Waiting for Justice

Al-Haq: 25 Years Defending Human Rights (1979-2004)

June 2005

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PREFACE

The year 2004 marked Al-Haq's 25th anniversary as a Palestinian human rights organization working towards the protection and promotion of human rights and the rule of law in the Occupied Palestinian Territories (OPT). In our 2004 annual report *Waiting for Justice*, Al-Haq covers violations of human rights by the Israeli occupying authorities based on first hand information gathered by our fieldworkers from eyewitnesses and victims of human rights violations. This report also provides an in depth legal analysis of these violations on the basis of international human rights law and international humanitarian law applicable to the OPT.

An important political development witnessed during the year was the so called Gaza "Disengagement Plan." While reaping the political benefits arising from this plan to unilaterally withdraw from Gaza and dismantle settlements there, Israeli authorities have continued with its systematic violations of human rights and with creating additional facts on the ground in the OPT. As highlighted in the political chapter of our report, the unilateral withdrawal from the Gaza Strip comes as an effort by Israel to relinquish its legal obligations under international law, while improving its political standing at the international level. In Al-Haq's opinion, this step will not lead to a just and durable solution to the Israeli-Palestinian conflict, but will only undermine opportunities for such a solution.

Another important legal development witnessed during 2004, was the Advisory Opinion of the International Court of Justice regarding the Construction of the Wall in the West Bank. In July 2004, the most authoritative legal body of the international community unequivocally stated that the construction of this Wall and its associated regime were unlawful, and called on the international community not to recognize the illegal situation arising from it. In the absence of effective measures on behalf of the international community to put pressure on Israel to dismantle the Wall, Israel has accelerated the process of constructing the Annexation Wall in defiance of international law. In *Waiting for Justice*, Al-Haq argues in its report that the international community is required to support its words by concrete action.

For a human rights organization working on the ground, it is striking to realize that many of the human rights violations highlighted in this report predate 2004, and constitute systematic violations of the rights of the Palestinian civilian population in the OPT for decades. Over the years, we have often felt that we highlighted what has become a systematic pattern of Israeli violations, many of which have only aggravated since the beginning of the current *intifada*.

More striking however, is the repeated times that we have called upon the international community to "respect and ensure respect" of the Fourth Geneva Convention, by intervening to ensure that Israel upholds its obligations under international human rights and humanitarian

law as an Occupying Power towards the Palestinian civilian population in the West Bank and Gaza Strip. In the past, Al-Haq has repeatedly called upon this community to take concrete action to hold accountable those who have committed war crimes. In its 25th anniversary report *Waiting for Justice*, Al-Haq repeats those calls, and awaits justice to come with ending the occupation, and allowing Palestinians to realize their right to self determination. In this regard, I want to underline the words of United Nations (UN) Secretary General Kofi Annan during a statement to the UN General Assembly on 21 September 2004, when emphasizing that legality should not be dictated by the powerful. He said:

> The victims of violence and injustice are waiting; they notice when we use words to mask inaction. They notice when laws that should protect them are not applied.

How much longer must the Palestinians wait before their fundamental rights under international law are upheld?

Randa Siniora
General Director
Al-Haq

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LIST OF ACRONYMS

ACRI	Association for Civil Rights in Israel
Adalah	The Legal Center for Arab Minority Rights in Israel
Addameer	Palestinian Prisoner's Support and Human Rights Association
ARIJ	Applied Research Institute-Jerusalem
Body of Principles	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
B'Tselem	The Israeli Information Center for Human Rights in the Occupied Territories
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEC	Central Elections Commission
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Committee on the Elimination of all Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CNMW	Convention on the Nationality of Married Women
CRC	Convention on the Rights of the Child
CRC	Cement Roadstone Holdings
DCI-Palestine	Defence for Children International-Palestine Section
DCLs	District Civilian Liaison Offices
DoP	Declaration of Principles on Self-Governing Arrangements
ECOSOC	Economic and Social Council
ESCWA	Economic and Social Commission for Western Asia
EU	European Union
FIDH	International Federation for Human Rights

First Additional Protocol	Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
FMEP	Foundation for Middle East Peace
Fourth Geneva Convention	Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
GA	General Assembly
GOI	Government of Israel
GSS	General Security Services
Hague Regulations	Regulations Annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land
HAMOKED	HAMOKED Center for the Defence of the Individual
HCJ	High Court of Justice
HRC	Human Rights Committee
ICBS	Israeli Central Bureau of Statistics
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICG	International Crises Group
ICJ	International Commission of Jurists
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICRC Commentary	Commentary-Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israel Defence Forces
IHL	International Humanitarian Law
ILC	International Law Commission
Interights	The International Center for the Legal Protection of Human Rights
IPS	Israel Prison Service
JMCC	Jerusalem Media and Communications Center
Nationality Law	Nationality and Entry into Israel Law
NDI	National Democratic Institute
NGO	Non Governmental Organization
OCHA	Office for the Coordination of Humanitarian Assistance
OCHR	Office of the High Commissioner for Human Rights
OPT	Occupied Palestinian Territories
PASSIA	Palestinian Academic Society for the Study of International Affairs
PCATI	Public Committee Against Torture in Israel
PCBS	Palestinian Central Bureau of Statistics
PCHR	Palestinian Center for Human Rights
PHRI	Physicians for Human Rights - Israel
PHRMG	Palestinian Human Rights Monitoring Group
PLC	Palestinian Legislative Council
PLO	Palestine Liberation Organization
PNA	Palestinian National Authority
PRCS	Palestine Red Crescent Society
PTSD	Post Traumatic Stress Disorder

Rome Statute	Rome Statute of the International Criminal Court
SC	Security Council
SG	Security General
Standard Minimum Rules	Standard Minimum Rules for the Treatment of Prisoners
TFPI	Task Force on Project Implementation
The Code	Code of Conduct for Law Enforcement Officials
UNCTAD	United Nations Conference on Trade and Development
UDHR	Universal Declaration for Human Rights
UN	United Nations
UNESCO	United Nations Edcuational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UN Norms	UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
UNRWA	United Nations Relief and Working Agency for Palestine Refugees in the Near East
UNTSO	United Nations Truce Supervision Organization
US	United States
Vienna Convention	1969 Vienna Convention on the Law of Treaties
WCLAC	Women's Center for Legal Aid and Counseling
WHO	World Health Organization

AL~HAQ IN 2004: A TWENTY FIVE YEAR RETROSPECTIVE

Al-Haq's Sign Outside its Office in Ramallah, West Bank.
(Rouba Al-Salem, 2005)

AL-HAQ IN 2004: A TWENTY FIVE YEAR RETROSPECTIVE

Fateh Azzam[1]

I am pleased and honoured to be asked to write this retrospective on the life and accomplishments of Al-Haq since its establishment 25 years ago. It seemed an easy and straightforward task at first; after all, I had worked with the organisation for eight of those years, and have maintained close contact with it since I left in 1995. Yet, it has not been so easy to sit and pull together the story of Al-Haq, an organisation I would unabashedly consider one of the most consistently serious and professional in the Middle East and North Africa, despite several external and internal upheavals. In fact, there is not one story to tell, but stories within stories; narratives crisscrossing other narratives that cannot be divorced from the context and environment if we are to gain an honest and clear understanding of this organisation.

To be sure, the story of Al-Haq is the story of the patchy and painful struggle for respect of human rights in the Occupied Palestinian Territory (OPT). In that struggle, the actors and targets have changed and changed again several times. First and constantly present is a ruthless occupier with an annexationist agenda who would rather re-define and re-invent the law than respect it. Following the 1993 Israeli-Palestinian Declaration of Principles on Self-Governing Arrangements for Palestinians (DoP), a national authority was established that did not seem to understand that its role was substantially different from the Palestine Liberation Organisation (PLO) from which so many of its chief actors were drawn – the Palestinian National Authority (PNA) was not a 'liberation movement' but the executive authority of a state-in-the-making with all that that entailed. It especially did not seem to understand the crucial role of law – and the concept of the rule of law — let alone commit itself to it. Also a constant actor and target audience was an international community that rarely had the political will to move effectively towards implementing its own commitments to human rights law and principles even as it continued to pay lip service to them, and even as it bankrolled and spent billions upon billions of dollars and euros in the OPT. Finally, there is a fearful and frustrated Palestinian society facing the ongoing and increasingly brutal occupation; a society that unfortunately, especially now under the current deteriorated state of affairs, seems farther than ever from being convinced that human rights have real tangible meaning and, if properly implemented, can indeed form a basis for positive and lasting change.

But the story of Al-Haq is also the story of the quest for professionalism, of commitment to the highest standards of work in the simplest tasks to be implemented, and of finding the meaning of human rights in everything that the organisation does. There was always the insistence on accuracy and precision, on firmly rooting organisational culture and language in legal and human rights discourse. Such organisations are difficult to find in the Middle East, and in that sense, Al-Haq was a school for dozens of Palestinian and international advocates and activists who are still pursuing human rights careers in Palestine, the region and the world.

[1] Fateh Azzam started at Al-Haq as Administrator in 1987 and resigned as Director in September of 1995. He is presently Director of the Forced Migration and Refugee Studies Program at the American University in Cairo.

Then again, the story of Al-Haq is that of discovery of the meaning of human rights in the workplace as well, learning how to be a good non-governmental organisation. Throughout its history, it has paid a heavy price for experimentation in participatory decision-making and democratic governance. It created and re-created structures and constantly re-invented organisational charts, committees and hierarchies, boards and advisors. Yet, even as boards resigned and were brought back, as staff members resigned or were dismissed, the work went on, and Al-Haq continued to register new accomplishments and to try new and creative approaches in a constant search for effectiveness. The volume and quality of work attest to the success of this unique organisation, despite the many ups and downs throughout its 25 years of life.

No writing can cover the broad range and complexity of an organisation such as Al-Haq, and I will therefore not attempt to be comprehensive in this brief retrospective. Rather, this is more of a personal view of what has been unique and different about Al-Haq, and my own perspective on the important contribution that this organisation has made to human rights in Palestine and in the region as a whole.

I. BEGINNINGS AND EARLY YEARS

In 1979, the Israeli occupation of what remained of historic Palestine, the West Bank and Gaza, had entered its thirteenth year and already the intentions of the occupiers were clear. Land confiscations were increasing at an alarming rate; Jewish settlements were being established illegally throughout the OPT; the economy was already made subservient to Israel's; and controls on the lives and livelihoods of Palestinians were tightening with clear demographic intent. The Palestinians, Arab states and the international community as a whole broadly perceived the occupation as a political problem that could only be managed and dealt with on a political level. The PLO was conducting its war of liberation while the international community and Arab states battled it out in the corridors and meetings halls of the United Nations (UN). In the meantime, Israel was proceeding with its own agenda, using a plethora of military orders and directives that touched every aspect of people's lives, from water use to agriculture to land confiscation and residency rights. Those military orders added yet another layer to the complex body of applicable – and some not so applicable – Ottoman, British, Jordanian and Egyptian laws inherited from Palestine's tortured history.[2]

Al-Haq, or Law in the Service of Man as it was originally called, was conceived by its founders Raja Shehadeh, Charles Shammas and Jonathan Kuttab on what is now a rather self-evident premise: that there are principles and rules that have been agreed to internationally, and that these principles and rules must apply and be respected even in situations of belligerent occupation

[2] Al-Haq's first publications were three indexed collections of Israeli military orders, the first such collation of amendments to local law since the occupation began in 1967. One was a collection of military orders governing charitable organisations (1979), then one on educational institutions and one on the courts in the West Bank (both in 1980). Later, in 1982, Al-Haq published an indexed set of military orders applicable in the West Bank. Arguably, these publications may have spurred the Israeli miltary's Civil Administration to begin publishing and updating its military orders in the mid-1980s.

and regardless of how close or far away a political solution to the conflict may be. It must be remembered that in 1979, the idea of human rights was still very new even internationally - after all, the two Human Rights Covenants had come into force just two years earlier,[3] and human rights organisations in the entire Arab region could be counted on the fingers of one hand. Furthermore, at the time, international human rights organisations such as Amnesty International paid scant attention to international humanitarian law. Besides the International Committee of the Red Cross (ICRC), there were hardly any international organisations specialized in humanitarian law or the laws of armed conflict generally.

Very few Palestinians had considered that law itself was a crucially important battlefield with the Israelis, and the founders' first attempts to engage lawyers in this effort failed. Palestinian lawyers in the West Bank who were members of the Jordanian Bar Association were on prolonged strike dating from 1967, and refused to appear before Israeli courts.[4] Most lawyers rejected out of hand the idea of debating law with the Israeli authorities, or even providing legal advice and assistance, in the belief that doing so would be tantamount to recognizing the legitimacy of the occupation and its legal structures. Israel was indeed a society that premised its governance on law, but it was Al-Haq's in-depth analysis of the use and impact of the law by the Israeli occupying authorities that began to clarify how the Occupying Power was using law as a tool to implement policy objectives that were themselves illegal, rather than looking to the law to govern its conduct of the occupation: the law was wielded as a weapon in much the same way as the gun, in the pursuit of an illegal and predatory agenda of annexation.

Al-Haq's important and lasting contribution in those first few years was to challenge that very interpretation and Israeli usage of law, relying in so doing on the idea of the rule of law. This concept was to stay with the organisation throughout its life, becoming part of its raison d'étre: "To protect human rights and promote the rule of law." This concept was the basis for the organisation's first important analytical publication in 1980, *The West Bank and the Rule of Law*, a seminal work by Raja Shehadeh assisted by Jonathan Kuttab. The study systematically exposed the Israeli occupation's use of law for its own ends, and did much to undermine the portrayal of Israel's rule in the OPT as some form of 'benign' occupation. It caught the attention of jurists and politicians alike, and raised a bit of a stir amongst legal and academic communities.

The West Bank and the Rule of Law was published by the Geneva-based International Commission of Jurists (ICJ), which became one of the organisation's most active supporters and allies at a time when Palestinians had few friends outside the region. In particular, the efforts of Mr. Nial McDermott, then Secretary General of the ICJ, were instrumental in assisting Al-Haq in those early years to gain a voice internationally, including at the UN, and helped set the professional

[3] The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both adopted by the U.N. in 1966, and entered into force in 1977.

[4] The strike was declared in 1967 in protest at the occupation. Palestinian lawyers participating in the strike refused to represent clients in the Israeli military courts, or in the Israeli-administered civil court system.

path of the organisation. In October 1979, Al-Haq became a West Bank "affiliate" of the ICJ - not a national 'section' as elsewhere, since Palestine was not yet a state.[5]

Perhaps the most important contribution of *The West Bank and the Rule of Law*, and of Al-Haq's membership in the ICJ and the latter's support, was that together they laid the groundwork and standard for the organisation's approach to human rights. Al-Haq's trademark became its approach: precise and objective legal analysis applied to empirical information documented and corroborated in the field, and a professional tone free of the politically charged language that was most common in Palestine at the time. While this did much to attract international attention and respect, ironically it was the lack of 'politics' in Al-Haq's language, and the fact that it had no affiliation to any political faction, that made it hard to 'place' domestically, and it took a while for the credibility and validity of an 'independent' organisation to be fully recognised within Palestinian society. In later years, especially at the height of the first and then the current *intifada*,[6] the struggle between the political and the professional would take on new meaning in Al-Haq's work, and within the organisation itself.

Those early years marked Al-Haq as a serious human rights organisation facing nearly insurmountable odds in getting the word out on the state of human rights under Israeli occupation. After the first collations of Israeli military orders, and guided by *The West Bank and the Rule of Law*, the organisation turned its attention to a number of key human rights issues, getting governments and UN bodies apprised of the extent and lasting impact of violations of Palestinian human rights perpetrated by the Occupying Power, and convincing international human rights organisations to speak directly on those issues.

II. GROWTH AND MANY "FIRSTS"

An important priority was to expose the treatment of Palestinian prisoners in Israeli detention facilities and prisons, especially the ongoing and systematic practice of torture. Al-Haq's exposition began with a report on torture in Al-Far'a detention facility in the Nablus district in the West Bank. Al-Haq had to confront, to its own surprise and dismay, the hesitation of the international community, including human rights organisations, to take up the issue. This might have been due either to a tendency to believe the denials of the Israeli authorities (the idea of the "benign occupation" still had some credence in those days) or to the lack of trust in the accuracy of a Palestinian human rights organisation, or to a combination of both. Because of Al-Haq's meticulous documentation and analysis, its claims and charges were eventually perceived to be credible and the international community began to ask the right questions.

[5] Later, conflicts on interpretations of international humanitarian law would arise between Al-Haq and the Israeli section of the ICJ, as certain members of the latter were significant exponents of the official Israeli legal view. The Israeli ICJ no longer exists as of this writing. Years later, other Palestinian organisations became ICJ affiliates, notably, the Palestinian Center for Human Rights (PCHR) in Gaza, and at one point LAW: the Palestinian Society for the Protection of Human Rights and the Environment.

[6] The first *intifada* began in December 1987 and ended with the Oslo peace process; the current began in September 2000 and is discussed in the Chapter: "The Political Framework Governing the Occupied Palestinian Territories" of this report.

Due partly to the crucial importance of accuracy, it became the culture of the organisation not to come out publicly on any issue until it had been thoroughly documented by its fieldworkers and analysed in the context of applicable local and international law. In the mid-1980s, Al-Haq became the first human rights organisation in the region to establish a fieldwork unit, with researchers placed throughout the West Bank and later in Gaza as well. Fieldworkers were trained in taking testimonies and sworn affidavits, gathering data and corroborating evidence of violations. They would spend the week collecting evidence of human rights violations and reporting back weekly with their documentation. Fieldwork became the real backbone of the organisation, giving it the information it needed and allowing it to monitor the situation on the ground quite closely, leading often to the discovery of new and hidden violations never before reported even politically in the newspapers.

A particular word of appreciation must be added here for Al-Haq's fieldworkers, who had to endure severe hardship in the process of data collection, taking serious chances despite frequent curfews and being present at areas of confrontation between the Israeli military and the civilian population. They often paid a high price for this effort; most of them were placed under renewable administrative detention at one time or another, especially with the outbreak of the first *intifada* in December of 1987, when all but one were detained without charge or trial. The first *intifada* also saw the rapid expansion of Al-Haq's fieldwork unit with fifteen fieldworkers employed at one point, and by the early 1990s, fieldworkers were further trained as paralegals providing legal advice to the community and pursuing interventions with the authorities in selected cases.

Documentation coming from the field was entered into a detailed and very particular database software program especially created for Al-Haq to meet its information and analysis needs. This soon developed into the first comprehensive and detailed database of human rights violations in Palestine, indeed the first such database in the entire Arab region. Several staff members were needed to translate field documentation into worksheets for data entry, and eventually the project grew to operate as an independent unit within the organisation. Al-Haq's database soon became an important resource for many other local and international actors concerned with human rights, and by the late 1980s, the organisation was regularly fielding requests for information from Amnesty International, Human Rights Watch, and many others.

Torture would continue to be an ongoing concern for Al-Haq. After the Far'a report, Al-Haq in 1986 went on to challenge the Israeli Medical Association, charging its doctors with violating medical ethics by complicity in acts of torture. A series of reports on prisons and detention centres were published, and in 1995, Al-Haq fieldworkers conducted a major documentation of Israeli torture of Palestinians, interviewing and taking testimonies and affidavits from more than 700 former detainees. This was one of the most comprehensive of Al-Haq's reports, and contained some of the more detailed descriptions to date of Israeli methods of interrogation and torture.

Between 1983 and 1987, a series of reports were produced, one after the other, exposing for the first time a number of Israeli practices and violations including administrative detention and

deportation of Palestinians on the basis of "secret evidence" with little legal recourse beyond a hearing before a military tribunal. Major issues like house demolitions, military censorship and the military justice system were documented, analyzed and publicized through the dissemination of reports. In these reports, a studied and systematic approach began to emerge, with Al-Haq situating these practices not only or simply as violations of human rights, but as a matter of sustained and systematic policy on the part of the Occupying Power. To confirm its analysis of such policies (as well as the practices) as in fundamental violation of the applicable rules of international law, Al-Haq sought the expert opinion of international jurists in the first international conference on the administration of occupied territories, held in January 1988, little more than a month after the outbreak of the first *intifada*. International and Palestinian lawyers presented studies on the theory of belligerent occupation and the reality of Israel's, and the collection of papers at the 1988 conference were eventually edited and published and constitute to this day an important contribution to the field of international humanitarian law.[7]

As the *intifada* ground on, the number and scope of human rights violations increased exponentially and the international visibility of these violations also increased, including through television and press reportage. The organisation doubled the size of its staff to meet the increased demand for information on Israeli military practices, and focused much of its reporting on annual reports that contained voluminous data and legal analysis on a broad range of Israeli governmental and military practices. Even today, anyone needing a comprehensive view of Israeli policies before and during the first *intifada* need only look through Punishing a Nation (1989), *Nation Under Siege* (1990), and *Protection Denied* (1991). Preparing the annual report, however, eventually became an immensely onerous task, and was dropped, to be revived again with the current *intifada* in 2001 with *In Need of Protection* (2002). This Anniversary Report is in many ways a continuation of that tradition.

The organisation's efforts throughout its history addressed a broad range of issues that went beyond violations of civil and political rights; issues that a political perspective usually misses or pays little attention. A quick perusal of the list of publications demonstrates the range of economic, social and cultural rights that Al-Haq has taken up throughout the years. It began early on to systematically address policies that affect Palestinian life and the potential for development, providing clear and ample warning for what is now the single largest obstacle to peace: the struggle over land and settlements. As early as 1985, Al-Haq founder Raja Shehahdeh authored the important work *Occupier's Law*, clarifying in detail Israeli legal practices and policies of land confiscation and the process of what he called the 'alienation' of Palestinian land from its inhabitants. Al-Haq continued to alert the public to land use planning as an issue of major concern, publishing an analysis of an Israeli road plan for the West Bank and questioning the occupier's right to make such plans and in whose interest. Clarification of 'whose interest' came with a more general study on Israeli land use planning, and several years later, a thorough and far reaching study was commissioned by Al-Haq that clarified Israeli delimitation of Palestinian

[7] *See International Law and the Administration of Occupied Territories*, Emma Playfair (ed.), Clarendon Press, Oxford, 1992.

development through its planning policies and practices.[8] Several studies and reports on Israeli practices in the areas of taxation, health, the robbery of Palestinian cultural property, the rights of persons (especially women) with disabilities, the right to housing, and many others.

As well as documenting and reporting on violations, Al-Haq invested substantial effort in strategies of intervention. Direct interventions with the Israeli authorities was the first step in trying to get redress, a strategy initially criticized by some in the Palestinian community as tantamount to "recognizing" the occupier's authority. Interventions were also made with various UN human rights bodies and letters written to the Secretary General. Al-Haq also targeted the annual US State Department Country Reports on human rights, critiquing its language and accusing it of using biased terminology that sought to minimize the extent and seriousness of Israeli violations.

In another first, Al-Haq began using the strategy of campaigns to publicize Israeli practices and elicit pressure to change them. Although the organisation's sustained work on torture certainly may be termed a campaign in some ways, the multi-pronged strategy of campaigning that included preparing all the documentation and analyses and reaching out to as wide an audience as possible using mailings and posters and extensive contacts coalesced in the first planned campaign "The Right to Family Reunification" in 1991. This was followed by the campaign "Stop Destroying Palestinian Homes" in 1992-1993. The 1993-1994 campaign on "Women, Justice and Law: Towards the Empowerment of Palestinian Women" was Al-Haq's first effort to address issues beyond the field of the Israeli military occupation, looking also towards the potential of domestic Palestinian legislation with the negotiation of the Oslo Accords and the establishment of the PNA.[9] The campaign reached out to all areas of the West Bank and Gaza to bring together women's perspectives and demands, culminating in a major conference in East Jerusalem; it was another "first" for a Palestinian human rights organisation. The campaign strategy seems to be reviving now, in 2004, with Al-Haq's most recent effort to put a stop to Israeli collective punishment of Palestinian society.

Another example of a post-Oslo campaign aimed at institutions within Palestinian society was the project to strengthen the accountability of Palestinian medical institutions and personnel. Working with a committee of doctors and nurses, Al-Haq drafted a Palestinian Charter for Patients' Rights, and began a campaign to disseminate the Charter in hospitals, clinics and doctors' offices. Unfortunately, the project was unable to make much progress, as both the medical association and the Ministry of Health had other priorities in these early years of the PNA.

But perhaps the most interesting and dynamic effort in the search for effective human rights protection was a project that Al-Haq started in 1988, inspired and led by co-founder Charles

[8] Coon, Anthony, *Town Planning Under Military Occupation: An Examination of the Law and Practice of Town Planning in the Occupied West Bank*, Al-Haq, 1992.

[9] Since the advent of the PNA in 1994, and the elections of the first Palestinian Legislative Council (PLC) in 1996, Al-Haq conducted a series of activities to ensure the inclusion of international human rights principles in Palestinian laws and legislation and for the development of national structure and legislation built on the rule of law.

Shammas, called the Enforcement Project. Building on Al-Haq's extensive documentation of ongoing policy-based violations of international humanitarian law, and against the background of the first *intifada*, the Enforcement Project focused on the duty of third party states to ensure Israel's respect for the Fourth Geneva Convention in its treatment of the Palestinian population of the OPT and in its conduct of the occupation. Al-Haq focused its efforts to mobilise the protections of the Convention for the occupied Palestinian population on Europe, placing a "field representative" in London, and engaging in targeted interventions with members of the European Parliament, the European Commission, and the parliaments and governments of a number of European states, as well as with the international legal community, law associations and legal practitioners. Eventually, the project spun off into its own organisation, the Centre for International Human Rights Enforcement, and elements of it continue even now under the auspices of the Mattin Group. In the current context of the current *intifada*, with the protections of international humanitarian law even more severely lacking, Al-Haq is now reviving its efforts and working together with Mattin and others on enforcement-related strategies.

One can go on and list many other efforts and strategies that Al-Haq adopted over the years in dealing both with the Israeli and Palestinian authorities, such as its ongoing Legal Services Unit where trained paralegals provide pro bono legal advice for victims of violations, as well as actively seeking to gain redress through interventions with the authorities, but short of going to court. Al-Haq did take test cases before the Israeli High Court of Justice, called on expert opinions of jurists on a variety of issues as they came up, and built coalitions in later years with other Arab, regional and international human rights organisations, particularly after the World Conference on Human Rights in Vienna in 1993.

The World Conference on Human Rights was the first time that Al-Haq came into contact with what was by then a significant world-wide movement for human rights, especially in the South, going beyond its usual work with international human rights organisations such as Amnesty International, Human Rights Watch and the Lawyers' Committee for Human Rights.[10] Al-Haq connected with its Arab sister organisations for the first time in Cairo at a preparatory meeting for the World Conference, and became a member of the Asia-Pacific Non-Governmental Organisation (NGO) Coordinating Committee to follow up on the Vienna Declaration and Programme of Action.

By the early 1990s, Al-Haq had become very well-known internationally for the strength of its work, accuracy of documentation, and legal approach. It won several international awards, including the Carter-Menil Human Rights Prize (1989) and the French Republic Human Rights award a few years later. In 1990, Al-Haq fieldworker Sha'wan Jabarin was awarded the Reebok Human Rights Award, soon after he was released from multi-year renewals of administrative detention, having never been brought to trial or convicted of any crime by the Israeli authorities.

[10] Now called Human Rights First.

III. OSLO AND THEREAFTER

After the signing of the Oslo Accords in September, 1993, a new situation emerged which posed significant questions as to responsibility and accountability between Israel and the emerging PNA. Consistent with its effort to clarify the law, and to ensure adherence to its human rights and humanitarian law principles, the organisation published a thorough analysis of the DoP, which challenged the argument that the Oslo Accords will lead Palestinians to their self determination. It also concluded in essence that under the DoP the occupier retains responsibility and should be held accountable, while at the same time the new PNA can and should be held accountable wherever the 'functions of government' have been effectively devolved to it.[11]

The need to think strategically about the new situation quickly became apparent. To help the organisation consider the immediate and more distant future, and how its own role may change to meet the new needs, Al-Haq enlisted the assistance of the well-known Chilean human rights expert, Jose Zalaquett, who evaluated the organisation's past work, and pointed the way to what it might expect in the future given the volatile and constantly changing political situation. New methodologies and approaches clearly needed to be considered. For example, it became important to learn more about and begin to use human rights law, rather than focusing on humanitarian law and laws governing belligerent occupation as had mostly been the case to date. Yet, according to Al-Haq's analysis, the state of belligerent occupation was not over either. Consequently, the major change in Al-Haq's human rights agenda after September 1993 consisted in a significant expansion of its remit to include monitoring and reporting on PNA conduct in the putative Palestine.

The organisation's strategy in the early post-Oslo years was to engage the PNA in a constructive dialogue, combined with training. This was perceived to be a "must" strategy in the beginning to assure the PNA that no political aims lay behind human rights advocacy; rather, the aim was strictly to achieve respect for human rights. Such constructive engagement, however, was not to be pursued at the expense of public discussion of unacceptable practices and the strategy of "shaming." It was clear, however, that at least in the first eighteen months, dialogue was a preferred option. Many meetings were held with security forces and ministries, and a seminar on strengthening the independence of the judiciary was organized in Jericho with the ICJ in 1994. Human rights education and training programmes were designed for members of the Authority's security forces, which as a target group of such a strategy generated quite heated debates within the organisation. For the purpose of human rights education for the broader public, Al-Haq revived *The Human Rights Corner*, a weekly newspaper column for human rights education purposes that it had initiated very early on in the 1980s. It actively participated with the Palestinian groups of Amnesty International in articulating and guiding a human rights education effort in the OPT, a project which continued for several years.

[11] *A Human Rights Assessment of the Declaration of Principles on Interim Self-Government Arrangements for Palestinians* , Al-Haq, 1994.

The "honeymoon period" was soon over, however, and there emerged on the part of the PNA – sometimes under pressure or with encouragement from the US[12] and Israel - patterns of human rights violations and a failure to establish the necessary legal safeguards to protect human rights. Al-Haq issued a number of reports on the PNA's practices, including attacks on freedom of assembly, the establishment of the State Security Court, and unfair trial procedures.

These were not easy years. The situation in the OPT was extremely fluid. The peace process stumbled and kept stumbling over implementation issues and continued Israeli violations of the international law. Debates within the organisation about how to respond to particular events or violations were sometimes heated as staff members articulated different opinions regarding the PNA. Al-Haq was not spared the rancorous debates about Oslo; whether the gradual approach of incremental agreements could possibly work, whether the Declaration of Principles did in effect give up Palestinian rights, especially the refugees' right of return; whether the PLO as a liberation movement can indeed become a state in formation and transform the individualized authoritarian leadership style into accountable institutions of governance. These debates resurfaced every time a violation or programme or event was brought up for discussion, and truth be told, it was an exhausting process for the over-worked staff of Al-Haq.

I reflect on those particular years – the years of my direct involvement, so I claim little objectivity here — and I cannot escape a feeling of genuine admiration for the organisation. Despite the intensity of political and personal feelings and the views held by each member of Al-Haq staff about the Oslo Accords and despite tremendous political pressure from all sectors of the society, Al-Haq stayed the course. Everyone remained committed to maintaining the organisation's independent human rights perspective and the high standard of professionalism, relying religiously upon the accuracy of information and strength of legal analysis that are required to achieve results and maintain credibility of the work.

There were of course particular gaps in Al-Haq's approaches throughout its years of work that may be criticized or that should have been considered in a different light than was apparent at the time. Many issues created debates within the organisation, some programmatic and some organisational, especially internal structure issues and problems that dogged Al-Haq for many years. No review of an organisation's history would be complete without acknowledging these issues and trying to draw lessons for the future from them. The assessments of these problems are by nature arguable, and my own subjective and personal view set out in this paper are unlikely to be shared by everyone in the organisation or by its friends and observers.

IV.CRITIQUES, CRISES AND COLLAPSE

I believe that Al-Haq got it right on nearly all of the substantive matters it took up over the years, faithfully maintaining the professional approach of a human rights organisation that does not

[12] The establishment of Palestinian State Security Court in the West Bank and Gaza Strip was praised by then US Vice-President Al Gore as an "important step in the fight against terrorism."

use political criteria to determine issues it chooses to take up or not. It had the most trouble with two very complex issues: the problem of collaborators during the first *intifada* and the problem of armed attacks against civilian targets inside Israel in the second. In both of those cases, the decision of when and how to go public became a matter of intense debate within the organisation.

Early in the first *intifada*, the extent and effectiveness of Israel's network of Palestinian collaborators throughout the West Bank and Gaza became apparent. Many of these collaborators were armed and with Israeli military backing, exhibited extreme gangster-like violence and brutality towards the community. The Palestinian community's response was equally harsh and uncompromising. By October 1989, 130 alleged collaborators were killed, some brutally, by Palestinian activists.[13] Furthermore, beyond the cases of armed agents of the Israelis, many of those killed were identified as informants on the basis of suspicion or assumption, a few had been subjected to informal trial by young activists, and many were severely beaten and tortured before they were killed. While no one in the Palestinian community had sympathy for the role played by collaborators, the meting out of "vigilante justice" posed very serious problems, not least of which are questions of due process, proof and clarity of evidence, whose responsibility and authority it was to hold those collaborators accountable, their exercise of a right to self-defence, and many other guarantees that such informal justice fails to provide. In addition to the denial of such rights (including, ultimately, the right to life),the killings threatened to sanction and 'normalise' in some way the "unofficial" use of force within the Palestinian community.

The issue of collaborator killings engendered very hot debates within Al-Haq, and those debates resulted in a two-pronged approach. Publicly, Al-Haq adopted a strict legal attitude. While clearly not condoning the killing of collaborators from the perspective of the right to life and opposition to the death penalty "with or without due process," Al-Haq assigned *de jure* responsibility to Israel as "the sole law enforcement power in the Occupied Territories."[14] It intervened privately with militants in the context of "quiet diplomacy," correctly delineating the responsibilities of the PLO and its organs under international humanitarian law despite the lack of legal mechanism or recourse available to them for bringing collaborators to justice. While this position is legally correct, Al-Haq's failure (and here I should say "our" since I share responsibility for this period of work) to publicly address collaborator killing cases where excessive brutality was exhibited had a negative effect on the organisation's mission and its standing internationally. Moreover, by keeping these interventions non-public, the organisation missed an important opportunity to educate the community. This is of course easier to say in hindsight, and it certainly was very difficult at the time given the highly charged emotional and political atmosphere in the OPT.

A much more difficult issue, and in my view a serious gap to date in Al-Haq's honourable human rights record, is the failure to take a clear public position on the problem of armed attacks against

[13] As reported by Al-Haq in *Nation Under Siege*, Al-Haq, 1990, page 152.
[14] *Ibid.*, page 153.

civilian targets inside Israel during the first three years of the current *intifada*. By any measure, attacks on civilians are unacceptable and may be the subject of charges of war crimes and crimes against humanity. Human rights organisations cannot argue a strict legal definition since these acts are a matter of individual as well as command responsibility for state and non-state actors alike. The problem of course is that the issue, like that of collaborators in the late 1980s, is extremely charged politically and emotionally. The state of desperation in the OPT, Israel's brutal behaviour and unbridled crimes in Gaza and West Bank, the Israeli destruction of Palestinian institutional structures and the failure of the international community to step in and provide any kind of protection for Palestinians, all create an environment where any form of "resistance" becomes acceptable out of sheer frustration. Any criticism of armed attacks against civilian targets inside Israel is liable to be met with: "but look at what the Israelis are doing."

However, like many sensitive issues, the debate around "martyrdom operations" as they are often called in Arabic, is framed wrongly. It is not the suicide or martyrdom aspect of these attacks that is or should be under question. On the contrary, martyrdom is the "supreme sacrifice" one can make for one's country, as every culture and army in the world will tell you. Nor is it about violence or the right to resist occupation. Fundamentally, targeting civilians for any reason is a crime under international law. Unfortunately, nearly all Palestinian and Arab human rights organisations have been silent on this question to date.[15] In the case of Al-Haq, the professionalism of its approach and the objective nature of its analysis and language, as mentioned earlier in this paper, have always been important aspects of its mission and the source of its credibility, especially when necessitating the adoption of unpopular or legally complex positions. Thus, should Al-Haq take a clearer position on the problem of armed attacks against civilian targets inside Israel, it would not be the first time it goes against the current of political trends or opinions.

To return from the realm of critique, Al-Haq's objectivity and professionalism is also what attracted international volunteers and professionals to work with Al-Haq, and these volunteers would prove an important asset for the organisation. Throughout nearly all of its 25 years, you would always find at least one or two and up to four or five "internationals" working alongside Palestinian lawyers, researchers and fieldworkers. These volunteers added needed skills and expertise to the organisation, and they participated fully and took equally in terms of experience and learning. Many of them went on to significant jobs in their countries of origin, and many became an expanded solidarity network and extended arm for Al-Haq.[16] In point of fact, it may be a misnomer to call them 'volunteers,' because although some were indeed self-funded, working on PhD research for example, others were paid and importantly, worked under similar conditions and pay levels as the rest of the staff. Many were supported by generous grants from organisations

[15] Only one organisation, the Association for Human Rights Legal Aid in Egypt, took a public position in 2002 against the targeting of civilians.

[16] Former Al-Haq colleagues, both Palestinian and international, have worked or are working with the ICJ, Amnesty International, Human Rights Watch, the International Centre for the Protection of Legal Rights (Interights), the Office of the High Commissioner for Human Rights (OHCHR), the International Crisis Group (ICG), The Ford Foundation, and a variety of governmental and academic institutions.

like the United Nations Association – International Service (UK), and Al-Haq sometimes found money within its own budget for salaries and other expenses.

In its early years, the spirit of volunteerism at Al-Haq was high; there were few staff members and they were mostly administrative. In fact, the organisation's first paid staff member was a secretary,[17] and the organisation owned one computer.[18] There was no "Director" as such; the founders formed an Executive Committee that took overall responsibility for the organisation, and they plus a few volunteers did the work. There were few bureaucratic encumbrances and all issues, ideas, action alerts, and plans were discussed and decided collectively at a General Meeting every Wednesday evening, a meeting that often became a marathon into all hours of the night.

There is always a sense of excitement and challenge in such an atmosphere: one has a very personal sense of mission and commitment to the work at hand, happily willing to give one's all in time and energy, sometimes working day and night to complete a task. The sense of accomplishment upon completing projects is also very high and rewarding. However, such high levels of energy and commitment are not sustainable in the long term, especially if you are successful and outside demands on you begin to mount. By 1983, Al-Haq opted for growth, and by 1986-87, it had a paid staff of fourteen, and moved out of its three-room apartment and into a large office space that could accommodate the growing law and human rights library – the first public one in the West Bank and Gaza. By the middle of the first *intifada*, Al-Haq staff had grown to over 45. It had reworked its structure and acquired a Board of Trustees, taking on all the accoutrements of a professional institution.

It was no doubt predictable that such rapid growth entailed growing pains, especially in the midst of such a volatile political and security environment. One need only imagine 45 people sitting around a table at the Wednesday meeting, at different stages in their exposure to, and involvement in human rights work, discussing the issues of the day and trying to come to a consensus decision. This became an exhausting process exacerbated further by the need to discuss organisational matters: increasingly, less time was being spent on discussing human rights issues and more on matters such as salary scales, insurances, division of labour and lines of authority and the like.

Much of Al-Haq's history shows its continuing efforts to bring several elements together: to be committed to the idea and ideal of human rights including participatory democracy, to be "professional" in the sense of doing the job with a high degree of accuracy and effectiveness and with proper supervision and lines of authority, and to ensure a sustainable job and reasonable conditions of employment that can ensure family security as well as organisational continuity and the implementation of long-term visions. At Al-Haq, this debate was quite acerbic at times and nearly caused the organisation's total demise on a couple of occasions.

[17] The late Pauline Hanna, who served the organization with great dedication for most of her working life until her ultimate death in 2002. Everyone who worked at Al-Haq will remember her fondly.

[18] For its first few years Al-Haq's office also had no telephone, lines being particularly restricted during that period of the Israeli occupation.

The first major shake-up occurred in 1993. Al-Haq's Board of Trustees resigned *en masse* when staff rejected a proposed new structure, salaries and benefits. In another dubious 'first' the organisation thus became one of the very few in the world to be entirely staff run for more than two years. While maintaining the basic unit structure,[19] staff elected an Executive Committee and a Coordinator under the overarching and aspirational motto: "Collective responsibility for decision-making, personal responsibility for their implementation." The following two years were difficult ones with much debate that stretched the limits of "participatory democracy," sometimes to the breaking point. Despite these difficulties, this was arguably one of the most prolific periods in Al-Haq's history, perhaps due to the sense of ownership that staff had, combined with the drama of the events transpiring at the time and the organisation's success in garnering the needed funds to support its many projects and activities. Eventually, debates and discussions grew to be severely burdensome, and the entire staff acknowledged the need for a change. Thus, a new structure and with it a new Board of Trustees were created.

The sense of empowerment, however, continued to be a double-edged sword, and in 1997, a number of staff members who had been with Al-Haq almost since its inception again found it difficult to live with Board decisions and authority. In an attempt to assert such "ownership," several staff members tried to claim the organisation and to dismiss the Board of Trustees. This time, however, the tables were turned, and the Board exercised unprecedented authority and dismissed the entire staff. Only one member of staff remained and a new director was brought in but the organisation had lost its institutional memory and its capacity and some would say even its ideals in one fell swoop. It was a shock to everyone who was ever close to Al-Haq to see the first and most important Palestinian human rights organisation come to such an ignominious end; or so we thought.

Al-Haq continued to exist in name but it lay essentially dormant for the next two years. Much of its ongoing work remained on the shelves, unfinished. It lost its donor base, and maintained its nominal presence only in meetings here and there; little work was accomplished. Everyone assumed the organisation was finished for good, but in 1999 its fortunes began to turn again. A new director was brought in by the Board whose main goal became to revive the organisation, but it would take two more years for Al-Haq to pull together again.

Today, like a Phoenix rising from the ashes, Al-Haq is back. Under the leadership of its present director, Randa Siniora, a former staff member since 1987, the organisation is regaining its institutional memory, its structures and its approach to the defence of human rights. Fieldworkers are again monitoring and documenting violations by Israeli and Palestinian authorities after more than a four-year hiatus, the database of violations with thorough records dating back to 1985 is operational again, the library is reorganized, Palestinian and international lawyers and researchers are again searching for effective and innovative approaches and strategies for the protection and promotion of human rights.

[19] Fieldwork and Documentation, Legal Research and Advocacy Unit, Legal Services, Library and Administration.

What has partly made this return possible is the degree of faith that the Palestinian and international community have in the history, mission and potential of Al-Haq. In particular, donor agencies such as the Ford Foundation and the Swedish section of the ICJ deserve particular appreciation for helping the organisation get back on its feet.

V. FROM SURVIVAL TO CHALLENGES AHEAD

We can look back on the history of an organisation like Al-Haq and appreciate its accomplishments in the past 25 years, understand the difficulties it has had, and learn many lessons from both. This of course cannot be done in isolation from the environment. This is an organisation that has always worked under the tremendous challenge of egregious human rights violations by a belligerent foreign occupation and more recently those of a recalcitrant national authority. It has seen the human costs rise every day. It has had to challenge powerful third party states that have shown themselves unwilling to discharge their own legal responsibilities regarding the protection of the Palestinian population, and unwilling to commit in any real sense to international law as an indispensable part of peace building. Successes at the advocacy level have been reversed or stalemated by new developments, events or policies. Yet Al-Haq has survived all the ups and downs, external and internal. It has fallen and stood up again and continues to struggle for the effective protection of human rights.

One key to understanding the strength of Al-Haq is to appreciate the importance of building an organisational culture based on commitment to accuracy, truth and high standards. A successful human rights programme is based on objective assessments free from political considerations and jargon on the one hand, and consistent with the very idea of international minimum standards on the other. Such a programme always has the search for effectiveness constantly before its eyes, and includes thorough planning or, by trial and error, an ongoing experimentation in strategies and approaches. This has been a mark of this organisation from its very beginnings, and its future depends on its ability to continue in the tradition of that culture.

A commitment to the ideals and standards of human rights, including participation and democratic decision-making, also need to be demonstrated in the internal workings of a strong human rights organisation. Al-Haq experimented with different ways of doing this, succeeding sometimes and failing terribly at other times. An empowered staff rejected authority for a time and realized it needed it, and the Board rejected the old staff for a time only to realize that the organisation could not survive without its institutional memory and the commitment of an experienced staff. The challenge before Al-Haq now is to find the balance between internal democracy and authority, avoiding the pitfalls of the past; to encourage participation but be clear on decision-making responsibility and implementation.

It is the very idea of Al-Haq that has helped it survive and do all that it has done over the past 25 years.

But has Al-Haq had any real impact on the human rights situation in the West Bank and Gaza? Have any of the other human rights organisations, national regional or international, had real impact? This is a question that dogs all of us in the field and continues to await the successful articulation of effective human rights impact assessment models. In the meantime, we can comfortably say that Al-Haq has had some impact on reinvigorating discussion and development of international humanitarian law, where it contributed to and stimulated new studies and challenging interpretations, especially in the context of its Enforcement Project. Al-Haq also challenged international human rights and other organisations in the development of their strategies on and responses to the situation in the OPT. The birth and proliferation of not less than fifteen other organisations in Palestine working in the field of human rights, and the incorporation of rights-based language in the broad work of most Palestinian NGOs is also due in no small part to the success of Al-Haq as a model. Most importantly, the record of violations of human rights in the Palestinian territories, carefully researched, compiled and analyzed by Al-Haq over the past 25 years is one of the most valuable testaments for posterity.

The human rights situation in the OPT has never been worse and therefore the challenges before Al-Haq in the coming few years are enormous. Israel as Occupying Power is more intransigent than ever and continues to commit, with impunity, serious violations and grave breaches of the Fourth Geneva Convention in pursuit of its predatory and annexationist agenda. An all but collapsed national authority continues to struggle with the institutionalization needed to build the infrastructure of a future state. Powerful third party states remain unwilling to move beyond repeated resolutions and condemnations towards law-based action to bring Israel into an attitude of compliance with its existing international obligations – even following the 2004 opinion of the International Court of Justice on the Wall. Political choices (and political expediency) appear to regard international law as something of a nuisance in the 'peace process.' In the past three years especially, the United States' deliberate and dangerous undermining of the international legal order, especially humanitarian law, poses a further threat to those still living in need and in hope of the protections of that law. All this and more seems to be conspiring against any progress in the Palestinians' exercise and enjoyment of their human rights and of their national right to self-determination.

Although it is true that the work of a serious human rights organisation is never done, nevertheless the challenges ahead are particularly daunting. Al-Haq, with 25 years under its belt, is needed as much or perhaps more than ever to face these tremendous challenges.

THE OCCUPIED PALESTINIAN TERRITORIES IN 2004: THE POLITICAL FRAMEWORK

Palestinians demonstrating against the Construction of the Annexation Wall in the West Bank
(Muhammed Muheisen, 2004)

THE OCCUPIED PALESTINIAN TERRITORIES IN 2004: THE POLITICAL FRAMEWORK

I. INTRODUCTION

Before one can analyse the human rights situation in the Occupied Palestinian Territories (OPT), it is essential to provide an overview of the political and legal frameworks that exist in the West Bank[1] and Gaza Strip,[2] occupied by Israel since 1967. This remains necessary, as "politics and law in the territories are intimately interwoven",[3] with immediate consequences for the status of human rights and the rule of law.

Although human rights violations have been a common feature of Israeli occupation, the year 2004 saw a further deterioration.[4] There was an increase in both scale and intensity of these violations, many of which constitute grave breaches of the Fourth Geneva Convention.[5] Nevertheless, Palestinians in the West Bank and Gaza Strip refuse to accept Israeli occupation as *a fait accompli*. Some commentators argue that it is precisely the systematic breaches by Israel of its duties as an occupying power in the OPT that accounts for the way that the current *intifada* has unfolded so far.

II. THE OSLO ACCORDS: THE MYTH OF ENDING ISRAELI OCCUPATION

The year 2004 constitutes the fourth year since the beginning of the current (second) Palestinian *intifada*, which erupted in response to the failure of the peace process in the "interim" or transitional period following the Oslo Accords. The Oslo Accords provided for the redeployment of Israeli occupying forces and transfer of various responsibilities and spheres of authority to the

[1] The West Bank, including East Jerusalem, covers circa 5,800 square kilometers and is home to approximately 2.3 million Palestinians. See the Palestinian Center for Human Rights (PCHR), "General Statistics on the OPT," www.pchr.org.

[2] The Gaza Strip is a 45 kilometre long strip that houses approximately 1.4 million Palestinians. Close to 920,000 of those are registered as refugees, whose families fled or were expelled during the 1948 war and the establishment of Israel. *Ibid.*

[3] Peleg, Illan, *Human Rights in the West Bank and Gaza Strip: Legacy and Politics*, Syracuse University Press, New York, 1995.

[4] According to one commentator, "since its occupation of the West Bank and Gaza Strip began in 1967, the Israeli authorities and occupying forces have violated nearly every provision of the Fourth Geneva Convention," See Pachecho, Allegra, "Flouting Convention: The Oslo Agreements" in Roane Carey (ed.), *The New Intifada: Resisting Israel's Apartheid*, 2001, Verso, UK, page 184.

[5] Grave breaches constitute war crimes and are concerned with individual responsibility for breaches of the laws of war. According to Article 147 of the Fourth Geneva Convention, these include: willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, wilfully depriving a protected person of the rights of a fair and regular trial, and extensive destruction and appropriation of property not justified by military necessity. They also mandate the exercise of universal jurisdiction in the prosecution of alleged perpetrators.

Palestinians. By virtue of this agreement, the Palestinian National Authority (PNA) assumed "the powers and responsibilities for internal security and public order," and the administration of specific civil spheres[6] in approximately 17% of the OPT, otherwise knows as Area A. The PNA established central political institutions, and was empowered to provide essential socio-economic services as well as security infrastructure.

The remaining territories were divided into Areas B (24%) and C (59%), where Israel retained primary responsibility for military and security-related issues.[7] While Israeli forces redeployed outside of the Palestinian populated areas by virtue of the agreements, this was neither tantamount to a complete withdrawal, nor did it result in the relinquishment of Israeli control over the OPT.[8] Moreover, the Oslo Accords clearly stated that the West Bank and Gaza Strip will continue to be considered one territorial unit where "all laws and military orders in effect prior to the signing of this agreement shall remain in force unless amended or abrogated in accordance with the agreement."[9]

This interpretation is also supported by the Oslo Accords' emphasis on a transfer of authority being made to the PNA, rather than the assignment of original powers, and that the Israeli military government retained "the necessary legislative, judicial and executive powers and responsibilities."[10] Moreover, they reserve to Israel a supervisory function over the legislative activities of the Palestinian Legislative Council (PLC).[11]

Under the Oslo Accords, Israel also retained control over foreign relations, external security, overall security for Israelis, including settlers in the OPT, and territorial jurisdiction over military installations, Israeli settlements and East Jerusalem.[12] Thus, the agreements enabled Israel to remain an occupant whether or not it has transferred specific parts of the territory to the Palestinians for self-rule.

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[6] A total of 14 civil spheres were transferred to the PNA in fields such as education, culture and health.

[7] "Area B" comprises of all other Palestinian population centers (except for several refugee camps. Although the Palestinians were given responsibilities for civilian matters, it remained under the overriding security responsibility of Israel. In the case of "Area C," Israel retains complete security control and civil control, which includes all Israeli settlements, military bases, areas and by-pass roads.

[8] According to the Israeli Legal Adviser of the Israeli Ministry of Foreign Affairs and key negotiator of the DOP Joel Singer, the military government simply "continues to exist elsewhere as the source of authority for the Palestinian Council and the powers and responsibilities exercised in the West Bank and Gaza Strip." See Malanzcuk, Peter, "Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law," *European Journal of International Law*, Volume 4, 1993, page 17.

[9] Article VII of *the Gaza-Jericho Agreement* (Oslo I) 1994.

[10] Article V *ibid.* Such possession of residual powers is described as being "normally, an indicia of being the source of ultimate authority", Malanzcuk, supra note 8, page 18.

[11] Article 17, *The Israeli-Palestinian Interim Agreement* (Oslo II), September 1995.

[12] Article 18, *ibid.*

III. CLOSE UP: LIFE UNDER OSLO

Anyone seeking to understand the root causes of the current *intifada* must examine the Olso Accords, and the way they affected the lives of the Palestinians in the OPT. The *intifada* did not emerge in a vacuum but emanated from the continued dispossession that had characterised the entire peace process. Indeed, rather than encouraging the establishment of a balance of interests, the Oslo process only accentuated "a skewed balance of power that created a dysfunctional environment for negotiations." [13] Instead of changing the pre-existing power relations between Israel and the Palestinians, it maintained the status quo and failed to abolish "the patronizing attitude of occupier to occupied."[14]

To begin with, Israel insisted on a phased implementation of its obligations as stipulated under Oslo. This open-endedness was coupled with Israel's creation of the facts on the ground, particularly its continued illegal confiscation of land,[15] and construction of settlements. In addition, crucial issues such as refugees and Jerusalem were specifically deferred in the Oslo Accords until final status negotiations. As time went on, concerns developed among Palestinians that this process was not in fact progressing towards the establishment of a viable Palestinian state, nor were the Israeli authorities intending to allow such a state to emerge as a result of the peace process. Palestinians increasingly perceived Oslo as laying the foundation for indefinite interim self-rule with limited authority, rather than for a sovereign state.

Throughout the Oslo Accords, Israel sought to benefit from all the privileges of an occupying power under international law, without the duties and responsibilities that this entails towards the OPT or its civilian population. Palestinians continued to have every aspect of their daily lives controlled by Israel, which sealed off cities, arrested Palestinians,[16] and "wasted no opportunity to remind them that the Occupation is still there."[17] As noted above, successive Israeli governments continued to expand settlements in the OPT after the signing of the Oslo Accords and throughout the 'interim period'; this was a key factor in the breakdown of the Oslo process. Decisions over the most critical aspects of the Palestinian economy were still made by Israel, with key resources such as land, water, labour and capital remaining subject to its jurisdiction. Israel also retained control over building, land registration and other resources. Moreover, the bulk of Palestinian agricultural land was located in Area C, thereby remaining outside the PNA's legal and economic domain.

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[13] Miller, Aaron David, "Wanted: A Serious American Peace Policy," *Ha'aretz*, 2 November 2004.

[14] Pundak, Ron "From Oslo to Taba: What Went Wrong?" http://www.nahost-politik.de/friedensverhandlungen/pundak.htm.

[15] See chapter on "Settlements and Settler Violence" in this report

[16] The Oslo Accords failed to provide for the release of all Palestinian detainees, to prohibit Israel from deporting them to prisons inside Israel or from making new arrests. Throughout the Oslo process, the Israeli authorities arrested, tried and convicted an additional 13,000 Palestinians, See Pachecho, Allegra, *supra* note 4.

[17] Hassassian, Manuel, "Why did Oslo Fail: Lessons for the Future, *The Israeli-Palestinian Peace Process: Oslo and the Lessons of Failure*, Robert L. Rothstein, Moshe Ma'oz, and Khalil Shikaki (ed.), Portland, Sussex Academic Press, 2002, page 118.

And although there are numerous and interrelated reasons for the deterioration in Palestinian economic life, they revolve around the closure policy. Officially instituted in 1993, it is enforced through a range of stringent bureaucratic requirements of permits and magnetic ID cards, and more than 700 checkpoints and other physical obstacles dispersed throughout the OPT.[18] Intensified during the Oslo years, the closure policy has fragmented and disconnected Palestinian communities and solidified Israel's economic and military control over the OPT. It has also resulted in devastating losses for the economy in the OPT and in the impoverishment of the Palestinian population. By January 2001, close to one million people or 32% of the population, was living below the poverty line, which represented an increase of 350,000 persons, over the 650,000 living in poverty prior to the beginning of the *intifada.*[19]

As a result, reliance on donor aid increased substantially. From 2001-2003, international donors more than doubled their pre-*intifada* disbursement, in the form of an average of US$950 million annually, without which living standards would have been far worse.[20] Current Israeli policies and practices have contributed to the persistence of the political and economic crises,[21] and have resulted in thousands of Palestinians leaving the West Bank and Gaza Strip in the last few years.[22]

IV. 2004 IN FOCUS: Systematic Violations of International Law Continue

Although human rights violations have been a common feature of Israeli occupation, the year 2004 saw a further deterioration. There was an increase in both scale and intensity of these violations. Developments throughout 2004 at both the Israeli and Palestinian levels further confirm that the human rights situation in the OPT did not witness any marked improvement.

