never be deviated from (e.g. the prohibition of torture). The ICESCR covers issues such as the rights to health, education, and employment.

Some of the rights covered in these instruments, are also dealt with to a certain extent within the rules of IHL – the 4th Geneva Convention for instance, contains provisions referring to medical and educational matters. The interplay between IHL and IHRL is the subject of ongoing debate. In the past, many have held the view that IHRL was the law of peacetime, and IHL was the law of war. Nowadays, it has become widely accepted that IHRL continues

to apply also during armed conflict, although there is not unanimous agreement on all aspects of this assertion, and there are still varying opinions on the precise relationship between the two bodies of law. The most recent formula suggested by the International Court of Justice, is that

“some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”

When it is a matter covered by both laws, a commonly held approach (though there are differing understandings of this) would be to maintain that the law specifically designed for this particular situation (*lex specialis*) is the one to be applied – during armed conflict and occupation, this would usually be the IHL rules.

Israel has disputed the applicability of IHRL to the West Bank and Gaza, on more than one ground. Firstly, that human rights law is not designed for times of conflict, and on an additional second ground, that IHRL only applies within the territory of the state. The latter point, revolves in part around article 2 of the ICCPR, which mentions that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant”, and whether this phrase (the italicised part) is to be read conjunctively or disjunctively. The question of whether human rights obligations can extend beyond a state’s recognised borders, is the subject of much controversy and ongoing debate, and has recently featured in a number of domestic and international court cases. However, even within the many varied and opposing views, there appears to be a majority of opinion that in situations in which a state is exercising effective control over a territory, and has been recognised as an occupying power, it is obliged to give effect to its obligations under IHRL. The UN Human Rights Committee and the Committee on Economic, Social, and Cultural Rights (the bodies entrusted with monitoring compliance with the ICCPR and ICESCR, respectively), hold the view that the human rights covenants are applicable to these territories. Moreover, the International Court of Justice has clearly stated that the treaties of IHRL, and the rules therein, do apply in the current situation.

International law instruments (referred to throughout this paper)

- Regulations Annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907)
- Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)

On the interplay between IHL & IHRL:

- L. Doswald-Beck and S. Vité, "International humanitarian law and human rights law" *International Review of the Red Cross*, No. 293, 1993, p. 94
- G.I.A.D. Draper, "The relationship between the human rights regime and the laws of armed conflict", *Israel Yearbook on Human Rights*, Vol. 1, 1971, p. 191
- F. Hampson and I. Salama, "Working paper on the relationship between human rights law and international humanitarian law", UN Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2005/14 21 June 2005
- M. Kelly "Critical analysis of the International Court of Justice ruling on Israel's security barrier" 29 *Fordham Int'l L.J.* 181 (2005) pp.187-207 (detailing some of the critical approaches to joint applicability)
- R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002
- R.E. Vinuesa, "Interface, correspondence and convergence of human rights and international humanitarian law", *Yearbook of International Humanitarian Law*, Vol. 1, T.M.C. Asser Press, The Hague, 1998, pp.69-110

On the applicability of IHRL to the Occupied Territories

- Concluding Observations of the Human Rights Committee: Israel, 18 August 1998, CCPR/C/79/Add.93
- Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 31/08/2001. E/C.12/1/Add.69.
- General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), par.10.

- O. Ben-Naftali & Y. Shany “Living in Denial: The Application of Human Rights in the Occupied Territories” *Israel Law Review*, Vol. 37, No. 1, pp. 17-118, 2003-2004. (including a detailed analysis of the approach taken by the Israeli government and Supreme Court, and a review of the case law and views of the UN and other international bodies).
- M. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation”, 99 *American Journal of International Law* 119 (2005). (for a critical approach of applying human rights law)

Occupation

Definition of occupation

According to the Hague Regulations:

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

In essence, the definition of occupation is a factual one, linked to the question of effective control over the area.

Israel has been repeatedly recognised as an occupying power, and the territories over which Israel gained control following the 1967 war, have therefore been referred to as occupied territory. Over the years Israel has often chosen to use a different term – that of administered territories – and has denied the formal, *de jure*, applicability of the 4th Geneva Convention (see following section). Nevertheless, not only has virtually the whole of the international community (including allies of Israel) referred to the situation as one of occupation, but Israel’s own practice reflects an acceptance of this, since it formally accepts the applicability of the Hague Regulations on occupation, and claims to be acting under authority granted to an occupying power in international law (including in provisions of the 4th Geneva Convention). As noted by the Israeli Supreme Court (sitting as High Court of Justice in *Beit Sourik Village Council v. The Government of Israel*):

“The general point of departure of all parties – which is also our point of departure – is that Israel holds the area in belligerent occupation (*occupatio bellica*).”

Applicability of the 4th Geneva Convention

Israel has argued that the 4th Geneva Convention is not *de jure* applicable to the situation at hand. This is based on a reading of the second paragraph of article 2 of the Convention, which states that:

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

The primary Israeli argument is that since the West Bank and Gaza were not recognised as part of the sovereign territory of Jordan and Egypt, these territories did not actually belong to a High Contracting Party, and therefore fall outside the scope of the Convention. Nevertheless, Israel stated it would *de facto* apply all the humanitarian provisions of the Convention (while the majority of the provisions might fall into this category, excluding applicability of other provisions is not without significance – see the later chapter on the legality of settlements).

The counter-argument states that since the occupation results from an armed conflict between High Contracting Parties, it is in fact the first paragraph of article 2 which governs the current situation:

“In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

Additionally, it has been argued that denying the applicability of the 4th Geneva Convention would stand in stark contrast to the purpose of the Convention, as is reflected in article 4:

“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

The population of the West Bank and Gaza would appear to fit into this category of people. However, it could be argued that article 4 can only be found relevant after first determining applicability of the Convention on the basis of article 2, and it is the debate over article 2 that remains the crucial point.

The position that the 4th Geneva Convention does indeed apply to the West Bank and Gaza is supported by the majority of leading commentators (including Israelis), the International Committee of the Red Cross, UN bodies, and the International Court of Justice. Furthermore, the Israeli Supreme Court regularly refers to the Convention in its rulings.

Questions nevertheless arise with regard to areas from which Israeli troops have pulled out, e.g. certain cities in the West Bank during the Oslo process, and the recent withdrawal of troops from the Gaza strip. It is beyond the scope of this paper to analyse whether in these

particular situations Israel remains an occupying power, and whether perhaps its responsibilities as an occupier are reduced or even eliminated. The answers to this depend amongst other matters, on the level of control nevertheless retained by Israel (e.g. the borders of Gaza); the legal understanding of the connection between Gaza and the West Bank; the international status of the Palestinian Authority. The answers to all these are highly debatable. The redeployment at will time and again, and ongoing ground operations in Palestinian cities in the West Bank, would seem to counter any argument of a change in status as occupying power following the Oslo Accords, or at least since September 2000, although this may be a debatable conclusion. With regard to Gaza, as of the time of writing, the military disengagement from Gaza is probably too recent for there to have been sufficient development of opinion (through court opinions, commentators and established factual evidence), and the question will, for the time being, remain open to debate. Notwithstanding the possible debates over the new situation and the status of the occupation and Israeli responsibilities in Gaza – which are yet to be determined – overall Israel is still regarded as the occupying power. It should however be noted that with regard to both Gaza and areas A of the West Bank (at least in the period between Oslo and the second *Intifada*), there are open questions on the links between the responsibilities of the occupying power to exercise of effective control and/or the potential ability to establish control; the actual control of an area and the responsibilities as an occupying power are linked both in practical and legal terms.

Legality of the occupation

The rules relating to armed conflict contain a clear and distinct separation between the rules on the resort to armed force (*ius ad bellum*) and the rules regulating conduct once the conflict has begun (*ius in bello*). The IHL rules on occupation belong to the latter. The occupation itself is a factual situation, and determining its existence on the basis of the definition in the above section, does not depend on the legality of the resort to force. In other words, ‘who started’ the armed conflict has little bearing on the definition of the ensuing military occupation. It is an ‘occupation’ regardless of the controversy over the resort to force.

The separation between the *ius ad bellum* and the *ius in bello*, means that the same rules of conduct apply to all sides to an armed conflict, regardless of who might be in the right or the wrong with regard to the resort to force. This is a fundamental underlying principle of the

laws of armed conflict, and is one of the methods to attempt to ensure that all parties to the conflict adhere to the rules, without it depending on the often impossible task of agreeing who the aggressor was. The term ‘unlawful occupation’ can be a misguided and confusing term, as it conflates the question of the resort to force with the rules of conduct, and obscures the distinction between the two. In that respect, the occupation is neither lawful nor unlawful; the rules of IHL dealing with occupation (i.e. the Hague Regulations and the 4th Geneva Convention) do not attempt to determine whether the occupation is unlawful or not, and they are concerned with the actions taken once we have already entered the situation of occupation.

In a recent case before the International Court of Justice (*Democratic Republic of the Congo v. Uganda* 19 December 2005), Judge Kooijmans noted in his separate opinion that:

“In particular, no distinction is made in the *ius in bello* between an occupation resulting from a lawful use of force and one which is the result of aggression. The latter issue is decided by application of the *ius ad bellum*, the law on the use of force, which attributes responsibility for the commission of the acts of which the occupation *is the result*. [...] It goes without saying that the outcome of an unlawful act is tainted with illegality. The occupation resulting from an illegal use of force betrays its origin but the rules governing its regime do not characterize the origin of the result as lawful or unlawful.”

