Converting Palestinians into ?Infiltrators? in Their Own Home Country: A New Military Order and Same Old Policy

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CONVERTING PALESTINIANS INTO 'INFILTRATORS' IN THEIR OWN HOME COUNTRY: A *NEW* MILITARY ORDER AND SAME *OLD* POLICY

Asem Khalil, Ph.D.*

I. Introduction

A new Israeli military "Order regarding Prevention of Infiltration", Order no.1650 of 2009, took effect on 13 April 2010, six months after being signed by the Israeli Commander of IDF (Israeli Defense Forces) in the "Judea and Samaria Area".[1] It is an amendment to a previously enforced Order no. 329 of 1969,[2] almost as old as the occupation itself.[3] Leading daily newspapers reported the alarming news and many International, Israeli and Palestinian human rights organizations protested. A Palestinian Authority official talked about "Apartheid" while an Israeli Military officer claimed that "[the amendment] makes it easier for people without the right paperwork to appeal."[4]

The objective of this paper is to analyze this military order in the light of older ones, in order to investigate how this *new* order fits within the same *old* Israeli occupation policy: maximizing the control of (Palestinian) land and minimizing the number of (Palestinian) people. In fact, despite the many changes introduced by military orders throughout more than four decades of occupation, this overarching policy goes *crescendo* since 1967. Following Oslo Accords, which did not put an end to the occupation, such policies intensified.

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[1] The text is in Hebrew. An unofficial translation was made available by Hamoked, at: http://www.hamoked.org.il/items/112301_eng.pdf .

[2] An unofficial translation of this order is made available online by Hamoked, at: http://www.hamoked.org.il/items/112300_eng.pdf

[3] Order no. 1650 of 2009 is the second amendment to order no. 329 of 1969 (which was itself a replacement of older order no. 125 of 1967). The first amendment was effectuated by order no. 831 of 1980. All military orders referred to in this paper, unless otherwise specified, are from Birzeit University Database: http://muqtafi2.birzeit.edu/ .

[4] Isabel Kershner, *Human Rights Groups Warn of New Powers for Israel*, N. Y. TIMES, Apr. 12, 2010, at 8.

In the wake of the June 1967 war, Israel took complete control of the West Bank, previously under Jordanian rule[5], and Gaza Strip, administered until then by Egypt.[6] Despite the restrictions imposed by international law applicable in times of occupation, Israel – that does not admit being an occupation power, at first place – started a systematic change of the existent legal system(s) in force in the West Bank and Gaza Strip; through law-like tools (military declarations and orders) and enforced by Israeli military courts. Not only did Israel maintain legal and administrative separation between the West Bank and Gaza Strip, it also reinforced it; separate military command and, in later stage, Civil Administrations were established to rule the West Bank and Gaza Strip. Each (Israeli) area commander issued hundreds of military orders.[7]

It is true that Israel rarely uses explicit words that clearly state its (discriminatory) policy towards Palestinians; however it is naïve to expect that from any contemporary state, especially from a country, like Israel, which declares itself a democracy. Military orders, nonetheless, show a continuum in Israeli policies towards Palestinian land and population. Three case studies will be analyzed: first, the way residency status is regulated which determines who legal and illegal residents are; second, the regulation of crossing borders and movement of Palestinians within the occupied Palestinian territory and to the outside world; third, family unification of Palestinians in the occupied territory. I will first analyze the new military order and the difference it makes.[8]

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[5] The West Bank refers to that territory that lies between the river Jordan and Israel proper, i.e. Israel in its pre-1967 borders; it fell under Jordanian rule in 1948 but was unified to the Emirate of Transjordan, forming the Hashemite Kingdom of Jordan in 1950; a constitution was adopted in 1952 and a New Nationality Law was adopted in 1954, in which West Bank Palestinians became Jordanian nationals. East Jerusalem, previously part of the West Bank, came under Israeli law, which extended boundaries on 28 June 1967 and was formally annexed on 30 July 1980. *See* LEX TAKKENBERG, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 211 (Oxford, Clarendon Press, 1998).

[6] Those zones forms what is called in UN resolutions occupied Palestinian territory. Israel had also occupied the Golan Heights – that was part of Syria and Sinai Peninsula which remained under Israeli control until it was returned to Egypt under the 1979 Peace Treaty. *See id.*

[7] For this reason, limiting analyses to Israeli military orders applicable in West Bank will be enough for the arguments I raise in this paper. Two other reasons why I limit my analysis to military orders applicable in West Bank: first, the new order of concern is issued by the Israeli Area Commander of Judea and Samaria (i.e. the biblical terms, used by Israel that covers, extends *grosso modo* to what is the West Bank). Second, following Oslo agreements, military governments were maintained in both West Bank and Gaza Strip. However, in 2005, following the unilateral disengagement plan effectuated by Israel, the military government was officially put to an end, while any remaining civil affairs of Palestinians of Gaza (population registry, requests of family unification, etc.) were transferred to Central Command Area.

[8] Those case studies were developed and analyzed in details through various research projects I have conducted in collaboration with CARIM – European University Institute; in particular: Asem Khalil, *Family Unification in the Occupied Palestinian Territory* (San Domenico di Fiesole, Robert Shuman Center for Advances Studies, CARIM Analytic & Synthetic Notes No. 2009/19, 2009). Asem Khalil, *Irregular Migration into and through the Occupied Palestinian Territory* (San Domenico di Fiesole, Robert Schuman Centre for Advanced Studies, CARIM Analytic and Synthetic Notes 2008/79, 2009).

The above analysis will show similar traits that all military orders share, an overarching (discriminatory) policy. Most importantly, the fact that this policy is targeting a specific national group rather than others, and the fact that it is accompanied by persistent settlement policy in the occupied Palestinian territories – which Israel still refers to in biblical names[9] – renders these policies, not only discriminatory, but also racist and colonial.

This paper constitutes a critique to law as a tool of social control whenever motivated and accompanied by racist and colonial policies. Such policies render Palestinians' dreams of a (viable and connected) state, *within* historical Palestine and side by side Israel, impossible. Such a critique is possible only if one admits that *legality*, as a political ideal, is intrinsically related to freedom and equality. Otherwise, legality is converted to legalism. The rule *by* and *through* law – like enactments whenever disconnected from the two values of legality convert law to a monster, often distrusted, feared and resisted by those who endure its burden.

II. The 'New' Military Order

As mentioned above,[10] order no. 1650 of 2009 is an amendment[11] to earlier Order no. 329 of 1969.[12] The latter is composed of 10 sections. As it is the case with other orders, the first section often contains definitions (if any) while last sections are concerned with formalities: cancellation of previous orders if any (section 8), the date of entry into effect (section 9), and the name that is given to the order itself (section 10). The sections in between dealt with: sentencing of the infiltrator (section 2), deportation of the infiltrator (section 3), sentencing of armed infiltrator (section 4), evidence (section 5), unlawful stay following expiration of permit (section 6), and obtaining permit under false pretences (section 7).

