

The Road to Annexation

Israel's Maneuvers to Change the Status of the Occupied Palestinian Territory

A Briefing Paper

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1. Introduction

Since the 1967 Six-Day-War, Israeli occupation of the Occupied Palestinian Territory, comprising the West Bank including East Jerusalem, and the Gaza Strip, has been characterized by a process of “incremental” or “creeping annexation”.¹ This move towards annexation, particularly in the West Bank, has been achieved by implementing long-term, irreversible changes to the occupied territory in contravention of the main tenets of the law of occupation under *jus in bello*, as well as in violation of the prohibition of acquisition of territory by force under *jus ad bellum*. The most striking examples of these “facts on the ground” approach, leading to the *de facto* annexation of portions of the Occupied Palestinian Territory, are the establishment and continuous expansion of Israeli settlements and related regime, as well as the construction of the Separation Barrier within the occupied territory. These actions, combined with Israel’s legislative activity aiming at extending its territorial jurisdiction to settlements, and its State officials’ declarations calling for annexation of parts or all of the West Bank, constitute important evidence of Israel’s intention to appropriate some parts of the OPT in disregard of international law.

This Briefing Paper concludes that actions taken by Israel throughout the 52 years of occupation, but accelerated in recent years, indicate a move towards attempted formal annexation of at least parts of the occupied territory. While the latter would run contrary to international law, laws and practices already in place, the effect of which is to extend Israel’s jurisdiction and appropriate, on a permanent basis, portions of the OPT, are equally unlawful.

To this day, Israel has not issued a formal declaration of annexation over any parts of the West Bank, excluding East Jerusalem; yet, given the current political situation in Israel and the accelerating pace and intensity of supportive statements and actions from the current administration of the United States,² such unilateral action may well occur in the near future. Regardless of whether this happens, it seems reasonable to agree with what has been said by Michael Lynk, the UN Special Rapporteur on the human rights situation in the OPT: “The strict prohibition against annexation in international law applies not only to a formal declaration, but also to those acts of territorial appropriation by Israel that have been a cumulative part of its efforts to stake a future claim of formal sovereignty over the occupied Palestinian territory.”³

¹ O. M. Dajani, “Israel’s Creeping Annexation”, in *Symposium on Revisiting Israel’s Settlements, AJIL Unbound*, Volume 111, 2017, p. 51.

² See, in particular, the United States Trump administration’s presentation of the economic elements of a proposed agreement which has been frequently labelled the “deal of the century”, with political and territorial elements expected to follow at an unspecified date. The purported aim is a final agreement on the Israel-Palestine conflict and related territorial disputes, though this is being proposed without input from Palestinian political leaders, *The Times of Israel*, *Netanyahu says Trump peace plan will be released ‘immediately’ after elections*, 3 September 2019, available at: <https://www.timesofisrael.com/netanyahu-says-trump-peace-plan-to-be-released-immediately-after-vote/>. For more details on the economic portion of the plan, the so-called “Peace to Prosperity” plan, see: <https://www.whitehouse.gov/peacetoprospersity/>; see also Trump administration’s declaration affirming that Israeli settlements are “not, per se, inconsistent with international law”, U.S. Department of State, *Secretary Michael R. Pompeo Remarks to the Press*, 18 November 2019, available at: <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press/>; and its recognition of Israel’s annexation of the Golan Heights, Syrian territory occupied since 1967, BBC news, *Golan Heights: Trump signs order recognising occupied area as Israeli*, 25 March 2019, available at: <https://www.bbc.com/news/world-middle-east-47697717>; see finally the US Ambassador’s declaration that Israel has “a right to retain ... some of the West Bank.”, *The New York Times*, U.S. Ambassador Says Israel Has Right to Annex Parts of West Bank, 8 June 2019, available at: <https://www.nytimes.com/2019/06/08/world/middleeast/israel-west-bank-david-friedman.html>.

³ *Report of the UN Special Rapporteur on the Situation of human rights in the Palestinian territories occupied since 1967*, UN Doc A/73/45717, 22 October 2018, para. 55.

Any act by Israel that would constitute *de facto* or *de jure* annexation of parts of the Occupied Palestinian Territory is null and void under international law and does not change the status of the occupied territory nor the protections afforded by international humanitarian law (IHL) and international human rights law (IHRL) to the Palestinians living in it. Therefore, the characterization by this paper of certain conducts as “acts of annexation” is critical not by virtue of their effect on the legal status of the OPT. Rather, it is to underscore that recent developments have signaled a clear evolution in the scope and nature of the unlawful occupation and its correlative IHL and IHRL consequences. In this regard, Israel not only continues to violate systematically key tenets of the law of occupation and international human rights law, but it is also acting in contravention of the peremptory norm of international law prohibiting the acquisition of territory by force. This brazen pattern of violations has wider implications as it engages the international responsibility of third States, which are under an obligation not to recognize and provide assistance in maintaining the unlawful situation derived from Israel’s wrongful conduct, as well as the duty to cooperate to bring to an end such conduct.

Based on this analysis, and on the applicable international law, the International Commission of Jurists calls on Israel, to comply with its obligations under international law and recognize the *de jure* applicability of the law of occupation as well as international human rights law to the Occupied Palestinian Territory.

In particular, the ICJ urges Israel to:

- **In line with its obligations as the occupying power, Israel must refrain from permanently changing the demographic composition or territorial status of the OPT, including through the construction of illegal settlements.**
- **In line with the findings of the International Court of Justice, Israel must cease the construction of the Separation Barrier within the West Bank; dismantle the portions of the Barrier already built; and make reparation to the Palestinians who were harmed by the effects of the Barrier.**
- **Israel must respect the Palestinian people’s right to self-determination as prescribed by IHRL and as reiterated by the International Court of Justice.**
- **Israel must end any conduct aiming at annexing parts or all of the West Bank.**
- **Israel must abide by relevant Security Council resolutions declaring the annexation of East Jerusalem as “null and void” under international law and renounce its sovereignty claims over East Jerusalem.**

The ICJ also urges other States to refrain from recognizing Israel’s conduct aiming at annexing parts of the West Bank and from providing assistance in maintaining such conduct. Third States should also cooperate to bring such unlawful conduct to an end.

2. Classification of the conflict and applicable law

Following the Six-Days War of 1967, Israel retained control over the Syrian Golan Heights, the West Bank, including East Jerusalem, and the Gaza Strip, placing them under belligerent occupation.⁴ The latter two non-contiguous areas had been administered by Jordan and Egypt, respectively, since the establishment of the ‘Green Line’ along the 1949 Armistice

⁴ During the Six-Day War of 1967, Israel also occupied the Sinai Peninsula from Egypt.

demarcation, separating the newly founded State of Israel and its neighbors.⁵ Pursuant to the Oslo Accords (1993-1995) – an interim agreement between Israel and the Palestinian Liberation Organization (PLO) intended to lead to a permanent resolution of the conflict – the West Bank was divided into three areas under different jurisdictions. Area A, constituting approximately 18 percent of the West Bank and encompassing urban Palestinian areas, was placed under the full control of the Palestinian Authority. Area B, constituting some 22 percent of the territory, was placed under Palestinian civil control and Israeli security control. Area C, including the remaining 60 percent of the territory, was placed under full Israeli control for security, planning and construction purposes.⁶ Although the Oslo Agreement provided that powers and responsibilities in Area C would be transferred gradually to the Palestinian Authority by the conclusion of the five-year interim period in 1999, the timeline for this transfer was never respected and progress on the overall implementation of the Agreement has remained stalled. The last genuinely serious process towards a final status agreement took place between Israel and the Palestinian authority in Taba in 2001. These and other efforts ultimately failed and the interim agreement is still in effect today.

It is important to stress that the division of territory following the Oslo agreements does not change the status of the territories under IHL, nor, pursuant to article 47 of the Fourth Geneva Convention (GC IV), the protected status of persons under occupation. Therefore, more than 50 years since the beginning of the occupation, the West Bank including East Jerusalem and the Gaza Strip, constituting the Occupied Palestinian Territory, remain under Israeli military rule.⁷

2.1 Classification of the conflict as belligerent occupation

International humanitarian law (IHL) is applicable to belligerent occupation. Article 42 of the Regulations annexed to the 1907 Hague Convention IV (Hague Regulations), lays down the constitutive elements of such occupation, affirming that “a territory is considered occupied when it is actually placed under the authority of the hostile army” and that “the occupation extends only to the territory where such authority has been established and can be exercised”.⁸ To determine whether a territory is under the authority of a hostile army, the notion of “effective control” is used.⁹ The “effective control” test, which is an assessment based on facts, consists of three cumulative elements:

- One State’s armed forces are physically present in the territory of another State, without the consent of the local government in place at the time of the invasion;

⁵ The ‘Green Line’ refers to Israel’s demarcation lines between Israeli forces and its neighbors (Egypt, Jordan, Lebanon and Syria) during the 1949 armistice negotiations following the first Arab–Israeli war. The name comes from the green ink used to draw the line on the map while the armistice talks were taking place. After the Six-Day War in June 1967, the Green Line boundary was maintained as an administrative line of separation between the sovereign state of Israel and the territories it occupies. See, Israeli Ministry of Foreign Affairs, *Armistice Lines (1949-1967)*, available at: <https://www.mfa.gov.il/mfa/aboutisrael/maps/pages/1949-1967%20armistice%20lines.aspx>.

⁶ For more information on the Oslo Accords, see *Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords)*, available at: <https://peacemaker.un.org/israelopt-osloaccord93>.

⁷ See, among others, the preamble of Security Council resolutions S/RES/1860, 8 January 2009, and S/RES/2334, 23 December 2016; UNGA Res A/C.4/73/L.16, 14 November 2018 and UNGA Res A/RES/72/85, of 7 December 2017; see also Peter Maurer, President of the International Committee of the Red Cross, *Challenges to international humanitarian law: Israel’s occupation policy*, (2012), p. 2-6.

⁸ This same standard is used to determine the existence of a state of occupation under the Geneva Conventions.

⁹ T. Ferraro, ‘Determining the Beginning and End of an Occupation Under International Humanitarian Law’, 885 *International Review of the Red Cross* 94 (2012) p. 139.

- The local government is incapable of exerting its authority by virtue of the foreign forces' presence;
- The foreign forces are able to exercise authority over the territory concerned (or parts thereof) in lieu of the local government.¹⁰

In principle, the effective control test applies to establish both the beginning and the end of an occupation. It follows that, when any of three elements ceases to exist, the occupation can be considered to have ended. However, according to the 2016 International Committee of the Red Cross (ICRC) Commentary, in some particular and exceptional cases, namely "when foreign forces withdraw from the territory they are occupying (or parts thereof) while retaining key elements of authority or other important governmental functions that are typical of those usually taken on by an Occupying Power", the law of occupation might continue to apply "within the territorial and functional limits of those competences."¹¹ The underlying reason for this exception is that, despite the lack of physical presence of the foreign forces in the territory concerned, "the authority they retain may still amount to effective control for the purposes of the law of occupation and entail the continued application of the relevant provisions".¹² This specific case will be further developed below, when analyzing Israeli's government position in relation to the status of the Gaza Strip.

Law applicable to the Occupied Palestinian Territory

The existence of an occupation, within the meaning of IHL, triggers the application of the 1949 Fourth Geneva Convention and other rules governing occupation set forth in the 1907 Hague Regulations, the 1977 Additional Protocol I to the Four Geneva Conventions (AP I), when applicable, and relevant rules of customary international humanitarian law.¹³ Israel, as the occupying power, is bound by the 1949 Geneva Conventions, most notably GC IV, as well as by the international humanitarian law norms that have become part of customary international law.¹⁴ The 1907 HR, the GCs, and to a large extent the 1977 APs, to which Israel is not a party, all reflect customary international law binding on all States, including by Israel.¹⁵ As this paper will explain below, Israel challenges the *de jure* applicability of the law of occupation to the OPT, since it does not consider these territories as "occupied" within the meaning of IHL.¹⁶

In addition to IHL, International Human Rights Law (IHRL) continues to apply in situations of armed conflict, including occupation.¹⁷ The two legal frameworks are complementary, meaning that one body of law may reinforce the protections offered by the other.¹⁸ As a party to the core UN human rights treaties,¹⁹ Israel is bound by human rights obligations set out therein,

¹⁰ T. Ferraro and L. Cameron, 'Article 2: Application of the Convention', ICRC, *Commentary on the First Geneva Convention*, 2016, para. 304.