A. DEVELOPMENTS AT THE ISRAELI LEVEL

During 2004, violations of international law by Israel "continue to destroy the fabric of Palestinian society."[23] 2004 witnessed an aggravation of already existing human, economic, social and political crises engulfing the OPT, many of which continue to be the direct consequence of Israeli occupation. As a result of restrictions on their freedom of movement, and more recent construction of the Annexation Wall, Palestinians increasingly feel that they are confined to a collection of "Bantustans." As noted in the report by the United Nations (UN) Special Rapporteur

[18] United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "Humanitarian Information Fact Sheet," January 2005.
[19] Roy, Sara, "The Economics of Middle East Peace: A Reassessment," in Carey (ed.) *supra* note 4.
[20] In 2002-2003, 97% of the money spent on welfare instruments such as food, cash support and job creation was donor-financed. See World Bank Report, "Disengagement, the Palestinian Economy and the Settlements," 23 June 2004.
[21] See World Bank, "Long-Term Policy Options for the Palestinian Economy," July 2002.
[22] It is estimated that about 5% of an average 3.5 million Palestinian residing in the West Bank and Gaza Strip have emigrated in recent years. See Rubinstein, Danny, "A Clearer Picture of the Territories," *Ha'aretz,* 28 October 2004.
[23] Interim Report by the UN Special Rapporteur on "Question of the Violation of Human Rights in the Occupied Territories, including Palestine," General Assembly, 59 Session, 12 August 2004, (A/59/256).

on Human Rights in the OPT, this apparatus of control constitutes "the institutionalized humiliation of the Palestinian people" and has "precipitated the prevailing economic crisis, and resulted in widespread unemployment, and severe disruption to education, health care services, work, trade, family and political life."[24]

In this regard, the World Bank stated that "the Palestinian recession is among the worst in modern history."[25] Unemployment rose from 10% in 2000 to 28.6%, in 2004 while poverty rose to more than 2.2 million Palestinians.[26] In terms of education and health, UN sources have estimated an increase of 7% in the university drop-outs in the year 2004 alone, and a dramatic decline in examination pass rates from 2000-2001 and 2003-2004, while mortality rates "have increased every year since 2000."[27]

In May 2004, Israel announced its intention to withdraw unilaterally from the Gaza Strip, and to dismantle its settlement presence in this territory,[28] as well as four smaller ones in the West Bank. On 26 October 2004, the Knesset approved the plan.[29] Appearing to relinquish its control over the Gaza Strip, the plan nevertheless comes as an effort by Israel to relinguish its legal obligations under the Fourth Geneva Convention with respect to the Gaza Strip, whilst simultaneously seeking to improve its political standing at the international level.

From an examination of the terms of the plan, it becomes apparent that Israel plans to retain ultimate control over Gaza by controlling its borders, territory and air space, whilst simultaneously denying its status as an occupying power with international legal obligations towards the Palestinian civilian population. According to its provisions, Israel also "reserves the basic right to self defense, which includes taking preventive measures as well as the use of force against threats originating in the area."[30]

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[24] *Ibid.*

[25] World Bank, *supra* note 20.

[26] According to United Nations Relief and Working Agencies for Palestine Refugees in the Near East (UNRWA) reports, exam pass rates have declined dramatically between 2000-2001 and 2003-2004, whilst university dropout rates have increased by 7% in the past year alone. See OCHA, *supra* note 18.

[27] *Ibid.*

[28] Approximately 7,000-8,000 settlers control 25% of the arable land in the Gaza Strip, control most of its water resources, and require some 6,000 Israeli soldiers to protect them, "hence, in part, Sharon's desire to withdraw from the strip next year." See "A Bloody Vacuum", Special Report, *The Economist*, 2-8 October 2004.

[29] The plan was approved by a vote of 67 to 45, with seven abstentions and one legislator absent. A large number of Israeli Prime Minister Sharon's Likud party members opposed the plan and attempted to block it. However, it received the full support of the formal opposition on the left which sees the plan as a first step towards making peace with the Palestinians. See "Israeli Parliament Backs Gaza Pullout," *International Herald Tribune*, 27 October 2004. In an effort to keep his government afloat and ensure that the Disengagement Plan is carried out, on 17 December 2004, Sharon's Likud party entered a coalition agreement with Labour to form a new government, which was approved by the Knesset shortly afterwards. See Mualem, Mazal, "Likud, Labor Meeting to Draft Coalition Government," *Ha'aretz*, 19 December 2004.

[30] Articles III A (3) and B(1), Appendix A in "Prime Minister Ariel Sharon's Four Stage Disengagement Plan" of 28 May 2004, published in *Ha'aretz* on 18 July 2004.

Moreover, Sharon is prepared to evacuate settlers in the Gaza Strip only in exchange for expanding the settlements in the West Bank.[31] That this plan serves only as a tactic to "legitimately" freeze the peace process, and to end the pretence of seeking a negotiated settlement with the Palestinians under the Road Map, was further confirmed in a statement on 6 October 2004 by Prime Minister Sharon's Senior Advisor Dov Wiesglass.[32] It comes as no surprise that according to opinion polls conducted in June 2004, 70% of Palestinians believed that Sharon's plan to withdraw from the Gaza Strip was not serious. [33] Still more people feared that the withdrawal will not be complete, turning the Gaza Strip instead into "a suffocating ghetto."[34]

Similarly, whilst Israeli Prime Minister Ariel Sharon announced his plans to withdraw from the Gaza Strip,[35] Israel continued its military incursions into this territory throughout the year, exacting a heavy toll on its civilian population. Israel used the rhetoric of being engaged in a fight against "terrorism" to justify its military incursions into the Rafah Refugee Camp and into northern Gaza in March and in September of 2004 respectively.[36] Representing two of the largest offensives into the Gaza Strip since 1967, these entailed widespread and well- documented practices in contravention of international law, most notably the disproportionate killing and injuring of Palestinian civilians, and massive destruction of property.[37]

During 2004, Israel continues to disregard the ruling of the International Court of Justice(ICJ) regarding the construction of the Wall in the OPT. On 9 July 2004, the ICJ declared that the construction of the Wall in the OPT is in violation of international law. In a ruling of 14 to 1, the 15-judge panel of the UN's highest legal body pronounced that the Annexation Wall violates the fundamental right of the Palestinian people to self-determination; is tantamount to *de facto* annexation and breaches Israel's obligations under international human rights and humanitarian law.[38] Moreover, it demanded that Israel make restitutions and reparations for all damage caused by the construction of the Wall in the OPT. Whilst the Advisory Opinion was greatly welcomed

[31] In return for the implementation of Gaza Disengagement Plan, Israel apparently plans to annex the large settlement block of Ariel in the northern West Bank, Ma'ali Adomim east of Jerusalem and the so- called Gush Etzion block, north of Hebron. See Amayreh, Khaled, "Closing the Circle," *Al-Ahram Weekly*, 16-22 September 2004. http://weekly.ahram.org.eg. This was further confirmed by Israeli Prime Minister Sharon's remarks on 16 December 2004, when in reference to the Disengagement Plan, he stated that it unites Israelis in distinguishing between goals that deserve to be fought for "such as Jerusalem [and] the larger settlement blocks," and those that can not be realized. Benn, Aluf, "PM: Disengagement Plan is 'Cornerstone' of Great Opportunity for Israel," *Ha'aretz*, 17 December 2004.

[32] According to Wiesglass, through the plan "you prevent the establishment of a Palestinian state, you prevent a discussion on the refugees, the borders and Jerusalem." See Shavit, Ari, Aluf Benn and Yair Ettinger, "Top PM Aide: Gaza Plan Aims to Freeze the Peace Process", *Ha'aretz*, 6 October 2004.

[33] Jerusalem Media and Communications Center (JMCC), "Poll Results on Palestinian Attitudes Towards the Palestinian Political Issues and the *Intifada*", Poll No. 51, June 2004.

[34] Shikaki, Khalil, "The Future of Palestine," *Foreign Affairs*, November-December 2004.

[35] See further below.

[36] For more information regarding the events in the Gaza Strip, refer to the chapter on "Property Destruction" in this report.

[37] These measures often violated the principles of military necessity, distinction and proportionality, and were in the majority of cases taken as punitive measures, or measures of collective punishment in contravention of international law. As a result, 12 UN organisations working in Gaza voiced their concern that the ongoing violence on top of the sharply deteriorating humanitarian situation this year was pushing the Palestinian population into a deep crisis, with which they were unable to cope. See OCHA, "UN Organizations Say the Current Violence is Pushing Gaza into a Humanitarian Crisis", 5 October 2004.

[38] For more information see Chapter regarding "The Annexation Wall in this report.

by the Palestinians, Israel stated that the opinion failed to address what it perceived to be the essence of the problem – Palestinian "terrorism", and moreover considered it evidence of the "politicization of the Court."[39]

Nevertheless, as one commentator correctly emphasized, the Opinion altered the dynamics of the political process by identifying the root cause of the Israeli-Arab conflict as Israel's illegal occupation of the West Bank and Gaza Strip.[40] Shortly afterwards, the Opinion was given new force when, by an overwhelming majority, the UN General Assembly (GA) adopted on 2 August 2004 a resolution demanding that Israel comply with the ICJ Advisory Opinion.[41]

B. DEVELOPMENTS AT THE PALESTINIAN LEVEL

In 2004, it became clear that Palestinians and the PNA are facing one of the biggest crises of governance since the beginning of the Oslo process. The weakening of the PNA, as a result of both Israeli policies and internal Palestinian dynamics, led to a rise in lawlessness and vigilantism, an increasingly familiar phenomenon throughout the OPT in 2004.[42]

The breakdown of law and order is primarily the by-product of Israel's punitive policies and practices such as its regular incursions into the OPT; targeting and destruction of headquarters and prison facilities; imposition of various forms of movement restriction; and seizure of PNA funds.[43] Their regular occurrence has undermined the PNA's ability to recover from the consequences of Israel's 2002 incursions into the West Bank, including Area A territory,[44] to carry out regular government operations; exercise control and supervision over its regional branches; and more importantly to enforce law and order, and to prevent crime. [45] By June 2004, there was a real danger of the PNA's collapse.[46] In a poll conducted during the same period in the OPT; only 47% of all Palestinians interviewed reported that they still felt the presence of the PNA.[47] Moreover, the majority of them did not feel that it could protect them.

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[39] Israel Ministry of Foreign Affairs, "ICJ Advisory Opinion on Israel's Security Fence-Israeli Statement," 9 July 2004, http://www.mfa.gov.il/MFA.

[40] Andoni, Lamis, "Moral Victory," *Al-Ahram Weekly*, 15-21 July 2004.

[41] UN General Assembly Resolution A/RES/ES-10/15. The resolution was adopted by 150 votes in favour, 6 against and 10 abstentions.

[42] International Crisis Group (ICG), "Who Governs the West Bank: Palestinian Administration under Israeli Occupation," *Middle East Report* No. 32, Amman/Brussels, 28 September 2004. Following Israeli Prime Minister Sharon's announcement in April 2004 that Israel intends to unilaterally withdraw from the Gaza Strip, the signs of a struggle for control over the Gaza Strip, post-disengagement made their appearance.

[43] PNA treasury sources were cited as saying that about half of the PNA budget deficit was caused by seizures that have been imposed by Israeli courts on their funds in response to damage suits against the PNA by Israeli citizens, often before the courts have reached a verdict. Some two-thirds of the PNA's income, roughly equivalent to $52 million a month are derived from customs, taxes and levies which Israel should transfer to them for goods and services passing through it. See Haas, Amira "Half PA Deficit Due to Israel Funds Seizure," *Ha'aretz*, 24 October 2004.

[44] During that period Israeli occupying forces targeted and ransacked PNA facilities, including security headquarters and prisons civil society institutions and Israeli occupying forces. This large scale destruction considerably weakened its capacity to govern. See ICG, *supra* note 42.

[45] *Ibid*.

[46] Terje Roed Larsen, "The Situation in the Middle East, including the Palestinian Question," 13 July 2004 (S/PV.5002).

[47] See JMCC, "Poll Results on Palestinian Attitudes Towards the Palestinian Political Issues and the *Intifada*," *supra* note 33.

Although not the only cause for the deterioration in PNA authority, Israeli actions in the OPT perpetuated the internal paralysis and a crisis of authority and legitimacy from which the PNA suffers. With security forces unable to carry arms openly and move about freely, the absence of courts and the serious deterioration in the state of the criminal justice system, the prospects for law and order have been further undermined. The steadily emerging chaos witnessed in 2004 in the OPT is pushing an increasingly fragmented system to the breaking point.

Moreover, the PNA has been unable to establish internal order and unify its ranks around a clearly formulated political programme.[48] Palestinian groups across the political spectrum have been fragmented, both in terms of their organisational capacity and leadership. This has encouraged in-fighting within and between factions and armed groups.[49] At times, criminal gangs have merged with anti-Israeli fighters,[50] and kidnapping of Palestinian government officials, law enforcement officials and foreign aid workers, all previously unheard of, made headlines during 2004.

On 11 November 2004, PLO Chairman and President of the PNA Yasser Arafat died.[51] With Arafat's departure, the need and feasibility of holding Presidential elections dominated much of the discussions at the Palestinian level at the end of 2004. For many Palestinians, elections represent the only means to allow for a smooth transition of power; for translating domestic calls and efforts for reforms into concrete steps, and for forming a clearer political strategy vis-à-vis the current political impasse.[52]

Following his death, and in accordance with constitutional provisions, PLC Speaker Rawhi Fattouh succeeded Arafat for a period of 60 days, pending election of the new president.[53] Palestinian Presidential elections were scheduled for 9 January 2005, and the year 2004 closed with the election campaign underway.

From 4 September to 13 October 2004, Palestinians in the OPT had already begun a voter registration drive, as a first step towards the first phase of municipal elections. Scheduled to be held in four stages, they were the first municipal elections in the Palestinian territories since 1974, to be followed by those at the presidential and legislative levels in 2005. Assembling a new register of Palestinian voters for use in municipal, parliamentary and presidential elections, a thousand voter registration centres were set up by the Palestinian Central Elections Commission (CEC) throughout the OPT, including East Jerusalem. Although the registration of Palestinian

[48] ICG, *supra* note 42.

[49] In Nablus for example, incoming reports spoke of Fatah's Al-Aqsa Brigade splitting into factions that occasionally fought each other. See "A Bloody Vacuum," *supra* note 28.

[50] *Ibid.*

[51] On 27 October, Arafat's health seriously deteriorated and was eventually flown out of Ramallah to a military hospital in Paris for treatment. After 6 days in intensive care he was pronounced dead.

[52] ICG, *supra* note 42.

[53] *Law No. 15 of 1995 Relating to the Elections*, issued by the Palestinian National Authority in Gaza on 7 December 1995, at http://www.elections.ps/english/legislation/law1995.pdf.

voters "took place under extraordinary difficult conditions," [54] the voter registration period from 4 September-13 October 2004 ended with the registration of 67% of eligible voters (not including the Jerusalem Electoral District). From 24 November-1 December 2004, an additional voter registration period was held, thereby increasing the total percentage of eligible voters who registered in the 16 electoral districts of the OPT to 71%.[55]

And whilst many Palestinian public figures and political analysts reiterated the fact that there was a political will for holding the elections,[56] Israel refused to facilitate the process by lifting restrictions on freedom of movement and withdrawing Israeli occupying forces from around West Bank villages and towns.

Nevertheless in December 2004, the first phase of the municipal elections took place in 26 different localities throughout the West Bank, with a voter turnout of more than 80%. Of the 306 elected local council members, 46 were women candidates.[57] Although Hamas officials refused to take part in the presidential elections,[58] they participated, as declared, in the local ones.[59]

During this period and despite Israel's reassurances that it would allow free and fair elections, [60] Al-Haq noted with great concern the fact that during the campaigning period, Palestinians continued to be denied their fundamental right to freedom of movement between the Gaza Strip and the West Bank, including East Jerusalem.[61] Soon thereafter, presidential candidates were repeatedly prevented from entering the West Bank or Gaza Strip. More seriously, several candidates were either arrested and even physically assaulted at checkpoints, or denied access to East Jerusalem. [62]

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[54] During the registration period, international observer missions noted armed clashes and Israeli military operations, particularly in north of the Gaza Strip. Other factors such as smaller incursions or military operations and checkpoints also complicated the logistical tasks of establishing and supporting registration centers. In East Jerusalem, where the CEC had established 7 registration centres, they were subject to frequent raids by Israeli authorities and then closed down. See National Democratic Institute, "Preliminary Statement of the National Democratic Institute International Observer Delegation to the Registration of Palestinian Voters, September-October 2004," 7 October 2004, available at http://ndi-wbg.org/eng/documents/ndi/NDI_VRM_Preliminary_Statement.pdf.

[55] CEC, *The Presidential Elections 2005: Guidebook*, Ramallah, West Bank., 2005.

[56] Erlanger, Steven, "Inching towards Elections: Palestinians Begin Voter Registration", *New York Times*, 5 September 2004.

[57] Regular, Amon, "PA Names Winners of Local Elections," *Ha'aretz*, 27 December 2004.

[58] So far, Hamas had refused to take part in the PNA, the result of the Oslo Accords which Hamas rejects. Myre, Greg, "Hamas Says It Won't Take Part in Palestinian Vote," *International Herald Tribune*, 17 November 2004. The Popular Front for the Liberation of Palestine (PFLP) also refused to field candidates. See ICG, *supra* note 42.

[59] Shikaki, *supra* note 34. While there were was no absolute breakdown as to how many of the winning candidates belonged to one or the other party, results indicated that Hamas won a clear victory in at least seven, while Fatah candidates did so in 12 localities. See Regular, *supra* note 57.

[60] Weisman, Steven, "Israel to Aid Palestinians in Elections," *International Herald Tribune*, 22 November 2004.

[61] For more information regarding the electoral process, see Al-Haq, "Palestinian Presidential Elections 2005 Monitoring Report," 2005, www.alhaq.org.

[62] As of 10 December 2004, Israeli soldiers had physically assaulted Palestinian presidential candidate Mustafa Barghouti at a roadblock and detained a second, Bassam Salhi, on the outskirts of Jerusalem. A third, Hassan Khreisheh announced his withdrawal from the contest, and cited Israeli restrictions on his movement and his inability to obtain a permit to campaign in the Gaza Strip as the main reason for his decision. See ICG, *supra* note 42.

One significant factor that undermined Palestinians' right to vote were Israeli measures in occupied East Jerusalem, which severely curtailed the ability of Palestinian East Jerusalemites to register, and thereby to participate in the elections. During the campaigning period, East Jerusalemites were intimidated by the continued presence of checkpoints, the closing down of the existing registration centres,[63] and the threat of ID confiscation by members of the Israeli security forces should they decide to exercise their voting rights. Access to East Jerusalem, was denied to candidates, which undermined the right of Palestinian East Jerusalemites to choose their representatives in an informed manner.[64] As a result, PNA officials declared that if East Jerusalemites were not given the opportunity to participate in the elections, none would be held in the first place.[65] In the end however, and partially as a result of US pressure, it was agreed that Palestinian East Jerusalemites would be able to vote by post, as they did in the first Palestinian presidential elections in 1996.[66]

V. CONCLUSION

The year 2004 marked the thirty-seventh year of Israel's control of the OPT, thereby making it the longest military occupation in modern history.

As subsequent chapters of this report will underline, allowing the stalemate in the political process between Israel and the Palestinians to undermine the protection of human rights renders the very notion of human rights meaningless. It also considerably complicates the prospects for a sustainable peace process and a just and durable political settlement of the conflict. Last but not least, the recognition of the reality that Israel is pursuing "gradual *de facto* annexation of the Occupied Territories" explains why "many Palestinians are contemplating whether the question for equal statehood should now be superceded by a struggle for equal citizenship."[67]

[63] On 13 September 2004, Israeli authorities closed down all registration centres, thereby preventing approximately 200,000 eligible Palestinian East Jerusalemite voters from registering.

[64] ICG, *supra* note 42.

[65] Regular, Amon, "Interim PA Chairman: No Elections if No Vote in East Jerusalem," *Ha'aretz*, 16 November 2004.

[66] In his visit to Israel and the OPT in November 2004, American Secretary of State Colin Powell is said to have secured an Israeli commitment not to obstruct the participation of Palestinians in East Jerusalem in the January 2005 Palestinian presidential elections, having noted that a precedent was set in 1996 when they could mail their ballots by mail to the West Bank, on the grounds that this would not "compromise" the Israeli claims to East Jerusalem. See Weisman, *supra* note 68. In this regard, Israel allowed only 5,376 people from East Jerusalem to vote in 5 Israeli post offices throughout the city. The remaining eligible voters were forced to cast their ballots in polling centers in West Bank towns on the outskirts of the city. See Baker, Joarah, "Jerusalemites Take to the Polls, but Not in Scores," *Palestine Report Online*, 17 January 2005, available at http://www.worldpress.org/print_article.cfm?article_id=2134&dont=yes.

[67] See Tarazi, Michael, "Why Not Two Peoples, One State?" *International Herald Tribune*, 5 October, 2004. Tarazi was reporting a recently conducted poll according to which a quarter of Palestinians indicated they were in favour of a one state solution.

ANNEX: HISTORIC OVERVIEW- CURRENT *INTIFADA* 2000

World War I: Following the fall of the Ottoman Empire, the whole of historic Palestine (which now encompasses Israel, the West Bank and Gaza Strip) is placed under a Mandate entrusted to the British Government by the League of Nations.[68]

1922-1939: Nazi persecution of Jews and other groups in Europe escalates. Jewish immigration to Palestine is facilitated by the British Mandate, despite nationwide riots by Palestinians, and full scale rebellions in 1936 and 1939 to oppose it. Although the Jewish population increases to represent some 30% of the population in Palestine, Jewish landholding represents only 6.6% of the total territory of Palestine.

1947: UN GA passes resolution 181 recommending the partition of Palestine into separate independent Arab and Jewish states and an internationalised Jerusalem. Since the plan provides the proposed Jewish state with 55% of the territory home to a substantial Palestinian population, the plan is rejected by the Palestinians. British authorities announce their intention to terminate the Mandate.

1948: The British Mandate expires, and Jewish leaders declare the establishment of the State of Israel. War breaks out involving several neighbouring Arab countries. With the declaration of the armistice, Israel takes control of all Mandate Palestine except those areas now known as the West Bank and Gaza Strip, and 750,000 Palestinians become refugees.[69] UN GA Resolution 194 of the same year "resolves that refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date."

1964: PLO is officially established by the Arab League as the political representative of the Palestinian people, and adopts a policy of armed struggle as a means of regaining historic Palestine.

1967: Israel occupies the West Bank (including East Jerusalem), Gaza Strip, the Sinai Peninsula, and the Golan Heights during a six-day war with neighboring Arab states.[70] The UN SC passes Resolution 242, reinforced by Resolution 338, both of which remain central to diplomatic and international efforts to resolve the conflict and which emphasise the

[68] Although already home to more than 500,000 Palestinians, the British government committed itself in the Balfour Declaration of 1917, to the establishment in Palestine of a national home for the Jews.

[69] Since then, Israel has refused to allow the refugees to return to their homes, apart from a very small number of family reunification cases. The number of registered Palestine refugees has subsequently grown from 914,000 in 1950 to more than four million in 2002, and continues to rise due to natural population growth. Following the 1948 Arab-Israeli conflict, UNRWA was established by UN GA resolution 302 (IV) of 8 December 1949 to carry out direct relief and works programmes for Palestine refugees.

[70] In 1950 the West Bank had been officially annexed by Jordan, while Egypt administered the Gaza Strip.

"inadmissibility of the acquisition of territory by war," and the need for the withdrawal of "Israeli armed forces from territories occupied in the recent conflict." More than 400,000 Palestinians are displaced, half of whom are 1948 refugees now displaced for a second time, while another 1.3 million Palestinians find themselves under Israeli occupation.

1973: The October War starts with a surprise attack launched by the Syrians and Egyptians to regain the territory occupied by Israel in 1967.

1978: Egypt and Israel sign the Camp David Peace Agreement, which restores Sinai to Egypt and outlines a negotiation framework for a five-year autonomy regime in the OPT.

1980: Israel effectively annexes East Jerusalem when the Israeli Knesset (parliament) declares "Jerusalem in its entirety to be the eternal capital f Israel." The action was condemned as illegal by the UN and almost all of the international community of states.

1987: Demonstrations against Israel's occupation erupt in the Gaza Strip and spread to the West Bank. They develop into the *intifada*, a wave of mass civil resistance by Palestinian population in response to the long duration and large scale of violations of the Israeli occupation. The *intifada* is without precedent in the conflict's history, and was increasingly met with an official policy of force, might and beatings,[71] which made it the object of severe international condemnation.

1988: Jordan cuts its legal and administrative ties with the West Bank, a disengagement that strengthens the position of the PLO. So far Israel's policy had been to never recognize the PLO or enter into political negotiations with it. During the same year, the Palestine National Council issues a symbolic declaration, proclaiming "the establishment of the State of Palestine on our Palestinian territory with its capital Holy Jerusalem," and only with respect to the pre-1967 "territorial boundaries of the West Bank (including East Jerusalem) and the Gaza Strip."

1991: Following the defeat of Iraq in the 1990-1991 Gulf War, and against the background of the ongoing first *intifada*, the first round of direct negotiations takes place between representatives of Israel, Lebanon, Syria and a joint Jordanian/Palestinian delegation. US Secretary of State James Baker, in remarks closing the Madrid conference, says a breakthrough was achieved with the start of "direct bilateral negotiations."

1993: Israeli Prime Minister Yitzhak Rabin and PLO Chairman Yasser Arafat sign the DoP in Washington DC,[72] outlining a framework for Palestinian autonomy in the OPT for a transitional period of five years. The interim phase was to be followed by permanent status negotiations and a settlement based on UN SC Resolutions 242 and 338. This settlement does not materialize.

[71] "Don't Say You Didn't Know", Antonym, Synonym: The Poster Art of the Palestinian Israeli Conflict, http://www.liberationgraphics.com/ppp/Dont_Say.html.

[72] In January 1993, the Israeli law prohibiting meetings with the PLO had been revoked.

1994: Israel and the PNA[73] sign the Agreement on the Gaza Strip and Jericho Area (Oslo I), which provides a framework for transferring power and responsibilities to the PNA and provides for Israeli redeployment from the Gaza Strip and the West Bank city of Jericho.

1995: The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II) is signed in Taba, Egypt, scheduling Israeli redeployment from the major Palestinian population centres in the West Bank. It also confirms the PNA's expanded role, including police, and sets coordination mechanisms for security, legal, judicial and economic policies. In November, Israeli Prime Minister Rabin is assassinated. Shimon Peres becomes Prime Minister and suspends the component of the Oslo II Agreement requiring Israel to withdraw from the West Bank city of Hebron.

1996: Palestinian presidential and legislative elections are held. Yasser Arafat is elected as the President of the PNA, and the PLC is elected as the legislature. A few months later, early elections in Israel culminates in the election of Binyamin Netanyahu as Prime Minister of Israel.

1997: In January 1997 a Protocol Concerning the Redeployment in Hebron is concluded by Israeli Prime Minister Benjamin Netanyahu and PNA President Yasser Arafat, detailed the arrangements for the withdrawal of Israeli troops from 80% of Hebron.

1998: The Wye River Memorandum outlines the steps to be taken to implement the Oslo II Agreement.

1999: Ehud Barak is elected Israeli Prime Minister. In September, both sides agree on implementing the Sharm El Sheikh Agreement (the Wye River Accord). Among other things, it provides for the opening of a safe passage between the Gaza Strip and the West Bank. Both sides also agree to start final status negotiations.

2000: In September, clashes erupt at Al-Aqsa Mosque in occupied East Jerusalem,[74] between Israeli forces and Palestinian worshippers angered by the visit made by then opposition leader Ariel Sharon and Israeli forces to the compound. The event proves to be the opening sequence of the largest sustained Palestinian uprising or *intifada* against Israeli occupation. The current *intifada* comes in the wake of the failed Oslo peace process, and against the background of continued Israeli control over the OPT. As a result, it was significantly more militarized in nature than the

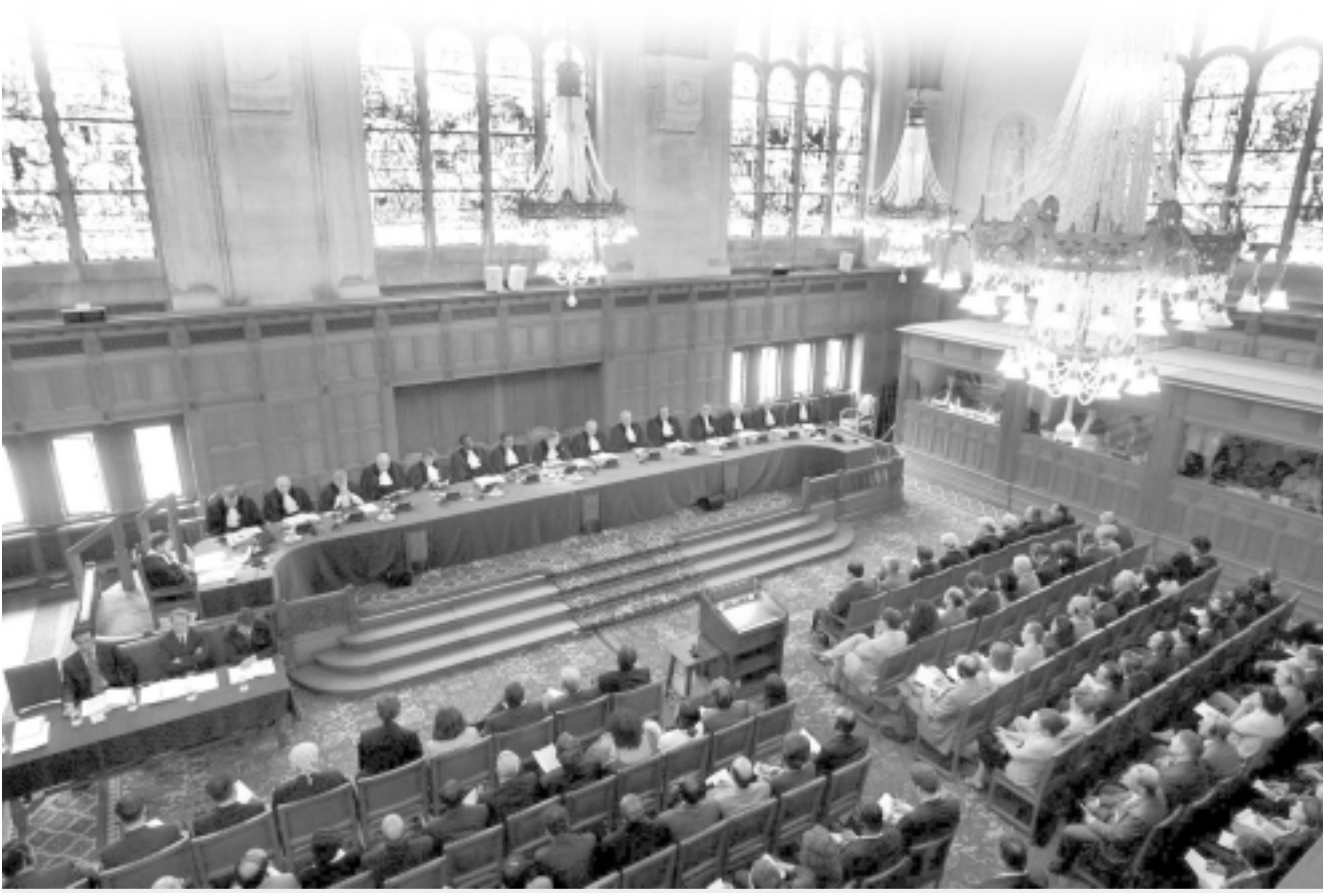
[73] The PNA, formally a subsidiary organ of the PLO, was established in 1994 following the Oslo Accords to administer the West Bank and Gaza Strip, from which Israeli occupying forces redeployed, pending the conclusion of final status negotiations between Israel and the Palestinians.

[74] The Mosque is Islam's third holiest site.

first. In addition, measures adopted by Israel to quell it have been significantly more violent than those in the first *intifada*.[75] The human rights situation deteriorates sharply.

[75] From September 2000-December 2004, approximately 3,850 Palestinians and 1,000 Israelis were killed and more than 36,500 Palestinians and 6,300 Israelis injured. See "Statement by John Dugard, UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967," 61th Session of UN Commission of Human Rights, Item 8, Geneva, 7 December, 2004.

THE LEGAL FRAMEWORK GOVERNING THE OCCUPIED PALESTINIAN TERRITORIES



President of the International Court of Justice delivering the Court's Advisory Opinion Regarding the Legality of the Wall in Occupied Palestinian Territories (Reuters 2004)

THE LEGAL FRAMEWORK GOVERNING THE OCCUPIED PALESTINIAN TERRITORIES

I. INTERNATIONAL HUMANITARIAN LAW AND ISRAEL'S OBLIGATIONS AS AN OCCUPYING POWER

As the Occupying Power in the West Bank and Gaza Strip, Israel's obligations are set out in the Regulations Annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land of 1907 (Hague Regulations),[1] and the Fourth Geneva Convention Concerning the Protection of Civilian Persons in Time of War of 1949 (Fourth Geneva Convention).

Israel has occupied the West Bank and Gaza Strip since the 1967 June war. In International humanitarian law, the test for the beginning and end of occupation is often referred to as effective control. As Article 42 of the Hague Regulations stipulates, a "territory is considered occupied when it is actually placed under the authority of the hostile army," and that the occupation extends "to the territory where such authority has been established and can be exercised."

Following the signing of the Oslo Accords, a number of Israeli commentators and jurists argued that since the Israeli military presence in the OPT was progressively diminishing (at least insofar as Area A was concerned), and that Palestinians were assuming broadened responsibilities and powers with respect to public services, Israel can no longer be considered an Occupying Power with obligations towards the Palestinian Territories and its civilian population.[2] However, as the previous chapter served to highlight, the facts on the ground following the signing of the Oslo Accords confirm that the Accords did not affect Israel's legal status as an Occupying Power in the West Bank and Gaza Strip, or to release it of its legal obligations towards its Palestinian civilian population and providing for their general welfare.[3]

As held by the Nuremberg Trial in the *Hostages* Case, "the test for application of the legal regime of occupation is not whether the occupying power fails to exercise effective control over the territory, but whether *it has the ability to exercise such power* [emphasis added]."[4] The Tribunal

[1] Today these rules are considered to be "rules recognized by all civilized nations" and to be "declaratory of the norms and customs of war". See Goering et al. *Trial of Major War Criminals before the International Military Tribunal*, 1 (1947), and the Advisory Opinion of the International Court of Justice (ICJ) in *The Legality of Threat or Use of Nuclear Weapons* Case, ICJ Reports, 1996, paragraph 75. These rules and principles are applicable to all States regardless of their adherence to relevant treaties.

[2] For example, see Gold, Dore, "From Occupied Territories to Disputed Territories," Jerusalem Center for Public Affairs, Jerusalem Letter, No. 470, http://www.jcpa.org/jl/vp470.htm. See Benivinisti, Eyal, "Israel and the Palestinians: What Laws were Broken?", Expert Analysis, Crimes of War Project, 8 May 2002, http://www.crimesofwar.org/expert/me-benvenisti.html.

[3] Under international humanitarian law, an Occupying Power is legally required to ensure, amongst other things, that the occupied civilian population has access to food, water, medical supplies, and all other goods and services that are essential for its survival. See Articles 55 and 56 of the Fourth Geneva Convention.

[4] *USA v. Wilhelm List, et al.*1949. In that case, the Tribunal had to decide whether Germany's occupation of Greece and Yugoslavia had ended when Germany had ceded *de facto* control to non-German forces of certain territories.

also considered a territory occupied even where the occupying forces had partially evacuated certain parts of the territory or lost control over the population, as long as it could "at any point in time" assume physical control of that territory.[5] In other words, under international humanitarian law, an Occupying Power can exercise effective control without being physically present in all the territories it occupies, if it has the potential capacity to be in control of the said territory and its population.[6]

The same remains true of Israeli Prime Minister Sharon's recently proclaimed Disengagement Plan for the Gaza Strip. Although seeking to portray the supposed end of its military and settler presence in the Gaza Strip as the end of its occupation,[7] the provisions of the plan (discussed in the previous chapter) leave no doubt that Israel will continue to exercise effective control of the Gaza Strip, and can resume military activities and the use of force within it, while maintaining that the territory that will withdrawn from is to remain de-militarized.[8] And whilst the absence of a "permanent" Israeli military presence and illegal settlers will mark a significant change in the 37-year long Israeli occupation of the Gaza Strip, as this case demonstrates, changes in circumstances or forms of occupation do not necessarily translate into the end of occupation itself.[9]

A. THE ISRAELI POSITION

Unlike the Hague Regulations, the applicability of which Israeli authorities have accepted due to their customary nature,[10] Israel contests the applicability of the Fourth Geneva Convention to the OPT. Despite having ratified the Geneva Conventions in 1951, Israel refuses to recognise their *de jure* applicability, on the grounds that the West Bank and Gaza Strip were not the "territory of a High Contracting Party"[11] as stipulated in common Article 2 (2).[12] Having shortly after the

[5] *Ibid.*

[6] In, *Tsemel v. Minister of Defence*, HCJ 593/8, July 1983, the Israeli High Court of Justice also adopted this position.

[7] Thus Section II A.3 of the Disengagement Plan states that "there will be no basis to the claim that the Strip is occupied land". For an official version of the plan, see Israeli Prime Minister's Office at http://www.pmo.gov.il/PMOEng/. In its effort to receive international legitimacy for the claim that the occupation of the Gaza Strip will end with disengagement, it was reported that Israeli Prime Minister Sharon had requested from Deputy to the Attorney General for International Law, Shavit Matias, to assess the extent to which the Disengagement Plan would end Israel's responsibilities as an Occupying Power in the Gaza Strip. See Yoaz, Yuval, "Expert: Philadelphi Route Pullout Ends Occupation in International Law," *Ha'aretz*, 19 December 2004.

[8] Disengagement Plan, *ibid.*

[9] See also Harvard Program on Humanitarian Policy and Conflict, International Humanitarian Law Research Initiative, "Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law," *Policy Brief*, 2004 available at http://www.ihlresearch.org/opt/.

[10] In the judgment of *Hilu v. Government of Israel, et al*, HCJ 302/72 and 306/72, the Israeli High Court of Justice maintained that customary international law is considered to be part of Israeli internal law without the need for any special legislation, unless contradictory to another provision in internal law.

[11] One of the arguments advanced by Israel against the applicability of the Geneva Conventions is that such recognition would be interpreted as recognition of formal Jordanian and Egyptian sovereignty over the West Bank and Gaza Strip respectively. For an elaboration of Israel's official position as developed by Israel's Attorney General Meir Shamgar. See Shamgar, Meir, "The Observance of International Law in the Administered Territory," *Israel Yearbook of Human Rights*, Volume 1, 1971.

[12] This paragraph stipulates that "the Convention shall apply to all cases of partial or total occupation of the territory of a High Contracting Party."

1967 war expressed willingness to recognise the applicability of the Convention through the promulgation of a military proclamation to that effect, the proclamation was soon thereafter amended to exclude the Convention.[13]

From then on, Israel has claimed that its presence in the OPT is as an "administrator", thereby completely unaccountable under the Fourth Geneva Convention.[14] In this regard it has declared that it will only abide by the "humanitarian provisions" of the Convention, although it has not specified which provisions it regards as humanitarian.

Although the Israeli High Court of Justice has in the past stated that Israel has been holding the Palestinian Territories in belligerent occupation since 1967,[15] it nevertheless chooses to endorse the official position of the government against the applicability of the Convention. To do so, it has argued that even though Israel signed and ratified the Convention, it was not bound by it, because it "generates new norms whose application in Israel demands an act of legislation."[16] One result of this position is that the Court is only authorized to examine the activities of Israeli military authorities in light of the provisions of the Fourth Geneva Convention only where the State Attorney agrees to their application, thereby rendering the position taken by the court without substantial legal significance.[17]

Thus although the Israeli High Court has since the beginning of the current *intifada* considered dozens of petitions related to Israeli military practices in the OPT,[18] its rulings continue to choose deference to the discretion of the military authorities whenever it invoked military considerations," thereby demonstrating that the security of the state continues to rule as the single most supreme guiding principle [and that]the notion of the military government acting as a separate entity from the Israeli body politics is a "fiction," which maintains the Palestinian civilian population of the occupied at the mercy of the occupying power.[19]

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[13] Article 35 of the Proclamation No. 3 of 7 June 1967 stated that: "the military court…must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail." In October 1967, this article was deleted by Military Order 144. See Shehadeh, Raja, "The Legislative Stages of the Israeli Military Occupation" in Emma Playfair (ed.), *International Law and the Administration of Occupied Territory,* Clarendon Press, Oxford, 1992.

[14] Although initially Israel's voting on UN GA resolutions reflected the view that the applicability of the Convention was an open question, it began from 1977 onwards to vote against its de jure applicability. See Roberts, Adam, "Prolonged Military Occupation: The Israeli Occupied Territories 1967-1988" in Playfair (Ed) *supra* note 13.

[15] For the latest, see *Beit Sourik Village Council v. The Government of Israel,* HJC 2056/2004, 30 June 2004.

[16] See the decision of the Court in the *Teachers' Housing Cooperative Society v. Military Commander,* HJC 393/82.

[17] This usually takes place only in cases in which the state is convinced that the interpretation by the Court of a specific provision covers the specific action that is subject of the petition. Although the court has argued that the state customarily allows such examination, it is not granted automatically. See Qupty, Mazen, "The Application of International Law in the Occupied Territories as reflected in the Judgments of the High Court of Justice in Israel," in Playfair (ed), *supra* note 13.

[18] Such decisions have focused on issues such as the forcible transfer of Palestinians from the West Bank and Gaza Strip; the deliberate targeting of medical personnel in the OPT; the use of Palestinian civilians as human shields and the demolition of houses without prior notice. For more information see Nizar Ayoub, *The Israeli High Court of Justice and the Palestinian Intifada: A Stamp of Approval for Israeli Violations in the Occupied Territories,* Al-Haq, 2003.

[19] Benvinisti, Eyal, *Legal Dualism: The Absorption of the Occupied Territories into Israel,* West Bank Data Base Project, Jerusalem Post Publication, 1989.

Nevertheless shortly after the ICJ's Advisory Opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Territory*, in July 2004, Israeli Attorney General Menachem Mazuz appointed a legal team to examine the implications of the Advisory Opinion. As a result of their report, he recommended to the government that the Fourth Geneva Convention be applied *de jure*.[20] As of December 2004, Israeli officials had not changed their position.

B. THE POSITION OF THE INTERNATIONAL COMMUNITY

Israel remains largely isolated in its interpretation of the applicable international law. Since 1967, the majority of the international legal community has repeatedly reiterated that as an Occupying Power in the West Bank and Gaza Strip, Israel cannot evade the obligations it undertook as a High Contracting Party to the Four Geneva Conventions.

Repeated resolutions by the General Assembly (GA),[21] the Security Council (SC),[22] and statements issued by governments worldwide, have all affirmed the de jure applicability of the Fourth Geneva Convention to the OPT, and have called upon Israel as an occupying power to abide by its terms. In a declaration of December 2001, the International Committee of the Red Cross(ICRC) recalled that it "has always affirmed the *de jure* applicability of the Fourth Geneva Convention." Similarly in a statement issued at the conclusion of a meeting of the High Contracting Parties to the Fourth Geneva Convention held on 5 December 2001, they reaffirmed "the applicability of the Convention to the OPT, including East Jerusalem and reiterate[d] the need for full respect for the provisions of the said Convention in that territory."[23]

This position was most recently confirmed by the ICJ in its July 2004 Advisory Opinion. In it, the court emphasised that the agreements between Israel and the PLO, which resulted in the transfer to the PNA of certain powers and responsibilities, "have done nothing to alter this situation, [and that] all these territories (including East Jerusalem) remain occupied territories [in which] Israel has continued to have the status of occupying power."[24] In this regard, the Opinion emphasises that "civilians who find themselves in whatever way in the hands of the occupying power" must remain protected persons,[25] "regardless of changes to the status of the occupied

[20] The Justice Ministry team, headed by Deputy Attorney General Shavit Matthias also suggested that Israel should reconsider the way in which the army and other Israeli agencies have been operating in the OPT. See Benn, Aluf, "AG: ICJ Ruling Necessitates Adoption of Geneva Convention," *Ha'aretz*, 25 August 2004.

[21] See for example the most recent GA Resolutions 56/60 of December 2001 and Resolution 58/97 of December 2003.

[22] SC Resolution 1544 of May 2004 reiterates "the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949".

[23] See "Annex 1: the Declaration of the Conference of the High Contracting Parties to Fourth Geneva Convention, 5 December 2001", ICRC , http://www.icrc.org/WEB/ENG/siteeng0.nsf/iwpList74/D86C9E662022D64E41256C6800366D55.

[24] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 9 July 2004, paragraph 78.

[25] Article 4 of the Fourth Geneva Convention defines protected persons as "those civilians who, at any given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals."

territory as is shown by Article 47 of the Convention".[26]

This accords with the intention of the drafters of the Convention. As the ICRC Commentary notes, since agreements concluded with the authorities of the occupied territory could represent "a more subtle means by which the Occupying Power may free itself from the obligations incumbent on it under occupation law," it must do so without undermining the rights of the civilians or their internationally accorded legal protections.[27]

After affirming the rule of international law prohibiting the acquisition of territory through the threat or use of force,[28] and the applicability of the Hague Regulations to the OPT,[29] the ICJ also addressed the applicability of the Fourth Geneva Convention to these territories. For this purpose, it recalled Article 2(1) of the Convention, noting that this convention applies "to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties..."[30] Once these conditions have been met, the Convention is deemed to apply, including "*in any territory* [emphasis added] occupied in the course of the conflict by one of the contracting parties."[31]

C. ALTERING EXISTING LAWS IN OCCUPIED TERRITORIES

Since the beginning of its occupation of the West Bank and Gaza Strip, Israel set out to fortify its control over the OPT. To meet this end, its military authorities have by 2004 issued over 2,500 military orders altering pre-existing laws. Passed by the Area Commander of the Israeli occupying forces,[32] they effectively extended military jurisdiction over the OPT, and continued to apply

[26] Paragraph 95, *supra* note 24. Article 47 stipulates that protected persons in occupied territory "shall not be deprived in any case or in any manner …by any agreement concluded between the authorities of the occupied territory and the Occupying Power." According to the ICRC Commentary, this provision was intended to reaffirm the general rule expressed in Article 7 of the same Convention which states that: "no special agreement shall adversely affect the situation of protected persons…nor restrict the rights which it confers upon them." See The Geneva Conventions of 12 August 1949, *Commentary-Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* Pictet, Jean S. (ed.), ICRC, 1958, page 247.

[27] *Ibid*. The same commentary notes that this applies also to cases where the lawful authority in the occupied territory is the one to have concluded such an agreement. See Roberts *supra* note 14.

[28] Paragraph 87, *supra* note 24.

[29] According to the Court, only Section III of the Hague Regulations dealing with military authority in occupied territories is currently applicable in the OPT. See paragraph 124, *supra* note 24.

[30] Paragraph 92, *ibid*. While the existence of an armed conflict is an essential precondition for the application of international humanitarian law, it is important to note that no treaty instrument has provided a precise definition of the term "armed conflict". One attempt to define it was made in the Prosecutor v. Dusko Tadic case (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995. Similarly, according to the ICRC Commentary regarding Common Article 2 of the Fourth Geneva Convention, "it remains to be ascertain what is meant by 'armed conflict,'" *supra* note 26, page 20.

[31] Paragraph 95, *ibid*.

[32] By virtue of Proclamation No. 2 issued on the eve of Israel's occupation of the West Bank, the military commander assumed all legislative, executive and judicial powers. See Shehadeh, Raja, *supra* note 13.

following the signing of the Oslo Interim Agreements.[33]

While the provisions of international humanitarian law acknowledge the *de facto* nature of an Occupying Power, one of the most substantive principles in this body of law is that military occupation is a temporary condition, i.e., it is not intended to confer sovereignty or prejudice future definite arrangements.[34] Under Article 43 of the Hague Regulations, Israeli authorities are obliged to respect local laws and procedural safeguards enacted prior to occupation, and are prohibited from making permanent changes, except when absolutely prevented.[35] Israel is therefore not entitled to apply its own domestic laws within the OPT. Similarly according to Article 64 of the Fourth Geneva Convention, penal laws of the occupied territory are to remain in force, except to ensure the security of its occupying forces, to restore and ensure as far as possible public order and safety, or where they constitute "a threat to the application of the present Convention."

Nevertheless since 1967, Israel enacted far reaching restrictions on the basic rights of the Palestinians, and created facts on the grounds that solidified its control over the OPT.[36]

Furthermore, and despite their illegality under international law, the Israeli authorities maintained that the British Defence (Emergency) Regulations of 1945, enacted by the British during their Mandate of Palestine, constituted part of the local law prior to the occupation of the West Bank and Gaza Strip in 1967,[37] thereby making their application of these laws in the OPT "lawful." They have used them to carry out particularly drastic punitive measures without judicial proceedings and in violation of the provisions of the Fourth Geneva Convention. These include

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[33] Such as the use of water, land and other natural resources; the issuing of travel permits and licenses to practice a number of professions. *Ibid*. Military Order No. 130 Concerning Interpretation provides in paragraph 8 that these military orders "supersede any law [i.e. any law effective in the region in the eve of the occupation], even if the former does not explicitly nullify the latter." See Benivinisti, Eyal, *supra* note 19.

[34] The proposition that Israeli authorities are restricted by the inherent temporariness of the occupation was acknowledged in *Dweikat (Mustafa) v. State of Israel*, HC 390/79, also known as the Elon Moreh case, in which the Israeli High Court emphasized that: "the military government cannot create in its areas facts which are designed *ab initio* to exist even after the end of the military rule in the area."

[35] That this duty is imposed by international law has been reiterated by the Israeli High Court of Justice concerning the occupation of the West Bank and Gaza Strip, particularly in its earlier judgment, *The Christian Society for the Holy Places v. Ministry of Defence*, HCJ 337/71. It was also acknowledged by the Israeli Court of Justice in its Judgment in the Teachers' Housing Cooperative Society case, *supra* note 16.

[36] This was most evident in Israel's policy of declaring large areas of the West Bank as "state lands" to facilitate extending its control for settlement activities or expropriation. See Shehadeh, Raja, *Occupier's Law: Israel and the West Bank*, Institute for Palestine Studies, Washington, 1988.

[37] Under British Mandate, the Defence Regulations granted the High Commissioner of Palestine extraordinary powers over the Palestinian civilian population, and empowered him to carry out such acts "as appear to him in his unfettered discretion to be necessary or expedient for securing public safety…[and] the maintenance of public order." These Regulations were revoked by the British prior to leaving Palestine in 1948 as confirmed by the British Foreign Office in a letter to Al-Haq on 22 April 1987, and therefore do not constitute valid law. See Appendix D in Moffet, Martha, *Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defence (Emergency) Regulations, 1945 in the Occupied Territories*, Al-Haq, 1989. In addition, a proclamation enacted by the Jordanian military commander in 1948 made Jordan's own Defence Law and Regulations applicable to the West Bank. Apparently failing to realise that they had already been revoked by the British, a Jordanian proclamation simultaneously revoked the British Defence Regulations.

[38] *Ibid*.

the power to deport; demolish houses; impose curfews and town arrests; and carry out administrative detention.[38] While separate military laws were imposed on Palestinians in the OPT, Israel enacted legislation which extended territorial laws of the state to Israelis outside the borders, including Israeli settlers in the OPT. As one commentator noted in 1989,

> Whether through extensive lawmaking by the military authorities, through extra-territorial prescription of Israeli laws, or through case law of the Israeli courts, large segments of the law of the territories have become Israeli law. This is an outcome of a lengthy step-by-step process. Nothing was effected overnight. [39]

Following the Oslo Accords, this has not changed.[40] The Israeli legal system continues to apply to Israeli settlements and settlers in the OPT.[41] In addition, the Israeli authorities continue to routinely cite "security concerns" to justify numerous features of their occupation and the radical changes they effect on the administrative and legislative structures. More dangerously, they continue through their actions to blur the distinction between their duties and rights as an Occupying Power and those of a sovereign.

II. ISRAEL'S OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

A. THE ISRAELI POSITION

Israel has acceded to all of the core United Nations (UN) international human rights instruments.[42] Nevertheless, since Israel's occupation of the West Bank and Gaza Strip in 1967, successive Israeli government have rejected the applicability of human rights treaties to the OPT on the grounds that the relationship between occupier and occupied is fundamentally different

[39] Benivinisti, Eyal, *supra* note 19. Both local government and the judiciary in the OPT were structured in such a way as to operate on a personal basis and not a territorial one. Thus the legal norms applying to Israeli settlements and settlers in the territories were from the outset different from those applied to Palestinians in the same area. See Shehadeh, Raja, *supra* note 36.

[40] As noted by one legal analyst, "it is quite obvious that the Israeli side went to great lengths to defeat any of the attempts by the Palestinians to introduce articles [in the 1993 Declaration of Principles] which could later be interpreted as enabling the Palestinian Self-Government Authority to extend its jurisdiction to Israeli settlements." See Shehadeh, Raja, "Can the Declaration of Principles Bring About a "Just and Lasting Peace?" *European Journal of International Law,* Volume 4, 1993.

[41] According to Annex II to *the Declaration of Principles on Interim Self Government Arrangement,* 13 September 1993, the Palestinians were to have no power or responsibilities, including for "external security, settlements, Israelis and foreign relations." In addition, the Agreed Minutes state that it is Israel that would remain responsible for "external security, and public order of settlements and Israelis."

[42] Israel ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 3 January 1992; the Convention on the Rights of the Child (CRC) on 3 October 1991; the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) on 2 November 1991; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on 2 February 1979 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 3 October 1991.

from that between a government and its people during peacetime. In 1984 Israel took the position that these instruments do not apply.[43]

The signing of the Second Oslo Interim Agreement between Israel and the Palestinians in 1995 (Oslo II), providing for the preparatory transfer of a total of fourteen civil spheres to the PNA, has been used by Israel as a further ground to reject Israel's responsibility under international human rights law. Furthermore the dominant tendency of the Israeli High Court of Justice rulings has been that of the non-application of international humanitarian law to the OPT. However since this would imply that rights would not be applied where safeguards would be needed the most, this position has been rejected by the majority of the international community, UN bodies and legal experts.[44]

B. THE APPLICABILITY OF CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW

Customary human rights norms are applicable in all situations, including times of war and peace. Most of the Universal Declaration for Human Rights (UDHR), [45] in addition to some provisions in international human rights conventions, particularly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Right (ICESCR), reflect customary international law, and are thus applicable to Israel, even in the absence of a binding treaty. Furthermore, they apply not only to persons living under the jurisdiction of their own national authority, but also to persons living in territories under belligerent occupation. As noted by the ICJ in the *Barcelona Traction* case, obligations derived from the principles and rules concerning the basic rights of the human person are obligations which are owed towards the international community as a whole (also known as *erga omnes* obligations). In this regard, the majority of scholars have considered the human rights provisions of the UN Charter to embody customary law, and therefore to be universally applicable (such as the prohibition against torture, certain basic due process guarantees and the principle of non-discrimination), and consequently to encompass not only persons living under the jurisdiction of their own national authorities, but also "persons living in territories under belligerent occupation."[46]

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[43] When preparing its report to the UN Human Rights Committee, Israel took the position that "the Covenant and similar instruments do not apply directly to the current situation." (CCPR/C/SR.1675 paragraph.21). Similarly, in both its initial report to the Committee on Economic, Social and Cultural Rights in 1998 and in a further report in 2001, Israel argued that "the Palestinian population are not subject to its sovereign territory and jurisdiction" and were therefore excluded from both the report and the protection of the Covenant (E/C.12/1/Add.27). See also, Bevis, Linda, *The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories*, Al-Haq, 2003.

[44] One analyst even pointed out "the longer and the more permanent the occupation, the more extensive are the human rights obligations of the state controlling the occupied area." See Peleg, Illan, *Human Rights in the West Bank and Gaza Strip: Legacy and Politics*, Syracuse University Press, New York, 1995.

[45] Adopted without a dissenting vote by the GA in 1948, there is no doubt that the UDHR has been considered the cornerstone of UN human rights activities. Although not a legally enforceable document, several authors have argued that it has become binding either by way of custom or general principles of law. See Shaw, Malcom, *International Law*, Fifth Edition, Cambridge University Press, 2003.

[46] UN GA Official Records, 25th Session, "Respect for Human Rights in Armed Conflict: Report of the Secretary-General", UN Document A/8052, 18 September 1970," Annex 1: "General Norms Concerning Respect for Human Rights in their Applicability to Armed Conflicts."

