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Asem Khalil

CARIM Analytic and Synthetic Notes 2010/46

Legal Module



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Euro-Mediterranean Consortium
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Analytic and Synthetic Notes – Legal Module
CARIM-AS 2010/46

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[Full name of the author(s)], [title], CARIM AS [series number], Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, [year of publication].

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Abstract

A new Israeli military Order no. 1650 regarding the Prevention of Infiltration took effect on April 2010. Human-rights organizations expressed alarm at the new powers Israeli military forces will have in dealing with Palestinians who do not hold 'lawful documents' of stay in the occupied Palestinian territory.

The objective of this paper is to investigate how this *new* order fits within a legal system Israel has set up in the West Bank and Gaza Strip through hundreds of military declarations and orders. Three aspects will be analyzed: first, the way residency status is regulated determining which residents are legal and which illegal; second, the regulation for border crossings and the movement of Palestinians within the occupied Palestinian territory and abroad; third, family unification of Palestinians in the occupied territory.

These examples will show how this *new* order is part of an overarching policy that has been in *crescendo* since 1967: maximizing Israeli control of (Palestinian) land and minimizing the number of (Palestinian) people. The fact that this policy is targeting a specific national group and the fact that it is accompanied by a persistent settlement policy in the occupied Palestinian territories renders these policies, not only discriminatory, but also racist and colonial.

Résumé

Israël vient de mettre en œuvre en avril 2010 une nouvelle ordonnance militaire, n°1650, visant à prévenir les infiltrations. Les militants des droits de l'homme ont exprimé leur préoccupation face aux nouveaux pouvoirs ainsi octroyés aux formes militaires israéliennes dans leurs rapports avec les Palestiniens qui ne disposent pas de « documents réguliers » pour séjourner en territoires palestiniens occupés.

L'objectif de cette note est d'étudier la manière dont cette nouvelle ordonnance s'insère dans un système juridique mis en place par Israël dans la bande de Gaza et la Cisjordanie par le biais de centaines de déclarations et ordonnances militaires. Trois aspects sont ici analysés : la gestion du statut de résident, et la distinction entre résidents légaux et illégaux ; la réglementation du passage des frontières et de la circulation des Palestiniens dans les territoires occupés et à l'étranger ; le regroupement familial des Palestiniens en territoires occupés.

Ces exemples révèlent que cette ordonnance s'inscrit dans une politique perverse allant *crescendo* depuis 1967, et qui vise à maximiser le contrôle israélien sur la terre (palestinienne) et à minimiser le nombre d'habitants (palestiniens). Le fait que cette politique cible un groupe national spécifique et qu'elle soit accompagnée d'une politique persistante de peuplement en territoires occupés rend ces politiques non seulement discriminantes mais aussi racistes et colonialistes.

I. Introduction

In the wake of the June 1967 war, Israel took complete control of the West Bank, previously under Jordanian rule¹, and the Gaza Strip, administered until then by Egypt.² Despite the restrictions imposed by international law applicable in times of occupation, Israel – that does not admit to being an occupying power – started a systematic change of the legal system(s) in force in the West Bank and the Gaza Strip. It did so through law-like tools (military declarations and orders) and enforced these in Israeli military courts.

Not only did Israel maintain legal and administrative separation between the West Bank and the Gaza Strip, it also reinforced it with a separate military command and, later, separate Civil Administrations were established to rule the West Bank and the Gaza Strip. Each (Israeli) area commander issued hundreds of military orders.³ Since then Israel has issued thousands of Military orders and continued to do so even after Oslo and the establishment of the Palestinian Authority.

On April 13, 2010, a new Israeli military Order ‘regarding Prevention of Infiltration’ – Order no.1650 of 2009 – took effect, six months after being signed by the Israeli Commander of the IDF (Israeli Defense Forces) in the ‘Judea and Samaria Area’.⁴ It is an amendment to Order no. 329 of 1969,⁵ which was almost as old as the occupation itself.⁶ Leading daily newspapers reported this 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” (Kershner 2010, 8).