The main reasons why the term ‘unlawful occupation’ is nevertheless sometimes used, could be due to a view that it is the result of unlawful aggression (i.e. depending on the historical and legal interpretation of the outbreak of the 1967 war – similar arguments leading to use of this term have been made with regard to the recent war in Iraq). In that respect, it was the initial act that would have been unlawful. Use of the term in this way should only be made if it is clarified that the meaning is intended to indicate the illegality of the initial resort to force.

Another reasoning behind the use of this term, relates to the view that the occupation is in effect preventing the Palestinian right to self-determination, and is thus unlawful. This view is supported by the reference to occupation as a situation akin to colonialism, racist regimes and apartheid, and as such an unlawful situation which must be brought to an end. However, it is debatable here whether it is the occupation *per se* that is unlawful, or whether it is the denial of self-determination, clearly linked to, if not an effect of, the occupation, but nevertheless a separate question of international law. As stated by Alain Pellet, a notable expert on international law: “Even if the deprivation of its right to self-determination infringes an

imperative norm of international law, occupation remains a legal institution, governed by the rules of law,[...]”

A third possibility for use of this term, would be due to the opinion that Israel may have perpetrated numerous unlawful acts in the Occupied Territories. However, in this case the unlawfulness is not attributed to the occupation, but to the specific acts which violate particular rules of international law.

In summary, the term ‘unlawful occupation’ is not a helpful term, and while there may be reasoning for using it – particularly on account of the link to denial of self-determination – this term is highly debatable. Refraining from use of the term does not however mean that one cannot reach the determination that certain aspects of the occupation, and specific actions taken by the occupying power, may well be unlawful.

Powers and duties of the Occupying Power

The rules of occupation are designed to allow the occupier to exercise temporary power of administration, and take into account security needs of the occupying forces. Large parts of the rules are dedicated to the restrictions and limitations in the exercise of that power, as well as responsibilities for the welfare of the population in the occupied territory.

Responsibilities include matters such as: humane treatment; allowing relief operations to take place; allowing the International Committee of the Red Cross to carry out its functions; respect for private property; responsibilities for functioning educational establishments; ensuring the existence and function of medical services. Some of the responsibilities, such as the latter two, are to be carried out with the cooperation of the national and local authorities of the occupied population.

The occupier has the power to detain individuals, primarily on security grounds. However, as far as ‘regular’ criminal activities, the original penal laws and justice system should be left in place – this is part of the principle of the occupation being temporary. There are also rules dealing with tax collection by the occupier as part of administering the territory.

The responsibilities and obligations of the occupier are inextricably linked to the occupier's powers to take certain measures. Responsibility for law and order (which can include the functioning of establishments), would be impossible to maintain without corresponding power to impose the said law and order. Thus with regard for instance to the question of the penal system, the 4th Geneva Convention states that:

“The Occupying Power may, however, subject the population of the occupied territory to 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 property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”

See also article 43 of the Hague Regulations:

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

As noted in the previous section, a separation exists between the question of the initial resort to force, and the subsequent conduct of the parties to the conflict. Accordingly, both the powers and responsibilities of the occupier remain the same regardless of whether the occupation was a result of unlawful aggression or not.

On the laws of occupation:

- E. Benvenisti *The International Law of Occupation* (1993) (For a general overview of laws of occupation; also pp.184-187 for legality of occupation with reference to self determination)
- G. Von Glahn *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957).
- Roberts, “What is a Military Occupation?”, 55 *British Yearbook of International Law* 249 (1984)
- G. Schwarzenberger *International Law as Applied by International Courts and Tribunals, 2: The Law of Armed Conflicts* (London 1968) pp.161-358.

On the applicability of the 4th Geneva Convention and Israel as an occupying power

- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Adv. Op., 9 July 2004, [2004] I.C.J. Rep. paras.90-101.

- Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", 8 Israel Y.B. Hum. Rts. 105 (1978).
- D. Kretzmer *The Occupation of Justice* (2002) Chapter 2. (and rest of book for an analysis of the approach of the Israeli Supreme Court to the Occupied Territories)
- Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988", 84 *American Journal of International Law* 44, at 61-70
- M. Shamgar "Legal Concepts and Problems of the Israeli Military Government – the Initial Stage" in M. Shamgar (ed) *Military Government in the Territories Administered by Israel 1967 – 1980: The Legal Aspects* (1982), pp.13-60, at pp.31-43 (for an explanation of the Israeli position)
- *Conference of High Contracting Parties to the Fourth Geneva Convention: Declaration & statement by the International Committee of the Red Cross* Geneva 5 December 2001
- UN General Assembly Resolution 35/122A (Dec. 11, 1980) (141-1-1).
- US State Dep't, Country Reports on Human Rights Practices for 1997.
- Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory, International Humanitarian Law Research Initiative; Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law; both policy briefs available on: <http://www.ihlresearch.org/opt/>

On the rights and duties of the occupying power

- G. Von Glahn "Taxation under Belligerent Occupation" in E. Playfair "*International Law and the Administration of Occupied Territories* (1992), pp.341-376
- Pellet "The Destruction of Troy" in E. Playfair "*International Law and the Administration of Occupied Territories* (1992), pp.169-204, p.178-9, 186-7
- R. Shehadeh *From Occupation to Interim Accords: Israel and the Palestinian Territories* (1997). (for an analysis of the legal and administrative rules applied in the Occupied Territories).

Armed Resistance Against the Occupier

A general right of resistance

Debate over the existence of a right to resist (coupled with questions of obedience to the occupying power) has long been a feature of discussion with regard to the laws of occupation, especially following the active resistance movements during the Second World War. The rules of IHL dealing with occupation do not contain an explicit reference to a right of resistance against the occupier, and do not therefore say whether it is lawful or unlawful. Resistance is however recognised as a potential factual occurrence, since the rules do cover the detention and treatment of persons held for acts against the occupier.

Generally speaking, during an armed conflict, both sides have the right to engage in violence against each other, so long as it takes place in accordance with the rules of IHL. The individuals who are actually given this right are the combatants of both sides. As long as the armed conflict continues, so might the violence between the opposing combatants. Military occupation is slightly different, in that it presupposes the establishment of effective control by one of the parties to the conflict, and thus at least some form of cessation or reduction of hostilities, even if temporary. In the case of the Occupied Territories, the combatants who were originally opposing the Israeli forces, were the Jordanian and Egyptian forces, both now states who have signed peace treaties with Israel. The question is then whether the Palestinians themselves have a right of armed resistance, and where this right would stem from. The principle of self-determination can play an important part in this matter.

The understanding that all peoples have the right to self-determination, has become an accepted principle of international law, albeit with some unclarified elements, and it appears explicitly in a number of international treaties and other documents. That the Palestinian people are entitled to self-determination, is not only the view of many in the international community, but has also been recognised by Israel in the context of agreements signed during various phases of the peace process. One of the aspects of the right to self-determination which has not received a resolute answer, is whether those who are entitled to this right, are thereby vested with the right to use force and armed struggle in order to achieve it. Clearly, armed struggle has been a component of many movements for national self-determination around the globe. The 1977 First Protocol to the Geneva Conventions (which Israel has not

ratified), brings such struggles into the category of international armed conflict. This is seen by some as legitimising armed force against alien occupation in the name of self-determination, though it should be noted that this Protocol belongs to the laws regulating the conduct of hostilities once the conflict has begun (*ius in bello*), as opposed to the rules determining the legality of the resort to (*ius ad bellum*). As such, it brings about the application of the rules of international armed conflict to struggles of this type (though its relevance is questionable for states such as Israel who have not ratified it and for whom it does not apply), without necessarily delivering any initial right to resort to force. Nevertheless, there are additional sources for support of the contention that force can sometimes be used to achieve self-determination. An explanation of this issue as it stands, is given by the expert on international law, Malcolm Shaw:

“The UN Charter neither confirms nor denies a right of rebellion. It is neutral. International law does not forbid rebellion, it leaves it within the purview of domestic law. The General Assembly, however, began adopting resolutions in the 1970s reaffirming the legitimacy of the struggles of peoples for liberation from colonial domination and alien subjugation, ‘by all available means including armed struggle’. This approach was intensively debated in the process leading to the adoption by the Assembly of the Consensus Definition of Aggression in 1974. In particular, the issue centred upon whether the use of force by peoples entitled to self-determination was legitimate as self-defence against the very existence of colonialism itself, or whether as a response to force utilised to suppress the right of self-determination. The former view was taken by most Third World states and the latter by many Western states. In the event, a rather cumbersome formulation was presented in article 7 of the Definition which referred *inter alia* and in an ambiguous vein to the right of peoples entitled to but forcibly deprived of the right to self-determination, ‘to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity’ with the 1970 Declaration.”

According to another leading expert, Antonio Cassese:

“[...] self-determination has resulted in granting to liberation movements a legal license to use force for the purpose of reacting to the forcible denial of self-determination by a colonial state, on occupying power, or a state refusing a racial group equal access to government [...]”.

It is evident, that it is at the very least credibly arguable that peoples entitled to the right to self-determination, could engage in armed struggle against those who are forcibly depriving them of this right. Whilst Israel might not accept this, it could therefore be argued that the Palestinians have a right to resistance against the occupation.

Three additional crucial factors must however be pointed out:

Firstly, the legitimacy of the resistance is in relation to legality under international law, i.e. it would mean that the very act of resistance is not in itself a violation of international law. However, the fact that international law may allow for certain acts of resistance by the Palestinians, would not negate Israel's right to protect its security forces and respond to force with detention and with proportionate force.