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[9] Order 187 of 1967 stated that 'Judea and Samaria' will be interpreted in all military orders as equivalent to west Bank.

[10] *See supra* texts accompanying notes 1-3.

[11] The first amendment was in Order no.831 of 1980, that included minor change, an addition to article 3-B.

[12] Order no.329 of 1969 was a substitution to an earlier order no.125 of 1967 adopted in September 21. The latter substituted an earlier order no.106 adopted in that same year, in the afterword of Israeli occupation of the West Bank. Two interesting changes between order no.329 and order 125: first, order no.125 defined the 'area' as being the 'area' of the West Bank, while order no.329 ignored such a definition all together; second, while in order 125 it is the IDF area commander, or the one delegated by him, who is empowered to deport any infiltrator, order 329 empowers any military commander to take such a decision. The deportation decision in both decrees shall be in written.

Order no. 1650 contains nine sections that introduce changes to almost all sections of Order no. 329. In what follows I will present only some of the changes that were introduced.[13] At first instance, it appears that the order includes (as rightly pointed out by the Israeli official cited above) new guarantees for what can be largely called a 'due process'. This is the case for example with regards to the inclusion of three new subsections after 3-A which impose conditions for the issuance of deportation order including "the opportunity to plead before an IDF or Police officer and until the infiltrator's claims had been brought to the attention of the military commander" or that the infiltrator is "given information in writing or orally, as far as possible in a language he understands, regarding his rights under this Order". Similarly newly introduced subsections C and D (that are now added to section 3 of the previous Order) regulate the way deportation is implemented. The newly introduced subsection 3-C states that "the infiltrator shall not be deported unless 72 hours had elapsed from the time he was served the written deportation order." Newly introduced article 6 states the possibility of release on bail, if certain conditions are met. This impression however is misleading. As always, the devil is in the details.

What can be considered an apparently minimal change in the definition as stated in the first section, has actually changed the whole meaning of the order, as much as the consequences in terms of possible deportation of thousands of Palestinians.

Old Order no. 329 defined in section 1-B an infiltrator as "a person who entered the Area **knowingly and** unlawfully **after having been present in the east bank of the Jordan, Syria, Egypt or Lebanon** following the effective date."[14] Instead, the new subsection now reads: "[An infiltrator is] a person who entered the Area unlawfully following the effective date, *or a person who is present in the Area and does not lawfully hold a permit*."[15]

a) The fact that "knowingly" is no more necessary as a condition to consider someone as an infiltrator means that having any irregularity in the documents – thus, not being an infiltrator will exclusively depend on continuously changing regulations introduced by new military orders, even if those who became infiltrators are not even aware of that fact. Meanwhile, unlawful is

[13] I will not refer to formal changes, but only to some of the most relevant substantial changes that the new order had introduced as much as needed to support the claims I advanced earlier in this paper. Although Hebrew is the official language, I will use the English version of the two orders as point of departure for my analysis. See *supra* notes 1 and 2.

[14] That is 7/6/1967, as in section 1 of order 125 of 1969. Emphasis in bold is mine, indicating parts of the definition that was simply deleted from the definition that the new order had introduced.

[15] Emphasis in italic is mine, indicating additions introduced to the older subsection.

defined exclusively as not being in the capacity of proving the possession of a document or a permit issued by the IDF commander or from Israel proper, as appears in Section 5-B, introduced by Order no. 1650.[16]

b) Order no. 329 limited the scope of the definition of infiltrator to those who have been present in the four countries surrounding Israel – where most Palestinian refugees and displaced are present. The fact that there is no such condition in the new order means that: First, those who entered the area from other countries and overstayed their permit will now be considered infiltrators. Second, some of those present in the West Bank, who are born and raised there and who have never been outside it, may now be considered infiltrators if they cannot prove their legal stay (i.e. having lawful document or permit, according to newly introduced Section 5-B). Third, the most important change is considering Palestinians of Gaza Strip and East Jerusalem as infiltrators given that the 'Area' refers only to 'Judea and Samaria'.

c) The fact that a new option is available in the newly introduced section 1-B ("or a person who is present in the Area and does not lawfully hold a permit") confirms what has been suspected above. In fact, Palestinians who are residents of Gaza Strip have a different ID card than that of those in the West Bank (even though Israel controls both populations registry). This provision means they need to have a permit from the Israeli authorities in order to stay in the West Bank, as if they were foreigners, or otherwise they will be considered unlawful and, accordingly, will be treated as 'infiltrators'. A similar argument can be advanced against Palestinians of East Jerusalem who have Israeli issued ID card, who are considered permanent residents in Israel proper (since Israel annexed East Jerusalem).

Another significant change was introduced in section 2 of Order no. 329: "The infiltrator shall be subject to a penalty of a term of imprisonment **of fifteen years or a fine of 10,000 Israeli Lira or both**."[17] Instead new section 2, now composed in two subsections, reads: "A. The infiltrator shall be sentenced to a term of imprisonment *of seven years. B. The provisions of Subsection (A) notwithstanding,*

[16] Newly introduced article 5-B now states: "A lawful document or permit" – a document or permit issued by the commander of IDF forces in the Judea and Samaria Area or someone acting on his behalf under the provisions of security legislation, or issued by the authorities of the State of Israel under the Entry into Israel Law, 5712-1952, as it is periodically valid inside Israel, which permit the presence of a person in the Area." It shall be noted that a shorter definition of "lawfully" was present in previous order 125 now deleted expressly by new order.

[17] Emphasis in bold is mine, indicating parts of the provision that was simply deleted from the new section 2.

where an infiltrator has proven his entry into the area was lawful – he shall be sentenced to a term of imprisonment of three years."[18] This means that:

(a) It is true that the penalty is reduced to seven years (instead of 15); however, this reduction is accompanied by the exclusion of an option that was available according to the previous Order, i.e. the "fine". Accordingly, the only possible sentence for infiltrators will be imprisonment. In case of a deportation order – as per section 3-B of Order no. 329 (maintained without change in the new order) – the person will be released for the purposes of executing the deportation order, even before the end of the detention period. The newly introduced article 6 provides that it is now possible to "charge the expenses of executing a deportation order, including the expenses incurred by holding in custody, on the infiltrator[.]"

(b) The new provision in section 2-B distinguishes the sentence term of imprisonment for those who entered the 'Area' lawfully but overstayed their permit from those who entered unlawfully. This distinction is not relevant whenever it comes to a possible order of deportation, which applies equally to both kinds of 'infiltrators'.

One may argue that this is a legitimate concern of any sovereign state; it may be deemed harsh but still within the possible responses many other states undertake to combat illegal stay, some would say. Such measures may include, but are not limited to deportation. In what follows,[19] I will show how Israel converted hundreds of thousands of Palestinians into illegal in their home country, through successive Israeli military orders. The fact that legality depends exclusively on proving possession of 'lawful' documents or permits – which is the exclusive prerogative of the IDF commander and, accordingly, of Israel, in control of borders of the occupied Palestinian territory, as much as of the population registry since 1967 – renders the status of legal or illegal stay completely dependent on Israeli regulation and not necessarily on actions undertaken by Palestinians.