C. THE APPLICABILITY OF CONVENTIONAL HUMAN RIGHTS LAW

Many international human rights conventions to which Israel is a party stipulate that the obligations apply not only to the territorial area of a specific state, but to all persons brought under the jurisdiction or effective control of that state. Therefore Israel is bound to apply conventions regarding the prevention of racial discrimination, [47] the prevention of torture,[48] the rights of the child, [49] and the protection of fundamental civil and political rights.[50] The fact that a territory "within [the state's jurisdiction" is considered territory "within its effective control" is beyond doubt today.[51] This principle has also been upheld by the European Court of Human Rights in the *Loizidou* case, which stated that the existence of a partly autonomous area in an occupied territory does not affect the overall responsibility of the occupying power if the latter exercises effective overall control of the territory. Furthermore, the Israeli-Palestinian Interim Agreement of 1995 on the West Bank and Gaza Strip specifically states that that the two sides shall "exercise their powers and responsibilities pursuant to this agreement with due regard to internationally accepted norms and principles of human rights and the rule of law."[52]

Despite the signing of the Oslo Accords, the Palestinian authorities do not exercise a degree of control or authority in the OPT that equals or supersedes that of Israel, or that frees the latter of its international responsibility. While the PNA is also expected to respect human rights norms under international legal norms,[53] Israel continues to exercise *de facto* authority in the OPT. Under the test of effective control, the PNA is responsible for human rights protection only in its spheres of effective authority.[54]

Therefore, the position of the international community is that as a state party to international human rights instruments, Israel must continue to be held responsible under its human rights conventional obligations in the OPT to the extent that it continues to exercise jurisdiction in those territories. In addition, it must furnish reports as required by the relevant conventions with respect to these territories.

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[47] ICERD, Article 6.

[48] Convention Against Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 2(1).

[49] CRC, Article 2.

[50] ICCPR, Article 2(1).

[51] The European Commission on Human Rights in *Cyprus v. Turkey* (1975) (Applications No. 6780/74 and No. 6950/75), otherwise known as the Loizidou Case states that the European Convention on Human Rights applies to the Turkish occupation of Northern Cyprus, because "…High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility whether that authority is exercised within their territory or abroad…".

[52] Article XIX of the *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip*, Washington D.C., 28 September 1995.

[53] See further below.

[54] Although this obligation cannot stem from signed and ratified international instruments unless the governing authority is a state or otherwise is granted the legal personality necessary to sign international documents, they can be incorporated into new domestic legislation and adopted into law. This will provide initial protection from abuse, and must be followed by the development and implementation of adequate supervisory and enforcement mechanisms, including an independent and impartial judicial system.

Thus in its Concluding Observations, the Human Rights Committee (HRC), charged with monitoring the implementation of the ICCPR, reiterated in reference to Israel that the Covenant's provisions apply "to the benefit of the population of the Occupied Territories, for all conduct by the state party's authorities or agents in those territories that affect the enjoyment of rights enshrined therein".[55] Similarly in its Concluding Observations, the Committee on Economic, Social and Cultural Rights (CESCR) reaffirmed its view that "the state party's obligation under the Covenant apply to all territories and populations under its effective control."[56]

This was confirmed by the 2004 ICJ Advisory Opinion on the Wall. In it, the court reiterated that human rights treaties such as the ICCPR and the ICESCR are "applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory,"[57] and to persons "within their jurisdiction, as in the case of the Convention on the Rights of the Child (CRC)."[58] Even where some competence has been transferred to the PNA, the court reiterated that Israel remains obliged not to raise any obstacles to the exercise of such rights.[59]

D. HUMAN RIGHTS LAW DURING TIMES OF ARMED CONFLICT AND BELLIGERENT OCCUPATION

The applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of international human rights law. This is more so because international human rights law tolerates no lacunae in its protective umbrella. Declarations, reports and resolutions by various UN bodies, including the GA and the SC, [60]

[55] HRC "Concluding Observations: Israel" August, 2003.(CCPR/CO/78/ISR). This observation is consistent with the Committee's approach which has found that the Covenant is applicable even where the state exercises jurisdiction outside its territory See *Lopez Burgos v. Uruguay* (No. 52/79); Lilian *Celiberti de Casariego v. Uruguay* (No. 56/79) and *Motero v. Uruguay* (No. 106/81).

[56] CESCR, "Concluding Observations: Israel," May, 2003. (E/C.12/1/Add.90). Although the progressive implementation of the ICESCR makes it a weaker covenant than the ICCPR, the idea of the indivisibility of all human rights has gained credence and was reaffirmed in the Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights, stated that "all human rights are universal, indivisible and interdependent and interrelated" (A/CONF.157/23). In this regard, even though the ICESCR does not mention its scope of applicability, as stressed by the ICJ, a strong case can be made for the applicability of this Covenant applies not only to the sovereign territory of a state but also to territories "over which a state party …exercises territorial jurisdiction" See ICJ Wall Advisory Opinion, *supra* note 24, paragraph 112.

[57] *Ibid*, paragraph 111 and 112.

[58] After citing Article 2 of the CRC, according to which "state parties shall respect and ensure the rights set forth in the… Convention to each child within their jurisdiction…," the court emphasized that the "Convention is therefore applicable within the Occupied Palestinian Territory". See *ibid*, paragraph 113.

[59] ICJ Advisory Opinion on the Wall, *supra* note 58.

[60] On 25 June 1993, the Vienna Declaration and Programme of Action of the Word Conference on Human Rights affirmed the universality of all human rights and fundamental freedoms, and called upon states and all parties to armed conflicts to observe not just international humanitarian law, but also "…other rules and principles of international law, as well as minimum standards for protection of human rights as laid down in international conventions". In 1970, the UN GA adopted Resolution 2675 which affirmed certain basic principles for the protection of civilians in armed conflict and affirmed that "fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict." As early as 1968 the GA established a committee to monitor human rights in the OPT stating that it was based on the World Conference on Human Rights in Tehran's call for Israel to respect and implement the UDHR in addition to the Geneva Conventions in the OPT. See UN GA Resolution 2443 (XXIII). Similarly, in the case of the SC, as early as 1967, it reiterated that "essential and inalienable human rights should be respected even during the vicissitudes of war." See SC Resolution 237/1967.

have all affirmed that fundamental human rights, as accepted in international law and laid down in international instruments, can be invoked to "complete in certain respects and lend support to the international instruments especially those applicable in conditions of armed conflict."[61] Equally the ICJ repeatedly stated that an Occupying Power remains responsible for fulfilling its obligations stemming from human rights conventions in occupied territory.[62] Furthermore, the ICRC has confirmed that the two branches of law are complementary.[63]

Certain human rights treaties, such as the ICCPR, acknowledge the necessity to restrict certain human rights in time of public emergency threatening the life of a nation and permit governments to derogate from certain rights therein.[64] However, UN treaty monitoring bodies charged with implementing these conventions have stressed that derogations are subject to the principles of necessity and proportionality and that only essential measures may be taken and only "to the extent strictly required by the exigencies of the situation." [65] They also may not be discriminatory or contravene other rules of international law, including rules of international humanitarian law.

Furthermore, those treaties do not permit derogation from articles concerning fundamental principles of international human rights law. These non-derogable principles were intended to apply in emergency situations such as situations of armed conflict or belligerent occupation, and they must be applied to all without discrimination based on race, political opinion or other status. These include the right not to be arbitrarily deprived of life;[66] the prohibition on torture and slavery; recognition before the law; and freedom of thought, conscience and religion, amongst others.[67] However, as recent jurisprudence and the practice of human rights implementation mechanisms have also affirmed, other rights remain applicable, insofar as this is possible in the circumstances. This is particularly true of certain judicial guarantees, which are essential for strengthening the protection afforded to the "hard core" rights.[68]

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[61] UN GA, Official Records, 25th Session, "Respect for Human Rights in Armed Conflict," *supra* note 46.

[62] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) ICJ Reports, 1971, and ICJ Advisory Opinion on the Wall, *supra* note 25.

[63] Doswald-Beck, Louise, "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross,* No. 293, April 1993, www.icrc.org.

[64] See Article 4(1).

[65] UN HRC, *General Comment 29: State of Emergency* (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001.

[66] In the advisory opinion of the ICJ on the *Legality of the Threat or Use of Nuclear Weapons* (1996), the Court held that respect for the right to life is one of the provisions from which derogation is permissible. "In principle, the right not to be deprived of one's life applies also in hostilities. The test of what is arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities." Also cited in the ICJ Wall Advisory Opinion, *supra* note 24, paragraph105.

[67] Article 4(2) of the ICCPR.

[68] See decisions by the Human Rights Committee *Lanza de Netto, Weismann and Perdomo v. Uruguay* (No. R.2/8, A/35/40, Annex IV, paragraph 15) and *Camargo v. Colombia* (No. R.11/45, Annex XI, paragraph 12.2).

That human rights law applies during times of conflict is also reflected in the various provisions of international humanitarian law. For example, the preamble of the Hague Convention with Respect to the Laws and Customs of War on Land states that parties to a conflict remain under the protection and governance of "…the principles of the law of nations derived from the usages established among civilized people [and] from the laws of humanity." This section of the preamble, otherwise known as the Martens Clause, is considered declaratory of customary international law, and has been interpreted as an attempt to fill the gap left by Hague instruments with humanitarian provisions from other sources. Moreover, its fundamental guarantees have been restated by both the Four Geneva Conventions and its two Additional Protocols.[69]

III. THE PALESTINIANS AND INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW-ARE THERE OBLIGATIONS FOR THE PNA?

A. THE PNA'S POSITION

On 14 June 1989, the Permanent Representative of Palestine to the UN and other international organisations in Geneva filed instruments of accession with the Swiss Federal Council, as depository of the Geneva Conventions and Protocols. In a letter to the Swiss Government, the PLO Executive Committee, expressed its desire "…to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto…and to respect ..and to ensure respect in all circumstances.[70] According to Article 96 of Additional Protocol I of the Fourth Geneva Convention, a non state actor may in certain circumstances "undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depository."

In the case of human rights, the PNA has also committed itself to abide by international law. Article 10 of the Amended *Palestinian Basic Law* of 2003 stipulates that "basic human rights and freedoms shall be binding and respected", and that the PNA "shall work without delay to join regional and international declarations and covenants which protect human rights."[71] In addition, PNA leaders and spokespersons have repeatedly pledged in meetings with representatives of international human rights organisations that the PNA intends to abide by internationally recognized human rights norms.[72]

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[69] Ticehurst, Rubert, "The Martens Clause and the Laws of Armed Conflict", *International Review of the Red Cross*, No 317, 1997, http://www.icrc.org.

[70] Letter from Ambassador Nabil Ramlawi to the Swiss Federal Council (14 June 1989) reprinted in the *Palestine Yearbook of International Law*, Volume V (1989). Although the Swiss government declined to decide whether the communication could be considered an instrument of accession, "due to the uncertainty within the international community as to the existence or non existence of a State of Palestine," the Permanent Mission of Switzerland to the UN noted that this unilateral declaration by the PLO remains valid. This was also noted in the ICJ's Advisory Opinion on the Wall, *supra* note 24, paragraph 91.

[71] Palestinian Legislative Council, Media Unit, Laws, Ramallah, West Bank.

[72] For example, on 2 October 1993, Chairman Yassir Arafat told a delegation from Amnesty International that the PLO was committed to respect all internationally recognized human rights and seeks to incorporate them into Palestinian legislation. See Amnesty International,"Israel: Amnesty International Delegation Discusses Human Rights with President Arafat", *Press Release* (AI Index: MDE 15/10/96), 15 October 1996.

Furthermore, the Oslo Accords clearly stipulate that both sides are required to give "due regard to internationally accepted norms and principles of human rights and the rule of law."[73]

B. THE POSITION OF THE INTERNATIONAL COMMUNITY

Since the Oslo Accords have not resulted in the establishment of a sovereign Palestinian entity, the PNA cannot be considered a subject of international law capable of becoming a party to international human rights instruments. [74] In addition, and since effective control over the OPT rests with Israel, one potential point of view is that the extent to which the PNA can be held accountable for human rights violations that occur within the OPT remains questionable.

Similarly others have argued that the exact meaning, scope, pertinence and legal implications of an assertion that "…non state actors are bound by human rights law and may be held accountable for violating it remains controversial".[75] In this regard, a number of UN officials have cautioned against the application of human rights obligations to non-state actors, stressing in this regard that this would risk states trying to offload their own responsibility onto these actors in an effort to diminish their existing state obligations and accountability, thereby amounting to a sort of justification of their own human rights violations.[76]

Nevertheless, it is generally accepted that human rights abuses committed by one private person or group against another, or at least the violations of human rights norms that are part of customary law, do not remain outside the ambit of human rights law.[77] Although contemporary human rights focus on the duty of governments to respect human rights, it is the individual that remains the central subject and primary beneficiary of international human rights. As a result, both universal and regional human rights instruments have imposed duties on individuals.[78] Similarly recent developments in UN practice have also indicated that there are certain situations in which some human rights obligations are implied for non-state actors.[79]

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[73] Article 19 and Article 11(1) of Annex 1 of the 1995 *Israeli-Palestinian Interim Agreement supra* note 52.

[74] The autonomous entity of the PNA does not satisfy all the requirements of statehood under customary international law as set out in the Montevideo Convention on Rights and Duties of States (1933) namely: permanent population, defined territory, government and capacity to enter relations with other states.

[75] See Report of the Special Rapporteur on Terrorism and Human Rights Kalliopi Koufa to the Commission on Human Rights, "Specific Human Rights Issues: New Priorities, In Particular Terrorism and Counter-Terrorism," 25 June 2004 (E/CN.4/Sub.2/2004/40).

[76] *Ibid*.

[77] Giegerich, Thomas, "An On-going Process of Nation-Building," Shapira, Amos and Mala Tabory (ed.) in *New Political Entities in Public and Private International Law: With Special Reference to the Palestinian Entity*, Kluwer Law International, Netherlands, 1999.

[78] Article 29 of the UDHR provides that "everyone has duties to the community," while Article 30 denies groups and persons the right "to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." Similar provisions are common Article 5 of the ICCPR and ICESCR; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 29-38 of the American Declaration of the Rights and Duties of Man; Articles 13, 17 and 23 of the American Convention on Human Rights, and Articles 27-29 of the African Charter of Human and People's Rights.

[79] However almost all of these situations are internal armed conflicts in which opposition forces are accountable under international law. See Report of the Special Rapporteur on Terrorism and Human Rights Kalliopi Koufa to the Commission on Human Rights, *supra* note 75.

Therefore the fact that Israel exercises effective control over the OPT and still has as an Occupying Power legal obligations vis-à-vis the Palestinians in the OPT, does not negate that the PNA may be held internationally responsible for human rights violations committed by its various organs, "for its acts and omissions in the areas under its jurisdiction and its spheres of authority."[80] According to the Oslo Accords, the PNA which exercises self-government functions in the West Bank and Gaza Strip consists of the chairman; the Palestinian Legislative Council (PLC) and the Executive Authority. To the extent that it operates a police force, a judiciary, a penal system, these and other structure, they have a duty to respect basic human rights norms

Moreover, with the development of international criminal law, a number of acts including war crimes, crimes against humanity and genocide can lead to both state and individual criminal responsibility.[81] Thus to the extent that the PNA is exercising public authority over the Palestinians in the OPT, it must be held accountable. In the case of international humanitarian law, it is equally established that its customary rules apply to all parties to a conflict, including non-state actors.[82]

In his report on the protection of civilians in armed conflict, UN Secretary General Kofi Annan recommended that the SC "call on member states and non-state actors, as appropriate, to adhere to international humanitarian, human rights, and refugee law, particularly the non-derogable rights."[83]

[80] Benvinisti, Eyal, "Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements," *Israel Law Review*, Volume 28, 1994, page 314.

[81] Nuremberg Statute and Judgment; Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, and Article 6 of the Statute of the International Criminal Tribunal for Rawanda as well as Article 27 of the Rome Statute

[82] Common Article 3 of the Four Geneva Conventions.

[83] Recommendation No. 2 in "Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflict," (S/1999/957), 8 September 1999, http://ochaonline.un.org/GetBin.asp?DocID=410.

ISRAEL'S USE OF FORCE

A Young Man carrying the Child Munir Al Duqs after he was mortally wounded by Israeli Occupying Forces in the Refugee Camp of Jabalya in the Gaza Strip. (Associated Press 2004)

ISRAEL'S USE OF FORCE

I. OVERVIEW

In its report on the second year of the first *intifada* published in 1990, Al-Haq opened its chapter on the use of force as follows,

> The illegal use of force, whether an unwarranted use of live ammunition, abuse of standard crowd control weapons, or physical brutality, has been the principal method used by the Israeli military to quell the uprising in the Occupied Palestinian Territories [OPT].[1]

A decade and a half later, and over four years after the beginning of the second *intifada*, the opening of this chapter can only re-iterate the same assessment, while adding to the list of illegal Israeli uses of force large scale military incursions into residential areas, abuse and killings at checkpoints, extra-judicial executions during arrest raids, and targeted assassinations. This chapter examines each of these practices from the perspective of international human rights and humanitarian law. It also addresses the culture of impunity that has developed through the failure of the Israeli military to uphold international legal standards, both in its regulations governing of the use of force by soldiers, and through the lack of credible investigations into the killings of Palestinian civilians.

Subsequent to the re-deployment of the Israeli occupying forces outside major Palestinian population centres as part of the Oslo process, the means through which the Israeli military exercised its control over Palestinian lives changed. Accordingly, the tools of this control, amongst them the use of force, also changed. While the occupation was rooted within Palestinian population centres, as it was prior to, during and immediately after the first *intifada*, the occupying forces used unlawful force in response to multiple incidents of dispersed civil unrest.[2] The redeployment provided established points of friction at checkpoints and also meant that in order to carry out arrests, or in response to attacks on Israeli targets by Palestinians, the Israeli military penetrated areas not under its direct civil, political and security authority. This has meant a greater reliance on war-like tactics such as the bombardment of Palestinian areas and large military incursions.[3]

Since the outbreak of the current *intifada* in September 2000, the actions of the Israeli occupying forces in the Occupied Palestinian Territories have often been characterised by unnecessary or disproportionate, and often lethal, use of force against Palestinians. This manifests itself in the daily lives of Palestinians through specific operations such as arrest raids, assassinations or incursions. Excessive force is employed in the repression of public demonstrations, in non-threatening situations and at checkpoints. The force used is often indiscriminate, killing civilians, medical personnel and children, and damaging medical vehicles and essential infrastructure.

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[1] Al-Haq, *A Nation Under Seige*, Al-Haq, Ramallah, 1990, page 21

[2] *Ibid*. Chapter 1.

[3] See generally, Andoni,Ghassan, "A Comparative Study of *Intifada* 1987 and *Intifada* 2000," in *The New Intifada: Resisting Israel's Apartheid*, Roane Carey (ed.), Verso, 2001.

During the first four years of the current *intifada* Al-Haq's documentation recorded a total of 3,044 Palestinians, including 489 children and 179 women, killed by the Israeli forces. Over the same time period, the Palestine Red Crescent Society (PRCS) estimates that some 27,770 Palestinians were wounded. Approximately 26% of these cases resulted from the use of live ammunition, and 23 percent from rubber coated metal bullets.[4] The prevalence of injuries sustained by live ammunition highlights the regular use of potentially lethal force. The prevalence of injuries sustained to the upper body further suggests disregard for Palestinian life. The following breakdown is based on Al-Haq statistics:

***intifada* Statistics (28 September 2000 – 25 September 2004)**

Cause of death			***Area of body injured resulting in death***		
	West Bank	Gaza		West Bank	Gaza
Live bullets	1070	1022	Upper body	930	1382
Explosives and small missiles	214	552	Lower body	210	92
Rubber-coated-metal bullets	7		All over body	256	122
Tear gas and other gas	15	4	Others	27	25
Other	117	43			

A factor that cannot be accurately related by the above statistics is the misuse of the specific weapons in question. Although deaths caused by live ammunition, rubber coated metal bullets and tear gas are noted, these are often employed in a manner inconsistent with their proper usage. Tear gas should not be used in confined spaces, nor should rubber bullets be aimed at the upper body, and in any event should not be used at close range. Also, the immediate resort to these weapons displays a disregard for the safety and lives of Palestinian civilian. This is particularly the case in the dispersal of demonstrations by the Israeli forces.

Throughout the course of the occupation peaceful demonstrations have been repressed with excessive force. In 2004, there were incidents where Israeli troops dispersed peaceful demonstrations using tear gas, rubber coated metal bullets and live ammunition. On 26 February 2004 a demonstration against the Annexation Wall being built in the village of Beit Surik in the West Bank resulted in the death of two Palestinians from live ammunition. A paramedic present at the demonstration stated that at least 11 people had been injured by live ammunition and 14

[4] PRCS, "Four Year Conflict Related Statistics," from http://www.palestinercs.org/the_fourth_year_intifada_statistics.htm, accessed December 2004. The percentages are the author's calculations.

by rubber coated metal bullets.[5] By 6 May 2004, over 260 injuries sustained during demonstrations had been treated for injury in the town clinic.[6] Although stones are thrown at Israeli troops on a number of demonstrations, a fully equipped military unit should have both the technical and operational ability to disperse demonstrations without the resort to lethal force against civilians. The policing of demonstrations betrays the total disregard of Israeli troops for the well being of Palestinian civilians.

Large-scale incursions by the Israeli military into the West Bank and Gaza display a similar disregard for the lives of Palestinian civilians, not only from the individual soldiers, but also their commanding officers and the Israeli political authorities who authorise and plan the operations.

From 29 March to 21 April 2002, under "Operation Defensive Shield," the Israeli military executed a massive incursion into the major West Bank urban centres from which they had redeployed during the Oslo process. The operation was mounted against the backdrop of increased attacks by both the Israeli military and Palestinians.[7] Within this overall offensive, the assault on Jenin Refugee Camp, an area of one square kilometre home to some 14,000 Palestinians, prompted strong international condemnation and a United Nations (UN) investigation.[8] The report of the Secretary-General (SG) on the assault noted that at least 52 Palestinians were killed, of whom up to half may have been civilians.[9] The incursions into other West Bank cities were similarly marked with disproportionate and excessive force being employed. Palestinian sources place the number killed during the 19 day Israeli military incursion into Nablus at 85.[10] During the assaults, tanks, artillery and assault helicopters bombarded refugee camps and residential areas. Eyewitness accounts confirm that in Jenin, houses were demolished with the residents still inside, medical personnel and ambulances were the subject of attack and at least seven unarmed civilians were killed by Israeli sniper fire.[11] In total, between 1 March and 7 May 2002, and the immediate aftermath, 497 Palestinians were killed in the West Bank.[12]

During the course of 2004, while different areas of the West Bank were subjected to numerous intermittent incursions, the Gaza Strip was the focus of sustained large-scale military incursions. From 18 – 24 May 2004, Israeli forces invaded the southern Gaza city of Rafah during "Operation Rainbow," the aim of which the Israeli military claimed was to arrest Palestinian militants, and

[5] Guardian Unlimited, "Israelis kill Two Villagers in Barrier Protest," 27 February 2004, http://www.guardian.co.uk/international/story/0,1157332,00.html.
[6] Christian Science Monitor, "A West Bank Town Tries to Protest the Wall Non-Violently," 6 May 2004, available at http://www.csmonitor.com/2004/0506/p05s01-wome.html.
[7] *Searching Jenin: Eyewitness Accounts of the Israeli Invasion*, Ramzy Baroud (ed.), Cune Press, 2003, pages 35 – 38.
[8] Report of the SG prepared pursuant to General Assembly (GA) Resolution ES – 10/10, A/ES-10/186, paragraph 43.
[9] *Ibid*, paragraph 44.
[10] International Federation of Human Rights Leagues, "Operation Defensive Shield," *in Israel/Palestine: The Black Book*, Reporters Without Borders (eds.), Pluto, 2003 page 75.
[11] See generally, *supra* note 7. For calculation of civilians killed by sniper fire see, pages 241 – 248.
[12] *Supra* note 8, paragraph 37 (a).

allegedly uncover weapons caches and smuggling tunnels. During the seven-day operation, during which only one tunnel was discovered, 42 Palestinians were killed, including 18 minors, and 170 Palestinians injured. Of those killed, 26 were killed by shrapnel from explosive projectiles, and 13 by sniper fire, including a three-year-old girl.[13] Disproportionate force in densely populated areas was once again employed, to more devastating effect, four months later. "Operation Days of Penitence," a 17-day operation in northern Gaza launched on 28 September 2004 in response to the deaths of four Israelis killed by homemade rockets launched from the Gaza strip, resulted in greater loss of civilian life. As noted by the United Nations Relief and Working Agency for Palestine Refugees in the Near East (UNRWA) in a report released on 20 October 2004,

> According to data collected by UNRWA's Field Security Office, 107 Palestinians were killed and 431 injured during Operation "Days of Penitence." This is the number of confirmed casualties and is likely to rise. Tank shells and helicopter missiles fired into densely populated areas caused many of the casualties. A quarter of those killed (27) were aged 18 years and under. Five Israelis were killed during the same period.[14]

The illegal use of force by Israel is not limited to large scale military incursions, but permeates many aspects of Israel's sustained occupation of the Palestinian territories. Israel's excessive use of force in the OPT and flagrant disregard for international law is apparent in its activities outside of large scale military offences.

One of Israel's most widely condemned and controversial policies in the OPT is that of officially endorsing, at the highest levels of government, the extrajudicial execution of wanted Palestinians through targeted assassinations.[15] While the Israeli authorities refer to these illegal killings as "preventative strikes" or "pre-emptive actions," justified on the grounds of security, the meticulous planning and attacking wanted individuals by surprise, with immediate, and often excessive, lethal force that affords no opportunity for arrest or surrender, can only be described as targeted assassinations.

Since the first officially approved targeted assassination was carried out on 9 November 2000, Al-Haq has documented a total of 385 Palestinians killed under the policy. On the day the policy was first implemented the Israeli Occupying Forces stated that,

> During an IDF [sic] initiated action in the area of the village of Beit-Sahur, missiles were launched by IDF helicopters at the vehicle of a senior Fatah/Tanzeem activist. The pilots reported an accurate hit. The activist was killed, and his aide, who accompanied him, was wounded.

[13] Al-Mezan, "A Report on Human Rights Violations Perpetrated by the Israeli Occupation Forces in Rafah from 18 to 24 May Operation Rainbow," at http://www.mezan.org/site_en/resource_center/mezan_publications/detail.php?id=75, accessed February 2004.

[14] UNRWA, *Gaza Field Assessment of IDF [sic] Operation Days of Penitence*, 20 October 2004, page 1.

[15] Although, it is impossible to determine the exact decision making process due to it being shrouded in secrecy, it appears that endorsement comes from the highest levels of government. Approval must be obtained from the Israeli Prime Minister and Defence Minister.

The statement then continued,

> The action this morning is a long-term activity undertaken by the Israeli Security Forces [sic], targeted at the groups responsible for the escalation of violence.[16]

The statement made no mention of two innocent women that had also been killed in the attack. Subsequent statements of Israeli officials further confirmed the policy.[17]

It must be highlighted that the extrajudicial execution of wanted Palestinians in the OPT by Israeli forces is not a new development, however, official endorsement of the policy is. During the first *intifada* Israel deployed special undercover units that were ostensibly charged with arresting wanted Palestinians. In reality however, they functioned more as hit squads. The regulations governing the conditions under which these special units could open fire, the tactics they employed, and their ability to act with near total impunity, contributed to targeted extrajudicial executions becoming consistent, albeit officially denied, Israeli practice in the OPT.[18] The military and political establishment steadfastly maintained that the objective of the undercover units was to arrest, and not assassinate, wanted Palestinians. It is therefore the explicit official political and military endorsement of the targeted assassination policy as applied in the current *intifada* that, in part, differentiates this practice from other extrajudicial executions. Targeted assassinations can also be differentiated from other extra-judicial executions through the fact that they are specifically planned before hand, and by the means employed to carry them out.

Over the course of the *intifada*, targeted assassinations have been carried out through missile strikes, explosive devices, sniper fire and close range attacks by undercover units. Inevitably, the use of such tactics in residential areas results in the injury and death of bystanders.

The often disproportionate and indiscriminate nature of the attacks was made vividly clear in the assassination of Salah Shehadeh, a Hamas leader in Gaza, on 22 July 2002. A one-ton bomb was dropped by an Israeli F-16 jet in a densely populated residential area of Gaza City, killing not only Shehadeh, but also 16 other civilians, including nine children.[19] The assassination drew widespread international condemnation prompting the European Union to release a joint statement which held,

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[16] Amnesty International, *Israel and the Occupied Territories: State Assassinations and other Unlawful Killings*, February 2001, page 9-10.

[17] See statement by Israeli Deputy Defence Minister, Ephraim Sneh in, Claire Snegaroff, "Eight Killed as Palestinian Bus Driver Mows Down Israelis," *Agence France-Presse*, February 14, 2001.

[18] Human Rights Watch, *A License to Kill: Israeli Operations Against Wanted and "Masked" Palestinians*, (1993), pages 1-31.

[19] Meyerstein, Ariel, 'Case Study: The Israeli Strike Against Hamas Leader Salah Shehadeh', 19 September 2002, at www.crimesofwar.org/print/onnews/Shehadeh-print.html, accessed December 2004.

> There can be no justification for the missile attack carried out by the Israeli Air Force in a residential area in Gaza leaving a high number of individuals, including children, killed and injured. The European Union and the international community at large have consistently rejected the Israeli method of extra-judicial killings.

Similarly the UN SG has condemned targeted assassinations.[20] However, despite this widespread international condemnation, the Israeli authorities have persisted in using targeted assassinations against Palestinians, justifying the policy on the basis of Israel's duty to protect its citizens from attack. Targeted assassinations have, accordingly, continued to form a central aspect of Israeli policy in the OPT during 2004. Over the course of the year, 78 Palestinians were killed in targeted assassinations. Although this represents a slight reduction from previous years,[21] 2004 saw two of the highest profile assassinations that once again focused international opinion on the use of such illegal measures. These were the assassinations of Sheikh Ahmed Yassin , the 67-year-old paraplegic spiritual and political leader of Hamas, on 22 March 2004, and Dr. Abdul Aziz al-Rantissi, the replacement political leader of Hamas, on 17 April 2004.

The assassination of Dr. Rantissi prompted the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to express concern at the extrajudicial killing, death of two other civilians and the injuries to several passers-by. In the same statement the Special Rapporteur re-iterated her conviction that, 'aerial bombings or "targeted assassinations" against civilian populations will only lead to escalating "violence" and called on the Israeli forces "to immediately end this unacceptable practice so as to comply with international human rights standards."[22]

The policy of targeted assassinations is applied not only to senior figures using aerial strikes, but is also employed against other wanted Palestinians, as illustrated by the following affidavit:

> Between 8:45 and 9:00 p.m., I heard firing in the quarter where we live. Immediately, I looked from the window to the southwest direction, where I saw three persons. One of them was disguised in women's clothes, and the other two were wearing [men's] civilian clothing. One of them had a beard. They moved towards the place where my nephew and his friend Majdi Mir'i were standing, ten metres away from my home. Then one of them moved toward Fadi and caught him from his neck, and opened heavy fire directly at him while he was putting his hands up.
>
> Majdi, who was standing with him, tried to escape after he saw what had happened to his friend Fadi. He ran for approximately seven metres, and then stopped and lifted his hands. One of the Israeli Special Squad members came towards him and emptied his gun directly

[20] UN SG, "Report of the Secretary General to the Security Council, 23 November 2001," A/56/642–S/2001/1100, paragraph 7.

[21] According to Al-Haq statistics, there were 108 targeted assassinations in 2002, and 103 in 2003.

[22] UN Information Service, "Special Rapporteur on Extrajudicial Executions Expresses Concern at Assassination of Abdel Aziz Al-Rantissi," 20 April 2004, (HR/CN/1094).

into Majdi's body. The third person of the Special Squad was standing and watching what was going on. I quickly went from my home to the scene. On my way down, I saw a number of soldiers standing to the south of my home. I then realised why Majdi had stopped rather than continued running away. The Special Squad soldiers were not satisfied with what they had done, but also intentionally fired at both Fadi and Majdi intensively, despite that they had fallen to the ground.

Extracts from Al-Haq Affidavit No. 2055/2004
Given by: Jihad Nour Yousef al-Serwan, (Resident of al-Yasmina quarter in the Old City of Nablus, West Bank).

The affidavit further relates that both victims were killed without warning, and that no effort was made to verify the identities of either victim before opening fire. In a particularly callous gesture, one of the members of the undercover unit left a box of sweets in front of the home of one of the victims.

Targeted assassinations are only one type of extrajudicial execution that results from the actions of Israeli forces in the OPT. The following affidavit provides an example of the extrajudicial execution of a Palestinian where it was clearly possible to take action that would not have resulted in his killing. Two members of Al-Aqsa Martyrs Brigades are warned of an ambush as they are leaving the house of the mother of one of them.

My son and his friend immediately ran to the balcony of our home in order to escape. It seems the house was besieged from all sides, because when Yousef Qandil jumped from the window, he was fired upon and injured in his hand. I heard him shouting, "My hand, my hand." Then the Israeli soldiers arrested him. My son Khaled did not try to escape, and fighting took place between him and the Israeli army, which came in large numbers to the area. My son Khaled was shooting through the west window of our home. Fighting continued for several minutes when Khaled was injured in his left hand then in his right hand. He ran out of ammunition and he fell to the floor. I ran towards him with two of my daughters, and tried to convince him to surrender. However, he did not agree and told us that he wished to be a martyr. It is worth noting that the army did not ask him to surrender.

My daughter and I carried Khaled from the west part of our home, and put him in our north yard near the asphalt street, hoping that the Israeli soldiers would give medical treatment to my son and arrest him while he was alive. The army was densely deployed around our home and two Apache helicopters were soaring in the sky. The soldiers asked me over the megaphones to go with my two daughters to the asphalt street. We did this and left Khaled in a very critical situation. When we were on the street, I saw more than 50 military vehicles and jeeps, and dozens of soldiers deploying all over the area in the vicinity of our home. The army then ordered us to enter the home of Muhammad al-

Hawi, which was around 300 metres away from ours. The army remained in the area until 6:00 pm after they imposed curfew on the eastern quarter of Jenin.

After the withdrawal of the army, I ran to my home where I saw my dead son lying face down, bleeding from his head and back. I also found that Khaled had been moved from the place where my daughters and I had put him to another place five metres away in the same yard. I also saw that there was a hole in the front of his right thigh. I would like to point out here that the Israeli soldiers repeatedly fired at my son and killed him in cold blood. It is worth noting that my son was an activist with al-Aqsa Martyrs Brigades, and had been wanted for three years by the Israeli army. He was accused of killing an Israeli settler near Ya'bad town, Jenin Governorate, two days before his assassination.

Extracts from Affidavit No. 1915/2004
Given by: Shafiqa Bashir al-Hawi, (Resident of Jenin, Jenin Governate, West Bank).

The execution of the wounded is not limited to wanted Palestinians who initially offer resistance to arrest; in at least one incident it has also involved a child. On 5 October 2004, a 13-year-old Palestinian girl was wounded and then executed after she strayed into a prohibited area on the outskirts of Rafah Refugee Camp in Gaza. Recorded radio conversations between the soldiers at the outpost, and their subsequent accounts of the events, established that the young girl was shot and wounded from a distance of around 70 metres while she was leaving the 'safe zone' into which she had strayed. The commander of the outpost then approached her, shot her twice and, switching his weapon to automatic, emptied the magazine of his gun into her. Doctors at Rafah Hospital confirmed she had been shot at least 17 times.[23] An initial inquiry finding that the commander had not committed a wrongful act was strongly contested by other soldiers in the unit, and recorded radio conversations established the inaccuracy of the investigation.[24] A second military investigation resulted in the commander in question being charged with relatively minor offences, such as "improper use of his firearm" and "conduct unbecoming of an officer."[25]

The immunity from which Israeli forces benefit in the OPT during the current *intifada* encourages excessive use of force in situations where such measures are not required. One such example is the regular use of disproportionate force in response to stone-throwing, which poses no threat to their physical safety, and does not warrant the use of firearms or targeting the perpetrators with lethal munitions. In the following affidavit given by a 17-year-old boy, two Palestinian youths were throwing stones from inside a graveyard to the south of Balata refugee camp in Nablus, at an Israeli patrol jeep located some 40 metres away, and then retreating behind a wall.

[23] Guardian Unlimited, "Israeli Officer: I was right to shoot 13-year-old child," 24 November 2004, at http://www.guardian.co.uk/israel/Story/0,2763,1358173,00.html, accessed December 2004.
[24] *Ibid.*
[25] *Ibid.*

My friend Yaser went out from behind the wall so that he was exposed to the soldiers. Yaser lifted his feet to the soldiers and moved his hands in an acrobatic way and laughed loudly at them. I asked him to come back to his place so that he would not be exposed to the patrol soldiers, but he did not respond. One of the soldiers was intermittently firing and hit Yaser in his left leg. Yaser fell down on the ground and I tried to pull him towards me. During that time a bullet hit the palm of my right hand when I was only half a metre away from him. While I was trying to pull Yaser, the soldiers fired at us intensively. Yaser asked me to run away and was shouting loudly for help. As for me, due to the intensive and heavy firing, I hid behind one of the graves and then ran out of the cemetery while shouting for help until I saw two medics and an ambulance. The medics put me inside the ambulance and one of them provided me with first aid.

After around ten minutes, my friend Yaser was brought to the ambulance and he was dead. We were taken by ambulance to Rafidya Hospital where I have stayed for two days under treatment.

I would like to mention that when we were subjected to firing by the patrol soldiers, the firing was aimed at us from inside the patrol car, especially from the back as I saw the back door of the patrol car was open. It is also worth mentioning that my friend Yaser and I were the only two people inside the cemetery when we were subjected to the heavy firing. It was not justified especially that we were not armed and neither of us presented any danger for the patrol soldiers. Moreover, the soldiers were aiming their gunfire directly towards us to kill us, and not to intimidate us. This was apparent to me from the bullets that were shot at us and hit the ground where we were standing.

Extracts from Al-Haq Affidavit No. 1895/2004
Given by: Walid Muhammad 'Abd-al-Jalil Wahdan, (Resident of Balatah Camp, near Nablus, West Bank).

The report of the Al-Haq fieldworker on this incident further indicates that Yaser was hit by live bullets in both legs and the chest.

A further illustration of the immediate resort to lethal force is in the enforcement of curfews. During military operations within Palestinian areas, or in response to an armed attack on Israeli targets, a curfew is often imposed on towns, villages and cities. Those who breach the curfew risk being shot, even if they pose no threat at the time of their killing.

On Monday, 27 September 2004 from the early morning, the Israeli army launched an extensive military campaign and imposed curfew on Jenin city and [refugee] camp. The Israeli army started breaking into and searching houses in the camp. At approximately six the same morning, I heard my mother, 'Urayb Muhammad Blalo, shouting to my uncle,

Saleh Blalo, 46 years and mentally disabled, telling him to go back home as she saw him going out of his home located in al-Damj Street in the camp. But my uncle did not respond to her shouts and continued walking towards the east of the camp, towards Jenin city, as he used to do every morning.

After few minutes we heard the firing of around three bullets. Suddenly my mother said "God save Saleh." I also realised that the bullets had targeted my uncle and directly went out cautiously towards the source of the firing, which was coming from the eastern direction where my Uncle Saleh went. As I looked up the lane, which leads to Ghubs ascending road that then leads to Jenin city, I saw my uncle lying on the ground on his back, not moving. I looked at the Women's Centre and saw two Israeli soldiers looking towards my uncle. I immediately realised that these two soldiers were Israeli snipers occupying the Women's Centre without being noticed by anybody. I hurriedly returned home crying and telling my family that Uncle Saleh had been killed.

It is worth mentioning that the distance between the place where my uncle was killed and the place where the Israeli snipers were positioned was only 100 metres and there was nothing preventing them from seeing him. My uncle's appearance shows that he is mentally disabled. Also, the three bullets hit my uncle in the chest, showing that the killing was intentional and willful and not for intimidation or frightening.

Extracts from Al-Haq Affidavit No. 2014/2004
Given by: Tha'er Misleh Ibrahim Blalo, (Resident of al-Damj Quarter, Jenin Camp, West Bank).

The specific instances of excessive use of force illustrated so far, although forming an all too frequent part of the daily lives of the Palestinian people, may be set apart from the final two examples of excessive use of force by the Israeli military in the OPT. The checkpoints system, which any Palestinian wishing to move within the OPT must endure, is an integral part of the mechanics of the occupation and are often the location of violence against Palestinians.[26] The following affidavit relates to an incident that occurred when a Palestinian taxi approached a flying checkpoint.[27]

The soldiers did not make any sign to us, such as a warning gesture or motioning to us. After seconds, I heard firing towards the car and the passengers. The bullets were coming from all directions. I heard the woman Kamla al-Shouli cry out once. The car stopped and the man who was beside her got down from the car shouting at the soldiers to stop firing at the car and the passengers. They stopped firing. We then discovered that Kamla al-

[26] During the first four years of the current *intifada*, 37 Palestinians have been killed at checkpoints.
[27] For a detailed discussion of the closures system and types of checkpoint see Chapter on "Movement Restrictions" of this report.

Shouli was the only person hit by the bullets. One bullet hit her in the left armpit and went out from the right side of her chest. We underwent a security inspection after the soldiers stopped firing at us and approached us. They tried to help Kamla by giving her artificial respiration, but she did not respond. Meanwhile, an Israeli ambulance passed by but did not provide any assistance to the injured woman. Then another Israeli ambulance passed by and a female doctor got out of it and prounounced her dead.

Extracts from Al-Haq Affidavit No. 1787/2004
Given by: Taysir Tawfiq Salim Hamadna, (Resident of 'Asira al-Shamaliya, near Nablus, West Bank).

Established checkpoints are also often the location of unnecessary violence towards Palestinians. As noted by the Special Rapporteur on the OPT, "accounts of rudeness, humiliation and brutality at the checkpoints are legion."[28] The following affidavit from a teacher attacked without provocation provides one example of such brutality,

At approximately 7:30 in the morning on 27 March 2004, I was with ten other teachers in a car going as usual to our school located in al-Ramadin village. Israeli soldiers stopped us at the barrier at the entrance to al-Ramadin and asked for our identity cards. This is normal and we are used to such things. We gave our IDs, and in each ID there was an UNRWA card that proved that we were UNRWA employees.

After approximately five minutes, a soldier came with an ID in his hand and asked who is 'Ala'?" I answered "I am 'Ala'." He asked me to accompany him. He took me far away from my friends and then started to ask me questions. He asked "are you Hamas?" I said, "No." Then he asked me, "are you Fateh?" and I answered, "No." He said "you are a liar, and what are you then?" I said, "I am a teacher."

At a distance of around 200 metres from my colleagues, the soldier told me to kneel on the ground and I did. Then he kicked me hard on the left side of my chest. I felt strong pain and faintness. Then he told me to put my hands on the back of my head and I did. He put plastic cuffs on my hands. This caused a lot of pain for me because the cuffs were tied very tightly. Then the same soldier blindfolded me. At that moment there were three soldiers around me, two of whom had just arrived.

After I was hand cuffed and blindfolded, the soldier put a jacket which I was carrying on my head and started beating me. I did not know if these blows were coming from the one soldier or from the three. I was also beaten by a gun butt on my back and the back of my neck. They were speaking in Hebrew which I do not understand, but I understood that

[28] "Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human rights in the Palestinian Territories Occupied by Israel since 1967," 8 September 2003, (E/CN.4/2004/6), paragraph 17.

they had called to verify my ID and that the response was that I was 'clean.' Nonetheless, the beating continued for around 40 minutes.

The soldiers left me for a short time and because of the pain in my abdomen, back, chest and the left side of my chest, I moved my hands and removed the jacket from my head. My hands were still cuffed and my eyes blindfolded. Then the three soldiers came up to me as I was lying on the ground and suffering from severe pains in my abdomen and the left side of my chest. One soldier asked me what was wrong with me and I told him that I had pains in my abdomen. I was speaking in Arabic and the soldier did not understand me. He then called one of the other teachers and asked him what was wrong with me. The soldier untied the cuffs, took off the blindfold and ordered me to stand. I tried to stand but I could not. He repeated his order but I could not stand. He then said that he would count to five and if I did not stand he would shoot me. I heard him counting but I could not stand. When he saw that I was so exhausted, he left me and gave me my ID and also gave all the teachers their IDs. Then the soldiers got into a military jeep and left the place.

Extracts from Al-Haq Affidavit No. 1711/2004
Given by: 'Ala' Younes Muhammad Battat, (Resident of al-Dhahriyya, near Hebron, West Bank).

The statistics and first hand testimonies presented above indicate a sustained practice of excessive and illegal use of force by Israeli troops against Palestinian civilians in the OPT. Each of the instances related constitute a violation of international human rights and humanitarian law. The following section will address each of these in detail.

II. THE LEGAL FRAMEWORK REGULATING THE USE OF FORCE

The excessive use of force by the Israeli military in the OPT is governed by the complementary legal frameworks of international humanitarian and human rights law. However, while the application of these two areas of law to the OPT has been established beyond dispute,[29] their dual applicability and inevitable intersection may at first glance appear to present alternative legal standards for regulating the use of force. Succinctly summarising the difference between of these two areas of law Meron notes,

> Unlike human rights law, the law of war [international humanitarian law] allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage.[30]

[29] See Chapter regarding "The Legal Framework Governing the Occupied Palestinian Territories" in this report
[30] Meron, Theodor, "The Humanisation of Humanitarian Law," 94 *American Journal of International Law*, No. 239 (2000), page 240.

To qualify this, Meron also notes that in the case of norms such as the arbitrary deprivation of life there exists "a large measure of parallelism between norms, and a growing measure of convergence between their personal and territorial applicability."[31] This imperfect convergence of international humanitarian and human rights law was also acknowledged in the drafting of the International Covenant on Civil and Political Rights (ICCPR) where it was held that lawful acts of war that result in the death of innocents will not be deemed to violate the right to life as enshrined in the Covenant.[32] The International Court of Justice (ICJ) further confirmed this approach in its Nuclear Weapons Advisory Opinion where it stated that,

> …whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[33]

The subsequent jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and regional human rights mechanisms has upheld and developed this approach, making explicit that international human rights and humanitarian law have converged to such a degree that they effectively protect and promote the same values. In the *Furundzija* case the ICTY held that:

> The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person…The general principle of respect for human dignity is…the very raison d'être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.[34]

The purpose of international humanitarian law is to reduce to a strict minimum the human suffering caused by war and military actions, while recognising the context and reality in which this suffering occurs. It is this ability to contend with military realities, while protecting to the utmost the human person that sets international humanitarian law apart from human rights. On a strict reading of international human rights law, a situation in which innocent civilians are killed is a severe violation of the right to life. However, if the military action that results in the death of the innocent civilians is lawful under international humanitarian law, then no violation of the right to life will have occurred. In considering the actions of the Israeli forces in the OPT, the basic guarantees of international human rights law must be considered to be supplemented in certain instances by international humanitarian law, as the *lex specialis* that applies to Israel's occupation of the Palestinian territories.

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[31] *Ibid*, page 245.
[32] UN SG, "Respect for Human Rights in Armed Conflicts, Report of the Secretary-General," 18 September 1970, (A/8052), at paragraph 104.
[33] ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ Reports 226, paragraph 25.
[34] *Supra* note 25.

A. INTERNATIONAL HUMAN RIGHTS LAW

The most obvious violation of human rights that results from the excessive use of force is the violation of the right to life.

The right to life is expressed in the Article 3 of the Universal Declaration of Human Rights (UDHR), and can also be found in all regional human rights mechanisms. Its formulation in Article 6(1) of the ICCPR states that,

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The specific wording of Article 6 emphasises that, the right to life is "inherent" to the human being, who shall not be "arbitrarily" deprived of life. In phrasing the right to life in these terms, the ICCPR acknowledges that in certain situations, strictly regulated by law, the state or organs thereof, may deprive a person of life. The rigours of maintaining law and order, a primary responsibility of any state to those under its effective control and jurisdiction, may at times necessitate the use of lethal force.

In its General Comment on Article 6 the Human Rights Committee (HRC) emphasised that killing by the state security forces must not be arbitrary, but strictly regulated by law,

> The depravation of life by the authorities of the State is a matter of utmost gravity. Therefore the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.[35]

While holding that the actions of the state authorities in using lethal force must be regulated by law, the HRC does not provide further clarification. However, authoritative guidance can be found in the Code of Conduct for Law Enforcement Officials (the Code), [36] including its annexed commentary clarifying the provisions thereof.

Although not binding international law,

> …[the Code's] careful formulation gives it significant interpretative authority. It should not be assumed that the General Assembly would have been so irresponsible as to address to individual law enforcement officials a standard of behaviour that went beyond the requirements that international law imposes on governments.[37]

[35] HRC, *General Comment No. 6: the Right to Life*, 30 August 1982, paragraph 3.
[36] Adopted by GA Resolution 34/169 of 17 December 1979.
[37] Rodley, Nigel, *The Treatment of Prisoners Under International Law*, Oxford University Press, (1987), page 151.

The Code is therefore an essential instrument in establishing whether the use of force by law enforcement officials is excessive under international human rights law. Further, in instances where lethal force is used, the Code will help determine whether the resulting depravation of life is arbitrary. This in turn allows a determination of whether the right to life has been violated.

The essential principle is that, as established in Article 3 of the Code, "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." This article is further supplemented by the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles).[38] Once again, while not a legally binding instrument, the Basic Principles provide an important analytical tool in determining whether a use of force is excessive and a killing arbitrary.[39] Therefore, when read in conjunction with Article 6 of the ICCPR, the Code and Basic Principles provide a framework for establishing an arbitrary depravation of life contrary to international human rights law.

The application of the Code to the actions of Israeli forces is made possible by the fact that it defines 'law enforcement officials' as, "…all officers of the law, whether appointed or elected, who exercise police powers, especially powers of arrest or detention."[40] The Commentary then clarifies,

> In countries where police powers are exercised by military authorities, whether uniformed or not, or by state security forces, the definition of law enforcement officials shall be regarded as including officers of such services.[41]

As can be seen from the affidavits earlier in the chapter, the operations carried out by the Israeli forces in the OPT in their essence are often akin to policing actions as described by the Code. The essential characteristic of both the Code and Basic Principles are dual legal notions of proportionality and necessity. The Commentary on Article 3 of the Code emphasises that,

> …the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorised to use force as is reasonably necessary under the circumstances or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.[42]

The force used by law enforcement officials should therefore not be disproportionate to the legitimate objective to be achieved. It must be noted that the objective must always be lawful

[38] Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[39] As stated in the preamble to the document, the Basic Principles were drafted to "…assist Member States in their task of ensuring and promoting the proper role of law enforcements officials, should be taken into account and respected by Governments within the framework of their national legislation and practice…"

[40] Code of Conduct for Law Enforcement Officials, Article 1(a).

[41] *Ibid*, Article 1(b).

[42] *Ibid*, Article 3(a).

arrest. Killing is not a legitimate objective and the use of firearms in general, "…is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children."[43]

This position is reiterated in the Basic Principles, which outline that the use of force by law enforcement officials shall be avoided in carrying out their duties. This general proscription establishes that firearms may be used only in very limited circumstances such as,

> In self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.[44]

Further, the intentional lethal use of firearms is the subject of further proscription and may only be so employed "when strictly unavoidable in order to protect life."

In addition to the right to life, the prohibition on cruel, inhuman or degrading treatment or punishment may also potentially be violated in the case of certain injuries or actions by Israeli forces. Both the right to life and the prohibition on cruel, inhuman or degrading treatment or punishment are accepted, beyond doubt, as forming part of the corpus of international law that is recognised as customary.

A further customary rule of international law is the right of individuals suspected of having committed crimes to due process before the law and a fair trial before a competent court. In cases where lethal force is employed by Israeli agents, most notably during extrajudicial killings, the victim is denied this right.

Practice clearly indicates that Israeli forces in the OPT consistently fail to meet the requirements for the legitimate use of force established by international human rights law. Firearms are used by soldiers to lethal effect in response to stone-throwing by Palestinians youths. Further, the primary objective of law enforcement activities is to apprehend those who are about to commit, or are suspected of having committed, a crime. If arrest is not practicable without the use of force, then the force employed must be applied in proportion to the requirements of arresting the suspect. Needless to say, the immediate resort by the Israeli troops to often lethal force, executing wounded Palestinians or those breaking curfew, as well as targeted assassinations and other extrajudicial executions are clearly excessive uses of force and illegal under international human rights law. In addition to violating the right to life, the immediate resort to lethal force denies the victim their fundamental right to due process under international law.

[43] *Ibid*, Art 3(c).
[44] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, paragraph 9.

The justification provided by Israeli authorities, in particular for the practice of targeted assassinations, is the notion of security. In this context it is worth noting that, recognising the inextricable link between the human person, the exercise of their rights, and the right to life, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has described the right as "the most important and basic of human rights. It is the fountain from which all human rights spring."[45] Accordingly, the protection afforded the right to life admits no derogation even "in time of public emergency which threatens the life of the nation," as allowed in the case of certain other rights under Article 4 of the ICCPR. Therefore, Israel may not advance security concerns as a legitimate justification for violating the right to life.

B. INTERNATIONAL HUMANITARIAN LAW

Under international humanitarian law, the ability to use force is governed by the key principles of distinction, proportionality, and military necessity. In order for the use of force by Israeli state agents to be lawful under international humanitarian law, it must conform to the specific requirements of each of these principles. It is therefore, the examination of the content of these principles that will form the focus of the following section. In discussing the Israeli use of force in the OPT under international humanitarian law, the First Additional Protocol to the Four Geneva Conventions will be referenced, in addition to the Fourth Geneva Convention. Although Israel is not a party to the Protocol, those provisions that relate to the use of force are considered customary international law,[46] and Israel is accordingly bound to uphold them. The consideration of the Protocol is of particular importance as it supplements and develops the legal content of the general protection provided to civilians under the Fourth Geneva Convention.[47]

Article 4 of the Fourth Geneva Convention, defines the persons protected under the Convention as,

> …those who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or an Occupying Power of which they are not nationals.

As made explicitly clear in the Commentary, this includes "the whole population of occupied territories (excluding nationals of the Occupying Power)."[48] By virtue of their protected status under the Convention, the population of an occupied territory are, "entitled, in all circumstances to respect for their persons…." Further, "They shall at all times be humanely treated, and shall

[45] "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," (E/CN.4/1983/16), paragraph 22.
[46] See generally the International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law, Volume I: Rules*, Henckaerts and Doswald-Beck (eds.), Cambridge University Press, 2005.
[47] Preamble to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (thereafter First Additional Protocol), 8 June 1977
[48] *The Geneva Conventions of 12 August 1949, Commentary-Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Pictet, Jean S. (ed.), ICRC, 1958, page 46.

be protected especially against all acts of violence or threats thereof…."[49] These provisions therefore protect, at the most basic level, the rights of Palestinians to physical integrity, life and freedom from unnecessary violence or injury. Article 32 of the Fourth Geneva Convention explicitly states that,

> The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering…of protected persons in their hands.

The Article continues to outline prohibited acts such as murder, torture and corporal punishment, but also establishes as prohibited "any other measures of brutality whether applied by civilian or military agents." The illustration of Israeli practices in the OPT presented in this chapter can leave little doubt that practices of extrajudicial killing, immediate resort to potentially lethal force and abuse at checkpoints all contravene the fundamental safeguards of the international humanitarian law, and the general protection provided by the Fourth Geneva Convention. These general protections afforded to the population of an occupied territory, are augmented by the customary principles regarding the protection of civilians codified in the First Additional Protocol.

Article 48 of the First Additional Protocol to the Four Geneva Conventions establishes the "basic rule" that,

> …the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

As stressed by the International Committee of the Red Cross (ICRC) this principle is "the foundation on which the laws and customs of war rests…."[50] As such, its fundamental customary nature is clearly established. If international humanitarian law is not to be stripped of all meaning, Israel must rigorously uphold this principle in the OPT.

Article 51 of the First Additional Protocol further establishes that a civilian population and individual civilians shall enjoy general protection against dangers arising from military operations, that they should not be the object of attack and that acts or threats of violence intended to spread terror among the civilian population are prohibited. However, these protections are contingent on civilians abstaining from taking "a direct part in hostilities."[51] If it can be established that a civilian is taking direct part in hostilities, their immunity from attack is forfeit and the civilian may be legitimately targeted, injured or killed. The definition of "taking direct part in hostilities" is therefore of pivotal importance in discussing not only the legality of Israel's policy of targeted assassinations, but also other extrajudicial killings.

[49] Article 27, Fourth Geneva Convention.
[50] ICRC, *Commentary on the First Additional Protocol*, Sandoz, Yves, Swinarski and Zimmermann (eds.), ICRC, Geneva, 1987, page 600.
[51] First Additional Protocol, 51(3).