¹¹ *Ibid.*, para. 307.

¹² *Ibid.*, para. 308.

¹³ See, ICRC Customary IHL Database, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul.

¹⁴ *Ibidem*

¹⁵ Israeli Supreme Court has recognized the 1907 Hague Regulations as reflecting customary international law and as applicable to the West Bank, HCJ 606/78 *Ayyub v Minister of Defence* [1978] PD 33 (2) 113 (*Beth El case*).

¹⁶ See the amendment (Military Order 144) to *Military Order Concerning Security Regulations that is annexed to Proclamation No. 3*, October 1967, section 35.

¹⁷ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 168 (2005), para. 216.

¹⁸ Human Rights Committee, *General Comment no. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11.

¹⁹ Israel is party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all Forms of

including in the occupied territory. The State of Palestine, as party to many of these treaties also has parallel human rights obligations in this respect, but that does not obviate Israel's independent obligations. Accordingly, Israel as the occupying power must respect and ensure to the protected population under occupation the full range of rights pursuant to its international treaty obligations. These obligations have been affirmed by the International Court of Justice in its *Advisory Opinion on the on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter the *Wall case*)²⁰ and in its judgment on the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* as well as on numerous occasions by the UN Human Rights Committee and other treaty bodies.²¹ Indeed, even if the State of Palestine were not deemed to be under belligerent occupation within the meaning of the law of armed conflict, Israel would still be bound to respect and protect the rights of Palestinians extraterritorially, since it exercises effective control of the territory and therefore its jurisdiction and responsibility are engaged. The fact that Israel bears human rights obligations in the OPT has also been consistently expressed in UN General Assembly (GA) Resolutions,²² in UN Secretary-General reports,²³ and by the UN High Commissioner for Human Rights.²⁴ Yet, Israel continues to persistently reject both the applicability of human rights in situations of armed conflict as well as the "extraterritorial applicability of human rights" to the OPT.²⁵ Pursuant to its reasoning, Israel accepts to be bound by human rights law in the territories it has formally purported to annex, namely East Jerusalem and the Golan Heights.²⁶

2.2 Israel's position on belligerent occupation

Since the conclusion of the Six-Day War in 1967, Israel has referred to the Palestinian territories it controls, namely the West Bank including East Jerusalem and the Gaza Strip (before the unilateral disengagement in 2005 from the latter),²⁷ as "disputed territories",²⁸ rather than occupied territories, consistently rejecting the notion that there is a state of

Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC), the Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography (CRC-OP-SC), and the Convention on the Rights of Persons with Disabilities (CRPD).

²⁰ ICJ, *Wall case*, p. 180, paras. 111 and 112.

²¹ See, among others, Human Rights Committee, concluding observations: Israel, CCPR/C/ISR/CO/4, para. 5 (2014); Committee on Economic, Social and Cultural Rights, concluding observations: Israel, E/C.12/ISR/CO/3, para. 8 (2011); Committee on the Rights of the Child, concluding observations: Israel, CRC/C/ISR/CO/2-4, para. 3 (2013).

²² See, among others, General Assembly Res 71/98, UN Doc A/RES/71/98, 23 December 2016, preamble; and Res 72/87, UN Doc A/RES/72/87, 14 December 2017, preamble.

²³ See, among others, A/69/348, para. 5, 25 August 2014; A/HRC/28/44, para. 6, 9 March 2015; A/HRC/34/39 para. 4, 13 April 2017.

²⁴ See, among others, A/HRC/8/17, para. 7, 6 June 2008; A/HRC/12/37, paras. 5-6, 19 August 2009; A/HRC/28/80, para. 4-5, 2 March 2015; A/HRC/37/43, para. 3, 6 March 2018.

²⁵ *Israel: Fourth Periodic Report*, UN Doc CCPR/C/ISR/4, 12 December 2013, paras. 47- 48.

²⁶ *Ibid.*, para. 49.

²⁷ During the Six-Day War of 1967, Israel also occupied the Sinai Peninsula from Egypt and the Golan Heights from Syria.

²⁸ It is worth mentioning that immediately after establishing control over the "occupied territories", Israel issued a military order in which it declared that the territories were occupied and that it accepted the applicability of GC IV. See, *Military Order Concerning Security Regulations that is annexed to Proclamation No. 3*, 7 June 1967, section 35: "A military court and the administration of a military court shall fulfill the provisions of the Geneva Convention dated August 12, 1949 Relative to the Protection of Civilian Persons in Time of War, in all matters related to legal proceedings, and in all case of contradiction between the Order and the aforesaid Convention, the provisions of the Convention shall prevail." However, in October 1967, the Military Commander introduced an amendment to Military Order 3 (Military Order 144), removing Section 35 and all references to GC IV. The Military Orders are available in Arabic and Hebrew, the translation above has been provided by the Israeli NGO, [Military Court Watch](#).

occupation and refuting the *de jure* applicability of the GCs. Israel has instead declared an intention to act *de facto* in accordance with the “humanitarian provisions” of GC IV, failing to officially communicate which provisions it considers to be humanitarian.²⁹ In fact, as an instrument of international humanitarian law, all of GC IV’s provisions may be characterized as humanitarian.

In asserting its position, the Israeli government has relied upon the so-called “missing reversioner” theory³⁰ referring in particular to the lack of a recognized sovereign over the occupied territories prior to their annexation by Jordan and Egypt in 1948. Pursuant to this theory, when Israel occupied the West Bank and the Gaza Strip in 1967, they were not considered to be part of the territory of a High Contracting Party; as a result, according to this view, the conditions of applicability set by article 2 of GC IV were not fulfilled.³¹

Under international law, the fact that an occupied territory is “disputed,” or its status is unclear, does not have a bearing on the legal assessment determining whether or not it is placed under military occupation. As emphasized by Ferraro, one of the authors of the 2016 ICRC Commentary on Common Article 2, “[a]s for all types of armed conflict, the question whether an occupation exists is determined on the basis of the prevailing facts” keeping a strict separation between *jus in bello* and *jus ad bellum*, “and does not depend neither on the subjective view of the parties involved nor on the lawfulness of the intervention under the legal framework governing the use of force in international relations.”³²

Israel’s interpretation of Article 2 of GC IV has been widely rejected,³³ and the UN Security Council from the outset in 1967 has asserted the West Bank, including East Jerusalem, and the Gaza Strip as occupied territory to which the GCs apply,³⁴ a position it has reaffirmed in numerous subsequent resolutions.³⁵ This is also the official stance of the ICRC³⁶ and of the International Court of Justice, which stated the following:

[T]he Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that the Convention is applicable in the

²⁹ See, Complementary Argument on Behalf of the State in HCJ 1526/07 *Ahmad `Issa `Abdullah Yassin et al. v Head of the Civil Administration et al.*, 5 July 2007, section 12, cited by Bimkom – Planners for Planning Rights, *The Prohibited Zone - Israeli planning policy in the Palestinian villages in Area C*, June 2008, p. 8.

³⁰ This theory was first advanced in 1968 by Professor Yehuda Blum. See Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 293-94 (1968).

³¹ See article 2(2), GC IV: “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.”

³² T. Ferraro, ‘Determining the Beginning and End of an Occupation Under International Humanitarian Law’, 885 *International Review of the Red Cross* 94 (2012) p. 134.

³³ See among others, International Commission of Jurists, *Israel’s Separation Barrier – Challenges to the rule of law and human rights*, 6 July 2004: “There can be no reasonable doubt that the four Geneva Conventions, and in particular the Fourth Geneva Convention, is *de jure* applicable to the Occupied Territories”, p. 18.

³⁴ United Nations Security Council, Res 242, UN Doc S/RES/242 (22 November 1967), op. 1(i).

³⁵ United Nations Security Council, Res 338 (1973), 446 (1979), 452 (1979), 465 (1980), 476 (1980), 478 (1980), 1397 (2002), 1515 (2003), 1850 (2008) and 2334 (2016).

³⁶ See among others, Conference of High Contracting Parties to the Fourth Geneva Convention Geneva, Declaration, 5 December 2001, para. 3, “Taking into account art. 1 of the Fourth Geneva Convention of 1949 and bearing in mind the United Nations’ General Assembly Resolution ES-10/7, the participating High Contracting Parties reaffirm the applicability of the Convention to the Occupied Palestinian Territory, including East Jerusalem and reiterate the need for full respect for the provisions of the said Convention in that Territory. Through the present Declaration, they recall in particular the respective obligations under the Convention of all High Contracting Parties (para. 4-7), of the parties to the conflict (para. 8-11) and of the State of Israel as the Occupying Power (para. 12-15)”; See <https://www.icrc.org/en/doc/resources/documents/statement/57jrgw.htm>.

Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.³⁷

The same position as been expressed on a number of occasions by the Israeli Supreme Court, sitting as the High Court of Justice,³⁸ including in the decision on the *Beit Sourik* case in 2004, where the Court affirmed that: "Since 1967, Israel has been holding the areas of Judea and Samaria [hereinafter – the area] in belligerent occupation."³⁹

Israel's unilateral purported annexation of East Jerusalem

The application of the law of occupation also extends to East Jerusalem, despite the fact that Israel purported unilaterally to annex the territory in 1967. Shortly after the conclusion of the Six-Day War, Israel enacted a number of laws aimed at expanding its jurisdiction over East Jerusalem and its adjacent areas,⁴⁰ effectively annexing the city in violation of the Charter of United Nations' (UN Charter) prohibition of acquisition of territory by force.⁴¹ The UN General Assembly condemned such measures as invalid and calling for their rescission.⁴² Israel's lack of compliance with GA resolutions led in 1968 to the Security Council's adoption of Resolution 252 which, *inter alia*, reaffirmed the invalidity of acquisition of territory by force and added that: "all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status."⁴³

In 1980, with a view to further consolidating its effective annexation over East Jerusalem, the Knesset adopted the "Basic Law: Jerusalem" declaring Jerusalem, complete and united, as the eternal capital of Israel.⁴⁴ In response to this unilateral act, the UN Security Council adopted resolution 478 declaring that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent 'basic law' on Jerusalem, are null and void and must be rescinded forthwith."⁴⁵ It also affirmed that such measures do not affect the continued application of GC IV and called on all States not to recognize Israel's unilateral

³⁷ International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), ICJ Reports 179 (2004), para. 101; see also paras. 78 and 89.

³⁸ In Israel, the Supreme Court also sits as the High Court of Justice. This function is unique to the Israeli system because as the High Court of Justice, the Supreme Court acts as a court of first and last instance. The High Court of Justice exercises judicial review over all acts and decisions of governmental authorities, including the IDF, wherever they may be performed. In addition, the Court has powers "in matters in which it considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal." As a High Court of Justice, the Supreme Court hears over a thousand petitions each year, upholding the rule of law and strengthening human rights. For more information, see Israel's MFA's website: <https://mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx>; see also, D Kretzmer, *The law of belligerent occupation in the Supreme Court of Israel*, *International Review of the Red Cross*, Volume 94 Number 885 Spring 2012, p. 3.

³⁹ Israeli High Court of Justice (HCJ) 2056/04, *Beit Sourik Village Council v. The Government of Israel et al.*, 48(5) PD, p.807, 2004, paras. 1, 23; see also HCJ 390/79, *Mustafa Dweikat et al. v. the Government of Israel et al.* (the *Elon Moreh* Case), 34(1) *Piskei Din* 1; excerpted in: (1979) 9 Israel YbkHR 345.

⁴⁰ See, among others, Law and Administration Ordinance (Amendment No. 11) Law, 27 June 1967 and Municipal Corporation Ordinance (Amendment) Law, 1967, available at: <https://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/13%20law%20and%20administrati-on%20ordinance%20-amendment%20no.aspx>.

⁴¹ See *Charter of the United Nations*, 26 June 1945, 892 UNTS 119 (UN Charter) Article 2(4).

⁴² See UNGA Res A/RES/2253(ES-V), 4 July 1967, and A/RES/2254(ES-V), 14 July 1967.

