



Master Programme in Democracy and Human Rights

**Israel's Human Rights Obligations  
in the Palestinian Territory after Oslo**

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in the Palestinian Territory after Oslo**

الالتزامات الاسرائيلية بموجب القانون الدولي في المناطق الفلسطينية بعد اوسלו

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1993

2005

2002

1967

1967

## **ABSTRACT**

Little has been written about Israel's obligations in the Palestinian Territory after the signing of the Oslo Accords in 1993 that highlighted an argument on whether Israel is still an occupying power or not. This argument was highlighted again in a more expanded form following the Israeli military escalation and incursions in the Palestinian towns in 2002 and after the Israeli withdrawal from the Gaza Strip in 2005. Although the Oslo Accords created a new situation, including the establishment of the Palestinian Authority that bore certain responsibilities in the Territory, the new situation brought no changes with regard to the status of the Palestinian territory as occupied territory under International Law.

The arguments suggest that if Israel is deemed an occupying state in the Palestinian Territory after the signing of the Oslo agreement, it should abide by International Law and so it is responsible for the implementation of International Humanitarian Law and International Human Rights Law in the Occupied Palestinian Territory.

In order to achieve its goals, the study follows an analytical critical approach for the theoretical framework governing occupation and its application on the Israeli Occupation of the Palestinian Territory. It is significant to note here that the research is based mainly and for most on the international conventions that compose the International Humanitarian Law and the International Human Rights Law.

The scope of the study is limited geographically to the Palestinian Territory, occupied in 1967, including the West Bank, East Jerusalem and the Gaza Strip, in addition to that any events before 1967 have no place in this study, except where it is needed to clarify applicability of International Law on the Occupied Palestinian Territory.

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## **ABBREVIATIONS**

|        |  |
|--------|--|
| BL     | Basic Law  |
| DoP    | Declaration of Principles                                      |
| GA     | General Assembly   |
| GS     | Gaza Strip   |
| ICCPR  | International Covenant on Civil and Political Rights           |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ    | International Court of Justice                                 |
| ICRC   | International Committees of the Red Cross                      |
| IHL    | International Humanitarian Law                                 |
| IHRL   | International Human Rights Law                                 |
| IL     | International Law  |
| ILO    | International Labour Organization                              |
| OPT    | Occupied Palestinian Territory                                 |
| PA     | Palestinian Authority  |
| PLC    | Palestinian Legislative Council                                |
| PLO    | Palestine Liberation Organization                              |
| SC     | Security Council   |
| UN     | United Nations   |
| UNCHR  | UN Commission on Human Rights                                  |
| US     | United States of America                                       |
| WB     | West Bank  |
| WWI    | First World War  |
| WWII   | Second World War   |

## **INTRODUCTION**

Following the signing of the Declaration of Principles (*hereinafter* DoP) between Israel and the Palestine Liberation Organization (*hereinafter* PLO) in 1993, an argument was highlighted on whether Israel is still an occupying power or not.

This argument was highlighted again in a more expanded form following the Israeli military escalation and incursions in the Palestinian towns during the Al Aqsa Uprising (Intifada) that erupted in the wake of the provocative tour of the Israeli opposition leader then Ariel Sharon to the Al Aqsa compounds in Jerusalem on September 28, 2000. After the Israeli withdrawal from the Gaza Strip (*hereinafter* GS) in 2005, the question of the status of Israel as occupation power was also revived.

The responsibility for human rights violations in the Palestinian Territory was not addressed in the Oslo Accords despite their inclusion of articles calling on both Israel and the Palestinian Authority (*hereinafter* PA) to respect human rights norms.

The arguments suggest that if Israel is deemed an occupying state in the Palestinian Territory after the signing of the Oslo agreement, it should abide by International Law (*hereinafter* IL) and so it is responsible for the implementation of International Humanitarian Law (*hereinafter* IHL) and International Human Rights Law (*hereinafter* IHRL) in the Occupied Palestinian Territory (*hereinafter* OPT).

The involvement of the Palestinians in the Oslo Accords cannot be considered as absolving Israel of its obligations as an occupying power. Here rises the question, "Does Israel bear some kind of responsibility for the violations committed by the Palestinian Authority (*hereinafter PA*) in the OPT, taking into consideration that most of these violations are linked to the security obligations of the Oslo Accords?"

One might comment that now in 2009 and after the many developments that led to the stalemate of the peace process, the Oslo agreements that started in 1993 and have so far failed to achieve a Palestinian state, are no longer valid or of value to be discussed in the thesis. Perhaps, there is part of fact here; however; it cannot be ignored that the Oslo process has created undeniable facts on ground, including the creation of the PA that assumes government responsibilities in certain areas.

Furthermore no party - Palestinian, Israeli, regional or international - has ever declared official invalidity of the Oslo Accords or the complete halting of the peace process. Rather all sides are calling for the resumption of the peace process and for the implementation of the Oslo agreements.

The thesis, meanwhile seeks to support or disprove the following premises or points:

- Israel is still an occupying country after the signing of the Oslo Accords and the transfer of certain responsibilities and powers in the OPT to the Palestinians.

- The implementation of the disengagement plan in the GS did not end the Israeli occupation of the GS.

- The PA is not a sovereign body, accordingly it cannot adhere to conventions forming basis of IHRL and IHL, but it is bound by its provisions of customary origin applicable on non-state international actors or subjects.

- As an occupying power, Israel is yet responsible for abiding by IHL and IHRL in the OPT.

In fact, a lot has been written about the Palestinian cause along all its stages since the 1948 war that led to the creation of Israel and the expulsion of hundreds of thousands of Palestinians out of their homes and lands.

Several approaches, meanwhile, can be followed to discuss issues of the Palestinian cause, including the historical approach, the analytical approach and the legal approaches that discuss the legality or illegality of the Israeli occupation of the Palestinian Territory or consider the legal status of the OPT along the different stages with the various developments.

Another approach is to discuss the right of self determination for the Palestinian people and the possibility of the establishment of a Palestinian state. International, regional and local (Israeli and Palestinian) humanitarian and human rights organizations focused on monitoring the Israeli practices in the OPT and its violations of the IHL and the IHRL that were put in periodical reports.

Some of these international organizations include Amnesty International and Human Rights Watch. At the local Israeli level there are B'Tselem, Hamoked and Peace Now, while at the local Palestinian level there is Al HAQ Institution and the Palestinian Independent Commission for Human Rights, in addition to other human rights monitoring groups.

In addition to a review of the legal and general situation in the OPT since the 1967 war and a general analysis for the Oslo Accords, this study seeks to benefit from all types of literatures, including books, essays, analytical and critical opinions and articles and periodicals to reach answers for the questions of the study.

The International Court of Justice Advisory Opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" has received special focus in this study as it touched several issues that support the argument of the study on the applicability of IHL and IHRL in the OPT.

In order to achieve its goals, the study will begin with the theoretical framework of the Law of War and its application on the Israeli Occupation of the Palestinian Territory in addition to the status of the Oslo Accords under International Law (*hereinafter IL*).

Then the study is to discuss the legal status of the Palestinian Territory since the 1967 war, taking into consideration the many developments in the West Bank (*hereinafter WB*) and the GS, including the West Bank-Jordan disengagement and the

Palestinian Declaration of Independence in 1988, the transitional period following the signing of the Oslo Accords in the early 1990s and the implementation of the Israeli unilateral disengagement plan from the Gaza Strip in 2005 and its consequences.

The study will then move to discussing the humanitarian and human rights obligations of Israel as an occupying power and discussing its violations in this respect.

The last part of the study is to discuss the obligations of the PA after the Oslo Accords and the PA's human rights violations in accordance with the fulfillment of the Oslo security obligations.

It will also include an analysis to scenarios of responsibility, other than the Israeli responsibility, in the OPT that would include the responsibility of the Palestinian Authority as an authority of "effective control" in the Territory and the responsibility of Hamas Movement in the Gaza Strip following the June 2007 infighting.

It is significant to note here that the research is to be based mainly and for most on the international conventions that compose the IHL and the IHRL.

The scope of the study is limited geographically to the Palestinian Territory, occupied in 1967, including the West Bank, East Jerusalem and the Gaza Strip, in addition to that any event before 1967 have no place in this study, except where it is needed to clarify applicability of the IL on the OPT.

## CHAPTER ONE

### **1. Occupation under International Law**

Wars are governed by IL<sup>1</sup> rules that form what is called "laws of war", otherwise; barbarism and brutality would overwhelm.<sup>2</sup> The main sources of the law of war are, as set by Starke, the Declaration of Paris 1856, the Geneva Convention 1864, the Declaration of St. Petersburg 1868, the Hague Conventions of 1899 and 1907, the Geneva Gas and Bacteriological Warfare Protocol, 1925, the Submarine Rules Protocol 1936 and the four Geneva Red Cross Conventions 1949 that came with humanitarian purposes to "reduce or limit the sufferings of individuals."<sup>3</sup>

The failure of the occupying states to apply the Hague Regulations on the territories that became under their control, following the WWI, the Geneva Conventions came to deal more with IL rules that govern occupation in what can be called the "law of occupation," giving more rights to the occupied population.<sup>4</sup>

The law of occupation both allows the occupant to exercise certain powers in the occupied territory and limits the actions of the occupying power, with the goal to

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<sup>1</sup> The International Humanitarian Law along with the International Human Rights Law form the International Law. The statute of the International Court of Justice has stated in Article (38) the source of International Humanitarian Law that the court is to apply in its functions and they include international conventions, international custom, general principles of law, recognized by civilized nations.

<sup>2</sup> J. G. Starke, *Introduction to International Law*. London: Butterworths, 1967, 439.

<sup>3</sup> Ibid, p440

<sup>4</sup> Benvenisti, *The International Law of Occupation*, (Princeton: Princeton University Press, 1992), 96-98

ensure decent treatment of the occupied population to prevent any risks the situation leads to renewed conflict, keeping good ties between the occupying state and other foreign states and keeping way open for an opportunity for a peace agreement.<sup>5</sup>

This Chapter focuses on the law of occupation with the goal to thoroughly examine the status of the Israeli occupation of the Palestinian Territory in light of the rules governing occupation specified under The Hague Regulations of 1907 and the Geneva Conventions of 1949.

The Chapter will also tackle the theoretical framework governing international treaties with the goal to get a clear image of the status of the Oslo Accords that are the focus of the thesis.

## **1.1 Concept of Occupation**

This Section of the Chapter will deal with the theoretical framework of the rules governing occupation, war and armed conflict. The focus here will be on the definition of occupation under IL, the concept of war and armed conflict under IL, in addition to human rights situation during armed conflicts.

### **1.1.1 Definition of Occupation**

The Hague Convention 1907<sup>6</sup> defined Occupation in Article (42), which says that a "Territory is considered occupied when it is actually placed under the authority

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<sup>5</sup> Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967." *The American Journal of International Law* 84, no. 1 (1990), 45-46

of the hostile army." It further defined that the occupation extends only to the territory where such authority has been established and can be exercised."

The ICRC says that a "(t)erritory is considered occupied when it is actually placed under the authority of foreign armed forces, whether partially or entirely, without the consent of the domestic government," and that the occupation extends only to territory where such an authority has been established and can be exercised.<sup>7</sup>

The occupying power must make it clear that it has established an occupation of the territory and that the local authorities are unable to exercise their regular functions. When occupation takes place, no changes to the status of the occupied territory are made. Such a change "can only be effected by a peace treaty or by annexation followed by recognition ... there is also no change on the nationality of the inhabitants."<sup>8</sup>

The IL of Occupation applies as soon as a territory comes under effective control of an occupying force, even if no armed resistance or fighting is witnessed, according to Article (2) of the Fourth Geneva Convention that says, "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all

<sup>6</sup> Convention Respecting the Laws and Customs of War on Land (Hague IV) Oct. 18, 1907. In Leoned Friedman, *The Law of War: A Documentary History*. (New York, 1972), 308-331.

<sup>7</sup> ICRC, "Civilians in the power of the enemy and international humanitarian law," available at: [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section\\_ihl\\_civilians\\_in\\_the\\_power\\_of\\_the\\_enemy?OpenDocument](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section_ihl_civilians_in_the_power_of_the_enemy?OpenDocument)

<sup>8</sup> Leslie C. Green, *The Contemporary Law of Armed Conflict*. (UK: Manchester University Press, 2000), 257.

cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

J. G. Starke distinguishes between two types of belligerent occupation: Invasion in which a complete control of the territory takes place following a stage of military operations and a complete transfer of sovereignty in which the control of the territory takes place by other "means of treaty of cession" or through a defeat that is followed by annexation. This distinction, given by Starke, is important as it helps define rights and duties of the occupying power in the occupied territory and ensures application of IHL in the occupied territory since under belligerent occupation, the occupying power is only entitled to exercise military occupation without any transfer of sovereignty of the territory or a change of nationality of the local residents.<sup>9</sup>

The occupying power shall not force the protected persons to serve in its forces or to work in providing it with information about the forces of their country. Article (44) of The Hague Convention 1907 says, "(a) belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense." And Article (31) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War stipulates that "(n)o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."

However, Article (55) of the Fourth Geneva Convention 1949 entitles the occupying power to enjoy certain rights during its occupation time. The article says

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<sup>9</sup> Starke, Ibid, 448.

that the occupying power can get food and medical supplies for the use of its forces and administration personnel, but not for “export outside the occupied territory and not for the benefit of anyone beyond the occupying personnel, unless necessary for the benefit of the population under occupation itself” and after the needs of the civilian population are fulfilled.

The state of occupation ceases when the occupying power “evacuates or retreats from the territory” at a time the local government assumes power. And so, persons accused or convicted during the occupation period and their relevant documentation should be transferred to the local authority.<sup>10</sup>

### **1.1.2 War under International Law**

The traditional definition of war is combat between two armies, yet under IL, there is no specific definition for war. However, the laws of war (*jus in bello*) organize behaviour of the armed forces, the political authorities and even the behaviour of civilians in order to reduce to the greatest extent possible the horrors of war and so both civilians and fighters remain under protection of IL, based on customary laws and humanitarian principles.<sup>11</sup>

The Permanent Court of Arbitration in the case of Russian Compensations in 1912 defined war as an international fact in the first place. Others consider war as a legal case, including rights and duties amongst the fighting states, whilst others consider it an international affair, during which the two sides use violence. However it

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<sup>10</sup> Green, Ibid, 258.

<sup>11</sup> Green, Ibid, 15-19.

is considered legal for one side and a crime for the other side. Meanwhile, the role of IL during war is to define international responsibility for war and to organize relations between the sides involved in the conflict.<sup>12</sup>

Charter of the League of Nations Union<sup>13</sup> that followed the First World War (*hereinafter* WWI) did not prevent wars, but urged states to avoid wars and set up certain pre-conditions for wars. In Article (11) of the Charter, the state parties said that "any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." Article (12) of the Charter urged the parties to "submit the matter either for arbitration or judicial settlement or to inquiry by the Council, and they agreed in no case would they resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute."

According to Article (13) of the Charter of the League, the member states "agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith." Meanwhile, Article (15) stipulates that "If there should arise

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<sup>12</sup> Tayseer Nabulsi, *Israeli Occupation of the Arab Land* (PLO: Researches Center, 1981), 16-17 (Arabic).

<sup>13</sup> The League of Nations was established after the end of the WWI in 1919 with the goal to promote peace amongst the world countries. The League's failure to prevent wars which was confirmed with the eruption of the WWII, led to the dissolution of the League to be replaced with the United Nations in 1945. Charter of the League is available at: <http://www.geocities.com/Heartland/Valley/8920/European/leachart.html>.

between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article (13), the Members of the League agree that they will submit the matter to the Council."

Any member state that resorts to war in breach of its pledges in the previously mentioned Articles would be deemed as declaring war against all the state members of the League and so will be subject to penalties set up in Article (16), including "severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League."

The Geneva Protocol 1924<sup>14</sup> or Protocol for the Pacific Settlement of International Disputes in October 1924 also urged countries not to resort to war except in certain cases it defined in Article (2) that says, "The signatory States agree in no case to resort to war either with one another or against a State which, if the occasion arises, accepts all the obligations hereinafter set out, except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol."

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<sup>14</sup> Web site of Britannica encyclopedia.

Meanwhile, under Article (3) of the Protocol "states would agree to submit all disputes to the Permanent Court of International Justice, any state refusing arbitration was *ipso facto* the aggressor, and the League Council could impose binding sanctions by a two-thirds majority."

Urging states' commitment to avoid wars, the Kellogg-Briand Pact in 1928 announced the cancellation of membership of those countries that use war as a means to achieve their national interests. Meanwhile, in its Article (1), the agreement condemned members' option of war to resolve their international differences.

The Charter of the United Nations (*hereinafter* UN), however, has not talked about war in any of its articles. The word "war" was mentioned only once in the preamble of the Charter when it talked about saving "succeeding generations from the scourge of war". Instead, the Charter used the expression "use of force" in Article (2) Paragraph (4) and "self defence" against any armed attack in Article (51).

Furthermore; the UN Charter allowed use of force only in two cases, first, in the case of self defence that is one of the main principles under IL.<sup>15</sup> Article (51) of the Charter stipulates that, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN, until the Security Council (*hereinafter* SC) has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the SC

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<sup>15</sup> Nabulsi. Ibid. 31-33.

and shall not in any way affect the authority and responsibility of the SC under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." Second the case of threatening global security and joint interest of the member states as stipulated in the Charter's Chapter (VII).<sup>16</sup>

IL is a developing sector and is a very important methodology for "organizing mankind against universal destruction through war."<sup>17</sup> Wolfgang Friedmann considers the development of a new kind of international law against the traditional regulations of diplomatic interstate relations; that is the international law of cooperation. He argues that the international social, political and legal revolution that was produced in the wake of WWII caused the European countries and the United States of America (*hereinafter US*) to reach a kind of state of balance that urged respect for peaceful settlement of international disputes. In the past, countries made efforts to codify "rules governing the conduct of warfare through the Hague Convention"<sup>18</sup> with the goals to humanize warfare through law and to distinguish between just and unjust wars. But WWII completed the destruction the WWI had started, with the use of "air power on the land and on the seas." Meanwhile, the laws of neutrality started emerging. The establishment of the League of Nations and the International Labour Organization (*hereinafter ILO*) following WWI were meant to organize mankind to seek peace and

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<sup>16</sup> See Antonio Cassesse, "Ex Inuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" *EJIL* 10 (1999): 23-30. *EJIL* 1999, Vol. 10, p 23-24.

<sup>17</sup> Wolfgang Friedmann, "Half a Century of International Law". *Virginia Law Review* 50-8. (1964): 1333.

<sup>18</sup> *Ibid*, 1334.

welfare. However, the international "trend towards peaceful settlement of interstate disputes" was mostly engulfed with reservations.<sup>19</sup>

Friedmann also argues that several major changes in the political structure of IL have dominated the evolution of IL after WWII, including, but not restricted to, the political and ideological split that threatened the universality of IL following the war, preventing the SC from functioning properly; wars are no longer the ultimate instrument of policy in the hands of sovereign national states due to the development of nuclear weapons that threaten civilization with destruction; the transformation of some underprivileged nations into sovereign states that have become members of the UN, aspiring economic development that urged for the establishment of new legal business relationships; the concentration of military and economic powers in certain states and development of communication narrowed differences between states. These changes altered the structure of IL that appears under two essential types of IL: "(T)he international law of coexistence and the international law of cooperation,"<sup>20</sup> widening the scope on IL beyond the traditional regulations of diplomatic interstate relations, bringing many new fields within the scope of IL and so customs and treaties are still not a sufficient source of law. For the contribution to the development of IL, Friedmann advises looking at the UN resolutions or other authoritative international declarations outside the UN though some lawyers still doubt the extent of the binding nature of those resolutions. However, Friedmann says that nevertheless; the UN resolutions that "lay down certain principles over ... natural resources or human rights" can reach consensus.<sup>21</sup>

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<sup>19</sup> Ibid, 1336-1337.

<sup>20</sup> Ibid, 1340.

<sup>21</sup> Ibid, p1345.

### **1.1.3 Human Rights Protection during Times of Armed Conflict**

The wider term “armed conflict” is currently used instead of the term war, which no longer takes the traditional form of a face-to-face confrontation between two armies, whilst armed conflict under IL includes all types of international and non-international armed conflicts between states and/or armed groups, and so, it is not limited to wars.

It is quite well known that IHL applies in times of war and IHRL applies in times of peace and war. During armed conflicts, many international conventions apply as to protect civilians and properties. Those conventions include the Fourth Geneva Convention of 1949, the Hague Regulations of 1907, Convention on the Protection of Cultural Property in the Event of Armed Conflict of 1954, Convention on the Prohibition of Military or any other hostile use of Environmental Modification Techniques of 1976, Convention on Prohibitions or Restrictions on the Use of Certain Conventions which may be deemed excessively injurious or to have indiscriminate Effects of 1980, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 1993 and Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of anti-Personnel mines and on their Destruction of 1997.

Most conventions have become Customary Law by time.<sup>22</sup> The International Court of Justice (*hereinafter* ICJ) in its advisory opinion "Legal Consequences of the

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<sup>22</sup> Since 1946, The Hague Regulations of 1907 have been viewed as embodying customary international law; the 166 high number of states parties of the Fourth Geneva Conventions of 1949 have strengthened arguments that the Conventions are, in whole or in substantial part, declaratory of customary international law and some of the provisions of the 1977 Geneva Protocol I are viewed as

Construction of a Wall in the Occupied Palestinian territory"<sup>23</sup> made reference to Israel's obligations under The Hague Regulations<sup>24</sup>, and the UN SC has always "maintained that Israel's authority in the occupied territories is subject to the Fourth Geneva Convention."<sup>25</sup>

The adoption of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in 1949 was deemed one of the most important developments in the Law of War since 1907. The 1949 Convention was meant to replace the previously reached Geneva Conventions for the Year 1929: the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field; the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea and the Third Geneva Convention Relative to the Treatment of Prisoners of War. Meanwhile, the Convention on protection of civilians during war was new, representing the first attempt to protect civilians during conflicts as it came in the wake of the sufferings inflicted in occupied territories during the WWII. The Geneva Convention applies to any international armed conflict even if none of the involved parties recognized the state of war in its conventional form,<sup>26</sup> and so the term "armed conflict" is used instead of the term "war", especially as conflicts after the year 1945 did not witness

embodying customary law. (Source: Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", *The American Journal of International Law* 84-1, (January 1990): 53-54).

<sup>23</sup> The International Court of Justice, the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, July 9, 2004, (2004 I.C.J. 136.

<sup>24</sup> See, ICJ Advisory Opinion. *Ibid*, paragraphs 89-101.

<sup>25</sup> Michael J. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation," *The American Journal of International Law* 99-1 (2005): 121.

<sup>26</sup> Edward Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, (the Netherlands: Kluwer Academic Publishers, 1992), 16-17.

war in its conventional form –a confrontation between two armies, moreover; the term "adverse party" was used instead of the term "enemy".<sup>27</sup>

One of the most important developments in the history of IL was the attempt to control armed conflict when the International Conference for Human Rights in Tehran in 1968 called for the respect of human rights during armed conflict. The conference stressed the principles of the Universal Declaration of Human Rights and other international treaties in this respect, urging all people and governments to comply with the declaration and to exert more effort to provide all humans a decent life with freedom and dignity. Although the conference's decisions were not binding, the UN General Assembly (*hereinafter* GA) asked the UN Secretary-General to turn those decisions to the relevant international organizations for implementation. Meanwhile, the conference has directed attention to the need to protect people, struggling against colonial regimes and against regimes that discriminate against minorities.<sup>28</sup>

In 1977, the Geneva Convention was updated with the creation of two additional protocols. Protocol I deals with international armed conflicts, whilst Protocol II approved for the first time the importance of applying humanitarian objectives during times of non-international armed conflicts that had previously been mentioned only in the Geneva Convention Article (3), and so, Protocol I has created a fundamental change in the law of international armed conflict by considering the

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<sup>27</sup> Green, *Ibid*, 44.

<sup>28</sup> *Ibid*, 46-47.

national liberation movements, fighting for self determination as international conflicts where international law should apply.<sup>29</sup>

## **1.2 1967 War and Israel's Belligerent Occupation**

Twenty years after the 1948 war that led to the creation of the state of Israel and the expulsion of hundreds of thousands of Palestinians from their homes and land, Israel launched a new war to annex the rest of the Palestinian land of the WB and the GS, along with the Egyptian Sinai and the Syrian Golan Heights.

This section of the chapter will focus on Israel's justifications for launching its war on the Arab countries in 1967 and the status of the Israeli occupation under IHL with a brief look at the situation of Jerusalem after Israel's annexation.

### **1.2.1 Israel's War Justifications**

In a bid to justify its attacks on the Arab countries and resorting to military force in 1956 and 1967, Israel claimed at the SC session on the 1967 war that it was retaliating to an Egyptian initiated attack.<sup>30</sup> The 1967 war led to Israel's occupation of Arab land, including the WB, the GS, the Sinai and the Golan Heights.

After the International Emergency Forces withdrew in May 1967, Egypt announced its right to impose its sovereignty on its land and regional waters. Due to the state of belligerency between Egypt and Israel, the former did not allow passage

<sup>29</sup> Ibid, 51.

<sup>30</sup> Nabulsi. Ibid. 44.

of Israeli ships across its regional waters which Israel considered an act of aggression. Israel also considered Egypt's closure of the Straights of Tiran another act of aggression that justified its right to self defence according to UN Charter Article (51). Another justification Israel used for its military attack was the withdrawal of international emergency forces and the massing of Egyptian forces in Sinai that forced it to launch a preemptive attack. Israel also considered the military operations of the Palestinian revolutionaries against Israeli targets before the 1956 and 1967 wars as another reason to launch its attacks, insisting on its right to self defence even though the attackers were not regular armies.<sup>31</sup>

Although Article (51) of the UN Charter allows states to resort to military action only as a means of self defence against an "armed attack", some scholars, however; support a preemptive military strike if an attack is "clearly imminent". Perhaps this notion helped prevent condemnation of Israel's strikes at the UN GA and SC. However; the position of the UN with regard to the six-day war in 1967 was taken only on November 22, 1967, when the SC adopted Resolution No. 242.<sup>32</sup>

Several facts, however; support the opposite notion that Israel's exploitation of Article (51) of the UN Charter as a justification for its strike during the 1967 war was unjustified.

First; Egypt had the right to protect its land borders and regional waters, especially as the truce between Israel and the Arab countries at that time, had not

<sup>31</sup> Ibid. 44-61.