The objective of this paper is to analyze military order n.1650: what does it really say? What is new about it? Why is it so alarming? What are the consequences of this order on the Palestinians of the occupied Palestinian territory? To answer these questions I will put aside questions of compatibility with international law applicable in times of occupation. I will also put aside questions of Israeli domestic law. Instead, I will read this new military order in the light of military orders previously in force and the legal system Israel has built up – gradually but definitively – in the occupied Palestinian

¹ 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 with 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 (Takkenberg 1998, 211).

² Those zones form what is called in UN resolutions ‘occupied Palestinian territory’. Israel had also occupied the Golan Heights – that was the part of Syria and Sinai Peninsula which remained under Israeli control until it was returned to Egypt under the 1979 Peace Treaty. (Takkenberg 1998, 211).

³ For this reason, limiting analyses to Israeli military orders applicable in the West Bank will be enough for the arguments I raise in this paper. There are 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 extends *grosso modo* to what is the West Bank); second, following the Oslo agreements, military governments were maintained in both the West Bank and the 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 the Palestinians of Gaza (population registry, requests of family unification, etc.) were transferred to Central Command Area.

⁴ The text is in Hebrew. An unofficial translation was made available by Hamoked, at: http://www.hamoked.org.il/items/112301_eng.pdf.

⁵ An unofficial translation of this order is made available online by Hamoked, at: http://www.hamoked.org.il/items/112300_eng.pdf

⁶ Order no. 1650 of 2009 is the second amendment to order no. 329 of 1969 (which was itself a replacement of order no. 125 of 1967). The first amendment was effected 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/>.

territory since 1967, making it possible to use law and ‘legality’ to carry out its colonial policies in the occupied Palestinian territory.⁷

Three aspects will be analyzed: first, the way residency status is regulated, which determines which residents are legal and which illegal; second, the regulation for border crossings and the movement of Palestinians within the occupied Palestinian territory and abroad; and third, family unification of Palestinians in the occupied territory. I will begin by analyzing the new military order and the difference it makes with regard to previous orders.⁸

II. The ‘New’ Military Order

As mentioned above,⁹ order no. 1650 of 2009 is an amendment¹⁰ to Order no. 329 of 1969.¹¹ The latter has 10 sections. As is the case with other orders, the first section often contains definitions, while the last sections are concerned with formalities: cancellation of previous orders if any (section 8), the date of its 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 any armed infiltrator (section 4); evidence (section 5); unlawful stay following expiration of permit (section 6); and obtaining a permit under false pretences (section 7).

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.¹² At first glance, it appears that the order includes (as rightly pointed out by the Israeli official cited above) new guarantees for what might be called ‘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’ and the infiltrator being ‘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 is, however, misleading. As always, the devil is in the detail.

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

⁷ See generally, (Ben-Naftali, Gross and Michael 2005); ([Bisharat 1994](#)); (Emon 2003); (Kassim 1984); ([Shehadeh 1988](#)); (Quigley 1981).

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: (Khalil 2009a); (Khalil 2009b).

⁹ See *supra* texts accompanying notes 4-6.

¹⁰ The first amendment was in Order no.831 of 1980, that included minor changes, an addition to article 3-B.

¹¹ Order no.329 of 1969 was a substitution of an earlier order, no.125 of 1967 adopted on September 21. The latter substituted an earlier order no.106 adopted in that same year, in the aftermath of the 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 writing.

¹² I will not refer to formal changes, but only to some of the most relevant substantial changes that the new order has 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 the point of departure for my analysis. See *supra* notes 4 and 5.

The previous Order no. 329 defined, in section 1-B, an infiltrator as ‘a person who entered the Area **knowingly and unlawfully after having been present [on] the east bank of the Jordan, Syria, Egypt or Lebanon** following the effective date.’¹³ 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.*’¹⁴

- a. The fact that “knowingly” is no longer necessary in the definition of an infiltrator means any irregularity in the documents will be enough to place a resident in this category. Thus, being or not being an infiltrator will depend exclusively on continuously changing regulations introduced by new military orders, and those who have become infiltrators may not even be aware of this fact. Meanwhile, ‘unlawful’ is defined exclusively as not being able to prove 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. 1650.¹⁵
- b. Order no. 329 limited the scope of the definition of infiltrator to those who had 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 overstay their permit will now be considered infiltrators; second, that some of those present in the West Bank, who were born and raised there and who have never been outside the West Bank, 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); and, third, the most important change is considering Palestinians of the 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 from those in the West Bank (even though Israel controls both population registries). This provision means that Gazans need to have a permit from the Israeli authorities in order to stay in the West Bank, as if they were foreign nationals, or they will be considered unlawful and, accordingly, will be treated as ‘infiltrators’. A similar problem exists for Palestinians of East Jerusalem who have Israeli-issued ID cards and 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.**’¹⁶ Instead, the 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, where an infiltrator has proven his entry into the area was lawful – he shall be sentenced to a term of imprisonment of three years.*’¹⁷ This means that:

- a. 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’.