⁴³ See UNSC Res S/RES/252, 21 May 1968, available at: <https://digitallibrary.un.org/record/90754?ln=en>

⁴⁴ Basic Law: Jerusalem, Capital of Israel, 34 L.S.I. 209 (1980).

⁴⁵ See UNSC Res S/RES/478, 20 August 1980, available at: <https://digitallibrary.un.org/record/25618?ln=en>.

moves.⁴⁶ Until today, no member of the United Nations, apart from Israel itself, recognizes the annexation of East Jerusalem. These resolutions have confirmed that the international community regards East Jerusalem as occupied territory, to which GC IV applies.

Israel's unilateral disengagement from the Gaza Strip

On 6 June 2004, the Israeli government adopted a "disengagement plan" providing for the unilateral removal from the Gaza Strip of Israeli security forces and Israeli civilians living in settlements. By 12 September 2005, when all Israeli residents and associated security personnel had left the Gaza Strip, Israel declared that "there will be no basis for claiming that the Gaza Strip is occupied territory."⁴⁷

However, in the *al-Basyuni* case of 2008, where the Israeli Supreme Court had to decide whether a reduction of electricity supply from Israel to the Gaza Strip was lawful, the Court affirmed that although Israel no longer occupied the Gaza Strip, it nonetheless maintained some humanitarian obligations toward its residents.⁴⁸ According to the Court, these obligations arose as a consequence of the state of active hostilities existing between Israel and Hamas; the degree of Israel's control over border crossings; and the dependence that Gaza residents have developed on electricity supplied by Israel over the many years of occupation.⁴⁹ Notwithstanding these conclusions, the Court failed to indicate the specific legal sources on which its assessment that Israel has a positive obligation to supply electricity to Gaza residents is grounded. Under IHRL, as mentioned above, the International Court of Justice, among other authorities, has affirmed that Israel bears human rights obligations in the OPT including with regard to economic, social and cultural rights.⁵⁰ Israel's obligations to supply electricity to the Gaza residents is therefore grounded in articles 11 and 12 of the ICESCR which ensure the rights to an adequate standard of living and the right to health.⁵¹ Under IHL, the only possible situation triggering the positive obligation of a party to the conflict to provide for the humanitarian needs of the population in the adversary's territory is if that territory is under belligerent occupation.⁵²

Leaving aside the contradictory domestic positions on the matter, as mentioned in the first section of this briefing, under IHL the end of an occupation depends on whether or not the occupying power is still exercising effective control over the territory. Pursuant to the 2016 ICRC's Commentary, key elements of such authority can be maintained, in some cases, even when the occupying forces physically withdraw from the territory.⁵³ Indeed, as reported by the Commentary:

⁴⁶ *Ibid.*

⁴⁷ See, *The Disengagement Plan-General Outline*, 18 April 2004, available on Israel MFS's website: <https://mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/disengagement%20plan%20%20general%20outline.aspx>. Previous to the 2005 disengagement, the Israeli Government rejected the notion that the Gaza Strip was occupied territory. However, in 2004, a judgment in the Israeli Supreme Court in referred to Israel's status in the Gaza Strip as occupying power. See, Israeli High Court of Justice, *Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip case*, HCJ 4764/04, 30 May 2004, paras. 10, 12.

⁴⁸ Israeli High Court of Justice (HCJ) 9132/07 *al-Basyuni v. Prime Minister of Israel*, 30 January 2008, paras. 21-22.

⁴⁹ *Ibid.*

⁵⁰ ICJ, *Wall case*, p. 180, paras. 111 and 112.

⁵¹ Committee on Economic Social and Cultural Rights, *General Comment no. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, UN Doc. E/C.12/2000/4, 11 August 2000, paras. 2-4, 12(a) and 41.

⁵² Article 59 GC IV, see also, ICRC Commentary of 1958, Article 59 GC IV, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15B5740DF2203BE4C12563CD0042C966>.

⁵³ T. Ferraro and L. Cameron, 'Article 2: Application of the Convention', ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 307-8.

it may be argued that technological and military developments have made it possible to assert effective control over all or parts of a foreign territory without a continuous military presence in the area concerned ... in these circumstances, any geographical contiguity existing between the belligerent States might play a key role in facilitating the remote exercise of effective control, for instance by permitting an Occupying Power that has relocated its troops outside the territory to make its authority felt within reasonable time.⁵⁴

Since its 2005 disengagement, Israeli continues to exercise effective control over the borders, coastline and airspace of the Gaza Strip as well as over the flow of people and goods into and out of the territory. In addition, Israel maintains its authority over the telecommunications, water, electricity and sewage networks in the Strip and its population registry.⁵⁵ It seems accurate to conclude that the Gaza Strip is still under Israeli occupation. This position has been reaffirmed by numerous UN Security Council⁵⁶ and UN General Assembly⁵⁷ resolutions as well as by the ICRC which, in 2012, reiterated the concept as follows:

While the shape and degree of this military occupation have varied, Israel has continuously maintained effective control over the territories it occupied as a result of the Six Day War in 1967, and over the Palestinian population living there ... In the Occupied Palestinian Territory – that is, the West Bank, East Jerusalem, and the Gaza Strip – the applicable legal framework is the law of belligerent occupation ...⁵⁸

The ICJ therefore concludes that the West Bank, including East Jerusalem, and the Gaza Strip retain the status of occupied territory within the meaning of international law.

- **Israel must comply with its obligations under international law and recognize the *de jure* applicability of the law of occupation as well as international human rights law to the Occupied Palestinian Territory.**

3. The occupying power's laws and practices aimed at permanently altering the status of the occupied territory

The main assumption underlying the law of belligerent occupation is that the exercise of authority and control by the occupying power is meant to be transitional and a temporary state of affairs.⁵⁹ In other words, occupation cannot become permanent and irrevocable and, in particular, it cannot lead to transfer of sovereignty nor to a unilateral change of the political status of the occupied territory. The occupying power assumes the role of a *de facto*

⁵⁴ *Ibid.*, para. 309.

⁵⁵ See, UN Human Rights Council, *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, UN Doc A/HRC/29/CRP.4, 24 June 2015, paras. 27, 29.

⁵⁶ See, among others, the preamble of Security Council resolutions S/RES/1860, 8 January 2009, and S/RES/2334, 23 December 2016.

⁵⁷ See, among others, UNGA Res A/C.4/73/L.16, 14 November 2018 and UNGA Res A/RES/72/85, of 7 December 2017.

⁵⁸ Peter Maurer, President of the International Committee of the Red Cross, *Challenges to international humanitarian law: Israel's occupation policy*, (2012), p. 2-6.

⁵⁹ *Prosecutor v Naletilić and Martinović* (Judgement) ICTY-98-34-T (31 March 2003) 214: "Occupation is defined as a transitional period following invasion and preceding the agreement on the cessation of the hostilities". See also United States Department of Defence, *Law of War Manual*, June 2015, 753-754: "[...] Occupation is essentially provisional".

administrator of the territory until conditions allow for the return of the territory to the sovereign.⁶⁰

As the ICRC clarified, “[...] the occupation of territory in wartime is essentially a temporary, *de facto* situation, which deprives the occupied Power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights. That is what distinguishes occupation from annexation [...].”⁶¹ It follows that an occupying power has the obligation to preserve, as far as possible, the *status quo ante* in the occupied territory.⁶² This obligation is reflected in the law of occupation, including under article 43 of the 1907 HR, stipulating that the occupying power should respect “unless absolutely prevented, the laws in force in the country;” and article 49 of GC IV, which is aimed at preventing permanent or long-term demographic change to the territory by prohibiting the forcible transfer of the protected population within or outside of the occupied territory, as well as the deportation or transfer of the occupying power’s own population into the territory it occupies.

As this section will show, in its 52 years of occupation Israel has repeatedly breached these core tenets of international humanitarian law. Some of these breaches show an unambiguous intention to permanently change the status of the occupied territory. This is the case with regard to the annexation of East Jerusalem,⁶³ the establishment and expansion of the settlement enterprise,⁶⁴ the construction of the Separation Barrier (the Barrier),⁶⁵ and the forcible transfer of the protected population.⁶⁶

3.1 *The transfer of population within or outside the occupied territory*

The establishment and expansion of Israeli settlements in the OPT is commonly understood as a flagrant violation of the law of occupation.⁶⁷ In order to enable the construction and development of settlements, Israel, beginning in the early stages of the occupation, seized property belonging to Palestinian persons and entities and undertook the demolition of houses, infrastructure and orchards. These actions constituted a primary driver of forcible transfer of the protected population and massive displacement.⁶⁸ The extensive destruction and appropriation of property and the forcible transfer of the protected population constitute grave breaches of GC IV and amount to war crimes.⁶⁹

⁶⁰ See, *Report of the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UN Doc A/72/556, 23 October 2017, para. 33.

⁶¹ ICRC, *Commentary on GC IV: Article 47* (1958) 275 at: <https://ihl.databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C4712FE71392AFE1C12563CD0042C34A>.

⁶² ICRC, “Contemporary challenges to IHL — Occupation: Overview”, June 2012, available at: <https://www.icrc.org/en/document/occupation>.

⁶³ See UNSC Res S/RES/478, 20 August 1980.

⁶⁴ See UNSC Res S/RES/2334, 23 December 2016, Op. 1, 2 and 4.

⁶⁵ ICJ, *Wall case*, p. 136, para. 142.

⁶⁶ See, *Report of the Secretary-General on the Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc A/HRC/34/38, 13 April 2017, paras. 23-29.

⁶⁷ See UNSC Res S/RES/2334, 23 December 2016, Op. 1; see also ICJ, *Wall case*, para. 120; ICRC, *Fifty years of occupation: Where do we go from here?*, 2 June 2017, available at: <https://www.icrc.org/en/document/fifty-years-occupation-where-do-we-go-here>.

⁶⁸ See, *Report of the Secretary-General on the Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc A/HRC/34/38, 13 April 2017, paras. 21-25.

⁶⁹ See Article 53 and 49(1) of GC IV. To have the list of violations amounting to grave breaches of GC IV see Article 147. The Geneva Conventions establish a system to repress through penal sanctions a limited set of violations of the Conventions described as “grave breaches” and listed in Articles 50, 51, 130, 147 of Conventions I, II, III and IV respectively. Under article 146 of GC IV, the High Contracting Parties have the obligation to enact penal sanctions for these particular violations, search for those “alleged to have committed, or to have ordered to be committed” these acts and prosecute them “before their own courts,” or hand over

The transfer of the occupying power's civilian population into the territory it occupies

As mentioned above, from the outset of the occupation Israel has pursued a policy of establishing illegal settlements by transferring its own population into the OPT.⁷⁰ Israeli settlements are located beyond the Green Line of 1949, established pursuant to an armistice and operational until 1967, and include structures in East Jerusalem and in "Area C" of the West Bank. Since settlements are scattered all across the West Bank, this territory is fragmented into enclaves with almost no territorial contiguity. With a current total settler population of at least 594,000 in the West Bank (around 386,000 in some 130 settlements in Area C and 208,000 in East Jerusalem), the number of settlers has more than doubled since the beginning of the Oslo process in 1993, and continues to grow.⁷¹ In addition to the regular settlements, approximately 100 "illegal outposts" have been built in Area C of the West Bank. Outposts are settlements built without an official authorization by the Israeli government, which means that they are illegal even under Israeli domestic law. However, the government typically provides support and assistance to these outposts and often ends up legalizing them retroactively.⁷²

Israel allocates land for the purposes of constructing settlements, which includes seizing land, some privately owned,⁷³ requisitioning land for military purposes, declaring or registering land as State land and expropriating land for public needs. Israel also supports the maintenance and development of settlements through the delivery of public services and the encouragement of economic activities, including agriculture and industry and by providing incentive to the settlers' population such as housing, education and tax benefits.⁷⁴

such persons to another State. Additional Protocol I to the GCs also lists a number of violations of its provisions as grave breaches (Articles 11 and 85). Grave breaches, together with other serious violations of IHL established by customary international law and by international criminal law treaties, constitute war crimes and are incorporated in the Rome Statute of the International Criminal Court. For more details see: ICRC, '*What are "serious violations of international humanitarian law"?*' - *Explanatory Note*', available at: <https://www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>.