<sup>32</sup> Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements*. (Oxford: Oxford University Press 2000), 29-30. The UNSC Resolution No. 242, can be viewed on the UN official web page: <http://www.un.org/documents/sc/res/1967/scres67.htm>.

removed the state of belligerency. Second; it was revealed after the war that neither Egypt, nor any other Arab country, was preparing to attack Israel. Third; Israel's use of armed force in 1956 and 1967 against the Arab countries in retaliation for the attacks of the Palestinian revolutionaries was a violation of IL as the UN Charter bans the use of military force against member states according to Article (51) and Chapter (VII) of the Charter. As already stated Israeli justifications do not meet standard criteria because these operations were conducted by members or small groups that did not belong to any Arab country, moreover; the operations of those groups were considered legal as they were resisting aggression that targeted the entire Palestinian people.<sup>33</sup>

Furthermore; Israel's right to self defence according to IL allows it only to defend against attack, but not to retain territory gained by military force.<sup>34</sup>

It thus becomes clear that Israel's resort to the use of force was meant to annex more Arab land and not a matter of self defence as it alleged; and so Israel's use of force against the Arab countries in 1967 can be deemed as an aggressive act in violation of Chapter (VII) of the UN Charter although the UN did not issue a resolution in condemnation of Israel as it did following the 1956 war.<sup>35</sup>

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<sup>33</sup> Nabulsi. Ibid. 49-63.

<sup>34</sup> Moussa Qudsi Dweik, *Jerusalem and the International Law*. (Jerusalem: The Jerusalem Center for Social and Economic Rights, 2002), 32. (ARABIC).

<sup>35</sup> Nabulsi. Ibid. 70.

### **1.2.2 Israeli Occupation under International Law**

The duties of the occupying country towards civilians in the occupied territory are defined in the Hague Convention of 1907 Articles (42-56) and in the Fourth Geneva Convention of 1949 Articles (27-34 and 47-78). However, any deals between the occupying country and the local authorities in the occupied territory can in no means deprive civilians in the occupied territory from the protection afforded by IHL, according to Article (47) of the Geneva Convention, in addition to that protected people under no circumstances lose their rights according to Article (8) of the Geneva Convention.<sup>36</sup>

John Quigley<sup>37</sup> argues that the derogation of rights of the protected persons in an occupied territory can be in three different ways: First; by changes the occupying state might impose, second; by any deal or agreement between the occupying power and the local authorities, and third; by annexation by the occupying power. Quigley argues that Article (47) of the Geneva Convention protects the protected persons from any provisions in any agreement between Israel and the PLO that might be oppressive or violates the rights of the Palestinian people who are protected by the Geneva Civilian Convention, and so, Israel is responsible for ensuring protection of the occupied people "regardless of the terms of any agreement Israel might conclude with the PLO."

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<sup>36</sup> ICRC web site: "Occupation and International Humanitarian Law," 4/8/2004: <http://www.icrc.org/Web/eng/siteeng0.nsf/html/634KFC>.

<sup>37</sup> John Quigley, "The P.L.O.-Israeli Interim arrangements and the Geneva Civilian Convention," in *Human Rights, Self Determination and Political Change in the Occupied Palestinian Territories*, ed. Stephen Brown, (The Hague, Netherlands: Martinus Nijhoff Publishers, 1997), 27-28.

Occupation, however, does not require a declaration of a special kind whilst the reasons behind the presence of foreign forces in the territory are not specified. At the same time, IHL considers the occupying country as "responsible for maintaining public order and security in the occupied territories."<sup>38</sup>

The common Article (2) of the Geneva Convention confirms that the Convention applies to every armed conflict, whether a declared war or if the "state of war is not recognized" by one of the warring parties. The second paragraph of the Article extends the implementation of the convention to cases in which the occupation does not meet armed resistance.

Whether Israel recognizes its status as an occupying power or not, does not change the fact that the OPT in 1967 is still under occupation, although such a recognition can facilitate the process of the implementation of IL in the Territory because "the recognition of the state of its being an occupying power can be the first step in the process of the implementation of the Law of Occupation."<sup>39</sup>

Since its occupation of the Palestinian Territory in 1967, Israel has repeatedly violated the principles of IHL on numerous alleged security pretexts.

As an occupying power, Israel is obliged according to Article (43) of the Hague Convention to maintain "security and public order, while respecting, unless absolutely prevented, the laws in force in the country," in the areas it controls. Article

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<sup>38</sup> HPCR, "Israel's Obligations under IHL in the Occupied Palestinian Territory," *Harvard University* (January 2004): 2.

<sup>39</sup> Assem Khalil, "Is Israel Obligated to Implement International Humanitarian Law?" *International Politics Journal* 201 (April 2004).

(2) of the Geneva Convention, says the agreement 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."

However, Israel has since worked on changing the laws in force in the OPT by issuing thousands of military orders in the WB and the GS under claims of public security and order.<sup>40</sup>

Since its occupation in 1967, Israel has not admitted to being an occupying power and so refused to implement IHL in the Territory, especially the Fourth Geneva Convention. Israel's justification is based on the claim that in 1967, Jordan and Egypt never had "legal sovereignty" of the WB and GS, respectively, and this means that Israel has not occupied land that belongs to another sovereign state. Consequently, Israel considers itself as administrating the land, not occupying it, a situation that does not require the implementation of IHL.<sup>41</sup>

On August 11, 1967, Israel issued Proclamation No. (3), which said in its Article (35) that the military court should implement the Fourth Geneva Convention Relative for the Protection of Civilian Persons in Time of War. However; the Israeli occupation authorities cancelled this article after issuing military order No. (144) in October 1967. Israel continues ignoring implementation of the Geneva Convention in

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<sup>40</sup> Amin Makki Madani, "The International Conventions and Human Rights under Occupation – Palestine," *Lawyers Magazine* 9-10 (1998): 846-856 (ARABIC).

<sup>41</sup> Ibid. 850-851.

the OPT despite the many calls by international bodies on Israel to abide by the convention regulations in the OPT.<sup>42</sup>

The Israeli courts distinguish between the binding Customary International Law that automatically becomes part of the domestic law of a state and the treaty-based laws that Israel considers having no binding status "unless incorporated by statute." However; the Israeli High Court applies *de facto* the humanitarian provisions of the Geneva Convention that unlike *de jure* do not make it possible to "persecute the government violations of these acts judicially."<sup>43</sup>

Israel's stand defies those of the International Community that confirms that IHL, including the Fourth Geneva Convention, applies to the Territories Israel occupied in 1967. This international stand is stressed in many resolutions of the UN SC and GA, all of which confirm that the Geneva Convention applies to the OPT, including the eastern part of Jerusalem.<sup>44</sup>

Moreover; the protracted nature of the Israeli occupation in the Palestinian Territory imposes on Israel the responsibility for the implementation of human rights in the territory as argues several scholars.<sup>45</sup>

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<sup>42</sup> Raja Shehadeh, "An Overview for the Interim Regime Established Pursuant to the Oslo and Cairo Agreements," in *International Human Rights Enforcement: The Case of the Occupied Palestinian Territories in the Transitional Period*. 1-5. The proceedings of a conference organized by the Centre for International Human Rights Enforcement and convened by Pax Christi International in Jerusalem, September 17th and 18th, 1994, Jerusalem: Centre for International Human Rights Enforcement (1996): 7.

<sup>43</sup> Khalil, 2004, *Ibid*.

<sup>44</sup> Madani. *Ibid*, 851.

<sup>45</sup> See Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967," *American Journal of International Law* 84-1 (1990): 44-103; Eyal Benvenisty. *The International Law of Occupation*. (Princeton: Princeton University Press, 1993); and Human Rights Council, "Human Rights Situation in Palestine and Other Occupied Arab Territories, Report of the Special Rapporteur on

The Israeli occupation of the Palestinian Territory is in fact distinguished with its long term with "no sign of ending", as expressed by John Dugard in his annual report on the human rights situation in the OPT for 2008.<sup>46</sup>

The possibility of witnessing a protracted occupation was first envisioned by the Geneva Conventions<sup>47</sup> that defined in Article (6) the applicability of the Convention with one year after the hostilities cease. Meanwhile, the protracted nature of the Israeli occupation does not reduce its responsibilities, but rather increases them as a result of the continuing occupation.<sup>48</sup>

Even if the status of the Israeli occupation of the Territory after the Oslo Accords could be argued to be only temporary until the agreements are implemented and a Palestinian state is established, such an argument cannot absolve Israel of its obligations under IL in the Territory.

The SC Resolution No. (1483)<sup>49</sup> of 2003 on the situation in Iraq confirmed applicability of IHL during temporary occupation described as transformative in Iraq.

The Oslo Accords have introduced a new political and legal situation in the OPT, whilst Israel resumed its power in the Territory. As well, a new local

the situation of human rights in the Palestinian territories occupied since 1967, John Dugard". (A/HRC/7/17). (21 January 2008).

<sup>46</sup> John Dugard, Ibid; paragraphs 7-8.

<sup>47</sup> Benvenisti, Ibid. p144.

<sup>48</sup> Adam Roberts. 1990. p55-57.

<sup>49</sup> Security Council Resolution (1483) of 22 May 2003; available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement>.

government was in the being of creation in Iraq, where the occupying powers maintained power.

The occupation powers in Iraq claimed their presence in the country was temporary and transformative with the goal to replace the dictator regime with a more democratic one and the (1483) Resolution confirmed applicability of IHL during this temporary occupation.

The resolution stipulates that the US and Britain are occupying powers in Iraq and are obliged to implement the IHL and the IHRL despite an earlier letter on May 8, 2003 to the SC President from the representatives of both states, pledging to "abide by their obligations under IL, including those relating to the essential humanitarian needs of the people of Iraq,"<sup>50</sup> and although the two countries did not admit their occupation to Iraq and considered their presence in the country as temporary to achieve certain goals with regard to transforming the regime in the country.

However, what can be deemed as a development in the IL in this respect is allowing the occupant to take part in deciding on the fate of the occupied territory. The Oslo process allowed Israel to decide the status and future of the Palestinians in the WB and the GS and the (1483) Resolution came to allow the US and UK occupying powers to take part in deciding the future of Iraqi people.

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<sup>50</sup> Letter from the Permanent Representatives of the UK and the US to the UN addressed to the President of the Security Council. May 8, 2003, (S/2003/538) available at: (<http://www.globalpolicy.org/security/issues/iraq/document/2003/0608usukletter.htm>)

However in this respect, several scholars considered that acting upon Chapter (VII) of the UN Charter, the SC derogates the IL,<sup>51</sup> which urges the occupying power to maintain the status quo in the occupied territory by respecting the existing law in the territory and trying to make as very few changes as possible.

In order to ease the conflict between the principles of IL and the goals of transformative occupation, Adam Roberts proposed easing this conflict in two ways: First, the application of IHRL; second, seeking involvement of international organizations, especially the UN with the goal to legitimize "certain transformative policies during an occupation."<sup>52</sup>

### **1.2.3 Annexation of Jerusalem**

The *de facto* authority of the occupier in the occupied territory that is confirmed in Articles (42 and 43) of the Hague Convention does not give the occupier the right of sovereignty on the occupied territory since the *de facto* term means that the authority transition is not legal.<sup>53</sup>

Since its annexation of Jerusalem, following its occupation in 1967, Israel has been taking a group of procedures to emphasize its complete sovereignty over the Holy City.

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<sup>51</sup> See, Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights," *The American Journal of International Law* 100-3 (2006): 580-622; Marten Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation," *The International Review of the Red Cross* 86-856 (2004); 745-769; and Eyal Benvenisti, "The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective," *The Israel Defence Forces Law Review* 1 (2003): 19-38.

<sup>52</sup> Roberts. 2006. *Ibid*, 580.

<sup>53</sup> Othman Takrouri and Yassin Omar, *The West Bank and the Law of Belligerent Occupation*, (Jerusalem: Studies Center, Advocates' Syndicate, 1986), 28 (ARABIC).

The status of Jerusalem was defined in the UN GA Partition Resolution No. (181), issued in November 1947, stipulating the creation of two states in Palestine, one Jewish and one Arab with a "Special International Regime for the City of Jerusalem". In 1949 and after Israel occupied the western part of the city, the UN GA Resolution No. (303) reiterated the UN commitment to internationalization of Jerusalem, and designated it a "*corpus separatum*", which means an entity standing alone.<sup>54</sup>

After the 1967 war and Israel's occupation of the eastern part of Jerusalem, along with the rest of the OPT of the WB and the GS, every incoming Israeli prime minister, in regard to the occupation of Jerusalem in 1967, "reiterated Israel's intention to keep Jerusalem the undivided capital" of Israel<sup>55</sup>, and have since taken a series of measures, aimed at "unifying" Jerusalem. Those measures included a Knesset decision on June 27, 1967 to alter the Judicial Systems Law for the year 1948 with adding Act (11B) to bring the East Jerusalem areas into this system. The Knesset had also made another alteration on the Israeli Municipalities Law (Law No. 6 for the year 1967) to grant authority for the Israeli Minister of Interior to announce expansion of the boundaries of Jerusalem municipality by annexing more land. However, Israel has not used the word annexation in "any of its orders or laws issued to *unify* the city."<sup>56</sup>

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<sup>54</sup> Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements*, (Oxford University Press, 2000), 286-289.

<sup>55</sup> Katherine M. Metres, "Israeli Ethnic Cleansing Undiminished in Jerusalem," *Washington Report*, (Sep/Oct. 1994): 85-86.

<sup>56</sup> Dweik. Ibid, 19.

The Israeli Basic Law<sup>57</sup>, adopted on July 30, 1980, also confirmed Israel's aim to keep Jerusalem "unified" and under its control. Paragraph (1) of the "Basic Law: Jerusalem, Capital of Israel", says that Jerusalem is the complete and united capital of Israel, whilst paragraph (2) emphasizes Israel's intentions to have Jerusalem as its capital by locating the main power and government institutions of Israel in Jerusalem as it says that Jerusalem is "seat for the President, the Knesset, the Government and the Supreme Court." Furthermore; paragraph (4) confirms that the government allocates special funding for the development of Jerusalem and its inhabitants. This funding includes the annual "Capital City Grant" upon the approval of the Finance Committee of the Knesset.

Israel's goal of this section of the Basic Law was to tell the world that East Jerusalem and West Jerusalem is one unified city and the capital of Israel, enjoying a special status inside Israel.<sup>58</sup>

A census was conducted in Jerusalem immediately after its occupation in 1967, upon which Israel issued blue Israeli ID cards for the Palestinian residents of the city who were included in the census. Whilst those Jerusalemites, who were not present in the city at the time of the census for reasons of study or work abroad or even for wartime flight, were not issued such identities, denying them the right to live in their city as they were deprived residency status. Consequently, "this way, some 8,000 Jerusalemites lost their right to live in their city"<sup>59</sup>

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<sup>57</sup> Israeli Knesset official web page.

<sup>58</sup> Ossama Halabi, *The Legal Status of Jerusalem*, (Beirut: The Palestinian Studies Institution, 1997), 23-24 (ARABIC).

<sup>59</sup> Metres, *Ibid.*

In 1990, Israel rejected resolutions by the UN SC<sup>60</sup> that East Jerusalem was under a belligerent occupation and asked the UN Secretary-General to "report appropriate measures to be taken." Israel claimed that East Jerusalem was "under its sovereignty," meaning that the rules of belligerency did not apply.<sup>61</sup>

On December 20, 1990, the SC adopted Resolution No. (681), expressing grave concern over Israel's rejection of the previous resolutions No. (672) and (673) and urging "the Government of Israel to accept the *de jure* applicability of the Geneva Convention of 1949, to all the territories occupied by Israel in 1967 and to abide scrupulously by the provisions of the convention."

Israeli measures in Jerusalem violate IL, which is meant to prevent the forced annexation of land, giving Israel no legitimacy to its annexation of the Holy City. The UN Charter stipulates in paragraph (4) of its Article (2) that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." International prevention of forcible annexation of land was also confirmed in the UN GA's Resolutions No. (2628) on November 4, 1970, (2799) on December 13, 1971 and (2949) on December 8, 1972.

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<sup>60</sup> The UNSC Resolutions No. (672) on October 12, 1990 and (673) on October 24, 1990, were adopted in the wake of the 1990 shooting of 17 Palestinians in East Jerusalem.

<sup>61</sup> Quigly, *Ibid*, 38.

### **1.3 Treaties under International Law**

In order to understand the status of the Oslo Accords that were signed between Israel and the Palestine Liberation Organization (hereinafter PLO), there is yet a need to understand the law governing treaties.

This section of the chapter will first tackle the law and practice of treaties under IL with rules governing their validity and annulment. Then the section will move to discussing the status of the Oslo Accords in IL.

#### **1.3.1 Law and Practice of Treaties**

Article (2) paragraph (a) of the Vienna Convention on the Law of Treaties for the year 1969 has defined a Treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation;"

The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations for the year 1986 also defined Treaties in Article (2) paragraph (a) as "an international agreement governed by international law and concluded in written form: (i) between one or more state and one or more international organizations or; (ii) between international organizations; whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation."

In his book *Introduction to International Law*, J. G. Starke defined a treaty as an "agreement whereby two or more States establish or seek to establish a relationship under international law between themselves."<sup>62</sup>

The previous definitions tell us that an international treaty should meet certain conditions: First; an international treaty should be governed by IL; second; international treaties should be reached between international sides or bodies; which means that only states or international organizations can be involved in treaties, whilst non-international bodies cannot sign international treaties; and third; international treaties should be concluded in a written form in order to have solid proof on what was agreed upon and so to protect rights and duties.<sup>63</sup> The value of a written text exists in referring to them when states are asked for application.<sup>64</sup>

International entities of special status are qualified to be part of a treaty. These entities include national liberation movements that are also obliged to implement humanitarian law and establish diplomatic ties, and so, a state that recognizes a national liberation movement can have a treaty with it.<sup>65</sup>

Treaties can include different aspects of life such as politics, military, economy, education and they go under different names depending on the rate of their

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<sup>62</sup> J. G. Starke, *Introduction to International Law*, (London: Butterworths, 1967), 336.

<sup>63</sup> Ghassan Jundi, *International Treaties Law*, (Amman, 1988), 8-24.

<sup>64</sup> Mark E. Villiger, *Customary International Law and Treaties*, (Kluwer Law International, 1997), 26.

<sup>65</sup> Jundi. Ibid, 38-41.

formality or their procedures. Starke, however; states eleven types of treaties as follows:<sup>66</sup>

1- Convention: An international agreement is meant to set up legal definitions to organize relations between state parties such as The Hague Convention 1907 and the Geneva Convention 1949. A convention can also apply to other non-party states.

2- Protocol: An international agreement, amending or interpreting a previous agreement, such as the Paris Protocol for the year 1926 that is an amendment to the Basic Statute of the ICJ. A protocol is less formal than a treaty.

3- Agreement: It is less formal than a treaty or a convention and it applies to agreements with few parties and not subject to ratification.

4- Arrangement: It is more like an agreement, however; it is "employed for a transaction of a provisional or temporary nature."

5- Procès-Verbal: It was originally used to summarize the conclusions of a diplomatic conference, however; now it is used to "record terms of an agreement reached between parties", such as the Procès-Verbal signed at Zurich in 1892 by the representatives of Italy and Switzerland to record their understanding of the provisions of the Treaty of Commerce between them. It is not subject to ratification.

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<sup>66</sup> Starke, Ibid, 340-344.

6- Statute: It is a collection of rules, relating to the "functioning" of an international body, such as the Statute of the ICJ.

7- Declaration: It is usually used for documents, confirming joint legal or political principles, such as the Declaration of Paris 1856. It may or may not be subject to ratification.

8- Modus Vivendi: It is an informal temporary agreement, waiting to be replaced with a more permanent and detailed one. It does not require ratification.

9- Exchange of Notes (or of Letters): It is an informal way, whereby states subscribe to certain understanding or obligations as binding for them. Ratification is not required.

10- Final Act: It is recording conclusions of a conference summoned to conclude a convention, such as the Final Act of the Conference of Countries Exporting and Importing Wheat in London in 1933. It is generally signed but not ratified.

11- General Act: It is a treaty that can carry formal or informal character, such as the General Act for the Pacific Settlement of International Disputes in 1928.

Other forms of treaties can also be taken into consideration, including:<sup>67</sup>

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<sup>67</sup> Ibid, p344n.

- Charter: It is an international agreement, taking the name of its organizer, such as the Charter of the League of Nations 1919, the Charter of the UN 1945 and the Charter of the Arab League 1945.

- Accord: It usually deals with political issues, such as the Accord between France and UNESCO in 1945 and the Oslo Accords, reached between Israel and the PLO in 1993.

### **1.3.2 Validity and Annulment of Treaties**

Generally, the provisions of the treaty decide its duration as when to come into force and when to expire. Some treaties come into force the minute they are signed and others would yet need ratification or endorsement by the domestic law of the signing country.

The terms of the treaty may define responsibility of the state party for the breach of the treaty, however, a breach by the state does not necessarily "engage its responsibility of international law", which arises only if the state breaches some "duty extraneous to the treaty."<sup>68</sup>

However; many reasons can cause annulment of treaties, including the agreement of the sides on the cancellation of the treaty; unilateral withdrawal from the

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<sup>68</sup> Ibid, 256-257.

treaty of one of the signing sides; certain circumstances that might lead to the annulment of the treaty, including war or the impossibility to fulfill the treaty.<sup>69</sup>

Draft Articles on Treaty Law adopted by the International Law Commission in 1966 framed in Articles (45-49) rule on invalidity of treaties on ground of essential error, fraud, corruption and coercion. Meanwhile, treaties may be terminated by the following:<sup>70</sup>

- Operation of law: Including extinction of any of the state parties; the outbreak of war between the state parties; and a fundamental change in the "state of facts which existed at the time the treaty was concluded."

- Act of the state parties: A treaty can be annulled upon a mutual agreement between the state parties; or denunciation to the treaty by any of the state parties that shows intention of this state party to withdraw from the treaty. However; some treaties include a "clause allowing denunciation after a certain period."

Generally, treaties pass through several stages until they come into force:<sup>71</sup> Firstly there are negotiations between the concerned sides, each of who should have appointed representatives to hold negotiations aimed at reaching a treaty. Bilateral treaties are generally conducted through negotiators, whilst multilateral treaties are conducted by a diplomatic conference. In both cases the representatives keep in touch with their governments for instruction and consultations. In the second case, Legal Drafting Committees are meanwhile appointed to review drafts of the other parties.

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<sup>69</sup> Jundi, Ibid, 187-218

<sup>70</sup> Starke, Ibid, 371-376

<sup>71</sup> Ibid, 346-363

Secondly, when the parties agree on the final draft of the treaty, it is presented for signature after the text is, not necessarily, made public for a while. As for a multilateral treaty, signature is made in a formal closing session as each representative signs on behalf of his country. The signature can be binding unless the agreement requires ratification, depending on the system of the state, which means that the signature is no more than an initial agreement on the text of the agreement since some states consider that an agreement is ineffective until it is ratified.

Thirdly: Treaties should be registered with and published by the Secretariat of the UN as states the UN Charter Article (102) paragraph (1) that says, "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."

Finally, states can incorporate provisions they find necessary in their domestic law to ensure implementation of these provisions.

### **1.3.3 Oslo Accords under International Law**

The Oslo Accords, signed between Israel and the PLO in 1993 received international support and endorsement. Perhaps the most important development the Oslo Accords have achieved was that they made it possible for the first time to consider creating a Palestinian entity that can assume certain powers, in addition to the possibility of holding general national elections (not only municipal ones) that

would require withdrawal or redeployment for Israeli forces in the Palestinian Territory.<sup>72</sup>

The UN GA on December 14, 1993, expressed "its full support for the achievements of the peace process" and urged all the concerned parties "to implement the agreements reached." This Resolution No. 48/58 of the GA, drafted by the US, Russia and Norway, was voted for by 155 world states against three, including Syria, Lebanon and Iran, as objecting with one abstentious (Libya). Such an overwhelming support for the resolution proves the interest of the world community in the implementation of the Accords.<sup>73</sup>

However, as of the status of the Oslo Accords with regard to the IL, Kathleen Cavannaugh said these Accords fall "within the gray area of international law."<sup>74</sup> Cavannaugh considered that the intra-, not inter-state Oslo Accords between the Palestinians and Israel are not subject to IL, since they lack "enforcement mechanisms." However, she added that the Oslo Accords had received a *de facto* legal status, while displacing the "relevant international law in practice."

She stated that the Oslo Accords could not fulfill the terms of IHL as interim agreements and so any permanent agreement to follow, basing on these interim agreements would not be expected to comply with IHL.

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<sup>72</sup> Shehadeh, *Ibid*, 5.

<sup>73</sup> Falk, Richard, "Some International Law Implications of the Oslo/Cairo Framework for the PLO/Israeli Peace Talks," in *Human Rights, Self Determination and Political Change in the Occupied Palestinian Territories*, *Ibid*, 10.

<sup>74</sup> Kathleen Cavannaugh, "The Cost of Peace: Assessing the Palestinian-Israeli Accords," *Middle East Report* 211, (1999): 11.

Cavanaugh also considered that the language of the agreements was left "vague or even contradictory." The Accords allow Israel to maintain control over Jewish settlements in the OPT, including the GS<sup>75</sup>, the WB and Jerusalem. At the same time these agreements promise the implementation of the UN SC resolutions (242) of 1967 and (338) of 1973 that call for Israeli withdrawal from the Palestinian Territory, occupied in 1967. For example Article (IV) of the DoP says, "Jurisdiction of the Council will cover WB and GS territory, except for issues that will be negotiated in the permanent status negotiations. The two sides view the WB and the GS as a single territorial unit, whose integrity will be preserved during the interim period." Article (V) paragraph (3) defines the "issues" to be negotiated in the permanent status negotiations, saying, "It is understood that these (final status) negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest."

Meanwhile, keeping Israel's control over Palestinian areas, where settlements exist, prevents the fulfillment of the aim of the negotiations that were to "lead to the implementation of SC resolutions (242) and (338) as indicated in Article (I) of the DoP.

Furthermore; Cavanaugh argues that Israel's practices show that the Oslo Accords are above IL since Israel refers to the "violations of the Oslo" Accords instead of referring to IL, even when these agreements violate IL.<sup>76</sup>

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<sup>75</sup> Israel evacuated Jewish settlements in the Gaza Strip and withdrew troops from the Strip in 2005 within the implementation of Ariel Sharon's plan of disengagement from the Gaza Strip. This will be discussed further in Chapters to come.

<sup>76</sup> Cavanaugh, *Ibid*, 12.

Despite the wide international concern, given to the Oslo Accords, they cannot meet the conditions for an international treaty, especially as the Palestinian side in the accords is not a sovereign party, in addition to that the accords are not governed by IL, rather; parts of them are deemed a breach of IL.

Richard Falk,<sup>77</sup> meanwhile, argues that even though the Palestinian side in the peace process and the PLO do not possess a full status like any other sovereign state, several factors had played role in “internationalizing” the process, giving the PLO a “state-like *de facto* role in the process and making the resultant arrangements treaty-like for most purpose.” These factors, according to Falk include, signing an endorsement of the White House agreements; international emphasis on the “equality of the parties”; the Norwegian encouragement of the negotiations; the respect Customary IL gives to any outcome of negotiations on self determination conducted with “non-state actors”; and the UN’s “formal support” for the peace negotiations.<sup>78</sup>

Falk’s argument points may fall within the tendency of the International Community to welcome any agreement reached between belligerent parties with the goal to resolving problems at a bilateral level or to end a state of violence, which by the way; helped Israel to breach IL in the name of the implementation of the peace accords.