The ICRC describes taking part in hostilities as "…engaging in hostile action against enemy armed forces, but not assisting in the general war effort."[52] As noted by the eminent international judge and jurist, Antonio Cassese,

> When civilians taking a direct part in hostilities lay down their arms, they re-acquire non combatant immunity and may not be the object of attack although they are amenable to prosecution for unlawfully participating in hostilities.[53]

There is therefore, a strong temporal element to the loss of protected status by civilians under international humanitarian law. While the definition of "taking a direct part in hostilities" may include deployment prior to a hostile act in which the civilian will participate, where arms are carried openly prior to the act, the loss of immunity does not extend to after the commission of the act once arms have been laid down. Therefore, even where the Palestinians killed by the Israeli forces are members of organisations that have carried out attacks against Israeli targets, or they themselves have carried out attacks, under international humanitarian law they retain their civilian status and the protections accorded therewith.

As highlighted above by Cassese, the only lawful action that may be taken under international humanitarian law against a civilian who has in the past, taken a direct part in hostilities, is their arrest and trial.[54] In this light, it must be concluded that Israel's targeted assassination policy is a clear violation of the protection afforded to civilians under international humanitarian law (IHL). Underlining the vital importance of this conclusion Cassese states,

> Clearly, if a belligerent were allowed to fire at any enemy civilians simply suspected of in some sort of planning or conspiring to plan military attacks, or having planned and directed hostile actions, the basic foundations of international humanitarian law would be undermined. The fundamental distinction between civilians and combatants would be called into question and the whole body of international humanitarian law eroded.[55]

A final point that must be considered when examining the direct participation of civilians in hostilities is the law that applies once the individual is rendered hors de combat. Under international humanitarian law, a person, including a non-civilian, is considered *hors de combat* if she/he is in the power of an adverse party, has clearly expressed an intention to surrender or has been rendered incapable of defending themselves.[56] In such cases the individuals may not be made the object of attack, provided they abstain from hostile acts and do not try to escape.[57] Therefore, even in the

[52] ICRC, *Fight it Right: Model Manual on the Law of Armed Conflict for Armed Forces*, 1999 paragraph 601.
[53] Cassese, Antonio, "Expert Opinion on Whether Israel's Policy of Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law," submitted to the Israeli Supreme Court in *The Public Committee Against Torture et al. v. The Government of Israel et al*., page 5.
[54] *Ibid*. page 11.
[55] *Ibid*. page 10.
[56] *Ibid*, Article 41.
[57] *Ibid*.

event of a civilian taking direct part in hostilities by attacking Israeli forces, be it in offence or defence, once wounded or otherwise incapacitated, she/he may not legitimately be attacked or killed. This requirement contrasts strongly with the practice illustrated above of killing incapacitated persons.

While the principle of distinction protects civilians from direct attack, international humanitarian law concedes to the realities of combat, and accepts that the injury and death of innocent civilians may occur as a result of legitimate military operations. In order to establish whether a military operation that results in the injury or death of civilians, and damage or destruction of their property, is legitimate under international humanitarian law, the principle of proportionality must be applied.

Article 51 of the First Additional Protocol prohibits "indiscriminate acts" against civilians and the civilian population. Two types of indiscriminate attack are of relevance "those which are not directed at a specific military objective," and

> An attack which is expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[58]

In relation to the first type of attack, under international humanitarian law the term military objective is not to be understood in a wide strategic sense, but rather as referring to concrete and specific military targets,[59] the destruction or damage to which would contribute to a military advantage. Any attack that would not confer such an advantage would be disproportionate.

The second type of indiscriminate attack relies on an ultimately subjective assessment of the anticipated military advantage of an attack against the civilian cost. These two prohibitions on indiscriminate attack when read together may appear to allow the conclusion that, under international humanitarian law, an attack on a legitimate military objective, even if it results in dire consequences for individual civilians or the civilian population, may be lawful if a significant military advantage is anticipated. Under such a framework, the devastating incursions carried out by the Israeli military throughout the current *intifada* may be argued to be lawful, as the standard by which the proportionality of the attack is judged is highly subjective. However, to adopt this position is an oversimplification of the key principles of distinction and proportionality, and ignores both the customary principles of precautions in attack and the requirements of military necessity.

Article 57 of the First Additional Protocol provides guidance on determining the proportionality of an attack and further bolsters the protection afforded the civilian population. As pointed out

[58] *Ibid*, Article 51.

[59] De Saussure, Hamilton, "Military Objectives", in *Crimes of War: The Book*, at http://www.crimesofwar.org/thebook/military-objective.html, accessed December 2004.

by the ICRC, the matter of precautions in attack reaffirms rules which are already contained implicitly or explicitly in other articles such as the basic rules of distinction, proportionality, the protection of the civilian population and objects and the prohibition on indiscriminate attack of either.[60] The basic premise of these precautions is enunciated in the first paragraph of Article 57, which holds that,

> In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

Precautionary measures include the requirement that everything feasible be done to verify that the targets are neither civilians nor civilian objects, that the means and methods of attack should aim to minimise collateral damage, both in terms of civilians and civilian objects, and that an attack should not be launched if the military advantage is outweighed by the civilian cost. This raises the final consideration of military necessity.

The principle of military necessity, although a difficult concept to define, has been held by the ICRC to mean, "...the necessity for measures which are essential to attain the goals war, and which are lawful in accordance with the laws and customs of war."[61] The principle therefore comprises two distinct ideas. The first is that any action must be intended towards the military defeat of the enemy, and must offer a contribution towards this goal. As noted by one scholar, "…attacks not so intended cannot be justified by military necessity because they would have no military purpose."[62] The second is that military necessity integrated into the laws of war, and subservient to the principles of proportionality and distinction. Therefore, in acknowledging the unconscionable realities of military conflict, international humanitarian law nonetheless exerts substantial constraint on the use of force. The incursions carried out by the Israeli military into densely populated areas, the excessive human costs of these incursions and their minimal military value, would strongly suggest that they violate international humanitarian law.

Both the Fourth Geneva Convention and the First Additional Protocol contain provisions that establish a framework within which violations of the Convention and Protocol respectively are to be suppressed, investigated and punished. Article 146 of the Fourth Geneva Convention states that,

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the Convention defined in the following Article.

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[60] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Yves, Swinarski, Christophe and Bruno Zimmermann (eds.), International Committee of the Red Cross (ICRC), Martinus Nijhoff Pyublishers, 1987, page 679.

[61] *Ibid*, page 393.

[62] Hampson, Francoise, "Military Necessity", in *Crimes of War: The Book* at http://www.crimesofwar.org/thebook/military-necessity.html, accessed December 2004.

The Article then continues to establish that such grave breaches entail individual criminal responsibility and mandatory universal jurisdiction,[63] requiring all High Contracting Parties to search for and prosecute persons alleged to have committed the breaches. Amongst the grave breaches defined in Article 147 of the Convention are, "wilful killing," "wilfully causing great suffering or serious injury to body or health," "wilfully depriving a protected person of the rights of a fair and regular trial," and "extensive destruction…of property, not justified by military necessity and carried out unlawfully and wantonly."

Article 85 of First Additional Protocol supplements and clarifies the grave breaches system established in the Fourth Geneva Convention, establishing that grave breaches of the latter are also grave breaches of the former. Accordingly, mandatory universal jurisdiction and the duty to prosecute also apply on the same terms. Amongst the grave breaches established by the First Additional Protocol are, wilfully "making the civilian population or individual civilians the object of attack," "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects,…" and "making a person the object of attack in the knowledge that he is *hors de combat*."

The grave breaches mechanisms enshrined in both the Fourth Geneva Convention and the First Additional Protocol, are re-iterations of the protections listed in other provisions. However, the prerequisite for any grave breach is the notion of intent. Applying these mechanisms to establish the criminal liability of soldiers, military commanders and political figures is therefore a two-fold process. First it must be shown that a breach of the Convention or Protocol has occurred. This will be done through examining the relevant provisions and applying the principles of proportionality, distinction and military necessity. Second, it must then be established that this breach was wilful.

The above analysis strongly supports the contention that grave breaches of both the Fourth Geneva Convention and the First Additional Protocol are frequently committed by the Israeli occupying forces in the OPT.

C. ISRAELI OPEN FIRE REGULATIONS AND ACCOUNTABILITY

It is difficult to determine the exact content of the regulations that govern the use of firearms by the Israeli forces in the OPT, as these have not been made publicly available. The only information that can therefore be gathered is from the testimonies of Israeli soldiers, the statements of public officials and from the media. An overview of these sources makes it apparent that the open fire regulations currently applied by the Israeli military in the OPT not only fail to conform to international human rights standards, but also afford substantially less protection than was the case prior to the beginning of the current *intifada*. This is an alarming development when

[63] Fourth Geneva Convention, Article 146.

considering that the protection afforded under the old system failed significantly to provide any meaningful protection as required by international law.[64]

At the beginning of the current *intifada* the situation in the OPT was defined by the Israeli authorities as a situation of "armed conflict short of war." This resulted in two significant changes: new open fire regulations were developed, and the Israeli authorities held themselves to be exempt from investigating all but a fraction of the deaths of Palestinians civilians caused by Israeli troops, border guards and other agents.

After collecting the testimonies of numerous soldiers, the Israeli human rights group B'Tselem noted that the new open fire regulations,

> Expand the range of situations in which soldiers may open fire, and give commanders in the field increased flexibility and discretion. The new regulations allow, inter alia, firing at the legs of stone throwers, and sniper fire from ambush. In some areas, the procedure for apprehending suspects is nullified, and soldiers are allowed to fire without warning at Palestinian suspects. [65]

Effectively the regulations enable firing in situations where there is no clear and present danger to life, or even in situations where there is no life-threatening danger at all. Such a permissive system clearly does not conform with the approach to the use of force and firearms adopted by international human rights law.

The permissive nature of the Israeli open fire regulations in the OPT is further compounded by the lack of clarity with which they are transmitted. In contrast to practice prior to the outbreak of the current *intifada*, where written explanation of the open fire regulations were provided to soldiers, during the current *intifada* orders are transmitted down the chain of command by spoken word. This has lead to a lack of clarity in terms of the permissible and prohibited use of weapons and force, with commanding officers deciding the rules of engagement at their discretion. Inevitably this has created substantial confusion amongst the individual soldiers whose behaviour the regulations are to control.

In 2001, in response to questions asked by Amnesty International, Colonel Daniel Reisner, Head of the Legal Department of the Israeli army's legal department confirmed and gave his unambiguous support to the current practice of transmitting the open fire regulations. He explained that,

[64] See generally, Hamoked, *Escaping Responsibility: The Response of the Israeli Military Justice System to Complaints Against Soldiers by Palestinians*, Ramallah, December 1997.
[65] B'Tselem, *Trigger Happy: Unjustified Shooting and the Violation of the Open Fire Regulations during the Al-Aqsa intifada*, March 2002, page 4.

> We have to tailor the rules of engagement to the situation...This is a constant process and we make adaptations as we go along. . . . The best way is to give soldiers a pre-mission briefing telling them the rules of engagement for that particular day….Thus it is better to give soldiers clear rules of engagement for each day and we ask officers not to make them ambiguous.

This position is alarming for numerous reasons. The minimum standards required by open fire regulations under international human rights law form a non-derogable core that cannot be ignored, irrespective of context. As such the regulations should not be the subject of an individual commander's assessment of a situation. The ability to alter the open fire regulations each day creates a significant risk of confusion amongst both the soldiers, and the Palestinian civilians, who may unwittingly put themselves at risk of being fired upon. In 2002 a company deputy commander quit his reserve duty at Qalandia checkpoint outside Ramallah in protest over the lack of clear directives provided to the soldiers operating the checkpoint. On Voice of Israel Radio, he held that,

> We sat there as the company's commanders and made up the procedures…we decided what constituted the red line, when to fire and when not.[66]

Towards the end of 2004, after two incidents that severely called into question the use of force and firearms by the Israeli forces, the Chief of Staff, Moshe Ya'alon, admitted that the issue of whether mixed messages were being sent to the soldiers must be examined.[67]

Over the last four years of the *intifada* the lack of a clear framework and guidelines regulating the use of force and firearms by Israeli soldiers and border guards has consistently jeopardised the lives of Palestinian civilians and the protections they are afforded under international law.

The violations of international law that are the result of the permissive and unclear nature of the open fire regulations is intolerably exacerbated by the lack of any credible form of accountability for the killing or injury of Palestinian civilians. As already noted, during the first *intifada* and the years of the Oslo process, every incident in which a Palestinian civilian was killed was investigated by the Military Police, unless the civilian was involved in "combat activities." At the outbreak of the current *intifada* the Israeli military authorities redefined the conflict and announced that they would no longer carry out investigations into the death of Palestinian civilians. This position was later refined to hold that investigations would be carried out in "exceptional cases." However, the criteria for such cases were never made clear.[68] From 28 September 2000 until 24 November 2004, there have been 89 military police investigations into the deaths of Palestinians, leading to

[66] The interview was given on 25 February 2002.
[67] See *Ha'aretz*, "Looking inside the IDF [sic]," 8 August 2004, at http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=511400, accessed December 2004.
[68] Quote from a meeting with Col. Daniel Reisner, 5 May 2002, in Human Rights Watch, *supra* note 18.

22 indictments and only one conviction.[69] When such numbers are contrasted with the 3,044 Palestinian deaths, it is impossible not to conclude that the Israeli authorities are purposefully creating an atmosphere of impunity, further denying the protections afforded Palestinians under international law.

The non-investigation policy of the Israeli military is irreconcilable with the obligations under both international human rights and humanitarian law incumbent on Israel to investigate, prosecute and punish those responsible for violations. Through terming the situation in the OPT an "armed conflict short of war," Israel seeks to circumvent the protections of international law, holding human rights law to not be applicable in the OPT, and refusing to acknowledge the application of international humanitarian law. However, in as much as the excessive use of force by Israeli troops in the OPT results in egregious violations of the fundamental right to life, Israel can not use linguistic distinctions to alleviate the burden of international human rights or humanitarian law. Since Israel's obligations under the grave breaches mechanism of international humanitarian law have already been addressed above, it is therefore international human rights law that will form the focus of the following paragraphs.

Under international human rights law, Israel is under the obligation not only to refrain from taking actions that would violate the rights guaranteed by the ICCPR, but must also act to protect those rights, and provide effective remedy in the case of their violation.[70] As noted by the HRC in its general comment on the nature of the legal obligation on States parties under the ICCPR,

> A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[71]

Similarly, it was noted that failure to bring to justice those responsible for violations could also amount to a separate breach of the Covenant, drawing special attention to, amongst others, the violation of the right to life in this respect.[72] The Israeli authorities are therefore under the obligation to carry out credible investigations into the death of Palestinian civilians, bring those responsible for the killing before a competent court, and provide effective remedy. Israel is clearly failing in this obligation. In addition, as further highlighted by the HRC,

> …the problem of immunity for these violations,…may well be an important contributing element in the recurrence of the violations.[73]

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[69] B'Tselem, "Rules of Engagement and Lack of Accountability Result in Culture of Impunity for Palestinian Civilian Deaths," *Press Release*, 24 November 2004.
[70] ICCPR, Article 2.
[71] HRC, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*', (CCPR/C/21/Rev.1/Add.13), 26 May 2004, paragraph 15.
[72] *Ibid*. paragraph 18.
[73] *Ibid*.

III. CONCLUSION

From the facts and legal analysis provided in this chapter it is evident that the conduct of the Israeli occupying forces in the OPT fails to adhere to the legal obligations incumbent on them under international human rights and humanitarian law. This failure comes at the expense of the Palestinian civilian population of the OPT who are the victims of unnecessary and disproportionate uses of force, and indiscriminate attacks. The occurrence of targeted assassinations and other extra-judicial executions, firing upon demonstrators and stone throwers or beating civilians at checkpoints are all clear violations of international law. In respect of these violations Israel, from the perspective of human rights, must implement measures to ensure these violations do not occur, while international humanitarian law requires that individuals who commit, or order these breaches to be committed, be brought to justice.

However, inaction and indeed explicit endorsement, of the Israeli government in regard to these violations, creates an atmosphere of total impunity and flagrant disregard for international law and the rights of the Palestinian civilian population in the OPT protected there under. The practices of the Israeli military not only severely undermine the foundations of international humanitarian law by failing to uphold the protections afforded the civilian population under the Fourth Geneva Convention and First Additional Protocol, but also violate the fundamental right to life, which underpins all other human rights. This sustained and blatant disregard for the most fundamental principles of international law serves only to jeopardise the lives of the Palestinian civilian population of the OPT.

MOVEMENT RESTRICTIONS

Palestinians waiting in Line at Qalandia Checkpoint, Ramallah, West Bank
(Atef Safadi, 2003)

MOVEMENT RESTRICTIONS

I. OVERVIEW

Palestinians have been subject to movement restrictions imposed by the Israeli authorities since the occupation of the West Bank including East Jerusalem, and the Gaza Strip in 1967, with increasing constraints in the period following the Oslo Accords. However, the period of the current *intifada* has witnessed extraordinarily severe and disproportionate restrictions. Palestinians face significant difficulties in travelling internationally, into Israel and between the West Bank and Gaza Strip. Further, from March 2002 onwards, they have been prevented from travelling within the Occupied Palestinian Territories (OPT) without an individual permit issued by the Israeli authorities. In addition to the humiliation, degradation and violence suffered by Palestinians at checkpoints and during curfews, the restrictions have also severely disrupted, if not totally denied, their access to work, health care and education. The means of movement restriction impose an unnecessary burden upon the Palestinian civilian population, and the consequences of these restrictions herald a bleak future for economic and social development in the OPT. [1]

Israel justifies its policies on restricting the movement of Palestinians within and outside the OPT on the grounds of "security." While the State of Israel has a right to take measures to protect itself and its citizens from attack, it is imperative that these measures conform to fundamental principles set out in international law.

Restrictions on freedom of movement are one of the most pervasive and destructive features of the Israeli occupation of the West Bank and Gaza Strip, and has had grave consequences on the lives of the Palestinians in the OPT. In addition, the policy and mechanisms by which movement is restricted clearly violate numerous provisions of international human rights and humanitarian law. As such, they cannot be allowed to continue with impunity and in the absence of clear condemnation and action from the international community.

II. THE INSTRUMENTS OF MOVEMENT RESTRICTION

The movement of Palestinians is primarily restricted through the two inter-related mechanisms of "closure" and "curfew". The term "closure" describes a multi-faceted system that combines both physical obstacles and bureaucratic procedures to restrict or prevent the movement of Palestinians within the OPT, between the West Bank, Gaza Strip and East Jerusalem; into Israel; and abroad. "Curfew" is the most extreme form of closure, confining inhabitants of the area under curfew to their homes for extended periods of time. Although curfew has been applied

[1] This chapter does not examine the impact of the construction on Palestinian land of the Annexation Wall on freedom of movement in the OPT. See in this regard the Chapter on "The Annexation Wall" in this report.

[2] See generally Palestine Red Crescent Society (PRCS) curfew tracking slides at: http://www.palestinercs.org/Presentation%20PowerPoint%20Curfew%20Tracking%20July%202002_files/frame.htm.

with less regularity in 2004 than in earlier years of the current intifada,[2] the nature of its imposition and means of enforcement indicates the inherently disproportionate and discriminatory approach of the Israeli authorities in restricting freedom of movement in the OPT.

The practice of curfew was heavily relied upon during the Israeli military incursions of 2002 into the West Bank. From 2 April 2002 to 10 May 2002, the city of Bethlehem was under a total 24-hour curfew, with one or two hours of relief every few days. Similarly, between 16 June and 15 August 2002, the cities of Jenin and Nablus spent roughly 1,000 and 1,300 hours under curfew, respectively. As already noted, curfew has been a less prominent feature of the Israeli occupation in 2004, but was still imposed, usually in the wake of an attack or during Israeli military actions in specific areas such as the search for a wanted person.

On 22 February 2004, in the wake of the suicide bombing [sic] operation carried out by Muhammad Za'oul in Jerusalem on 22 February 2004, the Israeli occupation forces closed all the village entrances and prevented the village inhabitants from going out or coming into the village. Consequently, Israeli soldiers and the intelligence agents arrested a number of persons. At 4:30 a.m. on the following day, occupying forces demolished the home of martyr Muhammad Za'oul, thereby causing damage to five neighboring houses. This also resulted in a power cut for more for one week. This impacted more than 30 families in the neighbourhood. Since the Israeli army imposed a curfew on the same day, maintenance workers were unable to access the village to inspect the damage.

I saw the fire swallowing the tent and the soldiers standing near the demolished house. Then soldiers then withdrew and started patrolling their patrols in the village, firing tear gas bombs at the houses of the village residents without any justification. There were no confrontations between the villagers and the occupying soldiers.

The strict and severe curfew on the village continued until 12 March. On the morning of that day, there were no Israeli soldiers or border guards in the village. This encouraged the village residents to emerge from their homes, open their shops and regular life started to return to the village. At ten in the morning, when I was in my home located on the main street, I saw multiple arm patrols passing through the street without altering the situation in the village or imposing curfew on it.

At eleven in the morning, I went to Abu-Bakr al-Siddiq Mosque, located on the main street of al-Matiyena neighbourhood, for Friday prayers. I remained at the mosque door in the street with other worshippers waiting for the call to prayer. I suddenly saw one green border guard jeep quickly drive from the west; and then it suddenly stopped in front of the mosque, (at a distance of 50 metres from me, and the mosque, and the crowd of worshippers). Four border guard soldiers wearing the olive green uniforms and carrying weapons got down from the jeep. Without any reason, they started firing tear gas bombs

towards the worshippers who immediately entered the mosque while the gas bombs fell near and around the mosque door. We closed the door and the windows. We were around 150 worshippers inside the mosque; around forty of them were tear gas sickness.

The border guards remained in the vicinity of the mosque for 15 minutes, and then went towards al-Zawiya Mosque in the old village centre of Housan. When the border guards left the place, we went to our homes.

Extracts from Al-Haq Affidavit No. 1686/2004
Given by: Ra'ed Na'im 'Abd-al-Hafith 'Amira, (Resident of Housan, near Bethlehem, West Bank).

A night curfew, from sunset until six in the morning, was imposed on 16 March 2004, and had not been lifted at the time the affidavit was collected on 18 March.

While curfew has more obvious immediate consequences in terms of both the suffering it causes and punishment it inflicts, it is the sustained pervasive restrictions on the movement of Palestinians within the OPT, and from the OPT to Israel that are taking the greatest toll on the Palestinian people.

A. MOVEMENT WITHIN THE OCCUPIED PALESTINIAN TERRITORIES

Following the 1967 occupation, Israel declared the West Bank and Gaza Strip closed military areas.[3] Palestinians were required to obtain permission from the Israeli authorities to enter Israel or travel internationally. In 1972, General Exit Permit (No. 5) was issued, allowing all Palestinians not deemed by the Israeli authorities to pose a security threat entry into Israel. This permit was suspended in 1991 during the Gulf War, and officially rescinded in 1993 when closure orders were issued for the West Bank and Gaza. Thus, the right of Palestinians to leave the OPT and enter Israel or occupied East Jerusalem, as well as travel between the West Bank and the Gaza Strip, became dependent on special permits issued on an individual basis by the Israeli authorities. Internal closure, whereby movement of Palestinians between different population centres in the OPT is restricted, was first imposed in 1996.

The internal closure system began as an ad hoc network of checkpoints and blockades, operating on an intermittent basis since the signing of the Oslo Agreements. However, since the beginning of the current *intifada*, the system became increasingly institutionalised,[4] culminating on 14 May 2002 in the division of the West Bank into eight isolated territorial units based around

[3] Military Order No. 5 (8 June 1967), *Order Concerning the Closure of the West Bank*. Orders for the Gaza are in general identical to those issued for the West Bank, see Jerusalem Media and Communication Centre (JMCC), *Israeli Military Orders in the Occupied Palestinian West Bank: 1967 – 1992*, page vi.

[4] Farsakh, Leila, "Israel: an Apartheid State," *le Monde Diplomatique*, November 2003, www.mondediplo.com/2003/11/04apartheid.

major Palestinian population centres.[5] Simultaneously, a new permit system was introduced whereby Palestinians in the West Bank were required to obtain special permits from the Israeli authorities to travel from one Palestinian city to another, including occupied East Jerusalem.[6] Although no specific permit is required for internal travel in the Gaza Strip, during the current intifada checkpoints have been regularly used to divide the Gaza Strip into three areas, restricting or preventing movement between these areas.

In November 2004 the United Nations (UN) Office for the Coordination of Humanitarian Assistance (OCHA) recorded a total of 61 checkpoints, partial checkpoints, 102 roadblocks, 374 earth mounds, 28 earth walls, 48 road gates, 61 trenches and 39 observation towers throughout the West Bank.[7] This amounts to a total number of 719 physical barriers to movement. Similarly in July 2004, OCHA recorded in the Gaza Strip a total of 5 checkpoints, 9 roadblocks, 12 earth mounds, 10 road gates and 46 military posts, 67 observation towers and 5 commercial entries, totalling 154 physical barriers to movement in the Gaza Strip.[8] In addition, the Israeli occupying forces continued to establish "flying checkpoints", mobile roadblocks where Palestinians must present identification and potentially be subject to search and long delays.

I own a shop in al-Almani quarter in Jenin. I used to leave my home in Faqqou'a [a village seven kilometres east of Jenin] at 7:30 a.m. and reach my shop at 7:40 a.m. I would stay in my shop until nine or ten in the evening and then return to my village without facing any difficulties or danger. But since the beginning of the *intifada*, the Israeli occupation forces imposed a tight and strangulating siege on Jenin and closed the entrances to the city with barricades, machinery, and earth barriers.

At first, Israeli occupying forces closed Jenin's eastern entrance with earth barriers, which we would cross on foot to get to and from Jenin. With the intensification of the *intifada*, the resistance operations and military incursions into Jenin, the situation has become unbearable. It has become impossible for people from villages to the east to reach the city through the eastern entrance after the Israeli army installed a permanent watch tower, manned by soldiers who fire at any person trying to approach the entrance.

Therefore, I started to search for an alternative road to reach my shop in Jenin, in order to earn my living and provide for my children. We started to go very long distances and pass through several villages located south of Jenin, using mostly dirt roads. It would take us more than an hour to reach Jenin, while it took us eight minutes in the past. Moreover, the transportation costs increased from two shekels to eight shekels and sometimes as high as ten shekels, depending on the route we had to follow. Then there is the danger we met on

[5] Palestinian Negotiations Support Unit, *Palestinian Movement Restrictions Highlight Israeli Apartheid*, www.nad-plo.org/fl5p.php.
[6] Haas, Amira, "Israeli Forces Internal Movement Restrictions on Palestinians," *Haaretz*, 19 May 2002.
[7] OCHA, *West Bank Closures Map*, November 2005
[8] OCHA, *Gaza Closures Map*, July 2004

the roads and the Israeli flying checkpoints, which increases the time it takes to reach the city. It has also become very dangerous to travel back to my village at night.

Consequently, I rented a small flat in Jenin to be able to open my shop daily. I live five days in Jenin, away from my wife and my three children. I return to Faqqou'a Thursday evening, spend Friday with them, and return to Jenin on Saturday morning. I would like to point out that the Israeli promises to ease the movement of the Palestinians are unfulfilled. The people of Jenin's eastern villages are still suffering from closures, checkpoints, and barricades.

Extracts from Al-Haq Affidavit No. 1888/2004
Given by: Nasim Yousef Muhammad Injiliyya, (Resident of Faqqou'a Village, nearby Jenin, West Bank).

As already noted, in addition to these physical barriers, the closure policy is underpinned by, and inherently linked to, a complex bureaucratic system of permits that render internal and external movement a privilege that Palestinians are sometimes granted, not a right they enjoy. As stressed by Physicians for Human Rights in Israel (PHRI), "It is important to remember that the permit system is not a relief within the general context of the closures policy, but the very means whereby that policy can continue to exist."[9]

The permit system is administered through the District Civilian Liaison Offices (DCLs), established within the framework of the Oslo Agreements to co-ordinate civil and security matters between the Palestinian and Israeli authorities. Although this creates the pretence that the administration of the permit system is in Palestinian hands, the Palestinian DCLs serve as little more than a conduit through which permit applications pass to the Israeli authorities.[10] Israel therefore retains ultimate control over the issuing of permits to Palestinians. This has also been tacitly acknowledged by Palestinians as today they apply directly to the Israeli DCLs in most instances.[11]

It is important to note that since establishing the permit system, Israeli authorities have never made public any clear or consistent rules or procedures governing the granting of permits to Palestinians. As a result, the process is subject to conflicting interpretations of unwritten rules by different officials, rendering the requirements for obtaining a permit and the outcome of an application unpredictable. Even where the Palestinian applicant has gone through the process of obtaining a magnetic card from the Israeli authorities certifying their "clean security record," a permit may still be withheld. In addition, Israeli authorities often do not provide explanations for rejecting a permit request, nor is there a meaningful opportunity for appeal. This was affirmed

[9] PHRI, *At Israel's Will: the Permit Policy in the West Bank*, September 2003, page 4.
[10] Annex III Protocol Concerning Civilian Affairs, *The Israeli Palestinian Interim Agreement on the West Bank and the Gaza Strip*, 28 September 1995.
[11] PHRI, *supra* note 9, page 9.

in a meeting with a representative of an Israeli human rights organization in June 2004, during which an Israeli official explained that "there are no definitive criteria for examining requests for a permit."[12]

Even when a permit is issued, it is for a restricted number of days, weeks or months. A permit issued to enter Israel it is only valid between specified hours, requiring permit holder to return to the OPT each night. This is to prevent permit holders from being or staying in Israel overnight. Once a permit expires or is cancelled, there is no renewal process and a new permit must be applied for.

In 2004, the UN Special Rapporteur on the Situation of Human Rights in the OPT, described the permit system that currently operates in the West Bank and Gaza Strip as reminiscent of the of the "pass laws" in apartheid South Africa. He, added however that,

> The past laws were administered in an arbitrary and humiliating manner, but uniformly. Israel's laws governing freedom of movement are likewise administered in a humiliating manner, but they are characterised by arbitrariness and caprice.[13]

The following testimony illustrates this point:

I am a resident of al-Dheisha Camp. I used to work inside Israel as I had an entry permit to Israel, in addition to a magnetic card.[14] On 29 March 2002, my fiancée Hayat al-Akhras carried out a martyr operation [sic] in Jerusalem, during in which she died and killed a number of Israelis. After that, and specifically in 2003, I tried to renew my magnetic card, but was rejected for security reasons.

Although I have never been arrested and I do not have a security file with the Israeli occupation forces, I am always denied an entry permit to Israel only because I am Hayat al-Akhras' ex-fiancée. As a result, I am prevented from leaving the West Bank. I have had my file examined through the Palestinian Borders Control Authority in Jericho. Despite this, the Israeli intelligence forces have not called me for an interview, nor have they clarified the reasons for preventing me from obtaining a permit. Therefore, I suffer from being unable to obtain an entry visa to work in Israel, especially as I am still planning to become engaged to another girl and to move on with my life. But I am still unemployed and face financial difficulties.

Extracts from Al-Haq Affidavit No. 1917/2004
Given by: Shadi Yousef 'Abd-al-Fattah Abu-Laban, (Resident of al-Dheisha Camp, nearby Bethlehem, West Bank).

[12] B'Tselem, "Forbidden Roads: the Discriminatory West Bank Roads Regime," October 2004.
[13] "Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967," (A/59/256), 12 August 2004, summary paragraph 13.
[14] Palestinians living in the West Bank and holding West Bank identification cards face a general ban on entering Jerusalem or Israel. In cases where an individual seeks to apply for an entry permit, Israeli authorities demand that they apply for and pay for a magnetic card proving that the person has had security clearance before qualifying for such a permit.

A further integral part of the closure policy, also underpinned by a permit system, is the Israeli policy of denying or heavily restricting the use of certain roads within the OPT by Palestinians.[15]

Much like the entire permit and closure system, the roads regime has no clear basis in law, and is the culmination of military orders, informal decision processes and the whim of the Israeli authority commanding officer responsible for the area in which the policy operates.[16] The regime does not prevent movement of Palestinians in the OPT in and of itself. Rather it makes using privately-owned Palestinian vehicles to travel freely within the OPT impossible. This affects routes used and increases travel times and costs.

The Israeli policy regulating the use of roads in the OPT is designed in accordance with the geopolitical divisions established in the Oslo Accords, and the redeployment of the Israeli occupying forces.[17] The division of the territory into non-contiguous Palestinian areas surrounded by a contiguous area under Israeli authority means that in order to travel the most direct route from one area to another, Palestinians must often travel through the Israeli controlled area or on Israeli-controlled roads. Furthermore, the movement of Palestinians on certain roads is heavily restricted, if not completely prohibited, whereas Israeli settlers may freely use them.

These roads can be classified into three categories: completely prohibited, partially prohibited and restricted use roads.[18] In the West Bank completely prohibited roads constitute 124 km of the total road network. Travel on these roads is completely forbidden to vehicles with Palestinian licence plates.[19] On certain roads a staffed checkpoint ensures that the prohibition is explicit and obvious, whereas on other roads the prohibition is enforced by blocking the access to Palestinian villages from the forbidden road. A forbidden road may dissect roads that are used by Palestinians. If crossing the road by car is prohibited, Palestinians must cross the road on foot and get into another vehicle on the other side to continue their journey.[20]

Partially prohibited roads, the use of which by Palestinian vehicles requires a special permit, constitute 244 kilometres of the total road network in the West Bank. The special permit can be obtained in the same manner, and subject to the same difficulties, as movement permits for individuals. As of July 2004, only 3,412 Palestinians, from a population of 2.3 million living in the West Bank (excluding occupied East Jerusalem) hold this special permit.[21] The main means

[15] The road network in the OPT, and associated Israeli practice, are intrinsically linked to illegal Israeli settlement policies and activities. The concern of this chapter is movement restrictions and it is therefore from this limited angle that the use of roads within the OPT will be addressed. For a detailed account of the road system see Al-Haq, T*he Bypass Road System in the West Bank*, 1997 and the B'Tselem report at *supra* note 12.

[16] *Ibid*.

[17] See Chapter concerning "The Legal Framework Governing the Occupied Palestinian Territories" in this report.

[18] B'Tselem report at *supra* note 12.

[19] Palestinian registered vehicles are differentiated from Israeli registered vehicles through a coloured licence plate system. Palestinian plates are green, Israeli plates are yellow.

[20] *Supra* note 12.

[21] *Ibid*., page 32.

for Palestinians to travel on these roads is in special bus services to which permits have been granted that run between the checkpoints that block major Palestinian cities.

In the case of restricted use roads, it is estimated that they constitute 364 kilometres of the West Bank road network.[22] These roads can be reached only by passing through an intersection at which a checkpoint is maintained. The other access roads from Palestinian villages to the restricted use road are blocked. No special permit, besides the individual travel permit for non-local Palestinians, is required to use these roads or pass the checkpoint, but vehicles are searched and IDs verified by Israeli occupying forces on a continuous basis. The number of soldiers is often insufficient to deal with the flow of traffic and so crossing the checkpoint entails lengthy delays. In addition Israeli soldiers running the checkpoint often apply apparently arbitrary rules, as illustrated by the following testimony of a Palestinian taxi driver.

> I left Jenin at 6:00 a.m., and in my taxi were a passenger from Jenin and an American-passport holder who were going to Jordan through Allenby Bridge. I reached al-Hamra checkpoint, which we have to pass through on our way to Jericho and the southern cities around 8:00 a.m.
>
> When we reached the checkpoint, there were more than twenty cars stopped in front of us, waiting to travel through the checkpoint. On the other side of the checkpoint, I saw around fifty cars waiting for permission to pass through the checkpoint on their way to Jenin and Toulkarem governorates. At 11:00 a.m. I reached the soldiers positioned at the checkpoint. The soldiers gestured to me to approach the checkpoint. One of them told me switch off the engine, and for all of us to get out of the car with the passengers. We did what the soldier ordered us to do. I looked at the watch tower and saw a soldier aiming his weapon at us. I was scared.
>
> One soldier, who was white, tall, around 22 years old, and hardly spoke Arabic, asked for our official papers and identity cards. We gave these to him while three other soldiers were thoroughly inspecting the car. One soldier entered the car while the second told me to open the truck and then searched it. The inspection process took around 20 minutes. Then the above-mentioned soldier returned our official papers, identity cards, and the American passport. He told the Palestinian passenger that he could not pass through the checkpoint because he is from Jenin, while the American passenger was permitted to cross the checkpoint on foot.
>
> [Unable to drive his Taxi through the checkpoint himself, the driver paid a young man with the necessary identification to do so. While the young man was driving his taxi through the checkpoint, the taxi driver circumvented the checkpoint on foot. He then recovered his taxi on the other side and continued to Ramallah, returning back to Jenin in the evening].

[22] *Ibid*., page 22

I arrived at the same checkpoint at 7:00 p.m. When I arrived, there was only one car at the opposite side of the checkpoint. I walked towards the soldiers and gave them my identity card. The soldiers asked me where I was going and I said I was going to Jenin. Then the short and brown-skinned soldier said that it is "Prohibited; the checkpoint is closed, go back." I told him that I wanted to go home and that I have no other place to go. But the same soldier denied me access and told me to go back to the car or else they will shoot at me. I returned to my car and waited in it for two hours until the soldiers gave me permission to pass and told me, "You are not allowed to come here, and if you come we will shoot at you." I arrived at Jenin at around 11:00 p.m.

Extracts from Al-Haq Affidavit No. 1710/2004
Given by: Anwar Hasan Sa'id Houshiyya, (Resident of Kharrouba, Jenin Governorate, West Bank).

B. MOVEMENT BETWEEN THE WEST BANK AND THE GAZA STRIP, AND BETWEEN EAST JERUSALEM AND OTHER PARTS OF THE WEST BANK

During the Oslo process the territory of the West Bank and Gaza strip was divided into Areas A, B and C. In Area A, Palestinians maintained full civil and security control. Area B was under Palestinian civil, but Israeli security control, and Area C was under full Israeli control. In terms of movement this creates a situation where Palestinian-controlled areas form a non-contiguous collection of isolated enclaves, surrounded by a contiguous area of Israeli control. As already alluded to above, currently Palestinians can only move freely within, and not between, the isolated Area A enclaves which compromise only 17.2% of the West Bank. Within the Gaza Strip free movement is restricted by the presence of settlements, related roads and the military installations to protect them.[23] These truncate the Gaza strip into three geographic areas, making the movement of Palestinians within the Gaza strip unpredictable at best, while movement outside the Gaza Strip is practically impossible. Further, the illegal annexation of East Jerusalem by Israel in 1967 has effectively cut West Bank Palestinians off from the city with which they have intertwined political, historical, social and cultural ties.

The total separation of the West Bank and the Gaza Strip means that Palestinians going from one to the other have to travel through Israel. Under the above mentioned General Exit Permit (No. 5, 1972), Palestinians retained their ability to travel between the West Bank and Gaza Strip. However, following the cancellation of the general permit and the imposition of individual permits for movement in the early 1990s, travel between the two areas has become extremely difficult for Palestinians. Under the terms of the Oslo Accords, a "safe passage" between the West Bank

[23] According to the Ministry of Planning, under the Oslo Accords, Israel was only to exercise control over 15% of the land of the Occupied Gaza Strip. This figure has substantially increased since September 2000 and some estimates are as high as 38%. PLO Negotiations Support Unit, Israel's "Disengagement" Plan Occupied Gaza Strip, at http://www.nad-plo.org/maps/gaza/pdf/gaza.pdf.

and Gaza Strip, in effect a direct road was to be established. Although the safe passage was agreed upon in May 1994, it did not become operational until October 1999. Even then the Palestinians allowed to travel on it were subject to Israeli security clearance. The "safe passage" was closed in October 2000 and remained closed at the end of 2004.

Movement to East Jerusalem is also heavily restricted for Palestinians from other parts of the West Bank and from the Gaza Strip. Although East Jerusalem and the West Bank form a contiguous occupied territorial unit, with the cites of Ramallah, Bethlehem and East Jerusalem merging on their outer boundaries, a permit is required for Palestinians not resident in East Jerusalem to travel there, as with anywhere else in the West Bank. East Jerusalem was illegally annexed by Israel in 1967 and although Israel's jurisdiction over the annexed land has been repeatedly condemned, and never recognised by the international community, the Israeli authorities continue to engage in measures to dislocate it territorially and demographically from the West Bank. Since the Oslo Accords and especially since the current *intifada*, the imposition of imposing stringent movement restrictions have been one of the most potent tools its effort to accomplish this.

C. RESTRICTIONS ON INTERNATIONAL TRAVEL

In addition to restrictions on movement within the OPT, Palestinians are also severely limited in their ability to travel internationally. Palestinians must obtain special travel documents from the Israeli authorities, and obtain a re-entry visa prior to their departure, without which they will not be allowed to return. The exit and entry visa requirement is used by Israeli authorities to impose conditions on Palestinians which, if they do not accept, leads to the denial of their visas.

> I met with [an Israeli Intelligence officer in Hebron area] on 1 September 1995 and he told me not to travel because I have a security file, and that I am forbidden from travelling. I appointed an Israeli lawyer to follow up on my case. I was permitted to travel on the condition that I would not come back before completing my studies. I completed my studies in 2000 and returned on 31 July 2000 with a Bachelor of Science in Dentistry. It is worth noting that I have never been arrested before, or have been taken to court, and I have not been accused of any security offence.
>
> **Extracts from Al-Haq Affidavit No. 1682/2004**
> Given by: 'Ammar Muhammad Hasan Badawi, (Resident of al-'Arroub Camp, Hebron Governorate, West Bank).

Only Palestinians who live in East Jerusalem and are considered permanent residents of Israel may travel through Israel's international commercial airports. Other Palestinians who wish to travel internationally must transit via Jordan or Egypt.

The Rafah terminal, through which residents of the Gaza Strip travel to Egypt and abroad, was repeatedly shut for long periods in 2004. On 18 July 2004, the terminal was closed for more than two weeks, trapping 2,500 Palestinians, including the elderly, children and medical patients, on the Egyptian side of the border.[24] Those who could not afford to stay at a nearby hotel were forced to wait and sleep at the terminal in unsanitary conditions, relying on food handouts from the Egyptian Red Crescent and without other basic necessities.[25] On 16 April 2004 the Israeli authorities, prohibited Palestinian males between the ages of 16 and 35 from passing through the terminal and therefore from leaving Gaza. On 23 October, over half a year later, this ban was still in place. This affected a number of students who were unable to return to their universities and continue their studies abroad. [26]

D. ABUSE AT CHECKPOINTS

As has been seen, the closure policy in the OPT is heavily entrenched in a system of physical barriers, bureaucratic procedures and limitations on private vehicle use. The hardship caused by these measures is compounded by the degrading treatment that is inherent in the system. Palestinians are often the subject of verbal and physical intimidation and abuse at checkpoints.

> On 23 September 2004, I was going from Bethlehem to my university in Abu-Dis. The public car in I was riding in reached Wadi al-Nar (al-Konteiner checkpoint) at 8:30 a.m. and the situation was normal. When our turn came, the driver moved the car and stopped beside the border guard soldier, who was alone at the checkpoint. The other soldiers were standing aside. The soldier looked inside the car and then told the driver in weak Arabic, "Turn your car around and go back. You will pass here only at 3:00 p.m."
>
> The driver turned back and dropped us about 100 metres from the checkpoint. I went to cross the checkpoint by foot. When I was 10 metres away from that soldier, he told me to turn back. I told him that I wanted to go to Abu-Dis, and again he told me to go back. I returned and saw the driver driving his empty car toward the checkpoint, where he was again turned back, although that soldier allowed all the other cars to pass. I got into another public taxi.
>
> When we reached the checkpoint, the same soldier was still there with another female soldier who took the IDs, checked them, gave them back, and allowed us all to pass. At the last moment, that soldier saw me, stopped the car, and told me to get out of it. I did so, and he took my ID, which he gave to two other soldiers. One of them asked me where I was going, and I told him I was going to Abu-Dis. He then asked me where I was from

[24] PHRI, *Petition to the High Court: End Dire Situation at Rafah Crossing*, Press Release, 28 July 2004.
[25] BBC Online, *Children Trapped at Gaza Border*, at http://news .bbc.co.uk/go/pr/fr/-/2/hi/middle_east/3532602.stm, and, *Stranded Palestinians Seek Return*, at http://news .bbc.co.uk/go/pr/fr/-/2/hi/middle_east/3933111.stm.
[26] Palestinian Center for Human Rights (PCHR), "Hundreds of Gazan Students Are Still Prevented from Traveling Abroad to Attend Their Universities," *Press Release*, 23 October 2004.

and I told him that I was from Bethlehem. The two soldiers laughed and talked with each other in Hebrew which I do not understand. After that the two soldiers took me while the brown skinned soldier stayed. I walked with the two soldiers about 100 metres away from the checkpoint.

They took me in a construction site besides the road (Wadi al-Nar road towards al-'Beidiyya). In the past, the site was a fuel station. They ordered me to stand in one of the corners of the site. A soldier said, "Lift up your hands." I did so, with my face to the wall and the two soldiers standing behind me. Then this soldier started to spread my legs with his, and asked me "Where you are going?" I answered, "To Abu-Dis." He then started to beat me with his fist on the two sides of my back, and crashed my head against the wall, but my hands softened the impact. He repeated the question "Where are you going?" many times, and every time I answered, he beat me in the same way. Then he beat me severely with his gun, I believe with the gun muzzle, twice on my back. He then took me by my shoulder and punched me in the face, and I started to bleed from my nose. He again asked me "Where you are going?" I said, "To Abu-Dis." He threw my ID on the ground and told me to go home. I went and the soldiers remained. They were laughing while the other soldier was only watching.

Extracts from Al-Haq Affidavit No. 1974/2004
Given by: Yaser Muhammad Shihada Hmeidan, (Resident of al-Khas, nearby Bethlehem, West Bank).

In addition to the standard operation of closures and curfew, and the individual instances of violence, humiliation and intimidation to which Palestinians are subjected, the movement restriction system can also operate as an instrument of reprisal or collective punishment against Palestinians. In the wake of attacks by Palestinians in the OPT or in Israel, movement is severely restricted for indeterminate periods of time, permits are revoked and travel between different areas of the OPT and into Israel becomes impossible. Such measures indiscriminately and disproportionately affect Palestinians who pose no threat to Israel's security. Imposed with the greatest severity in the wake of an attack against Israeli targets, the restrictions can no longer be argued to be preventative, and should therefore be viewed as a form of collective punishment.

III. The ECONOMIC, SOCIAL AND POLITICAL IMPACT OF MOVEMENT RESTRICTIONS

Since the beginning of the current *intifada*, the Palestinian economy has deteriorated dramatically, reaching the point in 2003 where it was referred to by the UN Conference on Trade and Development (UNCTAD) as a "war-torn economy."[27] Far from improving, this situation

[27] UNCTAD, Report on *UNCTAD's Assistance to the Palestinian People*, (TD/B/50/4), 28 July 2003.

further deteriorated in 2004 leading the World Bank to describe the situation as among the worst recessions in modern history.[28]

Although the confiscation and destruction of property and agricultural land contribute hugely to the Palestinian economic decline, early in the current intifada it was noted that "[t]he reasons for Palestinian economic regression are many and inter-related but turn on one primary axis: closure."[29] Moreover,

> Israel's closure policy, which restricts and at times bans movement of labour and goods from the occupied West Bank and Gaza Strip to Israel, to each other, and to external markets, represents the singular most deleterious factor shaping the nature of Palestinian economic activity and Palestinian life in general.[30]

The UN 2004 Consolidated Appeal for the OPT further emphasises the impact of internal closure, stating,

> Unable to move from villages to cities by vehicle or between cities within the occupied territory without a permit, these obstacles [closure] have decimated the Palestinian economy.[31]

According to World Bank estimates from November 2004, some 47% of Palestinians, or 1.8 million people, live below the poverty line.[32] Of these, more than 600,000 Palestinians live in subsistence poverty, which is to say that 16% of the population cannot even afford (or can barely afford) the basics of survival, despite significant amounts of humanitarian assistance.[33] The World Bank further projects that if the status quo continues, by 2006 poverty levels would climb to about 55% overall and more than 70% in Gaza.[34] The increasing level of poverty is intrinsically linked to increased unemployment resulting from the imposition of movement restrictions on Palestinian labour within and from the OPT.

Immediately prior to the beginning of the *intifada* in September 2000, an estimated 146,000 Palestinians, including East Jerusalem residents, worked in the Israeli labour market. This amounted to 22% of Palestinian employment. By 2003, only 9% of employed Palestinians, or roughly 57,000 people, worked within the Israeli labour market.[35] From the beginning of the

[28] World Bank, *Disengagement, the Palestinian Economy and the Settlements*, June 2004, page i.
[29] Roy, Sara, "Decline and Disfigurement: the Palestinian Economy After Oslo," from *The New Inifada: Resisting Israel's Apartheid*, Verso, 2001, page. 92.
[30] *Ibid*.
[31] OCHA, *Consolidated Appeals Process: Humanitarian Appeal 2004 for Occupied Palestinian Territory*, 18 November 2003, page 4.
[32] World Bank, *Four Years – Intifada, Closures and Palestinian Economic Crisis: An Assessment*, October 2004.
[33] *Ibid.* pages 32- 33.
[34] *Ibid.* page 102.
[35] *Ibid.* page 3.

current *intifada* in the third quarter of 2000, to the end of the second quarter of 2004, a period of three years and nine months, there was a 59% decline of Palestinians from the West Bank employed in Israel and the settlements, and a 99% decline for Palestinians from Gaza.[36] In addition to the external closures limiting the ability of Palestinians to obtain employment in Israel, internal closures often prevented workers inside the OPT from reaching their workplace with regularity, if at all. Movement restrictions also prevent Palestinians from seeking work in other areas of the OPT outside their local surroundings.

As a consequence of the external and internal closures, the unemployment rate in the OPT has increased from 14.5% in 2000 to 28.6% by the second quarter of 2004,[37] and is projected to reach 35% by 2006.[38] Further re-enforcing the urgency of the need to ease movement restrictions is the fact that that unemployment among males 15-24 years of age in Gaza stands at 43%, with little prospect of getting a job.[39] Aptly summarising the economic situation the World Bank stated,

> Closure stifles economic activity by raising the cost of doing business and increasing uncertainty. Closures have also greatly diminished the number of Palestinian workers who are able to gain employment in the Israeli labour market. Closures have a particularly devastating effect in remote areas where links between villages and urban areas have often been severed.[40]

Tied to the declining economic situation in the OPT brought about by movement restrictions has been a severe and negative impact on the social well-being of Palestinian communities. However, when discussing issues of social well-being, topics that form part of the focus of other chapters in this report, such as excessive use of force, arbitrary arrest and detention, and family unification all play an important role. Therefore, while the economic decline can overwhelmingly be attributed to movement restrictions, the social decline is more complex and dependent on numerous other violations committed by Israeli authorities, amongst which movement restrictions is highly significant.

The situation in the OPT has created "a generation of young men and women… growing up in an environment of curfews, movement restrictions and urban decay," whose experience is "reflected in declining grades, high levels of dysfunctional stress and,…widespread support for violence against Israelis." [41] This assessment is all the more daunting when it is taken into account that 67% of the population of the OPT are aged 24 years or younger.[42]

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[36] *Ibid.* page 4, figure 1.2.
[37] *Ibid.* page 13, figure 2.1.
[38] *Ibid*. page. 81.
[39] World Bank, *supra* note 28, page 3, paragraph 10.
[40] World Bank, *supra* note 32, page 1.
[41] World Bank, *supra* note 28, page 3, paragraph 10.
[42] UN Economic and Social Council (ECOSOC), "Economic and Social Repercussions of the Israeli Occupation on the Living Conditions of the Palestinian People in the Occupied Palestinian Territory, including Jerusalem, and of the Arab Population in the Occupied Syrian Golan," 7 June 2004, (A/59/89 E/2004/21), paragraph 40.

A report by the Economic and Social Commission for Western Asia (ESCWA) presented to the UN in June 2004 deplored the fact that a decade of efforts to improve the educational system had been lost through the closures and increased mobility restrictions imposed on Palestinian students during the current *intifada*. There are over one million students and over 44,000 teachers in 2,000 schools that are affected by movement restrictions.[43] In the West Bank, 68% of students reported obstacles reaching their institutions from November 2002 to November 2003. At least 498 schools closed during the 2002–2003 academic year, owing to movement restrictions that confined students to their homes.[44] During the academic year 2003–2004, 197,599 students of a total student population of 1,050,327 had school days lost or disrupted by closure or curfew.[45]

The problems generated by movement restrictions are felt more acutely in universities than in primary or secondary schools as universities draw their students from a wider geographic area within the OPT. The need for the students to travel further distances to reach their selected institutions is therefore greater.

Particular difficulties were experienced by students attempting to attend universities in the city of Nablus. Access for students through the checkpoints surrounding the city remains heavily restricted. Students are allowed entry into Nablus only on Saturdays, and exit only on Wednesdays. For students not resident in Nablus, this raises the cost of their education considerably, as they are forced to reside in the city during the week. It also impacts the number of women who can attend the universities, as social norms dictate that it is unacceptable for women to stay away from home overnight. Further, limiting the access of students to the city to certain days of the week causes unnecessary disruption to their education. The lack of flexibility inherent in the system means that students cannot leave the city, even in the case of an emergency, unless it is a Wednesday and, in parallel, students will miss the full week of classes if they are unable to reach the checkpoints on Saturday.[46] According to one report,

> The number of new students at Birzeit University from Tulkarem district in the north West Bank almost tripled at the start of this academic year [2004-2005], largely due to the fact that getting to Nablus, the nearest major city where students from Tulkarem usually study, is extremely difficult.[47]

In addition to movement restrictions forcing students to travel further distances to access universities, they can also completely prevent such access. A testimony to the increased difficulties

[43] United Nations Children's Fund (UNICEF), Education in the *OPT in Numbers*, http://www.unicef.org/oPt/partners.html, accessed 28/03/05.
[44] ECOSOC, *supra note* 42, paragraph 41.
[45] Palestinian Ministry of Education and Higher Education, "Right to Education, Barriers to Education – the Israeli Military Obstruction of Access to Schools and Universities in the Gaza Strip," Table 1, page 4.
[46] Machsom Watch, "Harassment of Nablus Students at Checkpoints," 10 May 2004, page 1,
[47] Birzeit University Right to Education Campaign, Barriers to Education: *The Israeli Military Obstruction of Access to Schools and Universities in the West Bank and Gaza*, 28 July 2004, page 6.

of travel is the fact that while in 1999 Birzeit University, located outside Ramallah, enrolled 101 students from Jenin, this number had dropped to zero in the 2003 - 2004 academic year.[48]

Movement restrictions have also negatively affected other essential areas such as the provision of health services. Due to movement restrictions, patients are unable to reach hospitals or other medical facilities outside their geographical areas, and therefore have access only to the primary facilities located near their communities.[49] ESCWA highlights that, "checkpoints and curfews have lowered health standards by preventing access to hospitals and clinics, impeding health-care programmes (for example, vaccinations) and leading to untreated psychological trauma arising from the physical, economic and social consequences of occupation."[50] In a survey conducted between October and December 2004 the Palestinian Central Bureau of Statistics (PCBS) recorded that just over 50% of Palestinian households have access difficulties to healthcare due to checkpoints and closures.[51] Further, during the first nine months of 2004, OCHA recorded 461 access incidents where the provision of first aid and/or medical evacuation was prevented by Israeli authorities.[52]

Restrictions on access to medical treatment affect the most fragile elements of society to a greater degree. They impose a greater burden on the elderly, children and the sick, in effect those that are in greatest need of health care. Movement restrictions have led to a number of Palestinian women being forced to give birth at checkpoints.[53]

Movement restrictions have thus resulted in a disastrous social and economic situation in the OPT. This has rendered large numbers of the Palestinian population dependent on emergency aid and humanitarian assistance. For example, by June 2004, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) was operating 272 schools and 51 primary health care facilities in the OPT, as well as providing, amongst others, 25 women's programme centres and 21 community rehabilitation centres.[54] The International Committee of the Red Cross (ICRC) provides food relief, water and medical supplies to thousands in the OPT.[55] Testifying to the scale of the challenge, the UN consolidated appeal for humanitarian assistance to the OPT in 2004 requested a total donor investment of just over US$ 305 million.[56]

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[48] *Ibid*.

[49] World Bank, *supra note* 32, page 45.

[50] ECOSOC, *supra* note 42, paragraph 36.

[51] "*PCBS: 53.6% of the households have access problem to health Services*," from www.healthinforum.net/modules.php?name=News&file=article&sid=401.