¹³ That is 7/6/1967, as in section 1 of order 125 of 1969. The emphasis in bold is mine, indicating parts of the definition that was simply deleted from the definition that the new order had introduced.

¹⁴ Emphasis in italics is mine, indicating additions introduced to the older subsection.

¹⁵ 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.

¹⁶ Emphasis in bold is mine, indicating parts of the provision that was simply deleted from the new section 2.

¹⁷ Emphasis in italics is mine, indicating additions introduced to the older section

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 term of imprisonment for those who entered the ‘Area’ lawfully but overstayed their permit from those who entered unlawfully. This distinction is not relevant though when 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 is, it might be argued, still within the responses many other states undertake to combat illegal stays. Such measures may include, but are not limited to deportation. In what follows,¹⁸ I will show how Israel converted hundreds of thousands of Palestinians into illegals 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 dependent on Israeli regulation and not on actions undertaken by Palestinians.

Others may object and say that this is the ‘law’. But what is ‘law’? Do those military orders include real rules of law? In other words, do these 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 – an impossible task! – 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 the conceptions of law and legality that 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.¹⁹

III. Regulating Residency Status

The term ‘resident’ was used – for the first time (Shaml 1996, 89) – 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 who have their permanent residence therein.²⁰ Legal presence, however, depends on having been counted in the census carried out by the Israeli military government in the West Bank, in September 1967.²¹

Palestinians who – for whatever reason – were not counted or registered, became *illegal* overnight, regardless of their physical presence in the West Bank, before full Israeli control of the ‘Area’ was established. By military orders their physical presence became illegal, because they did not have what Israel deemed lawful documentation. From an Israeli perspective, being illegal meant that they were not supposed to be there, and, in order to stay *legally*, they needed a permit, as if they were non-resident foreign nationals. As non-residents, they also needed Israeli authorization to have, among other things, a job and to perform commercial activities. Uncounted Palestinians, deemed illegally

¹⁸ See *infra* sections III-VII.

¹⁹ See *infra* Part VIII.

²⁰ 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).

²¹ In parallel, censuses had taken place in East Jerusalem and in the Gaza Strip. In what follows all references will be made exclusively to the West Bank, unless otherwise indicated.

present, became subject to various sanctions, including fines and imprisonment; many were deported despite the fact that they had no other place to stay.

Those who duly registered became candidates for an ID number. The granting of ID numbers was strictly regulated by various orders. In fact, Order no. 234 concerning ID cards was issued on 17 March 1968,²² substituted by a much more detailed Order no. 297 in 1969, and amended 23 times from then until 1995.²³

Order no. 297 of 1969 regulated the way that the population is registered (cases of deaths and births). Contrary to Order no. 234 of 1968, this Order demanded that 'males over 16 years old' request an ID card, hold it at all times, and show it whenever requested by an IDF soldier or an authorized person, while it *permitted* females over 16 years old, to request an ID card.²⁴ According to Order no. 297, an ID card includes, *inter alia*, religion, nationality, spouse name, children names, date of birth, sex, and address.²⁵ The same order demanded that residents inform the Israeli authorities about any birth within 10 days, if the birth took place in the 'Area' and within 30 days if it happened elsewhere. The Order also imposed sanctions (from fines to one year in prison) on those who transgress any of its provisions.