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<sup>77</sup> On March 26, 2008, the UN Human Rights Council elected Richard Falk as the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. He followed predecessor John Dugard in this position. Falk published his first official report on September 16, 2008.

<sup>78</sup> Falk, Ibid, 15

This tendency, as expressed by Antonio Cassesse,<sup>79</sup> stipulates that there are three sets of values, supporting the overarching system of inter-state relations in the current framework of the international community, "peace, human rights and self determination. However; any time that conflict or tension arises between two or more of those values, peace must always constitute the ultimate and prevailing factor."<sup>80</sup>

Although he agrees that the Oslo Accords do not possess the traditional sense as international treaties since only states possess that capacity, Geoffrey Watson argues that the Oslo Accords carry a binding character in many ways: The text of the Accords "strongly suggest(s) that the parties had in mind a legally binding arrangement."<sup>81</sup>

Watson also makes benefit of the text of Article (3) of the Vienna Convention on the Law of Treaties that says that, "it does not affect the legal force of agreements between states and other subjects of international law." Watson explains that the phrase "other subjects of international law" covers international organizations, the Holy See and other international entities, including "insurgents" which made some scholars consider the PLO as a subject of international law and so, the Oslo Accords it signed are "treaties under customary international law."<sup>82</sup>

Although, according to traditional IL Israel is the only side that can be bound, the two parties are intended to be bound. But modern IL gives opportunity for a state to make "binding international agreements with a sub-state entity" seeking autonomy

<sup>79</sup> Antonio Cassesse is the first President of the International Criminal Tribunal For the Former Yugoslavia (ICTY), 1993 to 1997.

<sup>80</sup> Cassesse, Ibid, 24.

<sup>81</sup> Watson, Ibid, p91.

<sup>82</sup> Ibid, 100-101.

or self determination. Watson also considers it as inappropriate to describe the Oslo Accords as a "delegation by Israel to the PLO," making the PLO a "puppet regime" that is disfavored by the laws governing belligerency laws.<sup>83</sup>

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<sup>83</sup> Ibid, 92-99.

## CHAPTER TWO

### **2. The Legal Status of the Palestinian Territory**

This Chapter addresses the argument that Israel is still occupying the Palestinian Territory. It is going to look at the status of the OPT since 1967 as occupied territory with the various developments that took place until the signing of the Oslo Accords, answering the first question of the hypothesis of the study "Is Israel still occupying the Palestinian Territory?"

#### **2.1. Legal Status of Occupied Territories under International Law**

The focus of this section of the chapter will be on the occupied territories as seen by the Charter of the UN and the international conventions, especially The Hague Convention of 1907 and the Fourth Geneva Convention.

The work of the International Committees of the Red Cross (*hereinafter* ICRC) is yet of significance that cannot be ignored. The last part of this section will focus on the ICRC intervention in occupied territories.

##### **2.1.1. Occupied Territories in International Conventions**

IHL defines belligerent occupation and sets rules laying out the responsibilities of the occupying power towards the occupied territory and people. The main international conventions that apply in the occupied territory are the 1907

Hague Conventions, Respecting the Laws and Customs of War and Land that focus on protecting interests of the state, whose territory is occupied and the 1949 Geneva Conventions Relative to the Protection of Civilian Persons in Time of War that focuses on the occupied people, who are referred to as the protected persons,<sup>84</sup> in addition to the 1954 Hague Cultural Property Convention and Protocol and the 1977 Geneva Protocol I.<sup>85</sup>

Section III of the Hague Regulations<sup>86</sup> sets rules relating to the occupied territory. Article (42) defines the occupied territory as, "(t)erritory is considered occupied when it is actually placed under the authority of the hostile army" and that "(t)he occupation extends only to the territory where such authority has been established and can be exercised." Meanwhile, the occupying power should take all the required measures "to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."<sup>87</sup>

As soon as a territory falls under occupation as set out in Article (42), IHL applies to that territory.

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<sup>84</sup> HPCR, "Israel's Obligations under IHL in the Occupied Palestinian Territory," *Ibid*, 3. Protected Persons, referred to in the Geneva Conventions include civilians, wounded and sick in the field; wounded, sick, and shipwrecked at sea; and prisoners of war, aliens in the territory of a party to the conflict, persons in occupied territory, and internees, all of whom are entitled to the basic protection codified in Article (27), respect, protection, and humane treatment under all circumstances. (Source: Heike Spieker, "Protected Persons", Crimes of War, A-Z Guide, <http://www.crimesofwar.org/thebook/protected-persons.html>).

<sup>85</sup> Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967," *American Journal of International Law* 84-1, (January 1990): 54.

<sup>86</sup> Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

<sup>87</sup> *Ibid*, Article (43).

Other obligations, The Hague regulations imposed on the occupying state are included in articles (44-56). The occupying state shall not "force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent or about its means of defense"<sup>88</sup> and it shall not "compel the inhabitants of occupied territory to swear allegiance to the hostile Power."<sup>89</sup>

The occupying power is also obliged to respect "(f)amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice," in the occupied territory.<sup>90</sup> "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country."<sup>91</sup>

The conventions ban any belligerent reprisals against the personnel, the wounded, the sick, prisoners of war, certain buildings and equipment and "persons and property of civilians" in the occupied territories.<sup>92</sup>

IHL, meanwhile, urges the maintenance of the administrative and judicial status of the occupied territory, unless it is cancelled by the occupying state if it is found that it could threaten the occupying state's security or it might prevent implementation of IL as stated in Article (64) of the Fourth Geneva Convention that says, "The penal laws of the occupied territory shall remain in force, with the

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<sup>88</sup> Ibid, Article (44).

<sup>89</sup> Ibid, Article (45).

<sup>90</sup> Ibid, Article (46).

<sup>91</sup> Ibid, Article (55).

<sup>92</sup> Kwakwa, Ibid, 150.

exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."

IL of Occupation also applies even if no armed resistance or fighting is witnessed, according to Article (2) of the Geneva Convention that says, "(T)he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. 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."

Meanwhile, the occupying power according to the first paragraph of Article (54) of the Geneva Convention "may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience."

Article (65) of the Geneva Convention obliges the occupying state to release the penalty laws it imposes in the language of the original citizens of the occupied territory before they come into force.

IL also forces the occupying authorities to follow legal procedures in bringing protected persons before a military court. The first paragraph of Article (71) of the

Geneva Convention says, "No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial."

Scholars differ in defining whether the occupying state has the right to issue laws or not. Some scholars say that the occupying power has very limited non-sovereign authority on the occupied territory and so it does not have the right to issue any laws, whilst others see expanding interpretation of Article (43) of the Hague Convention to give the occupying power the right to issue laws, except any law that allows it to annex the occupied territory. Meanwhile, a third party believes that Article (43) applies for issuing laws and not for decrees.<sup>93</sup>

Judicially, Article (54) of the Geneva Convention restricts the powers of the occupying state and obliges it to respect the judicial system in the occupied territory as the article prohibits the occupying state to "alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience."

As soon as conditions of applicability of conventions are fulfilled, they enter into force.<sup>94</sup> Article (2) of the Geneva Convention stipulates, "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or

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<sup>93</sup> Nabulsi, *Ibid*, 107-110.

<sup>94</sup> HPCR, "Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory," *Harvard University*, (July 2004): 2.

total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

Scholars consider IL, relating to the rights of the occupying state vis-à-vis the residents and property in the occupied territory as a treaty law that can be enforced by courts, however; they consider that the occupying power always tries to get what the IL prohibits and so, it tries to do so by using its legislative powers, bypassing IL.<sup>95</sup>

Israel has always denied applicability of the Geneva Conventions on the Palestinian Territory although the UN and other international bodies have always confirmed applicability of the Conventions in the Arab territories and Jerusalem as occupied territories since 1967.<sup>96</sup>

Israel's argument on the inapplicability of the Geneva Conventions on the OPT is based on its interpretation of the convention's Common Article (2). In light of its view to the status of the Palestinian Territory before the 1967 war,<sup>97</sup> Israel argues that the Article, which states the scope of application of the convention,<sup>98</sup> does not apply to the Palestinian Territory that before its occupation was not a sovereign state.

Israel interprets the Article as conditioning ousting a sovereign state for the applicability of the Fourth Geneva Conventions to civilians in occupied territories,

<sup>95</sup> Jacob Sundberg, "Belligerent Occupation and the Geneva Protocol, 1977: A Swedish Perspective," *Law and Contemporary Problems* 42-2, Changing Rules for Changing Forms of Warfare, (Spring, 1978): 82.

<sup>96</sup> Nizar Ayyoub, *The Legal Status of Jerusalem between the Mandate and the Political Settlement*, (AL HAQ, 2001), 79-80 (ARABIC).

<sup>97</sup> See supra section (1.2.2) of this study.

<sup>98</sup> Roberts, 1990, *Ibid*, supra note (18).

considering the occupation as a temporary situation with the end of which, the occupied land will be returned to the legitimate sovereign.<sup>99</sup>

The absence of a legitimate sovereign for whom the OPT can be returned, encourages the argument of Israel, which does not consider itself as occupying the GS and the WB, including East Jerusalem that were under the rule of Egypt and Jordan respectively.<sup>100</sup>

In what can be deemed as refuting Israel's convention inapplicability claims, the ICJ in its Advisory Opinion of 9 July 2004, confirmed in Paragraph (101) that, "In view of the foregoing, the 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 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."<sup>101</sup>

The article confirms that the parties of the 1967 war –Israel, Jordan, Egypt, Syria- were sovereign parties and are formally bound by the principal international agreements, governing occupation.<sup>102</sup>

<sup>99</sup> Ibid, 64.

<sup>100</sup> HPCR, "Review of the Applicability of the International Humanitarian Law to the Occupied Palestinian Territories," Ibid, 3-5.

<sup>101</sup> See, the ICJ Advisory Opinion on the Wall, Ibid.

<sup>102</sup> Roberts, 1990, Ibid, 61-62, (with regard to the commitments of the four states to international conventions, Roberts explains the situation as follows: (a) None of the four states has ever been member of the Hague Conventions on 1907, however; they are all bound to it in view of customary Law status of the regulations annexed to it; (b) Israel and Jordan ratified the Geneva Conventions of 1949 in 1951, Egypt in 1952 and Syria in 1953; (c) the 1954 Hague Cultural Property Convention and

### **2.1.2 Occupied Territories in the UN Charter**

The UN Charter and the law known as *jus ad bellum* decide the legality of any occupation. Meanwhile, the law of occupation applies as soon as an occupation situation has taken place, whether this occupation has received SC approval or not.<sup>103</sup>

Article (1) paragraph (2) of Chapter (I) of the UN Charter "Purposes and Principles" says that amongst the UN principles and purposes is developing friendly relations and respect amongst nations to ensure "equal rights and self-determination of peoples" and strengthen "universal peace."

Article (2) paragraph (4) urges the UN member countries to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Article (55) of Chapter (IV) of the charter "International Economic and Social Cooperation" confirms that the UN is also aimed at promoting "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"

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Protocol were ratified by Egypt in 1955, Jordan in 1957 and Syria in 1958, whilst Israel ratified the Convention in 1957 and registered its accession to the Protocol in 1958; (d) Whilst Israel has never made any adherence to the 1977 Geneva Protocol I, Egypt signed it but not ratified, Jordan ratified in 1979 and Syria acceded in 1983.

<sup>103</sup> ICRC, "Occupation and international humanitarian law: questions and answers," official web page <http://icrc.org/web/eng/siteeng0.nsf/htmlall/634kfc?opendocument>.

Article (73) of Chapter (XI) of the Charter "Declaration Regarding Non-Self-Governing Territories" says that, "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories,"

In order to achieve those goals, the members would work on ensuring social and economic rights of the concerned people and their just treatment and protection against abuses; developing self-government and considering the political aspirations of the peoples.<sup>104</sup>

Chapter (XII) of the Charter "International Trusteeship System" establishes, under the authority of the UN, an international trusteeship system, with the goal to promote "progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory."

In an advisory opinion in the case of Namibia in 1970, the ICJ ruled that an occupying state is responsible for the implementation of obligations stated in human rights conventions in the occupied territory, considering those conventions as "general conventions" with humanitarian character that might affect the people of the occupied

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<sup>104</sup> UN Charter, Chapter (XI), Article (73) paragraphs (a, b, c, d, e).

territory if not implemented.<sup>105</sup> In explaining the phrase “humanitarian character”, some scholars considered it to have the “general connotation of ‘human rights’”, which means that human rights apply to situation of belligerent occupation and armed conflict.<sup>106</sup>

Meanwhile, since its admission to the UN membership on May, 11, 1949,<sup>107</sup> Israel has been obliged to abide by the UN Charter<sup>108</sup> that is applied as a standard of human rights to the occupied territory.<sup>109</sup>

Since the Israeli occupation of the Palestinian Territory in 1967, the UN GA and SC have repeatedly confirmed that the Palestinian Territory is occupied by Israel. The UN GA Resolution No. (58/292) in 2004 confirmed "that the status of the Palestinian Territory occupied since 1967, including East Jerusalem, remains one of military occupation ... and that Israel, the occupying Power, has only the duties and

<sup>105</sup> Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution, 276 (1970)1971 I.C.J. 16, 1971 WL 8 (I.C.J.).

<sup>106</sup> Linda Bevis, *The Applicability of Human Rights Law to Occupied Territory: The Case of the Occupied Palestinian Territories*, (Ramallah: AL HAQ, 1994), 19-20.

<sup>107</sup> In fall of 1948, Israel had applied for membership in the UN but failed to win the necessary majority in the SC. In spring of 1949, the application was renewed This time, armistice agreements having been signed between Israel, Egypt, Jordan and Lebanon, Israel was admitted by 37 votes in favour, 12 against, with 9 abstentions. (Source: Jewish Virtual Library, United Nations General Assembly Resolution (273) of May 11, 1949. Consider: <http://www.jewishvirtuallibrary.org/jsource/UN/unga273.html>.

<sup>108</sup> Israel's admission to the UN membership was in fact conditioned by its respect to the UN Charter and resolutions as declared the Foreign Minister of the Provisional Government of Israel Moshe Shertok on November 29, 1948 (See Shertok's letter to the UN "Application of Israel for Admission to Membership in the United Nations: Letter dated 29 November 1948, from the Minister for Foreign Affairs of the Provisional Government of Israel to the Secretary-General," can be found on the UN official web site: <http://domino.un.org/unispal.nsf/2ee9468747556b2d85256cf60060d2a6/4a9a96807f788857052566c60059d4ff!OpenDocument>. However, in his book *Palestine, Palestinians and International Law*, Francis Boyle argued that Israel has violated the UN Charter since its admission by rejecting the UN GA Resolutions No. (181) and (194). He says that the UN has the right to expel Israel from the organization, but as it is not possible to do so due to the inevitable US veto against such a decision, the UNGA can exercise its powers to suspend Israel's participation throughout the UN organization.

<sup>109</sup> Bevis, Ibid, 60

obligations of an occupying Power under the Geneva Convention ... and the Regulations annexed to the Hague Convention ..."'

The SC Resolution No. (1544) in 2004 reiterated Israel's obligation as an "occupying power" and referred to the Palestinian Territory as "occupied by Israel since 1967".

At the same time, war and occupation do not absolve the occupying state of its responsibilities towards respect of human rights in the occupied territory, especially when the occupying state is signatory of a human rights treaty. For an example, Israel, as a signatory party after signing the International Covenant on Civil and Political Rights (*hereinafter* ICCPR) of 1966 and the International Covenant on Economic, Social and Cultural Rights (*hereinafter* ICESCR) of 1966, is obliged to respect and implement the IL.<sup>110</sup>

In its Advisory Opinion on the Wall in 2004 the ICJ said in Paragraph (112) that, "the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power."

This ruling, meanwhile; supports the argument that the IHRL and conventions, when Israel ratifies, apply to the OPT. Perhaps, the inter-relation between the IHL and the IHRL adds to the argument, since the former applies in situations of armed conflict and the latter is applicable in both situations of armed conflict and in times of peace.

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<sup>110</sup> Aisha Ahmed, *Israeli Violations to the Palestinian Human Rights during 2006 and their effect on the performance of the Palestinian National Authority*, (Ramallah: The Palestinian Independent Commission for Citizen's Rights, 2007), 14-15, (ARABIC).

"Israel denies that the ICCPR and the ICESCR, both of which it has signed,<sup>111</sup> are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace."<sup>112</sup>

In discussing the possibility of the applicability of human rights conventions, Israel ratified, to the Palestinian Territory, the court said "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States Parties to the Covenant should be bound to comply with its provisions."<sup>113</sup>

### **2.1.3. ICRC Intervention in Occupied Territories**

The main and most important role of the ICRC during armed conflicts is supervision<sup>114</sup> in addition to its role in the interpretation of the IHL. The ICRC interpretations of the international conventions are considered as official interpretations of the conventions. During the ninth meeting of the States Parties to the Convention on the Prohibition of Anti-Personnel Mines in Geneva between 24-28

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<sup>111</sup> On 3 October 1991, Israel ratified both the ICESCR and the ICCPR of 1966 and the Convention on the Rights of the Child of 1989.

<sup>112</sup> See ICJ Advisory Opinion, Ibid, Paragraph (102).

<sup>113</sup> Ibid, Paragraph (109).

<sup>114</sup> Kwakwa, Ibid, 168.

November 2008 and upon their request, the ICRC presented a legal interpretation of Article (5.5) of the Convention.<sup>115</sup>

The more restrictive approach that is adopted by a number of military manuals, in interpreting the concept "control" is "a situation of occupation (that) exists only once a party to a conflict is in a position to exercise sufficient authority over enemy territory to enable it to discharge all of the duties imposed by the law of occupation." Meanwhile, the ICRC suggested in its commentary to the Fourth Geneva Convention in 1958, another approach for interpretation that is "a situation of occupation (that) exists wherever a party to a conflict exercises some level of authority or control within foreign territory."<sup>116</sup>

IL obliges states to take certain measures at both national and international levels to enforce the IHL, including disseminating the IHL, respecting and facilitating work of international fact finding missions and work of the personnel of the ICRC,<sup>117</sup> which has principal role in ensuring respect of IL.<sup>118</sup>

State parties of international conventions are yet obliged to ensure respect of IL by other states to the convention. For example, in its Advisory opinion on the Wall, the ICJ stated that, "State parties to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to

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<sup>115</sup> The ICRC statement on the issue can be found on the convention's web site: [www.apminebanconvention.org](http://www.apminebanconvention.org).

<sup>116</sup> ICRC, "Occupation and international humanitarian law: questions and answers," Ibid.

<sup>117</sup> Kwakwa, Ibid, 159-171.

<sup>118</sup> ICRC, "What is the difference between humanitarian law and human rights law?" available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5KZMUY>.

ensure compliance by Israel with international humanitarian law as embodied in that conventions.”<sup>119</sup>

However, the occupation, the ICRC confirms, is a temporary situation that interferes in the sovereign rights of the people under occupation, but this interference can never be interpreted as diminishing or terminating these rights of the occupied people.<sup>120</sup>

The state of occupation ends when the occupying power withdraws its forces from the occupied territory and the local authority assumes power and exercises full and free sovereignty on the territory. Article (6) of the Fourth Geneva Convention provides, “In the case of occupied territory, the application of the present Convention shall cease one year after the close of military operations; however, the Occupying Power shall be bound, during the duration of the occupation, to the extent that such Power exercises the functions of government in such territory,” by provisions of several articles of the Convention. Accordingly, the article stipulates that occupation ends in two cases; first, after one year of ending military operations and second, when the occupying power no longer exercises governmental functions in the occupied territory.

The important principles governing occupation according to the ICRC, include, the obligations of the occupying power as defined in articles (42-56) of the 1907 Hague Regulations; Articles (27-34 and 47-78) of the Fourth Geneva

<sup>119</sup> See ICJ Advisory Opinion on the Wall, Ibid.

<sup>120</sup> ICRC, "Civilians in the power of the enemy and international humanitarian law", ICRC web page [http://icrc.org/Web/Eng/siteeng0.nsf/html/section\\_ihl\\_civilians\\_in\\_the\\_power\\_of\\_the\\_enemy?OpenDocument](http://icrc.org/Web/Eng/siteeng0.nsf/html/section_ihl_civilians_in_the_power_of_the_enemy?OpenDocument).

Convention; certain provisions of the Additional Protocol I of 1977; Customary IHL and deals reached between the occupying power and the local authorities of the occupied territory that should not deprive the population of the occupied territory of the international humanitarian protection according to Article (47) of the Fourth Geneva Convention.<sup>121</sup>

Meanwhile, in case of occupation state, several rules of law apply. The occupation power cannot acquire sovereignty over the occupied territory; the state of occupation is temporary and the occupying power enjoys rights that are only "limited to the extent of that period"; unless its security is threatened, the occupying power has to respect the laws in force in the occupied territory; restoring public order and safety is the responsibility of the occupying power; the occupying power is responsible for providing the people in the occupied territory with public health, food and medical care; the occupying power does not have right to force occupied people to enroll in its army; the occupying power does not have the right to transfer the people within or out of their country; nor does the occupying power have the right to transfer its population into the occupied territory; it is prohibited for the occupying power to take collective punishment measures against the occupied people or to take hostages; It is also prohibited for the occupying power to destroy or confiscate private property or cultural property of the occupied territory.<sup>122</sup>

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<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

## **2.2. Status of Palestinian Territory under Israeli Occupation**

Since the Israeli occupation in 1967, the Palestinian Territory has witnessed a series of developments, including the first and second uprisings in 1987 and 2000 respectively, the Jordan-West Bank disengagement and the Palestinian Declaration of Independence in 1988, the launching of the peace process in the early nineties and the Israeli unilateral withdrawal from the Gaza Strip in 2005.

This section of the chapter intends to check what changes those developments have brought with regard to the status of the Palestinian Territory as occupied territory.

Unlike the previous sections, this section is divided chronologically. As the Israeli occupation of the Palestinian Territory was clear before the launching of the Oslo process in 1994, the status of the Palestinian Territory after the creation of the Palestinian Authority became debatable. With the eruption of the Al Aqsa Intifada in 2000 and the Israeli incursions into the PA areas in 2002, the situation became more complicated as Israel proved to remain controlling the territory. The 2005 pullout of Israeli troops and settlers from the Gaza Strip, however, renewed the debate over the status of the OPT.

### **2.2.1. The Palestinian Territory (1967-1994)**

As soon as it took control of the West Bank and the Gaza Strip in 1967, Israel issued three proclamations. In Proclamation No. (1), Israel announced assumption of

powers in the Palestinian Territory; Proclamation No. (2) announced that the Israeli Military Command assumes executive, legislative and judicial powers in the occupied territory; whilst Proclamation No. (3) announced establishment of military courts.<sup>123</sup>

Shortly after the occupation, Israel started implementation of the British Defence (emergency) regulations in the Occupied Territory. The use of the emergency regulations increased after the first Palestinian uprising (Intifada) in 1987. Although Britain revoked those regulations with the end of the British Mandate on Palestine in 1948 and Jordan never recognized those regulations as valid during its rule of the WB, Israel alleged they were still in effect and still part of the local law of the WB that IL allows the occupied state to continue to apply.<sup>124</sup>

Israel declared its intentions to use laws it considers in effect before its 1967 occupation of the Palestinian Territory in two separate Proclamations it issued in the WB and in the GS. The Israeli Military Proclamation No. (2)<sup>125</sup> says in Article (2) that the laws that were in force in the area before the June 7, 1967 shall remain in force, unless they contradict with this Proclamation or any Proclamation or Order to be issued. Article (3) of the same Proclamation grants the Regional Commander governmental, legislative, appointive and administrative power in the Occupied Territory and so the executive, legislative and judicial powers came under the authority of the Military Command of the WB and the GS, except East Jerusalem, which was given a different administration and legal status. Upon this proclamation,

<sup>123</sup> Raja Shehadeh, 1996, *Ibid*, 7.

<sup>124</sup> Martha Moffett, *Perpetual Emergency, A Legal Analysis of Israel's Use of the British Defence (Emergency) Regulations, 1945, In the Occupied Territories*, (Ramallah: Al Haq, 1989), 1.

<sup>125</sup> "Publications, Orders and Appointments", Issued by the Israeli military force leadership in the West Bank, Issue (1), (5 August 1967): 3-4. (ARABIC). The publication appeared in Arabic and Hebrew only. The English translation as appeared in Shehadeh, *Ibid*, and Feras Milhem, "The Origins and Evolution of the Palestinian Sources of Law," PhD diss., (Vrije Universiteit Brussel, Faculty of Law, 2004).

thousands of military orders have been issued during the occupation years both in the WB and the GS.<sup>126</sup>

The Israeli occupation authorities established the Civil Administration in the WB and the GS in 1981 with the goal to administer the civil affairs in the territory and so to separate the military functions from civil ones. The Civil Administration was authorized to implement the laws in force in the WB and the GS.<sup>127</sup>

A report by the JMCC<sup>128</sup> argues that IL has allowed the occupying power to issue certain regulations only if its security needs new legislation or if the regulations are needed for the interest of the civilian population. Israel's reasons behind issuing the thousands of military orders, however; do not meet those conditions, but they were only meant "to change facts on the ground." Moreover; the report added, the Israeli military orders were issued as to legalize control of the WB and the GS and measures imposed on ground in the Palestinian Territory, including expropriation of Palestinian land, construction of the WB Wall, demolition of Palestinian homes and imposing economic restrictions.

With the goal to make the Jewish settlers in the WB and Gaza settlements equal to the rest of Israelis, Israel implemented the Israeli administrative and legal system in the settlements in the territory and thus the Israeli law is absorbed into the occupied territory.<sup>129</sup>

<sup>126</sup> Milhem, Ibid, supra note (112) 127-128.

<sup>127</sup> Ibid, 129.

<sup>128</sup> JMCC, "Israeli Military Orders in the Occupied Palestinian West Bank: 1967-1992," Special Report from Palestine, (1995): 214, available at: <http://www.jmcc.org/research/special/military.html>.

<sup>129</sup> Milhem, Ibid, 145-148.

With regard to Jerusalem, Israel imposed the Israeli law on the eastern part of the city upon a series of legal steps it took with the goal to annex the Holy City.<sup>130</sup>

Despite Israel's claims since its occupation to the Palestinian areas in 1967 that the IHL, especially the Fourth Geneva Convention, does not apply to the OPT, including East Jerusalem, the convention's High Contracting Parties stressed in their conference in Geneva on December 5, 2001, that the convention applies to the OPT in a statement that said, "the participating High Contracting Parties reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem. Furthermore, they reiterated the need for full respect for the provisions of the said Convention in that Territory."<sup>131</sup>

The conference also urged the high contracting parties to ensure implementation of the Geneva Convention in the OPT.

The only time Israel considered applicability of the Fourth Geneva Convention in the OPT was in Article (35) of Proclamation No. (3), announced in 1967, when Israel clearly indicated that the Convention applies in the WB and the GS. However; the article was removed, without explanation, upon military order No. (144), issued only about four months later. The reference to the Convention was not mentioned again.<sup>132</sup>

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<sup>130</sup> For further information about the Israeli annexation of Jerusalem after the 1967 War, see section (1.2.3) of this study.