⁷⁰ See *Report of the Security Council Commission established under resolution 446 (1979)*, S/13450 and Corr.1 and 2.

⁷¹ See *Report of the High Commissioner for Human Rights on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, UN Doc. A/HRC/34/39, 13 March 2017, para. 11.

⁷² See, UN Doc A/HRC/34/39, 13 April 2017, para. 32; and *Report of the Secretary-General on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, UN Doc A /71/355, paras. 10-14. On some rare occasions, Israel has proceeded to the dismantlement of "illegal outpost" in the West Bank. This is the case of the Amona outpost that was dismantled in February 2017 following an order by the High Court of Justice issued in 2014. See, Haaretz, *Israel Begins to Dismantle Homes in Evacuated Amona Outpost*, 6 February 2017, available at: <https://www.haaretz.com/israel-news/.premium-israel-begins-to-dismantle-homes-in-evacuated-amona-outpost-1.5495191>.

⁷³ Under IHL, private property must be respected and cannot be confiscated. Article 53 of GC IV specifically prohibits the destruction of private property by the occupying power. As reported by the *Report of the Secretary-General on the Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc A/HRC/34/38, para. 21: "The seizure of property, as well as the demolition of Palestinian houses, infrastructure and orchards, in order to establish, develop and maintain settlements and provide access to the latter are flagrant violations of the rules of usufruct." Under IHL, exceptions to this rule are only permitted where "rendered absolutely necessary by military operations." In the absence of active hostilities in the West Bank, any exception to the rule prohibiting the destruction of private and public property seems difficult to claim. See, UN Doc A/HRC/34/38, paras. 21, 22.

⁷⁴ See *Report of the independent international factfinding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc A/HRC/22/63, paras. 19-22.

IHL explicitly prevents the occupying power from transferring “parts of its own civilian population into the territory it occupies;”⁷⁵ such conduct constitutes a grave breach of Additional Protocol I and is listed as a war crime under the Rome Statute of the International Criminal Court (ICC).⁷⁶ The illegality of settlements under international law has been reaffirmed by numerous international entities, including the International Court of Justice, the UN Security Council and General Assembly, and the ICRC.⁷⁷

The construction and expansion of settlements and related activities also have grave repercussions on a wide range of human rights of Palestinians enshrined in the ICCPR and the ICESCR. A special network of roads has been established to connect settlements to each other and to Israel, some of which can be used exclusively by Israeli citizens. Such a new road network, consisting of mainly east-west roads, has gravely disrupted the previously existing network organized along a north-south axis connecting Palestinian communities.⁷⁸ This results in severe restrictions on Palestinians’ right to movement in violation of Article 12 of the ICCPR as well as on the right to access their land and earn their livelihood hindering the fulfillment of their right to an adequate standard of living under the ICESCR.⁷⁹ Similarly, Israeli water policies and practices in the West Bank discriminate against the Palestinian population and in favor of the settler population. Indeed, the Palestinian water system in the West Bank has been integrated into Israel’s; Palestinians have no control over it since the transfer of ownership to Israel’s national water company, Mekorot, in 1982.⁸⁰ In a study issued in 2013 by the prominent Palestinian NGO and ICJ affiliate Al Haq, it is reported that the settler population in the West Bank, amounting to more than 500,000 persons, consumes around six times the amount of water used by the Palestinian population, which amounts to almost 2.6 million.⁸¹ The examples above show how settlement activity precludes the Palestinian population’s access to “basic means of livelihood and services, which are essential elements of the right to housing and are linked to the realization of the rights to work, food, water, health and education and, in general, to an adequate standard of living”.⁸²

In addition, Palestinians living in the vicinity of settlements often face daily violence and intimidation by settlers, including verbal harassment, physical attacks causing casualties and damage to or destruction of their property. Such attacks hamper the enjoyment by affected Palestinians of numerous human rights, including the right to life and physical integrity, the

⁷⁵ Fourth Geneva Convention, Article 49(6).

⁷⁶ *Rome Statute of the International Criminal Court*, 17 July 1998, art. 8 (2) (b) (viii).

⁷⁷ See ICJ, *Wall case*, para. 120, UNSC Res S/RES/2334, 23 December 2016 and S/RES/465, 1 March 1980; UNGA Res 70/89, 15 December 2011. See also the Declaration of 17 December 2014 of the Conference of High Contracting Parties to the Fourth Geneva Convention, para. 8, available at: <https://unispal.un.org/UNISPAL.NSF/0/E7B8432A312475D385257DB100568AE8>.

⁷⁸ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank*, 30 July 2007, available at: https://www.ochaopt.org/sites/default/files/ocharpt_update30july2007.pdf; see also O. M. Dajani, “Israel’s Creeping Annexation”, in *Symposium on Revisiting Israel’s Settlements*, *AJIL Unbound*, Volume 111, 2017, p. 54.

⁷⁹ See, Article 11 ICESCR; For more examples of violations of economic, social and cultural rights in relation to settlements, see UN Doc A/HRC/34/38, para. 20; see also, *UN Secretary-General Report on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, UN Doc A/HRC/25/38, 12 February 2014, paras. 15-20; and *UN Report of the independent international factfinding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc A/HRC/22/63, 7 February 2013, paras. 35-58.

⁸⁰ Al Haq, *Water for One People Only - Discriminatory Access and ‘Water-Apartheid’ in the OPT*, 2013, p. 16.

⁸¹ *Ibid.*, p. 17.

⁸² UN Doc A/HRC/25/38, 12 February 2014, para. 18, for more examples of violations of economic, social and cultural rights in relation to settlements see also paras. 15-20 and 21-29. See also, ICESCR: right to right to adequate standard of living including housing and food (art. 11), right to work (art. 6), right to health (art. 12), right to an education (art. 13).

right to privacy, family and home and the right to an adequate standard of living.⁸³ In addition to settler violence which reportedly reached a new peak in the past year, the failure by Israel “to exercise its due diligence to prevent, investigate, prosecute, punish and remedy any harm sustained by Palestinians”⁸⁴ continues to be an ongoing issue in the OPT.⁸⁵

Furthermore, the unabated expansion of settlements severely impedes the exercise by the Palestinian people of their right to self-determination. The principle of self-determination is recognized in article 1 of the UN Charter as one of the fundamental purposes of the United Nations. The right to self-determination is established under the principal international human rights treaties, namely article 1 common to the two international human rights Covenants (ICCPR, ICESCR) and entails the right of all peoples to determine their own destiny. In particular, the principle allows a people to choose its own political status, to determine its own form of economic, cultural and social development and to dispose of its natural resources. In addition, every people has a right not to be subject to alien subjugation or occupation and all States have a corresponding obligation not to interfere with the right to self-determination.⁸⁶ The right to self-determination of the Palestinian people has been reaffirmed *inter alia* by the UN General Assembly resolution 67/19, 4 December 2012.⁸⁷

When addressing the issue of settlements in relation to Palestinians’ rights, the UN Secretary-General said that “the demographic and territorial presence of the Palestinian people in the Occupied Palestinian Territory was put at risk by the continued transfer by Israel, the occupying Power, of its population into the occupied territory”⁸⁸ changing the demography of the West Bank, including East Jerusalem. Furthermore, in its advisory opinion on the *Wall*, the International Court of Justice concluded that the construction of the Separation Barrier, coupled with the establishment of Israeli settlements, was altering the demographic composition of the occupied territory and, consequently, was severely impeding the exercise by the Palestinian people of their right to self-determination.⁸⁹

Forcible transfer of the protected population within or outside the occupied territory

IHL not only prohibits the transfer of the population of the occupying power into the territory it occupies, but also generally prohibits individual or mass forcible transfer or deportation of the protected persons, including nationals of an occupied territory, regardless of the motive.⁹⁰ Forcible transfer of the protected population amounts to a grave breach of GC IV, and is also

⁸³ See ICCPR: arts. 7 and 17; ICESCR, art. 11; and ICERD, art. 5. For concrete examples of settler violence see: UN Doc A/HRC/34/38, paras. 34-38; and *Report of the United Nations High Commissioner for Human Rights on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, UN Doc A/HRC/40/42, 30 January 2019, paras. 24-52.

⁸⁴ UN Doc A/HRC/34/38, para 37.

⁸⁵ See, Human Rights Committee, Concluding Observations – Israel, UN Doc CCPR/CO/78/ISR, 21 August 2003, para. 11, and Human Rights Committee, General Comment No. 31, para. 8. For more information on Israel’s lack of accountability for settler violence see: UN Doc A/HRC/40/42, 30 January 2019, paras. 53-55. See also, *Report of the United Nations High Commissioner for Human Rights on the Implementation of Human Rights Council resolutions S-9/1 and S-12/1*, UN Doc A/HRC/40/39, 15 March 2019, para. 8.

⁸⁶ See also, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/25/2625, 24 October 1970, Principle 5.

⁸⁷ UN General Assembly resolution 67/19 on *The Status of Palestine in the United Nations*, 4 December 2012, Op. 1.

⁸⁸ See *Report by the Secretary-General on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, UN Doc A/67/375, 18 September 2012, para. 12.

⁸⁹ See International Court of Justice, *Wall* case, paras. 122, 149.

⁹⁰ GC IV, article 49(1). The only permitted exceptions to this prohibition are temporary evacuations conducted either to ensure the safety of the civilian population or for imperative military reasons. Effectively, in the context of the West Bank, where there are no current active hostilities, temporary evacuations have little relevance. See article 49(2) GC IV and J. Pictet, *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Article 49, pp 300-302, (ICRC, 1958).

considered a war crime and a crime against humanity under the Rome Statute.⁹¹ Under IHRL, “forced evictions” are defined by the Committee on Economic, Social and Cultural Rights as: “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of and access to appropriate forms of legal or other protection”.⁹² Forced evictions violate a range of human rights enshrined in both the ICCPR and ICESCR including the rights to adequate housing, food, water, health, education, work, security of the person, freedom from cruel, inhuman and degrading treatment, and freedom of movement.

Over the years, the UN Secretary-General as well as national and international NGOs have extensively reported on cases where the forcible transfer of the Palestinian population within the OPT has taken place, as well as on the situation of individuals and communities at imminent risk of forcible transfer.⁹³ Very often, forced evictions and the resulting forcible transfer of the protected population is conducted within the context of settlements construction and expansion.⁹⁴ According to a former Special Rapporteur on the situation of human rights in the OPT, Richard Falk, forcible transfer together with the continuous expansion of settlements and their supporting services and infrastructure, “reflect a systematic policy of Israel to set the stage for an overall dispossession of Palestinians and the establishment of permanent control over territories occupied since 1967.”⁹⁵ These practices usually target herder Bedouin communities in Area C of the West Bank (Jordan Valley, South Hebron Hills and the area around Jerusalem) and other vulnerable communities in East Jerusalem. Cases of forcible transfer are typically reported after the demolition of homes and infrastructure that leads to forced evictions,⁹⁶ in violation of IHL and IHRL.⁹⁷

⁹¹ GC IV, article 147; and Rome Statute, articles 8(2)(a)(vii) and 7(1)(d).

⁹² CESCR, General comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions, para. 3.

⁹³ See, *Report of the High Commissioner for Human Rights on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, UN Doc A/HRC/34/39, 13 April 2017, paras. 40-42; *Report of the Secretary-General on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, UN Doc A/73/410, 5 October 2018, paras. 19-58; Diakonia IHL Resource Center, *Removing Peace by Force*, December 2015, available at: <https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl---briefs/removing-peace-by-force-a-legal-analysis-of-recent-israeli-policies-of-forcible-transfer-in-the-occupied-palestinian-territory.pdf>; Amnesty International, *Israel: Illegal demolition and forcible transfer of Palestinian Bedouin village amounts to war crime*, 1 June 2018, available at: <https://www.amnesty.org/en/latest/news/2018/06/israel-illegal-demolition-and-forcible-transfer-of-palestinian-bedouin-village-amounts-to-war-crime/>.

⁹⁴ OCHA, UNRWA, OHCHR, *Norwegian Refugee Council Call for a Halt to Plans to Displace Palestine Refugees from Sheikh Jarrah – Statement*, 22 January 2019, available at: <https://www.ochaopt.org/content/un-officials-and-ngo-partners-call-halt-plans-displace-palestine-refugees-sheikh-jarrah>.