Secondly, any armed resistance must conform to the rules of international law. The initial resort to force must meet requirements of necessity and proportionality. Ascertaining whether the resort to armed struggle in the second *Intifada* was necessary and proportionate could depend amongst other things, on an analysis of the preceding peace negotiations – for instance, on whether there had been a bilateral commitment to resolve the dispute without violence; whether each of the sides adhered to this; and considering the behaviour of both sides, were there alternative options other than resort to force of this type. Undoubtedly there will be differing views of this issue. Furthermore, once armed conflict has broken out, any violent resistance whether in a just cause or not, must conform to the IHL rules relating to conduct of hostilities. Attacking civilians of the occupying power cannot therefore be a legitimate act of resistance, since intentional attacks on civilians are always strictly prohibited (see next section on war crimes for further explanation of what acts are prohibited). A helpful analogy might be a case in which two states are locked together in armed conflict. If state B was responding in legitimate self-defence to an unlawful attack by state A, the use of force by state B would nevertheless have to be within the confines of IHL (e.g. no intentional attacks on A's civilians).

The right of an individual to participate in hostilities

The third difficulty goes to the obstacles encountered when moving from an abstract right of resistance in the name of self-determination, to the question of who would actually be carrying out these acts. IHL gives the explicit right to participate in hostilities only to combatants, and not to civilians. Civilians who nevertheless take part in the hostilities risk losing their civilian protection from attacks, and unlike combatants, are not granted immunity

from prosecution even if they adhered to the IHL rules of conduct. There is one exception which recognises that civilians might legitimately take part in the fighting, and that is the case of the *levee en masse*, when the inhabitants of a non-occupied territory take up arms to resist an invader. This is temporally restricted, and does not apply once the phase of occupation has already begun – i.e. it is not relevant to the existing situation in the Occupied Territories.

Allowing for civilians to legitimately take part in hostilities would be in contrast to one of the basic precepts of IHL, and would undermine the principle of distinction – perhaps one of the most fundamental of all IHL principles. If civilians regularly take part in hostilities, then it becomes almost impossible to demand or expect that civilians be protected persons, since any civilian encountered is as potential a threat as any combatant. This leads to the debate on whether any of the Palestinians can be defined as combatants.

Combatants are defined only in the rules of international armed conflict, and not in internal armed conflict (see the chapter on targeted killings as to debates on how the Israeli-Palestinian conflict is classified). The basic requirements to be recognised as a combatant, can be found in article 1 of the Hague Regulations:

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.”

Clearly, some groups (e.g. members of official security forces) might have less difficulty with the issue of fixed emblem (such as uniform) and open carrying of arms, than members of other militant groups, while the fourth requirement would raise the question of whether groups that target civilians through suicide bombings can claim to be conducting their operations in accordance with IHL.

The First Protocol to the Geneva Conventions follows a similar path, including the need for armed forces to comply with the IHL rules on conduct of hostilities, though it takes a slightly different approach on the question of visibility. Article 44(3) is sometimes also cited in

relation to this issue, particularly since it is often seen as aimed precisely for situations of national liberation or resistance movements. This provision states that:

“In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”

This provision is given mention in this paper primarily because it often crops up in any debate over combatant status, and its existence should therefore be noted here. However, Israel is not a party to the First Protocol, and the controversy surrounding this particular provision makes it difficult to claim that it has become part of customary international law. It is therefore not binding on Israel.

In the interests of a general understanding of the debate over combatant status, it should also be noted that recognition as a combatant who has the right to participate in the hostilities, usually means receiving prisoner of war status if captured – this is generally viewed as preferential for those captured (POWs have immunity from prosecution for acts that were in accordance with IHL), but on the other hand POWs can be held until the end of hostilities. In addition, the flip-side of the coin of combatancy is that the individual is then a legitimate target for attack at all times.

This might explain why – and it is important to be aware of this point – a claim of combatant status for Palestinian group members is rarely heard by either side (Israel perhaps not wanting to accept any right to participate in hostilities, or have to give POW status, and Palestinians perhaps not wishing to allow prisoners to be held until the end of hostilities, and to be legitimate targets for attack by Israel).

Not having combatant status means that the individual taking part in hostilities is not entitled to POW status, and can be prosecuted for any act of violence, even if adhering to the IHL rules of conduct. The advantage of not being a combatant is that civilians cannot be made the

target of attack; however, they can lose this protection when taking a direct part in the hostilities (more on this in the section on targeted killings).

It is beyond the scope of this paper to determine the members of which, if any, of the Palestinian groups might fulfil the combatant requirements. For the sake of the objective currently sought, suffice it to say that questions can clearly be raised with regard to most of the groups, casting doubt over the possibility that they might fulfil the requirements, perhaps also even had Israel ratified the First Protocol and accepted its standards for maintaining combatancy. There is not therefore an agreed conclusion which can be reached.

The difficulty in determining whether any of the individuals have the recognised right to participate in hostilities is not unique to this situation. In non-international armed conflicts, despite the recognition that there are armed groups fighting against the state (and/or against each other), there is no definition of combatants, and therefore no clear recognition of an individual's right to participate in the hostilities. The First Protocol to the Geneva Conventions was meant to solve some of these difficulties when dealing with armed conflicts in which peoples are fighting against colonial domination, alien occupation and racist regimes, in the exercise of their right of self-determination. However, the solution offered by the First Protocol remains largely out of reach for conflicts involving states such as Israel, who have not ratified the Protocol.

To conclude this section, while it is arguably possible that it does exist, if there is a right to engage in armed resistance against the occupying power, whether in the name of self-determination or under any other interpretation, it must be carried out in accordance with international law. It is debatable whether the members of any of the Palestinian groups have the status of combatants and the corresponding right under IHL to participate in hostilities. In any case, even if they did have the right to participate, any fighting must always stay within the confines of the IHL rules of conduct. All acts such as intentional attacks on civilians, which violate the rules on conduct of hostilities, would always be unlawful. The next sections on war crimes, terrorism and targeted killings, all contain further relevant information.

On resistance against the occupying power

- G. Von Glahn *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957), pp.48-56
- G. Von Glahn *Law Among Nations* (1996) p.671-672

On self-determination

- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Adv. Op., 9 July 2004, [2004] I.C.J. Rep, para.118.
- ILC 1988
- Cassese *International Law* (2005) pp.60-64.
- M. Shaw *International Law* (2003) p.39, 225-231, 269-273,p.1037-9
- Tomuschat (ed) *Modern Law of Self-Determination*

On the individual's right to participate in hostilities

- Y. Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) Chapter 2.
- J.Henckaerts and L.Doswald-Beck *Customary International Humanitarian Law Vol. 1* (2005) chapters 1,33.

War crimes

The identity of the perpetrators and the victims

War crimes might be committed by members of all parties to the conflict. Unlike certain other bodies of international law, the rules of IHL are considered binding upon non-state actors. In the context of the Israeli-Palestinian conflict, this means that both parties to the conflict, the Israelis and the Palestinians, are bound by the relevant rules of IHL and should individuals from either side violate the rules, they can be found guilty of committing war crimes.

War crimes can be committed by civilians as well as by military personnel. Furthermore, civilians are not the only possible victims of war crimes – certain acts committed against military personnel can also be classified as a war crime (e.g. use of prohibited weapons or the wilful killing of a prisoner).

Definition of war crimes

War crimes can be defined as serious violations of the applicable IHL treaty and customary laws, and which entail individual criminal responsibility. The reference to ‘serious’, is understood to denote endangerment or serious consequences for protected persons or objects (e.g. intentionally attacking civilians), or the breach of important values (e.g. desecration of bodies). In addition, as noted, the act must be one which entails individual criminal responsibility, i.e. it must have been criminalized. This can be determined through a review of the case law of international and national tribunals; the statutes of international tribunals; and the military manuals and legislation of states. It is therefore important to note that not every breach of IHL is a war crime – for it to be so it must fulfil the above definition.

The fact that a particular breach of IHL might not be established as a war crime, does not mean that the act was lawful – it might not be possible to prosecute an individual for committing a crime, but the state could nevertheless be held responsible for breach of international obligations (for instance by international courts or by domestic courts in a civil action).

There is no all-encompassing list of war crimes. The statute of the International Criminal Court provides a long and detailed list of acts defined as war crimes. The list contains many of the acts widely accepted as constituting war crimes, but it is not exhaustive and has been criticised for a restrictive approach (especially with regard to internal armed conflicts). The ICC list of war crimes includes, amongst other acts:

- intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- pillaging a town or place, even when taken by assault;
- employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.

With regard to the Israeli-Palestinian conflict, whilst most of the war crimes as defined by the ICC are fairly uncontroversial, the inclusion of transfer by the occupying power of its own population into the occupied territory is unaccepted by Israel. This issue will be further explored in the section on settlements.

An additional list of war crimes can be found in the expansive study on customary international humanitarian law, undertaken by the International Committee of the Red Cross. Whilst this study reflects the views of the ICRC, and some of its findings are not necessarily accepted by all states, it is the result of a decade of detailed research assisted by numerous leading experts in the field, and can serve as a most useful guide in matters of IHL. One example of an act described in the ICRC study as a war crime, is the use of collective punishments. There is no question of collective punishment being prohibited by IHL, explicitly so in both the Hague Regulations and the 4th Geneva Convention. It is not however mentioned by name in the ICC statute's list of crimes. Nevertheless, as the ICRC points out, the imposition of collective punishment is a breach of IHL that has been regarded by international tribunals as a crime.

Grave breaches

Grave breaches are a category of violations specified in the four Geneva Conventions and the First Additional Protocol to the Conventions, which result in criminal liability of the individuals who commit them. The 4th Geneva Convention describes the following acts as Grave Breaches, when committed against persons or property protected by the Convention:

“wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

The Geneva Conventions oblige all state parties to actively search for persons alleged to have committed such acts which comprise grave breaches, and bring them to trial (regardless of their nationality) before their own courts, or hand them over to trial by another state party. In other words, there is compulsory universal jurisdiction to bring to justice persons accused of such breaches. The assumption is, however, that if the given state has no connection to the alleged breach, a person may only be tried in its courts if he/she is in the territory of that state (although there are also views that allow at least for investigations to be initiated without the presence of the individual).