<sup>131</sup> The declaration of the High Contracting Parties of the Fourth Geneva Convention Conference, December 5, 2001, can be traced on the UN official web page: <http://domino.un.org/UNISPAL.NSF/c25aba03f1e079db85256cf40073bfe6/8fc4f064b9be5bad85256c1400722951!OpenDocument>.

<sup>132</sup> Shehadeh, 1996, Ibid, 7.

### 2.2.1.a 1987 Intifada

With the eruption of the uprising (Intifada) in December 1987, several developments on the situation of the Palestinian Territory have taken place. On July 31, 1988, less than one year of the eruption of the 1987 Intifada, King Hussein of Jordan declared political and legal disengagement between Jordan and the WB.

In implementation of this decision, Jordan started revoking Jordanian citizenship of WB residents, who were hence granted temporary travel documents for two years instead,<sup>133</sup> “subsequently extended to five years to Palestinian applicants” with the purpose to help their holders to travel freely throughout the world. However, the Palestinian holders of the documents were not recognized as Jordanian citizens although the documents were recognized as official ones.<sup>134</sup>

The Jordanian step was followed several months later with a Palestinian move to declare a Palestinian State. During the nineteenth session of the Palestinian National Council (*hereinafter* PNC) in Algiers on November 15, 1988, leader of the PLO Yasser Arafat declared a State of Palestine as outlined in the UN partition Plan

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<sup>133</sup> Samih K. Farsoun, and Christina E. Zacharia, *Palestine and the Palestinians*, (US: Westview Press, 1997), 205.

<sup>134</sup> Committee on the Elimination of Racial Discrimination, “Reports Submitted by States Parties under Article 9 of the Convention: Twelfth periodic report of States parties due in 1997,” Addendum, Jordan, United Nations: CERD/C/318/Add.1, 14 April 1998: <http://domino.un.org/unispal.nsf/361ee1cc08301c485256cf600606959/ab23121dac018b8d852569dc0070227e!OpenDocument>. The PA started issuing Palestinian Passport/Travel Documents in 1995, on which is written, “This passport/travel document is issued pursuant to the Palestinian Self Government Agreement according to Oslo Agreement signed in Washington on 13/9/1993.” The paragraph is signed by the Minister of the Interior or Director General of Civil Registration and Passport Department (“Palestine/Occupied Territories: Information on Passports Issued By The Palestine National Authority”, United States Bureau of Citizenship and Immigration Services, PAL99001.ZCH, 17 December 1998: <http://www.unhcr.org/refworld/country,USCIS,PSE,4562d8cf2,3df0b9914,0.html>.

(181),<sup>135</sup> that calls for terminating the British Mandate of Palestine by August 1, 1948, and facilitating the creation of two states, one Jewish and one Arab in Palestine.<sup>136</sup>

The Declaration illustrated the PLO's intention to build the Palestinian democratic state with "peaceful means" as stated the declaration when it said, "(t)he state of Palestine further declares, in that connection that it believes in the solution of international and regional problems by peaceful means in accordance with the Charter of the United Nations and the resolutions adopted by it."<sup>137</sup>

The Declaration also took into consideration principles of human rights and democracy when it said the Palestinians should "enjoy full equality of rights. Their religious and political beliefs and human dignity shall therein be safeguarded under a democratic parliamentary system based on freedom of opinion and the freedom to form parties, on the heed of the majority for minority rights and the respect of minorities for majority decisions, on social justice and equality, and on non-discrimination in civil rights on grounds of race, religion or colour or as between men and women, under a Constitution ensuring the rule of law and an independent judiciary and on the basis of true fidelity to the age-old spiritual and cultural heritage of Palestine with respect to mutual tolerance, coexistence and magnanimity among religions." The Declaration further said, "(t)he state of Palestine declares its commitment to the purposes and principles of the United Nations, to the Universal Declaration of Human Rights and to the policy and principles of non-alignment."<sup>138</sup>

<sup>135</sup> "A Brief History of Palestine", web page of Baker Abdel Menem, Palestine's Ambassador to Canada, [http://www.cyberus.ca/~baker/pal\\_hist.htm](http://www.cyberus.ca/~baker/pal_hist.htm).

<sup>136</sup> See UNGA Resolution No. (181) on 29 November 1947.

<sup>137</sup> PNC, Political Communiqué and Declaration of Independence, November 15, 1988, (27 I.L.M. 1660 (1988).

<sup>138</sup> PNC, Political Communiqué and Declaration of Independence, Ibid.

### **2.2.1.b Statehood Debate**

As the state of Palestine was declared, more than 114 world countries recognized it and one month after the declaration took place, the UN GA recognized the newly declared state of Palestine upon resolution No. (43/177) on December 15, 1988.<sup>139</sup>

Francis Boyle of the University of Illinois was one of the most enthusiastic supporters for the establishment of a Palestinian state. Boyle considers four elements, forming a state and applying to the Palestinian Territory.<sup>140</sup> These four elements include “territory, population, government and the capacity to enter into relations with other states.” Boyle excluded borders, arguing that borders are not necessary for a territory to be declared a state, since Israel is a recognized state at a time it does not have defined borders. Moreover; Boyle argues that the borders are yet to be negotiated between Israel and the Palestinians.

As the Palestinian people are an original population of the Palestinian Territory, they have always been supposed to establish a state. The PLO has always served as a government for the Palestinians. Boyle also considers the recognition of the UN General Assembly of the state of Palestine as “constitutive and universally determinative.”<sup>141</sup>

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<sup>139</sup> Francis Boyle, “The Creation of the State of Palestine,” *EJIL*. 1-1, (1990): 302.

<sup>140</sup> Ibid, 302.

<sup>141</sup> Ibid, 303.

James Crawford, however; was far more cautious in this concern. Crawford actually did not agree with Boyle's argument.<sup>142</sup> In addition to Boyle's four elements, Crawford adds Independence and sovereignty as other elements to form a state in addition to other elements, including permanence, willingness and ability to obey IL, a certain degree of civilization, legal order and recognition.<sup>143</sup>

In this respect, Asem Khalil, who also adopted arguments similar to Crawford and negated the existence of a Palestinian state since its declaration due to the continuation of the Israeli occupation, stressed on the right of Palestinians in self determination that is not exclusive to "those who make apart of state," and so absence of state for Palestinians due to the occupation can in no means deprive the Palestinians their right in self determination.<sup>144</sup>

The right of self determination is the legitimate basis for independence of peoples under occupation and it gives nations the right to freely decide their political independence and political future with no external intervention, in addition to choosing the political regime they see appropriate for them.<sup>145</sup>

The right of self determination was guaranteed in several international documents, including the UN Charter Articles (1) Paragraph (2) and Article (55), and common Articles (1) of the ICCPR and the ICESCR. The same Article in both

<sup>142</sup> See James Crawford, "The Creation of the State of Palestine: Too Much, Too Soon?" *EJIL*. 1-1, (1990): 307-313.

<sup>143</sup> James Crawford, *The Creation of States in International Law*, (Oxford: Clarendon Press, 1979), 47-77.

<sup>144</sup> Asem Khalil, "The Enactment of Constituent Power in the Arab World: The Palestinian Case," (PhD diss., Institute of Federalism Fribourg Switzerland, 2006), 223.

<sup>145</sup> *The International Humanitarian Law: "Horizons and Challenges"*, Part One, (Beirut-Lebanon: Al-Halabi Legal Publications, 2005), 336-337. (ARABIC).

covenants provides, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The UN GA Resolution No. (58/292) confirmed "that the Palestinian people have the right to self-determination and to sovereignty over their territory."

As they are seeking independence and state, the Palestinians had accepted autonomy as a political means that can protect their rights and not a goal by itself.<sup>146</sup> However; the Palestinians' view to their state has changed as the years passed. As of 1948 till 1974, the Palestinians only considered having a state in the whole of Palestine, whilst the 1967 war constituted no break on this view. Between 1974 and 1988, the Palestinians considered establishment of a Palestinian state on any liberated part of Palestine as stated the "provisional political programme", adopted by the PNC in its twelfth session in Cairo in June 1974. The 1974 development in the Palestinian view to statehood, resulted in granting the Palestinians an observer status at the UN in 1976, declaring by the European Economic Community the Palestinian self determination as "one of the main planks of the middle eastern policy", and after 1988, the Palestinians started seeking a state in the WB and the GS with East Jerusalem as its capital. This change appeared in the communiqué that accompanied the 1988 Declaration of Independence,<sup>147</sup> with which the Palestinians officially recognized Israel, relinquishing claims to 78 per cent of Palestine.<sup>148</sup>

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<sup>146</sup> David Newman and Ghazi Falah, "Bridging the Gap: Palestinian and Israeli Discourses on Autonomy and Statehood," *Transactions of the Institute of British Geographers*, 22-1, (1997), 112.

<sup>147</sup> Newman and Falah, *Ibid*, 124.

<sup>148</sup> Sara Roy, "Palestinian Society and Economy: The Continued Denial of Possibility," *Journal of Palestine Studies* 30-4, (Summer 2001): 5.

The issue of statehood was highlighted again after the signing of the Oslo Accords between Israel and the PLO and defining May, 4, 1999 as a deadline for the interim phase of the Accords.

Some scholars raised the question of declaring an independent Palestinian state on that day, whilst others aroused another related question that is “(h)ow many times must a national liberation movement declare a state during its lifetime?!”<sup>149</sup>

Azmi Bishara argues that if the PA had proceeded with the declaration of a state on May, 4, 1999, it would have struggled for securing recognition of that state for such a unilateral declaration of Independence would not have been passed without problems. Israel itself would have created obstacles before the recognition, arguing that the Palestinian side was violating the peace process by such a move; furthermore; such a Palestinian State could not survive without an agreement with Israel that controls borders and territory and so is capable of imposing punitive measures in the Palestinian Territory including ending negotiations.<sup>150</sup>

The issue of recognizing newly established states has developed along the years. “Recognition of states is not a matter governed by law, but a question of policy.”<sup>151</sup> This means that there are no specific rules defining recognition of states.

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<sup>149</sup> Azmi Bishara, “4, May, 1999 and Palestinian Statehood: To or Not to Declare?” *Journal of Palestine Studies* 28-2, (Winter 1999): 5-9.

<sup>150</sup> Ibid, 10-11.

<sup>151</sup> Quoting H. Lauterpacht, Roland Rich, “Recognition of States: The Collapse of Yugoslavia and the Soviet Union, Symposium: Recent Developments in the Practice of State Recognition,” *EJIL*, (1993): 36.

With the collapse of the Soviet Union and Yugoslavia in the early nineties, dozens of new states were created, bringing new considerations with regard to the practice of state recognition.<sup>152</sup>

A Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union was issued by the European Council Foreign Ministers on December 16, 1991 as “Annex 1” on Recognition of States. The Declaration was accompanied by another document “Annex 2” under the title Declaration on Yugoslavia.<sup>153</sup>

According to the Declaration, the states, wishing to be recognized, should abide by several conditions, including respect of the UN Charter, democracy and human rights, guaranteeing “rights of ethnic and national groups and minorities”, commitment to peace and negotiations, disarmament and nuclear non-proliferation.

The Declaration also warns that the European “community and its Member States will not recognize entities, which are the result of aggression.”

Roland Rich argues that those conditions make the process of recognition of states more difficult as the process would require additional requirements.<sup>154</sup>

Annex (2) of the Recognition of States, meanwhile; sets more measures in the process for recognizing the Yugoslav Republics, the independence of which can be

<sup>152</sup> Ibid, 37.

<sup>153</sup> European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States. December 16, 1991, (31 I.L.M. 1485 (1992).

<sup>154</sup> Rich, Ibid 43.

recognized only if those new states fulfilled certain steps: They should confirm that they wish to be recognized as independent states and they accept commitments in the Guidelines in Annex (1).

### **2.2.2. The Transitional Period (1994-2000)**

By the signing of the Oslo Accords in 1993, a group of laws were applied on the WB and the GS, including the British Emergency Regulations, the Jordanian Law in the WB, in addition to the Israeli military orders and the Ottoman Law.<sup>155</sup>

Proclamation No. (4), which introduces constitutional changes, does not revoke Proclamation No. (2), stipulating that the Area Commander assumes all powers over the territory. Proclamation No. (4) clearly shows that the military legislation remains in force and so, the Area Commander keeps all powers.<sup>156</sup>

The Oslo Accords aimed at establishing a Palestinian autonomous authority "in the West Bank and the Gaza Strip for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338," as stated Article (1) of the DoP, reached between Israel and the Palestinians, represented by the PLO, in 1993.

Proclamation No. (7) that the Israeli military authorities issued following the signing of the Oslo Accords with the title, "Proclamation Regarding the

<sup>155</sup> "Palestine: The Legal Background," *IDC Publishers*, VE/IIB.593.1000 No. 666, The Netherlands, no date.

<sup>156</sup> Tamar Pelleg Sryck, "Powers and Responsibilities in the Palestinian Authority Territories", Proceeding at "International Human Rights Enforcement: The Case of the Occupied Palestinian territories in the Transitional Period Conference," (Jerusalem September 17-18, 1994), 16.

"Implementation of the Interim Agreement", was intended to "confirm that the source of authority the PA was to enjoy according to the Agreements is that of Military Commander" and that the Interim Agreement should be implemented by Military Orders in order to become part of the Palestinian local law.<sup>157</sup>

With regard to the legal situation after the signing of the DoP, the Interim Agreement said the Israeli military government "will be withdrawn but not dissolved." Article (1) paragraph (5) of the Interim Agreement says, "After the inauguration of the Council, the Civil Administration in the West Bank will be dissolved, and the Israeli military government shall be withdrawn. The withdrawal of the military government shall not prevent it from exercising the powers and responsibilities not transferred to the Council."<sup>158</sup>

The Interim Agreement also retains Israel's legislative, judicial and executive powers. Article (XVII.4.b) provides, "(t)o this end, the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis *in personam*."

Feras Milhem argues that the word "necessary" in the article allows misuse in the exercise of the authority at a time the article itself gives Israel no authority in cases covered by the territorial and functional jurisdictions of the Palestinian Authority.<sup>159</sup>

<sup>157</sup> Milhem, Ibid, 178-179.

<sup>158</sup> Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington, D.C., September 28, 1995.

<sup>159</sup> Milhem, Ibid, 174.

With regard to the issue of implementation of human rights, the Oslo Accords almost did not refer explicitly to the enforcement of Human Rights in the Palestinian Territory;<sup>160</sup> however, certain articles in the agreements have dealt with the issue though without much elaboration on details.

Article (XIV) of the Agreement on the Gaza Strip and the Jericho Area of May 4, 1994 urged Israel and the PA to implement human rights as internationally accepted. The article says that "Israel and the Palestinian Authority shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law."

The article can be deemed as a pledge by both Israel and the PA to respect human rights as part of the agreements both parties have signed on.

The confirmation that both sides and their personnel should respect human rights appeared in Article (VIII) paragraph (1) of the agreement's Annex (I) that says, "Subject to the provisions of this Agreement, the security and public order personnel of both sides shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms of human rights and the rule of law and shall be guided by the need to protect the public, respect human dignity and avoid harassment."

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<sup>160</sup> Edward Kaufman and Ibrahim Bisharat, "Introducing Human Rights into Conflict Resolution: The Relevance for the Israeli-Palestinian Peace Process," *Journal of Human Rights* 1-1, (March 2002): 78.

The agreement's Annex (III) ensures human treatment of criminal suspects and restricts the use of force against them. Article (2) paragraph (7/h/1) says, "Both sides shall take all necessary measures to ensure that the treatment of individuals transferred under this Article complies with the applicable legal arrangements in Israel and in the Territory and with internationally-accepted norms of human rights regarding criminal investigations."

The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed in Washington on September 28, 1995, also urged for the respect of human rights by both Israel and the Palestinians as it says in Article (XIX) that "Israel and the Council shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law."

Meanwhile, Israel and the PA are expected to abide by the IHRL in implementation of their commitment to the agreements both have signed on. However, the pledges of Israel and the PA to respect human rights extend to more than their pledges in the Oslo Accords. For the PA had expressed respect to human rights in different ways as set up by Irwin Cotler of McGill University:<sup>161</sup> Palestinian pledges to human rights organizations, such as Amnesty International; statements by the PA confirming commitment to human rights; articles in the Oslo Accords urging Israel and the PA to abide by the internationally accepted principles of human rights and rule of law; pledges in the Palestinian draft constitution and Basic Law

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<sup>161</sup> Irwin Cotler, "Palestinian Undertakings to Respect Human Rights: Basic Sources," *The Monitor, Palestinian Human Rights Monitor, (PHRM)* 3, (May-June 1997): <http://www.phrmg.org/monitor1997/may97-1.htm>.

(hereinafter BL) to respect human rights; and the PA's responsibility to human rights enforcement according to the IHL.<sup>162</sup>

### **2.2.3. Al Aqsa Intifada (2000)**

After several years of unfruitful negotiations that failed to bring peace, violence returned to the Palestinian Territory. Israel blamed the Palestinians for the failure of the Camp David summit in July 2000 by rejecting Ehud Barak's proposal for settlement.

Barak was considered to have granted the Palestinians more concessions than any other Israeli prime minister before him, though he had always been considered a hardliner, opposing the Oslo Agreements. When Barak became prime minister in 1999, he sought to delay the third stage of redeployment in the WB and to offer his “take-it-or-leave-it proposals”, which the Palestinians discovered prevented the establishment of a viable or independent state.<sup>163</sup>

This led to the eruption of the Al Aqsa Intifada on September 28, 2000 in the wake of the provocative tour by the Israeli opposition leader of that time Ariel Sharon to the Al Aqsa Compound.

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<sup>162</sup> A reference to the human rights in the Palestinian Basic Law and the PA undertakings to respect human rights norms will receive further discussion in section (4.2.1) of this study.

<sup>163</sup> Jerome Slater, “What Went Wrong? The Collapse of the Israeli-Palestinian Peace Process,” *The Political Sciences Quarterly* 116-2, (2001): 179-189.

Analyzing the failures of the Camp David, Jerome Slater abandoned the possibility of having a “genuine settlement that is both fair and stable over the long run without a near complete Israeli withdrawal” to the pre-1967 borders.<sup>164</sup>

The Camp David impasse and the Al Aqsa Intifada resulted in a sharp reversal of the human rights situation in the Palestinian areas. The state of violence and counter-violence claimed lives of dozens of people on both sides. With shelling and incursions, Israel nearly completely destroyed the infrastructure of the Palestinian areas, destroyed and damaged thousands of Palestinian homes, stores and workshops. Israel also paralyzed the Palestinian economy by imposing closures and curfews and uprooting trees.

Richard Falk considered the Al Aqsa Intifada as a sort of right of resistance to occupation after Israel refused to “implement the underlying legal directives established by a consensus within the UN.”<sup>165</sup>

Israel was considered as violating IHL, although it justified its violations on grounds of self defence, despite unjustifiably targeting civilians, in retaliating to rocket attacks. In his annual report for the year 2008 on the Human Rights situation in the Palestinian and other occupied Arab territories, the Special Rapporteur on human rights in the Palestinian territories occupied since 1967, John Dugard criticized

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<sup>164</sup> Ibid, 192.

<sup>165</sup> Richard Falk, “International Law and the Al Aqsa Intifada,” *Middle East Report* 217, Beyond Oslo: The New Uprising, (Winter 2000): 18.

Israel's disproportionate military response to rocket attacks and "its failure to distinguish between military and civilian targets."<sup>166</sup>

Dugard accused Israel of violating fundamental rules of IHL, especially Article (147) of the Fourth Geneva Convention that stipulates: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

#### **2.2.4. Gaza Strip after Israeli Withdrawal in 2005**

Since its occupation to the Gaza Strip in 1967, Israel has tried to isolate the Gaza Strip. The failure of the Second Camp David negotiations and the eruption of the Al Aqsa Intifada helped Israel escalate its measures, aiming to implement its plot to isolate the Strip. In order to accomplish this plot, Israel destroyed more than 1,300

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<sup>166</sup> See John Dugard, "Human Rights Situation in Palestine and Other Occupied Arab Territories," Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Human Rights Council. The report can be found on the following link: <http://domino.un.org/UNISPAL.NSF/22f431edb91c6f548525678a0051be1d/f71be9fae0abbe1c852573ec006dde2e!OpenDocument>.

homes in Rafah and razed thousands of dunums of farming land, evacuating about 90% of the land in adjusting the borders with Egypt.<sup>167</sup>

As of August 5, 2005 to September 12, 2005, Israel accomplished evacuation of its military posts and settlements from the Gaza Strip in implementation of the unilateral Disengagement Plan,<sup>168</sup> set up by former Prime Minister Ariel Sharon. The Israeli step aroused debate amongst scholars and analysts on the legal status of the Gaza Strip after this evacuation and whether it was an ending to the occupation or was nothing more than a kind of redeployment especially as Israel maintained control of Gaza's land, air space and ports.<sup>169</sup>

Article (6) of the Fourth Geneva Convention provides, "In the case of occupied territory, the application of the present Convention shall cease one year after the close of military operations; however, the Occupying Power shall be bound, during the duration of the occupation, to extent that such Power exercises the functions of government in such territory, (by several provisions of the Convention)."

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<sup>167</sup> Ilayyan Hindi, *Separation and Isolation Policy: A Reading in the Israeli Plot*, (National Organizations Affairs Commission, 2000), 17, (ARABIC).

<sup>168</sup> The plan can be viewed at the official web page of the Israeli Ministry of Foreign Affairs, The Cabinet Resolution Regarding the Disengagement Plan, 6 Jun 2004: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Disengagement+Plan+20-Jan-2005.htm>.

<sup>169</sup> See for example: Sara Roy, "Praying with Their Eyes Closed: Reflections on the Disengagement from Gaza," *Journal of Palestine Studies* 34-4, (Summer 2005): 64-74; Geoffrey Aronson, "Issues Arising from the Implementation of Israel's Disengagement from the Gaza Strip," *Journal of Palestine Studies* 34-4, (Summer 2005): 49-63; Zak M. Salih, "Panelists Disagree Over Gaza's Occupation Status," *Virginia Law School*, (November 17, 2005), can be found at: [http://www.law.virginia.edu/html/news/2005\\_fall/gaza.htm](http://www.law.virginia.edu/html/news/2005_fall/gaza.htm).

The Palestinians accused the plan of being designed mainly to "serve Israel security interests not taking in(to) consideration the basic needs of the Palestinian people."<sup>170</sup>

Meanwhile, the disengagement plan itself speaks about Israel maintaining functions in the GS. Addendum A, 3(1) says that "The State of Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip."

Principle Six of the plan says, "The completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip." Iain Scobbie of the University of London considers Principle Six as ambiguous, since it talks about relinquishing responsibility for the population, whilst saying nothing about the status of the territory; especially as the plan also provides that "Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip."<sup>171</sup>

Scobbie considers it a question of "effective control", relying on Article (42) of the Hague regulations 1907 that does not necessarily require the occupation forces to be "in actual control of all the territory and population, but simply have the potential capability to do so."

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<sup>170</sup> Muhamad Shtayyeh et al., *Israel's Disengagement from the Gaza Strip: Implications for Social and Economic Development*, (PECDAR, 2005), 8.

<sup>171</sup> Iain Scobbie, "Is Gaza Still Occupied?" Foreign Migration Review, Issue 26, August 2006, p18, <http://www.fmreview.org/FMRpdfs/FMR26/FMR2608.pdf>.

In response to the Israeli Disengagement Plan, the PLO Negotiations Affairs Department in October 2004, issued a report, titled "The Israeli 'Disengagement' Plan: Gaza Still Occupied"<sup>172</sup>, suggesting that even after the implementation of the disengagement, the GS would legally remain an Israeli-occupied territory.

The report suggested that through its plan, Israel seeks absolving itself of "all legal responsibilities as an occupying power," whilst maintaining "effective military control over the Gaza Strip and its inhabitants."

Israel's retaining effective control of the GS, keeps Israel an occupying power and the Strip an occupied territory and so Israel is responsible for the implementation of the Fourth Geneva Convention and the Hague Regulations in the territory.

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<sup>172</sup> PLO Negotiations Support Unit, "The Israeli 'Disengagement' Plan: Gaza Still Occupied," (October 2004): available at: [http://www.nad-plo.org/inner.php?view=disengagement\\_Fact\\_GAZA%20STILL%20OCCUPIED](http://www.nad-plo.org/inner.php?view=disengagement_Fact_GAZA%20STILL%20OCCUPIED). The report was mainly in response to comments by Dov Weisglass, Senior Advisor to Israeli Prime Minister Ariel Sharon, who earlier said, "The significance of the disengagement plan is the freezing of the peace process . . . Effectively, this whole package called the Palestinian state, with all that it entails, has been removed indefinitely from our agenda. . . All with a presidential blessing and the ratification of both houses of Congress."

## CHAPTER THREE

### **3. Israel's Obligations as an Occupying Power**

The first two chapters have shown that Israel is still occupying the Palestinian Territory and that the signing of the Oslo Accords did not change the status of the Palestinian Territory as an occupied territory, in addition to that the Israeli withdrawal from the GS in 2005 made no change on the status of the GS as an occupied territory.

This Chapter, meanwhile, is dedicated for discussing some of the Israeli obligations and violations as an occupying power in the Palestinian Territory.

The Chapter is divided into three sections, the first of which is to focus on Israel's obligations and violations under IHL towards the OPT, the second section will consider Israel's obligations and violations under the IHRL towards the OPT and the third section is to tackle mechanisms for enforcement of human rights, including instruments of the UN Charter and conventional mechanisms.

#### **3.1 Israeli Obligations under International Humanitarian Law**

The Hague Convention of 1907 and the Fourth Geneva Convention of 1949 are the main instruments to define obligations of the occupying powers.

Previous Chapters in this study have proved that the IHL applies in the OPT and Israel is obliged to fulfill its international obligations towards this Territory.<sup>173</sup>

This section of the chapter is to somehow elaborate on the Israeli obligations under IHL in the OPT and its violations towards Palestinian civilians and detainees.

### **3.1.1 Israeli Obligations in the OPT**

As an occupying power, Israel should abide by international conventions applicable in time of occupation. Israel is obliged to apply provisions of the Hague Regulations of 1907, which constitute customary law that is binding to all states and the provisions of the Fourth Geneva Convention of 1949 that it ratified in 1951.<sup>174</sup> In accordance with Article (1) of the Convention, Israel as a signatory state should "undertake to respect and to ensure respect for the present Convention in all circumstances."

Despite Israel's rejection to the applicability of the Geneva Conventions to the OPT, it refers to certain provisions in the Convention when it wants to validate actions concerning its security. Furthermore, the Israeli Supreme Court has several times referred to provisions of the Geneva Convention in reviewing Israel's conducts in the OPT.<sup>175</sup>

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<sup>173</sup> See Chapters (I and II) of this study.

<sup>174</sup> Israel declared reservation on the Fourth Geneva Conventions of 1949 upon signature August 12, 1949 and maintained these reservations upon ratification on June 7, 1951. The reservation/declaration text is available at: <http://www.icrc.org/ihl.nsf/NORM/35D52356F487FC85C1256402003F9563?OpenDocument>.