Order no. 1206 of 1987 amended (article 11a Para.15 of) Order no. 297 of 1969, demanding that ID cards shall include (besides the name, date of birth and sex of children) the ID number; this means that, from then on, the ID number was to be given to children at birth and not, as before, when an ID card was 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' – in 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. 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 of resident males being married to non-residents than the contrary; thus linking children to the mothers serves Israel's interest in reducing the number of Palestinians in the 'Area' (Shaml 1996, 99). This change produced strange situations in which a family with a non-resident mother ended up with children who are residents and others who are not, depending on their date of birth; e.g. if a Palestinian there was 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 in time, whether through parental negligence or as a result of ignorance of the timeframe restriction, were simply denied registration and, hence, an ID number.

²² This Order was simple and brief (6 articles only); it allows 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 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 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).

²³ The Institute of Law - University of Birzeit in Al-Muqtafi had collected most available legislation 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.

²⁴ 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 an explicit way, the researcher understanding of the 'controlled Area' is to cover Gaza Strip, the Golan Heights, and until the 1980s, Sinai. The order also forbids those having obtained an ID number from Israel or the Controlled Area to obtain an ID number issued for residents of the 'Area'.

²⁵ 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.

These unregistered children of non-resident women or those who were not registered in 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 there. Accordingly, for Israel these unregistered persons are *de iure* inexistent, though their *de facto* presence is sometimes tolerated by Israel. As such, their presence will always be dependent on Israeli ‘good will’. The only way for them to be registered is to apply for family unification; a complicated, long and expensive procedure the results of which can never be guaranteed.

It should be noted that Order no. 1421 of 1995 included ‘positive’ changes to Order no. 1206 of 1987.²⁶ For example, it prolonged the registration period for children of residents to 18 years, regardless of the place of their birth and enabled registration of children when at least one of the two parents is a resident, as had been the case before August 1987. However, it added that this would only be possible if the Israeli authority were convinced that the applicant’s permanent residence was in the ‘Area’. This means that a space was left for the discretion of the Israeli authority to decide whether to register and thus to grant an ID number or not. Accordingly, many children whose parents’ permanent residence is not in the ‘Area’ may simply be denied registration because the Israeli official in charge of registering births decides otherwise. In other words, although changes over time – as shown by Order no. 1421 – are sometimes considered less restrictive, they nonetheless constitute an episode in the same overarching and oppressive Israeli policy.

IV. Regulating Population Access and Exit

Palestinians who were outside the ‘Area’ occupied by Israel in 1967, and those who fled because of the war, were denied re-admission. The fact that they were not counted in the census Israel conducted resulted in them being denied residency; as non-residents they could not get readmitted without prior authorization (with Israel, now in full control of the borders). It was as if they were foreign nationals. In fact, as a result of the war, a second massive wave of displacement took place for hundreds of thousands of Palestinians. These 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’.²⁷

The logic that Israel applied (that is similar to the way Israel dealt with Palestinian refugees in 1948²⁸) is perverted. It is 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’. 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 had no 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 into the occupied Palestinian territory. Stateless Palestinians, Palestinian refugees and those denied reentry

²⁶ 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.

²⁷ 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>

²⁸ 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 (Khalil 2007, 25-27).

became 'illegal' and 'unlawful' – and accordingly undesired – wherever they found themselves, no matter what they did. Their movement if not their existence 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 are trapped in a dilemma: dealing with this massive humanitarian challenge, while refusing to contribute to Israeli policies by integrating these new 'refugees'. Similarly, third countries – the targets (whether for work, study or even immigration) of these stateless Palestinians – were also suspicious.

Those who remained in the 'Area' to be counted in the census were deemed residents. Their *legal* status, however, depended on the 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 aliens, regardless of the fact that they – and their ancestors – were present before the occupation took place in 1967.

Residency is not secure, nor is it particularly empowering. In fact, having residency does not imply that the holder has a legal status; i.e. the 'right to have rights' of the kind that citizens or permanent residents enjoy in other countries. 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 Israel will tolerate residents doing without prior authorization. The fact that they are able to do certain things means that their *freedom* is not a right, but rather a result of the 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 the explicit suspension of the margins of actions tolerated for legal residents.