⁹⁵ *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk*, UN Doc A/HRC/16/72, 10 January 2011, para. 19.

⁹⁶ Most structures have been demolished or are at imminent risk of being demolished because they have been built without permits, which are issued by the Israeli authorities and are almost impossible to obtain. Indeed, Israel imposes tight restrictions on Palestinians’ use of, and access to, Area C: 68 percent of the territory is reserved for Israeli settlements, 21 percent for closed military zones, and 9 percent for nature reserves. The remaining less than one percent of Area C has been designated for Palestinian use making it “virtually impossible” for Palestinians to obtain construction permits for residential or economic purposes. See, World Bank, *Area C and the Future of the Palestinian Economy 4*, 2 October 2013, para. 9. The Israeli zoning and planning policy in the West Bank, which regulates the construction of housing and structures in Area C, has been defined by numerous UN and NGOs reports as restrictive, discriminatory and incompatible with international law. For more details about the Israeli planning regime see: *Report of the Secretary-General on Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc A/HRC/31/43, 20 January 2016, para. 45; *Report of the High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/and S-12/1*, UN Doc A/HRC/25/40, 13 January 2014, paras. 18-21, see also *Report of the Secretary-General on Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc A/69/347, 25 August 2014, paras. 23-26; and *Report of the Secretary-General on Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc A/67/372, 14 September 2012, paras. 36-37.

Forcible transfer does not necessarily involve the use of physical force by the occupying power as it may also be provoked by “specific circumstances that leave individuals or communities with no choice but to leave”.⁹⁸ The presence of such circumstances constitutes what is known as a ‘coercive environment’.⁹⁹ Any transfer conducted in absence of the ‘genuine consent’ of those affected is considered to be ‘forcible’.¹⁰⁰ Yet, ‘genuine consent’ to be transferred cannot be assumed in an environment characterized by the use or threat of physical force, coercion, fear of violence or duress.¹⁰¹ This is the case for many Palestinian communities in Area C of the West Bank and in East Jerusalem that have been forced to move, or are about to do so, owing to the existence of a coercive environment generated by measures such as home seizures and demolitions; history of forced evictions and relocations; settlements expansion and related movement limitations; restriction of access to public services; instances of excessive use of force by Israeli security forces and settler violence.¹⁰²

3.2 The Separation Barrier incorporating parts of the Occupied Palestinian Territory

In June 2002, following numerous incidents of violent cross-border exchanges, the Israeli government decided to construct a barrier with the declared aim of preventing violent attacks by restricting and controlling Palestinians’ access to Israel.¹⁰³ The exact trajectory of the Barrier, still subject to changes, is planned to stretch to approximately 712 kilometers long which corresponds to more than twice the length of the 1949 internationally recognized Green Line.¹⁰⁴ The course of the Barrier runs for 85 per cent within the occupied territory rather than along the blueprint of the Green Line or inside Israel proper.¹⁰⁵ While a considerable part of the Barrier has already been completed (460 kilometers which correspond to about 65 per cent of the planned barrier), another 53 kilometers are under construction and for the remaining 200 kilometers, the construction has yet to be started.¹⁰⁶ If fully implemented, the Barrier will

⁹⁷ GC IV, article 53; International Covenant on Economic, Social and Cultural Rights, article 11; and International Covenant on Civil and Political Rights, article 17; see also Committee on Economic Social and Cultural Rights, General Comment no. 7: The Right to Adequate Housing (Art. 11 (1)): Forced Evictions, UN Doc E/1998/22, 20 May 1997, paras. 5–6, 12.

⁹⁸ See, UN Doc A/HRC/34/38, para. 28.

⁹⁹ The concept of ‘coercive environment’ was introduced in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and was subsequently included in the ‘Elements of Crimes’ of the ICC, Article 6(e), p.3. See *Prosecutor v. Krajisnik*, Case number IT-00-39-T, ICTY Trial Chamber, Judgment, 27 September 2006, para. 724, 729; and *Report of the Preparatory Commission for the International Criminal Court*, UN Doc PCNICC/2000/1/Add.2 (2 November 2000), p. 7. See also, UN Doc A/HRC/34/38, para. 28.

¹⁰⁰ ICTY, *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Judgment (TC), 30 May 2013, para. 993:

¹⁰¹ *Prosecutor v. Stakić*, Case No. IT-97-24-T, ICTY Trial Chamber, Judgment, 31 July 2003, para. 707; and *Prosecutor v. Simić et al.*, ICTY 2003, Case number IT-95-9-T, ICTY Trial Chamber, Judgment, 17 October 2013, para. 126, 128. See also, UN Doc A/HRC/34/38, para. 28.

¹⁰² See among others, UN Doc A/HRC/31/43, para. 46; *Report of the Secretary-General on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, UN Doc A/69/348, 25 August 2014, para. 16, and *Report of the Secretary-General on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, UN Doc A/70/351, 31 August 2015, paras. 25-51.

¹⁰³ UN Office for the Coordination of Humanitarian Affairs (OCHA), *The Humanitarian Impact of the Barrier, July 2013*, available at:

https://www.ochaopt.org/sites/default/files/ocha_opt_barrier_factsheet_july_2013_english.pdf.

¹⁰⁴ In rural areas, the Barrier consists of layers of razor wire, military patrol roads and sand paths to trace footprints, ditches, surveillance cameras and a three-meter high fence with sensors to warn of any incursion. In urban areas, such as Qalqiliya and East Jerusalem, the Barrier is partly constructed of eight-meter high concrete walls with watchtowers.

¹⁰⁵ B’tselem, *The Separation Barrier*, 11 November 2017, available at: https://www.btselem.org/separation_barrier

¹⁰⁶ UN Office for the Coordination of Humanitarian Affairs (OCHA), *The Humanitarian Impact of the Barrier, July 2013*, available at:

https://www.ochaopt.org/sites/default/files/ocha_opt_barrier_factsheet_july_2013_english.pdf.

incorporate the majority of Israeli settlements (80 per cent) into the Israeli side, and will cut off 9.5 per cent of the West Bank, including East Jerusalem, from the rest of the OPT, further contributing to its fragmentation.¹⁰⁷

The Separation Barrier creates Palestinian enclaves within the occupied territory and it separates not only Israelis from Palestinians but also Palestinians from Palestinians. As a physical structure, the Barrier divides communities from each other. However, it must also be understood as a legal regime accompanied by a range of restrictions on the human rights and fundamental freedoms of the Palestinian population.¹⁰⁸ The construction and operation of the Barrier are determined by a set of regulations and orders creating a regime that is inherently discriminatory¹⁰⁹ and that severely impacts on the human rights of the affected Palestinian population. At the core of the human rights concerns raised by the Barrier are the restrictions on the liberty to freedom of movement and the right to residence, guaranteed under article 12 of the ICCPR.¹¹⁰ Many other human rights violations flow from these movement restrictions such as the violation of the right to education,¹¹¹ right to health,¹¹² right to work,¹¹³ the right to an adequate standard of living,¹¹⁴ including the right to food, water and housing, right to property,¹¹⁵ and right to privacy and family life.¹¹⁶

The Israeli Supreme Court asserted the lawfulness of the construction of the Barrier within the West Bank in several rulings responding to more than 150 petitions challenging both the legality of the Barrier *per se* as well as the lawfulness of specific segments.¹¹⁷ The *Beit Surik* (2004) and the *Alfei Menashe* (2005) cases clarified the position of the Court affirming that erecting the Barrier within the occupied territory is lawful and raises no issues of authority.¹¹⁸ The main issue considered by the Court was whether the planned route of the Barrier would cause disproportionate harm to the rights of the Palestinians living in the occupied territory.¹¹⁹ Most of the petitions were denied after the Court had established that the planned route passed the proportionality test. In some rare cases, such as the *Beit Surik* and the *Alfei Menashe* cases, some segments of the Barrier were deemed to cause excessive harm to the "fabric of life" of the Palestinian residents. In these cases, the Court ordered the Israeli authorities to revise the planned route accordingly.¹²⁰

¹⁰⁷ *Ibid.*

¹⁰⁸ ICJ, *Israel's Separation Barrier - Challenges to the rule of law and human rights*, 2 July 2004, p. 2, available at: <https://www.icj.org/icj-comment-on-israeli-supreme-court-barrier-decision/>.

¹⁰⁹ Article 2(1) ICCPR prohibits discrimination in the enjoyment of the rights set forth in the Covenant, such as article 12 ICCPR. For more information, see ICJ, *Israel's Separation Barrier*, p.34.

¹¹⁰ *Ibid.*, p. 30.

¹¹¹ Article 13 ICCPR.

¹¹² Article 12 ICCPR.

¹¹³ Article 6 ICCPR.

¹¹⁴ Article 11 ICCPR.

¹¹⁵ Property rights are protected under article 17 Universal Declaration of Human Rights and are also recognized in regional human rights instruments. While the ICCPR and the ICESCR do not as such contain a right to property, certain property related elements are protected in article 17 ICCPR (arbitrary interference into one's home) and in article 11 ICESCR (right to housing), see ICJ, *Israel's Separation Barrier*, p. 39.

¹¹⁶ Articles 17 and 23 ICCPR and article 10 ICESCR.

¹¹⁷ B'tselem, *The Separation Barrier*, 11 November 2017, available at:

https://www.btselem.org/separation_barrier.

¹¹⁸ See, *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04, Israel: Supreme Court, 30 May 2004; and *Zaharan Yunis Muhammad Mara'abe et. al. v. Prime Minister of Israel et. al.*, HCJ 7957/04, Supreme Court, 15 September 2005, available at:

<https://mfa.gov.il/mfa/aboutisrael/state/law/pages/high%20court%20rules%20on%20security%20fence%20around%20alfei%20menashe%2015-sep-2005.aspx>.

¹¹⁹ B'tselem, *The Separation Barrier*, 11 November 2017, available at:

https://www.btselem.org/separation_barrier.

¹²⁰ See footnote 39.

The International Court of Justice's Advisory Opinion on the Wall (2004)

On 8 December 2003, the UN General Assembly adopted resolution ES-10/14,¹²¹ requesting the International Court of Justice to urgently render an advisory opinion on: "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 ..." On 9 July 2004, the Court issued its opinion where, contrary to the Israeli Supreme Court, it determined that overall the construction of the Barrier within the West Bank, namely outside the Green Line, violated Israel's obligations under international law. Israel refused to cooperate in the proceedings, claiming that the Court did not have jurisdiction over the matter since it considered the question as political rather than legal.¹²²

After establishing its jurisdiction, exposing the applicable law and reaffirming some of the core relevant principles of international law, such as the prohibition of acquisition of territory by force, the Court observed "that the construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation."¹²³ Furthermore, the Court found that, together with the establishment of settlements, the construction of the Barrier and its associated regime were tending to alter the demographic composition of the occupied territory, in contravention of GC IV, and were severely impeding the exercise by the Palestinian people of its right to self-determination.¹²⁴ In conclusion, the Court found that Israel had an obligation to cease the construction of the Barrier, dismantle the parts of the Barrier that have been built inside the West Bank, and make reparation to those Palestinians who suffered losses as a result of the Barrier.¹²⁵

To conclude, the conduct of Israel as the occupying power has consistently and repeatedly contravened international humanitarian law, including the law of occupation, and in particular the principle that belligerent occupation is necessarily temporary as well as the prohibition of bringing any permanent changes to the status of the occupied territory. It has also contravened international human rights law imposing unlawful restrictions of the right to movement and impeding the fulfillment of a wide range of economic, social and cultural rights.¹²⁶ The combined effects of the Israeli policies of establishing and expanding new settlements, the demolition of Palestinian-owned properties, including houses, the restrictive and discriminatory housing policies as well as the Barrier and its related regime seem to suggest the intention of the occupying power to bring permanent changes to the occupied territory with a view to appropriating some parts of it.

- **In line with its obligations as the occupying power, Israel must refrain from permanently changing the demographic composition or territorial status of the OPT.**
- **The construction and expansion of Israeli settlements in the OPT constitutes a serious violation of IHL and are elements of a war crime under the Rome Statute. In line with its obligations under IHL and relevant UN Security Council**

¹²¹ See, UNGA Res. A/RES/ES-10/14, 12 December 2003.