<sup>175</sup> HPCR, "Israel's Obligations under IHL in the Occupied Palestinian Territory," Ibid, 8.

Basing on the doctrine of separation of powers,<sup>176</sup> domestic courts in Israel are empowered to refer to the Hague Conventions as Customary Law, automatically incorporated into internal law, for reviewing Israeli military measures in the OPT, whilst they are not empowered to refer to the Geneva Conventions that Israel considers a treaty that will yet need a special legislation to be incorporated into internal law,<sup>177</sup> nevertheless; Israeli courts refer to some provisions of the Geneva Convention with the agreement of the state's representatives though this cannot be considered as "uniform."<sup>178</sup>

International humanitarian conventions also urge the invading forces to not cause the civilian population any damages than necessary and to respect family honour, lives of individuals, private property, religious beliefs and liberty of public worship.<sup>179</sup>

Article (17) of the Geneva Convention says that "(t)he Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas."

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<sup>176</sup> Eyal Benvenisti, "The Attitude of the Supreme Court of Israel towards the Implementation of the International Law of Human Rights," in *Enforcing International Human Rights in Domestic Courts*, ed. B. Conforti and F. Francioni, (The Netherlands: Kluwer Law International, 1997), 208. See also, E. Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories," *Israel Law Review* 26-1(1992): 24-35.

<sup>177</sup> Eyal Benvenisti, *The International Law of Occupation*, (Princeton: Princeton University, 1993), 118-119.

<sup>178</sup> Ruth Lapidoth, "International Law within the Israel Legal System," *Israel Law Review* 24-3-4, (1990): 469-470.

<sup>179</sup> Alfred Hopkinson, "The Treatment of Civilians in Occupied Territories," *Problems of the War, Oxford University Press* 2: 158-159.

Article (33) of the convention prevents collective punishment, stating that "(n)o protected person may be punished for an offence he or she has not personally committed," and prohibited any "collective penalties ... of intimidation or of terrorism." Article (50) of the Hague Convention of 1907 also talks against collective punishment.<sup>180</sup>

Moreover; the IL obliges states to investigate their military actions during wartime, especially when there are civilian casualties.<sup>181</sup> Eyal Benvenisti considers that when a state conducts this investigation, it protects itself in three ways; first, there will be no need for a tribunal in a foreign country; second, the results of the investigation can prove or refute any rising accusations or allegations; third, "a fundamental investigation can serve as a basis for finding people innocent of the charges."<sup>182</sup>

### **3.1.2 Israeli Violations in the OPT**

In a statement, Al Haq Organization<sup>183</sup> accused Israel of violating the international humanitarian conventions during its offensive on the GS in December

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<sup>180</sup> Article (50) of the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, stipulates, "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

<sup>181</sup> Eyal Benvenisti, "An Obligation to Investigate," *Haaretz*, January 28, 2009, available at: <http://www.Haaretz/hasen/spages/1059435.html>.

<sup>182</sup> Ibid.

<sup>183</sup> Al-Haq is an independent Palestinian non-governmental human rights organization based in Ramallah and it is the WB affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organization Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC) and the Palestinian NGO Network (PNGO).

2008 and January 2009.<sup>184</sup> The organizations said that Israel, as an occupying power, violated its international civil responsibilities that are guaranteed by IHL conventions, including The Hague Convention, the UN Charter and the Fourth Geneva Conventions.<sup>185</sup>

In fact, during the occupation period since 1967, Israel has committed a series of breaches to the IHL in the OPT. This section is to focus on Israel's humanitarian breaches towards civilians during its 22-day offensive on the Gaza Strip in December 2008 and January 2009, and breaches towards Palestinian detainees in Israeli jails.

The focus on violations towards civilians and detainees in this section is due to two facts; first, the protection of both categories of civilians and detainees covers two significant parts of the Geneva Conventions; second, the violations towards civilians during the Gaza offensive is the biggest fresh violation to consider in this respect and the Israeli violations towards Palestinian detainees are a long-standing matter.

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<sup>184</sup> Israel launched its military offensive on the GS on December 27, 2008 and lasted for 22 days, during which time more than 1,330 Palestinians were killed and more than 4,300 were wounded.

<sup>185</sup> AL HAQ, "Occupier's Civil Responsibility for the Offensive on the Gaza Strip", 18/02/2009, available at: <http://www.alhaq.org/pdfs/18%2002%202009%20-%20occupation%20civil%20responsibility.pdf>.

### **3.1.2.a Violations towards Civilians<sup>186</sup>**

Human Rights Watch issued a statement on January 10, 2009, accusing Israel of using the internationally-prohibited White Phosphorus munitions during its offensive in the GS and warned of the risk to Palestinian civilians.<sup>187</sup>

The statement said the organization's researchers in Israel observed multiple air-bursts on January 9 and January 10 of artillery-fired White Phosphorus near the city of Gaza and the Jabalya refugee camp. The group also explained that Israel appeared to be using the ammunition as "obscurant" as to make smoke screens in hide military operations that is deemed a "permissible use in principle under international humanitarian law,"<sup>188</sup> however; Human Rights Watch said the practice should be stopped in Gaza's densely populated areas.

The statement concluded<sup>189</sup> that although the White Phosphorus "is not an illegal obscurant or weapon", Israel's use of it as an obscurant in densely populated areas of Gaza violates the obligation to take "all feasible precautions" to minimize harm to the civilian population during military operations and urged Israel to immediately stop using the substance in densely populated areas.

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<sup>186</sup> Civilians are one of the four categories of protected persons under IHL that defined civilians in Article (50) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). According to Article (50), a civilian is any person who does not belong to armed forces or carry arms during armed conflicts. The Article further provides in paragraph (3) that "(t)he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."

<sup>187</sup> The statement titled "Q & A on Israel's Use of White Phosphorus in Gaza," can be found on the official web page of Human Rights Watch: <http://www.hrw.org/en/news/2009/01/10/q-israel-s-use-white-phosphorus-gaza>.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

Although White Phosphorus munitions are not considered chemical weapons, the substance ignites easily in air at temperatures of about 30 Celsius (86 Fahrenheit) and its fire can be difficult to extinguish, causing undue suffering through severe burns.<sup>190</sup>

Whilst international conventions have always urged for the protection of civilians during armed conflicts, several legal and human rights organizations confirmed that Israel has committed war crimes, reaching the status of genocide and crimes against humanity during its offensive on Gaza.<sup>191</sup> A Protocol to the 1980 Convention on Conventional Weapons<sup>192</sup> forbids using incendiary weapons against civilians or against military targets amidst concentrations of civilians.

Internal displacement for the Palestinian residents of the strip was also another violation to have been observed as a result of the Israeli offensive. This displacement was described as the largest forcible displacement for the Palestinians since the 1967 war according to the UN Office for the Coordination of Humanitarian Affairs (OCHA).<sup>193</sup>

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<sup>190</sup> Global Security Organization, "White Phosphorus (WP)," January 2009: <http://www.globalsecurity.org/military/systems/munitions/wp.htm>.

<sup>191</sup> See for example: AL HAQ, "Legal Aspects of Israel's Attacks on the Gaza Strip during Operation Cast Lead," 7 January 2009; The Independent Commission of Human Rights, "The Israeli Aggression on the Gaza Strip: War Crimes and unprecedented Collective Punishment amidst Arab and International Silence," January, 2009; Amnesty International, "Israel used white phosphorus in Gaza civilian areas," January 19, 2009, can be found at: <http://www.amnesty.org/en/news-and-updates/news/israeli-armys-use-white-phosphorus-gaza-clear-undeniable-20090119> and Amira Hass, "Gaza Residents: IDF Troops Posing as Hamas Men," *Haaretz English-language website*, January 11, 2009, the story first appeared on: <http://www.haaretz.com/hasen/spages/1054461.html>, but removed several hours later upon order of the Israeli military censor. A copy of the article is available at: <http://cryptogon.com/?p=6277>.

<sup>192</sup> Convention on Certain Conventional Weapons, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Geneva, 10 October 1980, available at: [http://www.globalsecurity.org/military/library/policy/int/convention\\_conventional-wpns\\_prot-iii.htm](http://www.globalsecurity.org/military/library/policy/int/convention_conventional-wpns_prot-iii.htm).

<sup>193</sup> OCHA, Office of the Humanitarian Coordination Affairs, "Protection of Civilians Weekly Report," 1-8 January 2009: [http://www.ochaopt.org/documents/ocha\\_opt\\_protection\\_of\\_civilians\\_weekly\\_2009\\_01\\_08\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_2009_01_08_english.pdf).

The OCHA report said that at the beginning of the offensive on December 27, 2008, few hundred Palestinians sought refuge at five UNRWA schools, but as the Israeli ground incursion began, thousands of displaced residents arrived at the UNRWA facilities and by January 7, 2009, the day the report was issued, approximately 16,000 people were staying in 23 UNRWA facilities.

Commenting on the Gaza offensive, the UN Special Rapporteur on Palestinian Human Rights Richard Falk said, "what made the Gaza attacks launched on 27 December different from the main wars fought by Israel over the years was that the weapons and tactics used devastated an essentially defenceless civilian population. The one-sidedness of the encounter was so stark, as signalled by the relative casualties on both sides (more than 100 to 1; 1300-plus Palestinians killed compared with 13 Israelis, and several of these by friendly fire)." <sup>194</sup>

### **3.1.2.b Violations towards Detainees**

The ICRC defined Prisoners of War as "captured members of armed forces and associated militias who meet the criteria laid down in the third Geneva Convention,"<sup>195</sup> and that they are "entitled to the rights the Conventions grant them until they are released as soon as the hostilities end."<sup>196</sup>

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<sup>194</sup> Richard Falk, "Calls for investigation into Gaza attacks: Israel's war crimes," *Le Monde Diplomatique*, March 2009, available at: <http://mondediplo.com/2009/03/03warcrimes>.

<sup>195</sup> ICRC, "Occupation and international humanitarian law: questions and answers," available at: <http://icrc.org/web/eng/siteeng0.nsf/htmlall/634kfc?opendocument>.

<sup>196</sup>. ICRC, Ibid. Article (4) of the Geneva Convention Relative to the Treatment of Prisoners of War defines Prisoners of War as follows:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

Article (76) of the Geneva Convention grants protected persons, jailed by the occupying power, the right to be separated from other detainees, right to medical care, good health and to "enjoy conditions of food and hygiene which will be sufficient to keep them in good health."

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1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Article (85) of the Convention obliges the detaining power to "take all necessary and possible measures to ensure that protected persons .... be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health."

The Israeli violations of the rights of the Palestinian detainees start at the moment of the arrest, during which the Israeli soldiers often beat the detainees with gun butts, handcuff and blindfold them.<sup>197</sup>

Psychological torture is yet another type of torture Israeli interrogators use as to extract confessions from Palestinian detainees. Forms of psychological torture include holding political detainees with criminal prisoners and drug addicts, making it impossible for the detainees to sleep under such conditions.<sup>198</sup>

The interrogators also use another means of psychological torture by threatening of the rape or detention of a relative of the detainee.<sup>199</sup>

With regard to the conditions in the Israeli jails, Israel violates Article (91) of the Fourth Geneva Convention, upon which every prison should contain a suitable medical clinic under supervision of a qualified physician to provide the prisoners with their need of medical care, in addition to healthy food.

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<sup>197</sup> Mahmoud Dagher, *Human Rights Violations: Health Conditions of the Palestinian and Arab Detainees in the Israeli Jails*, (El-Bireh: Health Work Committees, 2004), 147, (Arabic).

<sup>198</sup> Independent Commission of Human Rights, "Status of the Rights of the Palestinian Citizen," 5<sup>th</sup> Annual Report, January-December 1999, 123 (Arabic).

<sup>199</sup> Al Jazeera, "Israelis use prohibited interrogation means against Palestinian political prisoners", February 2009: <http://www.aljazeera.info/News/2009/February/2%20n/Israelis%20use%20prohibited%20interrogation%20means%20against%20Palestinian%20political%20prisoners.htm>.

Treatment of prisoners is governed by Convention on the Standard Minimum Rules for the Treatment of Prisoners,<sup>200</sup> that grants detainees rights in personal hygiene, clothing and bedding, food, exercise and sport and medical attention. The Convention also sets rules with regard to discipline and punishment, instruments of restraint, information to and complaints by prisoners and their contacts with the outside world.

International conventions also protect prisoners against torture, which is defined, in Article (1) paragraph (1) of the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>201</sup> as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."

Paragraph (2) of the Article, meanwhile, describes torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

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<sup>200</sup> Convention on the Standard Minimum Rules for the Treatment of Prisoners was adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. It is available at: [http://www.unhchr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhchr.ch/html/menu3/b/h_comp34.htm).

<sup>201</sup> The Declaration was adopted by the GA resolution 3452 (XXX) of 9 December 1975 and can be found at: [http://www.unhchr.ch/html/menu3/b/h\\_comp38.htm](http://www.unhchr.ch/html/menu3/b/h_comp38.htm).

Despite a ruling by the Israeli high Court in 1993, restricting interrogation methods used by Israeli interrogators against the Palestinian detainees, different means of torture and maltreatment, however; have since been observed during interrogation.<sup>202</sup>

The torture methods the Israeli interrogators use against the Palestinian detainees include violent shaking, tying in different painful situations, covering the head and face with a bad-smelling sack, prevention of sleep, fierce beating, subjecting the detainee to high temperatures for a while and to very low temperatures another while.<sup>203</sup>

Furthermore; a 1999 ruling by the Israeli High Court on illegality of measures Israeli interrogators use against Palestinian detainees prohibited the use of certain interrogation methods that constitute ill-treatment and torture.<sup>204</sup>

### **3.2 Israeli Obligations under International Human Rights Law**

Israel ratified several international human rights conventions, yet it denies applicability of them or some of them to the OPT under many allegations. This section of the chapter is to discuss Israel's obligations and violations to three of the international human rights conventions it ratified with regard to their applicability in the OPT. These three conventions that were addressed in the Advisory Opinion of the

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<sup>202</sup> B'Tselem, "Human Rights Violations in the Occupied Territories," (Jerusalem, 1992-1993): 11.

<sup>203</sup> B'Tselem, Hamoked, "Absolute Prohibition, the Torture and Ill-Treatment of Palestinian Detainees," (Jerusalem, May 2007): 67-74.

<sup>204</sup> B'Tselem, "Torture and Ill-Treatment as Perceived by Israel's High Court of Justice," (September 1999): [http://www.btselem.org/english/Torture/HCJ\\_Ruling.asp](http://www.btselem.org/english/Torture/HCJ_Ruling.asp).

ICJ on the Construction of the Wall in 2004 are ICCPR<sup>205</sup>, ICESCR<sup>206</sup> and Convention on the Rights of the Child (*hereinafter* CRC).<sup>207</sup>

### **3.2.1 Israeli Obligations in the OPT**

On 3 October 1991, Israel ratified ICCPR with reservation on Article (23) on the status of family and marriage rights<sup>208</sup> and derogation from Article (9) on measures of arrest and detention<sup>209</sup>; ICESCR with no reservation and CRC with no reservations.<sup>210</sup>

Israel's ratification of the human rights conventions is seen by some scholars as falling within the measures the IL allows the occupant to take with the goal to ensure the well-being of the occupied people, in accordance with Article (43) of The Hague Convention of 1907 and Article (64) of the Fourth Geneva Convention. Moreover; the occupant is obliged to submit reports to the relevant committees of the

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<sup>205</sup> International Covenant on Civil and Political Rights is available at: [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).

<sup>206</sup> International Covenant on Economic, Social and Cultural Rights is available at: [http://www.unhchr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhchr.ch/html/menu3/b/a_cescr.htm).

<sup>207</sup> Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 on 20 November 1989 and *entered into force* 2 September 1990, can be found on the UN web site: <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

<sup>208</sup> Israel's reservation states, "With reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned. To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law." Available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=322&chapter=4&lang=en#EndDec>.

<sup>209</sup> For further information about Israel's derogation from Article (9) of ICCPR, see E. Benvenisti, 1992, *Ibid*, 29.

<sup>210</sup> These three treaties are not the only human rights treaties that Israel ratified. Amongst other international human rights treaties Israel ratified are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1979 with reservation on Article (22); the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW) in 1991; and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1991 with reservation on Article (28) paragraph (1).

conventions with regard to enforcement of these conventions in the occupied territories.<sup>211</sup>

With regard to the relationship between the IHRL and the IHL, the ICJ in its Advisory Opinion in 2004 recalled a previous Advisory Opinion on July 8, 1996, on the Legality of the Threat or Use of Nuclear Weapons, when it addressed the applicability of the ICCPR during armed conflict, stating that "the protection of the ICCPR does not cease in times of war," but agreed on the derogation of certain provisions during emergency, except with regard to the right to life that cannot be deprived.<sup>212</sup>

The Israeli derogation from Article (9) of ICCPR on arrest measures was in fact seen as recognition from Israel that the covenant applies to the Palestinian Territory because Israel seeks absolving itself the legal consequences for its measures in detention of Palestinians from this territory.

The ICJ, meanwhile; confirmed in Paragraph (106) the applicability of human rights conventions during armed conflict and set up three possible situations for the relationship between the IHRL and the IHL: "(S)ome rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."

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<sup>211</sup> Benvenisti, 1992, *Ibid*, 31-23.

<sup>212</sup> See ICJ Advisory Opinion on the Wall, Paragraph (104).

Considering Article (2) Paragraph (1) of the ICCPR<sup>213</sup> on the scope of application of the covenant, the court considers that the convention is “applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”<sup>214</sup>

Commenting on Israel’s statement in 1998 that the covenants did not apply directly to the Palestinian Territory, the ICJ cited an answer by the Human Rights Committee to Israel’s position, confirming that the ICCPR applies to the Occupied Territory.<sup>215</sup>

Although the ICESCR does not include any provisions on the scope of application of the covenant, the ICJ ruled that Israel is “under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.”<sup>216</sup>

However; Israel denies applicability of those conventions on the Palestinian Territory on allegations that they apply only on the citizens of Israel during time of peace.

In its report to the Convention on the Rights of Child Committee in 2000<sup>217</sup>, Israel failed to include information on the Palestinian children in the Occupied

<sup>213</sup> Article (2) Paragraph (1) of the ICCPR of 1966, provides, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>214</sup> ICJ Advisory Opinion, Ibid, Paragraph (108-111).

<sup>215</sup> Ibid, Paragraph (110).

<sup>216</sup> Ibid, Paragraph (112).

<sup>217</sup> Israel was supposed to submit its first report to the Convention on the Rights of the Child Committee in 1993, but it did that only seven years later in the year 2000.

Territory, alleging it is not legally bound to report on the situation in the OPT because the Territory has become under responsibility of the PA since 1995 though in fact Israel never stopped detention of Palestinian children after the signing of the DoP in the early nineties<sup>218</sup> and thousands of Palestinian children<sup>219</sup> have been detained since the Israeli occupation of the Palestinian Territory in 1967.<sup>220</sup>

Obligations of member states towards the CRC are set in Part (1) of the convention. Paragraph (1) of Article (2) of the convention urges states to "respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

Article (2) Paragraph (2), meanwhile; urges state parties to "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

According to Article (3) Paragraph (2) of the convention, children are entitled to protection and care to ensure their well-being.

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<sup>218</sup> Adam Hanieh et al., "Paying the Price of Injustice: Palestinian Child Prisoners and the UN Human Rights System," *Middle East Report* 229, (Winter 2003): 28-29.

<sup>219</sup> The CRC of 1989 defines a child as "every human being below the age of eighteen years," however; Israel complies with this definition with regard to Israeli children only, whilst treating Palestinian children as adults as of the age of 16.

<sup>220</sup> Hanieh, *Ibid*, 27.

In general, Articles (1-41) talk about a variety of rights member states should provide to children, including freedom to express one's self, rights to education, health, protection against discrimination and exploitation.

### **3.2.2 Israeli Violations in the OPT**

The Israeli human rights violations in the OPT take different shapes and are witnessed allover the Palestinian Territory, including the WB<sup>221</sup> and the GS. Since Israel's occupation in 1967, the Palestinians of the WB and the GS have been subject to a series of violations to their civil, political, economic, social and cultural rights.<sup>222</sup>

Even after Israel's 2005 withdrawal from the GS, human rights violations in the strip continued. Israel's control of main crossings of the strip, hindering movement of the residents into and from the strip was one of the main violations to the residents' right of free movement, guaranteed by human rights conventions.<sup>223</sup>

The focus here will be on the Israeli violations to its obligations to the 1966 Covenants and the CRC. The Advisory Opinion of the ICJ on the construction of the wall in the WB in 2004 will receive special focus in this section as it tackled a number of Israeli violations in this respect.

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<sup>221</sup> The WB here includes the eastern part of Jerusalem that was occupied by Israel in 1967 along with the rest of the Palestinian Territory.

<sup>222</sup> The Israeli violations in the OPT varied to include a large number of oppressive procedures that include, land confiscation for settlement construction and expansion; ethnic cleansing measures of house demolitions and illegal measures in Jerusalem; collective punishment measures, including roadblocks and closures; in addition to assassinations and control of natural resources

<sup>223</sup> See Article (12) of the ICCPR.

### **3.2.2.a Violation to 1966 Covenants**

In an attempt to absolve itself of any obligations in the wake of its illegal measures in the OPT, Israel has always justified its actions as being taken in self defence, a principle Israel first argued over the 1967 war.<sup>224</sup>

Israel used the same excuse as to justify the construction of its wall<sup>225</sup> on the WB land, arguing that it is building the wall for security purposes as to protect its citizens against any possible attacks by Palestinians. The wall, snaking along the WB, however; departed from the green line, refuting Israel's self defense claims.

In its 2004 advisory opinion on the wall, the ICJ ruled out Israel's self defence claims and said that Israel tries to impose facts on ground with regard to defining permanent borders along the route of the wall and it said that all states are under obligation not to recognize the illegal situation created by the construction of the wall.<sup>226</sup>

The Palestinian argument before the ICJ with regard to Israel's self defence claims were based on several points including, (1) the Palestinian violence against Israel does not reach the level of "armed attacks" within the meaning of Article (51) of the UN Charter; (2) Article (51) does not allow self defence against future armed attacks; (3) self defence must be proportionate to the actual harm, whilst the wall is

<sup>224</sup> See Chapter (I) of this study.

<sup>225</sup> The Palestinians use the term "apartheid wall", whilst Israel uses the term "security fence" or "security barrier". For the purpose of this study, the term "wall" is to be used taking into consideration the term used by the ICJ.

<sup>226</sup> Paragraphs (146 & 159).

not; and (4) As Israel's right to use force is governed by the *jus in bello* as *lex specialis*, any rights under Article (51) were displaced and could not be invoked.<sup>227</sup>

The ICJ then found no relevance for Israel's self defence claims with Article (51) of the UN Charter that grants the right of self defence "if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."<sup>228</sup>

In fact, the court highlighted a number of Israeli violations to the IHL and the IHRL that are related to the construction of the wall.

The harm the wall causes the Palestinians refers to its interference with their freedom of movement, preventing their access to social life and work as it separates Palestinian families from their farmland, educational institutions, medical care and relatives.<sup>229</sup>

Paragraph (133) of the Court's Opinion tackles several breaches to the rights of Palestinians in the wake of the construction of the wall, including isolating areas between the wall and the green line, restricting movement of the residents, such as in Qalqilya and Jerusalem.

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<sup>227</sup> Sean D. Murphy, "Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixie from the ICJ?" *The American Journal of International Law* 99- 1, (January 2005): 70-71.

<sup>228</sup> UN Charter, Article (51).

<sup>229</sup> Ruth Wedgwood, "The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defence," *The American Journal of International Law* 99-1, (January 2005): 54.

Meanwhile, Paragraph (134) concluded that Israel has acted contrary to various human rights conventions, including the ICCPR, the ICESCR and the CRC.

According to the paragraph, the construction of the wall impedes free movement of residents, guaranteed by Article (12) Paragraph (1) of ICCPR; it also breaches ICESCR and the CRC by sabotaging the residents' access to work, educational institutions and health installations.

The Court also cited relevance to the violation of the Palestinian right to self determination,<sup>230</sup> that is guaranteed in Article (1) common to the ICCPR and the ICESCR, both ratified by Israel, and the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960,<sup>231</sup> which considered the exploitation and subjugation of peoples as a violation of fundamental human rights in contrary of the UN Charter<sup>232</sup> and emphasized the people's right to self determination and to "determine their political status."<sup>233</sup>

### **3.2.2.b Violation to the Convention on the Rights of the Child**

In a letter dated, 5 March 2009, President of the Defence for Children International (DCI)<sup>234</sup> asked the Israeli Minister of Justice Daniel Friedmann to

<sup>230</sup> See ICJ Advisory Opinion, Paragraph (88).

<sup>231</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted upon General Assembly Resolution No. (1514) on 14 December 1960, available at: <http://www.un.org/documents/ga/res/15/ares15.htm>.

<sup>232</sup> Ibid, Paragraph (1).

<sup>233</sup> Ibid, Paragraph (2).

<sup>234</sup> The Defence for Children International is an international organization dedicated to the protection of the rights of the child in accordance with the Convention on the Rights of the Child.

present explanations with regard to the increased number of detained Palestinian children, notifying the Committee on the Rights of the Child of the issue.<sup>235</sup>

The DCI, meanwhile, expressed concern over the increased “number of Palestinian children, as young as 12, being arrested and detained” on allegations of throwing stones at soldiers or at the wall Israel is building in the WB.<sup>236</sup> The statement estimated that seven girls and six boys, being held in administrative detention without charges, were amongst 423 Palestinian children, detained by February 2009.

A report, prepared in cooperation between the DCI and Save the Children in December 2008,<sup>237</sup> estimated 6,000 Palestinian children to have been detained by the Israeli forces since September 2000, adding that by December 2007, there were 311 children in detention, 192 of whom were awaiting trial, whilst 101 were serving sentences, 18 of them administrative detention sentences. The report further added that the Israeli military system in the OPT has failed to apply basic rights, guaranteed by IL with regard to Palestinian child detainees.<sup>238</sup>

The ICJ has emphasized the applicability of the CRC of 1989 in the OPT and ruled that Israel is violating the Convention, which is "applicable within the OPT."<sup>239</sup>

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<sup>235</sup> Copy of the letter is available at: <http://www.dci-pal.org/English/Doc/Press/LetterToIsraeliMinister.doc>.

<sup>236</sup> DCI statement “DCI Concerned by Sharp Increase in Detention of Children”, available at: <http://www.dci-pal.org/english/display.cfm?DocId=1083&CategoryId=1>.

<sup>237</sup> “Child Rights Situation Analysis: Right to Protection in the occupied Palestinian territory,” *Defence for Children International/ Palestine Section and Save the Children*, (December 2008): available at: <http://www.dci-pal.org/english/publ/research/SRSAReport.pdf>.

<sup>238</sup> Ibid, 79.

<sup>239</sup> See ICJ Opinion, Paragraph (113).

Meanwhile, considering Israel's report on the situation of children in 2001, the Committee on the Rights of the Child "expressed concern about the difference in the definition of a child in Israel as persons under 18 and in the Occupied Palestinian Territory as persons under 16."<sup>240</sup> In fact, with this definition given to the Palestinian children, Israel allowed itself to treat Palestinian children under 18 as adults with regard to detention and sentence.