Residents' 'good behavior' (from an Israeli perspective) was not the only determinant factor in allowing these Palestinians to *remain* what they had become. These same Palestinians were often denied their status through simple changes in Israeli policies and orders, rather than on the basis of their actions (whether bad or good). Since this status is not an entitlement, nor a right, any reason might see hundreds of Palestinians forfeit their residency status. This means that a legally resident Palestinian in the 'Area' could at any time become an illegal resident – and so have their ID number revoked by the Israeli authorities. This was the case with hundreds of Palestinians who were deported and who had their ID cards revoked based on Israeli political and security pretensions. The same was true of many others who were denied reentry when they exceeded the period of time permitted for their stay abroad or whenever their travel document (an Israeli-issued *laissez passer*) expired while abroad.²⁹

In fact, in the case of departure through the Israeli Airport,³⁰ a resident of the 'Area' had to obtain a *Laissez Passer* issued for that purpose. If the travel document is not renewed within a year, the ID card, and 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 (Shaml 1996, 94).³¹ Following the Oslo Accords, Palestinians could obtain a Palestinian Authority travel document – valid for three years hence restrictions on exit were cancelled. However, thousands of Palestinians whose ID cards were revoked before the Oslo

²⁹ See *generally* (Shaml 1996, 12-13).

³⁰ Palestinian residents (those holding ID card) were forbidden from using Israeli airports, while at the same time, no airport for the Palestinians had been constructed following the Israeli attack and the complete destruction of Gaza International airport. This leaves ID holding Palestinians able to travel abroad only by land, by the Allenby Bridge in the West Bank, and through Rafah in the Gaza Strip. Palestinians of Gaza willing to use the Allenby crossing point needs special permits from Israel, and *vice versa*.

³¹ Having their permit renewed by family members each year after the third year of departure. In case of lack of renewal of the permit after the third year the ID card is revoked.

Accords were signed, were still considered by Israel as non-residents and cannot enter the 'Area' unless either they obtain a permit (issued by Israel) as visitors or a new ID number following a successful family unification procedure.

Israel, indeed, holds *de facto* supreme power over the borders of the occupied Palestinian territory, as much as it controls the movement between the West Bank and the Gaza Strip, for both residents and non-residents alike. The establishment of the Palestinian Authority over parts of the West Bank and Gaza Strip did not change this reality. The hundreds of thousands of new personnel in the Palestinian bureaucracy made their 'return' to the so-called 'Autonomous Territories' 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.

V. Family Unification

Those who are not in the population registry can only acquire a residency status in the 'Area' through family unification. Otherwise, they need to obtain a visitor's permit, granted by the Israeli Civil Administration's staff officer for interior affairs, as if they were a foreign national wanting to visit the 'Area' temporarily (Abu Mukh 2006, 2).

Requests for family unification are not filed directly by non-residents. Rather they are filed by resident relatives on their behalf. Those for whom family unification requests are filed are often Palestinian nationals – not foreign nationals, properly speaking³² – 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 were 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; and 6) children of non-resident mothers who were born between 1987 and 1995.

Regardless of the fact that they were Palestinian nationals, the outcome of family unification requests depended on Israeli rather than on Palestinian interests. Approving a request for family unification is not considered as satisfying a legal entitlement of individuals but simply a 'special benevolent act of the Israeli authorities'.³³ This attitude makes sense if one considers that, for Israel, residency is not considered 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, if given, revoked at any time.

Israeli policy in terms of approving family unification varied over time, according to political circumstances. Israel, indeed, applied restrictive policies with regards to requests for family unification through the decades of occupation.³⁴ The number of Palestinian families affected by these restrictions is very high.³⁵ The largest group in need of family unification remains families where one

³² 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 a foreign national, and needs the same permit for entry and stay in the 'Areas' as much as any other foreign national.

³³ To quote the state attorney's office in the response of 18 November 1992, Section 7, in the Israeli Supreme Court Case 4494/91. Cited in: (B'Tselem 2006).

³⁴ Restrictions intensified in times of 'violence' (for example following the second *Intifada* in 2001) or as a result of political pressure on the Palestinian Authority (for example, following Hamas victory in the 2006 elections).

³⁵ A survey carried out among Palestinian residents of the occupied Palestinian territories 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, 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 2006, 20-21).

of the spouses is not a resident, and who need this procedure to be able to live together with their spouse in the occupied Palestinian territory (B'Tselem 2006, 7).