¹²² B'tselem, *The Separation Barrier*, 11 November 2017, available at: https://www.btselem.org/separation_barrier.

¹²³ See International Court of Justice, *Wall* case, para. 121.

¹²⁴ *Ibid.*, para. 122. For further details on the Palestinian people's right to self-determination, see ICJ, *Israel's Separation Barrier - Challenges to the rule of law and human rights*, 2 July 2004, pp. 54-55.

¹²⁵ *Ibid.*, paras. 149, 151, 152.

¹²⁶ See Section 3.2 of this paper.

resolutions, Israel must end and reverse all settlement activity in the West Bank, including East Jerusalem.

- **Israel must halt its plans to forcibly relocate Palestinian individuals and communities in the West Bank, including East Jerusalem.**
- **In line with the findings of the International Court of Justice, Israel must cease the construction of the Separation Barrier within the West Bank; dismantle the portions of the Barrier already built; and make reparation to the Palestinians who were harmed by the effects of the Barrier.**
- **Israel must respect the Palestinian people's right to self-determination as prescribed by IHRL and as reiterated by the International Court of Justice.**

4. Annexation in the context of the Occupied Palestinian Territory

Throughout the five decades of occupation, Israel has pursued various policies and practices in relation to the territories it occupies that carry consequences in respect of the status of the OPTs and the rights of the Palestinian inhabitants. Regarding legislation and formal measures aimed at changing the status of parts of the Territory, Israel has proceeded to the formal annexation of East Jerusalem (and the Golan Heights). As noted above, in 1967 Israel first extended its law and administration to East Jerusalem and 28 surrounding Palestinian villages, while in 1980, it enacted a Basic Law¹²⁷ that declared the whole Jerusalem, including its Eastern part, the capital of Israel.¹²⁸ This unilateral act of annexation was condemned by the UN Security Council in Resolution 478 which declared it "null and void" under international law.¹²⁹

Israel has also expanded its authority over the West Bank without resorting, so far, to formal acts of annexation. As highlighted in section 3 of this report, Israel's policy has been to adopt a series of measures aimed at creating permanent "facts on the ground," such as the establishment of settlements and the construction of a separation Barrier that incorporates considerable parts of the West Bank into Israeli territory. This construction of the Separation Barrier has been characterized by the International Court of Justice as "tantamount to *de facto annexation*". This section will explore how Israel's enactment of legislation extending the applicability of its domestic law to the settlements on a territorial basis reinforces the claim that Israel is pursuing a policy of annexation. Such an intent is also manifested through official declarations by numerous government officials, including the current Israeli Prime Minister, Benjamin Netanyahu, who has openly called for the annexation of significant portions of the occupied territory.¹³⁰

4.1 The prohibition of acquisition of territory by force under international law

General international law has established particular rules governing the acquisition and loss of territorial sovereignty and administration. Traditionally, there are five modes of acquiring

¹²⁷ Since Israel does not have a Constitution, Basic Laws adopted by the Knesset – the Israeli parliament – have quasi-constitutional force within the Israeli legal system.

¹²⁸ Basic Law: Jerusalem, Capital of Israel, 34 L.S.I. 209 (1980). Similarly, in relation to the Golan Heights, in 1981 Israel adopted legislation that extended "the Law, jurisdiction and administration of the state [of Israel]" thereto. The Golan Heights is a hilly area overlooking the upper Jordan River valley on the west. The area was part of southwestern Syria until 1967, when it was occupied by Israel. See, Encyclopaedia Britannica, available at: <https://www.britannica.com/place/Golan-Heights>.

¹²⁹ See, UNSC Res S/RES/478, 20 August 1980; and UNSC Res S/RES/497, 17 December 1981.

¹³⁰ The Guardian, *Netanyahu vows to annex large parts of occupied West Bank*, 11 September 2019, available at: <https://www.theguardian.com/world/2019/sep/10/netanyahu-vows-annex-large-parts-occupied-west-bank-trump>; see also, *Insiders' Jerusalem, Q&A - Annexation: What Happened and Does It Matter?*, 12 September 2019.

territorial sovereignty: cession,¹³¹ occupation,¹³² accretion,¹³³ subjugation,¹³⁴ and prescription.¹³⁵ However, the new fundamental principles of international law that have emerged from the UN Charter of 1945 such as the right to self-determination and the prohibition of the use of force have had a great impact in changing the law relating to the establishment of sovereignty over territory. Indeed, as a result of the inclusion of a general prohibition of the use of force in international relations, acquisition of sovereignty by such means as subjugation, that is acquisition of territory by conquest, are no longer valid under international law. Accordingly, in the case at stake, the only way Israel could retain a lawful claim over parts of the occupied territory would be through "cession" which is the transfer of sovereignty over State territory by the owner State to another state. Cession can only be enacted through an agreement normally in the form of a treaty (e.g. peace settlement) between the ceding state, that would be the State of Palestine, and the acquiring state, Israel.¹³⁶ In absence of such an act the annexation is to be considered as "null and void".¹³⁷

As mentioned, contemporary international law prohibits the acquisition of territory from another State through the use of force, i.e. annexation. This is a corollary of Article 2(4) of the UN Charter, which binds all States and which forbids the use of force against the territorial integrity of a State and, therefore, the transmission of sovereign title over territories resulting from such use of force.¹³⁸ With regard to the OPT context, the UN Security Council first endorsed this principle in Resolution 242, adopted in the aftermath of the Six-Day War in 1967, and has since reaffirmed it in numerous subsequent resolutions on the matter.¹³⁹ Similarly, the UN General Assembly addressed the issue of annexation as follows: "The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal."¹⁴⁰ The International Court of Justice has affirmed that the prohibition of territorial acquisition by force is customary international law;¹⁴¹ additionally, such prohibition is deemed a peremptory norm of international law (*jus cogens*).¹⁴²

¹³¹ "Cession of state territory is the transfer of sovereignty over state territory by the owner-state to another state", for more information about "cession" as a mode of acquisition of state territory, see *Oppenheim's International Law (9th Edition): Volume 1 Peace*, Edited by Robert Jennings, Arthur Watts KCMG QC, Oxford Scholarly Authorities on International Law [OSAIL], 19 June 2008, paras. 244-249.

¹³² "Occupation is the act of appropriation by a state by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another state. The only territory which can be the object of occupation is that which does not already belong to any state, whether it is uninhabited, or inhabited by persons whose community is not considered to be a state", for more information about "occupation" as a mode of acquisition of state territory, see *Oppenheim's International Law (9th Edition)*..paras. 250-257.

¹³³ "Accretion is the name for the increase of land through new formations", for more information about "accretion" as a mode of acquisition of state territory, see *Oppenheim's International Law (9th Edition)*..paras. 258-262.

¹³⁴ "Subjugation is the acquisition of territory by conquest followed by annexation", for more information about "subjugation" as a mode of acquisition of state territory, see *Oppenheim's International Law (9th Edition)*..paras. 263-268.

¹³⁵ "Prescription is the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order", for more information about "prescription" as a mode of acquisition of state territory, see *Oppenheim's International Law (9th Edition)*.. paras. 269-270.

¹³⁶ *Oppenheim's International Law (9th Edition)*.. para. 245.

¹³⁷ See, UNSC Res, UN Doc S/RES/478, 20 August 1980, Op. 5(a), (b).

¹³⁸ Charter of the United Nations, 10 December 1948, article 2(4).

¹³⁹ UN Doc S/RES/242, 22 November 1967, Preamble, 1(ii), 2 (c); see also, UNSC Res 2334 (2016), Res 497 (1981), Res 478 (1980), Res 476 (1980), Res 298 (1971), Res 267 (1969) and Res 252 (1968).

¹⁴⁰ UNGA Res 2625, UN Doc A/RES/25/2625, 24 October 1970, para. 1(10). Similarly, in the UNGA Resolution on the Definition of Aggression, Article 5(3) affirmed that any territorial acquisition deriving from acts of aggression is to be recognized as unlawful. See UNGA Res, UN Doc A/RES/3314, 14 December 1974.

¹⁴¹ International Court of Justice, *Wall* case, para. 87.

¹⁴² *Jus cogens* or a peremptory norm of international law is defined as a: "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can

The unlawful acquisition of territory by force does not in itself obviate the applicability of the law of occupation. Indeed, territory unlawfully annexed by force still typically qualifies as occupied territory for purposes of IHL. This is made clear by Article 47 of GC IV, which provides that the status of protected persons under GC IV is unaffected “by any annexation by the [Occupying Power] of the whole or part of the occupied territory.” Consequently, the law of occupation continues to apply in annexed territories.¹⁴³ The UN Security Council affirmed this point in Resolution 478, which condemned the annexation of East Jerusalem by Israel as illegal and declared that GC IV remained applicable therein.¹⁴⁴

The acquisition of territory by force and the crime of aggression

The UN General Assembly in 1967 adopted Resolution 3314, which sought to provide a definition of aggression.¹⁴⁵ The definition stipulates that “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”¹⁴⁶ Among the acts specified is “The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any *annexation by the use of force of the territory of another State or part thereof.*”¹⁴⁷

In the OPT context, this raises the question of whether, with the coming into force of the amendments to the Rome Statute introducing the crime of aggression, a possible annexation by Israel of parts of the West Bank could trigger the ICC’s jurisdiction.

Article 8bis of the Rome Statute defines the crime of aggression as the planning, preparation, initiation, or execution of “an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”¹⁴⁸ The ICC Statute specifies that the “act of aggression” must be in accordance with the definition contained in the

be modified only by a subsequent norm of general international law having the same character.”, article 53, *Vienna Convention on the Law of Treaties*, 23 May 1969. See, International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment, 27 June 1986, para 190.

¹⁴³ See, ICRC *Commentary on GC IV* (1958), article 47, para. 4, stating: “A fundamental principle emerges from the foregoing considerations; an Occupying Power continues to be bound to apply the Convention as a whole even when, in disregard of the rules of international law, it claims during a conflict to have annexed all or part of an occupied territory.”

¹⁴⁴ See, UN Doc S/RES/478, 20 August 1980, op. 2: “Affirms that the enactment of the ‘basic law’ by Israel constitutes a violation of international law and does not affect the continued application of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, in the Palestinian and other Arab territories occupied since June 1967, including Jerusalem.”

¹⁴⁵ See, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)*, November 2001, Supplement No. 10 (A/56/10)), article 26(5). In the UN Charter, the term “aggression” appears on multiple occasions (Articles 1(1), 39, and 53) but no definition is provided of the concept. When acting under Chapter VII, the Security Council enjoys maximum discretion as to how it characterizes certain uses of force as aggression. The sole authoritative definition of aggression is found in the annex to the UNGA Resolution on the Definition of Aggression, article 3(a): “Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,” UN Doc A/RES/3314, 14 December 1974.

¹⁴⁶ UN Doc A/RES/3314, article 3(a).

¹⁴⁷ *Ibidem*, (emphasis added). For the purpose of this paper, only the attempts of acquisition of territory by force – annexation – by Israel will be considered as potentially falling within the definition of aggression, not the occupation *per se*.

¹⁴⁸ See article 8bis (1), *Rome Statute of the International Criminal Court*. The ICC jurisdiction over the crime of aggression was activated by Assembly of States Parties to the Rome Statute (ASP) on 15 December 2017.

UN General Assembly Resolution 3314,¹⁴⁹ namely “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”¹⁵⁰ Examples of such acts are: the invasion, bombardment, or attack of the territory of another State; military occupation or annexation; the blockade of the ports or coasts of a State; and the sending of armed bands or groups to other countries.¹⁵¹

To the extent that part of the West Bank can be characterized as having been annexed by Israel, these acts may fall under the definition of the “crime aggression” as per the Rome Statute. There are conceptual and practical considerations to bear in mind here. First, as a crime under international law, aggression engages the responsibility of individuals, not States. Individual Israeli officials could in principle be held liable, but not the State of Israel. Second, it is worth mentioning that the crime of aggression has a unique jurisdictional regime, which cannot be triggered in the same manner as the other crimes of the Rome Statute (genocide, crimes against humanity and war crimes). In fact, except in the case of UN Security Council referrals, non-party States are excluded from the ICC’s jurisdiction over the crime of aggression, regardless of the status as victim or aggressor.¹⁵² Since Israel is not a party to the Rome Statute, the only possible way to trigger the ICC’s jurisdiction over the crime of aggression in relation to the OPT would be through a referral of the UN Security Council. Given that the United States, the strongest ally of Israel and a supporter of its annexation claims, sit as a permanent member of the UN Security Council with veto power, it is highly unlikely that such referral would occur in the foreseeable future.