[52] OCHA, *Review of the Humanitarian Situation in the Occupied Palestinian Territory for 2004*, page 12.

[53] See Chapter on "Violations of the Rights of Palestinian Women" in this report.

[54] UNRWA, *UNRWA in Figures: Figures as of 30 June* 2004, August 2004, http://www.un.org/unrwa/publications/pdf/uif-june04.pdf, accessed 05/01/2005.

[55] ICRC, *The ICRC in Israel and the Occupied/Autonomous Territories: activities, January to July*, 31 July 2004. http://www.icrc.org/web/eng/siteeng0.nsf/iwpList393/EA2460F4F3BF391EC1256EF6004EC592, accessed 05/01/2005.

[56] OCHA, *Summary of the Consolidated Appeals Process (CAP): Humanitarian Appeal 2004 for Occupied Palestinian Territory,* 18 November 2003. http://www.reliefweb.int/w/rwb.nsf/UNID/E62B081A44095CC1C1256DE1004F187B.

The provision of extensive humanitarian assistance has been increasingly instrumental in mitigating the social and economic impact of movement restrictions. However, these very same restrictions have impaired the efficiency of the aid provided. Not only do movement restrictions delay the movement of humanitarian goods, they also limit the ability of the various aid agencies and their staff members to carry out their work.

As noted by the World Bank, donor frustration with the operational policy of the Israeli occupying forces is considerable. On 7 November 2003, the donor Task Force on Project Implementation (TFPI)[57] sent the Israeli Government Coordinator for the Territories a note demanding that Israel take steps to improve the operating environment, which had by that time,

> Deteriorated to a degree which many donors consider both unmanageable and unacceptable…[Government of Israel] GOI has given multiple assurances from the highest levels that donor activity and humanitarian aid will be fully facilitated. These assurances contrast dramatically with the facts on the ground. [58]

In April 2004, UNRWA was forced to suspend emergency food aid to some 600,000 refugees in Gaza for a period of three weeks "following restrictions introduced by Israeli authorities at the sole commercial crossing through which the Agency is able to bring in humanitarian assistance."[59] In the same press release UNRWA noted that it was,

> Not alone in facing chronic obstacles to the flow of humanitarian assistance. These have been experienced by all UN agencies operating in the West Bank and Gaza Strip, whose agency heads in a joint statement on 26 March called, without success, on the Government of Israel to loosen the restrictions currently in force in Gaza.[60]

Therefore, while humanitarian assistance is essential in mitigating the impact of movement restrictions on the most disenfranchised members of Palestinian communities the closure policy can, and does, greatly hinder its operation.

An area unaffected by humanitarian assistance, but nonetheless damaged through movement restrictions are the political processes in the OPT. Prior to the Palestinian presidential election campaign in December 2004, Israel issued reassurances that it would allow free and fair elections and promised to ease movement restrictions on the Palestinian civilian population during the electoral process. Despite this, during the campaigning period Palestinian presidential candidates were denied the ability to move between the Gaza Strip and the West Bank, including East Jerusalem, preventing them from campaigning effectively and denying Palestinians the right to

[57] TFPI includes representatives from USAID, the European Union, the United Nations, and the World Bank and works closely with Israeli government officials to facilitate donor project implementation, especially in the area of access.
[58] World Bank, *supra* note 28, page 12, paragraph 54.
[59] UNRWA, "UNRWA Suspends Emergency Food Relief to Gaza," *Press Release* No. HQG/06/2004, 1 April 2004.
[60] *Ibid*.

choose their leader in an informed manner. In addition, several candidates were arrested, physically assaulted at checkpoints and denied access to East Jerusalem.[61]

Each of the aspects of the economic and social decline outlined above, as well as the damage to free political process, are the result of violations of international human rights and/or humanitarian law by the Israeli authorities.

IV. INTERNATIONAL LAW AND THE FREEDOM OF MOVEMENT

Both international human rights and humanitarian law contain provisions that govern the Israeli authorities' ability to restrict the movement of Palestinians. The general application of these norms to the OPT is discussed in the Chapter concerning "The Legal Framework Governing the OPT" in this report. The following section will therefore focus on the content of the international legal norms applicable to movement restrictions in the OPT and how the Israeli practice violates these norms.

A. INTERNATIONAL HUMANITARIAN LAW

Similar to human rights law, international humanitarian law provides for the protection of individual freedom of movement but also stipulates requirements that relate to the free movement of goods and services. Although this body of law does not specifically guarantee freedom of movement in its own right, this freedom can be vividly inferred from other fundamental international humanitarian law provisions.

1. FREEDOM OF MOVEMENT

Article 27 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War proclaims the principle of respect for the human person, the inviolable character of the basic rights of individual men and women, and their right to non-discrimination. As such it is the foundation upon which the Convention rests and is the central point of reference for the other provisions of the Convention. [62]

Within its analysis of Article 27, the ICRC Commentary points to some essential characteristics of the provision from which freedom of movement can be established as a norm of international humanitarian law. Firstly,

[61] It must be noted that the detrimental impact of movement restrictions were felt most acutely in East Jerusalem on the day of the elections. As the election was held in January 2005, these issues are not covered in the current (2004) report. For a detailed account of the presidential elections see, Al-Haq, *Palestinian Presidential Elections 2005 Monitoring Report,* February 2005, available on www.alhaq.org .

[62] ICRC, *The Geneva Conventions of 12 August 1949, Commentary-Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* Pictet, Jean S. (ed.), pages. 199-200.

> The right of the respect for the person must be understood in its widest sense: it covers all the rights of the individual, that is the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers…[63]

An individual's freedom of movement falls within the description provided by the ICRC and it is therefore protected under IHL. Secondly, the right to freedom of movement under IHL is tacitly acknowledged, albeit in the negative, when the Commentary holds that,

> The right to personal liberty, and in particular the right to move about freely, can naturally be made the subject in war time to certain restrictions made necessary by circumstances. So far as the local population is concerned the freedom of movement of civilians of an enemy nationality may certainly be restricted, or even temporarily suppressed if circumstances so require.

In establishing the right, the ICRC therefore also notes its limitations. This confers a wide degree of discretion on the Israeli authorities to impose movement restrictions for security reasons. However, although not an absolute right under the Convention, freedom of movement cannot be suspended in a general manner.

The prescription against the general suspension of freedom of movement stems from the fact that "the regulations concerning occupation…are based in the idea of the personal freedom of civilians remaining unimpaired." The right of freedom of movement "is therefore a relative one which the party to the conflict or the occupying power may restrict or suspend within the limits laid down by the Convention."[64] According to the ICRC, discretion is not unlimited,

> What is essential is that the measures of constraint they adopt should not affect the fundamental rights of the persons concerned. As has been seen those rights must be respected even when measures of constraint are justified.[65]

Therefore, while "security" considerations may allow Israel to restrict the movement of Palestinians in certain instances, it cannot apply as a systematic practice, nor can it be operated in a discriminatory manner.

The central importance of the protection of the individual guaranteed in Article 27 translates to all aspects of the Convention. An Occupying Power is also under the obligation to ensure specific aspects of the well-being of the civilian population; most importantly their health and education. Much like international human rights law, the obligations of an Occupying Power towards the civilian population create an incidental obligation to respect freedom of movement.

[63] *Ibid*, page 201.
[64] *Ibid*, page 202.
[65] *Ibid*, page 207.

2. ACCESS TO HEALTHCARE

Article 56 of the Fourth Geneva Convention holds that to the fullest extent of the means available to it the Occupying Power,

> Has the duty of ensuring and maintaining, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory…

This article implies that the primary responsibility for the functioning of services, in this case health and hygiene remains with the competent authorities of the occupied territory. It is only if these authorities are failing in their responsibility that the Occupying Power must intervene. Otherwise, the duty is to avoid "hampering the work of the organisations responsible for the task."[66]

The last sentence of Article 56 provides that "medical personnel of all categories shall be allowed to carry out their duties." In this respect the ICRC Commentary points out that the obligation to maintain the health and hygiene of the population under its control,

> Necessarily involves measures to safeguard the activities of medical personnel, who must therefore be exempted from any measures (such as restrictions on movement, liable to interfere with the performance of their duty.

The group exempted by this categorisation of medical personnel includes "all people engaged in a branch of medical work…whether or not such persons are or are not attached to a hospital." [67]

3. HUMANITARIAN RELIEF

The Fourth Geneva Convention also provides in Article 59 that an Occupying Power "shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal."

When considering this article it must be borne in mind that while the Palestinian National Authority (PNA) has assumed numerous functions of governance over some areas of the OPT and receives funds for relief projects from international donors, Israel remains in effective control of the OPT. It remains clear that even if there is no duty to assist in the distribution of relief supplies, Israeli authorities must as an absolute minimum refrain form hindering the relief process. As clarified by the ICRC Commentary,

[66] *Ibid*, page 313.
[67] *Ibid*, page 314.

The Convention not only lays down that the Occupying Power must "agree" to relief schemes on behalf of the population, but insists that it must facilitate them by all the means at its disposal." Further "The occupation authorities must agree wholeheartedly in the rapid and scrupulous execution of these schemes.[68]

Article 60 of the Fourth Geneva Convention makes it explicitly clear that "relief consignments shall in no way relieve the Occupying Power of any responsibilities under Articles 55, 56 and 59." Despite the presence and operations of international agencies providing relief to occupied territories, the Occupying Power still retains primary responsibility for supplying the needs of the population of the territory it is occupying.[69] With regard to the distribution of the relief consignments under Article 61, although the responsibility can be delegated to a neutral power such as the ICRC, "The occupying power shall facilitate the rapid distribution of these consignments."

In all instances where the humanitarian relief provisions of the Fourth Geneva Convention can be invoked, the duty of the Occupying Power goes beyond mere inaction, requiring either positive action or, at the minimum, restraint from hindering the action being taken by other parties. Contrary to these obligations, the actions of the Israeli authorities in the OPT have often negatively affected humanitarian relief. Unfortunately, international aid agencies have been forced to suspend their programmes in light of the difficulties imposed by movement restrictions.

4. PROHIBITION OF COLLECTIVE PUNISHMENT

In addition to what may be termed the individual and humanitarian assistance provisions of the Fourth Geneva Convention, a number of actions that an Occupying Power may take against the occupied population are specifically prohibited. In the context of movement restrictions the most pertinent of these prohibitions is that on collective punishment.

The prohibition on collective punishment is to be found in both the Hague Regulations and the Fourth Geneva Convention. Article 50 of the Hague Regulations holds that,

> No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

It may be suggested that to view movement restrictions as a "penalty" does not sufficiently heed the pervasive and systematic nature of the restrictions. As clarified by Article 33 of the Fourth Geneva Convention however, the essence of the prohibition is punishment, and not the means by which it is imposed,

[68] *Ibid*, page 320.
[69] *Ibid*, page 323.

> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.

In its commentary of Article 33, the ICRC has clarified that collective punishment refers to,

> Penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principle of humanity, for acts these persons have not committed.[70]

The prohibition does not apply merely to punishment applied in response to acts committed by individuals, but also to the application of measures of intimidation to forestall acts that may be committed in the future.[71] Massive movement restrictions are often put in place in the wake of an attack against Israeli targets. In December 2004, in response to an armed attack on the crossing, the Rafah border point to Egypt was closed for a period of 35 days, leaving more than 20,000 Palestinians trapped on the Egyptian side of the border. It is evident that Israeli policies constitute collective punishment under international humanitarian law.

State responsibility as established by the Fourth Geneva Convention requires that the Israel authorities must actively prepare for and ensure the execution of the provisions of the Convention. One could argue that the imposition of massive movement restrictions is the diametric opposite of the requirements stipulated by international humanitarian law. Israel appears to be actively preparing and ensuring the non-execution of fundamental provisions of the Convention.[72]

B. INTERNATIONAL HUMAN RIGHTS LAW

The rights violated by movement restrictions are primarily expressed in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) also contain provisions relevant to the restriction of Palestinian movement by the Israeli authorities. Certain legal norms common to these instruments have achieved the status of customary international law, whereby they are integral to each Covenant or Convention but also maintain a distinct existence in international law. The prohibition on discrimination, and self-determination in international law are two such norms.

It must be highlighted that when considering the legality of movement restrictions, examining provisions relating specifically to movement forms the smallest part of the analysis. Movement

[70] *Ibid*, page 225.
[71] *Ibid*. pages 225-226.
[72] IHL also imposes obligations on third party states. This topic is addressed in the chapter concerning "The Obligations of the International Community" in this report and will not be discussed here.

restrictions impact numerous rights and it is the examination of these rights that that forms the bulk of the analysis.

1. FREEDOM OF MOVEMENT

At the most fundamental level, the imposition of punitive curfews, closures and the associated permit system prevents Palestinians from exercising their freedom of movement, in contravention of international law. The first paragraph of Article 12 of the ICCPR reads,

> Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Article 12 also establishes the right to leave and return to ones own country.

Freedom of movement is however, qualified by Article 12(3) which allows an individual's movement to be restricted if the restrictions are,

> …provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

In its General Comment on the Implementation of Article 12, the Human Rights Committee (HRC) explicitly clarified that in adopting laws that restrict movement,

> States should always be guided by the principle that the restrictions must not impair the essence of the right; the relation between the right and the restriction, between norm and exception, must not be reversed. The laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[73]

In addition to being based in law, the HRC held that restrictions must meet the test of necessity and the requirements of proportionality. Defining necessity, the Committee outlined that "it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them."[74] The principle of proportionality, in the words of the Committee, requires that the restrictive measures,

> …must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[75]

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[73] HRC, *General Comment No. 27: Freedom of Movement*, (Article 12), (CCPR/C/21/Rev.1/Add.9), 2 November 1999, paragraph 13.
[74] *Ibid*., paragraph 14.
[75] *Ibid*.

The principle of proportionality extends beyond the laws establishing the restrictions to the actions of the administrative and judicial agencies charged with their execution. The proceedings relating to the exercise or restriction of these rights must be expeditious, and the reasons for the restrictive measures must be provided.[76] Movement may therefore, under certain circumstances, be restricted if not imposed in a discriminatory, disproportionate or unnecessary way.

If the Israeli closure policies and their implementation meet the criteria established by the Committee, then they operate within the boundaries of international law. However, the permanent nature of the system, its lack of any consistent legal basis, the discretion accorded to military officials, and the absence of proportionality in the application of the restrictions and their excessive nature, negate any semblance of legality that the Israeli closure policy may aspire to in international law. The clear illegality of this policy is expressed by the HRC comment that "these conditions [permissible restriction] would not be met, for example…if an individual were prevented from travelling internally without a specific permit."[77]

In seeking to justify movement restrictions in the OPT Israel often refers to the notion of "security." This justification, if substantiated in international law, allows for freedom of movement to be legitimately restricted or suspended under paragraph 1 of Article 4 of the ICCPR, which provides that,

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

While allowing for restrictions, the article preserves Israel's obligation not to discriminate on the grounds of race. The prohibition on racial discrimination is one that admits no derogation whatsoever. To use the language of Article 4 ICCPR, Israel's imposition of movement restrictions do not exist only when the life of the nation is threatened and, as will be seen below, they are wholly inconsistent with other obligations under international law as they involve discrimination solely on the grounds of race. Israel cannot therefore avail itself of the notion of "security" to justify its illegal conduct in restricting Palestinian movement.

Once a violation of the right to freedom of movement is established, Israel is under an obligation to ensure that effective remedy is made available to individuals whose rights or freedoms have been violated. This obligation is extended to all rights guaranteed by the ICCPR by virtue of Articles 2(1), 2(3), 3 and 26. It follows that if Israel is not to find itself in breach of its obligation

[76] *Ibid* paragraph 15.
[77] *Ibid*. paragraph 16.

to provide effective remedy, Palestinians who have had their movement unfairly restricted should be afforded the opportunity to seek redress before a court of law or other impartial body, and if successful in their claim, receive remedy. This could take the form of granting a permit on appeal to a Palestinian who had had the permit unfairly denied.

2. THE PRINCIPLE OF NON DISCRIMINATION

The underlying rationale of the system of movement restrictions imposed on Palestinians by the Israeli authorities is one of discrimination. The free movement of Palestinians within, to and from the OPT is heavily restricted through the use of, amongst others, a permit system. Illegal Israeli settlers and foreign passport holders on the other hand, require no such permits and move around the OPT freely. In the case of the illegal settlers this often occurs on separate roads. Writing of discrimination one scholar has noted,

> If there is a principle that goes like a red thread through the United Nations Charter, the international law of human rights and the international humanitarian law, it is the principle of equality for all before the law and in the enjoyment of the rights and freedoms or, in other words, the principle of non-discrimination.[78]

As noted, this principle is expressed in numerous international legal instruments. However, this consideration will focus on the ICCPR, ICESCR and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

While both the ICCPR and ICESCR contain a clear prohibition on discrimination in Article 2(1) and 2(2) respectively, neither establishes the precise content of this prohibition. As noted by the HRC, the ICCPR neither defines the term "discrimination" nor indicates what constitutes discrimination.[79] The Committee on Economic Social and Cultural Rights (CESCR) is also of little use in seeking a clarification of "discrimination." Discrimination has achieved clear legal definition only in the specific legal instruments dealing with a single aspect of discrimination. For example the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW) provides a definition of discrimination as it relates to gender, the Convention on the Rights of the Child (CRC) as it relates to children and the ICERD defines discrimination in terms of race.

In the context of movement restrictions, discrimination against Palestinians occurs because they are Palestinian, any further discrimination is superseded by this fact and it is for this reason that of the binding mechanisms, the ICERD will be considered below. Article 1(1) of ICERD defines the term racial discrimination as,

[78] Svensson-McCarthy, Anna-Lena *The International Law of Human Rights and States of Exception*, Martinus Nijhoff, 1998, page 640.
[79] HRC, *General Comment 18: Non-Discrimination*, November 1989, paragraph 6.

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The extensive definition of racial discrimination provided by ICERD is tempered by the important caution that it "shall not apply to any distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." This may suggest that by virtue of the fact that Palestinians are not Israeli citizens, they may be treated differently and their movement legitimately restricted. However, as noted by various UN bodies, what is significant when determining what constitutes discriminatory practice, is not only the object of this practice, but also its character. As noted by Committee on the Elimination of Racial Discrimination (CERD), to determine racial discrimination, the practice must have "an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin."[80] The fact that Palestinians are not citizens of Israel does not eliminate the possibility that Israel's actions towards them may be discriminatory under international law.

Article 5 of ICERD which refers, amongst others, to freedom of movement, notes that,

> Whenever a State imposes a restriction upon one of the rights listed in [A]rticle 5 of the Convention, which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor effect is the restriction incompatible with [A]rticle 1 of the Convention as an integral part of international human rights standards.

In observing the Israeli practice of restricting movement, it can be seen that settlers and non-Palestinians may travel on certain roads that Palestinians are denied access. Non-Palestinians may also move within the OPT without having to acquire a permit other than their entry visa to Israel. Therefore, in imposing movement restrictions in the OPT, the Israeli authorities act in a manner contrary to both Articles 1 and 5 of ICERD. Also, the Israeli authorities fail to satisfy the general test for legitimate differentiation in treatment prescribed by the HRC which holds that,

> Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Israel therefore endorses a practice that is contrary to both the customary and conventional prohibitions on racial discrimination.

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[80] CERD, *General Recommendation No. 14: Definition of Discrimination*, 22 March 1993, paragraph 2.

3. THE RIGHT TO SELF-DETERMINATION

A further principle that has achieved customary status is the right to self-determination. The right to self determination is guaranteed in identical terms in Article 1 of each of the International Covenants. As explained by the HRC,

> The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.[81]

Common Article 1 states that by virtue of the right to self-determination, all peoples "freely determine their political status and freely pursue their economic, social and cultural development."

Clearly, the extent of the movement restrictions imposed by the Israeli authorities prevent the free pursuit of any of the essential components of the Palestinians' right to self-determination. At the most fundamental level therefore, the movement restrictions imposed on the Palestinian population of the OPT violate the essential characteristic of the rights the Covenants seek to uphold. The right to "freely determine their political status" is of particular resonance in light of the first phase of the Palestinian local elections and of the presidential election campaign, both of which took place in December 2004.

4. FREEDOM TO PARTICIPATE IN POLITICAL LIFE

Central to the notion of self determination is that Palestinians be able to exercise that right through freely choosing their political representatives. The closure system prevents not only Palestinians from being able to vote, but also candidates from campaigning.

Article 25 of the ICCPR which deals, in the words of the HRC, "with the right of individuals to participate in those processes which constitute the conduct of public affairs," guarantees the right of every citizen to vote and to stand for election without discrimination of any kind. Article 5 of the ICERD also guarantees these political rights.

In its general comment on Article 25 the HRC explained that the content of the right requires that the state takes positive measures to overcome "specific difficulties" such as "impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively."[82]

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[81] HRC, *General Comment 12: the Right to Self-determination of Peoples*, (Article 1), March 1984, paragraph 1.
[82] HRC, *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, (Article 25), (CCPR/C/21/Rev.1/Add.7), 12 July 96, paragraph 12.

5. PROHIBITION ON CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Palestinians at checkpoints are increasingly being subjected to ill-treatment such as lengthy delays, invasive and humiliating searches and beatings. Throughout the year, there was increasing criticism of the routine treatment of Palestinians at checkpoints in both international forums and the media. The UN Special Rapporteur on the OPT described the checkpoints as the routine humiliation of the Palestinian people, and an incident in which a Palestinian violinist was forced to play for Israeli soldiers at a checkpoint sparked widespread debate in the Israeli and international media.[83]

The prohibition on torture and cruel, inhuman or degrading treatment or punishment is contained in Article 7 of the ICCPR. However, when attempting to establish the legal content of each of the types of prohibited treatment the HRC provides little guidance. It has not found it necessary to provide precise clarifications of what constitutes the various types of ill-treatment or punishment since these "distinctions depend on the nature, purpose and severity of the treatment applied."[84] However, Article 7 applies not only to "acts that cause physical pain" but also to "acts that cause mental suffering to the victim."[85] As to what constitutes inhuman or degrading treatment, the HRC observed in one communication that the assessment "depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical and mental effects as well as the sex, age and state of health of the victim."[86]

Article 16 of the CAT contains a similar prohibition to that in Article 7 ICCPR. It mandates states to prevent and prohibit in any territory under its jurisdiction torture, or other cruel, inhuman or degrading treatment or punishment. However, similar to the HRC, the Committee against Torture provides little guidance as to what constitutes the different types of treatment.

The ample room for discretion left by the HRC and Committee Against Torture is not useful for the purposes of establishing the legal parameters of ill treatment when attempting to apply it to an institutionalised system of movement restriction. However, it is worth noting that the Committee Against Torture, in its Concluding Observations on the 2001 report submitted to it by Israel, expressed concern that "Israeli policies on closure…may, in certain instances, amount to cruel, inhuman or degrading treatment or punishment" contrary to the Convention.[87] This reflects the suffering caused by the physical barriers to movement to the Palestinian population in the OPT. Israel has yet to submit another report to Committee Against Torture.

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[83] Eldar, Akiva "Soldiers Force Palestinian to Play Violin at West Bank Checkpoint," *Ha'aretz*, 25 November 2004.
[84] HRC, *General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment*, 10 March 92, paragraph 13.
[85] *Ibid*., paragraph 3.
[86] HRC, *Communication No. 2657/1987, A. Vuolanne v Finland, Report*, (GAOR, A/44/40), paragraph 9.2.
[87] Committee Against Torture, *Conclusions and Recommendations of the Committee against Torture : Israel*, 23 November 2001, paragraph 6(i).

6. THE RIGHT TO EDUCATION

Movement restrictions, especially those placed on students attempting to pursue studies abroad in universities and other institutions, severely disrupt or totally deny meaningful access to education, in violation of international law.

Article 13, providing for the right to education under the ICESCR, is the longest article in the Covenant. The essence of the right is distilled in the first sentence, which holds "the States Parties to the present Covenant recognize the right of everyone to education."

The CESCR begins its General Comment on the right to education by highlighting,

> Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.[88]

Adopting this understanding of the right to education highlights its vital importance in the Palestinian context.

An essential characteristic of the right to education as determined by the CESCR is that, in order for the right to be enjoyed, education must be, inter alia, physically accessible. That is to say "within safe physical reach."[89] As has been illustrated, the closures regime makes accessing educational institutions for students of all ages difficult, if not dangerous. The conduct of the Israel authorities is therefore in violation of this right.

7. THE RIGHT TO WORK

Preventing Palestinian workers from accessing international labour markets, or even from travelling short distances between West Bank cities, towns and villages to find work, constitutes a violation of Palestinians' right to work and earn a decent living.

The right to work is guaranteed under Article 6(1) of the ICESCR which states that,

> The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

[88] CESCR, *General Comment No. 13: The Right to Education*, (Article 13), (E/C.12/1999/10), 8 December 1999, paragraph 1.
[89] *Ibid.*, paragraph 6(b).

This Article is complemented by Article 7 which inter alia, recognises the right of everyone to earn "a decent living for themselves and their families in accordance with the present Covenant."

Under Article 6(2) of the ICESCR Israel has a specific obligation to take steps to achieve the full realisation of the right to work "…and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual." Amnesty International has argued that the consequence of measures taken to restrict movement within and outside the occupied territory is the opposite of taking steps to achieve full and productive employment.[90] The closure policy in the OPT has consistently violated the right to work and the right to earn an adequate living.

The CESCR has repeatedly expressed its concern over the impact of the movement restrictions on the rights guaranteed in the ICESCR. In the Committee's conclusions on Israel's initial report in 1998, it noted,

> Workers from the occupied territories are prevented from reaching their workplaces, depriving them of income and livelihood and their enjoyment of their rights under the Covenant.[91]

Since the Committee made this assessment, restrictions on the movement of Palestinians have become increasingly stringent, inevitably causing a further deterioration in the situation described.

8. THE RIGHT TO HEALTH

Vulnerable groups such as the young, pregnant women, the elderly and the sick are those most in need of access to medical services and health facilities. By rendering it difficult if not impossible for Palestinians to access adequate health care, the system of checkpoints, permits, closures and punitive curfews imposed by the Israel authorities violate the Palestinian people's right to health under international law.

As described by the CESCR, the right to health is,

> Closely related to and dependent upon the realization of other human rights,…, including the rights to food, housing, work, education, human dignity, life, non-

[90] Amnesty International, *Israel and the Occupied Territories, Surviving Under Siege: The Impact of Movement Restrictions on the Right to Work*, (MDE 15/001/2003), September 2003.

[91] CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding observations of the Committee of Economic, Social and Cultural Rights: Israel*, 4 December 1998, (E/C.12/1/Add.27), paragraph 18.

> discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.[92]

Thus, when any of the above-listed rights are violated through the closures policy operated in the OPT, the right to health can also be violated as a result. However, the right also has a specific legal content of its own as expressed by Article 12(1) of the ICESCR,

> The States parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

State parties are also required, as with work, to take steps to achieve the full realisation of the right, which include "the creation of conditions which would assure to all medical service and medical attention in the event of sickness." As explained by the Committee in its general comment, the right to health is not the right to be healthy, but rather the right to have an adequate system of healthcare available and to be free from outside interference which may jeopardise access to this system.[93]

Amongst the essential elements listed by the Committee as necessary for the fulfilment of the right to health is "accessibility."[94] Reflecting the position adopted in relation to education, the Committee proceeds to define this as "health facilities, goods and services must be within safe physical reach for all sections of the population,…"[95] It can therefore be argued with significant force that Israeli movement restrictions violate the right to health.

As already noted, in terms of upholding the right to health under Article 2(1) of the ICESCR Israel undertakes "to take steps," individually or through co-operation with other states, "with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

The CESCR notes that Article 2 of the Covenant acknowledges the reality that rights such as education, work and health can be achieved only over a period of time, and that their realisation is inherently linked to the resources available to the implementing state. However, the CESCR also clearly establishes that certain undertakings are not dependent on resources and are capable of immediate implementation. The requirement not to discriminate in guaranteeing the enjoyment of the rights has immediate effect, as does the undertaking "to take steps." [96] Clarifying the latter

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[92] CESCR, *General Comment Number 14: The Right to the Highest Possible Standard of Health*, (Article 12), 2000, paragraph 3. This has since been reiterated by the Committee.
[93] *Ibid.*, paragraph 8.
[94] *Ibid*, paragraph 12.
[95] *Ibid.*
[96] CESCR, *General Comment No. 3: The Nature of States Parties' Obligations,* (Article 2(1)), 14 December 1990, paragraph 1, 2.

of these two undertakings, the Committee states that "while full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time period after the Covenants entry into force in the State concerned." Further, these steps should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant."[97]

Turning to address the requirement that the rights under the ICESCR are to be achieved progressively, the Committee holds that States Parties have "an obligation to move as expeditiously and effectively as possible towards that goal [full realisation of the rights]." Regressive measures would require full justification within the context of all the rights guaranteed under the Covenant.[98] In the view of the CESCR, "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent on every party."[99] The movement restrictions imposed by the Israeli authorities systematically and purposefully contribute to a failure to meet this minimum obligation in terms of education, work and health. They in fact operate in such a manner as to ensure a regression of the enjoyment and fulfilment of these rights. In a statement that indicts current Israeli practice the Committee has commented that,

> A state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.[100]

V. CONCLUSION

As this chapter has shown, movement restrictions, in and of themselves, are not totally prohibited under international human rights or humanitarian law. Rather it is the foundations upon which the closure policy in the OPT is based and the means by which it is imposed that render the Israeli system a flagrant violation of both international human rights and humanitarian law.

The denial of freedom of movement to the Palestinian people within and between the OPT, and internationally, denies Palestinians enjoyment of fundamental economic, social, cultural, civil and political rights. While considerations of "security" may allow for the movement of Palestinians to be legitimately restricted under international law, the implementation of these restrictions must conform to numerous international legal standards that limit their scope and legality. Restricting movement on racially discriminatory grounds is clearly illegal under international law. Even if not seen as discriminatory, restrictions imposed on movement are subject to the fundamental principles of proportionality and necessity. As has been illustrated, the extensive and permanent nature of the movement restrictions imposed by the Israel authorities in the OPT

[97] *Ibid.* paragraph. 2.
[98] *Ibid.* paragraph 9.
[99] *Ibid.* paragraph 10.
[100] *Ibid.*

cannot be described as proportionate and necessary. Further, the movement restrictions constitute a form of collective punishment of the Palestinian people expressly prohibited by international humanitarian law.

In order for Israel to meet the requirements of international human rights and humanitarian law, the permanent nature of the restrictions within the OPT would have to be abolished, including the permit system for internal movement within the OPT, including East Jerusalem. Without these steps being taken immediately, as required by international human rights law, the exacerbation of the disastrous economic and social trends will continue with devastating effect to the Palestinian people and society.

The consequences of the movement restrictions imposed by the Israeli authorities on Palestinians potently highlights the inextricable link between the enjoyment of fundamental legal rights in international law and the fulfilment of the human person and society. The international legal standards with which the mechanisms and policies of closure have been assessed cannot be disassociated from the human context in which they operate. The actions of the Israeli authorities in restricting the movement of Palestinians violate fundamental international legal standards which it is urgent and vital that Israel uphold.

PROPERTY DESTRUCTION

A Two Year old Palestinian Baby Girl sleeping over the Ruins of her Demolished Home in Beit Lahia, Gaza Strip
(Agence France Presse, 2004)

PROPERTY DESTRUCTION

I. OVERVIEW

Israel's policy of property destruction is as old as the military occupation of the West Bank and Gaza Strip itself. Since 1967, thousands of homes, vast areas of agricultural land and hundreds of other properties have been destroyed by Israeli occupying forces, thereby rendering tens of thousands of men, women and children homeless or without livelihood.

Since the beginning of the current *intifada*, Israel has stepped up its policy of property destruction, thereby causing unprecedented destruction or damage to Palestinian property. Throughout the Occupied Palestinian Territories (OPT), public and private property has been demolished for its proximity to illegal Israeli settlements and bypass roads, and during illegal and indiscriminate shelling of Palestinian civilian areas, on the pretext that this property poses a security threat. In this regard, the criteria used by the Israeli army to define "military/security needs" are extremely broad, in contravention of international law.[1]

One of the most intensive large-scale destruction of civilian property during 2000-2004 took place during the Israeli military offensives "Operation Defensive Shield" and "Operation Determined Path," both conducted in the West Bank from February to May 2002. During both incursions, Israeli occupying forces systematically damaged or destroyed civilian homes, commercial properties, educational institutions, hospitals, clinics and medical vehicles, and carried out targeted destruction of civilian infrastructure for reasons not linked to combat. Fifty Palestinian schools were damaged, 11 totally destroyed, nine vandalized, 15 used as military outposts, and another fifteen as mass arrest and detention centres.[2] In Ramallah, offices of 21 ministries and agencies were ransacked, rendering repair and replacement costs of at least US $8 million.[3] In the West Bank, the city of Nablus was especially hard-hit, with property destruction estimates running as high as US $114 million.[4] Buildings and centres of cultural, religious, and historic significance in Nablus, Bethlehem and Hebron have also suffered significant damage, particularly since 2000.

During the military incursion into the Jenin Refugee Camp in April 2002, Israeli occupying forces also seriously damaged the water, sewage, and electrical infrastructure.[5] The wide-scale destruction and physical damage of the Jenin camp has "shocked many observers,"[6] where Israeli

[1] See further below.

[2] "Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory," *Report of the UN Secretary-General prepared pursuant to General Assembly Resolution ES-10/10* (Report on Jenin), A/ES-10/186, UN General Assembly, Tenth Emergency Special Session, Agenda Item 5, 30 July 2002, paragraph 37(j).

[3] *Ibid.* at paragraph 73.

[4] *Ibid.* at paragraph 77.

[5] Human Rights Watch, "Israel/Occupied Territories: Jenin War Crimes Investigation Needed: Human Rights Watch Report Finds Laws of War Violations," 3 May 2002.

[6] *Ibid*, page 4.

occupying forces bulldozed hundreds of homes in a manner that rendered more than one-quarter of the total population of the camp homeless.[7] The property destruction costs are estimated to be US $27 million.[8] The devastating incursion into this camp led several human rights groups to conclude that the Israeli occupying forces had perpetrated war crimes.[9]

Whilst the frequency of military operations involving massive scales of property destruction intensified following Sharon's announcement of the Gaza Disengagement Plan in May 2004, for strategic purposes,[10] Israel had already begun carrying out more regular and heavy handed military incursions into the Gaza Strip since the beginning of the current *intifada*. By March 2002, estimates from the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) indicate that Israel's damages to refugee camps and other UNWRA facilities had cost approximately US$3.8m to rebuild.[11]

The daily destruction of Palestinian property in the OPT, including homes, commercial properties, business, agricultural land, educational and health facilities, water, sewage and electricity networks have all resulted in the deterioration of the housing and living conditions of the civilian population as a whole. From September 2000 to January 2005, it is estimated that 7,505 private buildings and 175 public buildings have been completely destroyed, resulting in a severe deterioration in health and educational services and facilities available to the Palestinian civilian population.[12]

In addition to the destruction of land and physical structures, the current *intifada* has witnessed an increase in the phenomenon of uprooting of fruit and olive trees and/or razing land belonging to Palestinians. It is linked with Israel's long-standing policy of appropriating as much as possible of the land that it occupies, [13] most notably through the construction of Israeli settlements.[14] In this regard, Israel's policy of demolishing Palestinian property has been implemented extensively in areas near Israeli settlements on the grounds that the destruction of property is necessary to

[7] *Ibid*.

[8] Report of the UN Secretary General, *supra note* 2, paragraph 43.

[9] For example, see Human Rights Watch, *supra note* 5, and Amnesty International, "Israel and the Occupied Territories Shielded from Scrutiny: IDF Violations in Jenin and Nablus," (MDE 15/143/2002), 4 November 2002.

[10] These purposes include trying to maintain control over the border between Gaza and Egypt and creating a buffer zone along the Philadelphi route. For more information regarding the Gaza Disengagement Plan, see Chapter on "The Political Framework Governing the Occupied Palestinian Territories" in this report.

[11] Oxfam, "Foundations for Peace: Urgent Steps to Address the Israeli-Palestinian Conflict," *Briefing Paper* 21, 28 March 2002, http://www.oxfam.qc.ca/html/politique/PDFpolitique/foundations_%20for_peace.pdf.

[12] In terms of the completely damaged private buildings, the highest number of buildings damaged was recorded in the governorates of Rafah and Jenin. In terms of public buildings, statistics indicate that the highest number of such buildings are located in Nablus and Ramallah/Al-Bireh. See Palestinian Central Bureau of Statistics (PCBS), "Number of Damaged Buildings in the Palestinian Territory from 28/09/2000 to 31/01/2005 by Governorate District and Building Type," available at http://www.pcbs.org/martyrs/dest_e.aspx.

[13] Although officially, the land is not confiscated but rather "temporarily" seized by the Israeli army for unspecified "security" needs, in the majority of cases seizure orders can be extended indefinitely, often resulting thereby in land that has "temporarily" been seized by the Israeli army never being returned to its owners.

[14] Since 1967, the number of Israeli settlements and settlers on Palestinian land has increased each year, including the years following the Oslo Accords, and has illegally transferred hundreds of thousands of Israeli settlers into the OPT, including East Jerusalem For more information see the Chapter on "Israeli Settlement and Settler Violence" in this report.

construct by-pass roads for the exclusive use of Israelis; build military installations; or to create buffer zones to prevent attacks against Israeli soldiers and settlers.[15] This has also led to the destruction and uprooting of thousands of fruit-bearing trees and expropriation of hundreds of thousands of dunums of land.[16]

> I own a small plot of land in the village of Sa'ir, which lies to the west of Asfar settlement. At 8:00 a.m. on 11 November 2004, I headed off to pick olives with other members of my family, and village residents, to the plot of land that I own. Some of the trees on this piece of land are at least 30 years old. When we arrived, I found Israeli soldiers in the process of uprooting the trees. When I inquired why they were doing this, they notified me that a bomb had allegedly been thrown from nearby this plot of land. I do not know if he spoke the truth or not, but they uprooted 170 almond and olive trees.
>
> **Extracts from Al-Haq Affidavit No. 2073/2004**
> Given by Nayef Muhammad 'Isa al-Shalalda, (Resident of the village of Sa'ir, nearby Hebron, West Bank)

Over the years, Al-Haq's documentation indicates that Israeli settlers have also committed acts of violence upon Palestinian civilians, and their property, particularly as a means of reprisal and/or intimidation, and have used physical force and death threats to intimidate Palestinian landholders.

Although already a common practice of Israel since 1967, this trend increased dramatically from 2000 onwards, as a result of the clearing of land for the continued expansion of Israeli settlements, and the construction of the Annexation Wall. In this regard, Israeli authorities have stepped up the confiscation and destruction of agricultural land and trees to seize more land and to create buffer zones along this Wall.[17]

The destruction of olive trees has been especially devastating, targeting not only a major sector of the Palestinian economy, but also a large part of traditional Palestinian culture and life. In many cases the trees and orchards uprooted were the only source of livelihood for hundreds of thousands of people,[18] and have carried out extensive destruction of agricultural facilities and equipment, including water wells, greenhouses, and agricultural sheds.[19] From the beginning of

[15] Amnesty International, "Under the Rubble: House Demolition and Destruction of Land and Property," (MDE 15/033/2004), 18 May 2004.
[16] For example, at least 23,000 dunums of land are confiscated for the construction of each settlement bypass road. See Shah, Samira, *On the Road to Apartheid: the Bypass Road Network in the West Bank, Columbia Human Rights Law Review 221,* Volume 29, Fall 1997, at page 254.
[17] For more information, see the Chapter on "The Annexation Wall" in this report.
[18] By 2002, olive and other fruit trees constituted 63.8% of the cultivated area of the OPT, comprising a principal source of income for Palestinian residents.
[19] UN Office for the Coordination of Humanitarian Assistance (OCHA), "Humanitarian Situation Report: Beit Hanoun-Gaza Strip," 30 July 2004, http://domino.un.org/UNISPAL.NSF/0/c2684d2a15e851db85256ee80063d3ba?OpenDocument.

the current *intifada* until June 2004, it is estimated that 1,058,592 fruit trees have been destroyed, and more than 32,000 dunums of land cleared.[20] This level of agricultural destruction not only harms Palestinians in the immediate term, but "will continue to have severe repercussions on the Palestinian economy for many years to come."[21] In addition, if and when Palestinians are allowed to resume farming the recently-destroyed land, it would take years and enormous resources for this land to become productive again.[22]

> I live with my family in the 'Ein Bani Slim area in Hebron city … adjacent to Kharsina settlement from the north. On 10 December 2003, Israeli settlers and soldiers dug a ditch around the settlement on land that we own, without any previous military order. This resulted in the destruction of three water wells on our land. My father owns 30 dunums planted with all kinds of fruit trees. As a result, only one well remained accessible and it is not sufficient for the irrigation of all the trees. Furthermore, 12 dunums of our land have been confiscated and 300 olive trees have been uprooted, in addition to 20 fig trees, 20 almond trees, and 200 pine trees … as well as approximately 8,000 cauliflower seedlings. … It is worth noting that digging has destroyed 60% of our land and only few metres of land are left on the north side of our home.
>
> **Extracts from Al-Haq Affidavit No. 1626/2004**
> Given by: 'Abdallah Khalifa Da'na, (Resident of Hebron, West Bank).

In this regard, property destruction in Gaza Strip has also been particularly problematic due to the high percentage of Israeli land confiscation, military incursions, and high population density. For example, in Gaza's Beit Hanoun area, it is estimated that "over 50% of [its] agricultural land has been destroyed in the last four years."[23] Much of the land was cultivated with olive, citrus, date and almond trees, and vegetables in greenhouses, which maximize production of the small amount of agricultural land available in the Gaza Strip.

Since the beginning of the current *intifada*, there has also been a significant increase in settler violence against the Palestinian civilian population, notably against their lands, crops, farm equipment, and livestock. Cases of settler violence against and destruction of Palestinian property have been particularly numerous in the city of Hebron.[24]

> On 25 April 2004, we were harvesting the last part of this year's crop and carrying it to the foot of a mountain in order to carry it back to our homes, which are eight kilometres away

[20] PCBS, "Statistical Monitoring of the Socio-Economic Conditions of the Palestinian Society," Second Quarter, October 2004.
[21] Amnesty International, *supra note* 9, page 2.
[22] *Ibid*.
[23] UNRWA, Progress Report: Twenty-fifth Progress Report, July-December 2004," 31 December 2004, http://domino.un.org/unispal.nsf/0/8ffdb4cffeb5e17485256fd60058165e?OpenDocument.
[24] For more information, see chapter on "Settlements and Settler Violence" in this report.

from the land. At that time, approaching us were a group of masked persons coming from the direction of the settlement, accompanied by a big black dog. Two of the settlers were carrying guns. … They then cut the rope of the donkey on which we carry the crops, and started to beat the donkey with iron pipes until it fell on the ground, bleeding from its head. All of a sudden, they started throwing stones at a truck I had brought to carry the crops. My 27-year-old son Ra'ed owned this car, and they completely smashed its front windshield. Seeing this violence, we felt that we could not try to resist. I saw them burning the barley crops, and I tried to approach the crops and put the fire out, but the masked settlers surrounding the crops threw stones at us. … I sat with others, sadly looking at the fire eating these crops that were supposed to feed 150 sheep and 20 calves. … The losses we sustained are huge, on top of the already difficult economic situation from which we are suffering.

Extracts from Al-Haq Affidavit No. 1776/2004
Given by: Muhammad Jbra'il 'Amr, (Resident of the village of Yatta, nearby Hebron, West Bank).

Since 2000, buildings and centres of cultural, religious, and historic significance have suffered from significant damage, as a result of military incursions and targeted attacks, most notably in the West Bank cities of Bethlehem, Hebron,and Nablus. For example, during Israel's military operation into Nablus in 2003, 60 historic buildings were totally demolished and 200 suffered partial damage. At its annual meeting in June 2003, the World Heritage Committee of the United Nations Educational, Scientific and Cultural Organization (UNESCO), emphasised the exceptional universal value of Palestinian heritage and condemned the destruction and damage inflicted upon it.[25]

II. CLOSE UP: HOUSE DEMOLITIONS

As the United Nation's (UN) Special Rapporteur noted, the policy of house demolitions "is a central feature of Israel's policy towards Palestinians,"[26] and has witnessed intensification since the beginning of the current *intifada*. From September 2000-December 2004, it is estimated that 4,170 homes have been demolished in the OPT. Houses have been demolished as a punishment of families of Palestinians who have carried out attacks against Israeli targets, or are suspected of having done so. Others have been demolished on the grounds that they were built without the required permit. In an estimated 60% of the cases, homes have been destroyed in the course of military operations to meet Israeli strategic and military objectives. [27]

[25] UNESCO, "The Director-General of UNESCO launches an appeal for the protection of historic, cultural and religious heritage in the Palestinian autonomous towns," *Press Release*, Paris, 11 April 2002, available at http://www.unesco.org/bpi/eng/unescopress/2002/02-avis8.shtml.
[26] UN Commission on Human Rights, "Report of the Special Rapporteur of the Commission on Human Rights John Dugard, on the situation of human rights in the Palestinian Territories Occupied by Israel since 1967," 61st Session, (E/CN.4/2005/29), 7 December 2004, paragraph 20.
[27] *Ibid*, paragraph 21.

For families whose houses have been completely demolished, the severe impact is made worse by the fact that they are prohibited from rebuilding on the site of their former home. In addition to the material loss, house demolitions cause also great mental suffering. A home is not merely a building which provides shelter," [28] but one's symbolic center…and the physical representation of the family." For most people, it has a great personal value, which embodies a whole family history and contains irreplaceable articles and memories from a lifetime. As noted by the UN Special Rapporteur on the Right to Adequate Housing, house demolition causes "disruption on the fabric of society, with particularly serious effects on the family, including children."[29]

> "We are here to execute the court's decision to demolish the house." He was showing me a file in his hand two metres away from me and that the reason for demolishing the house is "that my brother is a terrorist." I said, "Ibrahim has not been convicted yet." He said, "I am carrying out military orders." He added, "You have 10 minutes to evacuate the house.". . . . At 4:30 a.m., the house exploded. At around 5:00 am the army left the camp and then I went back to my house but I could not enter because it was still dark, until sunrise, when we discovered the huge damage in the second floor; nothing was left of it. According to the UNRWA's Committee of Engineers and the Public Works Ministry, the first and the third floor were also damaged and the whole building was about to collapse.
>
> **Extracts from Al-Haq Affidavit No. 1688/2004**
> Given by: Wa'el 'Abd-al-Rahman Jindiyya, (Resident of 'Ayda Refugee Camp, nearby Bethlehem, West Bank).

A. PUNITIVE HOUSE DEMOLITIONS

One of the most common practices in the OPT by Israeli occupying forces is that of wholly or partially demolishing or sealing up the houses of persons accused of having committed security-related offences, or to repress their supposed opposition to its policies. Already during the first intifada, the Israeli authorities have made extensive use of house demolition for "security" reasons. During the second year of that first uprising, "the few existing procedural constraints on house demolitions have been further relaxed."[30] According to Al-Haq's documentation, during that period, a total of 363 homes were totally demolished, and another 82 partially demolished in the West Bank as a punitive measure, thereby displacing an estimated 7178 persons.[31]

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[28] *Ibid*, paragraph 20.

[29] United Nations Economic and Social Council (ECOSOC), "Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, submitted by Mr. Giorgio Giacomelli, Special Rapporteur, pursuant to Commission on Human Rights Resolution 1993/2 A," 56th session, Item 8 on the Provisional Agenda, (E/CN.4/2000/25), 15 March 2000.

[30] In January 1989, West Bank Area Commander 'Amram Mitzna announced the introduction of tougher measures to put an end to stone throwing, considered by the Israeli military authorities as one of "the most troublesome phenomenon," and "the core of violent activity." See "House Demolition and Sealing" *in A Nation Under Siege*, Annual Report 1989, page 346.

[31] Statistics cover the period 9 December 1987 to 31 December 1991.

In this case, house demolitions are governed by Section 119(1) of the British-issued Defence (Emergency) Regulations, 1945, which states that a military commander may order the forfeiture,

> Of any house, structure or land situated in any area, town, village, quarter or street, the inhabitants or some of the inhabitants of which he is satisfied have committed or attempted to commit or abetted the commission of, or been accessories after the fact to the commission of, any offence against these regulations involving violence or intimidation or any military court offence, and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or structure or anything growing on the land.[32]

Prior to the first *intifada*, Israeli occupying forces generally resorted to the measure of sealing or demolishing homes only when the Palestinian in question was accused of a "violent" crime. However throughout that first uprising, "the scope expanded to encompass persons accused of less dangerous violations.[33] And while, during the first *intifada*, it was more common to seal houses, Al-Haq's statistics indicate that during the second *intifada*, Israel increasingly resorted to immediate house demolitions.[34]

According to Al-Haq's documentation from September 2000-December 2004, 425 homes were totally demolished in the West Bank and another 26 partially destroyed, thereby resulting in the displacement of approximately 2940 persons. In several cases, the demolition of houses takes place, even where the suspect had already been killed, tried, convicted or even arrested by Israeli authorities and occupying forces.

Since 2000, punitive demolition policy continued to target even persons who have been convicted for less serious offences, and thereby their families. In several instances, the mere presence at some stage of a wanted man in the house is sufficient to trigger demolition. For example, according to the Israeli human rights organization B'Tselem, 47% of all homes demolished since 2001 in the OPT were never home to anyone suspected of involvement in attacks upon Israelis, thereby rendering more than 1,200 persons unconnected with any acts against Israelis, homeless. [35]

> At around 4 a.m. in the morning of 17 May 2004, I was asleep with my family of 6 when I heard someone banging on the door. This was followed by a voice on the loudspeaker demanding that the residents of the house get out. When we left the house, there was a large number of soldiers outside. A certain Captain named Zohar approached me, and introduced himself as an intelligence officer. He then began asking questions regarding

[32] Defence (Emergency) Regulation 119, 1945, *Palestine Gazette* (No. 1442), Supplement No. 2, 1055.
[33] Ayoub, Nizar, *The Israeli High Court of Justice and the Palestinian Intifada: A Stamp of Approval for Israeli Violations in the Occupied Territories*, Al-Haq, 2003.
[34] According to Al-Haq's documentation, while 216 houses were sealed during the first *intifada*, in the case of the current intifada, only 2 houses were sealed by 2004.
[35] B'Tselem, "Through No Fault of their Own: Punitive Home Demolitions during the Al-Aqsa *Intifada*," November 2004.

my brother Mahmoud who works with the Palestinian police, and who had been on Israel's wanted list for the past three years. He wanted to know whether Mahmoud can be found in my home. While he used to live in this house in the past, he no longer resided with us. Then they searched the house repeatedly. Afterwards, the soldiers conducted a search operation in all the houses surrounding our own. Then they proceeded to demolish part of a nearby house belonging to Nawwaf Jaber, despite the fact that it was uninhabited. Nor did they find prohibited items or wanted persons found.

Extracts fromAl-Haq Affidavit No. 1827/2004
Given by: Muhammad Isma'il Mahmoud Abu-Zahra, (Resident of the village of Yatta, nearby Hebron, West Bank).

B. DEMOLITIONS ON THE PRETEXT OF LACK OF PERMITS

Thousands of Palestinian homes have been demolished on the basis that they were built in violation of the Israeli authorities housing permit "policy." [36] Following the Oslo Accords, Israel continued to retain authorization over planning and building in Area C and East Jerusalem of the West Bank, and in the absolute majority of all cases issues no permits to Palestinians to build there.[37]

In 2001, I started building a house in the village of Kufr Qallil, nearby Nablus, which according to the Oslo Accords is in Area C. I consulted an engineer who informed me that the Israeli authorities do not grant building permits during the current situation. Nevertheless, because I have been residing with my family in a rented house in the city of Toulkarem, I decided to build. Seven months later, I completed the ground floor. At that time, a white car with Israeli license plates approached the house. It belonged to an official from the Unit of Planning, who informed me that he had an order to stop the building. … I am seeking the assistance of an Arab-Israeli lawyer to help me appeal this order to the High Court. The house under the threat of demolition is within the planning of the village, and is not close to the wall. However, it is close to an Israeli settlement named Brakha, which is 250 m south of my home. The second-closest home to mine is 40 metres north of it.

Extracts from Al-Haq Affidavit No. 1890/2004
Given by: Anwar Ahmad Ibrahim, (Resident of the village of Kufr Qallil, nearby Nablus, West Bank).

[36] Israel's zoning law dates back to 1942 when the British declared most of the West Bank agricultural land, which the Israeli Occupying Forces later declared "state land." The construction of property on this "state land" requires a permit in Area C, which composes 70% of the West Bank. B'Tselem, "Demolishing Peace: Israel's Policy of Mass Demolition of Palestinian Houses in the West Bank," September 1997.
[37] Amnesty International Index, "Israel: House demolitions — Palestinians given 15 minutes to leave…"8 December,1999, available at http://web.amnesty.org/library/Index/ENGMDE150781999?open&of=ENG-ISR.

In an attempt to limit the number of Palestinians, since 1967, Israel's complex and sophisticated administrative planning, zoning, and housing system has discriminatorily denied Palestinians essential permits to build new homes,[38] thereby leading to the underdevelopment of their communities. Unable to obtain permits to build on their lands, thousands of Palestinians continue to have little choice but to build "illegally."

The implications of the strict permit system and subsequent house demolitions continues to be particularly severe in overcrowded East Jerusalem,[39] where Israel's discriminatory zoning policy reflects Israel's sentiments that allowing for new homes in Arab neighborhoods would mean bring about an undesired increase in the Palestinian population in the city.[40] According to Al-Haq's statistics, in 2004, 133 houses were demolished in the West Bank alone for lack of licence, with the highest numbers of demolitions taking place in East Jerusalem and Hebron respectively.[41]

> We have been living in the Qalandiya area, in the industrial area of 'Atarot, for the past 30 years. Currently five families reside on the land on which we live, including our own. Fifteen years ago, my sister Sahar also started building a house that is 100 metres square on the same piece of land next to us, so that she, her husband, our mother, and her two sons can live there. Prior to the completion of the house, on 15 June 2004, inspection staff from the Jerusalem [Israeli] municipality came to the house and handed us a demolition order. This was after various Israeli occupying forces besieged her home, and it was broken into and stripped of its furniture, most of which was broken while the movers were moving it outside the house. During the demolition, a quarrel erupted with the soldiers who then started beating my siblings and my sons, and within minutes the house turned into a rubble of cement and iron.As a result, my sister hired a lawyer and went to inquire at the municipality where she was fined NIS 10,000 for building without a permit. Although she paid this amount over the years, it soon became apparent that paying the fine would not spare her house from getting demolished. At the same time, and we were denied a permit, on the grounds that the land was confiscated and that it was illegal to build there. My sister continued to fight the case in court, as she had had devoted all her savings from the continuous work she has been doing for 15 years to build this house.
>
> **Extracts from Al-Haq Affidavit No. 1940/2004**
> Given by: Misbah Muhammad Abu al-Mfalfal, (Resident of East Jerusalem, West Bank).

[38] See Rishmawi, Mona, Planning in Whose Interest: Land Use Planning as a Strategy for Judaization", Al-Haq *Occasional Paper* No. 4, December 1986 and Coon, Anthony, *Town Planning Under Military Occupation: An Examination of the Law and Practice of Town Planning in the Occupied West Bank*, Al-Haq, 1992.

[39] In 1998 then Mayor Ehud Olmert declared that 2,600 Palestinian homes had been built illegally in East Jerusalem, and subsequently embarked on a house demolition campaign. See Imseis, Ardi, "Facts on the Ground: An Examination of Israeli Municipal Policy in East Jerusalem," 15, *American University International Law Review,* 1039, 2000 and Muhaisen, Muna, "Preempting Jerusalem," *Jerusalem Quarterly File*, Issue 3, 1999, http://www.jqf-jerusalem.org/journal/1999/jqf3/muhaisen.html.

[40] Cheshin, Amir and Ari Melamed, *From Separate and Unequal: The Inside Story of Israeli Rule in East Jerusalem*, Harvard University Press, 2003.

[41] According to Al-Haq's statistics, in 2004 60 were demolished in East Jerusalem and 34 in Hebron.