The reduced number for approvals to family unification requests suggests that Israel's policy was to minimize the number of approvals,³⁶ agreeing only to exceptional cases where there is an overwhelming humanitarian case or when it is in the Israeli authorities' interests to do so.³⁷ Though for Israel, the issue of family unification (or Palestinians in the occupied territory) is often presented as a security or a political issue,³⁸ the real justification behind its policy may be the 'fear of the demographic growth of the population in the territories' (B'Tselem 2006, 9). According to this narrative, what may appear as an oscillation in the attitude of Israeli authorities towards family unification requests is not necessarily indicative of change of policy, but rather a technique to temper pressures against its internal or international policies (Shaml 1996, 106).³⁹ One thing is certain though. Even when family unification requests are successful, they remain complex, long and costly. As a consequence, many were discouraged from pursuing an application, preferring to remain in irregularly, with all the fragility, instability and immobility that 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 those given to foreign nationals. 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 overstay their permit they become illegal and, if they exit the 'Area', they will most likely be denied visitors' permits in the future.

Since having a visitor's permit is a pre-requisite in the approved family unification process (B'Tselem 2006, 4), the fact that some are denied temporary visa to enter the 'Area' is a determinant

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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 2007).

³⁶ As admitted by Rabin, then Minister of Defence, in a letter to Knesset Member 16/11/1989: from 1967-1987, only 15% of 85,163 demands were accepted, while from 1987 to 1989, only 20% of 3,266 were accepted (Shaml 1996, 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 1,053 requests for family unification submitted in the West Bank, 250 were approved, and of 305 submitted in the Gaza Strip, 192 were approved. In 1990, through till the end of July, 139 of 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 (B'Tselem 1991).

According to a more recent report, B'Tselem documented how Israel has, since 1993, set up a quota for family unification cases at 2,000 which did not meet the real needs 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 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 (B'Tselem and Hamoked 2005, 13).

In 2007, Israel started again to receive requests for family unification and many thousands have received approval. The PA talks, as an official number, about some 54000 Palestinians who entered the occupied Palestinian territory since early 1990 and who are considered illegal by Israel. The news was reported online, see e.g.

<http://afp.google.com/article/ALeqM5iELL0iiiiCoG2eVFkFjCAi6fAYHw>

³⁷ As recognized by ISC decision 106/1986, cited in: (Shaml 1996, 103).

³⁸ As recognized by ISC decision 90/1979, cited in: (Shaml 1996, 103).

³⁹ For more details about Israeli policies on family unification, see generally (B'Tselem 2006, 15-16).

factor for unsuccessful family unification. Israel has frozen the issuance of visit permits on different occasions.⁴⁰ 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 visa extensions were issued, in part under pressure from different countries as a result of initiatives against such policies (Amnesty International 2007, 3). In other words, even when family unification is approved, one needs to obtain a short visitors' permit first; if denied, then family unification is indirectly affected by the mere fact of not being able to physically enter the 'Area'. As for those who enter the 'Area' with a short visitors' permit and overstay while waiting for the outcome of their family unification request, these risk being denied resident status through family unification (B'Tselem 2006, 4).

VI. Palestinians of Gaza and East Jerusalem

The following are some of the main issues regarding the movement of Palestinians within the West Bank, East Jerusalem and the 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, according to the Oslo Accords, one unit.⁴¹ 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 rule.

After 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.⁴² This marked a change in policy with regards to movement between the West Bank and Gaza Strip, and the way change of residency took place in the population registry. In January 1991 (during the first 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 (Abu Mukh 2006, 6).

The cancellation of the general exit permit marked the consolidation of the closure policy between the West Bank and the 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 (Abu Mukh 2006, 6). This closure made it more difficult for Palestinians to change their residency from one area to another. Changing an address listed on an ID card became a long and complicated procedure, and many requests for address changes were rejected (B'Tselem and Hamoked 2005, 5-6). This situation worsened after the second *intifada*. Palestinians from the Gaza Strip who failed to update their place of residence in the West Bank were expelled to the Gaza Strip because they were said to be in the West Bank illegally! Some West Bank Palestinians were likewise expelled to the Gaza Strip as a punishment, while others were forbidden from returning to the West Bank after a visit to the Gaza Strip (B'Tselem and Hamoked 2005, 16-19).