The term 'grave breach' should only be used for describing acts that have been defined as such within the Geneva Conventions. When describing other breaches of IHL, including war crimes that are not part of the specific list of grave breaches, it would therefore be prudent to refrain from using the word 'grave', and choose a different adjective.

On war crimes

- Rome Statute of the International Criminal Court, 17 July 1998, Article 8.
- Cassese *International Criminal Law* (2003) pp.47-63, 284-297.
- Y. Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (2004)
- Chapter 9.
- J.Henckaerts and L.Doswald-Beck *Customary International Humanitarian Law Vol. 1* (2005) chapter 44.

Terrorism

Much has been written about the definition of terrorism and the debates that have surrounded it. Any use of words with the ‘terror’ root, have become politically loaded, but while it might seem prudent to steer away from their use, it would be practically impossible to do so. The terms have become imbedded into the debates ranging over the multitude of issues dealing with non-state groups, and are also included in the language of international law.

What then, is ‘terrorism’? The definition of terrorism is open to multiple interpretations, and more than one definition has been suggested over the years. Nevertheless the controversies are not necessarily as complicated as it sometimes may seem. It is not the place here to engage in a lengthy analysis of the history and all aspects of the debates on definitions, but at a stripped down basic level, most definitions include a description of terrorism as an attempt through violent means to instil terror in a civilian population, for ideological, including political or religious, objectives. Anything beyond this, and even some elements within this limited description, could be subject to variant views. Most commentators agree that the validity of the ideological aims is not relevant to the determination of terrorism, and that terrorism refers to the means employed and not to the justice of the cause.

One of the few international instruments containing a semblance of a terrorism definition, albeit indirectly, is the 1999 UN *International Convention for the Suppression of the Financing of Terrorism*, which includes as terrorism any acts:

“intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”

In the context of the Israel-Palestinian conflict, the Sharm El-Sheikh Fact-Finding Committee Report described terrorism thus:

“Terrorism involves the deliberate killing and injuring of randomly selected noncombatants for political ends. It seeks to promote a political outcome by spreading terror and demoralization throughout a population. It is immoral and ultimately self-defeating. We condemn it and we urge that the parties coordinate their security efforts to eliminate it.”

The perpetrators

Although the origin of the term stems from descriptions of state actions – the French revolutionary regime – the debate over terrorism definitions has nevertheless grappled with the question of whether terrorism can be used to describe direct actions of states (and not only state support of other groups), as well as non-state groups. The rules of IHL appear to indicate that states can be guilty of spreading terror, since the First Protocol to the Geneva Convention contains the following prohibition:

“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

Indeed, this prohibition has been subject of a judgement by the International Criminal Tribunal for the former Yugoslavia.

The above quoted Sharm El-Sheikh definition does not confine itself to the actions of non-state groups, and in our context could theoretically equally describe Israeli or Palestinian actions. The obstacles arise less from the definition, and more so from the attempt to apply the definition to the facts. In some cases it seems fairly straightforward: detonating a bomb (whether with the help of a suicide bomber or not) in a crowded café, or on a civilian bus travelling through the city centre, would clearly qualify as an act of terrorism according to the above definition, as it involves the deliberate killing and injuring of randomly selected innocent civilians, for ideological gain.

It would appear therefore if the above definition is to be used, it would be correct to determine that certain Palestinian groups have engaged in terrorism. But when inspecting Israeli actions, it becomes slightly more complicated. A bomb dropped on a building in a civilian area in Gaza, resulting in injuries and deaths to innocent civilians (including children) could at first sight appear similar to some of the bombs in Israeli cities, and might initially seem to qualify for the above definition. However, if the stated objective of the action was to kill a specific individual whom the state claimed it had the right to target, then it would appear not to fit the definition – the definition includes an element of intention, i.e. the intent must have been to harm the innocent civilians. Israel’s position would be that the intent was never to harm the civilians, and such harm is unfortunate collateral damage from an action which had a different intention – to harm a particular person deemed not to have civilian protection – the opposite

of randomly selected innocent civilians. The argument then becomes one of proving intent, and would become more difficult to sustain. The separate question with regard to the lawfulness of targeting the individual would still remain, but this is a different question (to be dealt with in a later chapter). There are also Israeli actions which do appear to be designed to affect random and wider Palestinian population, such as the allegedly deliberate use of sonic booms by the air-force over Gaza. While there may be found here the element of pressuring the population through the use of fear, for it to fit the earlier cited terrorism definition, it would have to be shown that these sonic booms also involve the deliberate attempt to inflict injuries on the civilian population (unless a different definition is used, which covers any attempt to intimidate the population, even without actual injury).

In short, it would appear that while actions of the type of suicide bombings by Palestinian groups can be described as terrorism according to the above definitions, it would be more difficult to categorise many of the Israeli actions as such. Nevertheless, two crucial clarifications must be made:

First, the fact that actions might not fit the definition of terrorism, does not mean that they are lawful, but only that if unlawful, it would be a different label of illegality that is attached to them. Thus for instance, if the official proven intention might not be to cause harm to innocent civilians, and even if the target of the bomb was lawful, if the Israeli attack nevertheless expectedly led to disproportionate civilian casualties, then the action might well be described as a war crime. Once again, this will involve a debate over legal interpretations and factual elements - further discussion on this type of action can be found in the section on targeted killings.

Second, while the official policies and ensuing actions of the Israeli military might not be easily classified as terrorism, this does not rule out the possibility that actions of Israeli individuals may well fit the definition. An Israeli individual (civilian or military) acting alone or as part of a group, who places a bomb in a civilian area or opens fire on a bus or in a house of prayer (all of which have happened), attempting to kill and injure randomly selected innocent civilians, is committing an act of terrorism no different from the actions of Palestinian individuals detonating bombs in cafés or buses.

The victims

The definitions used above describe the victims of terrorism as members of the general civilian population, randomly selected. There is also the view that acts against military personnel might also be classified as terrorism, if carried out so as to intimidate and terrorise the wider civilian population (e.g. military personnel inside the Pentagon when the September 11th plane struck the compound). It should also be pointed out that the differentiation between civilians and combatants is generally relevant to situations of armed conflict, while the phenomenon of terrorism occurs also outside the context of armed conflict. In the latter situation, if it is not an armed conflict and the relevance of the combatant/civilian distinction is questionable, an attack on a group of soldiers waiting for a bus in a city street, might be considered by some to be an act of terrorism. Furthermore, even within the context of an armed conflict, if soldiers are harmed not as a result of being directly targeted, but rather as a result of being in the midst of a random group of civilians (e.g. sitting on a civilian bus, or walking through a shopping mall when these are attacked), then they might too be considered victims of terrorism. Most definitions, including the one used in the Sharm El-Sheikh Fact-Finding Committee Report, do however speak of civilians as being the victims of terrorism. In that case, while bearing the above in mind, it is necessary to clarify the status of those affected by the violent attacks taking place within the Israeli-Palestinian conflict.

On the Israeli side, a number of different categories of people can be referred to:

The general civilian population. If random civilians who might be found in a regular city bus or café at any given moment, are attacked by gunmen or with the use of explosives (including suicide bombers), this is a clear example of terrorism as defined above.

Settlers. The individuals living inside the settlements are civilians (see more on this in the later chapter on settlements). The fact that a settlement has been established in contravention of international law, does not mean that the families living within can be legitimately subjected to random violence. A bomb placed in a settlement shopping mall, or random attacks on civilians cars driven by people living in the settlements, would qualify as acts of terrorism as defined earlier.

Soldiers on active duty. Notwithstanding the earlier reference to certain circumstances in which some views would include military personnel as potential victims, if soldiers on active duty are subjected to a violent attack intended against them, for instance an attack on soldiers manning a checkpoint, this would generally not fit within the definition of terrorism. The attack is nevertheless likely to have been unlawful under the law of the occupying power, who can respond with necessary and proportionate force, and punish the offenders. It may also be unlawful under IHL (and even a war crime) if violating certain principles (e.g. if the attacker pretended to be an injured civilian and then detonated a bomb), but, as noted, the label of terrorism is unlikely to be appropriate.

Off-duty soldiers. This refers to soldiers who are at the given time taking part in active military service, but are not at this particular moment engaged in a military operation (e.g. not manning a checkpoint or patrolling). One of the features of IHL, is that during an armed conflict, combatant members of the armed forces retain their status as combatants also when not actively engaged in combat (e.g. while resting in their military base). Again, while bearing in mind the earlier views on when soldiers might be viewed as victims of terrorism, for the purposes of this analysis, this category of soldiers are therefore in the same category as soldiers on active duty.

Reserve soldiers. A large proportion of Israelis belong to the reserve forces. This means that as in certain other countries, they can be called up by the military either for regular determined periods or in times of emergency. This does not mean that any civilian who could potentially be called up, should be categorised as a soldier. When someone is called up they go through a brief but formal process (including signing papers) and are only then recognised as taking part in military service. Once they have begun their service, they are soldiers and fall into one of the two preceding categories. However, so long as they have not been called up and begun military service, they are members of the general civilian population.

On the Palestinian side, in the absence of a defined military, the primary division of categories would be between the general civilian population not actively involved in hostilities, to individuals and members of groups that do take part.

The general civilian population. A violent attack on randomly selected individuals from the general civilian population (e.g. a gunman opening fire upon worshippers in a place of prayer) would qualify as terrorism.