### **3.3 Human Rights Enforcement**

As human rights became a universal issue, concerning all nations, there has become an urgent need to ensure their implementation, which is now the concern of international organizations. This section of the chapter is to tackle a group of instruments for the enforcement and protection of human rights, including the UN Charter instruments, the conventional mechanisms and other mechanisms of concern.

#### **3.3.1 UN Charter Instruments**

Several UN bodies possess mechanisms to monitor the enforcement of human rights, including the UN Charter, the UN SC, the UN GA, the UN Secretary-General and the Economic and Social Council that established several committees with the goal to assist in its work, including, the Commission on Human Rights that established the Sub-Commission on Prevention of Discrimination and Protection of Minorities and was later replaced with the Human Rights Council, the Commission on

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<sup>240</sup> Human Rights Council, "Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15 (B) of the Annex to Human Rights Council Resolution 5/1 (Israel)", Working Group on the Universal Periodic Review, 3<sup>rd</sup> session, (Geneva 1-15 December 2008), Paragraph (13)

the Status of Women and the Commission on Crime Prevention and Criminal Justice.<sup>241</sup>

The ICJ also works on promoting enforcement of human rights through legal advisory opinions it presents in certain cases.

The UN Charter includes several provisions that promote the respect of human rights. The Charter urges countries to cooperate for resolving "international problems of an economic, social, cultural or humanitarian character, and .... encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion."<sup>242</sup>

Article (2) paragraph (4) of the UN Charter completely banned use of force against any member state.<sup>243</sup> However; the Charter later allows such use of force in situations of self defense<sup>244</sup> and in protection of international peace and security as set in Chapter (VII) of the Charter "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."

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<sup>241</sup> UN official web site: <http://www.un.org/rights/dpi1774e.htm>.

<sup>242</sup> See UN Charter, Article (1) paragraph (3).

<sup>243</sup> Article (2) paragraph (4) of the UN Charter provides, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

<sup>244</sup> See UN Charter, Article (51) that provides, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Article (13) paragraph (1) of the Charter urges the GA to make studies and recommendations with regard to encouraging the promotion and development of IL and human rights and fundamental freedoms.<sup>245</sup>

Article (55) of the UN Charter also calls for respect of "human rights and fundamental freedoms" with the goal to create "condition of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

Meanwhile, Article (56) urges "(a)ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article (55)"

### **3.3.1.a UN Secretary-General**

The Secretary-General of the UN is the only one to represent the international body and he is deemed as a symbol of the "United Nations ideals and a spokesman for the interests of the world's peoples, in particular the poor and vulnerable among them."<sup>246</sup>

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<sup>245</sup> Article (13) paragraph (1) of the UN Charter provides, "The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

<sup>246</sup> The official web page of the UN: <http://www.un.org/sgrole.shtml>.

Chapter (XV) of the UN Charter describes the Secretary-General as "chief administrative officer"<sup>247</sup>, who shall act in that capacity during meetings of the SC, GA, Economic and Social Council and to perform "such other functions as are entrusted" by these organizations to him.<sup>248</sup>

Moreover; another role for the Secretary-General according to the UN Charter is to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security".<sup>249</sup>

Former UN Secretary General Boutros Boutros-Ghali<sup>250</sup> was interested in promotion of international human rights norms that appeared in his statements. In one of his speeches, Boutros-Ghali said, "In 1948, the Universal Declaration made explicit the social dimension of human rights. That dimension was to be still more strongly reaffirmed in the Covenants of 1966, particularly the International Covenant on Economic, Social and Cultural Rights, to whose importance I would call attention. It was in that context that the basic concept of the right to development came into being a few years later. In the name of that concept and its underlying values, we are now under a compelling obligation to tackle the problem of poverty in the world."<sup>251</sup>

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<sup>247</sup> UN Charter Article (97).

<sup>248</sup> Ibid, Article (98).

<sup>249</sup> Ibid Article (99).

<sup>250</sup> Boutros Boutros-Ghali of Egypt was the sixth Secretary-General of the United Nations (1992-1996).

<sup>251</sup> Statement by Boutros Boutros-Ghali, Secretary-General of the UN, World Summit for Social Development, 6-12, March 1995, available at: [http://www.icsw.org/copenhagen\\_implementation/background\\_information/boutros.html](http://www.icsw.org/copenhagen_implementation/background_information/boutros.html).

### **3.3.1.b Security Council**

In Chapter (VII), the UN Charter authorizes SC to decide when a situation requires the intervention of the Council to take an action or give a recommendation that can reach the extent of use of military force.<sup>252</sup>

A military intervention by a third state with the goal to enforce human rights has become acceptable amongst some IL experts. The NATO military intervention in Yugoslavia in 1999 without the consent of the UN SC divided scholars into two camps. One camp agreed with the action, whilst the other camp disagreed on grounds that such an intervention firstly violates IL for bypassing the SC and secondly breaches state sovereignty.<sup>253</sup>

Although the NATO action in Yugoslavia in 1999 was illegal,<sup>254</sup> from an IL point of view, it can express development in IL and an exceptional practice. Talking morally, Antonio Cassesse argues that Human Rights organizations support what he calls positive peace, especially as the SC had recognized the committing of massacres in Yugoslavia.<sup>255</sup>

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<sup>252</sup> See Chapter VII of the UN Charter, Articles (39-44).

<sup>253</sup> See arguments by Bruno Simma, "NATO, The UN and the Use of Force: Legal Aspects," *EJIL* 10-1, (1999): 1-22 and Antonio Cassesse, "Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forceable Humanitarian Countermeasures in the World Community?" *EJIL* 10-1, (1999): 23-30.

<sup>254</sup> The NATO action in Yugoslavia was deemed illegal by both Simma and Cassesse, *Ibid.*

<sup>255</sup> Cassesse, *Ibid.*

### **3.3.1.c General Assembly**

Chapter (IV) of the UN Charter defines the powers and responsibilities of the GA, upon which, the GA is authorized to take actions with regard to the protection of human rights, including making "recommendations to the members of the United Nations or the Security Council or to both,"<sup>256</sup> with the goal to maintain international peace and security.<sup>257</sup>

The UN Commission on Human Rights (hereinafter UNCHR) was responsible for monitoring and publicly reporting human rights situation in certain countries or "major phenomena of human rights violations worldwide."<sup>258</sup>

In 2004, the UNCHR discussed possibility of introducing individual-complaints mechanism for economic, social and cultural rights, as well as civil and political rights; but the commission did not succeed in reaching a decision due to differences amongst participating states that kept the issue open for discussion. The debate amongst states focused on textual differences of the two covenants, especially the interpretation of Article (2) paragraph (1) of the ICESCR<sup>259</sup> that they deemed ambiguous for how can rights, depending on the availability of resources be rights in a meaningful sense, especially as these resources are limited. Furthermore; it is yet a big international challenge to achieve full economic, social and cultural rights allover

<sup>256</sup> UN Charter, Article (10).

<sup>257</sup> UN Charter, Article (11).

<sup>258</sup> Un official web site: <http://www.unhchr.ch/html/menu2/2/chr.htm>.

<sup>259</sup> Article (2) paragraph (1) of the International Covenant of Economic, Social and Cultural Rights provides, "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

the world since a large number of the world population are under poverty level, lacking the fundamental rights of education, health and housing.<sup>260</sup>

The paragraph is yet deemed of particular importance for describing the nature of state's obligations of both conduct and result towards the covenant. The paragraph urges states to adopt legislative measures amongst other "appropriate means" for the implementation of the covenant with the goal to have legislative foundation for any measures to be taken in this respect, and that is to achieve the desirable results of the achievement of "the full realization" of the economic, social and cultural rights recognized in the Covenant.<sup>261</sup>

During its meeting on 15 March 2006, the UN GA decided to replace the UNCHR with the Human Rights Council (hereinafter HRC),<sup>262</sup> which became responsible for protection and respect of human rights and making recommendations on them.<sup>263</sup> The council created the mechanism of Universal Periodic Review as to evaluate human rights situation in the 192 state members of the UN.<sup>264</sup>

The Palestinian delegation to the tenth session of the HRC on 8 January 2009, criticized Israel for failing to refer to its human rights responsibilities and obligations

<sup>260</sup> Michael J. Dennis and David P. Stewart, "Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?" *The American Journal of International Law* 98-3, (July 2004): 514-515.

<sup>261</sup> Office of the High Commission of Human Rights, "CESCR General Comment 3, The Nature of States Parties Obligations (Art. 2, par. 1)," Geneva, Switzerland, (14 December 1990), available at: <http://www.fao.org/righttofood/KC/downloads/vl/docs/AH351.pdf>.

<sup>262</sup> See GA sixtieth session, official records, Wednesday 15 March 2006, New York, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N06/272/60/PDF/N0627260.pdf?OpenElement>.

<sup>263</sup> See official web page of the Human Rights Council: <http://www2.ohchr.org/english/bodies/hrcouncil>.

<sup>264</sup> The Universal Periodic Review mechanism was one of elements the council set to guide its future work. For further information about the council's elements set for the council's "Institution-building package", visit: ([http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_5\\_1.doc](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_5_1.doc)).

in the Palestinian Territory as an occupying power.<sup>265</sup> The Council, meanwhile; urged Israel to respect and adhere to its obligations under the IHRL in areas under its control.<sup>266</sup>

The Economic and Social Council is also one of the main UN bodies that supervise the UN welfare policy as it helps the GA in promoting international economic and social cooperation.<sup>267</sup>

In its Resolution No. (1235) of 1967,<sup>268</sup> the Economic and Social Council (*hereinafter* ECOSOC) authorizes the UNCHR to study cases of human rights violations in a certain country.<sup>269</sup>

The more confidential Procedure (1503) of the Economic and Social Council<sup>270</sup> allows the UNCHR to appoint an ad-hoc committee to conduct human rights "investigation with the consent of the State concerned."<sup>271</sup>

In 1993, the GA established the post of the High Commissioner for Human Rights to carry out the "good offices function in the field of human rights on behalf of the Secretary-General" and now it became responsible for protecting human rights.<sup>272</sup>

<sup>265</sup> Human Rights Council, Universal Periodic Review, Report of the Working Group on the Universal Periodic Review (Israel), A/HRC/10/76, the UN General Assembly, (8 January 2009), 9.

<sup>266</sup> Ibid, 27.

<sup>267</sup> For further information about the Economic and Social Council, visit: <http://www.un.org/ecosoc>.

<sup>268</sup> ECOSOC Resolution 1235 (XLII), 42 U.N. ESCOR Supp. (No. 1) at 17, U.N. Doc. E/4393 (1967), available at: <http://fds.oup.com/www.oup.co.uk/pdf/bt/cassese/cases/part3/ch16/1602.pdf>.

<sup>269</sup> ECOSOC Resolution No. (1235) paragraph (2), available at: <http://fds.oup.com/www.oup.co.uk/pdf/bt/cassese/cases/part3/ch16/1602.pdf>.

<sup>270</sup> ECOSOC Resolution 1503 (XLVIII) of 1970, available at: [http://www.rewi.uni-jena.de/data/rewi\\_LS\\_Ruffert/SS%202008/IntOrg%202008/E-RES-1503-1.pdf](http://www.rewi.uni-jena.de/data/rewi_LS_Ruffert/SS%202008/IntOrg%202008/E-RES-1503-1.pdf).

<sup>271</sup> Ibid, paragraph (7).

<sup>272</sup> "The United Nations and Human Rights", available at the UN official web page: <http://www.un.org/rights/dpi7774e.htm>.

Upon Resolution No (2443) of 1968, the GA established the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and other Arabs of the Occupied Territories with the goal to ensure "respect for and implementation of human rights in occupied territories."<sup>273</sup>

### **3.3.1.d International Court of Justice**

The ICJ is deemed as the UN's main judicial organ.<sup>274</sup> Chapter (XIV) of the UN Charter considers all the charter's members as members of the ICJ<sup>275</sup> that plays a dual role of "settling legal disputes between States submitted to it by them and giving advisory opinions on legal matters referred to it by duly authorized United Nations organs and specialized agencies."<sup>276</sup>

The court's judgments on disputes between state parties are considered binding to both states.<sup>277</sup>

As the PA is not a state party in the court, it cannot seek the court's opinion in issues concerning it, but Article (96) of the UN Charter authorizes the GA and other UN organs, "authorized by the General Assembly," to request the court to give an advisory opinion in legal matters "within the scope of their activities."

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<sup>273</sup> GA Resolution No. (2443), available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/244/03/IMG/NR024403.pdf?OpenElement>.

<sup>274</sup> UN Charter Article (92).

<sup>275</sup> Ibid Article (93) Paragraph (1).

<sup>276</sup> ICJ official web site, "Frequently Asked Questions": <http://www.icj-cij.org/information/index.php?p1=7&p2=2#1>.

<sup>277</sup> See Article (94) of the UN Charter.

Accordingly, Article (34) of the statute of the ICJ<sup>278</sup> says that international organizations can present "information relevant to cases before it ...on their own initiative" and that was the case of the GA requesting the court's opinion on the legal consequences of the construction of the wall by Israel in the WB.

The advisory opinion, given by the ICJ is yet deemed one of the weak mechanisms to ensure "compliance with norms of the International Humanitarian Law"<sup>279</sup> as described by David Kretzmer in discussing the court's advisory opinion on the wall, noting that there should be stronger and more binding actions to prevent violations of the IHL and the IHRL.<sup>280</sup>

### **3.3.2 Conventional Mechanisms**

With the goal to further promote respect for human rights, the UN urged for bringing fundamental human rights into a written document. The non-binding Universal Declaration of Human Rights of 1948<sup>281</sup> has since become basis for more detailed and more binding human rights conventions.

The GA proclaimed the Declaration "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and

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<sup>278</sup> Statute of the International Court of Justice, available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

<sup>279</sup> David Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law," *The American Journal of International Law* 99-1, (January 2005): 102.

<sup>280</sup> Ibid, 102-103.

<sup>281</sup> The Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948 and it is available at: <http://un.org/Overview/rights.html>. The Declaration as a Custom is not within the scope of focus of this study, but the reference to it here is due to the fact that it constitutes basis for other binding human rights treaties within the focus of the study.

education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.<sup>282</sup>

The Universal Declaration of Human Rights of 1948 along with the ICCPR and the ICESCR of 1966 are seen as milestones for the transition of states from the culture of violence to the culture of peace as some of their provisions were brought into local laws of the states, leading to the emerging of “a parallel transition from a culture of sovereign impunity to a culture of national and international accountability.”<sup>283</sup>

Ways to enhance enforcement of human rights have always received international interest and so several international human rights conventions oblige state parties to report about their human rights situation,<sup>284</sup> to committees, established for this purpose with regard to every convention. For example there is the Human Rights Committee to monitor enforcement of the ICCPR, the Committee on the Economic, Social and Cultural Rights and the Committee on the Rights of the Child.

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<sup>282</sup> Ibid, Preamble.

<sup>283</sup> The International Commission on Intervention and State Sovereignty, “The Responsibility to Protect,” Ottawa-Canada: The International Development Research Center, (December 2001): 14.

<sup>284</sup> Jose L. Gomez del Prado, “United Nations Conventions on Human Rights: The Practice of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination in Dealing with Reporting Obligations of States Parties,” *Human Rights Quarterly* 7-4, (November 1985): 492. These human rights conventions include: The ICCPR of 1966; the ICESCR of 1966; the CRC; the International Convention on Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women (CIDAW); the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment; and the International Convention on the Suppression and Punishment of the Crime of Apartheid.

In fact, human rights conventions include articles, urging for the establishment of monitoring mechanisms by state parties and yet set conditions for these mechanisms. For example; such articles may define number and type of people the monitoring body should include; such as Articles (28-45) of the ICCPR.<sup>285</sup>

With the goal to ensure enforcement of the ICCPR, the Human Rights Committee receives reports from state parties every five years and gets into public discussions with countries. Furthermore; domestic supervision on the implementation of the Covenant is also of significant role.<sup>286</sup>

According to Christopher Harland, the importance of supervising the Covenant by domestic law refers to the fact that the Covenant covers a wide range of rights that are important to be protected since many countries are not obliged to implement IL "without domestic implementing legislations."<sup>287</sup>

Harland further quoted from Israel's report, submitted under Article (40) of the Covenant, saying that the provisions of the Covenant are not part of the Israeli internal law since the international agreements are not part of Israeli internal law and that the "Knesset generally does not legislate by way of direct reference to such agreements."<sup>288</sup>

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<sup>285</sup> See also as further examples the ICESCR, Part (IV) Articles (16-25); CRC, Part (II) Articles (42-45) and CEDAW, Part (V) Articles (17-22)

<sup>286</sup> Christopher Harland, "The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents," *Human Rights Quarterly* 2201, (February 2000): 187-188.

<sup>287</sup> Ibid, 189.

<sup>288</sup> Ibid, 226.

Reviewing the report submitted by Israel in 2003 on civil and political rights situation, the Human Rights Committee highlighted a group of concerns Israel failed to implement.<sup>289</sup>

The Committee emphasized applicability of the ICCPR in the OPT,<sup>290</sup> rejecting the derogation of some provisions of the Covenant on pretexts of the existence of a state of emergency, such as for example Article (12) Paragraph (3); Article (19) Paragraph (3) and Article (21) Paragraph (3).<sup>291</sup>

The Committee further expressed concern over the use of oppressive measures of the Israeli soldiers, including using Palestinians as human shields during military operations in conducting house-to-house searches.<sup>292</sup>

With regard to the enforcement of the CRC, the Committee on Convention<sup>293</sup> obliges states parties to present reports on the situation of child human rights within their jurisdiction.

But it seems that the self-reporting mechanism is yet a problem facing the treaty-based bodies that monitor states' performance in human rights protection<sup>294</sup> for it gives states an opportunity to ignore certain violations of child human rights.

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<sup>289</sup> Concluding Observations of the Human Rights Committee: Israel, 21, 8, 2003 (CCPR/CO/78/ISR), available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument).

<sup>290</sup> Ibid, Paragraph (11).

<sup>291</sup> Ibid, Paragraph (12).

<sup>292</sup> Ibid Paragraph (17).

<sup>293</sup> Committee on the Rights of the Child is a body, consisting of 10 internationally elected independent experts on children's rights. See Article (43) of the CRC.

<sup>294</sup> Prado, Ibid, 493.

The self reporting mechanism could have helped Israel to ignore giving information about the Palestinian children in the OPT though acknowledging applicability of treaties on a territory is deemed a positive step towards implementation of its provisions. Israel presented its report on the situation of child human rights in the year 2000, seven years later than it was scheduled to. Israel, nonetheless; excluded the situation of Palestinian children from its report and ignored the many calls by the committee to present such information on allegations it is no longer responsible for the Palestinian children after the establishment of the PA. Israel's claims can simply be refuted by the fact that it continued to detain Palestinian children after the signing of the Oslo Accords. Furthermore; Israel applies its laws on the Palestinian land, where Jewish settlers reside and Israel considers its citizens; and so, Israel "recognizes the applicability of the CRC to the Occupied Territories, but on the basis of nationality, rather than territory, as required by the Convention."<sup>295</sup>

Generally, reviewing reporting information, submitted on Israel by treaty bodies and special procedures, the Human Rights Council's Working Group on the Universal Periodic Review in 2008, stressed all committees' concern about Israel's exclusion of the Palestinian Territory from its reports, confirming Israel's obligations to include population of all territories under its "effective control" upon each treaty.<sup>296</sup>

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<sup>295</sup> Hanieh, Ibid, 28-30.

<sup>296</sup> Human Rights Council, Working Group on the Universal Periodic Review, "Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1," 3<sup>rd</sup> Session, Geneva, (1-15 December 2008): Paragraph (1).

### **3.3.3 External Pressure**

With the development of international relations, many parties have become involved in the process of enforcement of human rights that became a universal interest concerning not only the country which observes such violations, but also the entire world.

This development rises from the fact that the contemporary international relations look at human rights as a global civilized behaviour and a moral value.<sup>297</sup>

This section is to consider means, other than the UN Charter instruments and conventional mechanisms, used with the goal to enforce human rights in a certain country. They include foreign pressures and the work of non-governmental organizations concerned with human rights protection.

#### **3.3.3.a State Conditionality**

The international relations of states allow the use of assurances amongst countries as a means to protect human rights.<sup>298</sup>

Nowadays and upon current foreign policy of states, powerful countries give themselves the right to impose conditions for their relations with the less powerful countries. Human rights enforcement became one of the main conditions to ensure

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<sup>297</sup> See Jack Donnelly, "Human Rights: A New Standard of Civilization?" *International Affairs: Royal Institute of International Affairs*. 74-1, (January 1998): 1-24.

<sup>298</sup> International Commission of Jurists, "Diplomatic Assurances against Torture," AIRE Center Conference on Torture and Terrorism, Eminent Jurists Panel: Terrorism, Counter Terrorism and Human Rights, (February 1, 2006): available at: <http://ejp.icj.org/IMG/UKHRWSubmission2.pdf>.

political reform and establishment of democracy. The USA had used this policy many times by pressing the World Bank to suspend or delay funds for certain countries, citing human rights violations.<sup>299</sup>

The European Union's (*hereinafter EU*) conditionality is, meanwhile; linked to concepts of good governance, sovereignty of law and democracy. Upon these conditions, the EU gives itself the right to suspend a cooperation deal with a country, proved to have violated human rights in someway.<sup>300</sup>

Considering human rights enforcement as an integral part of its foreign policy, the EU in the early 1990s introduced the "Human Rights Clause" in its bilateral cooperation, trade and partnership agreements,<sup>301</sup> providing "a mechanism by which the Community could, as a last resort, suspend or terminate agreements,"<sup>302</sup> and opening "room for political conditionality within the Euro-Mediterranean Partnership,"<sup>303</sup>

The Human Rights Clause is, meanwhile; deemed as a new model for international relations and cooperation of the EU that is no longer willing "to exert political hegemony."<sup>304</sup>

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<sup>299</sup> David P. Forsythe, "The United Nations, Human Rights and Development," *Human Rights Quarterly* 19, (2 May 1997): 346

<sup>300</sup> See Dorothee Schmidt, "The Use of Conditionality in Support of Political, Economic and Social Rights: Unveiling the Euro-Mediterranean Partnership's True Hierarchy of Objectives?" *Mediterranean Politics* 9-3, (Autumn 2004): 404.

<sup>301</sup> Vaughne Miller, "The Human Rights Clause in the EU's External Agreements," *Research Paper, House of Commons Library*, (16 April 2004): 9, available at: [www.parliament.uk/commons/lib/research/rp2004/rp04-033.pdf](http://www.parliament.uk/commons/lib/research/rp2004/rp04-033.pdf).

<sup>302</sup> Miller, *Ibid*, 11.

<sup>303</sup> Schmidt, *Ibid*, 404.

<sup>304</sup> Der Chin-Horng, "The Human Rights Clause in the European Union's External Trade and Development Agreements," *European Law Journal* 9-5, (December 2003): 700.

In this concern, some scholars consider that preferential trade agreements can play a significant role in the enforcement of human rights when they supply "hard standards that tie agreement benefits to member compliance with specific human rights principles."<sup>305</sup>

Moreover and as more countries have become more interested in "humanitarian intervention", this concept was developed to also mean physical intervention of a third party with the goal to protect civilian population against atrocities of an oppressive party, such as bringing international forces or simply international monitors to areas of conflict. This action has become welcomed world wide under the term of "peacekeeping."<sup>306</sup>

The deployment of international monitors in Hebron, following the 1994 massacre conducted by a Jewish settler against Muslim worshippers<sup>307</sup> was made possible due to a group of calls for the presence of a third party in the disputed Palestinian town as to protect Palestinian civilians against such future atrocities.<sup>308</sup>

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<sup>305</sup> Emilie M. Hafner-Burton, "Trading Human Rights: How Preferential Trade Agreements Influence Government Repression," *International Organization* 59-3, (Summer 2005), 594.

<sup>306</sup> Lynn Welchman, "International Protection and International Diplomacy: Policy Choices for Third-Party States in the Occupied Palestinian Territories," in *International Human Rights Enforcement: The Case of the Occupied Palestinian Territories in the Transitional Period*, Ibid, 226.

<sup>307</sup> On February 25, 1994, Barouch Goldstein, an Israeli-American Jewish, off-duty Israeli reservist captain and member of the extremist Kach movement, opened fire on Muslim worshippers inside the Ibrahimi Mosque in the southern WB town of Hebron, killing dozens of people and wounding more than hundred others. Goldstein was also killed in the attack by the angry worshippers.

<sup>308</sup> For further discussion on the issue, see Lynn Welchman, Ibid, 225-277.

### **3.3.3.b NGOs Work**

Lately, the ICRC and non-governmental organizations have played a significant role in urging states to respect and abide by the IHRL during armed conflicts.<sup>309</sup>

David Weissbrodt of the University of Minnesota argues that international human rights non-governmental organizations such as Amnesty International Americas Watch, the International Commission of Jurists as well as the ICRC are playing a significant role in safeguarding human rights during situations of armed conflict, especially tensions not covered by the IHL, with the goal to fill the "vacuum left by the failure of the UN SC and other international mechanisms to deal successfully with armed conflict situations."<sup>310</sup>

Reasons for those non-governmental organizations to use IHL to protect Human Rights were put by Weissbrodt in five points. First, the number of countries that ratified the Fourth Geneva Conventions of 1949 is yet bigger than those, who ratified the ICCPR; second, the provisions of IHRL are not as specific as those of the IHL; third, abuses, such as arbitrary killings, ill-treatment and detentions; are more likely to take place during armed conflicts which is covered by IHL, whilst IHRL can be suspended in certain cases of emergency; four, during armed conflicts military

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<sup>309</sup> David Weissbrodt, "Humanitarian Law in Armed Conflict: The Role of International Nongovernmental Organizations," *Journal of Peace Research* 24-3, Special Issue on Humanitarian Law of Armed Conflict, (September 1987): 303.

<sup>310</sup> Ibid,p297.

officials take IHL more seriously than IHRL; fifth, IHRL focuses mainly on the responsibilities of governments, whilst IHL addresses both sides of the conflict.<sup>311</sup>

A survey for the Human Rights Quarterly in 1998 divided non-governmental organizations into four categories, according to their main activities in the field of human rights, including the fields of education, standard-setting, monitoring compliance with international standards, and enforcement.<sup>312</sup>

The survey found that the organizations in the Global South "tend to pursue a wider range of goals than did Northern NGOs" as they focus mainly on advancing for adoption of more and new human rights standards, and promoting the rights in social, economic and cultural development and transforming the national institutions towards protection of human rights, whilst the more industrialized Northern ones mainly report that their main goals were promoting or protecting human rights.<sup>313</sup>

Some scholars consider the participation of NGOs in the process of the treatment of the bodies of treaties is yet welcomed as it provides a new source of information and so making easier the process of analysis and reaching conclusions as they present alternative reports to those presented by their governments to the relevant human rights committees with the goal to bring attention to possible inaccuracies in the governments' reports.<sup>314</sup>

<sup>311</sup> Ibid, 297-298.