Others may object and say that this is the 'law'; period. But what is 'law'? Do those military orders include real rules of law? In other words, do those military orders respect the principle of legality? In what follows I do not promise to give an exhaustive answer to what the Rule of Law is (Nobody does!) or even to what the law is; there are indeed different approaches to and different conceptions of the law. In the conclusion, however, I will reflect on those conceptions of law and legality that

[18] Emphasis in italic is mine, indicating additions introduced to the older section

[19] *See infra* sections III-VII.

has been used by Israel to facilitate its policies, and reduce the (moral and political) costs of maintaining the occupation structure for more than 43 years.[20]

III. Regulating Residency Status

The term 'resident' was used (for the first time[21]) in Israeli Military Order no. 65, issued in 18 August 1967, referring to those who have permanent residency in the 'Area'. In subsequent Israeli military orders, however, this term was used to indicate those who are 'legally' present in the 'Area' and have their permanent residence therein.[22] Legal presence, however, depends on the fact of being counted in the census realized by Israeli military government in the West Bank, as soon as September 1967.[23]

Palestinians who – for whatever reason – were not counted or registered, became *illegal* overnight, regardless of their physical presence in the West Bank, even before the Israeli full control of the 'Area'. By military orders their physical presence became illegal, because they didn't have what Israel deemed lawful documentation. From an Israeli perspective, being illegal meant they were not supposed to be there, and, in order to stay *legally* where they were already, they needed a permit, as if they were non-resident foreigners. As non-residents, they also needed an Israeli authorization to have a job and to perform commercial activities, among other things. Uncounted Palestinians, deemed illegally present, became susceptible, and were often subjected to various sanctions, including fines and imprisonment; many were deported despite the fact that they had no other place where they had a legal title of stay.

Those who duly registered, they were candidates for an ID number. The way ID numbers were granted was strictly regulated by various orders. In fact, Order no. 234 concerning ID cards was issued on 17 March 1968,[24] substituted less than a year after by a much more detailed Order no. 297 of 1969, and amended 23 times until 1995.[25]

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[20] *See infra* Part VIII.

[21] *See* SHAML, AL-NAZEHOUN AL-FALESTENEYYOUN WAL MUFAWADAT AL-SALAM [DISPLACED PALESTINIANS AND PEACE NEGOTIATIONS] 89 (Ramallah, Shaml 1996).

[22] Such as in Israeli Military Orders No. 234 concerning ID Cards (Issued on 17 March 1968) later on substituted by Order No. 297 concerning Identity Cards and Population Registration (Issued on 8 January 1969).

[23] In parallel, censuses had taken place also in East Jerusalem and in Gaza Strip. In what follows all references will be done exclusively to the West Bank, unless otherwise indicated.

[24] This Order was simple and brief (6 articles only); it permits for males, who are 16 years old and legally residing in the 'area', to request an ID card before 1 August 1968. This means that the ID card is not a right to pretend but a grant by the IDF commander that those entitled to may request; i.e. it can be negated if any of the conditions (imposed by the

Order no. 297 of 1969 regulated the way the population can be registered (cases of deaths and births). Contrary to Order no. 234 of 1968, this Order *imposed* on 'males over 16 years old' to request an ID card, to hold it at all times, and show it whenever requested by an IDF soldier or an authorized person while it *permitted* for females over 16 years old, to request an ID card.[26] According to Order no. 297, an ID card includes, *inter alia*, religion, nationality, spouse name, children names, date of birth, sex, and address.[27] The same order imposed on residents to inform the Israeli authorities about any birth within 10 days, if the birth took place in the 'Area' and 30 days if it happened outside. The Order also imposed sanctions (which range goes from a fine to one year in prison) on those who transgress any of its provisions.

Order no. 1206 of 1987 amended (article 11*a* Para.15 of) Order no. 297 of 1969, imposing that ID cards shall include (besides the name, date of birth and sex of children) the ID number; this means that ID number was given since then to kids at birth and not, as before, when an ID card could be requested (16 years old). As for the registration of new born children, the order extended the period for the registration of children for resident parents, to 16 years (instead of 10 days) if born in the 'area', and five years (instead of 30 days) if born outside the 'Area'.

Order no. 1206 was to a certain extent 'revolutionary' – on the light of historical (or even regional) experiences related to transmission of legal status to children – in that it linked the registration of children to their mothers, not to their fathers. According to that order only children of resident females could be registered within five years of the date of their birth. Some suspected that this change was motivated by the fact that there are more chances to have resident males married to non-residents than the contrary; thus linking children to the mothers serves Israel's interest to

IMG) are not respected. Besides, it means that it was not obligatory to request an ID card nor was it possible for all (males over 16 years old exclusively).

[25] The Institute of Law - University of Birzeit in Al-Muqtafi had collected most available legislations including Israeli Military Orders in Al-Muqtafi database; according to that source, the last amendment that could be collected is Order no. 1421 concerning Identity Cards and Population Registration (Amendment no. 23), issued on 17 January 1995.

[26] Order no.396 had amended Order no. 297 of 1969 and interestingly distinguished between the 'area' and the "Controlled Area", referring to those territories that fall under Israeli Military Army less the 'area'. Since the order makes reference to Israel and to Jerusalem in explicit way, the researcher understanding of the "controlled area" is to cover Gaza Strip, Golan Heights, and until 1980s, Sinai. The order also forbids those having obtained an ID number from Israel or Controlled Area to obtain an ID number issued for residents of the 'area'.

[27] Order no. 996 of 1982 added two elements to be included on the ID card: the date and place of entry; the date the person becomes a resident.

reduce the number of Palestinians in the 'Area'.[28] This change produced strange situations in which a family with a non-resident mother may end up with children who are residents and others who are not, depending on the date of their birth; e.g. if they are born before 12 August 1987 (the date Order no. 1206 was signed and entered into effect) then he/she is a resident; otherwise they are not. Besides, children of resident parents who were not registered duly on time, whether for parents' negligence or even simply as a result of their ignorance of the timeframe restriction, were simply denied registration and, hence, an ID number.

Those unregistered children of non-resident women or who were not registered duly on time were considered *illegally* present, despite being born and raised in the 'Area'. An administrative irregularity converted them into ghosts (legally speaking) despite their physical presence in the 'Area'. Accordingly, for Israel those unregistered persons are *de iure* inexistent, but whom *de facto* presence is sometimes tolerated by Israel. As such, their presence as a matter of fact will always be dependent on Israeli policies towards their 'illegal presence'. The only way for them to be registered is to apply for family unification; a complicated, long and expensive procedure which results are never guaranteed.