Members of armed groups and individuals engaged in hostilities. Their status is a little more difficult to determine. Depending on differing interpretations and circumstances they might be described as civilians belonging to the preceding category while at other times their categorisation may differ, leaving them outside the victims as defined earlier (similarly to Israeli soldiers). The issue of their status is analysed in the earlier chapter on armed resistance, and in the following chapter on targeted killings.

Terrorism and terrorists

The above sections covered the issues of what type of acts, and against whom, could be described as terrorism. One must however distinguish between the terms ‘terrorism’ and ‘terrorists’. It is terrorism that is the subject of the various definitions. While it might be automatically deduced that anyone responsible for an act of terrorism is a terrorist, this is not usually followed in practice. Although terrorism is often used to describe the actions of non-state groups, it is at least theoretically possible as noted earlier, that terrorism can also be a method employed by states. Nevertheless, in practice the term ‘terrorists’ is (whether correctly or not) less often used to describe states, and usually refers to members of non-state groups. In fact, certain states even have lists naming various organisations around the world as terrorist organisations. This appears to result in a situation in which the members of a group which engages in acts of terrorism are labelled as terrorists, while the same acts by a state might be described as an act of terrorism without the state being labelled a terrorist. Logically if there is an act of terrorism then there is a terrorist behind it, but the use of the term ‘terrorist’ may be fraught with even more difficulty than ‘terrorism’. There is no straight legal answer to this. Semantics, politics and law are all entangled together in the creation of the conundrum.

One solution might be to label the act as terrorism, in accordance with the definition chosen, but refrain from labelling the actors as terrorists. The perpetrators can be described according

to factual attributes, e.g. gunmen / member of group X/ militant /soldier / etc. These are all factual descriptions of the individuals which do not carry the same connotation as terrorist, and by using them one is not ruling that the action they are guilty of is not terrorism – i.e. the description of the event would be that a suicide bomber/ soldier/ militant committed an act of terrorism. This would be a legally correct even if not wholly satisfactory approach; but then neither is an approach which uses the term ‘terrorist’ only when describing actions of non-state groups even if the state engaged in the same activity, or an approach going against the grain and labelling states as terrorists on the basis of specific actions. Avoiding any use of words with the ‘terror’ root might be seen as shying away from determinations that at least in some cases seem resolutely unquestionable, and legally correct. All approaches are likely to lead to criticisms of sorts. Ultimately, while there might be agreed (even if not unanimous) ways to describe ‘terrorism’ and therefore use that term, as long as there is no clear definition and universal agreement on usage of the term ‘terrorist’, use of the latter remains a policy choice. Whatever exact definition of terrorism is used and the terms chosen to describe the perpetrators, the key would be to maintain consistency, both within a given conflict situation, and also across conflicts, applying the same definitions and terms equally to all situations and circumstances.

On terrorism

- International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, at 408, U.N. Doc. A/54/49 (Vol. I) (1999), entered into force Apr. 10, 2002.
- M. C. Bassiouni, “Legal Control of International Terrorism: A Policy-Oriented Assessment” 43 *Harvard International Law Journal* 83 (2002)
- A. Cassese *International Criminal Law* (2003) pp.120-132

Targeted Killings

During the past few years, Israel has engaged in the practice of deliberate killing of specific individuals who are allegedly active members of Palestinian militant groups. This practice has developed into a recognised government policy, and has been the subject of much debate within the international law community, and as a pending case before the Israeli Supreme Court. The policy is referred to differently, as targeted killings, assassinations, or extra-judicial executions. An additional term sometimes used in Hebrew by official sources, can be roughly translated to ‘targeted prevention’. Referring to it as extra-judicial executions is problematic, certainly at this stage of the explanation, as it predetermines the illegality of the action. Assassinations are often associated with the killing of political leaders whereas many of the individuals killed by Israel might not be described as such; and also assassination is not usually used for killings taking place during an armed conflict, which might be the scenario here. Use of the Hebrew phrase obscures the fact that we are dealing with deliberate taking of lives. Targeted killings is probably the closest description in that it best describes the policy – the deliberate killing of specific individuals, without the term itself containing a determination of its legality or illegality. This is the term that has also been chosen for discussion of the issue by prominent international legal experts, and will be the term employed here. It should be noted however, that usage of the term to describe the policy, does not necessarily mean that it would be an appropriate description of all individual cases.

The following is an attempt to summarise and explain the debate surrounding this policy. First by setting out some of the concepts and issues that lie at the heart of the debate, and then by explaining how these are addressed by the different sides and the conclusions they lead to.

In essence, the question and debates over the legality of targeted killings should in fact be divided into two distinct stages:

- a) The legality of targeting a specific individual in an attempt to kill the person;
- b) The question of how this is actually carried out.

Even if it would be determined legal to attempt to kill a certain person, questions can still be raised on how the operation takes place – for example, did the methods used result in disproportionate harm to innocent bystanders? Conversely, if the initial decision to target the

individual had no legal merit, than however proportionate the methods might seem, the action would still be unlawful. These two questions must therefore be analysed separately.

The law enforcement model

Under IHRL, force must be limited to strict necessity, and potentially lethal force can only be used as a last option. The starting point beyond question, is that the state may not wilfully take the life of an individual. Some situations which in certain circumstances might nevertheless not violate the prohibitions, can be summarised as including:

- (a) the carrying out of a lawfully imposed death penalty (unless the state is party to an instrument forbidding this, such as the First Optional Protocol to the ICCPR);
- (b) if the force used was necessary and proportionate, and lethal force was not a first option;
- (c) killings taking place during an armed conflict and which are lawful under IHL.

As will be shown later, targeted killings are presented by Israel as being a preventative measure, not a punitive one, and therefore would not fall under (a). The second scenario (b) encapsulates the basic principle of using force under IHRL. The UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* state that

“Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

Option (c) touches upon the relationship between the two bodies of law – IHRL and international humanitarian law (IHL) – in which, according to a commonly held approach, if there is an armed conflict and we are faced with a particular situation for which an IHL rule has been designed, then this rule would be the primary source for determining legality (see also chapter on international law framework for reference to relationship between the bodies of law). For example, under the law enforcement model if an individual shot and killed someone who did not pose a direct an immediate threat, this would likely be unlawful –

however, if this was in the context of an armed conflict and it was a soldier who shot an enemy soldier, this would likely be lawful under IHL, and thus deemed to be a lawful act.

The armed conflict model

The armed conflict model for the use of force, as found in IHL, is inherently different from the law enforcement model, in that it largely relies upon categorising people into distinct groups. This model only becomes applicable during an armed conflict.

Combatants

In brief, under IHL combatants (see definition in chapter on armed resistance) have the right to target opposing combatants at any given time during the armed conflict, even if the opposing individual does not pose an immediate threat at the given moment. For instance, a sniper soldier from one army, can hide behind a rock and shoot to kill an enemy soldier who emerges from a tent to sit back and smoke a cigarette. If the targeted individual belongs to the combatant category, then unless he/she is *hors de combat* (through injury or capture), then, generally speaking, lethal force can be used against him/her.

Civilians

Civilians on the other hand, cannot be targeted, and enjoy protection from the use of force. There is however an exception to this basic rule – civilians lose their protection during and for such time as they take a direct part in hostilities. This exception is subject to debate on both its components: how to determine the time period in which the protection is lost; what constitutes taking a direct part. The latter is especially difficult, as there are endless scenarios with no clear cut-off point. Firing a weapon would constitute a direct part. Delivering new rounds of ammunition to the front lines might well be seen as taking a direct part, but delivering sandwiches to the soldiers probably not. Driving a car loaded with explosives into a military barracks would be taking a direct part, but what of the person who helped load the car and stayed behind? The person who procured the explosives? The person who gave his car to be used for the operation? The person who planned it and recruited the operators? The person who suggested the operation be carried out but wasn't actually involved in planning the details? The religious leader who gave his blessing to the operation and said it was God's

will? On many of these there will be little agreement on whether they were taking a direct part.

Additionally, even in the cases where it is determined they were taking a direct part, there will be further debate over what was the period of time in which they can be targeted – in fact, the two parts of the sentence are linked, with the definition of direct part impacting upon the duration for which protection is lost. The narrow approach contends that protection is lost only when actively engaged in the hostile act. A wider approach maintains that active membership in an armed group is in itself a form of taking part, and therefore protection is lost for the duration of membership.

Unlawful combatants

A third category is often mentioned in this debate – that of unlawful combatants. The mere mention of this category is in itself subject of debate, as there is disagreement over whether it even exists, and if so then who does it cover. The IHL treaties mention explicitly only two categories of persons – combatants and civilians. The term unlawful combatant (or other variations such as unprivileged belligerents) has nevertheless been used over the years to describe certain individuals involved in the armed conflict. Generally speaking, it has been used in two ways, describing either (i) combatants who have acted unlawfully and perhaps even lost certain combatant privileges, or (ii) persons who never were eligible for combatant status and are participating in the hostilities despite not having the right to do so. The second usage is the one more often employed in the current debate.

Critics of this term would argue that these people are civilians taking a direct part in hostilities, and that there is no need to mention a new category because they are already dealt with in the existing IHL rules. Accordingly, if the term is nevertheless used, it is only in a descriptive sense – describing those civilians who are taking a direct part – but does not imply a separate legal category with distinct rules. On the opposing side of the debate are those who promote use of the term as a legal category denoting a group of people to whom different rules apply than those of civilians or lawful combatants. According to this view, this is an approach that reflects the reality of modern conflicts, and that the rules on civilians are too

restrictive to be able to counter the threats posed by such individuals, by giving them distinct advantages and protections not available to the combatants who have to face them.