The recent construction of the Annexation Wall has been used by the Israeli authorities as a further pretext for the destruction of Palestinian homes, allowing for more confiscation of land. The construction of the Wall has led to the destruction not only of houses on the planned route, but also of homes near the route, and the confiscation of land and homes caught on the western side of the Wall.[42]

C. DEMOLITIONS AS A RESULT OF LARGE SCALE ISRAELI MILITARY OPERATIONS

Since the beginning of the current *intifada*, the Israeli military has also stepped up its implementation of its harsh policy house demolition in the OPT during military incursions and clearing operations. One of the heaviest military incursions into the West Bank, since the start of the current *intifada* in 2000, took place in the refugee camp of Jenin in April 2002. In addition, as Human Rights Watch noted in its report, following an investigative mission to the camp,

> The presence of armed Palestinian militants inside the camp, and the preparations made by those armed Palestinian militants in anticipation of the [Israeli Defence Forces] IDF [sic] incursion does not detract from an essential fact: Jenin refugee camp was also home to more than 14,000 Palestinian civilians.[43]

It also "does not detract from the IDF's [sic] obligation under international humanitarian law to take all feasible precautions to avoid harm to civilians."[44]

As in Jenin, during house demolitions taking place within the larger context of military operations or incursions, Israeli occupying forces fail to give adequate warning to inhabitants that their home is about to be destroyed. Often, as little as 15 minutes is allowed for residents to remove all their belongings from the house that is about to be demolished. All too often, this leaves them with enough time to take only their papers and money out. In the majority of cases no prior warning is given. For example, as one report indicates, since the beginning of the current *intifada*, Israeli occupying forces gave prior warning in only 3% of all cases of house demolition,[45] thereby suggesting that they are carried out in an arbitrary and indiscriminate manner.

Since 2000, Israel's policy of house demolitions during heavy military operations manifested itself in one of the most densely-populated areas in the world namely the Gaza Strip, especially along the border between the Strip and Egypt. To "secure" this area, Israel's policy of house demolition has been systematic, and has involved the conduct of numerous military incursions into the area.

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[42] Amnesty International, *Under the Rubble*, *supra* note 15.
[43] The investigative mission took place from April 19-28, 2002. See Human Rights Watch, *supra note* 5, page 3, available at http://hrw.org/reports/2002/israel3/.
[44] *Ibid*.
[45] Amnesty International, *supra* note 15.

In addition to taking place in the majority of cases without prior warning,[46] patterns of destruction strongly suggest that homes were demolished regardless of the their specific threat, and in the absence of military necessity. In the Gaza Strip alone, it is estimated that since the beginning of the current *intifada*, 2,442 houses have been totally demolished, while another 3,531 were partially damaged.[47] According to the UN Office for the Coordination of Humanitarian Affairs (OCHA), between January and September 2004 alone, it is estimated that an average 120 houses were razed each month, thereby rendering an estimated 10,800 Palestinians homeless. Hundreds more homes have also been partially destroyed.

Since September 2000, 1,497 buildings have also been demolished in Rafah, thereby affecting over 16,000 people – i.e. more than 10 per cent of the population of Rafah. [48] An analysis of events taking place in 2004, confirms the continuation, if not stepping up of this policy. For example, during "Operation Rainbow" in Rafah from 18 to 24 May 2004, Israeli occupying forces demolished or rendered uninhabitable hundreds of buildings. [49]

Israel contends that the purpose of its military operations is to find arms smuggling tunnels, [50] and has claimed that its actions are justifiable under the "absolute military necessity" exception to the basic principle in international humanitarian law prohibiting the destruction of civilian property during military operations. Nevertheless the manner and large number of homes demolished highlights the failure of Israeli military authorities at making the necessary balance between alleged security concerns and the respect for the human rights of the Palestinian civilian population, as required by international law.

As noted by the UN Special Rapporteur on Human Rights in the OPT, the "figures simply emphasize the disproportionate and excessive nature of Israel's actions in Rafah."[51] In the majority of cases, residential homes are demolished without proving that these individual homes must be demolished in order to destroy smuggling tunnels. Following an in-depth investigation of the mass demolitions in the Gaza Strip, particularly in the refugee camp and city of Rafah in 2004, Human Rights Watch reported that,

> The IDF [sic] has consistently exaggerated and mischaracterized the threat from smuggling tunnels to justify the demolition of homes ... the [IDF] [sic] has failed to explain why

[46] This was confirmed by Deputy Military Commander Colonel Shuki Rinsky who claimed that "'if there will continue to be a danger to soldiers, we will continue to destroy houses without giving prior warning." See Yoaz, Yuval, and Arnon Regular, "Court Rejects Petition to Prevent Further Rafah Demolitions," *Haaretz*, 16 May 2004.

[47] Al Mezan Center for Human Rights, "Statistics for Home Demolitions from 2000 to September 2004." See http://www.mezan.org/site_en/statistics/home_demolitions.php.

[48] *Ibid*.

[49] *Ibid*.

[50] According to the report of one international human rights organization, Israel "has greatly exaggerated the number of actual tunnels as a pretext to justify home demolitions." See Human Rights Watch, "Israel: Reject Plan to Demolish Gaza Homes", 23 January 2005, http://www.hrw.org/english/docs/2005/01/22/isrlpa10051.htm.

[51] See Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, *supra* note 26, paragraph 12.

> nondestructive means for detecting and neutralizing tunnels employed in places like the Mexico-United States border and the Korean demilitarized zone (DMZ) cannot be used along the Rafah border. Moreover, it has at times dealt with tunnels in a puzzlingly ineffective manner that is inconsistent with the supposed gravity of this longstanding threat.[52]

In addition, despite Israel's announcement that it will withdraw unilaterally from Gaza, provisions of the Disengagement Plan,[53] statements by Israeli military officials and its practices on the ground, all indicate that Israel is seeking to establish a new reality by widening the buffer zone along the Israeli-controlled border between the Gaza Strip and Egypt, in order to facilitate long term control over the Strip. Far from responding to immediate security concerns, Israel's policy of house demolitions constitutes a violation of international law.[54]

Nevertheless the refugee camp and area of Rafah are not alone in the Gaza Strip to have suffered from incursions by Israeli occupying forces during 2004. On 8 July 2004, Israel continued a wide scale offensive on the northern Gaza Strip town of Beit Hanoun which had started on 28 June 2004. During the operation, at least 30 Palestinian houses were totally demolished leaving 250 people (44 families) homeless. Several other houses were also severely damaged.[55] Shortly afterwards, in October 2004, Israel conducted one of its most severe military operation into the Jabaliya refugee camp, which accommodates some 120,000 people in an area of less than 2 kilometres. Israel demolished 91 homes and damaged a 101houses. During the operation, Caterpillar bulldozers ripped up roads and dug trenches, damaging around 12,000 m^2 of road. Water, sewage and electricity networks were also damaged and acres of farmland destroyed in a scorched earth offensive."[56]

III. INTERNATIONAL LAW AND PROPERTY DESTRUCTION

A. INTERNATIONAL HUMANITARIAN LAW

The Israeli policy of extensive property destruction, including house demolitions, violates the fundamental principles of international humanitarian law, most notably the principles of necessity, distinction and proportionality, in addition to the obligation of having to treat civilians at all times with humanity.

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[52] Human Rights Watch, *Razing Rafah: Mass Home Demolitions in the Gaza Strip*, October 2004, http://www.hrw.org/reports/2004/rafah1004.

[53] Article 6 of Appendix A of the plan states that "the physical widening of the route where the military activity will take place, may be necessary in certain areas." See Prime Minister Ariel Sharon's Disengagement Plan, available at http://www.shamar.org/emet/documents/sharon_disengagement_05282004.htm.

[54] See further below.

[55] Palestinian Center for Human Right (PCHR), "7 Palestinians killed in Beit Hanoun and 40 Houses Destroyed in Khan Yunis," (Ref 106/2004), 8 July 2004, www.pchr.org.

[56] See Report of the Special Rapporteur of the Commission on Human Rights John Dugard, *supra* note 26.

1. ON MILITARY NECESSITY

To justify its policy of house demolitions during military operations, Israeli military authorities have relied upon the "absolute military necessity" exception to the basic principle in international humanitarian law, prohibiting the destruction of civilian objects during such operations. Nevertheless, as one international human rights organization noted in its report, "the [IDF]'s expansive notion of security erodes the spirit of international humanitarian law, and is a recipe for ongoing demolitions."[57]

In international law, the circumstances in which civilian property may be destroyed during military operations under the "military necessity" exception are narrowly and precisely defined. In this regard, Article 53 of the Fourth Geneva Convention states that

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the state , or to other public authorities , or to social or cooperative organizations , is prohibited , except where such destruction is rendered absolutely necessary by military operations.

According to the official Commentary of the International Committee of the Red Cross (ICRC), "military operation," means "the movements, manoeuvres, and actions of any sort, carried out by the armed forces with a view to combat."[58] Therefore, "the destruction of property as a general security measure is prohibited." [59]

International law also grants special protection to certain objects such as cultural objects. According to Article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, they include movable or immovable property of great cultural importance and centres containing a large amount of cultural property. While Article 4 of this Convention permits that the general protection to cultural property can be waived where "military necessity imperatively requires such waiver," special protection may be withdrawn only in exceptional cases of unavoidable military necessity. The occupying powers have also similar duties.

In the case of the overwhelming majority of Israel's home demolition operations, the extensive scale of these operations invalidate its recourse to the justification of "absolute military necessity."

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[57] *Ibid.*

[58] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Yves, Swinarski, Christophe and Bruno Zimmermann (eds.), International Committee of the Red Cross (ICRC), Martinus Nijhoff Pyublishers, 1987, paragraph 2191.

[59] ICRC, "ICRC Deeply Concerned Over House Destructions in Rafah," *Press Release,* 18 May 2004.

2. THE DISTINCTION BETWEEN CIVILIAN AND MILITARY OBJECTIVES

Civilian objects include not just property owned by individuals, but that of municipalities, religious and charitable institutions, and educational facilities. In this regard, an essential distinction must be drawn between civilians and civilian objects on one hand, and combatants and military targets on the other. Established by state practice as a norm of customary international law, this principle has been set forth in Article 51(4) of the First Additional Protocol to the Fourth Geneva Convention, and prohibits any form of indiscriminate attacks, whether offensive or defensive.[60] Therefore civilian property can be legitimately demolished if it is being used for military purposes, and only when the military risk it presents is immediate and absolute. Thus civilian property demolition must not be used at the army's convenience to justify protection against potential attacks on Israeli soldiers or settlers.

In addition, under customary international law, a military commander must do everything feasible to verify that targets are military objectives. In cases of ambiguity as to whether a civilian property is being used for military purposes, it is incumbent on an army to consider it as a civilian object, and accordingly not to demolish it. Even if a number of distinct military objectives are located in an area containing a concentration of civilians or civilian objects, they may not be the subject of a single area attack. [61]

3. THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality has been established by state practice as a fundamental rule of customary international law, [62] and is codified in Article 51 (5)(b) of Additional Protocol One, which states that

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

In this regard, the ICRC Commentary states that the advantage must be substantial and relatively close, and that advantages which are hardly perceptible and *those which would only appear in the long term* [emphasis added] should be disregarded.[63] Moreover, military authorities

> *Must do everything feasible to cancel or suspend an attack* [emphasis added] if it becomes apparent that the target is not a military objective or that the attack may

[60] ICRC, *Customary International Humanitarian Law*, Volume I: Rules, Jean Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, UK, 2005.
[61] These attacks are considered indiscriminate, and are therefore prohibited. See Article 51(5) of Additional Protocol One to the Four Geneva Conventions, reflective of customary international law.
[62] ICRC, *Customary International Humanitarian Law, supra* note 60.
[63] *ICRC Commentary on the Additional Protocols, supra* note 58, paragraph 2209.

> be expected to cause…damage to civilian objects… which would be excessive in relation to the anticipated military advantage.[64]

Nevertheless, Israeli actions in the OPT have resulted in attacks against and destruction of public and private civilian property that serves no concrete military purpose, and fails to uphold the principle of distinction and proportionality, including during the current *intifada*.

4. PROHIBITION OF COLLECTIVE PUNISHMENT AND REPRISALS

Collective punishment and reprisals are thematically intertwined with each other, and the latter can best be described as the logical "sequitur" of the former.[65] The ICRC Commentary defines collective punishment as "penalties of any kind inflicted on persons or entire groups of persons ….for acts that these persons have not committed." [66] Reprisals are defined as "acts otherwise prohibited by the laws of war which can be taken exceptionally for the purpose of compelling the enemy to discontinue illegitimate acts of warfare." [67]

Article 33 of the Fourth Geneva Convention lays an absolute prohibition against taking any measures of collective punishment, intimidation or reprisal against civilian persons in occupied territories by stipulating that,

> *No protected person* [emphasis added] may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or terrorism are prohibited….Reprisals against protected persons and their property are prohibited.

A similar prohibition is upheld in Article 50 of the Hague Regulations, which outlaws the imposition of penalties on persons who cannot be regarded as "jointly and severally responsible" for the acts for which the penalty is applied.

In the West Bank and Gaza Strip, the policy of demolishing property, particularly residential homes frequently take place after the "wanted" individual has been killed, against buildings in which the perpetrator did not reside,[68] or against his family, thereby making this policy among

[64] Article 57 (2)(b) of Additional Protocol One, reflective of customary international law. *See ICRC, Customary International Humanitarian Law , supra* note 59.

[65] Welchmann, Lynn, "A Thousand and One Homes: Israel's Demolition and Sealing of Houses in the Occupied Palestinian Territories," *Occasional Paper* No. 11, Al-Haq, 1993, page 29.

[66] See *The Geneva Conventions of 12 August 1949, Commentary-Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Pictet, Jean S. (ed.), ICRC, 1958, page 225.

[67] *Ibid*, page 228.Thus when a belligerent party is hurt by conduct on the part of its adversary that it considers to be a violation of international law, it retaliates by means of an action involving the use of force that violates the same body of law. See Kalshoven, Frits, "Reprisal," *Crimes of War: What the Public Should Know*, Roy Gutman and David Rieff (eds.), Norton and Company Inc., New York, USA, 1999.

[68] In the vast majority of house demolitions, the person because of whom the house was demolished no longer lived in the house, either because he was "wanted" by Israel and was in hiding, or because he was being detained, or killed in the attack. See B'Tselem "Punitive House Demolitions from the Perspective of International Law," www.btselem.org.

> the most widespread measures of collective punishment adopted by Israel against the Palestinian civilian population.

The fact that in the majority of cases, the main victims of the demolitions are family members such as women, the elderly, and children, who have not been involved in any offence, and therefore can not be held responsible for the acts of their relative, indicates that these actions amount in such instances to measures of collective punishment or measures of intimidation, expressly prohibited under customary and conventional international law.

In the past, Al-Haq has argued that Israel's policy of property destruction constitutes "a reprisal in intent."[69] In this regard, since they "usually can not be directed against those persons on the adverse side who are responsible for the unlawful conduct," they tend mainly to affect people who are 'innocent' of that conduct.[70] Similarly, the ICRC Commentary reiterates that, "reprisals constituted a collective penalty bearing on those who least deserved it."[71]

Even in the cases where Israel has claimed self defense, in the majority of cases involving extensive property destruction, Israel's arguments would fail to fulfil the pre-conditions under international law for lawful action in self defence, namely of "immediacy of danger posed to the state," and the "lack of alternative means."[72]

Furthermore, Israel often carries out military operations that result in large-scale and indiscriminate destruction of civilian property, including homes, following the targeting of Israeli civilian or military targets which may in some cases amount to a retaliatory action or reprisals.[73] For example, during Israel's incursions into the Rafah Refugee camp in 2004, civilian properties were demolished by Israeli forces even where there were attacks or armed confrontations, or after they had ended. In other instances, most notably following attacks against civilian targets inside Israel, houses were demolished on the pretext of acts carried out by persons who had already been killed. As a result demolitions do not take place in a context of hostilities "with a view to combat," and are not connected to actual fighting, thereby failing to fulfill the requirement of military necessity.

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[69] See Playfair, Emma, "Demolition and Sealing of Houses as a Punitive Measure in the Israeli-Occupied West Bank," *Occasional Paper* No.5, Al-Haq, 1987, page 11.

[70] *ICRC Commentary*, *supra* note 66, page 309.

[71] *Ibid*, page 228.

[72] The US Secretary of State asserted that a country claiming such a right must "show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation...[the act of self-defence must also involve] nothing unreasonable or excessive." See the *Caroline Case* cited in *Cases and Materials on International Law*, D.J.Harris (ed.), Fifth Edition, Sweet and Maxwell Limited, London 1998, page 895.

[73] In the international law on the use of force *(Jus ad Bellum)*, reprisals are counter-measures which are illegal acts that are rendered lawful in response to a prior illegal act. Under international law, "reprisals that involve the use of armed force are prohibited by virtue of Article 2(4) of the UN Charter." See *ibid*, page 13.

5. GRAVE BREACHES

Under Article 146 of the Fourth Geneva Convention, house demolition is an international crime. Furthermore, according to Article 147 of the same Convention, the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," is deemed to be a grave breach of the Convention, and as such a war crime within the jurisdiction of the International Criminal Court.[74] The serious consequences arising mandate the High Contracting Parties to the Fourth Geneva Convention to invoke mandatory universal jurisdiction to ensure that those responsible for such breaches are tried. Since Israeli Area Commanders are the ones who sign demolition orders, Israel's house demolition policy is an example of a grave breach where responsibility can be traced to persons at the top of the Israeli military command.[75]

In the *Prosecutor v. Blaskic*, the *Prosecutor v. Kordic*, and the *Prosecutor v. Naletilic*, cases, the International Criminal Tribunal for the Former Yugoslavia (ICTY) rejected the "military necessity" defence argument for the extensive destruction and appropriation of personal and public property, and convicted and indicted politicians and high-ranking military commanders for it. [76]

B. INTERNATIONAL HUMAN RIGHTS LAW

1. CIVIL AND POLITICAL RIGHTS

Property destruction, including punitive house demolitions violate several fundamental provisions of international human rights law. Several provisions in the International Covenant on Civil and Political Rights (ICCPR) such as the rights not to be arbitrarily deprived of one's property and the right not to be subjected to arbitrary interference with one's privacy, family, home or correspondence are breached by Israeli policy.

Moreover, in the absence of precise charges and open evidence in many cases, the use of property destruction amounts to extra-judicial punishment. Article 14 of the ICCPR states that a penal sanction may be imposed only after a fair and public hearing at which an accused has the right to be informed promptly of the nature of the charge, and has an opportunity to defend himself. As Al-Haq's documentation points out, Israeli authorities implement this policy even when the accused was still under interrogation or was a "wanted" individual that had not been arrested yet. This contravenes the fundamental principle of justice and the presumption of innocence. [77]

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[74] Article 8(2)(a)(iv) of the Rome Statute.

[75] Welchmann, *supra* note 65.

[76] All received a sentence ranging between 15 and 45 years. See Prosecutor v. *Dario Kordic and Mario Cerkez*, ICTY, February 26, 2001), paragraph 808; *Prosecutor v. Mladen Naletilic, aka "Tuta" and Vinko Martinovic, aka "Stela"* ICTY, (Case no. IT-98-34-T, March 31, 2003) paragraph 227.

[77] Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) reiterates that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

In 2003, the UN Human Rights Committee (HRC) called upon Israel to cease forthwith the practice of property destruction and home demolition in the OPT, and reiterated that,

> The demolition of property and houses of families some of whose members were or are suspected of involvement in terrorist activities or suicide bombings contravenes the obligation of the State party to ensure equality of all persons before the law and equal protection of the law.[78]

In addition, the right of each individual not to be "subjected to torture or to cruel, inhuman or degrading treatment or punishment" is a fundamental right from which no derogation is permissible under any circumstances. In its 2003 Concluding Observations, the UN HRC urged Israel more generally to review its recourse to the "necessity defence" argument, and deplored "what it considers to be the partly punitive nature of the demolition of property and homes" in the OPT.[79] In addition, it noted with concern that the unnecessary destruction of private property "contravenes obligations of the State party relating to private property and residence, and amounts to torture or cruel and inhuman treatment."[80] This reiterated the earlier Concluding Observations of the UN Committee Against Torture which stated that "Israeli policies on house demolitions may, in certain instances, amount to cruel, inhuman or degrading treatment or punishment."[81]

2. ECONOMIC AND SOCIAL RIGHTS

Israel's practice of property destruction violates also fundamental economic and social rights, including the right to an adequate standard of living and the right to adequate housing, under Article 11(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR). The ICESCR further states that "in no case may a people be deprived of its own means of subsistence," and reiterates that no state, group or person has the right "to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein…." In this regard, the Committee on Economic, Social and Cultural Rights (CESCR) reiterated in 2003

> Its grave concern about the continuing practices by the State party of home demolitions [and] land confiscations…and its adoption of policies resulting in substandard housing and living conditions…of Palestinians in East Jerusalem."[82]

It also urged the State party to cease the practices of "expropriating land, water and resources, demolishing houses and carrying out arbitrary evictions."[83]

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[78] HRC, *Concluding Observations: Israel*, (CCPR/CO/78/ISR), 21 August, 2003.
[79] *Ibid*.
[80] *Ibid*.
[81] The Committee Against Torture, *Conclusions and Recommendations: Israel*, 23 November, 2001, (CAT/C/XXVII/Concl.5.), 12-23 November 2001, paragraph 6(j).
[82] CESCR, *Concluding Observations: Israel*, (E/C.12/1/Add.90), 5-23 May 2003, paragraph 26.
[83] *Ibid*, paragraph 42.

IV. ISRAELI CASE LAW

In considering Palestinian claims regarding Israel's house demolition policy, the Israeli High Court "fell into a pattern compatible with the policies of the military authorities."[84] Although it has heard cases concerning house demolitions for decades, in the vast majority of these cases, the High Court of Justice has dismissed the petitions and effectively accepted the state's arguments, thereby legitimizing this practice.

In force in the OPT since 1967, and despite their illegality, the Israeli High Court has refused to invalidate the application by Israeli military authorities of the British Defence Regulations, to justify many of its home demolitions. Moreover, the court asserted that principles of international law do not apply to a measure based on local laws, [85] in clear contradiction of Israel's international legal obligations.[86]

In addition, although, the Israeli High Court of Justice held in 1989 that, family must be allowed to petition before the house is demolished,[87] a review of the rulings of the Court indicates that it has nevertheless failed to provide Palestinians an adequate means of redress in response to the fundamental violation of house demolitions.

In many cases, the sanction of property destruction has been imposed before a suspected person is convicted of a crime. [88] Although the court established in 1988 the principle that Palestinians can object to the demolition or sealing of their homes before the order is carried out,[89] and may only be denied "when "military operations are irreconcilable with the conditions of time and place" such as during military operations.[90]

Nevertheless, an overview of the cases in front of the court indicates that it continued to uphold the extra-judicial nature of the penalty.[91] In addition, the Court has traditionally refrained from interfering in the decisions of a military commander made under the authority vested in him by Emergency Regulation 119, and has confined itself instead to examining whether, based on the facts, the Military Commander duly exercised the discretion afforded to him.[92]

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[84] Ayoub, Nizar, *supra* note 33, page 107.

[85] *Jab'r v. IDF Commander O.C. Central Command and Minister of Defence*, HCJ 897/86, 1986.

[86] As noted in Article 27 of the Vienna Convention on the Law of Treaties, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." As such, Israeli reliance on local law does not justify its violations of its international legal obligations.

[87] In the case of house demolitions, a demolition order allows for a thirty days right of appeal to the Local Planning Subcommittee, and if the Subcommittee rejects the appeal, the only legal remedy left is to petition the Israeli High Court. See B'Tselem, "Demolishing Peace," *supra* note 36.

[88] *Khamri v. Commander of the West Bank,* HCJ 361/82, 1982.

[89] *The Association for Civil Rights in Israel v. Officer Commanding Central Command*, HCJ 358/88, 1988.

[90] *Ibid*, paragraph 529.

[91] *Karabsa v. Minister of Defence et al*, HCJ 2665/90,1990.

[92] See for example *Nasman, et al v. Military Commander of the Gaza Strip*, HJC 802/89,1989.

In the 1990s, the Court expanded the aforementioned exception by holding that the right to judicial review can be denied in the interest of maintaining order and security, and preventing danger to human life.[93] Following the beginning of the current *intifada* in 2000, Israeli authorities began demolishing houses without giving prior notice, most notably during its heavy military incursions into the OPT in 2002. Nevertheless, the Court continued to uphold the state's argument that there it is not obliged to grant affected Palestinians the prior notification where this would potentially undermine the success of military operations. In this regard it identified three instances where exceptions can be made: where there is a military necessity for a demolition to be carried out; where not carrying out a demolition would present an immediate danger to soldiers' lives or where it would obstruct a military operation.[94] More dangerously, it maintained that the authority to determine such cases rests with the Israeli military authorities.[95] To date, the High Court has stated in the majority of cases that house demolition of Palestinians conforms to the British Defence Regulations and refuses to challenge their legality.[96]

Even during the hearing for a petition filed during the 2002 "Operation Defensive Shield," in which the state acknowledged," that the demolition of several houses had begun while the residents remained inside, the Court refused to challenge the decision of Israeli military authorities, stating that,

> *Presumably* [emphasis added] - and [since] no arguments to the contrary have been presented to us - instructed and will instruct the fighting forces to do all that is needed to avoid the possibility of causing unnecessary harm to the innocent.[97]

It then dismissed the petition. This effectively removed the right of affected persons to due process in situations where a military commander so demands it, and conflicts with the fundamental rule that criminal responsibility is personal, and that punishment may only be inflicted on the offender after due process of law.

Although the High Court has in the past acknowledged that house demolitions punish innocent persons for acts they did not commit,[98] it has held that the military commander's authority to demolish or seal parts of a house continues to apply in circumstances where it is not owned or used by the suspect, but by others, including in cases where there was no evidence that the latter participated in the suspects' actions, encouraged him, or were aware of his activity.[99]

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[93] *The Association for Civil Rights in Israel v. Officer Commanding Southern Command*, HCJ 4112/90,1990.
[94], *Amer et al. v Military Commander of the West Bank*, HCJ 6696/02, August 2002. .
[95] *Ibid*.
[96] J*animat v. OC Central Command Major General Uzi Dayan*, HCJ 2006/97, 1997. The use of the Defence Emergency Regulations has been challenged by Palestinian and Israeli human rights organizations, including Al-Haq. Israel continues to invoke them as part of local laws, despite the fact that these Regulations were explicitly revoked by the British government. For more information, see Chapter on "the Legal Framework Governing the Occupied Palestinian Territories" in this report.
[97] *Adalah et al. v. Military Commander of the West Bank*, HCJ 2977/02, 2002.
[98] Daghlas *et al. V. Military Commander of the West Bank*, HCJ 698/85,1985.
[99] *Almarin v. IDF Commander in Gaza Strip*, HCJ 2722/92, 1992.

While the Court has argued that house demolitions were mainly intended as a preventative measure rather than as a punitive one,[100] even where it did acknowledge the punitive nature of this policy, it refused to acknowledge that house demolitions can amount to a form of collective punishment.[101] In this regard, the Court has claimed that the person intending to commit the crime, must be fully aware and responsible for the consequences that his or her actions will bring onto his family and that "his criminal acts will not only hurt him, but are apt to cause great suffering to his family."[102] Furthermore, the court endorsed the notion that the practice of house demolition was justifiable as a deterrent,

> So that they may see and learn that by their criminal acts, they not only harm individuals, endanger public safety and incur severe punishment on themselves, but also bring hardship to the members of their households.[103]

In the past the High Court of Justice refused to question the effectiveness of this policy in deterring Palestinians from future armed attacks against Israeli targets, preferring instead to argue that a judge is "in no position to hold positively that refraining from demolishing the houses …will not encourage potential candidates to overcome their final hesitation about taking part in such attacks."[104]

V. CONCLUSION

Since the beginning of the current *intifada*, Israel has carried out repeated and large scale destructions of private and public property in the OPT, including the demolition of houses and destructions of acres of agricultural land in the OPT, thereby leaving thousands of homeless or without their source of livelihood. Despite its attempts to justify these actions on the grounds of military necessity or self defence, Israel's pursuit of this policy constitutes a flagrant abuse of the governing rules and standards of international human rights and humanitarian law. It also amounts to a selective application of rights granted to it as an occupant by international law.

In many instances, most notably house demolitions, such destruction represents a form of collective punishment, whereby members of the Palestinian civilian population are punished in the majority of cases for acts they did not commit. This policy continues to exact a heavy material and social toll from Palestinians in the OPT, and causes further deterioration in living conditions and loss in income for already destitute communities.

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[100] Kretzmer, David, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, 2002.

[101] *Daghlas et al. v Military Commander of the West Bank, supra* note 97.

[102] *Ibid*. at paragraph 3.

[103] *Hizran et al v. The Commander of the IDF in Judea and Samaria*, HCJ 5359/91, paragraph 5.

[104] *Nazaal v. IDF Commander*, HCJ 6026/941994, paragraph 349.

Moreover, the right of Palestinians to challenge the decisions of the Israeli military has been severely undermined. Difficulties in getting redress are compounded by the fact that the Israeli High Court of Justice has in the majority of cases refrained from challenging the Israeli military authorities' contention that such measures are justifiable under the principle of military necessity, thereby interpreting the law in favour of the authorities.[105]

In 2004, it was reported that Israeli Chief of Staff has demanded an inquiry into the effectiveness of house demolitions as a deterrent. However this will address just one form of this violation, namely that of punitive house demolitions, leaving open the option of demolishing Palestinian's homes for administrative reasons or in the course of clearing operations. As a result, even if the demolition of houses as a punishment or as a deterrent will cease, the policy will likely to continue in its other forms. Sadly, Israel's halting of this particular form of house demolition derives from a purely tactical evaluation of effectiveness, and does not stem from an acceptance of its illegality under international law. It also leaves open the option for resumption, should it at some point be the assessment of the military regarding the potential effectiveness of this policy change in the future.[106]

In this regard, it is worth noting that in May 2004, Al-Haq, together with the Gaza-based Palestinian Center for Human Rights and Adalah, a Palestinian human rights organization inside Israel, filed a petition asking the Court to define, for the first time, the legal parameters of the term "absolute military necessity," in accordance with international humanitarian law.[107] In addition, the petitioners argued that the Israeli military have grossly violated the exception of "absolute military necessity," and have invoked it only as a pretext for executing what in the majority of cases prove to be extensive and large scale home demolitions in the OPT, that amount to grave breaches of the Fourth Geneva Convention, which are war crimes also.

Despite their verbal condemnations of various of these measures of demolition by the international community, the systematic resort to this policy by Israel in the West Bank and Gaza Strip continues to leave Palestinian homes, property and livelihoods at the mercy of the Occupying Power as it pursues its own political agenda in the OPT . An analysis of the judgments rendered by the Israeli High Court regarding petitions challenging this policy, indicate that the court continues

[105] For more information on the rulings of the Israeli High Court since the beginning of the current *intifada*, see Ayoub, Nizar, *supra* note 33.

[106] In February 2005, Israel's Defence Minister ordered an end to the policy of demolishing the houses of Palestinians allegedly involved in attacks against Israeli targets based on the conclusions of the panel that this policy has proved to be ineffective in deterring future attacks. "Israel Ends Demolition of Palestinian Houses," Associated Press, 2 February 2005, available on www.standwithus.com/news.

[107], *Adalah, et. al. v. Moshe Kaplinski, IDF Major General Central Command, et. al.* (case pending). HCJ 4969/04, 2004. Petition which is available on www.adalah.org draws on extensive fieldwork and documentation by local and international human rights organizations and UN agencies, which demonstrate that house demolitions operations carried out by Israeli military authorities fail to meet the requirement of "absolute military necessity." By the end of 2004, the case is still pending. For more information regarding the developments of the case, see The Legal Center for Arab Minority Rights in Israel (Adalah), "The Israeli Amry's Exploitation of the "Absolute Military Necessity" Exception to Justify its Policy of Home Demolitions in the 1967 Occupied Palestinian Territories," *Briefing Paper*, October 2004.

its policy of refusing to consider Palestinian cases in accordance with international law, choosing instead to adopt the claims of the Israeli government and to find "legal" justifications for them.[108] The absence of an effective restraining role by the Court on Israel's military's decision, coupled with the lack of effective action by the High Contracting Parties to the Fourth Geneva Convention, highlights one of the biggest challenges facing international law today, namely that of enforcement.

[108] Ayoub, Nizar, *supra* note 33.

SETTLEMENTS AND SETTLER VIOLENCE

Israeli Settlement of Pisgat Ze'ev built on Confiscated Land of the Palestinian Village of Hizma in the West Bank
(Maureen Clare Murphy, 2005)

SETTLEMENTS AND SETTLER VIOLENCE

> Everybody has to move, run and grab as many hilltops as they can to enlarge the settlements because everything we take now will stay ours... Everything we don't take will go to them.
>
> Ariel Sharon, Israeli Foreign Minister, addressing a meeting of the Tsomet Party, Agence France Presse, November 15, 1998.

I. OVERVIEW

The creation of Israeli settlements in the Occupied Palestinian Territories (OPT) aims to incorporate into Israel all – or as much as possible – of the land recognised under international law as territory on which the Palestinian people is entitled to exercise its right to self-determination. Defying the law, Israel thus creates "facts on the ground" that it hopes to benefit from in case of a final status agreement with the Palestinians. The settlement policy also serves to control natural resources, notably land and water; encourage Palestinians to depart from the land by making their life there difficult; and prevent the emergence of a viable Palestinian state by fractioning the territorial contiguity of the OPT.

The history of settlements in the OPT begins in September 1967, only months after the Six-Day war. Initially the dominant official justification for the creation and the placement of settlements was to redraw the borders of Israel in order to make them easier to defend. But within a few years, and notably under the influence of the Israeli religious right-wing movement Gush Emunim established in 1974 and the right-wing Likud party that came to power in 1977, the emphasis shifted to creating settlements throughout the OPT in order to control and take over the land. From the beginning East Jerusalem received separate treatment in an outright policy of de facto annexation, intense colonisation and separation from the rest of the West Bank. Every Israeli government since 1967 has actively pursued the settlement policies, including during the years of the Oslo Accords (1993-2000).[1] Indeed, settlement activity intensified during this period and the number of settlers increased by more than 50%, except in the already intensely colonised East Jerusalem where the increase was approximately 20%.[2]

Initially, most settlements were established in the Jordan valley in the eastern part of the West Bank. They are mainly agricultural and are not among the most populated ones. A second line of settlements run north-south along the mountain range, in the heart of the most densely populated

[1] From 1994-2000, Israel confiscated approximately 35,000 acres of land in the West Bank to construct an estimated 250 miles of settler by-pass roads and settlements. See World Bank, "Long-Term Policy Options for the Palestinian Economy," July 2002.

[2] On the history of the settlement policies, see B'Tselem, *Land Grab – Israel's Settlement Policy in the West Bank*, 2002, pages 11-17; Aronson, G., *Creating Facts: Israel, Palestinians and the West Bank*, Hagerstown Bookbinding and Printing, USA, 1987, page 334.

Palestinian areas of the West Bank. Most of these settlements are found on hilltops that surround Palestinian cities and villages. They are situated and connected to each other and to Israel in a way that confines Palestinians into separated communities. Some settlements are located inside Palestinian cities, such as the Kiryat Arba' settlement in Hebron. A final group of settlements is situated in the western part of the West Bank, on fertile lands and in close proximity to jobs and services inside Israel. These settlements often straddle the Green Line and serve to erase it de facto. The intensive settlement around Jerusalem separates it physically from the rest of the West Bank. In the Gaza Strip, the settlement policy was not pursued as intensively and the few existing settlements are slated for evacuation under the current Disengagement Plan.[3]

Settlements are connected to each other and to Israel by an extensive network of "bypass roads" that were built after the signing of the Oslo Accords and are controlled by the Israeli occupying forces. The bypass roads, which confiscate even more Palestinian land and on which Palestinian movement is submitted to severe restrictions, serve to circumvent areas inhabited by Palestinians, often at a short distance from these. The bypass roads are surrounded by a buffer zone in which no Palestinian construction is allowed, and they increasingly isolate, and restrict the growth of, Palestinian residential areas.[4]

II. METHODS OF LAND CONFISCATION FOR SETTLEMENT EXPANSION

From the beginning of the occupation in 1967 until 1999, the Israeli authorities used a variety of approaches to confiscate an estimated 70% of the West Bank and 48% of the Gaza Strip.[5] This land has been principally used for settlement purposes. East Jerusalem, illegally considered by Israel to be a part of its territory, receives separate treatment by being subjected to Israeli law and British Mandate regulations. Within the rest of the OPT, settlements have overwhelmingly targeted the West Bank as opposed to the Gaza Strip. Consequently, the present examination of the legal methods of land confiscation will be limited to the West Bank.

A. REQUISITION OF PRIVATE LAND FOR "MILITARY NEEDS"

Ostensibly based on an exception in international humanitarian law authorising the Occupying Power to take temporary possession of private property for the needs of the army of occupation, Israel issued until 1979 dozens of military orders requisitioning private land in the OPT, much of which was subsequently used for civilian settlements. In 1979, the Israeli High Court of Justice ordered one settlement based on this method, Elon Moreh in the Nablus District, to be dismantled and the seized land to be returned to its owners.[6] Since then, this method has not been used for

[3] For more information on the Disengagement Plan, see the chapter on "The Occupied Palestinian Territories in 2004: The Political Framework."

[4] For more information on the bypass roads in 2004, see B'Tselem, *Forbidden Roads – Israel's Discriminatory Road Regime in the West Bank, 2004.*

[5] Al-Haq, *The Israeli Settlements from the Perspective of International Humanitarian Law*, 2000, page 14.

[6] *Dweikat (Mustafa)v. State of Israel et al.,* (The *Elon Moreh* Case), HCJ, 390/79, 22 October 1979.

establishing settlements. However, since 1994, it has continued to form the legal pretext for the construction of bypass roads that themselves service the settlements.

B. ABANDONED PROPERTY

Under Israeli Military Order No. 58, issued in 1967, if the owner or possessor of property in the West Bank has left the area, the land becomes "abandoned property." The Custodian of Abandoned Property, an Israeli body, is then empowered to take possession and regulate its use. The Custodian can also classify property as "abandoned" where the possessor or owner is unknown. Military Order No. 150, also issued in 1967, expanded the definition of "abandoned property" to include property belonging to residents of an enemy country, or to a corporation controlled by such residents. Technically, the Custodian only becomes the trustee of the property and not the owner. However, since Israel as a rule prohibits the return of refugees to the West Bank, this has so far made little practical difference. In any event, the Custodian transfers "abandoned" property to third parties for their permanent use. The law has also been used to gain possession of lands whose owner was present in the West Bank, based on a provision in Military Order No. 58 that validates land transactions by the Custodian as long as these were carried out in "good faith." Legal challenges against such transactions have almost invariably failed. Land in East Jerusalem falls under the separate legal regime of the Israeli Absentee Property Law of 14 March 1950.

C. DECLARATION OF LAND AS "STATE LAND"

Initially based on the Ottoman Land Law of 1858, Military Order No. 59, issued in 1967, authorised the seizure and taking possession of property registered in the name of the Jordanian government. Making liberal use of this method, Israel has declared about 40% of the West Bank to be "state land." Under this Order, the Custodian of Government Property is empowered to acquire possession of government property and control its use. Property certified as government property by the Custodian is deemed so unless otherwise proved, placing on land owners the burden of proof that the land is not state land, while a further provision validates land transactions by the Custodian as long as these were carried out in "good faith." Few legal challenges against applications of this provision have succeeded. By far most settlements, including Elon Moreh (in its new location, east of Nablus), have been constructed on the basis of this Military Order. In East Jerusalem, the body in charge of state land is the Israel Land Administration.

D. EXPROPRIATION FOR "PUBLIC PURPOSES"

Legally, this method is based on a Jordanian law amended by Israeli military orders. The fact that the land must in principle be used for a public purpose has somewhat limited the use of this method for obtaining land for Israeli settlements. Rather, it has been much used to secure land for the building of bypass roads. In and around East Jerusalem, the legal basis for expropriation has instead been a British mandatory order from 1943, integrated into Israeli legislation. More

than one-third of the Palestinian land illegally annexed to Jerusalem has been expropriated on this basis and overwhelmingly used for the establishment of settlements.

E. ENCOURAGING PRIVATE PURCHASE OF LAND

The Likud government that came to power in 1977 encouraged an additional method of taking control of Palestinian land by facilitating its private purchase. This method, based on Jordanian legislation amended by Israeli military orders, was used to facilitate private Israeli control over lands that could not be reached by other methods. There have been several cases of Palestinians made to sell their lands by being promised various permits or by being deceived into believing that the land would otherwise anyway be acquired for the expansion of a nearby Israeli settlement.[7]

III. SETTLEMENTS AND SETTLER VIOLENCE IN 2004

A. SETTLEMENT EXPANSION

According to the Palestinian Central Bureau of Statistics (PCBS), the number of settlers in the West Bank in 2004 reached approximately 425,000.[8] Estimates of the number of settlements in the OPT in 2004 ranged from approximately 150 to above 200, not counting around 100 outposts.[9] The so-called "outposts," actually embryonic settlements, appear - and sometimes disappear again - overnight, making it impossible to give any precise figures of their number. Settlement expansion in 2004 was carried out by a range of methods, including new construction plans, government incentive schemes, new land expropriations and rezoning of areas for settlement purposes, new tenders for the construction of settlement homes, new outposts, sales of housing units, and new settlers moving into homes.[10]

Government financing of new settlements and subsidies to existing ones continued. On 16 February 2004, the Knesset Finance Committee approved more than the equivalent of $11 million for constructing 200 housing units in the West Bank. On 5 May, an Israeli government auditor revealed that the Israeli Housing Ministry, then under Effi Eitam as the Minister of Housing, had spent more than $6 million on building outposts and expanding settlements in the West Bank over the past three years. In July, a new plan issued by Israeli Agriculture Minister Yisrael Katz was revealed. The plan offers financial incentives for the planting and care of 72,000 olive trees

[7] On these methods and their use, see B'Tselem, *supra* note 2, pages 47-63; Shehadeh, Raja, *The Law of the Land – Settlements and Land Issues under Israeli Military Occupation*, Palestinian Academic Society for the Study of International Affairs (PASSIA), Jerusalem, 1993, pages 58-78.

[8] PCBS, "Israeli Settlements in the West Bank and the Expansion of the Annexation Wall, March 2004," available at [http://www.pcbs.org/Settlements_Wall/Staistic.aspx].

[9] See, e.g. Foundation for Middle East Peace (FMEP), http://www.fmep.org. The discrepancies probably derive from different criteria for exactly what constitutes a settlement.

[10] The sources used in this section, unless otherwise indicated, are from FMEP, "Report on Israeli Settlement in the Occupied Territories," from Volume 14, No. 3, May 2004, until Volume 15, No. 2, April 2005 (www.fmep.org/reports).

on 2,500 dunums of land near settlements, with the goal of chipping away at the Palestinian control over their land. Katz also declared a similar plan to expropriate 31,200 dunums of agricultural land in the Jordan Valley, complete with incentives to draw Israeli Jews to the settlements.

New settler homes were announced in several waves. On 2 August 2004, the Israeli Defence Ministry announced the approval of 600 new housing units in the Ma'ale Adumim settlement, previously approved by Israeli Prime Minister Ariel Sharon and Defence Minister Shaul Mofaz. On 17 August 2004 the Israeli Ministry of Housing published tenders to build approximately 1,000 new houses in the West Bank settlements of Betar Ilit, Ma'ale Adumim, Ariel and Karne Shomron. Soon thereafter on 23 August, an additional 532 new settler homes were announced. This was only the tip of the iceberg, since not all new housing constructions were announced so publicly. Ariel Sharon attempted to suppress reports of a new settlement being planned between Ma'ale Adumim and Jerusalem with the purpose of linking the two and further encircling Jerusalem.[11] According to the Israeli newspaper *Ha'aretz*, between January 2004 and the end of September 2004, approximately 2,200 dunums were confiscated and declared to be "state lands" in the West Bank, for the purpose of expanding settlements.[12]

"Outposts" continued to spring up throughout 2004. According to the Applied Research Institute – Jerusalem (ARIJ), 27 new outposts in the West Bank appeared between January and August 2004, especially in the Ramallah area.[13] Since these new settlements cannot even be justified as "natural growth" of pre-existing ones, the Israeli government has ostensibly been engaged in an effort to dismantle them, grabbing many headlines and much attention. However, outposts spring up again nearly as fast as they are dismantled and usually contain few, if any, permanent inhabitants. Moreover, Israeli efforts to dismantle them have been half-hearted at best. The United States has criticised Israel for not doing enough to dismantle them and not providing comprehensive lists of all such outposts. In the meantime, the debate over the outposts deflects international attention from the constant, and illegal, expansion of other more established Israeli settlements in the OPT.

Indeed, many existing settlements expanded during 2004, including in the area around Rachel's Tomb in Bethlehem; in Alfe Menashe (situated south east of Qalquilya) which began expanding towards the Israeli town of Nirit; in the Brukin outpost, located near the Ariel settlement in the West Bank; and in Har Homa, south of Jerusalem, where the Israel Land Administration sold 11 lots with 682 apartments. According to the Israeli Central Bureau of Statistics (ICBS), 413 new housing units were sold in settlements in the OPT from January to November 2004, an approximate 19%

[11] Urquhart, Conal, "Israel flouts road map with new settlement," *The Guardian*, 6 August 2004, http://www.guardian.co.uk/print/0,3858,4987147-103552,00.html.

[12] Benn, Aluf, "Israel Still Expropriating Land to Expand Settlements," *Ha'aretz*, 26 September 2004, http://www.globalexchange.org/countries/palestine/2501.html.

[13] ARIJ, "Illegal Settlement Outposts Continue to Expand throughout the Occupied West Bank," 2 December 2004, available at www.poica.org/editor/case_studies/view.php?recordID=472.

increase compared to the same period in 2003.[14] To this construction corresponded a stream of new Israeli settlers moving into settlements, including sensitive areas such as the City of David settlement in Silwan, East Jerusalem, the Palestinian village of Abu Dis and the area around Rachel's Tomb in Bethlehem. ICBS reported that the settler population in the West Bank (excluding East Jerusalem) and Gaza Strip increased to 231,800 at the end of 2003, an annual increase of 5.3%, a higher population increase than anywhere in Israel during the same period.[15]

Events of the year reconfirmed that the route of the Annexation Wall is being largely determined by the placement of settlements.[16] On 2 August, Defence Minister Shaul Mofaz announced that Ma'ale Adumim and the Etzion bloc will be included on the western side of the Wall, thereby creating territorial contiguity between these settlements and Israel. On 8 September, Ariel Sharon declared the same regarding Ariel, Gush Etzion and Ma'ale Adumim. The progressive construction of the Wall has led to the redeployment of Israeli soldiers from settlements west of completed segments of the Wall to the settlements situated on its eastern side. On 15 June, Defence Minister Shaul Mofaz and Finance Minister Binyamin Netanyahu authorized a new budget of nearly $70 million to build secondary walls around the settlements remaining on the eastern side of the Annexation Wall. This entails, de facto or by orders issued by the Israeli occupying forces, the creation of several hundred metres broad 'special security areas' surrounding certain settlements, with further impact on the Palestinian owners of the affected lands.

In late 2003, Ariel Sharon announced a unilateral "Disengagement Plan" to evacuate all of the settlements in the Gaza Strip and four settlements in the north of the West Bank.[17] This would amount to evacuating approximately 8,500 out of a total of 425,000 settlers, or around 2% of the total settler population currently living in the OPT, including East Jerusalem. The announcement appears to have motivated at least some members of the international community to reduce their pressure on Israel to respect international law by dismantling all settlements.[18] Al-Haq is concerned that the Disengagement Plan, whether it is actually carried out or not, may be used to divert attention from the constantly expanding settlements in the greater part of the West Bank.

B. SETTLER VIOLENCE

In 2004, settler violence in the OPT continued at the high level that has marked the current intifada. The violence is directed towards Palestinian civilians as well as their property and their

[14] ICBS, "New Dwellings Sold in the Private Sector in November 2004," Table 3 "New Dwellings Sold and New Dwellings for Sale, by District," available at http://www.cbs.gov.il/hodaot2005/03_05_23t3.pdf.

[15] ICBS, "The Population of Israel in 2003 – Data from the Statistical Abstract of Israel no. 55," *Press Release*., http://www.cbs.gov.il/hodaot2004/01_04_246e.htm.

[16] For more information, see the Chapter on "The Annexation Wall" in this report.

[17] Disengagement Plan of Prime Minister Ariel Sharon - Revised, 28 May 2004, http://www.knesset.gov.il/process/docs/DisengageSharon_eng_revised.htm.

[18] See, *supra* note, the section "Enforcement in 2004 of the International Law Pertaining to Settlements."

environment, including beatings, shootings and destruction of property, crops and trees. The violence increased during the olive harvest season. The Palestinians in the Old City of Hebron are particularly exposed to settler violence. Al-Haq has documented many of these cases based on first-hand information taken in the form of affidavits by the victims or eyewitnesses.

1. ASSAULTS

Al-Haq has documented dozens of instances of settler assaults during 2004, the most affected area being Hebron. The most common type of incident was non-lethal beatings by groups of settlers, sometimes acting in a clearly organised way, as illustrated by the following testimony:

> On 15 April 2004, my husband was beaten up by six young settler women whose ages range between 16 and 24; they come daily from 2:00 p.m. until 10:00 p.m. These girls are dropped off from a GMC vehicle that comes back to pick them up, and the car usually has stones in it. I ran to protect my husband, but when I arrived I was also beaten up by these women. Several times my four children, husband, and I have slept at the neighbour's house out of fear of these settlers.
>
> **Extracts from Al-Haq Affidavit No. 1772/2004**
> Given by: Suhayla Jouda Ahmad Jaber, (Resident of Hebron, West Bank).

A disturbingly high number of incidents involve violence against children, as illustrated by the following sworn statement,

> At around 4:00 p.m. April 2004, a settler attacked my nine-year-old grandson, Nour Khaled Na'im, with the participation of a group of girl settlers. Some others and I ran to rescue the screaming child and the settlers ran away. We took Nour to Hebron Municipal Hospital, about two kilometres away. But due to closures we had to take a road that's about 10 kilometres to reach the hospital. It turned out that his left arm was broken by these settlers. His arm was put in a cast and he left the hospital that same night.
>
> **Extracts from Al-Haq Affidavit No. 1768/2004**
> Given by: Na'im 'Abd-al-Salam 'Abd-al-Muhsen Da'na, (Resident of Hebron, West Bank).

However, not all instances of settler violence are limited to beatings, as demonstrated by the following testimony:

> Sometime between 11:00 a.m. and noon on 11 October 2004, I was working in my uncle's home located to the north of the village ('Asira al-Qibliyya) when I heard intense gunfire coming from the area where the villagers were picking olives. I left my uncle's home in order to make sure that my father and mother, who were also picking their field's olives,

were safe. After walking 100 metres, I met a number of persons from the village with whom I stood beside one of the village houses. At about 100-200 metres, there were a number of settlers gathered and an Israeli soldier standing to the south. After I had been standing and talking to the villagers for a few minutes, the settlers began shooting randomly at us.

We tried to escape to protect ourselves from the gunfire, but unfortunately a bullet hit me in the back. I fell to the ground, bleeding. After a few minutes, Mr. Munir reached me and comforted me until the firing completely halted. Then the villagers gathered around me and took me to the hospital in Nablus. Because the bullet hit my shoulder and pierced my neck, I am still in the hospital receiving treatment. Only God's will saved my life because the injury was very dangerous.

Extracts from Al-Haq Affidavit No. 2017/2004
Given by: Hani 'Abd-al-Ra'ouf 'Abd-al-Rahman Shihada, (Resident of 'Asira al-Qibliyya, Nablus Governorate, West Bank).

2. KILLINGS

According to Al-Haq's documentation, 46 Palestinians were killed by settlers between 28 September 2000 and 31 December 2004, including two in 2004. They were Sa'el Mustafa Ahmad Jbara, a 45-year-old taxi driver from the village of Salem near Nablus and Salman Yousef al-Safadi, a 17-year-old boy from the village of 'Ureef, also close to Nablus.

A. THE CASE OF SA'EL MUSTAFA AHMAD JBARA

Jbara was killed on 27 September 2004 by an Israeli settler on a bypass road that leads to the settlement of Alon Moreh. An eyewitness described what happened:

On 27 September 2004, at around 12:30 noon, I was in a Ford Transit driven by Sa'el Mustafa Jbara, a citizen from my village, with four other passengers, going towards our villages. Because there is no direct asphalt road leading to our villages (al-Far'a, Wadi al-Far'a, and al-Nasariyya), Sa'el was driving on Salem village's fields. As the car was approaching the bypass road leading to the Alon Moreh and 'Itmar settlements, we saw a settler's car on the road. We thought that the settler had just been driving his car because, as we were driving, we had seen it from time to time on the bypass road above us. When we went from the field to the bypass road, we saw the settler in his red Vesta car parked on the right side of the bypass road, as if he was waiting for us. He got out of his car, his gun pointing towards us. At that moment, the distance between us and him was only 4 to 5 metres.

The driver of the Ford said that perhaps the settler needed help or water for his car or that maybe his car was not working and he needed to repair it. Sa'el asked us if we thought we should help him if he needed it. When the driver reached the bypass road, which was higher up and to the east of our road, he stopped the car. He was about to open the window beside him to ask the settler if he needed help, when the settler approached the car. He was about 40 years old, wearing trousers and a shirt and carrying a M16 gun. From a distance of two metres, he shot a bullet, which penetrated the window beside Sa'el. The bullet hit Sa'el's left arm and the shrapnel penetrated his heart.

At that moment, all the passengers lay down on the car floor. Sa'el said "I've been shot" and said nothing more. The Ford then moved 10-15 metres forward until it was stopped by some earth and stones. Immediately, I tried to see what had happened to Sa'el and to locate his injuries. I found that his left arm was almost amputated from the elbow with other injuries to his chest, near his heart. I got out of the car and yelled at the settler in Hebrew for what he had done. He replied, "I wish he had died. I don't care what happens to him." I asked the settler to call for an ambulance but he ignored the request. Then I stood in the middle of the road to try to stop a car. A settler's car passed by and I tried to stop it, but the first settler told him not to stop for me and the second settler kept driving.

Extracts from Al-Haq Affidavit No. 2018/2004
Given by: Ahmad Muhammad Theeb Ishtayya, (Resident of Salem village, Nablus Governorate, West Bank).

The passengers of the Ford Transit eventually managed to take Sa'el to Rafidiya Hospital in Nablus but he died before arriving. The Israeli police were called to investigate and went to the scene of the murder to make a report. They informed Ahmad that the settler claimed that Sa'el had tried to run him over with the Ford.

B. THE CASE OF SALMAN YOUSEF AL-SAFADI

Salman Yousef al-Safadi, aged 17, was killed on 26 October 2004. At approximately 2.30 pm, a settler persuaded Salman to enter the Yetsehar settlement, one kilometre east of his village 'Ourif, in the Nablus District. Once inside, another settler shot him twice from inside a house, once in the left side of his waist and once in his stomach. The settler who had brought him in then beat him and broke his right arm. The Israeli police came and gave Salman to the Deputy Governor of 'Ourif village, who had him taken to the Rafidia Hospital, but he was dead upon arrival. To the knowledge of Al-Haq, no official investigation has been carried out or report been issued on the killing.

3. DESTRUCTION AND OCCUPATION OF PROPERTY

The presence of Israeli settlers in the OPT is intimately linked to the struggle for control over the land, and much of the settler violence is directed towards property. A typical pattern is the following: a settlement is built, an Israeli military base is placed to protect it and bypass roads are constructed to service it. All of this takes up Palestinian land and usually forces the local Palestinians to take long, cumbersome and expensive alternative routes to reach their destinations. The settlements are surrounded by buffer zones, ostensibly for security purposes. As a result, the Palestinian property in this area becomes inaccessible and may even become occupied. This can be excruciatingly burdensome for the Palestinian residents and hence a strong incentive for them to move away, making new land available for continued settlement expansion. Sometimes, direct attacks on their homes and land serve to increase this incentive.

This is seen in Shofa village, about nine kilometres southeast of Toulkarem and only 500 metres away from the Avni Heivetz settlement. As described by a local resident and Shofa Village Council member:

> As there were no clashes between the inhabitants of Shofa and the settlers of Avni Heivetz, we were surprised at noon of 11 July 2004 by a huge fire consuming the land of the village north of Shofa, east of the settlement. The fire broke out on land planted with olive and almond trees and burned approximately 100 dunums of the village land. This land belongs to many citizens and many families of the village. I will provide you with the details and names very shortly. The fire started in an area 100 metres to the east of the settlement. This area is a forbidden area and it is impossible for the citizens of Shofa or any Palestinian citizens to enter or approach it due to the Israeli army watchtowers around the settlement. The soldiers in the tower open fire at any person who approaches the settlement. We were able to extinguish the fire when it got to the land we could reach. We believe that the settlers or the Israeli army started the fire, but we do not know if it happened intentionally or accidentally. Everything is possible, especially given that the settlers and the army saw the fire but did not try to extinguish it, as if it were something normal.
>
> And early in the morning on Tuesday, 17 August 2004, we were surprised by another fire on land directly adjacent to the settlement and to the land that was previously burned. The fire was to the east of the barbed wire of the settlement and north of Shofa village. The fire stretched over 20 dunums planted with olive and almond trees. The citizens of Shofa village, with the assistance of a Toulkarem municipality fire truck, extinguished the fire without any help from the Israeli army. As a result, we became suspicious of these consecutive fires starting from a forbidden area that no Palestinian citizen can reach and we started to accuse the settlers and the Israeli army. It seems that there is an Israeli plan for the confiscation of further lands surrounding the Avni Heivetz settlement for the purpose of settlement extension, something that we never expected or realized until now.