It shall be noted that Order no. 1421 of 1995 included 'positive' changes to Order no. 1206 of 1987.[29] For example, it prolonged the registration period for children of residents to 18 years old, regardless of the place of their birth and enabled registration of children whom at least one of the two parents is a resident, as it was the case before August 1987. However, it added that this is possible on the condition that the Israeli authority is convinced that the applicant permanent residence is in the 'Area'. This means that a space was left for the discretion of the Israeli authority to decide in each case whether to register – thus to grant an ID number – or not. Accordingly, many children whom parents' permanent residence is not the 'Area' – upon the discretionary conviction of Israeli officials in charge of registering new births – may simply be denied registration. In other words, although changes over time – as shown by last Order no. 1421 – may have been considered less restrictive, they nonetheless constitute an episode in the same overarching Israeli policy.

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[28] *See* SHAML, *supra* note 21, at 99.

[29] Interestingly enough, the order included provisions that seem to be at least 'theoretically' (because it was never effectively enforced) less restrictive than the Interim Agreement itself.

V. Regulating Population Access and Exit

For Palestinians who were outside the 'Area' occupied by Israel in 1967, as much as for those who fled because of the war, they were denied re-admission. The fact that they were not counted in the census Israel conducted resulted in denying them residency; as non-residents they couldn't get readmitted without prior authorization (by Israel, now in full control of the borders) as if they were foreigners. Actually, as a result of the war, a second massive wave of displacement for hundreds of thousands of Palestinians took place. Those new *nazeheen* (displaced) – a word used to distinguish them from *lage'een* (refugees) of 1948 – were denied reentry to the West Bank and Gaza Strip – considered by the United Nations 'occupied Palestinian territory'.[30]

The pervert logic that Israel applied (that is similar to the way Israel, dealt with Palestinian refugees in 1948[31]) is tricky; it can be formulated as if the Israeli authorities were saying: A) if you are a resident of the 'Area' you can be readmitted through borders; B) in order to be a resident, you need to be counted in the census; C) in order to be counted, you need to be in the 'Area'. Meaning, those Palestinians who were outside the 'Area' at the time the census took place were not granted residency because they were not present; and they could not return to the 'Area' to be counted and registered because they were not residents!

The tragedy of those thousands of Palestinians is not only that they were not re-admitted or that they became refugees/displaced persons because of the war; many became stateless and without any legal title of stay in third countries. Those 'lucky' Palestinians having temporary legal title of stay in foreign countries became unlawful once their title expired without ever being re-admitted back to the occupied Palestinian territory. For those Palestinians (refugees, stateless and denied reentry) they became 'illegal' and 'unlawful' – and accordingly undesired – wherever they were or went, regardless of whatever they did. Their existence, not to consider their movement, was and still is, regarded with suspicion, not only by the state that is currently occupying their homeland and controlling its borders, but also by host countries which were trapped in a dilemma: dealing with this massive

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[30] The most recent endorsement of this position can be found in the position held by the International Court of Justice in its advisory opinion concerning the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", issued on July 9, 2004, see summary of the opinion available at: http://www.icj-cij.org/docket/files/131/1677.pdf

[31] Palestinian refugees, who left historical Palestine prior and during the establishment of the state of Israel in 1948, were denied re-entry, because they were not Israeli citizens while they were denied Israeli citizenship because they were not in Israel. *See* Asem Khalil, *Palestinian Nationality and Citizenship: Current challenges and Future Perspectives* 25-7 (San Domenico di Fiesole, European University Institute, CARIM Research Report 2007/08, 2007).

humanitarian challenge while refusing to contribute to the Israeli policies by integrating those new 'refugees'. Similarly, third countries – possible target (whether for work, study or even immigration) of those stateless Palestinians – were also suspicious.

As for those who remained in the 'Area' and counted in the census, they were deemed residents. Their *legal* status however depended on their day to day satisfaction of whatever conditions, old and new, the Israeli occupation authorities imposed. The fact that Israel used 'residency' to describe the status of Palestinians in the 'Area' indicates that Palestinians were treated by Israel as foreigners and aliens, regardless of the fact that they, as much as their ancestors, were present before the occupation took place in 1967.

Residency status is not secure nor is particularly empowering. In fact, having a residency does not imply that the holder has a legal status; i.e. the 'right to have rights', as other countries treat their citizens or permanent residents. Rather, the consequences of being granted *legal* residency are often implied in a negative form. Israeli military orders explicitly state what non-residents *cannot* do without prior authorization (for example, non-residents cannot open, manage or work in any commercial activity without a permit from an authorized Israeli official) implying what residents are *tolerated* to do (without prior Israeli authorization). The fact that they are tolerated to do certain things means that their *freedom* is not a right but rather a result of benevolent action of the authorities. According to this logic, restrictions imposed by the Israeli authorities may take place at any time and for any reason, even without explicit suspension of those margins of actions tolerated for legal residents.

Residents' 'good behavior' (from an Israeli perspective) was not the only determinant factor for those Palestinians to *remain* what they *became*. They were often denied their status for simple changes in Israeli policies and orders, without even taking any action (whether bad or good). Since this status is not an entitlement, nor a right, any reason was enough for hundreds of Palestinians to lose their residency status. This means that any legally resident Palestinian in the 'Area' could at any time be converted to an illegal resident – thus having their ID number revoked by the Israeli authorities. This was the case of hundreds of Palestinians who were deported and had their ID cards revoked based on Israeli political and security pretensions. The same applied to many others who were

denied reentry when they exceeded the period of time permitted for their stay abroad or whenever their travel document (Israeli-issued laissez passer) expired while abroad.[32]

In fact, in case of departure through the Israeli Airport,[33] a resident of the 'Area' had to obtain a Laissez Passer issued for that purpose. In case the travel document is not renewed within a year, the ID card, thus the status of resident, was automatically revoked. Those who traveled using a permit (through the Allenby Bridge crossing) and remained outside the 'Area' for more than six years had their residency status revoked as well.[34] Following Oslo Accords, Palestinians could obtain a Palestinian Authority travel document – valid for three years; hence restrictions on exit were cancelled. However, thousands of Palestinians whom ID cards were revoked before Oslo Accords were signed, were still considered by Israel as non-residents and cannot enter the 'Area' unless they obtain a permit (issued by Israel) as visitors or if they receive a new ID number following a successful family unification procedure.

Israel, indeed, holds *de facto* supreme power on borders of the occupied Palestinian territory, as much as it controls the movement between the West Bank and Gaza Strip, for both residents and non-residents alike. The establishment of the Palestinian Authority on parts of the West Bank and Gaza Strip did not change this reality. The hundreds of thousands of the new personnel of the new Palestinian bureaucracy made their 'return' to the so-called "Autonomous Territories" as a result of a deal with Israel, in which the list of 'returnees' was approved name by name. Those who Israel approved were granted an ID card.

VI. Family Unification

Those who are not registered in the population registry can acquire a residency status in the 'Area' exclusively through family unification. Otherwise, they need to obtain a visitor's permit, granted by

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[32] *See generally* SHAML, *supra* note 21, at 12-3.