Although not directly part of the debate over targeted killings, it should be noted that the issue of unlawful combatants impacts also upon post-capture proceedings. Combatants who adhere to the rules of IHL while fighting, are immune from prosecution for their actions (but can be held as prisoners of war), although they can be prosecuted for violations of IHL; civilians, having no right to take part in the hostilities, can be prosecuted for any participation in the hostilities regardless of whether they adhered to the IHL rules of conduct (and are not entitled to prisoner of war status). Those who claim the existence of a legal category of unlawful combatants, often hold that while these individuals are lawful targets (similarly to combatants), they are also subject to prosecution for any participation in hostilities, and are not entitled to prisoner of war status (similarly to civilians).

Non-international armed conflicts

The above explanation is largely founded upon the rules of international armed conflict. Non-international (or internal) armed conflicts pose similar if not more complicated dilemmas. Unlike the IHL rules on international armed conflict, the treaty rules for non-international conflicts make no mention of a legal status of combatants, i.e. of persons who may participate in the hostilities and can be lawfully targeted. This is largely due to a reluctance of states to recognise any right of armed opposition groups to participate in hostilities. This means that whereas the targeting of civilians is prohibited, it is unclear how to classify members of armed groups and consequently determine when they can be targeted. The differing views on their classification include defining them as non-civilians who may be targeted at all times, similar to combatants in international conflicts; as civilians who have lost their protection due to direct participation and can be targeted for the duration of the conflict, since their very membership of such a group is a form of participation in the hostilities; or as civilians who may lose their protection at certain times during the conflict, but only if and during the time their actual actions (other than general membership of the group) constitute taking a direct part.

There are also views claiming that the struggle against terrorism (globally and in the context of the Israeli-Palestinian conflict), can be classified as a situation to which the laws of armed conflict apply, even if it is not an international or non-international armed conflict as these are traditionally understood.

The debates and dilemmas on the status of the targeted individuals and if and when they can be attacked, raise similar (although not identical) issues under any of the armed conflict models chosen.

Force during military occupation

So far we have seen the two primary models on the use of force – law enforcement and armed conflict. The question now is which of these models is to be used in occupied territories. The rules here are unclear, as on the one hand military occupation is a situation covered within the IHL rules and therefore the armed conflict model could be applicable, but on the other hand the IHL rules appear to envision a primarily law enforcement situation.

Notwithstanding the latter point, it is apparent that large-scale violence can erupt/continue also after occupation has begun (as has been the case in Iraq), and certain provisions in the rules on occupation do appear to recognise that military operations might take place. A recent report looking into this question, provides some possible approaches to an answer. The Occupying Power, as noted much earlier, has a duty to ensure the stability and security of daily life. While carrying out these functions, it is generally assumed that the law enforcement model will be used, as the functions carried out are essentially ones of policing. However, should force need to be used in the context of preserving the security of the occupying power, this might differ from regular policing. If the level of hostilities reaches a heightened degree of violence justifying it being qualified as armed conflict, and the need for response takes on the shape of straightforward military operations, then the armed conflict model may be the most appropriate one for use in these limited situations (i.e. it would be applied in assessing the legality of the particular military operation, but the law enforcement model would still remain the default model for the regulation of daily life in the territories outside the context of the particular military operation). In the case of the Israeli-Palestinian conflict, if the armed conflict model is to be used, it should also be noted that there is disagreement whether to use

the rules of international armed conflict (as this is the context in which the occupation came about), or a non-international one (as the Palestinian side is not a recognised state) or even, as some claim, a new format of armed conflict against terrorism. In any event, with regard to the participation of non-combatants in the hostilities, and when they can be targeted, the problems are similar.

Proportionality and precautions in attack

As noted earlier, even if one were to conclude that certain individuals might be legitimate targets at a certain time, there are still rules on how attacks are to be carried out. Perhaps the most well-known of these rules, is the principle of proportionality. The clearest definition of this principle is to be found in the First Protocol to the Geneva Conventions, in the form of a prohibition of:

“an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

This prohibition is recognised as one of the fundamental principles of IHL, and part of customary international law (binding all states regardless of ratification of treaties). As such, its status and importance are beyond questioning. Its actual meaning and application to the facts is, however, not as clear. The proportionality test requires the balancing of elements bearing little resemblance to each other; on one side of the scale are the lives and welfare of civilians (and civilian objects) while the other side of the scales contains the concrete and direct military advantage. In both cases the principle refers to the *expected* casualties / *anticipated* advantage – i.e. one can only assess proportionality on the basis of what is known at the time leading up to, and of, the attack, and not on the basis of hindsight.

The difficulty stems not only from the need to strike a balance between incomparables, but also from the fact that one of the sides of the equation – the direct military advantage – is not easily quantifiable. When it comes to applying the principle to a set of facts, the extremes can be fairly clear (e.g. a manifestly disproportionate attack in which a strike against an almost empty munitions warehouse causes the destruction of an entire village, or a clearly proportionate attack in which a strategic military airbase is put out of commission and there are only broken windows and few and very slight injuries are caused in the neighbouring

buildings). Much of the area between the two extremes could find itself the subject of contention, although there are certain guidelines primarily in the form of precedents.

In the situation before us, for instance, problems involve the measuring of the direct military advantage anticipated from the killing of the individual – e.g. does the killing of someone higher up the command chain, or the expert bomb maker, provide an even greater military advantage, and therefore allow for greater risk to be taken with regard to bystanders, than in the case of an attempt to kill a lower level operative? This is the type of question that can arise when applying the proportionality principle.

Proportionality is far from being the only IHL rule dealing with *how* (as opposed to the lawfulness of the target) to carry out an attack. There are also other rules on taking basic precautions, including for instance the issue of identification of the target. The choice of means and methods is also crucial. The weapons used, and the time and place in which the attack is carried out, are all variables that can impact upon the effects of the attack, and the consequential determination of legality. Precautions must be taken both in the earlier planning phases, and when the attack is actually carried out.

It bears repeating here, that however proportionate and carefully planned and executed an attack might be, it must first pass the hurdle of having been aimed at a legitimate target.

Arguments for and against targeted killings

Much has been written about the use of targeted killings, in the context of the Israeli-Palestinian conflict, and outside it. It has been debated in expert meetings, in numerous academic articles, and in hundreds of pages of a petition before the Israeli Supreme Court; the lengthy and detailed arguments clearly cannot all be repeated in this short paper. The following is a summary of the main points that are used in support or as criticism of targeted killings. Not all points are raised by all commentators on the same sides to the debate, and in fact some of them can even appear to contradict each other – e.g. one critic might argue that the armed conflict model does not apply and that the killings violate the rules of law enforcement, while another critic might say that the armed conflict model does apply, but the targeted killings do not conform to its requirements. As will be evident, in many cases the

contention revolves around different interpretations of the key issues and concepts as laid out above. Other disagreements revolve around differences over factual aspects.

Arguments made allowing for targeted killings

- The level of violence in the recent years of the second Intifada qualifies as an armed conflict, and therefore it is the armed conflict model of the use of force that should be applied.
- The individuals that are targeted are all either:
 - unlawful combatants; or
 - civilians taking a direct part in the hostilities;
- Due to the preceding point, the individuals are not entitled to civilian protection.
- The killings are not punishment or revenge, but a preventative measure to thwart these people from carrying out future deadly attacks.
- Targeted killing only takes place when there is no reasonable prospect of detaining the individual – for instance in Gaza, where there are now no Israeli troops and any new incursion would cause much more bloodshed on both sides. There is therefore no availability of a less drastic measure to prevent them from carrying out new attacks.
- The killings are carried out with care and precision, and any casualties amongst bystanders is regrettable but does not violate the principle of proportionality.

Arguments made against targeted killings

- This is a situation of occupation to which the law enforcement model applies, and there is therefore no category of people who can automatically be targeted.
- Under the law enforcement model, force – *a fortiori* lethal force – cannot be resorted to without a prior attempt to detain and bring to trial.
- Even if the armed conflict model would apply, these people are civilians, entitled to civilian protection.
- As civilians, they are entitled to protection at all times other than way they are taking a direct part in hostilities – this is to be construed narrowly, e.g. to those times when someone is actually carrying the explosives on a mission to wreak destruction.
- Killings have taken place in instances where arrest was a viable option.

- It is unclear that there is proof of future danger from targeted individuals, as opposed to targeting those who were involved in past actions. Insofar as this is a punitive action, it amounts to extra-judicial execution.
- The number of innocent bystanders who have been killed and injured is disproportionate; adequate precautions have not been taken in the planning and execution of the attacks. This all adds a further dimension of illegality.

In summary, a clear-cut conclusion covering all cases of targeted killings carried out by Israel is not easily found. The debates on this matter cover a wide range of issues, including some of the more contentious and compounded areas of IHL. Much of the debate over targeted killings appears to be taking place between the two extremes, neither of which side can claim full support from the law. The critics often do not recognise the theoretical possibility that in certain specific and limited circumstances a targeted killing might be lawful; supporters of the policy appear to stretch the potential legality too far, in theory and practice. Perhaps the best reasoned approach, is to be found in the report of international experts recently convened to discuss the question of the right to life in armed conflict, including the matter of targeted killings in occupied territories. From the report it appears that if the situation reaches the threshold for application of the armed conflict model, then killings that are in accordance with IHL might not be unlawful (but see the above debates over interpretations of IHL issues such as loss of civilian protection). Furthermore, even outside the armed conflict model, targeted killings might not be unlawful, as stated in the report:

“All the experts concluded that on the basis of Principle 9 targeted killings are not necessarily unlawful in occupied territory (1) where they are carried out by the occupying power in an area where the occupying power does not exercise effective control such that the occupying power cannot reasonably effect an arrest of the individual, (2) where the occupying power has sought to effect the transfer of the individual from whatever authority is in effective control of the area, assuming there is such an authority, (3) where the individual has engaged in serious, life-threatening, hostile acts and the occupying power has reliable intelligence that the individual will continue to commit such acts, acts which threaten the lives of persons the occupying power is under an obligation to protect and (4) where other measures would be insufficient to address this threat.”