<sup>312</sup> Summary of the survey results are found in: Jackie Smith, et al., "Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s," *Human Rights Quarterly* 20-2, (May 1998): 379-412.

<sup>313</sup> Smith, Ibid, 387-389.

<sup>314</sup> Scott Leckie, "The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform," in *The Future of UN Human Rights Treaty Monitoring*, ed. Philip Alston and James Crawford, Cambridge University Press, (2000): 133-134.

## CHAPTER FOUR

### **4. Palestinian Authority Human Rights Obligations**

As previous sections have shown that the Israeli redeployment in the OPT and the creation of the PA did not bring any changes on the status of the Palestinian Territory as occupied territory, it is worth to consider new levels of responsibility for the implementation of human rights in the OPT that are created by the Oslo Process.

With the launching of the peace process, the Palestinians and Israel have entered a new era of mutual recognition that was supposed to end the Israeli occupation of the Palestinian Territory in preparation to establish the Palestinian State.

The transition from the state of occupation to statehood, according to the Oslo Accords, was agreed upon to take place in several stages, starting with the redeployment of the Israeli troops in the GS and Jericho area. The redeployment process in the WB should have finished by 1997 as negotiations on the final status issues were to begin in 1996.

However; the failure of the peace process to achieve a Palestinian state or even to start negotiations on the final status issues, had shaken the stands of the PA and weakened support amongst Palestinians to the peace process in general.

In return, the PA insisted to protect the legitimacy of its stands and existence that appeared in the conflict between Fatah, which dominates the PA, and the other factions, especially Hamas and the Islamic Jihad that oppose the Oslo process. This

conflict, however, obliged the PA to take oppressive measures against members of other anti-Oslo factions, reporting human rights abuses.<sup>315</sup>

This Chapter is to get closer to the human rights obligations of the PA in areas under its jurisdiction. The PA's assumption of civil responsibilities in the Palestinian Territory has imposed on it certain obligations with regard to the implementation of IL.

The Chapter will first tackle the PA's human rights obligations since the signing of the Oslo agreements with reference to the status of human rights in the Palestinian BL and then to move to discussing responsibility scenarios in light of the situation that the Oslo Accords created in the OPT.

#### **4.1 Palestinian Authority Obligations under Oslo**

In order to understand the PA's human rights obligations in the OPT, one has to understand the general legal status and responsibilities of the PA under Oslo as well, since human rights obligations are only part of these obligations and defined by them.

The Oslo Accords have created a complicated situation in the OPT by dividing responsibilities between Israel and the PA without drawing a clear line between the responsibilities of each side which brought to the view a situation of correlated responsibilities.

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<sup>315</sup> See Khalil Shikaki, "The Peace Process, National Reconstruction, and the Transition to Democracy in Palestine," *Journal of Palestine Studies* 25 (2) (1996): 5-20

The first part of this section will give a general look at the main points of concern of some of the signed Israeli Palestinian agreements with their consequences on ground and the second part will discuss the Palestinian undertakings to respect international human rights norms.

#### **4.1.1 Palestinian Authority Legal Status**

The establishment of a Palestinian state was the main goal for the Palestinians to get involved in the peace process with Israel that started with the signing of the DoP in 1993. This goal was confirmed by late Yaser Arafat<sup>316</sup> in an article in the New York Times when he said that the Palestinians' goal of the peace process is mainly to establish "an independent and viable Palestinian state on the territories occupied by Israel in 1967."<sup>317</sup>

In his article, Arafat further said the Palestinian vision of peace is the ending of occupation, the sharing of Jerusalem as one open city and capital of two states and enjoyment of "mutually beneficial economic and social cooperation."<sup>318</sup>

Following is a general look at the principal points in some of the agreements, signed between Israel and the PLO in the nineties:

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<sup>316</sup> Yaser Arafat, who died on 11 November 2003, was Chairman of the PLO and he was elected President for the PA in 1996.

<sup>317</sup> Yasir Arafat, "The Palestinian vision of Peace," *The New York Times*, February 3, 2002. available at: <http://www.nytimes.com/2002/02/03/opinion/03ARAF.html?pagewanted>.

<sup>318</sup> Ibid.

#### **4.1.1.a Declaration of Principles**

Following a series of secret negotiations in the wake of the 1991 Madrid Conference, Israel and the PLO signed the DoP on Interim Self-Government Arrangements on September 13, 1993.<sup>319</sup> The DoP was signed in a ceremony, hosted by former US President Bill Clinton in Washington. The PLO was represented in the ceremony by Yaser Arafat, whilst late Prime Minister Yitzhak Rabin represented Israel.

Several days before the signing of the DoP, Israel and the PLO exchanged letters of recognition, in which the PLO recognized Israel and denounced terrorism and violence; whilst Israel recognized "the PLO as the representative of the Palestinian people and commence negotiations with the PLO within the Middle East peace process."<sup>320</sup>

In fact the signing of the DoP has opened way for certain irreversible facts that Israel had to live with, including its recognition of the political rights of the Palestinian people, recognition of the PLO as representative of the Palestinian people and recognition of the territorial unit of the WB and the GS.<sup>321</sup>

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<sup>319</sup> Declaration of Principles on Interim Self-Government Arrangements on September 13, 1993; available at: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm>.

<sup>320</sup> The letters of recognition can be found on the official web site of the Israeli Foreign Ministry at: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israel-PLO+Recognition+-+Exchange+of+Letters+betwe.htm>.

<sup>321</sup> Khalil Shikaki, "The Future of the Peace Process and Palestinian Strategies," *Journal of Palestine Studies* 26-1 (1996): 82-83.

The main points the DoP included were the establishment of a limited autonomous authority in the WB and the GS for five years;<sup>322</sup> launching negotiations on the final status of the WB and the GS by the third year of the five-year transitional period,<sup>323</sup> with the goal to reach settlement basing on the SC Resolutions No. (242 and 338),<sup>324</sup> agreement on limited Israeli withdrawal from Gaza and Jericho; and limited transfer of responsibilities to the Palestinians, including the fields of education, health, culture, social affairs, taxation and tourism; in addition to building a Palestinian police force.<sup>325</sup>

Nine months after the implementation of autonomy, direct elections were to be run in the WB and the GS to elect the Palestinian autonomous council<sup>326</sup> that was to be preceded by an Israeli redeployment in the WB and the GS.<sup>327</sup>

Article (IV) of the Declaration stipulates that the "Jurisdiction of the Council will cover WB and GS territory, except for issues that will be negotiated in the permanent status negotiations. The two sides view the WB and the GS as a single territorial unit, whose integrity will be preserved during the interim period."

The responsibilities of the PA<sup>328</sup> were only to maintain public order with the help of a Palestinian police unit to be established for this purpose, whilst its responsibilities

<sup>322</sup> DoP; Ibid. Article (I).

<sup>323</sup> Ibid; Article (V).

<sup>324</sup> Ibid; Article (I).

<sup>325</sup> Ibid; Article (VI).

<sup>326</sup> Ibid; Article (III).

<sup>327</sup> Ibid; Article (XIII). The first Palestinian legislative and presidential elections were held on 20 January 1996.

<sup>328</sup> The PA is also to be referred to here as the 'Council' due to the use of the term in some of the Palestinian-Israeli agreements.

do not include external security, settlements, Jerusalem or foreign relations, all of which were to remain an Israeli responsibility.<sup>329</sup>

Article (IX) of the Declaration that empowers the Council "to legislate, in accordance with the Interim Agreement, within all authorities transferred to it," gives Israel the right to object any legislation the Council adopts during the transitional period as the article stipulates in its paragraph (2) that "(b)oth parties (Israeli and Palestinian) will review jointly laws and military orders presently in force in remaining spheres."

#### **4.1.1.b Oslo II Agreement**

On 28 September 1995, the two Palestinian and Israeli sides signed the Interim Agreement, also called Oslo II Agreement,<sup>330</sup> upon which the Palestinian Territory was divided into three areas: Area A, including the main Palestinian towns, excluding Hebron<sup>331</sup>; was placed under the PA's administrative and security control; Area B, including rural areas, was placed under PA's administrative control, while security remained under joint Palestinian-Israeli control; and Area C, including settlements, border areas and Jerusalem and its neighbourhoods; was kept under full Israeli control.<sup>332</sup>

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<sup>329</sup> DoP; Article (VIII).

<sup>330</sup> Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip; available at: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm>.

<sup>331</sup> Special arrangements for the redeployment from Hebron were concluded in the Protocol Concerning the Redeployment in Hebron in 1997.

<sup>332</sup> See Article (XI) of the Oslo (II) Agreement.

Moreover; the agreement stipulates election of legislative council for the self-rule areas<sup>333</sup> and the PA, upon the agreement, should be responsible for protecting security and preventing any operations against Israel.<sup>334</sup>

As with regard to the issue of human rights, the agreement stipulates that the two sides "shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law."<sup>335</sup>

With regard to this article, some scholars argue that Israel's being an occupied state, governed by the 1907 Hague Convention and the Fourth Geneva Convention, yet continues to be responsible for the enforcement of human rights in the OPT and for ensuring that the PA respects human rights under its jurisdiction.<sup>336</sup>

#### **4.1.1.c Hebron Protocol**

Hebron was excluded in the previous agreements due to its sensitive situation that led to the signing of Protocol Concerning the Redeployment in Hebron on 17 January 1997,<sup>337</sup> upon which the southern WB town was divided into two sections: The Jewish section that includes the Old City and the Ibrahimi Mosque area was

<sup>333</sup> The first PLC was elected on 20 January 1996. In the same elections Yaser Arafat was elected President for the PA.

<sup>334</sup> See The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip: Annex I: Protocol Concerning Redeployment and Security Arrangements; available at: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT+-+Annex+I.htm#article2>.

<sup>335</sup> Oslo (II) Agreement. Article (XIX).

<sup>336</sup> Asem Khalil, 2006, *ibid*, 282-283.

<sup>337</sup> Protocol Concerning the Redeployment in Hebron; available at: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Protocol+Concerning+the+Redeployment+in+Hebron.htm>.

called Area H-2 and the Palestinian section that includes the rest of the town was called Area H-1, with the erection of Israeli checkpoints in the seam line between the two Palestinian and Israeli sections.<sup>338</sup>

The protocol, in fact, imposed very tough and complicated security arrangements with the goal to protect some hundreds of Jews, living in the center of the city, making the daily living conditions of the Palestinian residents unbearable.

Furthermore; the Protocol was viewed as bringing no change on the fact that Israel keeps its *de facto* control over the WB and the GS.<sup>339</sup>

#### **4.1.1.d Wye River Memorandum**

One of the significant agreements that was signed between the Palestinian and Israeli sides and seen as encouraging human rights abuses was the Wye River Memorandum,<sup>340</sup> signed in Washington on 23 October 1998.<sup>341</sup>

Scholars also argued that although the fundamentals of the Wye Memorandum are not different from the previous Palestinian-Israeli agreements, the memorandum yet imposes more security obligations on the PA with the goal to destroy the opposition parties to the Oslo Process.<sup>342</sup>

<sup>338</sup> See Protocol Concerning the Redeployment in Hebron, Ibid. Paragraphs (2-5).

<sup>339</sup> See; Edward W. Said, "The Real Meaning of the Hebron Agreement," *Journal of Palestine Studies*. 26-3 (1997): 31-36.

<sup>340</sup> Wye River Memorandum, October 23, 1998; available at: <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/The%20Wye%20River%20Memorandum>.

<sup>341</sup> Human Rights Watch, "An Analysis of the Wye River Memorandum," (1 November 1998). available at: <http://www.hrw.org/en/news/1998/11/01/analysis-wye-river-memorandum>.

<sup>342</sup> See; Naseer H. Aruri, "The Wye Memorandum: Netanyahu's Oslo and Unreciprocal Reciprocity," *Journal of Palestine Studies* 28-2 (1999): 17-28.

Article (II) Paragraph (C-4) on security arrangements in the memorandum urges the Palestinian police to "exercise powers and responsibilities to implement this Memorandum with due regard to internationally accepted norms of human rights and the rule of law, and will be guided by the need to protect the public, respect human dignity, and avoid harassment." However; this paragraph looks as conflicting with previous paragraphs in the same article that urge the PA to fight anti-Oslo groups under the guise of fighting terror and incitement.

Of the PA's security obligations that can be problematic to the enforcement of human rights include outlawing and combating terrorist organizations<sup>343</sup> and preventing incitement<sup>344</sup> that would require as the memorandum says, apprehending "the specific individuals suspected of perpetrating acts of violence and terror for the purpose of further investigation, and prosecution and punishment of all persons involved in acts of violence and terror." The memorandum, however; did not give definitions for violence and terror; moreover; the investigations and punishment the PA is obliged to conduct in this concern could lead to abuses to human rights, including use of torture, that are not even mentioned in the memorandum.

#### **4.1.1.e Juridical Consequences**

In fact, the Palestinian Israeli interim agreements were mainly criticized for failing to tackle the fundamental issues of refugees, Jerusalem, borders and settlements, all of which were postponed to the final status negotiations, providing

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<sup>343</sup> Wye River Memorandum; Article (II) Paragraph (A-1).

<sup>344</sup> Ibid; Article (II) Paragraph (A-3).

Israel with an opportunity to impose facts on ground as Israel did not stop imposing conditions, forcing the PA to implement the security obligations imposed by the agreements and so bringing the armed resistance to an end.

Although the DoP did not define the "future nature of the entity in the territories, or as to its future territorial jurisdiction," the PA, after assuming civil responsibilities, started playing a state-like role by effective control, bearing a kind of responsibility.<sup>345</sup>

The accords have kept Israel's military control over the Palestinian Territory. Article (III) paragraph (1) of the Agreement on the GS and the Jericho Area of May 4, 1994,<sup>346</sup> stipulates the transfer of the civil administration responsibilities to the PA, allowing Israel in Article (V) paragraph (3-b) to "exercise its authority through its military government, which for that end, shall continue to have the necessary legislative judicial and executive powers and responsibilities, in accordance with International Law."

Eyal Benvenisti, meanwhile, explains that the reference to IL in this article as a source of power means reference to the law of occupation.<sup>347</sup>

Benvenisti, further elaborates on the occupant's obligations towards protected persons upon Article (47) of the Fourth Geneva Convention that grants protected persons inviolable rights that cannot be deprived "by any change introduced .... nor

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<sup>345</sup> Eyal Benvenisti, "The Status of the Palestinian Authority," in *The Arab-Israeli Accords: Legal Perspectives*, ed. Eugene Cotran and Chibli Mallat, (London: Kluwer Law International, 1996), 48.

<sup>346</sup> Agreement on the Gaza Strip and the Jericho Area, May 4, 1994; available at: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Agreement+on+Gaza+Strip+and+Jericho+Area.htm>.

<sup>347</sup> Benvenisti, 1996, Ibid 50.

by any agreement concluded between the authorities of the occupied territories and the Occupying Power."<sup>348</sup>

Despite stipulating the transfer of powers from the Israeli military government and its Civil Administration to the Palestinian Council, the DoP talked about dissolution of the Civil Administration but not the military government, which would remain as the upper hand in the Territory. Article (VII) paragraph (5) of the Declaration provides; "After the inauguration of the Council, the Civil Administration will be dissolved, and the Israeli military government will be withdrawn."

Joel Singer<sup>349</sup> depended on this article to declare his argument that the PA is replacing the "Civil Administration of Israel."<sup>350</sup> Whether Singer's argument that the PA is operating as the Civil Administration can be adopted as correct or not; what is proved here is that the PA is a non-sovereign body.

Singer argues that the DoP brought no change on the status of the territory as long as the Israeli military authority would remain the source of authority in the territory, upon which the PA would operate. Moreover; the exclusion of a group of issues during the interim stage and delaying their discussion until talks on permanent status was meant as Singer admitted to avoid any Palestinian claims to these issues during the transitional period.<sup>351</sup>

<sup>348</sup> Ibid, 50 n.11.

<sup>349</sup> Joel Singer was the Legal Advisor of the Israeli Foreign Ministry and member of the Israeli negotiations team with the Palestinians.

<sup>350</sup> See, Joel Singer. "The Declaration of Principles on Interim Self-Government Arrangements: Some Legal Aspects," *Justice* 1 (1994): 4-13. In his article Singer notes that his views in the article do not necessarily reflect those of the Israeli government.

<sup>351</sup> Singer. Ibid, 6.

According to Singer, three criteria limit the jurisdiction of the Palestinian Council during the transitional period:<sup>352</sup> First; territorially, the Council is not supposed to control all the WB and the GS upon Article (IV) of the DoP; second; Israelis are excluded from the Palestinian jurisdiction and law; third; the PA's functions are limited to the powers transferred to it, whilst many other issues, including external security and foreign relations, are excluded from the Council's jurisdiction and remained under Israeli control.

The result then as Singer concluded, is "that the jurisdiction of the Council shall be limited to a specific territory. Within that territory its jurisdiction shall only extend to non-Israelis, situated outside the Israeli settlements and military locations, and will apply only in spheres which have been specifically transferred to the Council."<sup>353</sup>

#### **4.1.2 Palestinian Authority and International Human Rights Standards**

The Palestinians' undertaking to respect international human rights norms is not new. In 1977, the PLO was allowed full membership in the Economic and Social Commission for Western Asia (ESCWA), which recommended the UN ECOSOC in April 1977 to amend ESCWA's terms of reference for this purpose. The ECOSOC responded positively in July 1977.<sup>354</sup>

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<sup>352</sup> Ibid, 7.

<sup>353</sup> Ibid, 7.

<sup>354</sup> The Permanent Observer of Palestine to the UN, official web page: <http://www.un.int/palestine/seventies.shtml>.

Moreover; articles (157) and (158) of the PLO Revolutionary Penal Code of 1979 include provisions ensuring protection of the wounded and the sick during armed conflicts and punishment of those who try to prevent them their right to life.

In 1982 the PLO demanded applying for the signing of the Fourth Geneva Convention and the 1977 Additional Protocols.<sup>355</sup> The Palestinian Declaration of Independence of 1988 expressed the commitment of the coming Palestinian State to human rights norms,<sup>356</sup> and a committee was authorized by the Palestinian National Congress, which was formed to represent the Palestinians in the world, started work on drafting a constitution.<sup>357</sup>

On May 4, 1989, following the signing of the Declaration of Independence, the PLO Executive Committee confirmed commitment to the Fourth Geneva Conventions of 1949 and Additional Protocols of 1977. The PLO's official application to adhere to the Conventions and Protocols came in a letter, dated on June 21, 1989 to the Swiss Federal Department of Foreign Affairs.<sup>358</sup> The letter was directed by the Permanent Observer of Palestine to the UN Office at Geneva.

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<sup>355</sup> Human Rights Situation in Palestine and Other Occupied Arab Territories, Human Rights Council, A/HRC/8/17, 6 June 2008, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.17.doc>.

<sup>356</sup> See Section (2.2.1.a) of this study.

<sup>357</sup> Nathan Brown, *The Third Draft Constitution for a Palestinian State: Translation and Commentary* (Palestinian Center for Policy and Survey Research, 2003), 1.

<sup>358</sup> The letter can be viewed at the official web page of the Permanent Observer of Palestine to the UN: <http://www.un.int/palestine/tenth/expmeet.html>.

But the Swiss Federal Council on September 13, 1989, replied that due to the absence of a State of Palestine, "it was not in a position to decide whether the letter constituted an instrument of accession."<sup>359</sup>

Shortly after the signing of the DoP in 1993, the PLO in Tunis decreed commitment to protecting human rights.<sup>360</sup>

In the same year, Yaser Arafat confirmed to an Amnesty International delegation the PA's respect of human rights norms that will be incorporated in the Palestinian domestic laws. The UN Human Rights Council cited that the PLO chairman Yaser Arafat had repeatedly reiterated his government's commitment to the respect of international human rights standards to representatives of Amnesty International in 1993 and 1996.<sup>361</sup>

Arafat further briefed the Amnesty delegation in 1993 on a decree, he signed, to establish a higher commission for human rights to supervise the performance of the Palestinian government in this regard to ensure respect of human rights and rule of law.<sup>362</sup>

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<sup>359</sup> The answer of the Swiss Federal Council to the PLO's letter can be found at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>.

<sup>360</sup> Irwin Cotler, "Palestinians Undertakings to Respect Human Rights," *The Palestinian Human Rights Monitor*, (1997).

<sup>361</sup> Human Rights Situation in Palestine and Other Occupied Arab Territories, Human Rights Council, A/HRC/8/17, 6 June 2008, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.17.doc>.

<sup>362</sup> Fateh Azzam, "The Palestinian Independent Commission for Citizens' Rights," *Human Rights Quarterly* 20-2 (1998): 340.

Upon Arafat's decree,<sup>363</sup> the Independent Commission for Human Rights<sup>364</sup> was established in 1993 and the decree was published in the official Gazette in 1995.<sup>365</sup> The Commission that started its activities in the beginning of 1994, was set to fulfill the following duties: "to follow-up and ensure that different Palestinian laws, by-laws and regulations, and the work of various departments, agencies and institutions of the State of Palestine and the PLO meet the requirements for safeguarding human rights".<sup>366</sup>

Since it exercises state-like responsibilities in the Palestinian Territory, the PA is also obliged under international customary law to adhere to human rights norms,<sup>367</sup> especially as the Universal Declaration of Human Rights or some of its provisions have become part of International Custom<sup>368</sup> as considered by the Teheran International Conference on Human Rights in 1968 that urged in its Proclamations "all peoples and governments to dedicate themselves to the principles enshrined in the Universal Declaration of Human Rights,"<sup>369</sup> that can be viewed as a contribution to International Customary Law.<sup>370</sup>

Moreover; the incorporation of provisions of the Universal Declaration in domestic laws of states proves the argument that the Declaration has become

<sup>363</sup> An English translation for the (Decree No. 59 of 1994) is available at: <http://www.piccr.org>

<sup>364</sup> Upon its establishment, the Commission was named the Palestinian Independent Commission of Citizens' Rights, but changed later on to the Palestinian Commission for Human Rights.

<sup>365</sup> The Palestinian BL referred to the Commission in Article (31).

<sup>366</sup> The Official web page of the Independent Commission for Human Rights: <http://www.ichr.ps/etemplate.php?id=6>.

<sup>367</sup> Cotler. *Ibid.*

<sup>368</sup> Vojin Dimitrijevic, *Customary Law as an Instrument for the Protection of Human Rights* (Milano: Istituto Per Gli Studi Di Politica Internazionale (ISPI), 2006), 8.

<sup>369</sup> See Proclamation of Tehran: Proclaimed by the International Conference on Human Rights at Teheran on 13 May 1968; available at: [http://www.unhchr.ch/html/menu3/b/b\\_tehern.htm](http://www.unhchr.ch/html/menu3/b/b_tehern.htm).

<sup>370</sup> Dimitrijevic, *Ibid.*, 8.

customary law. There is even an argument that some provisions of the Declaration have become *jus cogens* norms.<sup>371</sup>

Furthermore; in its membership in the Euro Mediterranean Partnership<sup>372</sup>, the PA committed itself to respect international human rights norms as set by the Partnership's Declaration, known as the Barcelona Declaration of 1995, upon which member states should "act in accordance with the UN Charter and the Universal Declaration of Human Rights, as well as other obligations under international law ... respect human rights and fundamental freedoms and guarantee the effective legitimate exercise of such rights and freedoms, including freedom of expression, freedom of association for peaceful purposes and freedom of thought, conscience and religion ... without any discrimination on grounds of race, nationality, language, religion or sex(.)"<sup>373</sup>

In general, the human rights situation in the OPT is worth a long stop and discussion since the Palestinians' view of human rights is special and quite different from the general world view to the issue.

At a time the world is setting up common standards and norms for human rights and is increasingly pushing towards respect for and enforcement of these norms, the Palestinians continued to face daily human rights abuses, whether these abuses are committed by Israel or the PA in both the WB and the GS.

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<sup>371</sup> Ibid, 9.

<sup>372</sup> The Euro Mediterranean Partnership, known as Barcelona Process, is a framework of political, economic and social relations between the European Union member states and countries of the Southern Mediterranean.

<sup>373</sup> Barcelona Declaration adopted by the Euro Mediterranean Conference on 27-28 November 1995, available at: [http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc\\_124236.pdf](http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc_124236.pdf).

The gloomy atmosphere, overwhelming the human rights situation in the OPT has encouraged scholars to argue that it is impossible for the Palestinians to view human rights neutrally.<sup>374</sup> For how can the Palestinians believe in the justice of international human rights norms whilst the world legitimizes the occupier's abuses as self defense and describes the resistance actions of the occupied as terrorist acts?!!

The Palestinians now believe that only power and interests and not human rights norms are the main motivators for the world external relations. The human rights that should be basis for the achievement of self determination and freedom have lost credibility amongst Palestinians.<sup>375</sup>

This view is, meanwhile, confirmed by the double-standard policy seen in the world nowadays as some countries are punished for committing human rights violations, whilst other countries are not punished for their grave such breaches.

The “power and interests” motivation that led to the double-standard world policy in considering human rights was witnessed in the Palestinian case, especially during the deterioration of situation in the OPT in 2002 after Israel stopped seeing Yaser Arafat as partner in the peace process and the world powers started putting pressures on Arafat and the PA.

The world powers that had long closed eyes on the violations being committed by the PA, started pressuring the PA for reforms and fighting corruption. The repeated

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<sup>374</sup> See Asem Khalil, "Palestinians and 'Human Rights': Impossible Neutrality", *Mawared*, 12, (2009).

<sup>375</sup> Ibid, 37

calls on the PA to draft a constitution along with introducing financial and administrative reforms in its institutions were viewed by Palestinians as no more than means of pressure to be forced to adhere to Israel's demands and give the concessions it requires.

The real reason behind these calls was undoubtedly not the achievement of transparency and accountability as was declared, but it was in fact weakening the stands and legitimacy of Arafat and the PA to be shown as violators of human rights and consequently Arafat was sidelined to give more authority to the newly created post of prime minister.

#### **4.2 Human Rights in Palestinian Law**

As the previous section of the Chapter had shown, the Palestinians have many times expressed interest in adhering to international human rights norms even long before the establishment of the PA.

This section of the chapter will first check on the status of human rights in the Palestinian BL and then it will look at some of the human rights violations observed in the OPT as result of measures taken by the PA.

The focus on the situation of human rights in the BL in this section stems from the fact that the BL constitutes basis that the rest of domestic laws should abide by without violating.<sup>376</sup>

#### **4.2.1 Human Rights in Basic Law**

Upon international standards, the PA cannot sign international treaties since it is not yet a sovereign state, however, the PA has committed itself to abiding by international human rights standards in Article (10) of the 2003 amended BL<sup>377</sup> that provides in paragraph (1) "Basic human rights and liberties shall be protected and respected." Paragraph (2) of the Article, further urges the PA to "work without delay to become a party to regional and international declarations and covenants that protect human rights."

This article had been drafted in a different way in the Draft BL of 1994<sup>378</sup> that referred to the Universal Declaration of Human Rights with regard to human rights and freedom. In Article (8), the PA committed itself to adhere to international treaties, including, in addition to the Universal Declaration, the ICCPR, the ICESCR and other conventions.