[33] Palestinians residents (those holding ID card) were forbidden from using Israeli airport, while at the same time, no airport for the Palestinians was constructed following Israeli attack and complete destruction of Gaza International airport. This leaves the ID holders' Palestinians with unique possibility to travel abroad through land, by Allenby Bridge in West Bank, and Rafah in Gaza Strip. Palestinians of Gaza willing to use Allenby crossing point needs special permit from Israel, and vice versa.

[34] *See* SHAML, *supra* note 21, at 94. Having their permit renewed by family members each year after the third year of departure. In case of lack of renewal of permit after the third year, ID card is revoked.

the Israeli Civil Administration's staff officer for interior affairs, as much as if they were a foreigner willing to visit the 'Area' temporarily.[35]

Requests of family unification are not filed directly by non-residents, rather by resident relatives on their behalf. Those for whom family unification requests are filed are often Palestinian nationals – not foreigners, properly speaking[36]- who were artificially converted into foreigners by consecutive Israeli military orders. They can be, but are not limited to: 1) persons who were present in the 'Area' but not counted in the census of 1967, 2) Palestinians displaced as a result of the 1967 war, 3) Palestinians who happened to be outside the 'Area' at the time Israel occupied the West Bank and Gaza Strip, 4) Palestinians whose residency was revoked following their 'prolonged' stay abroad; 5) children of residents who were not registered duly on time; as much as 6) children of non-resident mother who were born between 1987 and 1995.

Regardless of the fact they were Palestinian nationals, the outcome of family unification requests depended on Israeli interest rather than on Palestinian. Approving a request for family unification is not considered as satisfying a legal entitlement of individuals but simply as a "special benevolent act of the Israeli authorities."[37] This attitude makes sense if one considers that, for Israel, residency status is not considered as a vested right, in the first place, but a 'privilege' unilaterally *granted*. Since it is a grant, it can be denied for any reason and it can be revoked at any time.

Israeli policy in terms of approving family unification varied with time, according to political circumstances. Israel indeed applied throughout the decades of occupation restrictive policies with regards to requests of family unification.[38] The number of Palestinian families affected by those restrictions is very high.[39] The largest group in need of family unification remains families where one

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[35] *See* Leena Abu Mukh, *Movement to and from the Palestinian Territories under Israeli Occupation after Oslo* (1993-2006) 2 (San Domenico di Fiesole, European University Institute, CARIM Research Report 2006/02, 2006).

[36] The term foreigner is problematic. I use it here to identify non-Palestinian nationals. For Israel, anyone who is not resident of the area is dealt with as foreigner, and needs the same permit for entry and stay to the areas as much as any other foreigner.

[37] To quote state attorney's office in response of 18 November 1992, Section 7, in the Israeli Supreme Court Case 4494/91. Cited in: B'Tselem, *Perpetual Limbo: Israel's Freeze on Unification of Palestinian Families in the Occupied Territories* 8, 2006, http://www.btselem.org/Download/200607_Perpetual_Limbo_Eng.doc.

[38] Restrictions intensified in times of 'violence' (for example following the second *Intifada* in 2001, for example) or as a result of political pressure on the Palestinian Authority (for example following Hamas victory in 2006 elections).

[39] A survey carried out among Palestinian residents of the oPt in October 2005 "shows that, 17.2 percent of the respondents have at least one first-degree relative (father, mother, brother, sister, wife, or child) who is not registered in the population registry and therefore is prevented from obtaining an identity card. Among the participants in the survey,

of the spouses is not a resident, and needs this procedure to be able to live together with their spouse in the occupied Palestinian territory.[40]

The reduced number of approvals to family unification requests suggests that Israel's policy was to minimize the number of approvals,[41] and privileged agreeing only on exceptional cases where the humanitarian nature is particularly proven or when it is in favor of Israeli authorities' interest.[42] Although for Israel, the issue of family unification (of Palestinians in the occupied territory) is often presented as a security or a political issue,[43] the real justification behind its policy may be effectively

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78.4 percent stated that the family unification request filed on behalf of these persons had not yet been processed. These figures show that more than 72,000 nuclear families in which at least one family member had a family unification request filed on his or her behalf are directly affected by Israel's freeze policy." B'Tselem, *supra* note 37, at 20-1.

Amnesty International estimated that by 2006 at least 120,000 families were affected by Israeli restrictions on family life. Moreover, since 2006 the number of families affected by such restrictions has increased. Amnesty International, *Israel/Occupied Palestinian Territories: Right to Family Life Denied; Foreign Spouses of Palestinians Barred*, MDE 15/018/2007, Mar. 21, 2007, http://www.amnesty.org/en/library/asset/MDE15/018/2007/en/399e2f88-d3a7-11dd-a329-2f46302a8cc6/mde150182007en.pdf.

[40] *See* B'Tselem, *supra* note 37, at 7.

[41] As admitted by Rabin, by then Minister of Defence, in a letter to Knesset Member in 16/11/1989: from 1967-1987, only 15% of the 85163 demands have been accepted, while from 1987 to 1989, only 20% of the 3266 were accepted. *See* SHAML, *supra* note 21, at 103.

According to data from the Ministry of Defense collected by B'Tselem, during 1989, 24% of the requests for unification of West Bank families and 63% of the requests of families from the Gaza Strip were approved. In the first seven months of 1990, 41% of the requests from the West Bank and 71% of the requests from the Gaza Strip were approved. According to the data for 1989 obtained from the Office of the Coordinator of Activities in the Territories, of the 1053 requests for family unification submitted in the West Bank, 250 were approved, and of the 305 submitted in the Gaza Strip, 192 were approved. In1990, through the end of July, 139 of the 334 requests submitted in the West Bank were approved, and of the 261 requests from the Gaza Strip, 187 were approved. According to data published by the Red Cross, between 1967 and 1987, 140,000 requests for family unification were submitted; of these only some 19,000 were approved. *See* B'Tselem, *Renewal of Deportation of Women and Children from the West Bank on Account of "Illegal Residency*, 8-9, 1991, http://www.btselem.org/Download/199110_Renewal_of_Deportation_Eng.doc.

According to a more recent report, B'Tselem documented how Israel started since 1993 to set up quota for family unification cases to be 2000 which did not meet the real need of the population. In 1995, the PA demanded that Israel cancel the annual quota, or at least increase it substantially. Israel refused. In protest, in early 1996, the PA refused to forward family unification requests to Israel for approval. It was not until early 1998 that the PA again forwarded requests to Israel, which were based on the quota that had been set in 1993. According to press reports, in mid-1998, Israel and the PA had more than 17,500 requests for family unification waiting to be processed. In October 1998, in the framework of the Wye Agreement between Israel and the PA, Israel raised the quota to 3,000 a year. In early 2000, in the framework of peace negotiations between the parties, Israel again raised the quota, to 4,000 a year. This policy remained in effect until the outbreak of the second intifada, in September of that year. Following the outbreak of the second Intifada in September 2000, the process of family unification was frozen. *See* B'Tselem, *supra* note 37, at 13.