Extracts from Al-Haq Affidavit No. 1952/2004
Given by: 'Aref Ahmad 'Aref Ya'qoub, (Resident of Shofa, Toulkarem Governorate, West Bank).

In Hebron, the particular impacts of the close proximity of settlers can be illustrated by the following testimony:

> Since the events of 15 November 2002 [when the Islamic Jihad killed and injured twelve Israeli soldiers in Hebron], the main gate of my house has been closed off. Furthermore, my family and I cannot leave the house since they have enlarged the settlers' street in the area and the area has been closed off, including where the entrance to my house is. My husband even created another opening to our house from the back, after we lost hope of ever opening the main doorway again. We do use it now, but we remain in constant fear of those settlers, especially for our children.

Extracts from Al-Haq Affidavit No. 1769/2004
Given by: Maysa' 'Abd-al-Hadi Tawfiq Jaber, (Resident of Hebron, West Bank).

Some settler assaults on Palestinian-owned land are much more straightforward, and have had a long term impact on the owners as shown in the following testimony:

> On 10 December 2003, settlers and soldiers carried out excavations in the land that we own surrounding the settlement. We were not given any military order on this matter and when we asked them to stop what they were doing, they did not listen and kept on working. This has caused damage to three groundwater wells that we own. My father owns 30 dunums and they are planted with fruit trees of practically every kind, and now we have only one well left, which will not be enough for our land's irrigation and agricultural needs. As a result of this assault, 12 dunums of our land were confiscated and trees were uprooted: 300 olive trees, 20 fig trees, 20 almond trees, and 200 pine trees. Many bushes and grape vines, reaching to up to four dunums, were uprooted. Our whole produce of cauliflower, at around 8,000 seedlings, was uprooted.

Extracts from Al-Haq Affidavit No. 1626/2004
Given by: 'Abdallah Khalifa Muhammad Da'na, (Resident of Hebron, West Bank).

During the olive-picking season, settler violence repeatedly targets this essential crop, as illustrated by the following testimony:

> I own a tract of land located at the entrance of the settlement of 'Atna'el and at the south-west entrance of the village [Khirbet Karma]. The three dunum large tract of land is planted with approximately 40 olive trees, many of which are 20 years old. On 26 October 2004, I was warned by telephone that settlers living near my tract of land were picking my olives. When I hurried over there at around 4:00 p.m., I found a group of [Israeli] settlers in their traditional clothes and with white kippas on their heads, holding sticks

and guns and picking the olives. Near the settlers there were approximately five Israeli military jeeps protecting them. As a result, I didn't dare come any closer. Around 8:00 p.m., I called the lawyer Mousa al-Makhamra, who is also a member of the Land Defence Committee and told him what I saw. He informed me that he would come the next day with a group of foreign nationals. The following morning when we arrived, we didn't find any olives to pick, even though we expected a harvest of 1,000 kilograms…

This is not the first time that we get assaulted by settlers. In 2002, under the threat of their guns, they took three kilograms of olives after we had picked them and put them in a bag on the side of the road. Back then we did not manage to have them returned to us, even though there were Israeli soldiers standing 100 metres away from us who were watching what was happening. We have also submitted complaints to the Israeli police in the past, but to no avail, as they did not put an end to these attacks.

Extracts from Al-Haq Affidavit No. 2043/2004
Given by: Eid Abdel al-Fattah Jibrin Abu Shikha, (Resident of the village of Khirbet Karma, nearby Hebron, West Bank).

4. ISRAEL'S INACTION IN THE FACE OF SETTLER VIOLENCE

The Israeli security forces generally fail to prevent, stop or redress instances of settler violence. Settlers are rarely held accountable for their acts. When they are, the punishment is usually lenient. These facts stand in stark contrast to the harsh means used against Palestinians found guilty of violence against settlers.

The affidavits given by victims of settler violence that were collected by Al-Haq in 2004 very often report that the action of Israeli law enforcement authorities (soldiers, police, administration and military courts) in response to settler violence was either ineffective, nonexistent, or verging on complicity. As significant illustration of this situation can be found in the following testimony:

We have grown accustomed to this life, where our children are beaten up in front of our own eyes and we cannot do anything to help them. We have filed several complaints against the settlers to the Israeli police but no justice has been granted to us from that. Moreover, if it happens that one of our children or us defends him/herself and hits one of the settlers back, be they female or male, then that one of us would be arrested. The court would also issue a ruling; in a swift manner, the case would be finished, in addition to the fact that the testimony of the settler or soldier would be certified at the police station and the court, but our testimonies would be uncertified. They even ask us on presenting our complaint to file the name of the settler or his picture, how can we provide such a thing, and where do we get such evidence? This is the reason I am convinced not to submit a complaint this time.

Extracts from Al-Haq Affidavit No. 1768/2004
Given by: Na'im 'Abd-al-Salam 'Abd-al-Muhsen Da'na, (Resident of the city of Hebron, West Bank).

In Hebron, a 14-year-old Palestinian child was beaten up by a large group of settlers at approximately 12:30 p.m. on 16 April 2004. He noticed some soldiers photographing the incident but the beating only stopped when his neighbours intervened. A police officer arrived in a car and drove him around to have him identify the settlers. In the child's own words:

> After that, I went with them to a military camp with a police station in it and a file was opened for me. My affidavit was taken and they made me wait an hour outside in the cold and I came back and I was tired. I was interrogated again by another police officer who kept on saying, you Arabs are liars and dogs. He asked me to re-write the affidavit and so I repeated the details of the incident again. He accused me of trying to stab a settler or soldier and said that there was a knife found in the area. My fingerprints were taken, but I had nothing to do with that knife. An unexecuted bail and fine were placed worth 10,000 shekels, if I were caught in a new attack, according to what they claimed.

Extracts from Al-Haq Affidavit No. 1767/2004
Given by: Murad Yusri 'Abd-al-Ghani Idris, (Resident of the city of Hebron, West Bank)

5. AL-HAQ'S PETITION TO THE ISRAELI HIGH COURT OF JUSTICE

In response to settler violence against Palestinian civilians in Hebron, Al-Haq and twelve residents of Hebron submitted a petition on 22 May 2003 against the Israeli Prime Minister, the Minister of Defence and the Minister of Interior Security. The petitioners argued that the respondents do not enforce the law on the Jewish settlers in Hebron and do not protect the Palestinian residents who are victims thereof. As a result, the Arab residents are forced to leave. One of the petitioners provided the following testimony:

> I live in a house that I own with my husband, located within the borders of the Kiryat Arba' settlement in Hebron. When I was away, settlers confiscated my house and set it on fire. There used to be a gate at the eastern side of the settlement through which I accessed my house. It was later closed and I was not allowed to go back to my home. I demanded of the [Israeli] civil administration that I be allowed to go back to my home. I also filed a case through Al-Haq so I could go back to my home. The house was burnt and is now under the settlers' control. After I had filed the case, the commander of the civil administration talked to me several times. I gave an affidavit to Al-Haq on this matter.
>
> At about nine in the evening of 25 September 2004, Captain Tareq talked to me and introduced himself as the commander of the civil administration. I knew him before; a

few months ago we had visited the house for inspection and he took pictures for me inside the house. I stayed there for about half an hour. This time he asked me to go back home. I told him that I wanted to go back home but how could I go back without him opening the gate I used before. He asked me to use the main gate through which I cannot pass without having a permit, or a policeman or a person from the civil administration accompanying me. When I told him this, he said I can take some workers to repair the house and I will be allowed to enter. I told him that they would not allow me to enter without a permit.

I knew that they would not let me in because I tried this many times before. They did not even let me walk along the eastern side of the settlement without having a permit or in the company of the police or the civil administration. I am now ready to go back home if the old gate is reopened. I do not want compensation. I also do not want to sell the house to anybody.

Extracts from Al-Haq Affidavit No. 2008/2004
Given by: Amneh Mahmoud Suleiman al-Bakri, (Resident of the city of Hebron, West Bank).

It took the Israeli High Court more than one year to issue a decision. Finally, on 12 October 2004, the Court called for Amneh al-Bakri and Shahinaz Yousef al-Sharabati, who were both evicted from their homes by settlers, to be returned thereto within 45 days. As of 31 December 2004, the decision of the Court had not been enforced and the two families were still not allowed to return. The Court also gave the respondents 60 days to finish investigations they claimed that they needed with respect to the other cases. At the end of 2004, the respondents still had not replied.

IV. INTERNATIONAL LAW AND ISRAELI SETTLEMENTS AND SETTLER VIOLENCE

United Nations (UN) SC Resolution 446 of 22 March 1979,

> Determines that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.

Similar conclusions have been reached by the International Court of Justice[19] and the Conference of High Contracting Parties to the Fourth Geneva Convention.[20] Indeed, both the settlement

[19] See *infra* note 28.
[20] Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention of 5 December 2001.

policy and the ensuing settler violence entail serious violations of international humanitarian and human rights law.[21]

A. SETTLEMENTS AND INTERNATIONAL LAW

Israeli authorities have continued to mislead the international community by inventing and using terminology to justify the settlement policy. Expressions like 'security settlements', 'natural growth' and 'outposts' are typical. In the face of international pressure to halt settlement construction and expansion, the primary justification and pretext for the continued settlement policy has become the 'natural growth' of pre-existing settlements. The so-called outposts are actually embryonic settlements. Some are termed, in official Israeli parlance, 'illegal outposts' because they are not, at the time of their appearance, officially authorised by the Israeli government. This phrase also gives the impression that the other settlements and outposts are legal. As will presently be shown, all settlements are equally illegal under international law.

1. TRANSFER OF POPULATION INTO OCCUPIED TERRITORY

Under Article 49(6) of the Fourth Geneva Convention, "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."[22] This applies to the Israeli settlement activity in the OPT.

All Israeli Governments since 1967, working on the basis of numerous plans, have actively pursued a settlement policy, encouraging and facilitating, including by financial incentives, the establishment and growth of settlements in the OPT. Even "illegal outposts" have been secretly funded by the Ministry of Housing. Those settlements that were not officially planned have usually been retrospectively approved by the Israeli authorities. It is safe to say that the vast majority of the settlements, if not all, can be imputed to the state of Israel.[23]

Since the beginning of the settlement enterprise in the OPT, Israel has put forward several arguments in favour of the legality of settlements. Currently, the main official argument is that Article 49(6) only prohibits forcible transfer of the population of the Occupying Power into occupied territory, and consequently does not concern voluntary migration.[24] However, nowhere does this provision restrict its scope to forced population movement. It does not use the terms

[21] See generally B'Tselem, *supra note* 2, pages 37-45; Quigley, John, "Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory," *Pace International Law Review*, Volume 10, 1998, pages 1-29; Mallison, W.T. Jr. and Mallison S. V., "A Juridical Analysis of the Israeli Settlements in the Occupied Territories," *The Palestine Yearbook of International Law*, Volume X, 1998/99, pages 1-26.

[22] The preparatory works of the Geneva Diplomatic Conference of 1949, where Israel was present, that lead to the adoption of the four Geneva Conventions contain no indication that this provision should be interpreted narrowly. Nor did Israel make any reservation or declaration pertaining to Article 49(6). See *Ibid* Mallison and Mallison, pages 17-18.

[23] See in particular B'Tselem, *supra* note 2, pages 73-84.

[24] Israel Ministry of Foreign Affairs, "Israel's Settlements – Conformity with International Law," 1 December 1996, available from [http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings].

deportation and/or "forcible transfer" found in Article 49(1) (which prohibits forcible transfers and deportations of protected persons from occupied territory). Instead, Article 49(6) specifically and expressly uses the unqualified term "transfer." Whether the transfer is voluntary or not is thus irrelevant.

Israel also argues that "the settlements themselves are not intended to displace Palestinian inhabitants, nor do they do so in practice."[25] This is also irrelevant under Article 49(6) which makes no mention of the motive or the effects of the population transfer. If one goes back to the object and purpose behind the provision, these were not limited to the mere risk of displacement of the original population but concerns all the negative effects inherent in the colonisation, such as the expropriation of land and the use of natural resources. Finally, even if the exact motive and effects were relevant, it is disingenuous to claim that the settlements do not, in intent or effect, displace Palestinian inhabitants. The tendency of the settlements to expropriate the land of the surrounding Palestinian villages and towns and on which these depend for their livelihood, not to mention the many hardships caused by the immediate proximity of the settlers and the Israeli soldiers that come with them, certainly contributes to the Palestinian emigration from the OPT.

Finally, Israel notes that "the existence of Jewish settlements in [the West Bank and Gaza] is a continuation of a long-standing Jewish presence," without explaining how this pertains to Article 49(6).[26] This provision does not contain any exception allowing for the legality of population transfers by the Occupying Power based on the historic or contemporary presence of its nationals in the occupied territory. As long as the transfer of Israeli settlers into the OPT is part of an Israeli government policy, the prior existence of a Jewish minority in the area is irrelevant.

The fact that the Israeli settlements in the OPT constitute a blatant violation of Article 49(6) was confirmed by the International Court of Justice (ICJ) in its Advisory Opinion on the Wall. When discussing Article 49(6), the ICJ held that,

> That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.[27]

The ICJ concluded that "the Israeli settlements in the OPT (including East Jerusalem) have been established in breach of international law."[28]

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[25] *Ibid*.

[26] *Ibid*.

[27] International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (2004) 61, paragraph 120.

[28] *Ibid*.

The UN SC has essentially taken the same position, calling upon Israel, as the Occupying Power,

To abide scrupulously by the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the Occupied Arab Territories.[29]

2. THE OBLIGATION NOT TO MAKE PERMANENT CHANGES IN OCCUPIED TERRITORY

Two general principles of international humanitarian law underpin the laws governing belligerent occupation: the temporary nature of military occupation and the fact that the occupant does not acquire sovereign rights over the occupied territory. These two principles are particularly apparent in Article 55 of the Hague Regulations:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

When the Israeli authorities expropriate vast areas of land in the OPT, uses them for the establishment of communities of tens of thousands of its own nationals, includes many of these on the western side of the Annexation Wall, and insists that it will retain them in any final status agreement, there can be no doubt that the settlements are intended as permanent changes. Many settlements have moreover been built on what Israel has declared "state land," in outright violation of above provision. In short, the settlement policy flies in the face of the principle of the temporary nature of occupation, the principle that the Occupying Power does not acquire sovereign rights over the occupied territory and the principle that the Occupying Power must administer the occupied land and property according to the rules of usufruct.

The UN SC reaffirmed these principles when it determined,

> That all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity.[30]

[29] UN SC Resolution 446 of 22 March 1979, paragraph 3. See also the preamble of UN SC Resolution 452 of 20 July 1979 and UN SC Resolution 465 of 1 March 1980, paragraph 5.

[30] UN SC Resolution 465 of 1 March 1980, paragraph 5. See also, specifically on East Jerusalem, UN SC Resolution 298 of 25 September 1971, paragraph 3, and Resolution 476 of 30 June 1980, paragraph 4.

Having no legal validity, the "facts on the ground" constituted by Israel's settlements do not affect the legal title of the Palestinians over their land.[31]

3. SETTLEMENTS AS WAR CRIMES

Under customary international law, all serious violations of international humanitarian law constitute war crimes.[32] One such serious violation is "the transfer by the occupying power of parts of its own civilian population into the territory it occupies."[33] This customary rule has been confirmed by article 8 (b) (viii) of the Statute of the International Criminal Court which characterised as a war crime the "transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies." The customary rule, which clearly originated in Article 49(6) of the Fourth Geneva Convention, applies to the Israeli settlement policy in the West Bank. Indeed, this policy may even amount to a grave breach under Article 147 of the Fourth Geneva Convention which includes as a grave breach the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

It is important here to clarify the identity of the authors of these war crimes. The settlers themselves are merely the instrument of the violation, as they are transferred by the Occupying Power. However, existing international law does not recognise the criminal responsibility of States. By virtue of the principle of individual criminal responsibility, those accountable for such war crimes are the people who, in their capacity as agents of the Israeli state, within the Israeli government and administration, plan and execute the settlement policy.

4. SETTLEMENTS AND THE RIGHT TO SELF-DETERMINATION

Common Article 1 of the two international covenants respectively on civil and political rights, and economic, social and cultural rights, provides, in relevant part,

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

[31] According to the international legal theory of e*ffectivités*, facts on the ground are only relevant for determining the territorial sovereign when legal title cannot be established.

[32] Henckaerts, J-M. and L. Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules*, Cambridge, Cambridge University Press, 2005, page 568.

There is a broad international consensus among states that the right to self-determination applies to the Palestinian people and that it should take the form of an independent state in the West Bank and the Gaza Strip. The settlements violate this right in many ways. First, they occupy Palestinian land with the purpose and effect of annexing it into Israel, albeit illegally under international law. This obstructs the ability of the Palestinian people to exercise their right to self-determination over their territory. Secondly, the settlements are placed in a way that severs the territorial contiguity of Palestinian population centres. This seriously endangers the possibility of creating a viable Palestinian state, in contravention of the Palestinians' right to have a state. Finally, the settlements make enormous – and disproportionate – use of key natural resources, most notably land and water. This violates the Palestinians' right to self-determination by not allowing them to "freely dispose of their natural wealth and resources."

5. SETTLEMENTS AND OTHER HUMAN RIGHTS

The settlements are also the more or less direct source of a host of other human rights violations committed against the Palestinian population in the OPT. The most direct link regards the right to property, since most of the settlements have been built on illegally confiscated private Palestinian land. Moreover, the different legal regimes and effective practices applied to the Israeli settlers and to West Bank Palestinians, clearly favouring the former,[34] breach Israel's obligation not to discriminate against people on the basis of their nationality, ethnic origin or race. The presence of settlers in the OPT is also a major cause of the "internal closures", notably consisting of a complex system of checkpoints and other physical barriers. This network and its corresponding laws violate the right to freedom of movement of the Palestinians living in the OPT.[35] Finally, the land seizures operated for the benefit of the settlements take away agricultural land on which Palestinians depend for their livelihood and also force a rapidly increasing Palestinian population to share an ever decreasing amount of living space. These effects imperil the Palestinian's right to an adequate standard of living.

6. INTERNATIONAL RESPONSIBILITY AND REMEDIES FOR THESE VIOLATIONS

According to customary international law[36] the primary remedy for a violation of international law is restitution, that is to say the undoing of the wrong. Only if this is physically impossible, can restitution be replaced with compensation, i.e. providing the victim with something else of equal value. Applied to the settlements in the OPT, this means dismantling them, evacuating the settlers and restituting the land to their rightful owners in a state as close as possible to what it 2.

[33] *Ibid*. pages 576, 578.

[34] For more information on the dual legal regimes, see the Chapter on "The Legal Framework Governing the Occupied Palestinian Territories" in this report.

[35] For more information, see the chapter on "Movement Restrictions" in this report.

[36] As recently applied by the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ, 2004, 59-60, paragraph. 152-153.

would have been had there never been any settlement. Only when and where such restitution cannot be satisfactorily carried out, may it be replaced by reparation, primarily in the form of monetary indemnification.

Some may object that such a solution would be extremely disruptive of the lives of the settlers living in the settlements and problematic vis-à-vis a range of their human rights. This is true, but cannot absolve the Occupying Power of its liability for breaching international law by creating, maintaining and expanding settlements in occupied territory. International law does not ratify illegal acts simply because their undoing would cause hardship to members of the violating state's population who acted as the instruments of the violation. In any event, international practice does not recognize the right of settlers to remain on occupied territory beyond the end of occupation. Their evacuation, however, must respect their right to being treated in a way that is respectful of their human dignity.[37]

Secondly, customary international law also calls for the indemnification of the rightful owners of the land used for settlements, for the material damage that they sustained during the period that these lands were withheld from their possession and use. This reparation is entirely independent of the abovementioned principle of restitution and both must be simultaneously respected.

Until these principles are respected by Israel and as long as settlements exist in the West Bank, members of the international community, notably states but also international organisations and even corporations, must abstain from giving legal recognition to the settlements, or assisting in any way in their construction and maintenance, as well as actively encourage Israel to stop its violations of the Fourth Geneva Convention and of the Palestinian right to self-determination.[38]

7. ENFORCEMENT IN 2004 OF THE INTERNATIONAL LAW PERTAINING TO SETTLEMENTS

Although most states continue to confirm the illegality of Israeli settlements in the OPTs, efforts by influential third party states during 2004 continued to lack the rigour and political will necessary for the effective implementation of the protections of international law and for the consequent constraint of Israel's actions in this regard.

On the positive side, the European Union (EU) made certain attempts to enforce the exclusion of products made in settlements from its free-trade Association Agreement with Israel, implying that customs duty would be levied on these products. An agreement was signed between the European Commission and Israel according to which Israel must label all export goods with their exact place of origin, so that settlement goods can be identified and taxed accordingly. The

[37] Quigley, *supra* note 20, pages 8-9.
[38] On this topic, see supra the Chapter on "The Obligations of the International Community" in this report.

question remains why the EU is accepting any products made in settlements.

In addition, some individual states also took at least symbolic measures. On 18 April 2004, the Swiss embassy declined to attend a ceremony for naming a street after a Swiss national because the street was located in the East Jerusalem settlement of Pisgat Ze'ev. In August, the government of Brazil refused to approve the adoption of Brazilian children by Israeli settlers living in the OPT.

On the other hand, the US backtracked compared to previous years. President George W. Bush, in a 14 April 2004 letter to Ariel Sharon, reversed decades of American policy by reassuring him that Israel would be able to hold on to some settlements in the OPT in a final status agreement. Unlike in 2003, the US decided not to subtract Israeli expenditures on settlements from US loan guarantees to Israel.[39]

B. SETTLER VIOLENCE AND INTERNATIONAL LAW

As has been shown in this chapter, settler violence against Palestinians and their property is a serious problem in the OPT. Indeed, in resolution 474 of 17 June 1980, the UN SC declared itself "[d]eeply concerned that the Jewish settlers in the Occupied Arab Territories are allowed to carry arms, thus enabling them to perpetrate crimes against the civilian Arab population." This situation entails violations of both international humanitarian law and international human rights law.

1. SETTLER VIOLENCE AND INTERNATIONAL HUMANITARIAN LAW

Israel, as an Occupying Power, is responsible for the safety of the local population under customary international humanitarian law, as reflected in Article 43 of the Hague Regulations. Indeed, the UN Security Council, in resolution 904 of 18 March 1994, called upon,

> Israel, the Occupying Power, to continue to take and implement measures, including, inter alia, confiscation of arms, with the aim of preventing illegal acts of violence by Israeli settlers

and also more generally called for,

> Measures to be taken to guarantee the safety and protection of the Palestinian civilians throughout the occupied territory" (paragraph 3).

Israel has not taken adequate and necessary measures to prevent settler violence, hence it is not ensuring the safety of the Palestinian population and, as such, finds itself in breach of its obligation under international humanitarian law.

[39] FMEP, *supra* note 9.

SETTLER VIOLENCE AND HUMAN RIGHTS

Since it exercises effective jurisdiction over the OPT, Israel is responsible for ensuring the respect of international human rights law. Under international human rights law, Palestinians have a right to life (Article 6 of the International Covenant on Civil and Political Rights - ICCPR), to security of person (Article 9 of ICCPR) and to property (customary law as reflected in Article 17 of the Universal Declaration of Human Rights. Settler violence is a threat to Palestinian limb, life and land. Israel's inaction or lack of effective action in preventing or repairing instances of settler violence therefore constitute violations of these rights.

In addition, the different treatment given to Israeli settlers who are victims of private Palestinian violence, on the one hand, and Palestinians who are victims of settler violence, on the other hand, amounts to a violation of Israel's obligation not to discriminate between people on the basis of their nationality, race or ethic origin. This right is of an absolutely fundamental nature and is therefore enshrined in numerous international instruments and in customary international law. A particularly relevant example can be found in Article 5(b) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in which,

> States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.

Inter alia in the enjoyment of the

> Right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

Although Article 1(2) of ICERD permits distinctions between citizens and non-citizens, the Treaty's supervisory body, the Committee on the Elimination of Racial Discrimination (CERD), has qualified this provision through General Recommendations 20 (1996)[40] and 30 (2004)[41]. Both of these stipulate that differentiations made by states with regard to rights afforded to citizens but not to non-citizens, may not detract in any way from the rights all human beings are guaranteed under international human rights law. Thus, the State may not provide differing levels of care to nationals and non-nationals placed under its protection or jurisdiction, which would amount to a violation of the rights guaranteed under human rights instruments.

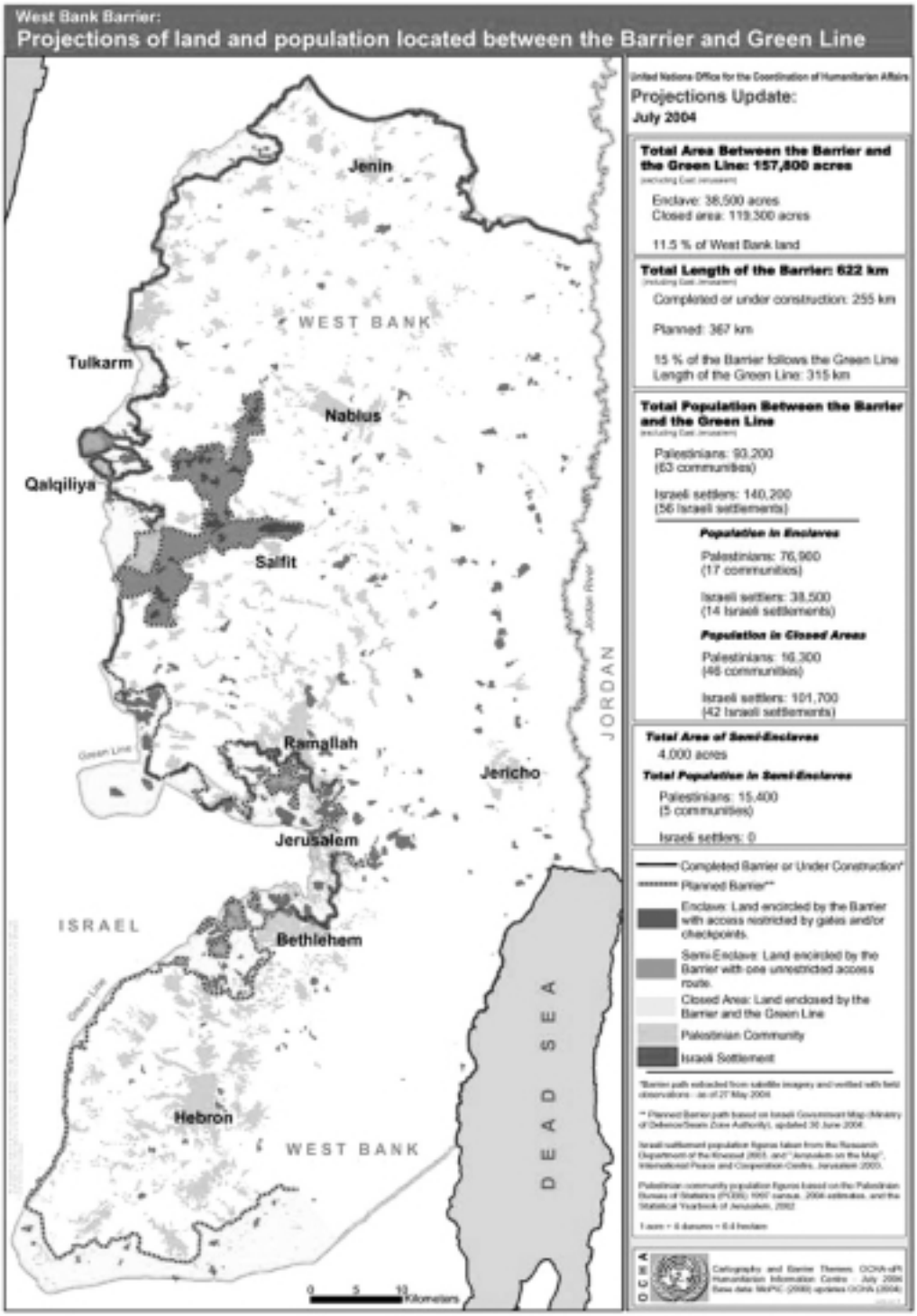
[40] CERD, *General Recommendation No.* 20, "Non-Discriminatory Implementation of Rights and Freedoms (Aricle.5)", (UN Doc.A/54/18), 15 March 1996.
[41] CERD, *General Recommendation No. 30*, "Discrimination against Non-Citizens", (UN Doc.CERD/C/64/Misc.11/rev.3), 1 October 2004.

V. CONCLUSION

The Israeli settlement enterprise in the OPT and the violence it entails continued unabatedly during 2004, including harassment, beatings, killings, property destruction, eviction from property and land grab. Settlers killed two Palestinians and injured dozens, while Palestinian land and property were the main targets. The settlement expansion, though hard to measure precisely, was sustained at all levels, ranging from new construction plans to new settlers moving into homes. The Disengagement Plan, projecting evacuation of 2% of the current settler population from the Gaza Strip and the northern West Bank, has not put an end to the official policy of settlement expansion in all other parts of the OPT. In short, Israel, as the Occupying Power, still carries on its 37-year-old continuous and ever more aggravated violation of international law in the form of the settlement policy in the OPT.

THE ANNEXATION WALL

Section of the Annexation Wall in Abu Deis, nearby East Jerusalem, West Bank
(Maureen Clare Murphy, 2005)



Map detailing the Route of the Annexation Wall
(United Nations Office for the Coordination of Humanitarian Assistance 2004)

THE ANNEXATION WALL

I. OVERVIEW

A. STRUCTURE AND ROUTE OF THE WALL

In 2002, Israeli authorities began planning what the UN Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territories (OPT) has termed "the Annexation Wall."[1] The structure varies in composition: in some areas it consists of layers of razor wire, military patrol roads, sand paths to trace footprints, trenches, surveillance cameras and a three-metre high electronic fence, totalling approximately 60-100 metres in width and accompanied by an additional buffer zone measuring 30-100 metres. In other areas, generally those in which the Palestinian and Israeli populations are in close proximity, the Wall is constructed of eight-to-nine-metre high concrete slabs with concrete watchtowers.[2] Most problematically, 85% of the Wall as planned as of December 2004 is constructed on Palestinian land,[3] cutting in one location 22 kilometres into the West Bank to encompass the Israeli settlement of Ara'el north of Salfit. Because of the Wall's irregular path, it stretches to nearly twice the length of the Green Line: at the time of this writing, the Wall is anticipated to be 622 kilometres long once completed.[4] It has been estimated by the Knesset Economics Committee that it will cost Israel $3.4 billion to construct the Wall.

Israeli authorities have repeatedly claimed that the Wall is a temporary structure being built for the purpose of providing security to Israeli citizens. Although the Wall has - justifiably - been the subject of much international debate, it should be noted that this is not the first time that Israeli authorities have raised the possibility of building a physical barrier between Israel and the West Bank. The issue was raised in various forms since the 1990s by Israeli politicians, who had already built a structure around the Gaza Strip. However, the plans for the Wall as it is presently being constructed were decided upon on 14 April 2002, when the Israeli Cabinet decided to construct a physical structure in the zone around the Green Line to prevent Palestinian passage into Israel, citing the need to "improve and reinforce the readiness and operational capability in coping with terrorism."[5] Although the detailed proposal was not due to be submitted to the Israeli Knesset until June, days later Palestinian landowners along parts of the proposed route of

[1] Al-Haq has therefore chosen to use the terminology of the Special Rapporteur. Other entities have employed different terminology to reference the structure, *inter alia,* the Separation Barrier, the Security Fence, and the Apartheid Wall.

[2] In some instances, such as the vicinity around Rachel's Tomb in Bethlehem, areas where the Wall had previously been constructed of razor wire and electronic fences are subsequently changed to concrete slabs. See Palestinian Monitoring Group, "Trend Analysis: Israeli Wall Activity Since the Advisory Opinion of the International Court of Justice," 13 September 2004, page 7.

[3] UN Office for the Coordination of Humanitarian Affairs (OCHA), *et al.*, "The Humanitarian Impact of the West Bank Barrier on Palestinian Communities," 1 September 2004, page 3.

[4] See *Ibid*, page 5.

[5] B'Tselem, "Behind the Barrier: Human Rights Violations as a Result of Israel's Separation Barrier," March 2003, pages 6-7.

the Wall began to receive military orders signed by Brigadier General Yitzhak Eitan, the Israeli Military Commander of the West Bank, informing them that their land would be confiscated. The orders, which were prefaced with the statement that they were necessary for military requirements and "special security circumstances," stated,

> The lands were confiscated and will be confiscated by the [Israeli Defence Forces] IDF [sic] forces and the sole proprietorship of them will be given to the Land Officer in the Central Command via the Office of the Headquarters for Ministry of Defence Matters at the Civil Administration.[6]

On 23 June 2002, the Sharon Government approved the plan, noting that the final route was to be determined by the Prime Minister and Minister of Defence, and construction of the Wall began. Both its planning and construction have been difficult to track, as authorities have changed the route multiple times, and the construction itself proceeded in a non-systematic manner. Construction has been carried out to date in phases and has been undertaken sporadically. Phase 1 stretches from Salem checkpoint in the northern West Bank to El-Kana settlement south of Qalqiliya, snaking around Toulkarem and Qalqiliya en route. It also included 20 kilometres of the structure north and south of Jerusalem (the "Jerusalem envelope"). The next phase included the building of the Wall from Salem to al-Mtalla, as well as another section perpendicular to this one. Subsequent phases, many of which have already begun, include the route from El-Qana to Jerusalem, veering around in order to incorporate such Israeli settlements of Ara'el, Kedumim, and Immanu'el en route; a fully encircled Jerusalem; and a path which weaves down through the southern West Bank, ensuring that such settlements as Gilo and Carmel are on the "Israeli" side of the Wall. In March 2003, Israeli Prime Minister Ariel Sharon indicated that an additional eastern section of the Wall may extend into the Jordan Valley and join the western section, although no formal route has been proposed. Even when a phase has been completed, Palestinians in the area continue to be subjected to further violations, as military orders continue to be issued confiscating more land east of the Wall.[7] While the Wall has been re-routed in 2004, each route proposed as of December 2004 has entailed the confiscation of substantial amounts of Palestinian land.

As a result of the persistent veering of the Wall inside the OPT, 119,300 acres, or 11.5% of the West Bank, are trapped between the Wall and the Green Line (excluding East Jerusalem).[8] This land includes some of the West Bank's most arable land - a devastating blow to the agriculture-dependent Palestinian economy. Some of this land is trapped between the Wall and the Green Line (the "Seam Zone"), while some of it has been formally confiscated for the construction of the Wall. As of September 2004, it has been estimated that the construction of the Wall has

[6] IDF [sic], "Order Concerning Confiscation of Land Number T/09/02," paragraph 3. Translation by Al-Haq. This statement is included verbatim in other confiscation orders issued at this time.

[7] Al-Haq Affidavit No. 2107/2004.

[8] See OCHA, *supra note* 3, page 6.

resulted in the formal confiscation of 8,000 acres of land.[9] In addition, the Wall effectively annexes a large portion of Palestinian water resources: the Palestinian Hydrology Group estimates that over 32% of the Palestinian share of the Western Aquifer Basin has been lost due to the first phase of the Wall's construction.[10] If the eastern section of the Wall in the Jordan Valley is built as has been discussed, at least 35% of the West Bank will be de facto annexed by the Wall.

The construction of the Wall is destroying sizeable amounts of Palestinian property, including homes, agricultural facilities, businesses, water reservoirs, olive and citrus trees, and other agricultural crops. While no comprehensive documentation has been done of this issue to date, in the aftermath of the International Court of Justice (ICJ) Advisory Opinion, the United Nations will establish a body which will be responsible for the verification of the Wall's extent of damage and of the causal link between the Wall's construction and the damage sustained.[11] In some instances, demolition orders are given well in advance of the actual demolition. In the village of Barta'a al-Sharqiyya, for example, demolition orders issued in December 2002 were implemented in July 2004.[12] As the debate and litigation on the Wall continues, the Israeli authorities are gradually altering the state of the land presently trapped between the Wall and the Green Line. The building of roads, destruction of arable land, and development of Israeli infrastructure on this territory not only adds to the extensive property destruction associated with the construction of the Wall, but serves to effectively formalise the route and establish its permanency.

B. GATES

The Wall's route and construction is necessarily accompanied by an associated regime of legal and administrative issues which impact Palestinians in the OPT. With such a large percentage of Palestinian land trapped in the Seam Zone, there are many Palestinians whose houses or agricultural land are located in this area and who are no longer able to access their homes or their means of livelihood. As Israeli authorities are quick to point out, a system of gates has been incorporated into the Wall's planning and construction. There are seven types of gates that are built into the Wall: agricultural, checkpoint, military, road, school, seasonal, and settlement gates.[13] Of the 55 gates in the sections of the Wall constructed as of this writing, only 21 are accessible to Palestinians.[14] Those gates which are accessible to Palestinians are not open throughout the day: in many instances they are open three times a day for an hour or an hour and a half,[15]

[9] PLO Negotiation Affairs Department, "Basic Facts on Israel's Wall," September 2004.

[10] Palestinian Hydrology Group, "Water for Life: Israeli Assault on Palestinian Water, Sanitation, and Hygiene During the *Intifada*," 2004, Ramallah, pages 72-73.

[11] This is being done in accordance with United Nations (UN) General Assembly (GA) Resolution ES-10/15 of 2 August 2004, which "[r]equests the Secretary-General to establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion."

[12] PLO Negotiation Affairs Department, "Special Report: The Wall and Demolitions: Barta'a Al-Sharqiya, Jenin Governorate," 20 July 2004.

[13] See OCHA, *supra note* 3, page 28.

[14] See *ibid*, page 2.

[15] See Palestinian Monitoring Group, *supra note* 2, page 8.

although in practice the opening hours are erratic. On 8 May 2003, Israeli soldiers at Qalqiliya said that the entrance to the city would close at 17.30 p.m., rather than 19.00 p.m. or 19.30 p.m. as was the norm. They were asked by an Amnesty International delegation present about what would happen to the city's residents who returned to Qalqiliya after 17.30 p.m. The soldier replied that such residents would simply have to stay outside of the city until the entrance opened again in the morning.[16] In one instance, local residents told Al-Haq that the gate in Far'on village in Toulkarem Governorate has never been opened.[17]

C. PERMITS

In order to cross through these gates, Palestinians must have a permit. To obtain a permit, they must submit an application to the (Israeli) District Coordination Office, which has total discretion in its decision on such applications. Those who live and own homes in the Seam Zone must apply for "long-term residence" permits, while others who wish to cross to access their land or for other purposes must apply for a separate permit. While Israeli authorities distributed permits when the permit regime was initially established, such permits were short-term in validity and their allocation was not done comprehensively. The duration of permit validity varies, although they are typically valid for short periods (e.g., ranging from two weeks to six months), so those who must regularly access the Seam Zone must repeatedly re-apply for permits.[18]

The application process for permits is complex and processes and policies have varied in different areas. Landowners must provide documentation regarding their ownership, the only acceptable proof thereof being documentation from the Israeli Civil Administration (current as of 2004). Moreover, supporting land documentation, such as inheritance orders and affidavits from the Palestinian Magistrates' Court regarding the possession of the land must also accompany the application. Obtaining this documentation is a complicated task, as land in the West Bank was under the control of the Ottoman Empire, the British Mandate, and Jordanian rule prior to the Israeli occupation. Land ownership records are complex, and may be in the name of the father or grandfather, without being updated over the years. As a result, some Palestinians are unable to obtain adequate documentation in order to obtain a permit to access their land.

Land ownership documentation must be accompanied by a completed application form, the owner's ID card, and a certificate from the local village council indicating that all the documentation is valid. Any discrepancies in the name on the documentation, including different spellings due to historical mis-transliteration by the Israeli authorities, must be explained in an accompanying affidavit. Initially, the Israeli authorities also required applicants to pay taxes on

[16] Amnesty International, "Surviving Under Siege: The Impact of Movement Restrictions on the Right to Work," MDE 15/001/2003, London: Amnesty International, 8 September 2003, page 29.

[17] See *supra* note 7.

[18] For more on this issue, see B'Tselem, "Not All It Seems: Preventing Palestinians Access to Their Lands West of the Separation Barrier in the Tulkarm-Qalqiliya Area," Jerusalem, June 2004.

their land within the Seam Zone, although this requirement was changed in February 2004.[19] Presuming that applicants can obtain all this information, they may still have their application rejected; B'Tselem estimates that 25% of requests in the Toulkarem/Qalqiliya area were rejected.[20] The precise requirements for obtaining permits have also changed, becoming more complex and difficult over time. Contracted labourers are denied permits, as are grandchildren and other relatives of the individual whose name is on the land ownership documentation.[21] It should be noted that permits are not required for Israeli citizens or residents (including Israeli settlers in the OPT), or even for non-citizens who are allowed to immigrate to Israel under The Law of Return (1950); these individuals are freely allowed to enter into the Seam Zone.

Because of the extent to which the Wall's route weaves throughout the OPT, it has a grave impact on the Palestinians' fundamental rights, as they are now further restricted in their ability to travel to work, school, places of worship, health care facilities, family members, etc. It isolates Palestinians not merely from Israelis, but from each other. Clearly the Wall is not merely a physical structure, but a microcosm of a broad range of Israeli violations of Palestinians' rights.

It is difficult to predict the Wall's ultimate route, as the Israeli authorities have been slow to release their plans, and those which are released are subject to change due to litigation and pressure from politicians and settlers. In July 2004, the ICJ issued an historic Advisory Opinion stating that the construction of the Wall in the OPT was a violation of international law. Since this ruling, the Israeli authorities have announced that they will reconsider the route of the Wall, although its new route was still not published by the end of 2004. In February 2004, they pre-emptively relocated a nine-kilometre strip of the Wall in the vicinity of Baqa al-Sharqiyya in the northwestern West Bank just before the ICJ began its oral hearings. The nearby village of Barta'a al-Sharqiyya saw the relocation of a two-kilometre strip of the Wall. There have been a handful of other announced relocations, generally for short lengths which entail the Wall's relocation within the OPT. It should be noted that the process of moving the Wall entailed property destruction both in its initial construction and the relocation process. While it is difficult to completely assess the situation due to its ever-changing nature, Israeli authorities, including the High Court of Justice, have repeatedly made it clear that they do not consider themselves obligated to refrain from constructing the Wall in the OPT.

II. IMPACT OF THE ANNEXATION WALL

The construction of the Wall in the OPT will impact the Palestinian people in three ways: the further loss of Palestinian land through its confiscation and annexation, the isolation of the Palestinian people, and ultimately, the prevention of the ability of the Palestinian people to exercise their right to self-determination. It results in the increased restriction on Palestinians' ability to

[19] See, generally, *ibid* and United Nations Relief and Working Agency for Palestine Refugees in the Near East (UNRWA), "The Permit System: The Case of Jayyous and Falamyeh, Qalqiliya Governorate," May 2004.
[20] See B'Tselem, *supra* note 18, page 10.
[21] Palestinian Monitoring Group, "Trend Analysis: Israeli Wall Activity Since 13 September 2004," 27 February 2005, page 2.

access their homes, family, work, school, places of worship, health care providers, etc. It is no exaggeration to state that the construction of the Annexation Wall negatively impacts all aspects of the lives of a number of Palestinians, and a number of aspects of the lives of all Palestinians.

At the same time, it serves to include Israeli settlers, whose presence in the OPT is in breach of international humanitarian law, on the "Israeli" side of the Wall. If the Wall is constructed along the route outlined by the Israeli Ministry of Defence in its 30 June 2004 map, over 140,000 settlers will be living in the Seam Zone.[22] Israeli officials have themselves noted that this is the intent:

A line that is genuinely based on security would include as many Jews as possible and as few Palestinians as possible within the fence. That is precisely what Israel's security fence does. By running into less than 12% of the West Bank, the fence will include about 80% of Jews and only 1% of Palestinians who live within the disputed territories.[23]

The desire to preserve as much Palestinian land as possible for Israel's settler population was recently upheld in a letter by the Israeli military's Deputy Legal Counsellor, who stated that the balance to be considered in regards to possible re-routing of the Wall would be the harm caused to the Palestinians versus that likely to be caused to Israeli settlers seeking to expand the settlements.[24] The inclusion of 80% of Israel's illegal settler population and preserving their ability not merely to exist, but to expand, will serve as a means of legalising their status and further implementing the expansionist policies of the State of Israel.

Arguably, the Wall also establishes a de facto border which may be used to delineate a future Palestinian state. While Israelis officials such as Prime Minister Sharon deny that this is their intent, it is interesting to note that during a tour of the Seam Zone in March 2003, Israeli Cabinet ministers told journalists that Sharon wanted to establish temporary borders of a Palestinian state for the Roadmap through the construction of the Wall.[25]

Official Israeli claims regarding the Wall is that it will result in increased security for Israel through a reduction in Palestinian attacks against civilians inside the Green Line. However, the real impact was summarised by Avraham Shalom, former head of the Israeli intelligence agency Shin Bet from 1980 to 1986, when he stated, "it creates hatred, it expropriates land and annexes hundreds of thousands of Palestinians to the state of Israel…. The result is that the fence achieves the exact opposite of what was intended".[26]

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[22] See OCHA, *supra* note 3, page 6.

[23] Netanyahu, Benjamin, "Why Israel Needs a Fence," *New York Times*, 13 July 2004.

[24] Association for Civil Rights in Israel (ACRI), "Expansion of Settlements and the Route of the Separation Barrier," (letter from Attorney Avner Pinchuk to Israeli Deputy Attorney General Malchiel Blass), 30 January 2005.

[25] Aluf Benn, "Defense Ministry Wants Fence Moved Deeper into West Bank," *Ha'aretz*, 23 March 2003.

[26] Moore, Molly, "Ex-Security Chiefs Turn on Sharon: Government Policies 'Create Hatred,' Israeli Newspaper Is Told," *The Washington Post*, 14 November 2003.

A. LOSS OF PALESTINIAN LAND

The confiscation and annexation of Palestinian land is the Wall's most obvious impact. Palestinians have received military orders confiscating their land along the Wall's route, in the Seam Zone, and along a strip parallel to the Wall on its eastern side.[27] Though precise statistics on the amount of land taken change as Israeli authorities re-route the Wall or shift construction to another area, it is clear that the Wall, as presently planned, will annex no less than 11.5% of the West Bank. If the eastern section of the Wall is constructed through the Jordan Valley, another 25.2% of the West Bank will be isolated outside of the Wall.[28] In some instances, Israeli authorities have in fact declared land between the Wall and the Green Line to be Israeli land. In June 2004, Israeli border guards stated that the area of the West Bank south of the Gilo checkpoint where construction of the Wall had begun was "Israel." They subsequently arrested several Palestinian men who tried to cross this area on the grounds that the men had entered Israel without a permit.[29] One month later, the Israeli Cabinet decided to permit the use of the *Absentee Property Law* (1950) to confiscate land in East Jerusalem, including that between the Wall and the Green Line.[30] West Bank Palestinians unable to access their land behind the Wall were thus considered absentee, and their property vulnerable to confiscation. Although Israeli Attorney General Menachem Mazuz subsequently cancelled the decision,[31] this decision highlights Israeli endeavours to permanently confiscate the land in the Seam Zone.

The loss of Palestinian land is not limited to that beneath the Wall and in the Seam Zone. Israeli officials have also restricted the use of land parallel and to the east of the Wall. In September 2004, a military order was issued prohibiting the construction of any building - defined as structures built from stones, concrete, clay, iron, wood or any other material, including walls, earth piles, fences or other similar things - in Nazlet 'Isa in Toulkarem Governorate.[32]

> On 1 August 2003, the Israeli Knesset officially announced the completion of the Wall in Toulkarem. Officially, it was considered to be complete, but on the ground it was not. After that date tens of Israeli military orders were issued for the confiscation of land located east of the Wall. Orders for the demolition of houses have been issued as well. For example, two houses were demolished in Far'on village on the pretext that they did not have building licences. But the reality is that these two houses were demolished because they are located near to the Wall. Ten houses in the same village are threatened

[27] In some instances, military orders confiscating land were even "delivered" by leaving them on the land itself, rather than giving them to the landowners or village council. Al-Haq Affidavit No. 1641/2004, 14 February 2004.
[28] See Palestinian Monitoring Group, *supra* note 15, page 3.
[29] See OCHA, *supra* note 3, page 19.
[30] The Absentee Property Law has historically been used to permanently confiscate vast amounts of Palestinian land inside the Green Line. For more information on this subject, see U. Halabi, "Israeli Law as a Tool of Confiscation, Planning, and Settlement Policy" in *Adalah's Review*, Volume 2: Land, Fall 2000, pages 7 - 11.
[31] Yuval Yoaz, "AG Halts East Jerusalem Property Expropriation," *Ha'aretz*, 2 February 2005.
[32] Military Order Concerning Prohibition of Construction No. 04/6 7564 - 2004, 5 September 2004.

with demolition under the same reasons and pretexts. The cases of these houses have been taken to the Israeli High Court. Also, a number of similar, yet more dangerous, military orders were recently issued. These stated that the construction is prohibited in the vicinity of the Wall from the north of the West Bank to the south, and at 500 metres deep to the east. These orders were issued a month and a half ago, during the sickness of the late President Yaser Arafat. Initially, they were issued in Toulkarem, Jenin, and Qalqiliya. These orders prohibit any construction using cement or iron, and also prevent erecting a fence of mesh or wood, or anything that may change the contour of the land.

Extract from Al-Haq Affidavit No. 2107/2004
Given By: Suheil Salim 'Abd-al-Fattah Salman, (Resident in Toulkarem Governorate, West Bank).

Despite such actions, Israeli authorities have repeatedly stated that their intent is not to annex Palestinian land. It should be noted that even if the confiscation of the land is not intended to be permanent, the prolonged loss of land for the Palestinians will cause grave harm. The permit system that was established in order to provide Palestinians access to their land on the "Israeli" side of the Wall serves in practice as an administrative means to prohibit Palestinians from accessing their land, as many Palestinians are unable to meet all of the complex documentation requirements. Saleh Mustafa Ahmad Maqatif told Al-Haq that 2004 will be the third year that he has been unable to harvest 40 of his olive trees due to the Israeli authorities' refusal to grant him a permit.[33]

It is important to consider the use of the Wall to take Palestinian land in the larger context. Palestinians have been subjected to land confiscation and annexation by Israeli authorities since 1948. The Palestinian Negotiation Affairs Department has estimated that as a result of the annexation of land by means of the Wall, only 12% of historic Palestine will remain for the Palestinian people.[34] The Palestinians have been subjected to a prolonged "war of attrition," whereby they have gradually lost an increasing amount of land and its accompanying natural resources. The construction of the Wall only serves to continue this pattern whereby Palestinians are disenfranchised from their own natural resources.

B. ISOLATION

The Wall also serves to isolate Palestinians. If the Wall is constructed as presently projected, 93,200 Palestinians in 63 communities will be trapped between the Wall and the Green Line.[35] This includes the population that is trapped in enclaves, areas where Palestinians are fully surrounded by the Wall. These people will require permits in order to remain in the Seam Zone,

[33] Al-Haq Affidavit No. 1996/2004.
[34] PLO Negotiation Affairs Department, "Israel's Wall: Another Land Grab," September 2004.
[35] See *supra* OCHA, note 3, page 6.

even if they own land or homes in this area. While the Jordan Valley is less densely populated, the construction of an eastern section of the Wall will clearly result in the isolation of the Palestinian population in that region as well. Those Palestinians isolated by the Wall will be isolated from other Palestinians as well as from Israelis, and thus will be unable to access their social and economic means of support.

This effect has a substantive impact on Palestinian society, which places great emphasis on strong family and social ties. The family is the centre around which Palestinian revolves, and the erratic nature of the Wall's route has a grave impact on this important social structure.

> Since the bulldozing for the Separation Wall [sic] began, we have faced difficulties and now we have to go to Bethlehem or Beit Sahour to manage our lives and do our shopping. Additionally, I have to walk about a kilometre to find cars going towards Bethlehem or Beit Sahour. Moreover, the army prevents people from driving to the area where we live. My children go to a school in Dar Salah village, which is one and a half kilometre from our home. Our social life has been adversely affected, and we become isolated. For example, I have a daughter married to a man from Sour Baher. She now lives there and if they want to visit us, they first have to go to Bethlehem and then on to our home. This takes time and effort, while before the Wall was built this would not take more than few minutes. It is worth noting that our neighbours have deserted their homes and moved to Sour Baher. Our life with the Wall has become very difficult, and now that we are outside Sour Baher area, we have been deprived of all the social aspects of life.
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> **Extracts from Al-Haq Affidavit No. 2146/2005**
> Given by: Da'oud Mahmoud Salman Abu-Haniyya, (Resident of al-Baq'a/Sour Baher, nearby East Jerusalem, West Bank).

C. IMPACT ON ALL AREAS OF PALESTINIAN LIVES

1. LOSS OF AGRICULTURAL AND WATER RESOURCES

The Wall has directly and indirectly influenced many areas of Palestinians' lives. The land which has been confiscated includes a sizeable percentage of agricultural land, including some of the most fertile land in the OPT. In light of the heavy dependence of the Palestinian economy on agricultural production, the annexation of this land impacts the livelihood of many Palestinians. This will have a particularly severe impact on the Governorates of Jenin and Toulkarem, which together generate over 20% of Palestinian agricultural production.[36]

One of the most important elements of the Palestinian economy is the production of olives and olive oil. The 2004 olive crop was expected to be one of the best in years, but many Palestinians

[36] World Bank, "Four Years - *Intifada*, Closures and Palestinian Economic Crisis: An Assessment," Washington, DC, October 2004, page xv.

had difficulty in harvesting the yield due to Israeli restrictions. Limitations were made on which days people could harvest, insufficient time was granted for the harvesting, and permits frequently were not given to younger workers who could harvest a better yield.[37] The United Nations (UN) has noted that once the Wall's construction is completed, one million olive trees will be inaccessible or access to them restricted.[38] This constitutes 10% of the Palestinian olive crop, a significant blow to the Palestinian economy. In some instances, olive trees which are in the vicinity of the Wall have been dug up and sold; one Israeli contractor's Chief Executive Officer offered to sell trees for NIS 1,000 a tree.[39]

The village of Jayyous, located in Qalqiliya Governorate in the northwest of the West Bank, has long been renowned for its agricultural production. The Wall in this area has annexed 75-90% of the fertile land in this area, isolating 120 greenhouses and six water wells.[40] The UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) estimates that the land on the "Israeli" side of the Wall in Jayyous produced approximately nine million kilograms of fruit and seven million kilograms of vegetables annually, a substantial contribution to the local economy that is now inaccessible. Palestinian farmers cannot grow and harvest their own crops; their access to the markets for that which can be produced is restricted; and the resulting price escalation impacts all Palestinians, the vast majority of whom were already experiencing a substantial economic decline since the outbreak of the *intifada* in 2000.[41] It is evident that the agricultural restrictions alone impact not just farmers, but the average Palestinian consumer.

One person who previously lost 20 of his 24 dunums of land for the Wall's construction,

> Two weeks ago, my brothers and I headed out to cultivate land, or the four dunums left of it. The [Israeli] border police came to us and asked us why we were here near the Separation Wall [sic]. We replied that we wanted to cultivate our land, but they prevented us by threatening us with weapons; therefore, we had to leave the area. Our agricultural land used to generate a profit of approximately JD 2000 a year, which we lived on all year long. Now, my brothers and I are deprived of this income; we are unemployed and have no other source of income. I had to work in the municipality of al-Yamoun, with a salary of NIS1,300 per month, which I divide among us in order to meet their basic needs. I

[37] See Palestinian Monitoring Group, *supra* note 21 at paragraph 14.

[38] UN, "The Olive Harvest in the West Bank and Gaza Strip: October - November 2004.," available at <http://www.humanitarianinfo.org/opt/docs/UN/Olive_Harvest_Fact-Sheet%5bEn%5d_Oct04.pdf>, accessed 18 November 2004. It should be noted that for some areas, farmers are granted permits to access their lands only during the harvest period, which means that they are unable to adequately tend to the olive groves prior to harvest, thus reducing the potential yield of the crop. See *supra* note 15, page 2.