4.2 Legal measures adopted by Israel towards the annexation of parts of the OPT

In absence, at the time of writing, of a formal declaration or equivalent act of annexation over some portions of the West Bank, this section will identify what conduct by Israel, as the occupying power, demonstrate a clear intention or can already be considered as preliminary steps to appropriate partially or totally the territory it occupies. For example, do the legislative and administrative acts recently adopted by Israel still fall within its lawful competency as the administrator of the occupied territory? Or can they be seen as consolidating into an annexation enterprise? In order to make this assessment with regard to the West Bank, it is necessary to look both at the legislative measures adopted by or under scrutiny at the Israel parliament (Knesset) aiming at extending its sovereignty over parts of the West Bank; and, at the plethora of public statements and electoral campaign promises, along the same lines, issued by Israeli government officials.

The limited legislative prerogative of the occupying power under IHL

In line with the fundamental tenet of the law of occupation – the temporary nature of this regime – IHL limits the occupying power’s legislative authority to the restoration and maintenance of public order and civil life. Article 43 of the HR clearly stipulates that the occupying power must respect, when restoring public order and safety, the laws in force in the occupied territory, unless absolutely prevented from so doing. In addition, given that the occupying power must not act as a sovereign legislator in the occupied territory, and therefore must not apply its own legislation to it, it follows that the only entity entitled to exercise

¹⁴⁹ UNGA Res 3314, UN Doc A/RES/3314, 14 December 1974.

¹⁵⁰ See article 8bis (2), Rome Statute.

¹⁵¹ *Ibid.*, article 8bis (2) (a)-(e). The Rome Statute definition of an act of aggression is taken from UNGA Res 3314, UN Doc A/RES/3314, 14 December 1974, article 3(a).

¹⁵² *Ibid.*, articles 15bis (5) and 15ter.

legislative authority over the occupied territory is the military commander.¹⁵³ Article 64 of GC IV provides additional guidance by listing the exceptional circumstances allowing for changes to the local legislation, namely when necessary for the security of the occupying power, for the respect of IHL; and to maintain public order and civil life in the occupied territory. While the prolonged nature of the Israeli occupation might require a flexible interpretation of these provisions to adjust to the evolving needs of more than 50 years of military rule, such flexible interpretation must remain between the boundaries set by IHL and must never be directed at changing the sovereign status of any part or the whole of the territory.¹⁵⁴

Legislative steps by Israel towards the annexation of portions of the West Bank

Since the beginning of the occupation in 1967, the OPT has been administered directly by a military commander who issued “military orders” and “proclamations” to regulate the civil affairs of the Palestinian population under occupation.¹⁵⁵ Israel relied on Article 43 to justify military orders bringing changes to the local legislation, although the scope of such changes was often non-compliant with the permissible scope of measures allowed for in this provision.¹⁵⁶ With the exception of East Jerusalem, Israel has never attempted to apply its sovereignty to the West Bank territory, which it characterizes as “disputed.” It has always kept the two territorial entities – the State of Israel and the West Bank – as distinct, one subject to Israel’s sovereignty and jurisdiction, the other subject to Israel’s military rule under the military commander’s jurisdiction.

According to the Israeli NGO Yesh Din, a significant shift in Israel’s conduct occurred in March 2015 with a transition from a situation of what might arguably be characterized as *de facto* annexation – constituted among others by the establishment and expansion of Israeli settlements in the West Bank and their related regime – to one of *de jure* annexation. As also explained by Sassoli and Boutruche, in recent years Israel has showcased a trend of “growing legislative expansion illustrated by the nature and scope of application of the Israeli legislation... that range[s] from legislating for prohibited purposes (settlements) and in the interest of Israel and Israelis (including settlers) rather than that of the local population to Israel abusing its personal jurisdiction over Israelis to govern life in Israeli settlements largely by legislation adopted by the Israeli parliament to most recently, the adoption by that Parliament of legislation openly territorially applicable in the oPt.”¹⁵⁷

A number of key legislative developments have been enacted or considered by the Knesset displaying this significant change in Israel’s behavior, which go well beyond an occupying power’s legislative prerogatives under IHL and seemingly amount to acts of *de jure* annexation.¹⁵⁸ Although far from a comprehensive accounting, legislative developments introduced during the 20th Knesset legislature (31 March 2015 – 28 April 2019) are particularly instructive to illustrate the point. During this period of time, sixty bills extending Israeli law to the West Bank or laying the foundation for some form of future annexation were introduced in

¹⁵³ See, M. Sassoli, T. Boutruche, *Expert Opinion on the Occupier’s Legislative Power over an Occupied Territory Under IHL in Light of Israel’s On-going Occupation*, June 2017, pp. 31-33, available at: <https://www.nrc.no/resources/legal-opinions/expert-opinion-on-the-occupiers-legislative-power-over-an-occupied-territory-under-ihl-in-light-of-israels-on-going-occupation/>.

¹⁵⁴ *Ibid.*, p. 2.

¹⁵⁵ *Ibid.*, p. 3.

¹⁵⁶ *Ibid.*, pp. 3-4.

¹⁵⁷ *Ibidem*

¹⁵⁸ Annexation by law is intended as Israel extending its own legislation to the occupied territory through the enactment of specific laws, subjecting it to its own territorial jurisdiction as if it was its own. See M. Sassoli, T. Boutruche, *Expert Opinion..*, p. 7.

the Knesset, eight of which were approved and became law.¹⁵⁹ The most significant and unprecedented element of this shift is that currently the “Knesset regards itself as the legislative authority” in the West Bank, as opposed to the military commander as prescribed under the law of occupation.¹⁶⁰

Among the most significant examples of this trend is the adoption by the Knesset, in February 2017, of the *Law for the Regulation of Settlements in Judea and Samaria*, also known as the “Regularization Law,” which purports to retroactively legalize Israeli outposts in the West Bank established unlawfully on land privately owned by Palestinian nationals.¹⁶¹ This law is particularly important for a number of reasons. First of all, it deprives Palestinians in the OPT of their right to protection of their private property from confiscation and destruction in violation of IHL and international human rights standards. In addition, this Law is an explicit step towards annexation because, for the first time, the Knesset extends its territorial jurisdiction (rather than personal jurisdiction), and thus its sovereignty, to the West Bank. It is worth noting that, since the late 1970s, Israeli domestic law has applied to the Israeli settlers living in the West Bank on a personal and extraterritorial basis, Israel had never attempted to proceed to a territorial application of the law in the OPT knowing that it would have amounted to prohibited annexation.¹⁶² This law includes criminal law, National Health Insurance Law, taxation laws, laws pertaining to Knesset elections and so on.¹⁶³

The *Higher Education Law*, which was adopted in February 2018, purported to dissolve the Council for Higher Education operating in the West Bank, which was headed by the military commander, transferring its authority over higher education institutions based in Israeli settlements to the Council for Higher Education operating in Israel. The law was put into effect on 15 February 2019 and places higher education institutions located in settlements on an equal footing with all other Israeli universities, normalizing their illegal presence in the occupied territory. Furthermore, with this Law, the Knesset went beyond its authority by abrogating the military commander’s authority in the OPT and transferring it to an official Israeli institution.¹⁶⁴

Israeli law-makers also proposed a few bills with clearly stated annexation aims. While these attempts do not constitute *per se* conducts of annexation, they signal future risks should these bills proceed or be taken up again in the future. In August 2016, for instance, a few members of the Knesset introduced a bill with the stated purpose to annex the settlement of Maale Adumim, one of the biggest Israeli settlements in the vicinities of Jerusalem.¹⁶⁵ The bill was

¹⁵⁹ Yesh Din, Annexation Legislation Database, 1 April 2019, available at: <https://www.yesh-din.org/en/about-the-database/>.

¹⁶⁰ *Ibid.*

¹⁶¹ *Law for the Regulation of Settlements in Judea and Samaria* (6 February 2017) available at <https://www.loc.gov/law/help/israel-settlement/judea-and-samaria.php>. While the law envisages compensation to Palestinian private owners, it does not foresee restitution of the confiscated land. As noted by some commentators, the confiscation of private property for the benefit of the occupant violates Article 46 of the HR prescribing that private property must be respected and cannot be confiscated; Yael Ronen and Yuval Shany, ‘Israel’s Settlement Bill Violates International Law’ (20 December 2016) *Just Security* at <https://www.justsecurity.org/35743/israels-settlement-regulation-bill-violates-international-law>.

¹⁶² See, Association for Civil Rights in Israel (ACRI), *One Rule, Two Legal Systems: Israel’s Regime of Laws in the West Bank*, October 2014, pp. 15–18, available at: <https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>.

¹⁶³ *Ibid.*

¹⁶⁴ For more details on the *Higher Education Law*, see Yesh Din, Annexation Legislation Database, 1 April 2019, available at: <https://www.yesh-din.org/en/legislation/>.

¹⁶⁵ For more details on the *Maale Adumim Draft Bill*, see Yesh Din, Annexation Legislation Database, 1 April 2019, available at: <https://www.yesh-din.org/en/legislation/>.

presented to the Knesset for a preliminary reading but the legislative process was stopped because of the end of the Knesset term. Similarly, the *Greater Jerusalem Bill*, introduced in October 2017, aims to incorporate five major settlements located in the West Bank into the Jerusalem municipality, formally annexing them. This Bill would add around 120,000 Israeli settlers to Jerusalem, altering the delicate demographic balance of the city by enhancing its Jewish majority.¹⁶⁶ Additional bills were introduced calling for the annexation of all the Settlements and Outposts in the West Bank (January 2016), the annexation of the Etzion Bloc (June 2016), the annexation of the entire West Bank (May 2018), the annexation of the Jordan Valley (December 2018), just to name a few.¹⁶⁷

In July 2018, the Ministry of Justice drafted a legal memorandum amending the *Law on the Administrative Affairs Court*, transferring to the Jerusalem District Court, as opposed to the Israeli Supreme Court (sitting as the High Court of Justice), the authority to adjudicate petitions by Palestinians residing in the West Bank. The memorandum refers to petitions submitted by Palestinians and by settlers relating to four issues: freedom of information, planning and building, entry to and exit from the West Bank, and administrative restraining orders. The Law removes the authority of the Israeli High Court of Justice to adjudicate such matters and extends the jurisdiction of an Israeli domestic court to the occupied territory in contravention of IHL.¹⁶⁸ This Law, like many of the others mentioned above, highlights Israel's process of slowly moving towards annexing the West Bank by means of blurring the substantial clear distinction that must exist between Israel, a sovereign State, and the occupied territory, which is under a military regime.

Calls for "annexation" by Israeli state officials

The Knesset's aim of extending Israel territorial jurisdiction to parts of the OPT is reflected in the State officials' public declarations and statements, over the last few years, openly calling for the annexation of parts or all of the West Bank. On 10 September 2019, just a week before the Israeli parliamentary election, the incumbent Prime Minister, Benjamin Netanyahu, publicly announced his commitment, if re-elected for a fifth term, to extend Israel sovereignty to all settlements in the West Bank, including the Jordan Valley and the northern Dead Sea.¹⁶⁹ As some commentators have noted, unlike other similar statements he made in the past, this time Netanyahu clarified his intentions in a more specific way by mentioning a timetable for implementation and presenting a map of the areas to be annexed. The Prime Minister added that such move would be undertaken "in maximum coordination" with US President Donald Trump, linking for the first time, the call for annexation with the US Peace Plan.¹⁷⁰

¹⁶⁶ *Report of the UN Special Rapporteur on the Situation of human rights in the Palestinian territories occupied since 1967*, UN Doc A/73/45717, 22 October 2018, para. 42.

¹⁶⁷ For a comprehensive list of all the proposed and adopted bills during the Knesset 20th term, see: Yesh Din, Annexation Legislation Database, 1 April 2019, available at: <https://www.yesh-din.org/en/legislation/>.