In 2007, Israel started again to receive requests for family unification and many thousands have received approval. As reported to be the official number, the PA talks about some 54000 Palestinians who entered the occupied Palestinian territory since early 1990 and who are considered by Israel as illegal. The news was reported online, *see*, i.g., http://afp.google.com/article/ALeqM5iELL0iiiCoG2eVFkFjCAi6fAYHw

[42] As recognized by ISC decision 106/1986, cited in SHAML, *supra* note 21, at 103.

[43] As recognized by ISC decision 90/1979, cited in *id.* at 102.

the "fear of the demographic growth of the population in the territories".[44] According to this narrative, what may appear as an oscillation in attitude of Israeli authorities towards family unification requests is not necessarily indicative of change of policy but rather used as a technique to temper pressures against its policies, whether internationally or internally.[45] One thing is certain, though. Even when family unification requests are successful, they remain complex, long and costly. As a consequence, many had been discouraged to proceed or pursue the application, preferring to remain in the irregularity, with all the fragility, instability and immobility it causes.

In order to enter the occupied Palestinian territory, non-resident Palestinians need a temporary visitors' permit, often granted for a period of three months by the Israeli authorities – similar to foreigners. Hence, they need to renew their permit, or travel abroad and return back – hoping to be readmitted again with a new three-month temporary permit. Whenever visitors overstayed their permit they became illegally present and, if they exit the 'Area', they can be sure that they will most likely be denied visitors' permits in the future.

Since having a visitor's permit is a pre-requisite in the process of an approved family unification process,[46] the fact that some are denied temporary visa to enter the 'Area' may be a determinant factor for unsuccessful family unification. Israel had frozen the issuance of visit permits in different occasions.[47] Many foreign spouses of Palestinian residents were affected. In 2006, following Hamas' victory in legislative elections, Israel intensified its restrictions. In 2007, some 200 short extensions of visas were issued, largely upon pressures from different countries as a result of protest initiatives undertaken against such policies.[48] In other words, even when family unification is approved, one needs to obtain a short visitors' permit first; if denied, then the family unification is indirectly affected by the mere fact of not being able to physically enter the 'Area'. As for those who entered

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[44] B'Tselem, *supra* note 41, at 9.

[45] *See* SHAML, *supra* note 21, at 106. For more details about Israeli policies to family unification, *see generally* B'Tselem, *supra* note 37, at 15-6.

[46] *See id.* at 4.

[47] At a meeting held on 20 December 2005, the coordinator of government operations in the Territories, Major-General Yusef Mishlav, informed HaMoked that "the freeze on issuing visitor's permits… *had been removed*, and a number of categories for granting visitor's permits were set, including persons invited by Abu Mazen, *humanitarian cases, entry of foreign spouses, and investors*." This was not the reality, however. Apparently, the "compromise" does not cover more than a few hundred visitor's permits, among them permits intended to enable the registration of children who were born abroad where one of their parents is a resident of the Occupied Territories, and, in the case mentioned by Major-General Mishlav, of members of an orchestra that wanted to perform in the West Bank. *Id.* at 24.

[48] *See* Amnesty International, *supra* note 39, at 3.

the 'Area' with a short visitors' permit and overstayed while waiting for the outcome of their family unification request, they risk being denied the status of resident through family unification altogether.[49]

VII. What about Palestinians of Gaza and East Jerusalem?

The following are some of the main issues regarding movement of Palestinians within the West Bank, including East Jerusalem and Gaza Strip, change of residency address and family unification that involves marriages between residents of those three territories under different legal regimes.

The West Bank and Gaza Strip are deemed, according to Oslo Accords, as one unit.[50] Together with East Jerusalem, they form the territorial claim for Palestinian statehood, within the two-state solution. This *aspirational* unity however is challenged by the *de facto* and *de iure* separation that took place in 1948 when the West Bank and Gaza Strip fell respectively under Jordanian and Egyptian rules.

After the Israeli occupation in 1967, the two territories were declared closed military areas, while East Jerusalem was annexed to Israel. In 1972 'a general exit permit' was issued for the two areas.[51] This marked a change in policy with regards to permitting movement between the West Bank and Gaza Strip, and the way change of the residency place in the population registry took place. In January 1991 (during the Gulf War), Israel cancelled the general exit permit of 1972. From that date on, any resident of the occupied Palestinian territory who wanted to enter Israel needed to obtain an individualized permit.[52]

The cancellation of the general exit permit marked the consolidation of the closure policy between the West Bank and Gaza Strip, and between both territories and Israel (including East Jerusalem). In March 1993 Israel imposed a 'general closure' on the Occupied Territories, which still remains in place.[53] The closure added difficulty for Palestinians to change their residency from one area to the other. Changing an address listed on an ID card became a long and complicated procedure, and

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[49] B'Tselem, *supra* note 37, at 4.

[50] Article IV of the Declaration of Principles of 1993 reads as follows: "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."

[51] In the West Bank it was through Order no. 34, in Gaza Strip it was through Order no.2 of 1972.

[52] *See* Abu Mukh, *supra* note 35, at 6.

[53] *See id.*

many requests for address changes were rejected.[54] This situation worsened after the second *intifada*. Palestinians of Gaza Strip who failed to update their place of residence in the West Bank were expelled to Gaza Strip because they were considered as staying illegally in the West Bank! Some other Palestinians of the West Bank were expelled to Gaza Strip as a punishment while others were forbidden from returning to the West Bank after a visit to Gaza Strip.[55]

Following the disengagement plan carried out unilaterally by Israel in 2005, the Israeli Military Government in Gaza Strip officially came to an end.[56] In 2007, after Hamas took control of Palestinian Authority institutions, Israel declared Gaza an 'enemy entity'. The movement between the West Bank and Gaza Strip through Israel became almost impossible. It also became more complicated to obtain a change of residence from Gaza Strip to the West Bank. For this reason, families composed of Palestinians holding West Bank ID cards and Gaza Strip ID cards are now facing similar challenges to those families with a non-resident spouse.

Families with a spouse from the West Bank or Gaza Strip and the other from East Jerusalem, face similar challenges. Recently, the Israeli Supreme Court rejected a petition against the temporary order 2003 (The Nationality and Entry into Israel Law, published on 6 August 2003). That law prevents Palestinians from the occupied Palestinian territory to enter Israel, thus forbidding family unification between Palestinian residents of East Jerusalem and their Palestinian spouses residing in the occupied Palestinian territory.[57] If those Palestinians holding a Jerusalem ID card decide to move their residency to the 'Area', they risk having their Jerusalem ID card revoked.