(Principle 9 refers to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, quoted earlier in this chapter)

Even should this formulation be agreed upon, there will undoubtedly remain disagreement over whether various particular cases did actually conform to these requirements (e.g. was

there a reasonable option to attempt to first detain). The official Israeli position would be that the targeted killing policy follows all the above requirements, while critics of the policy would claim that a number of the requirements have been disregarded (see arguments above, and details in the sources at end of chapter). The facts as known to the public, appear to show that there have been cases which may have met the requirements, alongside other instances which did not.

The assertion that such killings might in certain circumstances be lawful, opens the door for potential abuse and the risk of sliding down a slippery slope, into an area where measures are over-used and taken in questionable directions (as it is claimed to have happened on various matters in the past in this conflict); supporters of the policy argue that great care is taken not to abuse the law, while some critics claim that Israel has already descended down the slope and that the targeted killing policy is carried out in such a way as to regularly contravene the law. Nevertheless, as far as the law is concerned, it should be recognised that a default label of illegality cannot automatically be attached to each and every killing occurring in this context, and these will likely need to be examined on a case-by-case basis.

On killings under international law

- *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*
- *UN Code of Conduct for Law Enforcement Officials*
- *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Organised by The University Centre for International Humanitarian Law, Geneva, Convened at International Conference Centre, Geneva, 1-2 September 2005
- HCJ 769/02 (Israeli Supreme Court sitting as High Court of Justice) *The Public Committee Against Torture in Israel et al. v. Government of Israel et al.* (including all submissions - those by the petitioners for arguments against targeted killings, and state submissions for support of the government position).
- *McCann and Others v. United Kingdom* 21 Eur. H.R. Rep. 97, paras.147-149
- *Guerrero v. Colombia*, Communication No.R.11/45, U.N. Doc. Supp. No. 40 (A/37/40) at 137 (1982)
- D. Kretzmer "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?" 16 *European Journal of International Law* 171

On individual status – combatants, civilians and unlawful combatants

- Y. Dinstein "Unlawful Combatancy" 32 *Israel Yearbook on Human Rights* 247 (2002)

- C. Garraway “Interoperability and the Atlantic Divide – A Bridge over Troubled Waters” 34 *Israel Yearbook on Human Rights* 105 (2004)
- J.Henckaerts and L.Doswald-Beck *Customary International Humanitarian Law Vol. 1* (2005) chapters 1, 33.
- *Second Expert Meeting: Direct Participation in Hostilities under International Humanitarian Law*, The Hague, 25-26 October 2004, Co-organized by the ICRC and the TMC Asser Institute

On proportionality and other rules on carrying out attacks:

- A.P.V. Rogers *Law on the Battlefield* (2004) chapters 1,4,5.
- M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) on Articles 35-42, 48-60 of the First Protocol.
- J.Henckaerts and L.Doswald-Beck *Customary International Humanitarian Law Vol. 1* (2005) chapters 3-6

Annexation

In the modern era, annexation of territory acquired by force is unlawful. As noted in the first chapter, occupation is regarded as a temporary situation. While the occupying power does have effective control and exercises authority over the territory, it does not acquire sovereignty. The annexation by Israel of East Jerusalem was widely condemned by the international community as contravening international law, and Israel's sovereignty over East Jerusalem remains largely unrecognised by the international community. Whilst under international law the status of East Jerusalem is one of occupied territory and thus the same as the rest of the West Bank, East Jerusalem is nevertheless differentiated by being subject to Israeli domestic law, thereby placing its Palestinian population in separate circumstances, legally (under Israeli law), practically and politically. The topic of annexation has also been mentioned in connection with the Separation Barrier, (see discussion in chapter on the Barrier).

- Schwarzenberger *International Law as Applied by International Courts and Tribunals, 2: The Law of Armed Conflicts* (London 1968) pp.166-8
- G. Von Glahn, *Law Among Nations: An Introduction to Public International Law* 324-25 (1986).
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Adv. Op., 9 July 2004, [2004] I.C.J. Rep, paras. 87, 117.
- Security Council Resolution 242 (1967)
- Security Council Resolution 478 (1980)

Settlements

Legality of the settlements

The Israeli settlements in the Occupied Territories have been described as unlawful, on the basis of article 49 of the 4th Geneva Convention:

“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

The last sentence would appear to cover the case of the Israeli settlements, and is the straightforward basis for the claim that the settlements were created in contravention of international law.

There have nevertheless been claims in the past contending that this article does not lead to the determination of the settlements as unlawful. One argument put forward is based on the inapplicability of the 4th Geneva Convention to the West Bank and Gaza, and the consequent irrelevance of article 49 of the Convention. The question of applicability of the Convention and the resulting answer that it does appear to apply, have already been dealt with above (in the opening section on occupation), and will not be repeated here.

The second argument goes to the literal interpretation of the article, and is based on the claim that Israel did not “deport or transfer” people into the Occupied Territories, but rather that the individuals chose to go live in the settlements. There are also distinctions made by commentators over the way land was acquired, whether it was private or public property, and if it was first acquired by the state or purchased directly by individuals who then moved there, with the latter circumstances viewed by some as not contravening article 49 .

One of the primary counter-arguments, is that the relevant paragraph of article 49 does not speak of *forcible* transfer – as opposed to the first paragraph of the article which does do so – and the decisive element is therefore less about the question of individual choice, and more about the role played by the occupying power in the movement of its own population into the occupied territory. This would seem to endorse the contention that active encouragement and the extension of financial and other support (e.g. through tax incentives, building of roads to the settlements, and state support in the actual construction process), would be in violation of article 49.

The vast majority of opinion holds that the establishment of the settlements is indeed a violation of the 4th Geneva Convention. This is the view expressed not only by leading commentators (including Israelis), but also by other states (including allies of Israel), the UN Security Council, and the International Court of Justice. The Security Council has clearly stated:

“[...]that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East”

The settlers

The illegality of the settlements is attributed to the role played by the state itself, and does not turn the settlers into ‘illegal persons’. The settlers themselves are civilians. In fact, the illegality of the settlements and the civilian status of the settlers go hand in hand, and it might be said that it is the very fact that they are civilians that makes the settlement unlawful, since

the prohibition that is said to have been violated by the establishment of settlements, involves the transfer of *civilian* population into the occupied territory.

There is a wide variety of reasons for these individuals to be living in the settlements. For instance, some moved there for ideological and/or religious motives of establishing Israeli presence. Many others were motivated by the chance given by the government for cheaper housing and a perceived higher quality of life than was affordable inside Israel – this probably reflects the largest proportion of the settlers. Those amongst the settlers who engage in violence or unlawful activities against the Palestinian population (recent examples have included frequent allegations of the uprooting of olive trees), must be treated as criminals, or in certain limited circumstances armed settlers engaging in violence might also be seen as civilians taking a direct part in hostilities. Israel has a duty to protect the Palestinians from any such violence. As civilians, citizens of Israel, the state also has a duty to protect the settlers from Palestinian violence. Whilst some might argue that this legitimises the construction of the barrier around settlements, others would argue that since the settlements are unlawful, legitimate protection of the settlers should be achieved by dismantling the settlements and having the individuals move back into Israel (see more on this in the chapter on the barrier).

- United Nations Security Council Resolutions 452, 465
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Adv. Op., 9 July 2004, [2004] I.C.J. Rep, para.120.
- E. Benvenisti *The International Law of Occupation* (1993)140-141
- D. Shefi “The Reports of the UN Special Committees on Israeli Practices in the Territories: A Survey and Evaluation” in M. Shamgar (ed) *Military Government in the Territories Administered by Israel 1967 – 1980: The Legal Aspects* (1982) (for the Israeli position)
- G. Von Glahn *Law Among Nations* (1996) p.675
- *Conference of High Contracting Parties to the Fourth Geneva Convention: Statement by the International Committee of the Red Cross* Geneva 5 December 2001
- *The Legal Status of Israeli Settlements under IHL*, policy brief available on: <http://www.ihlresearch.org/opt/>

The Construction of a Barrier in the West Bank

One of the most controversial issues in the past few years has been the construction by Israel of a physical barrier, much – but not all – of which runs through West Bank territory. The public support for this construction appears to be based primarily upon security concerns, as a method of preventing suicide bombers from being able to enter Israel. However, the route of the barrier and the actual construction of it, have raised questions both as to the legitimacy of its purpose and its effects on the Palestinian population.

This construction has been referred to in a variety of terms, ranging from ‘security fence’ to ‘apartheid wall’. In reality the physical attributes of it are not uniform, some sections being similar to a fence, and some to a concrete wall. In addition, large swathes of land adjacent to the construction also form part of it. The term ‘barrier’ might therefore be a slightly more neutral and more importantly – accurate – term than ‘wall’ or ‘fence’. As for the description of its purpose, the adjective is largely in the eye of the beholder. The adjective ‘separation’ would appear to be less controversial than some others, though refraining from any adjective might be the best solution. The terminology of ‘wall’ used by the International Court of Justice was primarily dictated by the question as put to it in the request by the General Assembly for an Advisory Opinion. The term ‘barrier’ will be employed in this paper, other than when quoting the ICJ Opinion.