¹⁶⁸ For more information see, ACRI, *Transfer of OPT petitions from the High Court to the Court for Administrative Affairs in Jerusalem*, 25 February 2018, available at: <https://law.acri.org.il/en/2018/02/25/transfer-of-opt-petitions-from-the-high-court-to-the-court-for-administrative-affairs-in-jerusalem/> and ACRI, *Memorandum on Administrative Affairs Courts Law (amendment – a decision of an authority in the area) 5768 – 2018*, 25 January 2018, available at: <https://law.acri.org.il/en/wp-content/uploads/2018/02/ACRI-Position-on-Legal-Memorandum-Administrative-Affairs-Courts-Law.pdf>; see also Michael Sfar, Israel and Annexation by Lawfare, *The New York Review of Books*, 10 April 2018, available at: <https://www.nybooks.com/daily/2018/04/10/israel-and-annexation-by-lawfare/>.

¹⁶⁹ The Guardian, *Netanyahu vows to annex large parts of occupied West Bank*, 11 September 2019, available at: <https://www.theguardian.com/world/2019/sep/10/netanyahu-vows-annex-large-parts-occupied-west-bank-trump>.

¹⁷⁰ The Guardian, *Netanyahu vows to annex large parts of occupied West Bank*, 11 September 2019, available at: <https://www.theguardian.com/world/2019/sep/10/netanyahu-vows-annex-large-parts-occupied-west-bank>.

In recent years, a number of other Israeli state officials have held similar pronouncements. In the aftermath of the adoption the "Regularization Law", the former Minister of Education Naftali Bennett declared: "Today, the Israeli Knesset moved from heading toward establishing a Palestinian state to heading toward sovereignty in Judea and Samaria ... The outpost regulation bill is the tip of the iceberg in applying sovereignty."¹⁷¹ Similarly, Ayelet Shaked, former Minister of Justice, mused: "I think we should apply the Israeli law to the Israeli towns and villages [settlements], and to normalize the life there, and in the far future, to apply the Israeli law in Area C [occupied West Bank]. In Area C, there are a half-million Israelis [settlers] and 100,000 Palestinians; they will have citizenship with full rights, of course, like myself. And that Area A and B will be part of a confederation with Gaza, with Jordan."¹⁷² Furthermore, Ze'ev Elkin, the Minister for Jerusalem Affairs, stated: "Halas ['enough' in Arabic] with the story of two states. There is no other option but the State of Israel, certainly between the Jordan [River] to the [Mediterranean] sea there will be one State."¹⁷³

- **Israel must end any conduct aiming at annexing parts or all of the West Bank.**
- **Israel must abide by relevant Security Council resolutions declaring the annexation of East Jerusalem as "null and void" under international law and renounce its sovereignty claims over East Jerusalem.**
- **Israel must refrain from taking legislative steps aiming at unlawfully extending its jurisdiction over the OPT with the aim of annexing parts of it.**

5. Legal consequences arising from acts of annexation

Any violation of international law, including acts of annexation, triggers the international responsibility of the offending State and engenders an obligation to make full reparation for injuries caused.¹⁷⁴ Under the Law of State Responsibility, the responsible State is under an obligation to cease the unlawful conduct and provide guarantees of non-repetition.¹⁷⁵ This means that the State responsible for annexing a territory must first of all withdraw from such territory and bring to an end all acts connected to the acquisition of that territory by force. Subsequently, the responsible State is under an obligation to make full reparation for the injury caused which includes, singly or in combination as appropriate, restitution, compensation and satisfaction.¹⁷⁶ Under the Law of State Responsibility, reparations are interpreted within a context of State-to-State relationship.¹⁷⁷ It follows that the alleged annexing State, is under an obligation to reinstate the *status quo ante* in the territory it has annexed. Where possible, this would include the restitution of all movable or immovable property, otherwise, the offending State has an obligation to provide compensation for the material and moral damage caused. If the previous two forms of reparations are unable to make up for the damage caused, the alleged annexing State has an obligation to provide

[trump](#); see also, *Insiders' Jerusalem, Q&A - Annexation: What Happened and Does It Matter?*, 12 September 2019.

¹⁷¹ *Report of the UN Special Rapporteur on the Situation of human rights in the Palestinian territories occupied since 1967*, UN Doc A/73/45717, 22 October 2018, para. 54.

¹⁷² Hamodia, *Exclusive Interview With Israeli Justice Minister Ayelet Shaked*, 7 March 2018, available at: <http://hamodia.com/2018/03/07/exclusive-interview-justice-minister-ayelet-shaked/>.

¹⁷³ The Middle East Monitor, *Israel minister: We must plan for a million settlers in the West Bank*, 15 November 2017, available at: <https://www.middleeastmonitor.com/20171115-israel-minister-we-must-plan-for-a-million-settlers-in-the-west-bank/>.

¹⁷⁴ See, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)*, November 2001, Supplement No. 10 (A/56/10), article 30.

¹⁷⁵ *Ibidem*.

¹⁷⁶ *Ibid.*, article 34.

¹⁷⁷ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

satisfaction to the victim State through, among others, acknowledgement of the breach, expression of regret or formal apology.¹⁷⁸

Violations of a human rights and serious IHL violations give rise to an obligation of the responsible State to provide an effective remedy and make reparation directly to the victims.¹⁷⁹ Each individual, who is victim of a violation of human rights, has a right to procedural remedies as well as full redress.¹⁸⁰ It follows that the human rights violations derived from an act of annexation such as confiscation and destruction of property, forced evictions and violations of the right to housing, right to work, right to health, right to education, freedom of movement, and displacement, give rise to an obligation of the responsible State to provide redress directly to the victims without necessarily going through the intermediation of the State.

In the *Wall* case, the International Court of Justice, besides affirming that Israel must cease the construction of the Barrier and dismantle the parts of the Barrier that have been built inside the OPT, it also added that Israel had an obligation to make reparations to those Palestinians who suffered losses as a result of the Barrier:

Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.¹⁸¹

Obligations of Third States

Common Article 1 to the GCs stipulates that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” This provision includes an internal dimension, namely the obligation to “respect” the Convention, as well as an external one, i.e. the obligation to “ensure respect” by other High Contracting Parties.¹⁸² The latter dimension entails a positive obligation of means, requiring States to take positive steps to ensure the respect for the GCs by others.¹⁸³ Common Article 1 has been referred to on numerous occasions in UN Security Council and General Assembly resolutions, the

¹⁷⁸ *Ibid.*, Articles 28-39.

¹⁷⁹ See, Human Rights Committee, General Comment No. 31, *The nature of the general legal obligation imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004); see also the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005.

¹⁸⁰ See, article 8 of the Universal Declaration of Human Rights, 10 December 1948; article 2 of the ICCPR; see also, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005; see also ICJ, *Practitioners Guide No. 2: The Right to a Remedy and Reparation for Gross Human Rights Violations* (Revised Edition, 2018).

¹⁸¹ ICJ, *Wall* case, para. 153.

¹⁸² The existence of such “external dimension” of Common Article 1 has been confirmed by the ICJ in the *Wall* case, para. 158 and *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports, 1986, para. 220.

¹⁸³ ICRC, *Commentary on the First Geneva Convention*, 2016, Article 1, paras. 119, 121 and 153-173, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD>.

International Court of Justice, as well as by High Contracting Parties, to call on third States to take action against violations of GC IV by Israel.¹⁸⁴

Under the law of State Responsibility, violations of peremptory norms of international law (*jus cogens*), may trigger the responsibility of third States giving rise to specific duties. Articles 40-41 of ARSIWA stipulate that when a serious breach of a peremptory norm of international law occurs, third States are under an obligation to: (1) cooperate to bring to an end the wrongful situation; (2) refrain from recognizing the wrongful situation; and (3) refrain from rendering aid or assistance in maintaining the wrongful situation.¹⁸⁵ As mentioned, the prohibition of acquisition of territory by force and the right to self-determination qualify as peremptory norms of international law.¹⁸⁶ It follows that, in the presence of conducts running contrary to these norms, such as Israel's annexation practices, third States are under an obligation to refrain from recognizing such acts as well as refrain from rendering aid or assistance in perpetuating the unlawful situation derived from such acts. Lastly, third States should cooperate among themselves, and with the offending State, to bring the wrongful conduct to an end.¹⁸⁷

In the aftermath of Israel's adoption of the Basic Law on Jerusalem formalizing the unilateral annexation of East Jerusalem,¹⁸⁸ the UN Security Council applied the principle of non-recognition in resolution 478, declaring Israel's claims over East Jerusalem "null and void" and urging States not to recognize the annexation of East Jerusalem and to withdraw their diplomatic missions from the city.¹⁸⁹

In the *Wall* advisory opinion, the International Court of Justice illustrated the obligations of third States in relation to the construction of the Barrier and its associated regime in the West Bank including East Jerusalem:

The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law [...]. Given the character and the importance of the

¹⁸⁴ See for example, UNSC Res 681, 20 December 1990, Op. 5; UNGA Res ES-10/2, 5 May 1997, Res ES-10/3, 30 July 1997, Res ES-10/4, 19 November 1997, and Res ES-10/6, 24 February 1999; ICJ, *Wall* case, paras. 158-159; and the Declaration adopted by a Conference of the High Contracting Parties to the Fourth Geneva Convention convened on the basis of common Article 1 in Geneva, 5 December 2001, available at: <http://www.eda.admin.ch/eda/e/home/foreign/hupol/4qc.html>. For more details see: M. Sassoli, T. Boutruche, *Expert Opinion...*, p. 41.

¹⁸⁵ It might also be relevant to mention Article 16 of the ARSIWA that governs instances of what is described as "complicity" in third State national legal systems and provides that a State that aids or assists another State in the commission of an internationally wrongful act may engage its international responsibility if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State. To provide a practical example of instances of "aid and assistance" in committing an internationally wrongful act, Crawford suggests that "[economic and commercial dealings between Israel and a third State [...] might be considered to amount to aid or assistance in the commission of an internationally wrongful act, contrary to Article 16 and 41(2) of the ILC Draft Articles". See, J. Crawford, *Opinion Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories*, paras. 84-85, available at:

<https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>

¹⁸⁶ See footnote 115.

¹⁸⁷ Article 48(1)(b) of the ARSIWA further entitles third States to invoke the responsibility of the wrongdoer whenever there is a breach of an obligation *erga omnes*, which is a characteristic all *jus cogens* norms share. Accordingly, third States may request the cessation of the wrongful act, guarantees of non-repetition, and the fulfilment of the obligation to make reparation in the interest of the directly-injured State (48(2)). Article 54 of the ARSIWA finally allows third States to adopt lawful countermeasures against a State that infringes upon an obligation *erga omnes* and that remains non-compliant with the duties to cease acting wrongfully and make reparation.

¹⁸⁸ See fn 40.

¹⁸⁹ See, UNSC Res, UN Doc S/RES/478, 20 August 1980, Op. 5(a), (b).

rights and obligations involved, the Court is of the view that all States are under an obligation *not to recognize the illegal situation* resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation *not to render aid or assistance in maintaining the situation* created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to *see to it that any impediment*, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is *brought to an end*.¹⁹⁰

With regard to Israeli settlement enterprise, the UN Security Council has repeatedly called upon States to refrain from recognizing settlements as well as not to provide aid or assistance in maintaining them. Security Council Resolution 471, for instance, urged third States “not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories.”¹⁹¹ Similarly, Security Council Resolution 2334 called upon all States “to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.”¹⁹²

- **Israel must comply with its obligations under the law of State responsibility and cease all conducts in relation to the annexation of parts or all of the West Bank, provide guarantees of non-repetition, and make reparation to the State of Palestine.**
- **Third States must refrain from recognizing Israel’s conduct aiming at annexing parts of the West Bank and from providing assistance in maintaining such conduct. Third States should also cooperate to bring such unlawful conduct to an end.**
- **In line with Common Article 1 to the Four Geneva Conventions, States should take all necessary measures, individually or collectively, to ensure respect for IHL by Israel.**

¹⁹⁰ ICJ *Wall* case, paras. 155, 159 (emphasis added).

¹⁹¹ UNSC Res, UN Doc S/RES/471, 5 June 1980, Op. 5.

¹⁹² UNSC Res, UN Doc S/RES/2334, 23 December 2016, Op.5.

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