VIII. Conclusion: Military Orders, Law, and Legality

During the Second World War, Lord Atkin famously contradicted Cicero's 2000-year-old dictum (*Silent enim leges inter arma*),[58] when he said: "In this country, amid the clash of arms the laws are not

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[54] *See* B'Tselem and Hamoked, *One Big Prison: Freedom of Movement to and from the Gaza Strip on the Eve of the Disengagement Plan*, 5-6, 2005, http://www.btselem.org/Download/200503_Gaza_Prison_English.doc.

[55] *See id.* at 16-9.

[56] *See* Abu Mukh, *supra* note 35, at 16.

[57] *See id.* at 9.

[58] Quoted in: Aharon Barak, *The Role of a Supreme Court in a Democracy and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125, 130 (2003).

silent. They may be changed, but they speak the same language in war as in peace."[59] In contemporary states, it is rare to rule by brutal force, in times of emergencies, threats to national security, or even in times of occupation of an alien population. Israel indeed ruled the West Bank and Gaza Strip using law and legality. Changes to local Palestinian legal and judicial systems were often introduced through military orders.

According to Brigadier General Uri Shoham – the IDF Military Advocate General between 1995 and 2000 – "all Israeli governments from 1967 to the present have laid down a strict requirement that all activities of the Israeli military in the control of the Territories must adhere to the principle of "the rule of law," for as the philosopher John Locke said in 1690, "Wherever law ends, tyranny begins.""[60] It is this concern that explains why Israel insisted to use military orders at first place (legislative-like enactments) to rule the areas under its control. Israel opted to rule the occupied Palestinian territory *through* law. The fact that Israel created civil administration to administer civil affairs, and established military courts with some rules for ensuring minimal defense in a due process like form, may suggest that Israel decided somehow that the IDF be ruled *by* law also.

Though, there are different examples in the literature that suggest how Israeli military orders fail the test of legality. Some used Fuller's inner morality of law expressly;[61] while others used one of the Fuller's eight principles as criteria to judge the *legality* of Israeli military actions in the occupied Palestinian territory.[62] However, the large part of the literature uses positivistic approach as their point of reference in respect to IDF obligations under international law, Israeli domestic law, and the local legal systems in the 'Area'.[63] For many human rights organizations and advocates, the insistence was on the way law is enforced. The due process of law as much as the well-functioning

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[59] Quoted in: Rt. Hon. Lord Lowry, *National Security and the Rule of Law*, 26 ISR. L. REV. 117, 119 (1992). For a discussion, *see generally* David Dyzenhaus, *Intimations of Legality amid the Clash of Arms*, 2 I.CON 244 (2004).

[60] Uri Shoham, *The Principle of Legality and the Israeli Military Government in the Territories*, MIL. L. REV. 153, 153-273 (1996).

[61] *See*, e.g., John Quigley, *Review: West Bank: Israel's Abuse of Law*, 10 JOURNAL OF PALESTINE STUDIES 118, 119.

[62] *See, e.g.*, RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK 63-75 (Rev. Ed., Washington D.C., Institute for Palestine Studies 1988); Anis F. Kassim, *Legal Systems and Developments in Palestine*, 1 PAL. Y.B. INT'L L. 19, 32 (1984); John Quigley, *Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory*, 10 PACE INT'L L. REV. 1 (1998).

[63] *Se, e.g.*, Mona Rishmawi, *Administrative Detention in International Law: The Case of the Israeli Occupied West Bank and Gaza*, 5 Pal. Y.B. Int'l L. 83 (1989). Other scholars inquires the respect of international humanitarian law by Israel, *see, e.g.*, Amichai Cohen, *Administering the Territories: An Inquiry into the Application of International Humanitarian Law by IDF in the Occupied Territories*, 38 Is.L.R. 24 (2005); Orna Ben-Naftali and Keren R. Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT'L L.J. 233 (2003).

of courts (whether Palestinian local courts, or Israeli military courts) constitute the central point to any conception of legality.

Without underestimating the above arguments, it is nonetheless still possible that Israel undertakes – whether as a matter of law, or simply as a matter of fact –steps to overcome the critiques and ameliorate its way of making law and applying it. One can argue that the newly adopted Order no. 1650 was adopted by the IDF commander, enabled by Declaration no. 2 of 1967 – deemed declaratory of a fact not constitutive of power.[64] In other words, the Israeli occupation would be considered as a simple change in the *grundnorm* – as Kelsen would put it. Accordingly, whenever inferior norms are adopted in accordance with it, then the order creates real rules of law. Besides, this order entered into effect after six months of its adoption. In different aspects this order may be considered as satisfying some if not most of Fuller's desiderata. It is possible also to argue that this order ameliorated the way justice will be served, since it includes several guarantees that fits within the requirements of a 'due process'. Although one may find it unconvincing, the above demonstrates that those *formal* criteria for how the law is made and applied are arguably possible to realize, at least theoretically. Still, can we say that – as the IDF advocate general had suggested – that this is what legality is all about and that this is what Rule *of* Law means?

My suggestion is to distinguish between rule *by* and *through* law and Rule *of* Law.[65] Rule *by* and *through* law are part of what is arguably called 'formal conceptions' of legality. The second is substantial

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[64] As defended by Meir Shamgar (by then the Military Advocate General) in which he argued that "proclamation was not constitutive but only declaratory." Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government - The Initial Stage, in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967 - 1980: THE LEGAL ASPECTS 13, 14 (Meir Shamgar ed., Jerusalem, Hebrew University of Jerusalem, 1982).

[65] The rule *by* law means that the government itself subjects its will power to the constraints of the law and the rule *through* law means that the acts of domination must acquire the form of the law. For Preuss, those are the "twofold meaning" of the rule of law. *See* Ulrich K Preuss, *The political meaning of constitutionalism, in* CONSTITUTIONALISM, DEMOCRACY AND SOVEREIGNTY: AMERICAN AND EUROPEAN PERSPECTIVES 11, 16 (Richard Bellamy ed., Averbury 1996).

However, as rightly pointed out by Jeffrey Kahn, the rule *by* law and the rule *through* law describe a political system in which statutes and other legislation are the supreme authority in the state by virtue of adherence to a formal legislative process of passing statutes and other legal acts. For Kahn, this system represents a *Rechtsstaat* but not a rule of law. *See* Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEORGETOWN J. INT. L. 353, 364 (2006).

In this paper we adopt a concept of the rule of law similar to Kahn, not Preuss. To my understanding, early positivist, such as the eighteenth century utilitarian theorist and reformer, Bentham, would have individualized principles needed for controlling the abuse of power. Hart for example believed that in Bentham work it is possible indeed to identify the elements of *Rechtstaat*. For him, those principles are now revived by natural law theorists. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 71 593, 595 (1958).

conceptions of legality. Formal conceptions differ on many issues but they may be grouped under one same umbrella because they are somehow value or content-free. Legality is simply converted into respecting certain principles or criteria for making new rules of law and in applying those same rules whenever conflict arises. On the contrary, substantial conceptions look beyond the form of rule making and applying to reach the values behind them.