An Advisory Opinion differs from a contentious case between two states, in that the conclusions are not binding decisions directed at the specific state. Rather, it is meant to clarify matters of international law that have been put before it by an organ of the United Nations - in this case the General Assembly asked:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

Although Advisory Opinions do not directly bind the state, if the conclusion of the Opinion means that a particular state is in breach of international law obligations, the Opinion could

serve as an important stepping stone, or even foundation, towards other measures (e.g. an Advisory Opinion given by the ICJ on the South African presence in Namibia, played a role in the decisions of sanctions against South Africa).

In its Advisory Opinion of July 2004, the International Court of Justice concluded that:

“The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law”

One might expect that since the highest authority in the field of international law has made its determination, this would end the debate. Indeed, at least formally speaking, the construction has been found to be unlawful and can be described as such. However, the ICJ Advisory Opinion has since been subject of much discussion including support and also a significant amount of criticism, and the debate continues to rage. Any reporting of the barrier would therefore be well served by understanding some of the legal issues at stake.

Different attributes of the barrier

The barrier itself is not homogenous, and along its route it differs greatly on various levels. For instance: long parts of it run through the West Bank, but some sections run inside Israel or alongside the Green Line; some sections run around areas with settlements, some do not. Some sections run right through Palestinian communities, and cause hardship to the population, while other sections have less of a direct effect. While much of the barrier physically exists, there are long kilometres which are still in the earlier construction or even planning phases.

The conclusion quoted above from the ICJ Advisory Opinion, refers to the sections running through the Occupied Territories, and not to any sections that do not cross over the Green Line. The reasoning of the Court rested on a number of arguments, including the adverse effect on the human rights of the Palestinian population, and the issue of the barrier being used to protect the settlements which were themselves illegally established. This raises the question of whether sections of the barrier that do not run around settlements, or are in areas that do not have harsh effects on the population would also be unlawful. Conversely, constructing sections of the barrier along the Green Line – and therefore outside the criticism of the ICJ Opinion, and presumably considered legitimate – could nevertheless cause severe

hardship and violations of human rights, since some of the Green Line actually runs right through existing communities. There is therefore some difficulty in speaking of the barrier as a homogenous whole. The Israeli Supreme Court has taken a different approach, ruling on petitions relating to specific sections, and examining them case by case. It should also be noted that as a result of various considerations (including petitions to the Supreme Court), the planned route of the barrier continues to be subjected to discussions of changes, also after the ICJ Opinion.

Purpose of the barrier

Much of the debate surrounding the barrier boils down to an assessment of the purpose for its construction. Its detractors usually claim that it is aimed at creating irreversible facts on the ground, leading to Israeli annexation of all land west of the barrier, including settlements. Supporters of the barrier place their emphasis on the security aspect, stating that it a measure taken to stop suicide bombers from attacking Israeli civilians.

Protecting Israeli citizens living within the Green Line, should be an uncontroversial objective to be sought by the Israeli government. The questions however would be a) whether this construction is a legitimate way of achieving this objective; b) whether the particular route of the construction is designed to meet additional other objectives, and if so would these affect its legitimacy.

Factual support can be found for claims of both detractors and supporters. On the one hand, it can be argued that the completed sections of the barrier have proven effective in preventing suicide bombers from entering Israeli cities. On the other hand, some sections of the barrier are clearly routed to protect settlements; it has also emerged from cases before the Israeli Supreme Court, that despite the Court's view that security concerns must be the primary consideration for the construction, political elements are claimed to be involved (and some would also claim links to land deals benefiting private contractors). While the latter points might lead towards an assessment favouring the detractors, it should also be noted that it would be hard to maintain a claim that annexation has actually taken place, since under international law, certain criteria must be fulfilled for an act of annexation to take place, including a declaration of intent by the state – in this case Israel has repeatedly and publicly

asserted that the barrier is not an annexation attempt, and has shown an ability to dismantle constructed sections. Of course, there is the issue of annexation of East Jerusalem (as dealt with above), but that is an act which took place earlier and regardless of the barrier. In short, there is a difference between saying that Israel is trying to create facts on the ground and wants to gain permanent control of the land – a speculative claim which some would support and others disagree – to actually determining that an illegal act of annexation has occurred, which is a legal claim not easily supported. Indeed, while the ICJ Opinion reflected fears of future annexation rising from the concern that the construction could become permanent, Judge Higgins noted that “As the Court states in paragraph 121, the wall does not at the present time constitute, *per se*, a *de facto* annexation.”

As to the matter of protecting the settlements, this too contains controversial elements. On the one hand, as the ICJ noted, the settlements were unlawfully established, and any measures taken to perpetuate and solidify their existence would thus be tainted with the same illegality. The barrier could easily be viewed as precisely such a measure. On the other hand, as noted in the above section on settlements, the settlers themselves are civilians, and not themselves the violators of the prohibition of establishing settlements. As nationals of the state of Israel, living in areas under its effective control – to where they have moved usually with the acquiescence if not support of the state – they are entitled to a certain amount of protection by the state. Indeed, under IHRL, one might say that Israel is obligated to protect them. The question then becomes one of the level and type of protection these individuals must be given. Even if one were to take the line that the state should withdraw from the settlements and announce to the settlers that it cannot afford them adequate protection while they are living there, any such withdrawal process could take some time (see for instance the length of time and preparation involved in the withdrawal from Gaza). The inhabitants of the settlements cannot be abandoned from one day to the next. Viewed from this angle, one proposed solution might be to accept that temporary measures designed for protection of the civilians are permitted, as opposed to permanent measures designed to also strengthen the settlements’ existence. Supporters of the barrier would classify it as the former, while critics would say it is the latter.

Human rights violations and destruction of private property

Much of the criticism of the barrier focuses upon the daily hardship caused to the Palestinian population of the West Bank. In legal terms, this centres upon alleged violations of IHRL, and IHL rules on interference (e.g. destruction, requisition or confiscation) with private property. The affected human rights, include amongst others: freedom of movement, and the rights to education, health and employment. The ICJ found that both the IHL rules on private property and the human rights obligations, have all been breached. The hardship caused to the Palestinian population is well documented in NGO and UN reports, and is detailed in the ICJ Opinion.

Many of the IHL and human rights obligations, contain qualifications allowing for military or security needs to override the obligation, albeit in a limited fashion dictated by strict necessity and proportionality. Freedom of movement for instance, as stated in the ICCPR:

“shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”

Critics of the Advisory Opinion have pointed out that the process of determining violations may have been lacking, since little detailed attention, if any, was given to the security concerns faced by Israel. While it is true that Israel chose not to cooperate with the Court by submitting material on the merits of the Opinion, states are not obligated to cooperate in Advisory Opinions, and it is up to the Court to assure it is basing its Opinion on the necessary evidence. The Court in fact does recognise this, saying that the lack of material presented directly by Israel should not be an obstacle, since there is plentiful material in the public domain. Considering however the scant reference to details of Israeli security concerns and what role the barrier plays in addressing these concerns (e.g. preventing suicide bombers from entering Israel) it is, as one of the judges pointed out, unclear whether the Court used the available material. The assessment of the violations did not therefore appear to include a detailed examination of the security necessities, and consequently of whether the measures were proportionate to these necessities.

All the above difficulties with the Advisory Opinion are mentioned here not in attempt to necessarily invalidate the final conclusion or to claim that the construction of the barrier was

lawful, but are meant to provide some understanding of why the Advisory Opinion did not end the debate surrounding the barrier, and may have even exacerbated it. It may well be that had the ICJ addressed all the above differently – e.g. included a detailed analysis of Israeli security concerns – it would nevertheless have reached the conclusion that the construction of the barrier on the proposed route is not strictly necessary for security reasons, and/or causes disproportionate hardship to the population, amounting to breaches of international legal obligations. In fact, this is what happened with some of the barrier related cases that came before the Israeli Supreme Court.

The Israeli Court has received petitions on specific sections of the barrier, largely concerned with the effects of the barrier on the Palestinian population. In the ruling over a petition occurring after the ICJ Opinion, the Israeli Court addressed the conclusions reached in the Hague. According to the Israeli Court, the disagreement is not over the principles used by the ICJ, but over the application to the facts (primarily with regard to the question of whether security concerns were adequately put into the balance of proportionality). The Israeli Court has in the past ruled that certain sections of the barrier caused disproportionate hardship, and that the government must amend the route. Proportionality is however always going to be a complex determination, subject to differing interpretations. Those sections that might be amended following the Court's decisions might pass the proportionality test of some observers and fail it in the eyes of others.

In summary, some of the differing views and reasoning behind the disagreements have been laid out above. The Israeli government disagrees with the ICJ's conclusion, while the Israeli Supreme Court approaches the issue section by section, seemingly balancing security concerns with the restrictions placed on the Palestinian population.

The construction of sections of the barrier running through the West Bank has been described by the ICJ as a violation of international law, and whatever criticism may exist, the considerable status of the ICJ in determinations concerning international law cannot not be ignored. While the debates can be acknowledged, any reporting or description of the barrier should include the ICJ's conclusion that the construction in the West Bank breaches international law.

- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Adv. Op., 9 July 2004, [2004] I.C.J. Rep, including Separate Opinions of the Judges, and submissions by states.
- David Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", 99 *American Journal of International Law* 88 (2005)
- N. Lubell "The ICJ Advisory Opinion and the Separation Barrier: A Troublesome Route" 35 *Israel Yearbook on Human Rights* 283 (2005)
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- Ruth Wedgwood, "The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense", 99 *American Journal of International Law* 52, 52 & n. 1 (2005)
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- HCJ 2056/04 (Israeli Supreme Court sitting as High Court of Justice), *Beit Sourik Village Council v. The Government of Israel* (June 30, 2004)
- HCJ 7957/04 (Israeli Supreme Court sitting as High Court of Justice) *Mara'abe et al v. The Prime Minister of Israel et al (Alfei Menashe)* (September 15 2005)