⁴⁰ 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 (B'Tselem 2006, 24).

⁴¹ 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.'

⁴² In the West Bank it was through Order no. 34, in Gaza Strip it was through Order no.2 of 1972.

Following the disengagement plan carried out unilaterally by Israel in 2005, the Israeli Military Government in the Gaza Strip officially came to an end (Abu Mukh 2006, 16). In 2007, after Hamas took control of Palestinian Authority institutions, Israel declared Gaza an 'enemy entity'. Movement between the West Bank and the Gaza Strip through Israel became almost impossible. It also became more complicated to obtain a change of residence from the Gaza Strip to the West Bank. For this reason, families 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 comparable challenges. Recently, the Israeli Supreme Court rejected a petition against temporary order 2003 (The Nationality and Entry into Israel Law, published on 6 August 2003). That law prevents Palestinians from the occupied Palestinian territory from entering Israel, thus forbidding family unification between Palestinian residents of East Jerusalem and their Palestinian spouses residing in the occupied Palestinian territory (Abu Mukh 2006, 9). If those Palestinians holding a Jerusalem ID card decide to move their residency to the 'Area', they risk having their Jerusalem ID card revoked.

VII. Conclusion

During the Second World War, Lord Atkin famously contradicted Cicero's 2000-year-old dictum (*Silent enim leges inter arma*),⁴³ when he said: 'In this country [the UK], amid the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace.'⁴⁴ In contemporary states, it is rare to rule a population by applying brutal force alone, even in times of emergencies, threats to national security, or occupation by 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."' (Shoham 1996, 264). It is this concern that explains why Israel insisted on using military orders in the 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, suggests that Israel decided that the IDF would be ruled *by* law also.

Although the above claims are unconvincing, it is possible nonetheless to argue that the *formal* criteria for how the law is made and applied are realizable, at least as theoretical possibilities. Still, can we say that – as the IDF advocate general suggested – 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 the rule *of* law.⁴⁵ To rule *by* and *through* law are part of what is arguably called 'formal conceptions' of

⁴³ Quoted in: (Barak 2003, 130).

⁴⁴ Quoted in: (Lowry 1992, 119).

⁴⁵ The rule *by* law means that the government itself subjects its power to the constraints of the law and the rule *through* law means that the acts of domination must acquire the form of law. For Preuss, those are the 'twofold meaning' of the rule of law (Preuss 1996, 16).

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 the rule of law (Kahn 2006, 364).

In this paper we adopt a concept of the rule of law similar to Kahn, not Preuss. To my understanding, early positivists, such as the eighteenth-century utilitarian theorist and reformer, Bentham, would have individualized principles needed

legality. The second is a substantial conception of legality. Formal conceptions differ but they may be grouped together because they are 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 making and attempt to reach the values behind them.

In this paper I have showed how Israel has used law and legality – perceived in its formal conception of rule *by* and *through* law – to carry out 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 the ways that ‘lawful’ documentation is granted, and through military orders they also converted those without ‘lawful’ documentation into illegal subjects in the territories, and then criminalized, imprisoned and deported them.

The Israeli use of law – in which freedom and equality are absent – simply facilitated Israeli control of the Palestinian population and land (Bisharat 1994, 4-5). It provided the occupation with a very sophisticated tool to violate what may be considered the basic rights of the Palestinians, as 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 – allows law, especially positive law, to be converted into a tool for discrimination, apartheid and colonialism, and reduces legality to legalism.

Israel has employed law and legality to rule the territories under its control. Using legality it has maintained the occupation, which was illegal in itself. Such a system of the *mis*-rule of law (Emon 2003) coexisted with oppression, restriction of freedoms, and the dispossession of rights. It led to the normalization of the ‘exception’ in day-to-day politics (Ben-Naftali and Michaeli 2003, 605-608). In times of occupation, the laws have spoken; and they have spoken disturbingly loud. They are oppressive and pervasive in all aspects of individuals’ lives. For those who live under the heavy burden of these laws, the language is still the same, as is the mistrust.

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for controlling the abuse of power. Hart for example believed that in Bentham’s work it is possible to identify the elements of *Rechtstaat*. For him, these principles are now being revived by natural law theorists (Hart 1958, 595).

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 2006, 364).

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