I claim – although not in the measure right now to develop it further – that the formal conceptions of legality do not provide an adequate tool for deciding on the nature of military orders, and the attitude towards them. Such analysis is unsatisfactory because it does not deal with the substance but only with the form of rules. A positivist approach to legality is incapable of explaining the original sin of the new legal system, and the possibility of building legality over an illegal act of occupation.[66] The inner morality of law in Fuller's terms cannot escape recognizing a colonial law, or an apartheid law, whenever the standards of the inner morality of law are respected. Finally, even legality as procedures and due process is incapable of dealing with 'justice' administered under occupation, the opposite of justice.[67]

It seems absolutely absurd to be neutral towards those enactments, simply because such military enactments are often used to realize colonial objectives, rather than the Palestinian people's interest: land is expropriated from Palestinians,[68] where Israeli settlements are built instead,[69] water rights largely curtailed,[70] houses demolished,[71] Palestinians detained by administrative procedures[72] while

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Accordingly, it is possible to conclude that the rule of law goes beyond the limits imposed by the state itself in the way it makes laws, execute them, or apply them. In such a system, "the state is not the sole source of law and adherence to procedural formality is necessary but not sufficient for law to be made." Kahn, *supra*, at 364.

66 About the illegality of occupation, *see generally*, Ben-Naftali, Gross and Michael, *supra* note 63.

67 Even the role of Israeli High Court of Justice may lead to undermining the fact of occupation. As pointed out by Martti Koskenniemi: "The acceptability of the use of discretion by a law-applying institution such as the Israeli High Court of Justice is based on the assumption that its preferences and moral sensibilities are broadly reflective of the preferences and sensibilities of the community in which it exercises its jurisdiction. When jurisdiction is exercised in conditions of occupation, however, such consensus cannot be easily presumed. On the contrary, recourse to moral pathos by an institution of the occupying power will appear to normalize its jurisdiction and add an element of hypocrisy to the felt illegitimacy of its possessing jurisdiction in the first place. Moreover, it will undermine the moral and political significance of the fact of the occupation, even diminishing the urgency of bringing it to an end." Martti Koskenniemi, *Occupied Zone - "A Zone of Reasonableness"?* 41 Isr. L. Rev. 13, 13 (2008) (emphasis omitted).

68 *See* Shehadeh, *supra* note 62, at 42-3.

69 *See generally* Quigley, *supra* note 62.; Sabri Jiryis, *Settlers' Law: Seizure of Palestinian Lands*, 2 PAL. Y.B. INT'L L. 17 (1985); Ben-Naftali, Gross and Michael, *supra* note 63, at 579-88.

70 *See generally* Jeffrey D. Dillman, *Water Rights in the Occupied Territories*, 19 JOURNAL OF PALESTINE STUDIES 46 (1989); Iain Scobbie, *H2O after Oslo II: Legal Aspects of Water in the Occupied Territories*, 8 PAL. Y.B. INT'L L. 70 (1994-1995).

others targeted and killed, without due process.[73] It is also by military orders that freedoms (of movement, of religion, of the press, of opinion, and so on) are restricted.[74] It is through military orders that persons are denied reentry to the West Bank and Gaza Strip,[75] access to East Jerusalem,[76] families are separated,[77] Palestinians denationalized,[78] workers denied access to their place of work, farmers to their land, and students to their schools.[79]

In this paper I have showed how Israel used law and legality (in the above formal conceptions) to realize its discriminatory policies in the occupied Palestinian territories. It is through military orders that Palestinians were denied registration, treated as foreigners in their home country, denied reentry, deported and denied family unification. Through military orders, Israel regulated ways 'lawful' documentation is granted, and through military orders also converted those who cannot prove having 'lawful' documentation into illegally present in the territories, and then criminalized, imprisoned and deported them.

The three formal conceptions of legality do not seem to deal with the core issue at hand, and will leave us unsatisfied and unable to see how to deal with those law-like enactments. Such conceptions simply facilitate Israeli control of the Palestinian population and land.[80] It provided the occupation with a very sophisticated tool to violate what may be considered as basic rights of the Palestinians, as

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[71] For a discussion of Israeli practice of house demolitions, *see generally*, Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation* 119, 28 BROOK. J. INT'L L. 871 (2002-2003); Usama R. Halabi, *Demolition and Sealing of Houses in the Israeli Occupied Territories: A Critical Legal Analysis*, 5 TEMP. INT'L & COMP. L.J. 251 (1991).

[72] *See generally* Rishmawi, *supra* note 63.

[73] *See generally see generally*, Ben-Naftali, Gross and Michael, *supra* note 63.

[74] *See* Quigley, *supra* note 61, at 119.

[75] *See generally* Asem Khalil, *The Circulation of Palestinian Refugees and Migrants* (San Domenico di Fiesole, Robert Shuman Center for Advances Studies, CARIM Analytic and Synthetic Notes 2008/33, 2008).

[76] For more about the status of East Jerusalem under international law, *see generally* Joseph B. Tulman, *The International Legal Status of Jerusalem*, 39 ASILS Int'l L.J. 39 (1997); Antonio Cassese, *Legal Considerations on the International Status of Jerusalem*, 3 PAL. Y.B. INT'L L. 13 (1986); Moshe Hirsch, *The Legal Status of Jerusalem Following the ICJ Advisory Opinion on the Separation Barrier*, 38 ISR. L. REV. 298 (2005).

[77] *See generally* John Quigley, *Family Reunion and the Right to Return to Occupied Territory*, 6 GEO. IMMIGR. L.J. 223 (1992).

[78] *See generally* Victor Kattan, *The Nationality of Denationalized Palestinians*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW 67 (2005).

[79] Most recently the building of the separation wall has aggravated the situation in the day-to-day life of Palestinian population of the West Bank. *See supra* note 33.

[80] *See* George E Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467 (1994); Shehadeh, *supra* note 62, at 4-5.

a people or as individuals. Only a substantial conception of the Rule *of* Law - in which freedom and rights are integrated in the same concept of legality – that it is possible to avoid converting law, especially positive law to a tool for discrimination, apartheid and colonialism, and to avoid reducing legality to legalism.

Israel had used law and legality to rule the territories under its control. Using legality contributed largely to maintaining the occupation, illegal itself. Such a system of *Mis*-Rule of Law[81] coexisted with oppression, restriction of freedoms, and dispossession of rights. It led to the normalization of the 'exception' in the day-to-day politics.[82] In times of occupation, laws have spoken; and they have spoken disturbingly loud. They are oppressive and pervasive of all aspects of individuals' lives. For those who live under the heavy burden of those laws, the language is still the same, as much as the mistrust.

[81] *See generally* Anver Emon, *The (Mis)Rule of Law in the Occupied Territories: A Summary of Findings*, 60 GUILD PRAC. 80 (2003).

[82] *See generally*, Ben-Naftali, Gross and Michael, *supra* note 63, at 605-8.