The PA's commitment to the international human rights conventions was also stipulated in the 1996 Draft BL that was drafted in cooperation between AL HAQ

<sup>376</sup> Yasser Alawna, *Human Rights in the Palestinian Basic Law* (Ramallah Center for Human Rights Studies, 2003), 7 (Arabic).

<sup>377</sup> The 2003 Amended Palestinian BL is available at: <http://www.palestinianbasiclaw.org/2003-amended-basic-law>. The 2005 amendment to the BL is available at: <http://www.palestinianbasiclaw.org/2005-amendments>.

<sup>378</sup> 1994 Draft BL – draft by PLO, available at: <http://www.palestinianbasiclaw.org/1994-plo-basic-law-draft>

institution and Birzeit University Institute of Law. Article (3) of Title (II) "Fundamental Rights and Freedoms", mentioned more conventions that were not mentioned in the 1994 draft, such as CEDAW and the Statute of the ILO. The article meanwhile, urged the PA to work for joining these conventions.<sup>379</sup>

The PA's adherence to international human rights was also mentioned in Article (8) of the Draft Palestinian Constitution that stipulated the PA's recognition of the fundamental rights set in the Universal Declaration of Human Rights, the ICCPR, the ICESCR and other international conventions. However, the article was criticized for not including provisions forcing all the PA security apparatuses to act upon the international human rights conventions.<sup>380</sup>

The 2003 BL also included articles ensuring the PA's commitment to human rights. Title Two – Public Rights and Liberties –, in fact, provides basis for a group of human rights that encouraged scholars to assume that the BL was the "most liberal in relation to constitutions of Arab World."<sup>381</sup> However; the BL should be tested with regard to how extent it can defend rights and not with the number of freedoms it includes.<sup>382</sup>

Article (9) ensures equality of Palestinians "before the law and the judiciary, without distinction based upon race, sex, color, religion, political views or disability."

<sup>379</sup> See "Human Rights in Draft Constitution for the National Authority in the Transitional Period and the Proposed Palestinian Interim Draft Basic Law," Al HAQ and Birzeit University Institute of Law, Ramallah, (1996).

<sup>380</sup> Ibid, 38

<sup>381</sup> Asem Khalil. "Which Constitution for the Palestinian Legal System?" (PhD diss., Roma: Pontificia Universita Lateranese, 2003), 101. For further comments on the BL, see Nathan Brown, 2003, Ibid.

<sup>382</sup> Nathan J. Brown. *Palestinian Politics after the Oslo Accords: Resuming Arab Palestine*. (London: University of California Press, 2003), 76-77.

Title Two further grants the Palestinians civil rights, including personal freedom, immunity against torture and arbitrary and unlawful arrest, fair trials,<sup>383</sup> and freedoms of religion, expression and movement.<sup>384</sup> It also grants the Palestinians a group of economic, social and cultural rights, including protecting private property,<sup>385</sup> organizing health and social insurance services,<sup>386</sup> right to housing, education and work.<sup>387</sup> It further guarantees the people's right in establishing media means.<sup>388</sup>

Article (31) urged for the establishment of "(a)n independent commission for human rights" upon "a law that will specify its formation, duties and jurisdiction." But such a law that is never passed by the Palestinian Legislative Council (*hereinafter PLC*), and the commission continued working through its internal bylaws on basis of respect of human rights, good governance and democracy.<sup>389</sup> The reports of this commission shall be submitted to the PA President and to the PLC.<sup>390</sup>

However; these rights in the BL can easily be restricted or derogated during states of emergency as appears in Article (101) of the BL that grants the PA President the right to halt these rights upon a decree in cases of "threat to national security caused by war, invasion, armed insurrection or in times of natural disaster," for a period of time limited to no more than renewable thirty days with the consent of the

<sup>383</sup> Palestinian BL. Ibid. Articles (11-15).

<sup>384</sup> Ibid. Articles (18-20).

<sup>385</sup> Ibid. Article (21) Paragraph (3).

<sup>386</sup> Ibid. Article (22) Paragraph (1).

<sup>387</sup> Ibid. Articles (23-25).

<sup>388</sup> Ibid; Article (27).

<sup>389</sup> The Commission's official web site: <http://www.ichr.ps/etemplate.php?id=2&lid=2>.

<sup>390</sup> BL, Article (31)

PLC. Article (111), however; excludes "fundamental rights and freedoms" during a declared state of emergency.

Meanwhile, despite the existence of many provisions in the BL that ensure respect for international human rights norms, there can be observed some failures in this regard. Some provisions appear as vague and bear different interpretations, making some scholars to believe that the reference to human rights norms in the BL as no more than decorous, presenting no actual guarantees for these freedoms and rights.<sup>391</sup>

The BL seems to have focused on the civil and political rights more than the economic, social and cultural rights, for there is no mention in the BL for certain fundamental rights in this regard, including the rights to health that was confirmed in earlier drafts. The 1996 draft Article (39) stressed every person's right to enjoy the highest attainable physical and mental health.

The only mention to the right to health in the 2003 draft BL was in Article (16) that banned the conduct of "any medical or scientific experiment on any person without prior legal consent," in addition to that "medical examination, treatment or surgery" for any person should be performed according to law. Moreover; the Article stipulates that "(t)ransplantation of human organs and new scientific developments shall be regulated by the law in order to serve legitimate humanitarian purposes." Article (22) paragraph (1) talked about ensuring health insurance.

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<sup>391</sup> See Alawna. Ibid. 13.

With regard to the right to culture, some scholars considered the absence of provisions, ensuring cultural rights in the BL, as a big failure due to the high importance of the cultural issue in the lives of nations.<sup>392</sup> In fact all previous drafts of the BL and draft constitution ignored the right to culture.

The BL also ignored the right to life, which was mentioned in earlier drafts of the BL. The 1994 draft confirmed the right to life in Article (9) providing, "Every person has the right to life." Article (6) of title (II) of the 1996 draft also grants the right to life and bans death penalty.

Another problem that is observed in the BL concerns its inability to ensure separation of the three legislative, executive and judicial powers since the authority of the executive power over the legislative and judicial powers is quite obvious.<sup>393</sup>

The interference of the executive power in the authorities of the legislative power has, in fact, weakened its performance and sabotaged the work of the PLC.

One of the PLC members criticized its performance in 1997. Ziad Abu Amro<sup>394</sup> accused the PLC of failing to accomplish its objectives since its inauguration in 1996.<sup>395</sup> The PLC's failures, according to Abu-Amr, include supervision of the executive authority and enacting "substantive legislation" and checking abuses, all of which led to the erosion in the popularity of the Council.<sup>396</sup>

<sup>392</sup> Ibid. 33.

<sup>393</sup> Ibid. 45-49.

<sup>394</sup> Ziad Abu Amr was chairman of the Political Committee of the PLC.

<sup>395</sup> Ziad Abu-Amr. "The Palestinian Legislative Council: A Critical Assessment", *Journal of Palestine Studies* 26-4, (1997): 90.

<sup>396</sup> Ibid. 90-93.

Abu-Amr, meanwhile refers the PLC's failures to several reasons including the unclear mandate of the council; the inability of the Palestinians to perform smooth "transition from the logic of 'revolution' and exile to the logic of 'state' and civil society;" the attempt of the executive power to protect itself by expanding its powers and marginalizing the legislative power that finds it difficult to challenge the executive power due to the political composition of the council.<sup>397</sup> Moreover; the Israeli measures, preventing the Gaza legislators from reaching the WB to attend the PLC's meetings led to the failure of the Council in several times to realize the required quorum for convening.<sup>398</sup>

#### **4.2.2 Palestinian Authority Human Rights Violations**

The PA limited the functions of its police forces in Article (84) of the BL "to defending the country, serving the people, protecting society and maintaining public order, security and public morals," and that their duties should remain "within the limits prescribed by law, with complete respect for rights and freedoms."

However; in implementation of the security obligations of the Oslo Accords, the PA committed several violations, including political detentions and torture in areas under its jurisdiction.

As the Israeli troops redeployed in the OPT in implementation of the Oslo Accords, there were an urgent need for another force to assume power as to keep law

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<sup>397</sup> Upon the 1996 elections, Fatah Movement dominated the PLC and so it worked in accordance with its interests since the movement is also represented in the government and the person of the President.

<sup>398</sup> Abu-Amr. Ibid. 93-95

and order. The Oslo Accords have defined the nature of the Palestinian force to be established in the Territory.

The DoP authorizes the PA in Article (VIII) to "establish a strong police force," with the goal "to guarantee public order and internal security for the Palestinians of the WB and the GS."

The Israeli-Palestinian Interim Agreement of 1995, however; set further duties for the Palestinian police. The agreement's Annex (I) Protocol Concerning Redeployment and Security Arrangements<sup>399</sup> obliged the Palestinian police in Article (II) paragraph (1-b) to "act systematically against all expressions of violence and terror;" and in paragraph (1-d) to "arrest and prosecute individuals who are suspected of perpetrating acts of violence and terror;" and in paragraph (3-b) to "actively prevent incitement to violence, including violence against the other side or persons under the authority of the other side;" and in paragraph (3-c) to "apprehend, investigate and prosecute perpetrators and all other persons directly or indirectly involved in acts of terrorism, violence and incitement."

This focus on fighting violent and terrorist acts without defining the type of the acts addressed in the Article can be viewed as opening wide way for the Palestinian security forces to abuse human rights in the name of fighting violence that appeared in the form of the many political detentions especially amongst members of the anti-Oslo factions.

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<sup>399</sup> Israeli-Palestinian Interim Agreement of 1995: Annex (I) Protocol Concerning Redeployment and Security Arrangements; available at: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT+-+Annex+I.htm#article2>

In its Article (IV) paragraph (2), Annex (I) of the 1995 Interim Agreement stipulated that the Palestinian police should "consist of one integral unit under the control of the Council," and added that it shall be composed of six branches: (1) Civil Police; (2) Public Security; (3) Preventive Security; (4) Presidential Security; (5) Intelligence; and (6) Emergency Services and Rescue. It added that "(t)he Palestinian Police shall have a Palestinian Coastal Police unit," and that in "each district, all members of the six Police branches shall be subordinate to one central command."

In fact, about nine branches of Palestinian security forces have been observed in the Palestinian Territory since the establishment of the PA in 1994 that was deemed by some scholars as a factor, helping abuse of human rights since these different branches lacked the ability to coordinate with each other and so every branch performed separately and even had its own separate jails.<sup>400</sup>

Over 1,200 opposition members were reported arrested in the first two years of the establishment of the PA. The large number of detentions obliged the security forces to place the detainees in facilities that were not controlled by the security forces responsible for the arrest; in addition to ignoring the implementation of law provisions concerning the procedures of arrest as the Palestinian police "rarely presented arrest warrants and often held detainees under false names."<sup>401</sup> Furthermore; the detainees were reported to have been physically tortured and not allowed family visits or access to legal consultations.<sup>402</sup>

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<sup>400</sup> Beverley Milton-Edwards, "Palestinian State-Building: Police and Citizens as Test of Democracy," *British Journal of Middle Eastern Studies* 25-1 (1998): 104.

<sup>401</sup> Elizabeth Freed, "Palestinian Authority Political Arrests, Illegal Detainment, and Torture," *The Palestinian Human Rights Monitoring Group*, (2008): 6.

<sup>402</sup> Ibid, 7.

The recent geographical and political divisions between the WB and the GS have added to the escalation of abuses by security forces against Palestinian civilians in both parts of the OPT.

The June 2007 events that resulted in the seizure by Hamas Movement of the GS and the ousting of Fatah rulers to the WB, led to further political detentions targeting the pro-Hamas people in the WB; and the pro-Fatah people by the Hamas security forces in the GS.

The Palestinian Independent Commission for Human Rights that operates in both the WB and the GS reported deterioration in the situation of human rights in the OPT in 2008, accusing the PA, controlled by Fatah Movement in the WB, and Hamas Movement, controlling the GS, of violating IL by trading political detentions in both regions.<sup>403</sup> However; the Commission referred the Palestinian failure to protect human rights to several reasons, *inter alia*, the Israeli violations in the territory.

In its annual report on human rights situation in the Palestinian Territory, the Commission said five Palestinians died in 2008 in questionable circumstances in prisons under control of the PA forces in the WB and two in jails under the control of Hamas Movement in the GS. The report also said that arbitrary arrests based on political motives have become part of the daily work of the security services in the WB and the GS, adding that it had documented torture in Palestinian prisons in the two regions that included beatings, the removal of fingernails and sleep deprivation.

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<sup>403</sup> PICH, Human Rights Situation in the Palestinian National Authority Areas. *Annual Report* (14. January 1-December 31, 2008); available at: <http://www.ichr.ps/pdfs/aar14.pdf>.

The Commission said it had received 2,312 complaints of arrests and prisoner mistreatment in 2008 compared with 2,007 in the previous year.<sup>404</sup>

The Commission criticized the existence of military courts along with the civil courts that led to violations against civilians in breach of the provisions of the BL and the relevant criminal procedures. Furthermore; the Commission criticized the Palestinian Ministry of Interior for failing in certain cases to implement some orders by the high court to release Palestinians detained in violation of provisions of the law.<sup>405</sup>

#### **4.3 Responsibility Perspectives**

The complicated situation and correlated responsibilities between Israel and the PA that was discussed in the previous section have brought to mind a complicated set of addresses to bear responsibility for any human rights violations in OPT.

In addition to Israel's responsibility for human rights violations in the OPT as discussed in previous chapters, this section considers another two levels of responsibility in the Territory, including the PA's responsibility as an authority of "effective control" and Hamas Movement's responsibility as a *de facto* authority in the GS after the seizure of power in the strip in 2007.

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<sup>404</sup> Ibid. 39-77.

<sup>405</sup> Ibid. 77-91.

#### **4.3.1 Palestinian Authority Responsibility as Authority of 'Effective Control'**

The PA as a legal body that controls part of land and a group of people bears certain responsibilities under IL.

Regardless of its undertakings to respect human rights, the PA, as an authority of effective control, is bound by Customary IL, both the IHL and the IHRL.

Upon the 1994 Cairo Agreement<sup>406</sup> and the 1995 Oslo II Interim Agreement, the PA assumed some powers in parts of the WB and the GS and so, it is responsible for these areas under its jurisdiction.

Moreover; the PA is bound by its own laws. Upon Article (10) of the BL, the PA undertakes to protect and respect "(b)asic human rights and liberties" and to "work without delay to become a party of regional and international declarations and covenants that protect human rights."

Article (VI) paragraph (2-b) of the Cairo Agreement grants the PLO the right to negotiate and "sign agreements with states or international organizations for the benefit of the Palestinian Authority," that Benvenisti considers absolving Israel from

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<sup>406</sup> Agreement on the Gaza Strip and the Jericho Area (Cairo Agreement), May 4, 1994; available at: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Agreement+on+Gaza+Strip+and+Jericho+Area.htm>.

responsibility in this respect.<sup>407</sup> However; in fact as long as it is not a sovereign state, the PA cannot sign international agreements, including human rights treaties.<sup>408</sup>

Assessing the human rights situation in the OPT in 2008, the UN Human Rights Council<sup>409</sup> concluded that the PA with its different organs of the PLO and the PLC is bound by the international human rights obligations; especially as it undertook to respect international human rights norms on many occasions.<sup>410</sup>

#### **4.3.2 Hamas Responsibility in the Gaza Strip**

Internationally, the GS was not recognized as a sovereign region after the Israeli withdrawal in 2005.<sup>411</sup> The PA considers the Strip as part of the Palestinian Territory even after Hamas took control of the Strip in June 2007. Hamas itself has not declared a state in the Strip after its assumption of power and it insists the Palestinian areas are one integral territory, including the WB and the GS.

Hamas Movement as part of the PA and heading the Palestinian government until the Gaza events (June 2007), is responsible for the Palestinian people under its control and it should make every effort to ensure rights of these people.

As well as the PA, Hamas Movement as a non-state *de facto* authority in the GS after 2007 cannot sign international treaties, including human rights treaties.

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<sup>407</sup> Eyal Benvenisti. "The Status of the Palestinian Authority," in *The Arab-Israeli Accords: Legal Perspectives*, ed. Eugene Cotran and Chibli Mallat., (London: Kluwer Law International, 1996), 61.

<sup>408</sup> HRW, 2008, *Ibid.* 96.

<sup>409</sup> Human Rights Situation In Palestine And Other Occupied Arab Territories, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.17.doc>.

<sup>410</sup> Human Rights Council, A/HRC/8/17, 6 June 2008. *Ibid.* paragraph (8).

<sup>411</sup> See Section (2.2.4) of this study.

However; it is bound by international standards of human rights that govern political parties and armed groups.<sup>412</sup> In its 2008 report, the Human Rights Council said Hamas Movement in Gaza is "bound by international humanitarian law obligations," including ensuring safety of protected persons.<sup>413</sup>

Moreover; in its National Unity Government Programme, Hamas Movement committed itself to respecting IL and to abide by articles of the BL, which also stipulates respect of international human rights norms.<sup>414</sup>

Confirming Hamas commitment to human rights norms, the Human Rights Council confirmed "that non-state actors that exercise government-like functions and control over territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control,"<sup>415</sup> citing a joint report on Lebanon and Israel, when a group of four Special Rapporteurs concluded that: "Although Hezbollah, a non-State actor, cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights. (...) It is especially appropriate and feasible to call for an armed group to respect human rights norms when it exercises significant control over territory and population and has an identifiable political structure."<sup>416</sup>

<sup>412</sup> Human Rights Watch. *Internal Fight: Palestinian Abuses in Gaza and the West Bank.* (USA, 2008): 97.

<sup>413</sup> Human Rights Council. 2008. A/HRC/8/17, Ibid.

<sup>414</sup> Programme of the National Unity Government was delivered by then Prime Minister Ismail Haniya before the PLC, 17 March 2007. Text of the programme can be found in Arabic at: <http://www.islamicnews.net/Document>ShowDoc09.asp?DocID=91477&TypeID=9&TabIndex=2>.

<sup>415</sup> Human Rights Council. 6 June 2008. A/HRC/8/17, Ibid.

<sup>416</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a

Furthermore in a speech delivered at a conference organized by the Palestinian Center for Human Rights on "The New Government and the Agenda for Human Rights" in Gaza in June 2006, Hamas leader Ismail Haniya confirmed Hamas determination to "promote the rule of law, the respect for the judiciary, the separation of powers, the respect for human rights, the equality among citizens; to fight all forms of discrimination; to protect public liberties, including the freedom of the press and opinion."<sup>417</sup>

The Human Rights Council has also obligated Hamas Movement in Gaza, as well as Israel and the PA, to respect IL in treating "the civilian populations."<sup>418</sup>

In paragraph (6), the Council confirms that Hamas is bound by obligation of IHL with regard to the "conduct of hostilities and the rights of civilians and other protected persons."

With regard to human rights obligations, the Council concluded in paragraph (9) that Hamas as exercising government-like functions and controlling a territory, is yet "obliged to respect human rights norms when (its) conduct affects the human rights of the individuals under (its) control."

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component of the right to an adequate standard of living, Miloon Kothari, Mission to Lebanon and Israel, 7-14 September 2006, (A/HRC/2/7) , paragraph 19.

<sup>417</sup> Speech delivered by Ismail Haniya at the conference organized by the PCHR on "The New Government and the Agenda for Human Rights," Gaza, June 2006; as cited by the Human Rights Council, A/HRC/8/17, Ibid.

<sup>418</sup> Human Rights Council Ibid, paragraph 4.

In a 26-page report, published on 20 April 2009, Human Rights Watch documented a group of acts of extrajudicial killings arbitrary arrests and detentions and torture, having been committed by Hamas forces in the GS since late December 2008, which means during the 22-day Israeli offensive on the GS in December 2008 and January 2009.<sup>419</sup>

The report considered these violations as breach to several international conventions<sup>420</sup> that "apply at all times, even during recognized states of emergency"<sup>421</sup> and a breach to the Palestinian BL that cites PA's commitment to human rights and the Palestinian Penal Procedures Law on arrest and detention procedures.

Hamas is also bound by the commitments of the PA to adherence to international human rights norms, since it considers itself as the "lawful government of the PA."<sup>422</sup>

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<sup>419</sup> Human Rights Watch, "Under Cover of War: Hamas Political Violence in Gaza", 2009; available at: (<http://www.hrw.org/sites/default/files/reports/iopt0409webcover.pdf>).

<sup>420</sup> These conventions include ICCPR, ICESCR, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>421</sup> HRW, Ibid, 19.

<sup>422</sup> Ibid, 21.

## CONCLUSION

The debate on the status of the Israeli occupation of the Palestinian Territory is unending. Before the signing of the Oslo agreements, Israel's responsibility for the Occupied Territory was clear despite Israel's denial of the existence of occupation. But this denial has nothing to do with facts on ground, since the occupation authorities do not decide the status of the territory, but the state of occupation imposes that status.

But since the signing of the Oslo Accords in 1993 and the assumption by the PA of certain responsibilities in the WB and the GS, Israel has been trying to convince the world that it no longer bears any legal responsibilities towards the Palestinian Territory.

Circumstances on ground, however; have since proven the opposite. As the entire world witnessed the Israeli 2002 incursions in the Palestinian Territory, especially areas, classified as Area (A) that were supposed to have been under complete PA control, there became no doubt that Israel remains the Master in the Territory.

This proved that the Israeli Occupation to the Palestinian Territory has not ended and so Israel is yet responsible for the implementation of the IHL in the OPT.

Although the Vienna Convention for Treaties does not apply to the Oslo agreements, they are yet binding to the signing parties in reference to Customary IL that applies to international treaties and allows a state to sign treaty with non-international parties or national liberation organizations.

Moreover; it cannot be denied that the Oslo Accords have created a new political and legal situation in the OPT that imposed different levels of responsibility in the Territory.

Three levels of responsibility for the implementation of human rights in the Palestinian Territory were discussed in this study. Israel's responsibility as an occupying power has received the main focus as to prove the main premise of the thesis that the Oslo Accords, which did not change Israel's status as an occupying power in the Palestinian Territory, do not absolve Israel of its human rights obligations in the Territory.

The PA also bears certain responsibilities under IL in areas under its jurisdiction. As an authority of effective control, the PA is bound by Customary IL applicable on non-state international actors or subjects.

Furthermore; as a local authority, the PA that practices actual responsibilities is obliged to implement IHL due to the continuation of the state of occupation and that it is working in time of occupation as stipulates Article (47) of the Fourth Geneva Convention of 1949 that can be interpreted as stressing responsibility of a local authority under occupation to implement IHL.

Article (47) is aimed at protecting the occupied people against the derogation of their rights that can be caused by certain oppressive provisions under an agreement between the occupying power and a local authority. Some of the security obligations of the Oslo agreements can fall under this interpretation.

The formula of the Article is then that the presence of a local authority under occupation creates an obligation towards implementation of IHL in the occupied territory.

Furthermore; the PA is bound to respect human rights by its own laws and provisions in the Oslo agreements that call for adherence to human rights norms.

The presence of Hamas Movement as a *de facto* authority in the GS after 2007 and the ousting of Fatah leadership from the strip also constitute another level of responsibility in the Palestinian Territory. Meanwhile, Hamas is also bound by the Customary IL to implement human rights in the territory under its control.

There is no way for Israel to absolve itself from its legal responsibility towards the OPT. This responsibility is viewed from several angles:

First, as shown in the thesis, UN bodies, including the SC, the GA and the ICJ; in addition to several other international bodies have confirmed on many occasions Israel's responsibility for the implementation of IHL and IHRL in the OPT.

When Israel was admitted to the UN membership, it accepted abiding by IL that is composed of IHRL and IHL.

Although Israel signed only several international human rights conventions, it is yet bound by IHRL, especially as the Universal Declaration of Human Rights had become Customary Law that the world countries started bringing into their domestic laws.

Moreover; the Israeli withdrawal from the GS in 2005 had not ended its occupation because Israel continued effective control over the strip by controlling the strip's air space and sea and ground terminals and maintained the ability to enter the strip whenever it wishes, which was confirmed in the latest offensive on the GS between December 2008 and January 2009.

Second; the argument that Israel remains an occupying power and obligated to implement human rights in the OPT is not only supported by the consequences of Israel's incursions into the Palestinian towns, classified as Area (A), in 2002, confirming that those areas are still under Israeli control, but also by the protracted nature of the Israeli occupation that imposes a state of human rights enforcement.

Third; even if the status of the Israeli occupation to the Palestinian Territory after the signing of the Oslo Accords could be deemed as temporary until a final settlement is reached and a Palestinian state is established, this claimed temporary nature cannot absolve Israel of its responsibilities under the IHRL.

The UN Security Council Resolution No. (1483) of 2003 on the situation in Iraq confirmed applicability of IHL during transformative occupation even if the occupying powers do not admit that their presence in the territory constitutes occupation.

Another level of responsibility for human rights abuses in the OPT that was not tackled in this study, but can be addressed in future studies on the issue, is the responsibility of third party countries, such as the USA and Europe that can be considered as facilitating the PA's abuse of human rights by providing unquestioning moral and financial support for the PA's security forces without this being contingent on respect for human rights.

This is supplemented by strong encouragement for fighting any political opposition in the guise of fighting terrorism. The PA is further encouraged to spend economic support on a bloated police force and security network, whilst limiting spending on civil society social needs and other forms of democracy building.

At a conference devoted for raising money for the reconstruction of the GS following the Israeli December 2008 and January 2009 offensive, and held in Cairo in March 2009, the US Secretary of State Hillary Clinton pledged \$900 million for the Palestinians, \$600 million of which would be devoted for supporting the Palestinian Security forces, while \$300 million only for Gaza restitution.<sup>423</sup>

Furthermore; in a report on 15 December 2008, the EU Police Coordinating Office for Palestine said that \$55 million were spent on projects in support of the Palestinian police and added that 500,000 Euros of this sum was "spent during 2008 in equipment, refurbishment and furniture to 38 police stations throughout the West Bank."<sup>424</sup>

Moreover; The International Quartet Committee, consisting of the US, the UN, the EU and Russia, has frequently urged the PA to abide by the Oslo security obligations, which were proved to include human rights abuses; and so, the Quartet as well bears some kind of responsibility for what the PA is doing.

This can fall within the interpretation of Article (18) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001.<sup>425</sup>

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<sup>423</sup> See ABC news article on the issue at: <http://blogs.abcnews.com/politicalradar/2009/03/clinton-pledges.html>.

<sup>424</sup> The report is available at: [http://www.consilium.europa.eu/uedocs/cmsUpload/20081215\\_EUPOL\\_COPPS\\_project\\_in\\_the\\_last\\_18\\_months.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/20081215_EUPOL_COPPS_project_in_the_last_18_months.pdf).

<sup>425</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session in 2001; available at: [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

The Article rules provide that a "state which coerces another state to commit an act is internationally responsible for that act." The Article further conditions the act to be "internationally wrongful act of coerced State," and that the "coercing State does so with knowledge of the circumstances of the act."

However, widening the scope of the thesis regarding the Quartet and other third party countries can take on a lot and no way to do that in this study.

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