[39] See *supra* note 5, page 19, citing a *Yediot Aharonot* article from November 2002.

[40] UNRWA, "The West Bank Barrier: Profile: Jayous," available at <http://www.un.org/unrwa/ emergency/barrier/profiles/jayous.html>, accessed 18 November 2004.

[41] The World Bank reported in 2004 that between September 2000 and late 2002, the Palestinian economy underwent one of the greatest recessions in modern times, exceeding those suffered by the US during the Depression. They added that the precipitator of this collapse was the system of closures imposed on the OPT. See The World Bank, "Disengagement, the Palestinian Economy, and the Settlements," Washington, DC, 23 June 2004, paragraphs 1 - 2.

remember once while the Israeli bulldozers were digging up our land, I went to the Jewish contractor in charge of the work, and I told him: "This land is ours, do not dig it." He replied sarcastically; "Get out of here! You do not own any land. We are the true owners of the land." He asked me to go away and threatened to summon Israeli soldiers if we did not leave the land. Since the completing the construction of the Separation Wall [sic] in that area, the land is no longer ours. Furthermore, a street has been built on vast parts of the land, as well as a metal fence along the Green Line. Our land is number thirty-six in plot number seven. In addition, twenty-four dunums of land owned by my uncle Yousef Suleiman 'Abahra were confiscated. This has led to the deterioration of our financial and psychological situation

Extracts from Al-Haq's Affidavit No. 1647/2004
Given by: 'Adel Mahmoud 'Ali 'Abahra, (Resident of the village of Yamoun, nearby Jenin, West Bank).

The Wall will also have a severe impact on the ability of Palestinians to access their water resources, as its route is located on key well fields in the West Bank, particularly on the Western Aquifer Basin. This restricts many areas of Palestinians' lives, inter alia, isolating them from domestic and agricultural water resources; damaging the wells, cisterns and other water facilities; interrupting piping routes; restricting the evacuation of wastewater; and blocking transport of water via tankers.[42] Further, to date Israeli officials have taken few steps to minimise the damage to these water resources though the construction of a substantial physical structure thereupon.

It should be acknowledged that there have been some instances in which Israeli authorities relocated the Wall, including some well-publicised instances of its relocation after a section had been completed. On 20 February 2004, days before the beginning of hearings at the International Court of Justice, Israeli authorities announced that the Wall around Baqa al-Sharqiyya in the northwestern West Bank would be relocated. Although this announcement was welcome, the land's return was not accompanied by any means to restore it to its previous arable condition. Ahmad Rushdi Muhammad 'Id, a farmer from the nearby village of Zeita, owned 23 dunums of agricultural land with greenhouses, and olive and citrus trees. In August 2002, six dunums of this land were confiscated from the Wall's initial construction in the area. Although the Israeli authorities returned the land after they relocated the Wall in February 2004, 'Id was no longer able to cultivate it as it was no longer arable. Moreover, despite the return of land in the area, Palestinians have reported harassment by Israeli soldiers when they attempt to use the land, and its restoration to its prior arable state is beyond the financial means of many farmers, include 'Id.[43]

[42] See Palestinian Hydrology Group, *supra* note 10, page 76.
[43] Al-Haq Affidavit No. 1995/2004.

2. PREVENTION OF ACCESS TO MEANS OF EMPLOYMENT

The construction of the Wall has restricted other Palestinians in their access to means of employment. Those who live in the Seam Zone but work elsewhere must travel daily through the gates in order to reach their places of employment. Those merchants whose commercial establishments depend heavily on consumers from Jerusalem or Israel have also been impacted; in Abu-Dis, shop-owners relied on customers from Jerusalem for up to 60% of their monthly income, a consumer base that is now at risk.[44] Although the impact of the Wall on employment rates has to date been limited, due to the existing grave impact of closures and other movement restrictions,[45] it is likely that the construction of the Wall will result in an increase in unemployment. Many of those who have previously been able to maintain some financial savings in order to provide for future needs such as the education of their children, construction of homes, etc., have to rely on those savings in order to be able to meet their current financial needs. The Wall will also impact those Palestinians who work in the Israeli labour market, further restricting their ability to reach their employment.[46] Hasan Muhammad Darwish Da'oud, a resident of Beit Diqqo near Jerusalem, stated that the Wall will result in unemployment in his village and the surrounding area both because of the inability of residents to access labour markets for work and the inability to farm their land as an alternative means of income generation.[47] It is clear that the Wall, as an extension of the Israeli policy of closures imposed on the Palestinian people, will continue to harm the Palestinian economy, already in a dire condition with 47% of Palestinians living below the poverty line.[48] One resident of Nazlet 'Isa stated that 350 workers and their families now have to rely on food aid from the World Food Programme.[49]

> Work in my shop has constantly deteriorated, as customers from Jerusalem and the surrounding neighbourhoods such as al-Shayyah, Ras al-'Amoud, Wadi Qadoum, Silwan and Jabal al-Mukabber are unable to reach by car. Moreover, dozens of high-income families holding Israeli [permanent residency] identity cards moved away from al-'Eizariyya and Abu-Dis area. Therefore, although our shop had been located in a strategic location, the south gate to Jerusalem, this location has become the end of Abu-Dis line and it no longer witnessed traffic jams of cars coming from the south of the West Bank [Bethlehem and Hebron]. [The construction of the wall] made our daily sales drop from NIS15,000 to NIS 4,000.[50] Undoubtedly this change has negatively impacted all 50 member of our extended family - 50 m.

[44] UNRWA, "Reports on the West Bank Barrier: Abu Dis, East Jerusalem," March 2004.
[45] See World Bank, *supra* note 36, pages 17-18.
[46] However, it should be noted that there has been a decline of 67.6% of the number of Palestinian West Bank labourers working in the Israeli labour market since the outbreak of the *intifada. Ibid*, page 19.
[47] Al-Haq Affidavit No. 1641/2004.
[48] See World Bank, *supra* note 36, page xv.
[49] Al-Haq Affidavit No. 2155/2005.
[50] Equivalent to a drop in daily income of $2420 at March 2004 exchange rates.

Extracts from Al-Haq's Affidavit No. 1728/2004
Given by: Usama Salah Naser Marziq, (Resident of Jabal al-Mukabber, nearby East Jerusalem, West Bank).

3. DESTRUCTION OF PALESTINIAN HOMES

Property destruction which has accompanied the Wall's construction in the OPT has seen other victims as well, notably the Palestinian home, which represents not merely the house and land, but also the family and its centre of life. Houses near the route of the Wall have been demolished, although it should be noted that Israeli authorities have stated that such demolitions are due not to the Wall's construction, but to administrative reasons, i.e., lack of permits. The problem of housing is particularly complex in the vicinity of Jerusalem. Because of the special impact of the Wall on Palestinians with Jerusalem IDs, those Palestinians who can afford to do so are moving closer to Jerusalem and away from Abu-Dis, al-Ram, and other surrounding areas. However, the cost of land on the "Israeli" side of the Wall is escalating, and thus moving is not always possible for Palestinians, many of whom are in a low economic bracket. At the same time, the price of land on the "Palestinian" side of the Wall is depreciating, thus contributing to the further decline of the economy. It is also important to note that Palestinian families in this area are gravely impacted. Those families in which some members hold a West Bank ID while others have a Jerusalem ID find themselves in a particular bind, as it is even more difficult for them to live together. Those who hold Jerusalem IDs must remain on the "Israeli" side of the Wall or risk losing their ID, which permits them to work in Jerusalem as well as access to healthcare and other services. Those with a West Bank ID cannot legally live on the "Israeli" side of the Wall, and it is impossible to obtain a Jerusalem ID through family unification, as all family unification applications have been frozen since 2002.[51] In sum, Palestinian homes - the houses as well as the families therein - have both directly and indirectly been gravely impacted by the construction of the Wall.

4. RESTRICTED ACCESS TO EDUCATION

The Wall also restricts the ability of Palestinians to reach educational institutions. For those areas in the Seam Zone where the community has no school or where the level of schooling is not comprehensive, students will have to cross through the gates every day. In the southern area of the West Bank, students residing in the eastern area above the Wall will no longer have access to the secondary school in al-Ram. As a result, they will have to travel over to Karmil or Yatta. Ministry of Education officials in the southern Hebron area are trying to enlarge the educational facilities, but have been prevented from doing so by Israeli building restrictions.[52] It has been reported that 3.4% of Palestinians in areas where the Wall is being constructed have abandoned

[51] For more information see chapter on "Family Unification" in this report.
[52] See OCHA, *supra* note 3, page 29.

their educational pursuits entirely.[53] Teachers are also impacted by the construction of the Wall: 28% of the teachers at the UNRWA Girls School in Abu-Dis are from outside the area, and thus will have to travel across the Wall every day.[54] Jamila Sarsour, the headmistress of the girls school in 'Azzoun 'Atma, has said that her daily travel between her village of Mas Ha and 'Azzoun 'Atma, which previously took 15 minutes, now takes an hour. Such delays and problems with logistical matters such as access through the gates and obtaining permits will have a grave impact on the quality, accessibility and availability of education to Palestinian students.

Inevitably, the construction of the Wall will have a similar impact on many other aspects of Palestinians' daily lives. Their ability to access adequate health care, to reach places of worship, and to see family and friends has been substantially curtailed. In February 2004, two-year-old Muhammad Hashem died when his parents were unable to cross a gate in the Wall. A doctor told his mother that the child was severely ill and needed to be taken to hospital, the nearest one being in Qalqiliya. The gate in the Wall was closed and they were unable to get through. The trip that should have been three kilometres from the village of Habla to Qalqiliya was instead 25-30 kilometres. The additional travel time proved fatal.[55] Such restricted access to health care has a severe impact on a society whose demand for health care is increasing due to conflict-related violence. Further, the use of the Wall as a means of cutting off Jerusalem from the rest of the OPT has a special impact on the ability of Palestinians to access adequate health care, as most Palestinian health care specialists are based in the city.[56] Such situations are not wholly new, as Palestinians have long been subjected to restrictions resulting from Israeli policies of curfews, closures, checkpoints, etc. Through the construction of such a vast physical structure, however, the Wall serves to permanently institutionalise restrictions on such rights as those to work, education, adequate housing, and health care.

> We face more difficulties during emergencies. Twenty days ago, my uncle Fou'ad Jado had a heart attack at around 3:00 p.m., and we had to carry him for a kilometre on a rough road until we reached to the opening in the Wall opposite 'Ayda camp. The Palestine Red Crescent Society ambulance was waiting for us on the opposite side because the Israeli army does not allow them to come to home. In addition to that, the Israeli bulldozers have damaged the road to our home.
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> **Extracts from Al-Haq's Affidavit No. 1947/2004**
> Given by: Bilal 'Adel Ahmad Jado, (Resident of al-Wata al-Tantour, nearby Bethlehem, West Bank).

[53] Palestinian Central Bureau of Statistics (PCBS), "Impact of the Expansion and Annexation Wall on the Socioeconomic Conditions of Palestinian Households in the Localities in which the Wall Passes Through," Palestinian Central Bureau of Statistics, October 2004, page 5.

[54] See UNRWA, *supra* note 44, March 2004.

[55] Al-Haq Affidavits No. 1680/2004 and 1681/2004.

[56] Médecins du Monde, "The Ultimate Barrier: Impact of the Wall on the Palestinian Health Care System," Paris & Jerusalem: Médecins du Monde, February 2005, page 8.

It should also be emphasised that it is difficult to separate these issues from each other. Students drop out of school not just because of the travel restrictions resulting from the Wall's construction, but because of the decline in the family income resulting from the Wall. The inability of Palestinians to obtain adequate health care has a direct impact on their ability to work, and the decline in family income results in the inability of family members to obtain adequate health care. This inter-connectedness is arguably one of the most pernicious aspects of the Wall. The result is a collection of accumulated violations which exacerbate each other, and a crisis from which Palestinian society will unquestionably need years to recover. Further, the concentration of so many core issues through one structure serves as a means of increasing pressure on the Palestinian population to relocate. This point was recognised by the ICJ, which observed in its Advisory Opinion on the Wall,

> There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing … to the departure of Palestinian populations from certain areas.[57]

The Court went on to note that the demographic balance of the OPT has already been altered by the construction of the Wall therein, and that this impact will continue with the ongoing construction of the Wall together with the Israeli settlement policy. [58]

D.RESTRICTION OF THE PALESTINIANS' ABILITY TO ACHIEVE SELF-DETERMINATION

If the Wall is completed as presently planned, it will have a devastating impact on the ability of the Palestinian people to achieve their self-determination. The imposition on the Palestinian people of a physical structure, the creation of enclaves, and an additional administrative permit system can only be expected to further divide the population. In his comment on this matter, the UN Special Rapporteur on the OPT stated,

> [T]he amputation of Palestinian territory by the Wall seriously interferes with the right of self-determination of the Palestinian people as it substantially reduces the size of the self-determination unit (already small) within which that right is to be exercised.[59]

The further division of the OPT, already a non-contiguous territory; the reduction of the territory available to the Palestinians for the formation of a state; and the resulting demographic changes in this area cannot serve but to prevent the Palestinians from exercising their fundamental right to self-determination.

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[57] International Court of Justice (ICJ), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, paragraph 122.

[58] *Ibid*, paragraph 133.

[59] John Dugard, "Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967, Submitted in Accordance with Commission Resolution 1993/2 A, E/CN.4/2004/6," 8 September 2003, paragraph 15.

E. CONTRADICTORY TO THE ABILITY TO ACHIEVE PEACE

The construction of the Wall in the OPT also has a significantly detrimental effect on the ability to achieve a just and durable solution to the conflict. Rather than seeking ways in which each party can live freely and without interference, the Israeli authorities have unilaterally and forcibly imposed an invasive "solution" through newly-created facts on the ground. This concern has been raised by various international leaders, including UN Secretary-General Kofi Annan, who declared,

> Israel has repeatedly stated that the Barrier is a temporary measure. However, the scope of construction and the amount of occupied West Bank land that is either being requisitioned for its route or that will end up between the Barrier and the Green Line are of serious concern and have implications for the future. In the midst of the road map process, when each party should be making good-faith confidence-building gestures, the Barrier's construction in the West Bank cannot, in this regard, be seen as anything but a deeply counterproductive act. The placing of most of the structure on occupied Palestinian land could impair future negotiations.[60]

As such, the construction of the Wall impacts not just the present of the Palestinian people, but their future as well.

III. INTERNATIONAL LAW AND THE WALL

As evidenced above, the construction of the Wall results in the extensive violation of Palestinians' fundamental rights under international human rights and humanitarian law as well as other areas of public international law. Such violations are both direct (e.g., the destruction of Palestinian property) and indirect (e.g., the resulting inaccess to education, health care, etc.). Further, the Wall's construction is a violation of the bilateral agreements signed between Israel and the Palestine Liberation Organisation (PLO) in the early 1990s. It is important to note that any legal analysis should consider both the existing damages resulting from the construction of the Wall to date, as well as those damages which would be anticipated in the future.

A. INTERNATIONAL HUMANITARIAN LAW

The construction of the Wall in the OPT has breached a number of provisions of international humanitarian law through the confiscation of private property, the destruction of real or personal property, the use of collective punishment and measures of intimidation, the infliction of harm on Palestinian civilians (who are protected persons in accordance with the Fourth Geneva Convention), and the annexation of occupied territory. It also breaches the fundamental legal principle of proportionality, and may constitute a grave breach of the Convention (i.e., a war crime which invokes mandatory universal jurisdiction).

[60] Annan, Kofi, "Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13, A/ES-10/248," 24 November 2003, paragraph 29.

1. DESTRUCTION OF REAL OR PERSONAL PROPERTY AND THE CONFISCATION OF PRIVATE PROPERTY

The construction of the Wall has resulted in the extensive confiscation of Palestinian land and the destruction of Palestinian property. Such actions are in violation of Israel's obligations under both the Hague Regulations and the Fourth Geneva Convention. Article 46 of the Hague Regulations specifically prohibits the confiscation of private property, while Article 53 of the Fourth Geneva Convention states,

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

As such, any actions by Israeli authorities to destroy Palestinian houses, shops, land, agricultural resources, aquifers, or cultural property in the process of construction of the Wall is in breach of Israel's obligations under international law. Israel's primary defence of the Wall's construction has been the protection of the lives of its citizens inside the Green Line. However, the construction of a Wall inside the OPT, rather than along the Green Line or inside Israel itself, does not meet two basic tests of military necessity. First, the military advantage to be gained by the Wall's construction does not outweigh the grave damage done to the Palestinian population in the OPT. Secondly, the routing of the Wall inside the OPT is neither the most adequate nor the most effective response to armed attacks against Israeli targets inside the Green Line. It has also been argued that the Wall serves to protect the Israeli settlers in the OPT; however, this argument does not meet this test as their presence is itself a breach of international law. Further, the principle that an illegal act cannot produce legal rights is a well-founded one in international law. This argument could potentially have merit were the Wall constructed along the Green Line without impacting Palestinian land and other natural resources; however, with 85% of the Wall constructed in the OPT, the damages done to the Palestinian population cannot be justified under international humanitarian law.

While it could be argued that the confiscation of land is a temporary act, and as such can be considered as requisitioning property from occupied territories, an act which is permitted if it is for the need of the occupying forces, the Hague Regulations are quite clear that such requisitioning must be in proportion to the resources of the country. The extent of the confiscation of property to date makes it evident that all such confiscation has been clearly disproportionate to the resources of the OPT. Further, any claim to the temporary nature of the confiscation must be seen in context of Israel's ongoing history of "temporarily" confiscating Palestinian land and then using it to build settlements, bypass roads, and other illegal structures for its own settler population.

The extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, is deemed to be a grave breach of the Fourth Geneva It

Convention under Article 147 thereof. In light of the fact that 11.5% of the West Bank is located between the Wall and the Green Line, it is evident that Israeli authorities have appropriated extensive amounts of Palestinian property. Further, the uprooting of trees and destruction of greenhouses and aquifers, combined with the construction of the Wall and its accompanying components (i.e., depth barriers, asphalt roads, and trace paths) which have created a long-term impact on the land, may constitute extensive property destruction.

2. PRINCIPLE OF PROPORTIONALITY

The principle of proportionality - a principle which necessitates a balance between the anticipated military advantage and the means used to obtain it - is one of the most fundamental provisions of international law. The Israeli High Court of Justice has stated that it is also a general principle of Israeli administrative law, adding that "it applies to the use of the military commander's authority pursuant to the law of belligerent occupation."[61] The construction of the Wall in the OPT, together with its associated regime - property destruction and confiscation; house demolition; destruction of natural resources; restrictions on the rights to work, health, food, water, education, adequate housing, movement, and worship; restriction on the right to self-determination; and infliction of harm on protected persons - clearly constitute a disproportionate measure. Indeed, in its consideration of the legality of a 40-kilometre section of the Wall near Jerusalem, the Israeli High Court found that for 30 of those 40 kilometres,

> … the relationship between the injury to the local inhabitants and the security benefit from the construction of the separation fence along the route, as determined by the military commander, is not proportionate.[62]

3. PROHIBITION OF COLLECTIVE PUNISHMENT AND MEASURES OF INTIMIDATION

The principle of individual penal responsibility - that individuals may only be punished for acts that they personally committed - is also a fundamental principle of law. The corollary to this principle is that no one may be penalised for an act they did not themselves carry out. International humanitarian law clearly prohibits the Occupying Power from penalising a group for the actions of individuals if the group members are not jointly responsible. This prohibition is upheld in the Hague Regulations as well as the Fourth Geneva Convention, Article 33 of which states,

> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.

[61] *Beit Sourik Village Council v. the Government of Israel, et al*., HCJ 2056/04, at paragraph 38.
[62] *Ibid*, at paragraph 60. See also paragraphs 67, 71, 76, 80, and 81.

should be emphasised that this prohibition does not apply merely to punishment applied in response to acts committed by individuals, but also specifically references the application of measures of intimidation intended to forestall acts that may be committed in the future.

The Israeli authorities have repeatedly stated that they are constructing the Wall in response to Palestinian armed attacks against Israelis. However, as the Occupying Power, Israel is bound in any response by the fundamental principles of international humanitarian law. The construction of a Wall that impacts all Palestinians regardless of their individual responsibility for acts that the Israeli authorities seek to bring to an end is a clear violation of the prohibition of collective punishment and measures of intimidation. The completion of the Wall will effectively result in the creation of a large outdoor prison to which the Israeli authorities hold the keys.

4. RESPECT FOR THE HUMAN PERSON

One of the most basic provisions of the Fourth Geneva Convention is Article 27, which proclaims the principle of respect for the human person and the inviolable character of the basic rights of individuals. The International Committee of the Red Cross (ICRC) notes in its authoritative commentary that this article is "the basis of the Fourth Geneva Convention, proclaiming as it does the principles on which the whole of 'Geneva law' is founded."[63] While certain rights may be restricted for security measures "as may be necessary as a result of war," no specifications are made as to what security measures may be considered legitimate actions for a state to take in such circumstances. This leaves a great deal of discretion to the parties to a conflict to restrict rights. What is essential is that such measures not affect the fundamental rights of the protected persons concerned.[64]

It is unquestionable that the Wall and its associated regime - which serve to restrict such rights as those to food, housing, work, education, health, culture, worship and self-determination - have a grave impact on the fundamental rights of Palestinians. The collective restriction of all of these rights simultaneously arguably represents a lack of respect for the human person, and thus is considered a violation of the fundamental rights of the Palestinian people. Further, the Israeli authorities are in breach not merely of their negative duty not to cause harm to Palestinian civilians, but also of their positive duty to protect them.

5. PROHIBITION OF ANNEXATION OF OCCUPIED TERRITORY

As noted earlier, the West Bank (including East Jerusalem) is deemed occupied territory under international law. The Fourth Geneva Convention is quite clear about the inviolability of rights of protected persons living in occupied territory. In accordance with Article 47 thereof, Palestinians

[63] International Committee of the Red Cross (ICRC), T*he Geneva Conventions of 12 August 1949, Commentary-Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Pictet, Jean S. (ed.), 1958, pages 199-200.
[64] *Ibid*, page 207.

in the OPT may not be deprived of the Convention's protections by changes introduced as a result of the occupation,

> Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

This article specifically references annexation (in whole or in part), which clearly includes Israel's attempt to annex land in East Jerusalem and elsewhere in the West Bank. The ICRC states in its authoritative commentary that the inclusion of annexation in this provision does not imply recognition to annexation as a means of acquiring sovereignty over occupied territory.[65] As noted therein, "A decision on that point [annexation of territory] can only be reached in the peace treaty."[66] Occupation does not end the sovereignty of those under occupation, and is in fact legally incompatible with annexation - it cannot imply any right whatsoever to dispose of territory.[67]

Since the beginning of the Wall's construction in 2002, Israeli officials have disputed claims of human rights and civil society organisations regarding the illegality of the Wall under international humanitarian law. They have stated that they are entitled to build such a Wall based on the right to self-defence and the principle of military necessity, and that such actions as property confiscation are permissible under international humanitarian law. The ICRC, the guardian of the Geneva Conventions, has taken a different position: in a press release in February 2004, the ICRC stated that the Wall's construction and its associated measures to date were a violation of Israel's obligations under international law,

> The measures taken by the Israeli authorities linked to the construction of the Barrier in occupied territory go far beyond what is permissible for an occupying power under [international humanitarian law].[68]

B. INTERNATIONAL HUMAN RIGHTS LAW

The Wall's construction breaches international human rights law as well as international humanitarian law. As a State Party to most of the core UN human rights treaties, Israel is in

[65] *Ibid*, page 276. It should also be emphasised that it is a basic principle of international law that the acquisition of territory by force is prohibited, as will be considered *infra*.
[66] *Ibid*, page 275.
[67] *Ibid*, page 275.
[68] ICRC, "Israel/Occupied and Autonomous Palestinian Territories: West Bank Barrier Causes Serious Humanitarian and Legal Problems," *Press Release* 04/12, 18 February 2004.

violation of the provisions thereof which relate to the Wall, in particular, the rights to freedom of movement; to own property and to be free from arbitrary or unlawful deprivation thereof; adequate housing; work; food; health; education; and cultural life. Israeli authorities are also in breach of the principle of non-discrimination, as well as the fundamental right to self-determination.

1. FREEDOM OF MOVEMENT

One of the most obvious violations resulting from the construction of the Wall is the restriction on Palestinians' movement. While Israeli authorities have utilised a number of movement restrictions over the years, the Wall serves as a durable and physical manifestation of the Israeli policy of restricting the freedom of movement of Palestinians both within and from the OPT. Arguably the most pernicious aspect of this form of restriction is the requirement that Palestinians seeking to enter the area between the Wall and the Green Line - notably including East Jerusalem - must obtain a permit to do so. The right to freedom of movement is upheld in numerous international standards, most notably the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 12(1) of the ICCPR states that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." The UN Human Rights Committee (HRC) has stated that this right,

> … relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place.[69]

In accordance with this article, Palestinians may not be restricted in their movement within the West Bank, and their ability to travel within this area, including within the Seam Zone, cannot be dependent on a specific purpose for their desire to go to a particular area. While paragraph 3 of Article 12 makes clear that the right to move freely can be subject to restrictions based on the need to protect national security, such restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes, and must be consistent with all other rights recognised in the ICCPR. In addition, such derogations must respect the fundamental principle of proportionality. The HRC stated that restrictions must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[70] The Committee's observations on permissible limitations of this right give evidence that Israel's construction of the Wall in the OPT is unlawful,

[69] HRC, *General Comment No. 27: Freedom of Movement*, (Article 12), (CCPR/C/21/Rev.1/Add.9), paragraph 5.
[70] *Ibid*, paragraph 14.

The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of "State secrets," or if an individual were prevented from travelling internally without a specific permit.[71] [emphasis added].

Moreover, restrictions of the right to freedom of movement are incompatible with other rights contained within the ICCPR if this right is restricted by distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[72]

Although Palestinians must apply for a permit to cross through gates in the Wall, this requirement is not imposed on Israeli citizens or residents (including Israeli settlers in the OPT), or on non-citizens who are allowed to immigrate to Israel under The Law of Return (1950). Further, the route of the Wall is such as to include a maximum number of Israel's settler population on the "Israeli" side of the Wall, while excluding as many Palestinians as possible, which itself is discriminatory. As such, the Wall and its permit regime are clearly based on discriminatory grounds, and thus cannot be deemed a lawful derogation based on the grounds of national security.

In response to criticism of the movement restrictions placed on Palestinians in regards to both the Wall and the bypass roads, Israeli authorities have announced that they will construct a series of tunnels to facilitate Palestinians' travel. These tunnels would divert Palestinian traffic away from the Wall and settlements, allegedly providing "transportation contiguity." However, this plan will only serve to formalise Palestinian movement restrictions, lengthening Palestinians' journeys and increasing costs in an effort to protect Israeli "territorial contiguity."[73] Further, such a system based on ethnicity fails to address the underlying racial discrimination on which the Wall and its associated regime are based.

2. RIGHT TO OWN PROPERTY AND TO BE FREE FROM ARBITRARY OR UNLAWFUL DEPRIVATION THEREOF

The Wall's construction has a grave impact on the ability of Palestinians to exercise their right to property. The right to own property alone and with others is upheld in the UDHR; Article 17 thereof states that no one may be arbitrarily deprived of his property. Even in the most narrow definition of property, the Wall's construction is clearly breaching this provision, as it confiscates the private property of Palestinians living and working in the vicinity of the Wall.

[71] *Ibid*, paragraph 16.
[72] *Ibid*, paragraph 18.
[73] See *supra* note Palestinian Monitoring Group, 21 at page 3.

Specific components of this right are also found in a range of other international standards. In particular, international law prohibits racial discrimination in the ownership of property. It is evident that the impact on the Wall is solely felt by Palestinians, including as it relates to confiscation of land and property around the Wall. As such, Israel's construction of the Wall breaches its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 5(d)(v) of which states,

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: …
> (d) Other civil rights, in particular: …
> (v) The right to own property alone as well as in association with others;

The confiscation of Palestinian land under and around the Wall and denial of access to that in the Seam Zone is clearly a breach of this right.

It is worth noting that property serves a range of social functions; in the OPT, it particularly relates to the rights to housing and employment. To this end, the Israeli violation of the right to property also entails violations of the right to adequate housing and the right to work.

3. RIGHT TO ADEQUATE HOUSING

The right of Palestinians to adequate housing has clearly been curtailed by the construction of the Wall. This right is upheld in several international standards, such as the UDHR; the International Covenant on Economic, Social and Cultural Rights (ICESCR); ICERD; and the Convention on the Rights of the Child (CRC). Article 11(1) of ICESCR, one of the primary legal provisions on this issue, states,

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions….

The UN Committee on Economic, Social and Cultural Rights (CESCR) has noted that the right to housing should not be interpreted narrowly, but "should be seen as the right to live somewhere in security, peace and dignity."[74] The CESCR has thus maintained that this right has a range of elements which are important for its realisation, including availability of services, habitability, accessibility, and location.[75] With this in mind, the construction of the Wall is in breach of this

[74] UN CESCR, *General Comment No. 4: The Right to Adequate Housing* (Art. 11(1), (E/1992/23), paragraph 7.
[75] *Ibid*, paragraph 8.

provision, as it results in the destruction of Palestinian houses;[76] places households and families at risk of demolition and separation; prevents affected Palestinians from accessing emergency health care services; and separates families.

Further, when reading this provision of the ICESCR, one must also consider the non-discrimination provision contained within Article 2(2) thereof.[77] This principle is also upheld in Article 5(e)(iii) of ICERD, which states that everyone is entitled to equality before the law in regards to key rights, including the right to housing, "without distinction as to race, colour, or national or ethnic origin." Thus, to the extent that the construction of the Wall is restricting the ability of Palestinians to exercise their right to adequate housing (in particular by requiring those Palestinians living in the Seam Zone to obtain permits to live in their own homes), while not impacting the ability of Israelis to exercise this right, Israeli authorities are in further breach of these standards.

4. THE RIGHTS TO WORK, FOOD, HEALTH AND EDUCATION

As a result of the construction of the Wall, Palestinians are being subjected to violations of several other economic, social and cultural rights, particularly the rights to work, food, health, education and cultural life. Many of these rights are also upheld in the ICESCR, notably the right to work (Articles 6); the right to food (Article 11(1)); the right to the highest attainable standard of physical and mental health (Article 12); the right to education (Article 13); and the right to take part in cultural life (Article 15(1)(a)). They are also upheld in other standards such as the UDHR, ICERD, CEDAW and CRC. It should also be noted that the realisation of these interrelated rights is an important element of the ability to live in dignity.

Although many Palestinians are not completely isolated from workplaces, schools, healthcare clinics, and places of worship, the construction of the Wall will greatly complicate their ability to access these institutions, in particular with the associated gates and permit regime. Travel time has been greatly multiplied, and some places, including East Jerusalem where specialist health care facilities and principle religious sites are based, will be unreachable entirely. It is important to note that Article 2(1) of the ICESCR provides that,

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

[76] As of this writing, no houses have been demolished specifically for the Wall; however, Israeli authorities have undertaken house demolitions along the route of the Wall on administrative grounds, notably that the homeowners do not have a permit for the construction/expansion/renovation of their houses. The Israeli refusal to grant such permits to Palestinian homeowners has been well-documented.

[77] "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Israeli actions pertaining to the Wall's construction are in fact regressive in regards to the realisation of the rights outlined within the ICESCR. As such, Israeli authorities are failing to respect their obligation to protect these rights. Further, as with the right to housing, these obligations must be read jointly with the non-discrimination provision of the ICESCR. As the restrictions imposed by the Wall's construction affect only Palestinians, they are discriminatory in nature, and thus are in breach of Israel's obligations under the Covenant.

5.THE PRINCIPLE OF NON-DISCRIMINATION

Underlying nearly every legal issue pertaining to the Wall is the fundamental principle of non-discrimination. The right to be free from discrimination is a long-standing principle of international human rights law, first cited in the UN Charter, and subsequently cited in the core human rights treaties such as the ICCPR, ICESCR, and CRC. Palestinians are typically victim to racial discrimination, defined in Article 1(1) of ICERD as,

> …any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

It should be noted that ICERD indicates that states do not merely have an obligation to take steps to prevent racial discrimination, they also have a positive obligation to take steps towards achieving equality for disadvantaged groups. In short, it presses states for equality in fact as well as in law. The prohibition of racial discrimination has been deemed to be a matter of customary international law,[78] and indeed an erga omnes obligation.[79] Further, the European Court of Human Rights has deemed that "discrimination based on race could, in certain circumstances, of itself amount to degrading treatment."[80]

As such, through the construction of the Wall, the Israelis are in violation of their obligation not to discriminate against Palestinians and to ensure equality before the law. The routing of the Wall so as to include as many Israelis and exclude as many Palestinians as possible is a clear restriction imposed on the Palestinian people. Similarly, the institutionalisation of permit and gate systems that treat Israelis (and those eligible for Israeli citizenship under the Law of Return) differently than Palestinians also serves as a means of excluding Palestinians. Such actions serve in effect, if not also in purpose, to restrict the ability of Palestinians to exercise many of their fundamental rights and freedoms.

[78] Judge Tanaka, *South West Africa Cases* (Second Phase) Judgment, *ICJ Reports* (1944) 4 at 298.
[79] *Barcelona Traction Light and Power*, Ltd (Belgium v Spain) Judgment, *ICJ Reports*, 1970, at paragraph 32.
[80] *East African Asians v United Kingdom* (1981) 3 European Human Rights Reports 76 at 86.

6. THE RIGHT TO SELF-DETERMINATION

The construction of the Wall on the route as presently planned will gravely restrict the ability of the Palestinian people to exercise their basic right to self-determination. This right, which is based in the UN Charter, is also common to both the ICCPR and the ICESCR. Article 1 of each states,

> (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

This principle has been repeatedly upheld by the General Assembly (GA)[81] and the Security Council (SC).[82] Indeed, in its Advisory Opinion on this issue, the ICJ reiterated that the right to self-determination is a right erga omnes.[83]

Israel's construction of the Wall breaches the Palestinian right to self-determination on several levels. First, the Wall's construction, in particular its weaving route throughout the OPT, effectively restricts the ability of the Palestinian people to realise this right by reducing the territory on which this can be exercised. Secondly, both the Wall's construction and its route are harming the Palestinians' natural resources, depriving them of their means of subsistence. Thirdly, rather than promoting and respecting this right for the Palestinians, Israeli authorities are restricting it and weakening the capacity for its realisation. In addition, the effort to change the demographic nature of the territory in the Seam Zone will serve to further hinder the Palestinians' ability to exercise this right.

[81] See, *inter alia*, UN General Assembly (GA) Resolutions 2767 (1970), 2787 (1971), 34/70 (1979), and 58/163 (2003).
[82] See, *inter alia*, GA Resolutions 1397 (2002) and 1402 (2002).
[83] See ICJ, *supra* note 57, paragraph 88.

C. PUBLIC INTERNATIONAL LAW

1. PROHIBITION OF THE ANNEXATION OF TERRITORY BY FORCE

International law prohibits the acquisition of territory by force, even in self-defence. This principle is upheld in Article 2(4) of the UN Charter, which notes that states may not use force or the threat thereof against the territorial integrity or political independence of other states, or in a manner which is not consistent with the purpose of the UN. This principle was reiterated in GA Resolution 2625(XXV) of 1970, which noted that states must not use force to violate existing international boundaries or to solve international disputes, including territorial ones. The resolution adds,

> Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect….

Despite this clear prohibition under international law, Israeli authorities have continued their efforts to annex more of the OPT through means of the Wall. Palestinians have been told that they must have a permit to enter the area between the route of the Wall and the Green Line, as they are entering "Israeli territory." This is not unique, as Israeli authorities have in practice purported to annex other territory which they occupied in 1967, such as East Jerusalem and the Golan Heights. Despite such efforts, the international community has maintained its refusal to recognise such actions, and has in fact condemned them repeatedly.[84]

There is also a possible risk of the permanent loss of some Palestinian land in the Seam Zone as early as April 2005. A number of Palestinian farmers and landowners have been unable to access their land since it was confiscated by Israeli military orders. Under the Ottoman Land Law of 1858,[85] certain types of land which are uncultivated for three consecutive years may be declared "state land" and permanently confiscated. This is based on one of the fundamental and historical principles relating to land law in Palestine: ownership is limited by use.[86] Israeli authorities have utilised this provision in the past to confiscate Palestinian land for settlements and bypass roads. Those lands in the Seam Zone vulnerable to such confiscation may be at risk of permanent confiscation once three years has passed since they were able to be cultivated.

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[84] See, *inter alia*, Security Council (SC) Resolutions 252 (1968), 476 (1980), and 487 (1981) and GA Resolutions 2949 (1972) and 55/50 and 55/51 of 1 December 2000.

[85] Some areas of Ottoman law remain in force in the OPT because subsequent legal regimes, including those under the British Mandate, Jordanian rule and Israeli occupation, have all stated that existing laws will remain in place unless they are amended, appealed or in contradiction with the new laws under each of these regimes. Raja Shehadeh, *The Law of the Land*, Palestinian Academic Society for the Study of International Affairs (PASSIA), Jerusalem, 1993, pages 18-19.

[86] *Ibid*, page 12.

2. BILATERAL AGREEMENTS

Finally, it should be mentioned that the construction of the Wall is not merely a breach of international legal standards, it is also a violation of the bilateral agreements that have been negotiated between the Israelis and the PLO. The 1995 Interim Agreement on the West Bank and Gaza Strip (Oslo II) addresses the issue of land in the OPT, noting that "[t]he two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period."[87] As such, the Wall's construction is a breach of Israel's obligations undertaken in the pursuit of a peaceful settlement of the Israeli-Palestinian conflict.[88]

IV. PETITIONS BEFORE THE ISRAELI HIGH COURT OF JUSTICE

Within months of Israeli Cabinet's approval of the Wall's construction, legal challenges were brought, several by residents of the local villages affected by the Wall. Most of the initial challenges were actually legal challenges to the Israeli Civil Administration's Appeals Committee, and not in fact to Israeli courts. They may have subsequently been brought before Israeli courts upon appeal, but it was typically in order to appeal the Committee's decisions regarding land seizure orders.[89]

Local non-governmental organizations (NGOs) began submitting legal claims in 2003, typically to the Israeli High Court of Justice. Taking into consideration the Court's history of dismissing petitions which were not specific in focus, most of these challenges addressed particular issues as they related to a specific area, or the legality of a particular section of the Wall, rather than focusing on the principle of the Wall's construction in the OPT.[90] Included among this "focused" litigation that had been submitted to the Court were the issues of:

A. PERMIT REGIME

Israeli military authorities were asked to revoke the designation of the Seam Zone behind the northern section of the Wall (the one that had already been built) as a closed military zone, and to cancel the permit regime. More than 5,000 Palestinians reside in the affected area, and thus must obtain permits from the Israeli authorities to live in their own homes, while no such restrictions are placed on Israeli citizens (or those eligible to immigrate under the Law of Return) who wish to live in this area.

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[87] Article XI(1), *Interim Agreement on the West Bank and Gaza Strip*, 28 September 1995.

[88] For a more detailed review of Israel's legal violations resulting from the construction of the Wall, see the written statement and oral pleadings of Palestine to the International Court of Justice: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

[89] HaMoked and Michael Sfard, "The Fight Against the Separation Wall: The Legal Front in Israel," September 2004, page 2, available at <http://www.hamoked.org.il/items/7090.pdf>, accessed 12 January 2005.

[90] See, *inter alia*, ACRI, No Exit: *Challenging the Impact of the Separation Barrier*," *Progress Report*, March - August 2004.

B. GATES IN THE WALL

In this petition, the Israeli military was challenged as to the inaccessibility of the gates system of the Wall as it affected the residents of four villages bordering the structure. Petitioners cited the erratic and limited opening hours of the gates, noting that they did not take into consideration the needs of the affected population. In response to the petition, the High Court challenged the military's actions in this regard, with Chief Justice Aharon Barak in particular noting that the military must provide solutions to the gates problem or else the Wall must be moved. This concern has been raised in subsequent petitions before the Court.

C. ENCLOSURES SURROUNDING PALESTINIAN VILLAGES

the Israeli authorities were challenged regarding the route of the Wall in al-Ram, where local residents had access cut off both from Jerusalem and from the surrounding areas which are an important contributor to the local economy. Petitioners cited areas where the construction resulted in irrevocable damage to local infrastructure, noting that it impacted 58,000 residents of the community. Although an interim injunction had been initially issued by the High Court, it later permitted the Israeli military to continue the construction while the petition is in process.

D. STOPPING CONSTRUCTION TO ALLOW FOR LEGAL CHALLENGES TO LAND EXPROPRIATION

This petition was filed on behalf of residents of Deir Qaddis and Ni'lin. They challenged the route of the Wall, as it confiscated substantial amounts of the land of the two villages. Petitioners sought a halt to the construction to allow time for adequate legal challenge to the confiscation. In the case of Ni'lin, Israeli authorities agreed to stop the construction until the revised route has been made available to village residents and they could then submit their objections. As for those in Deir Qaddis, residents were told that they would be given the opportunity to submit their objections, and that construction would be stopped until that time.

Individual petitions on such issues to the High Court are important, and can greatly assist those whose lives are directly impacted by the Wall. However, there is one substantive concern that must be raised therein: by seeking to "improve" the various associated regimes, such litigation serves to make the Annexation Wall "better." Individual petitions on issues such as permits must be submitted, but, in order to adequately address the problem, they must be accompanied by parallel efforts to challenge the Wall itself and its route in the OPT on principle. This was raised before the Israeli courts in the legal challenge of *HaMoked v. Government of Israel, et al*. The petitioners in this case addressed not only the legality of specific and limited segments of the Wall, but also raised an issue of principle, in particular,

> …[t]hat a colossal construction project such as that of the separation wall, the effects of which on the occupied civilian population, on the economy of the occupied territories and on all aspects of civilian life conducted therein, are far-reaching and long-term, to the extent that one might say they are permanent - violates the principles of international law and is categorically prohibited by the laws of belligerent occupation, insofar as its route runs inside the occupied territory and materially modifies the fabric of civilian life in the occupied territory, isolating in fact considerable portions of the occupied population, creating hermetic enclaves and constituting a de facto annexation of parts of the occupied land.[91]

The Israeli State Attorney's Office submitted a response, asking the High Court to deny the petition on such grounds as its generalness, its political nature and prematurity, and the fact that the likelihood that the petition would stop the Wall's construction was minimal. Further, it asked that the request for a temporary injunction be denied on the ground that the petition entailed substantial financial consequences. In the responses, the State cited previous and pending petitions, some of which it noted had resulted in changes to the Wall's route.[92]

Approximately a week before the ICJ rendered its Advisory Opinion, the Israeli High Court of Justice issued a well-publicised decision on the legality of a 40-kilometre stretch of the Wall north of Jerusalem. As noted above, in *Beit Sourik Village Council v. the Government of Israel, et al.*, the High Court held that for 30 of those 40 kilometres, the route of the Wall was disproportionate.[93]

However, the High Court also found that the military commander was authorised to build a Wall in the OPT, that much of the route addressed in the petition passed the test of military rationality and thus realised the military objective of the Wall, and that they deferred to the military commander on the ground whether a particular route granted less security than the existing one. Indeed, in its response to the petitioners' claim that the Wall, if it were built for security rather than political considerations, would be built on the Green Line, the Court stated,

> Petitioners, by pointing to the route of the fence, attempt to prove that the construction of the fence is not motivated by security considerations, but by political ones. They argue that if the fence was primarily motivated by security considerations, it would be constructed on the "Green Line," that is to say, on the armistice line between Israel and Jordan after the War of Independence. We cannot accept this argument. The opposite is the case: it is the security perspective - and not the political one - which must examine the route on its security merits alone, without regard for the location of the Green Line….[94]

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[91] *HaMoked v. Government of Israel, et al*., HCJ 9961/03, at paragraph 3 (emphasis in original).

[92] *Ibid*, "Respondents' Response to Application for Temporary Injunction," 1 December 2003, and "Preliminary Response on Behalf of the Respondents," 1 January 2004. For more information on this petition, see infra. No decision was made on this matter in 2004.

[93] See *Beit Sourik Village Council v. the Government of Israel, et al., supra* note 61, at paragraph 60. See also paragraphs 67, 71, 76, 80, and 81.

[94] *Ibid*, at paragraph 30.

The importance of the High Court's decision on this matter should not be underestimated, as it adopted a position that Israeli military authorities must take into some consideration the impact of their actions on individual Palestinians' lives. However, the corollary to this point is also true, in that its importance should not be overestimated. The Court refrained from assessing the impact on the Wall on Palestinians' collective rights, such as those to self-determination or to sovereignty over natural resources. Upon examination, it is obvious that the Court again utilised its formulaic balance in favour of Israeli security versus Palestinians' rights. Further, the decision of the Court to issue a decision on the Wall at this time appears to be a legal-political manoeuvre to minimise the impact of the Advisory Opinion. The Court had several earlier opportunities to consider the grave impact of the Wall on the Palestinian population in the OPT, including ones addressing such issues as the creation of enclaves which unquestionably have a disproportionate impact on the Palestinians trapped therein; however, the Court did not previously choose to raise such concerns until this time.

The response of the State and of the High Court in the aftermath of both Beit Sourik and the Advisory Opinion has been interesting. On the one hand, the State submitted a supplemental response to the HaMoked petition, reiterating its earlier concerns and asking that it be dismissed in light of the fact that a re-examination was being undertaken following the Beit Sourik judgment

> It is already clear that more than a few changes will be made in the route, as approved at the time, and that this will be done following the rules set forth in the judgment as a guide.
>
> This being the case, it appears that the present petition, which attacks the fence's route as approved at the time by the government, is no longer relevant, and the Respondents therefore request that the petition be summarily dismissed.[95]

Around this same time, during a hearing on the Wall, the High Court agreed that the Ministry of Justice must submit a written brief regarding the legal implications of the ICJ's Advisory Opinion. Although the Ministry was asked to submit this response within 30 days, repeated requests were made for additional time to prepare the document. Construction of the Wall continued throughout this period. As of December 2004, no response had been submitted to the Court.

In general, it is important to remember that in accordance with the right to a remedy, the options for remedy must be effective.[96] To the extent, therefore, that the Israeli High Court of Justice remains unwilling to challenge the claims of the military commander on the ground, regularly deferring to him on all relevant matters in the name of security, it is questionable whether Palestinian petitioners have had a genuine opportunity for an effective remedy in their efforts to legally challenge the Wall before the Court.

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[95] See *supra* note 91, "Supplemental Response on Behalf of the Respondents," 10 August 2004, paragraph 3 (emphasis in original).

[96] See, *inter alia*, Article 8 of the UDHR and Article 2(3) of the ICCPR.

V. THE INTERNATIONAL COURT OF JUSTICE ADVISORY OPINION

A. BACKGROUND OF THE ADVISORY OPINION

In December 2003, UN member states, through the GA, requested that the ICJ urgently render an advisory opinion on the Wall. In GA Resolution ES-10/14, the ICJ was specifically asked,

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

Although this referral was the subject of much international discussion, it is clear that it was fully in accordance with the provisions of international law regarding referrals to the ICJ as outlined in the UN Charter and the Statute of the ICJ. As one of the principal organs of the UN, the ICJ accepts referrals "at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[97] Article 96(1) of the UN Charter clearly states that "the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." Further, the UN Charter states that the GA has competence for any questions or matters within the scope of the Charter, and that this competence specifically includes "questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations."[98] Despite rhetoric to the contrary based on such claims as the "political" nature of the issue or the need to have the consent of both parties, the referral to the ICJ was unquestionably in full compliance with international law.[99]

Once the matter was referred to the ICJ, the Court then issued an order organising proceedings, setting 30 January 2004 as the deadline for written statements, and granting Palestine authorisation to submit a written statement and take part in the hearings, which were scheduled to open on 23 February 2004. Permission was also granted to the League of Arab States and the Organisation of the Islamic Conference to take part in the proceedings. By 30 January 2004, the ICJ had received 48 written statements from the UN, Israel, Palestine, the League of Arab States, the Organisation of the Islamic Conference and 43 UN member states. Some of these statements addressed the wisdom of the referral, stating that they believed that the hearing would be political, not legal, in nature. However, it is worth noting that many such statements came from states whose leaders clearly themselves said the route of the Wall was illegal. Such instances serve as

[97] Article 65, Statute of the ICJ.

[98] Articles 10 and 11, UN Charter.

[99] For more on this matter, see Scobbie, Ian, "Issues of competence and procedure in the Wall Advisory Opinion," Hotung Project - Law, Human Rights and Peace Building in the Middle East - Papers, No. 1, June 2004, <http://www.soas.ac.uk/lawpeacemideast/papers/1scobbie.pdf>.

sober reminders of the willingness of states to concede the illegality of certain acts and yet simultaneously seek political, rather than legal, solutions.

During the hearings, which lasted three days at the Peace Palace in The Hague, the ICJ heard oral statements from Palestine, the League of Arab States, the Organisation of the Islamic Conference and 12 UN member states. Israel declined to participate in the public hearings on the grounds that the ICJ was not an appropriate forum for discussion of the issue, although it submitted a 130-page written document detailing why it believed that the Court did not have jurisdiction in the matter and thus should decline to hear the case.

B. FINDINGS OF THE COURT

In June 2004, the ICJ announced that it would render its Advisory Opinion on 9 July. On that date, the ICJ issued an historic Advisory Opinion stating unequivocally that the construction of the Wall in the OPT was unlawful. The Court found that it had jurisdiction and agreed to comply with the referral request, stating that, as with previous referrals to the Court in which it had been held that the request was legally unclear, the referral was "'framed in terms of law and raise[s] problems of international law', and it is indeed a question of a legal character."[100] It its almost unanimous opinion, the ICJ held that:

(1) the construction of the Wall in the OPT and its associated regime are contrary to international law;
(2) Israel must stop its breaches of international law, cease the Wall's construction in the OPT, dismantle the Wall constructed thus far in the OPT, and undo all legislative and regulatory acts relating thereto;
(3) Israel must make reparation for all damage caused by the Wall's construction in the OPT;
(4) States must not recognise the illegal situation resulting from the Wall's construction and provide neither aid nor assistance in maintaining the situation created by its construction, and all High Contracting Parties to the Fourth Geneva Convention must ensure compliance by Israel with international humanitarian law as embodied in the Convention; and
(5) the UN should consider what further action is required to bring to an end the illegal situation resulting from the Wall's construction.

In addition, within the context of the opinion, the ICJ maintained that the OPT, specifically including East Jerusalem, remain occupied territories and that Israel remain the occupying Power thereof. Further, the Court held that the Fourth Geneva Convention is applicable in the OPT, and that the ICCPR and other human rights treaties are applicable in the OPT in respect to Israeli acts committed in the exercise of their jurisdiction outside their own territory. In assessing to

[100] See ICJ, *supra* note 57, paragraph 37.

whether Israel violated the rules and principles of international law through the construction of the Wall, the ICJ also found that Israeli settlements in the OPT have been established in breach of international law. The Wall's construction in the OPT is resulting in creating facts on the ground that may well become permanent, thus resulting in de facto annexation.

C. OBLIGATIONS UPHELD IN THE OPINION

The points in the ICJ's dispositif (findings) were neither misinterpretations nor expansions of international law, as has been alleged by some commentators.[101] To the contrary, many of the Court's findings were reiterations of longstanding principles of international law.[102] Israel has three primary obligations which are outlined in the dispositif:

* Stop the illegal construction of the Wall in the OPT and dismantle those sections built to date
* Undo all legislation and regulatory acts related to its construction therein
* Provide reparation for all damage caused by its construction in the OPT

These provisions basically provide for the termination of the unlawful act and the provision of reparations for all damage caused by the Wall's construction in the OPT. Once the matter of the illegality of the Wall's construction in the OPT was upheld, the remaining provisions relate the principle of cessation and non-repetition of unlawful actions (as upheld in the Draft Articles on Responsibility of States for Internationally Wrongful Acts), and to the fundamental right to a remedy (as upheld in, inter alia, the UDHR, the ICCPR, the Convention on the Rights of the Child, and the Fourth Hague Convention Respecting the Laws and Customs of War on Land). The principles of reparation are also upheld in the Statute of the International Criminal Court. In its opinion, the ICJ addressed two components of this right: a remedy (the procedural means by which a violation of a right is redressed) and reparations (the substance of the relief afforded). The underlying obligation is that the wrongdoing party must, as far as possible, wipe out all the consequences of the illegal act and restore the situation to that which would have in all probability existed if the act had not been committed. As noted by the Permanent Court of International Justice (the ICJ's predecessor) in the 1928 *Chorzow Factory* case, "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."

Al-Haq believes that ICJ's provisions on this matter entail specific obligations that Israel must undertake in order to provide an effective remedy for its unlawful construction of the Wall. In order to uphold their obligations, the Israeli government must not only immediately cease the construction of the Wall and dismantle those sections built to date, it must undertake adequate, effective and prompt measures to provide restitution in kind, compensation, and/or rehabilitation

[101] See, inter alia, Bayefsky, Anne, "Had Enough? The U.N. Handicaps Israel, Along with the Rest of Us," *nationalreviewonline*, 17 July 2004, <http://www.nationalreview.com/comment/bayefsky200407171024.asp>.
[102] See Koury, Stéphanie, "Finding for the Palestinians," Fundacion para las Relaciones Internacionales y el Diologo Exterior, July 2004, http://www.fride.org/eng/Publications/Publication.aspx?Item=540.

address physical or mental harm suffered by Palestinians; lost opportunities, including employment and education; and material damages and loss of earnings resulting from the construction of the Wall in the OPT.

Unfortunately, since the issuance of the ICJ's ruling, Israeli authorities have repeatedly flouted these obligations. Within hours of the ruling, Israeli officials said that they will not abide by its provisions. Further, the Wall's construction was in fact accelerated after the ruling.[103]

In addition, the ICJ also outlined four obligations of the international community resulting from Israel's unlawful construction of the Annexation Wall in the OPT:

* Not to recognise the illegal situation resulting from the Wall's construction in the OPT
* To provide neither aid nor assistance in maintaining the situation created by its construction
* All High Contracting Parties to the Fourth Geneva Convention must uphold their obligations under Common Article 1 to ensure respect for the Convention
* The UN should consider what further action is required to bring to an end the illegal situation resulting from the Wall's construction in the OPT

These obligations address the official and practical non-recognition of Israel's unlawful acts and the matter of enforcement of its obligations. Most of these provisions are also reflective of existing international norms. For example, the non-recognition of unlawful acts is included in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which states that, to the extent that a given state's authorities are in breach of peremptory norms of international law, no state shall recognise as lawful those acts which constitute such breaches. Given that the principle of non-discrimination[104] and the right to self-determination[105] are deemed to be such norms, in accordance with this article, states should cease all acts which can be seen as recognising Israel's unlawful acts in the construction of the Annexation Wall. It should also be noted that the obligation not to aid or assist was upheld even by Judge Kooijmans, although he did not vote with the majority on this provision of the dispositif.[106]

The second category of international obligations relate to the matter of enforcement. The ICJ reiterates that all High Contracting Parties to the Fourth Geneva Convention must ensure Israeli compliance with international humanitarian law as upheld in the Convention. This is in effect a restatement of the longstanding obligation under common Article 1 to respect and ensure respect

[103] See Palestinian Monitoring Group, *supra* note 15, page 2.
[104] See Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 on the Juridical Condition and Rights of the Undocumented Migrants*, 17 September 2003, at paragraph 101, and *Barcelona Traction Light and Power, Ltd*, *supra* note 79.
[105] *East Timor (Portugal v. Ausralia)*, ICJ Report 1995, p. 102, paragraph 29. See also ICJ, *supra* note 83.
[106] See paragraph 45, *Separate Opinion of Judge Kooijmans*, which states,

> …I fully support that part of operative subparagraph (3)(D) [the obligation not to render aid or assistance in maintaining the situation created by the serious breach]. Moreover, I would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to victims of the construction of the wall.

for the Convention's provisions. There are a range of actions which states may choose from in the practical implementation of this obligation, ranging from such measures as diplomatic pressure to reduction or suspension of aid or preferential trade relations, with a goal of restoring Israeli respect for international humanitarian law in the OPT.[107] It is evident that a detailed analysis gives evidence to the numerous concrete steps which states may take to uphold the obligations affirmed in the ICJ opinion.[108]

D. THE UNITED NATIONS IN THE AFTERMATH OF THE ADVISORY OPINION

In the aftermath of the Advisory Opinion, the UN GA then reconsidered the matter. In July 2004, the GA adopted Resolution ES-10/15, which, inter alia, acknowledged the Advisory Opinion, demanded that Israel comply with the legal obligations referenced therein, requested the Secretary-General to establish a register of damages caused to all natural or legal persons concerned, and called on the UN member states to comply with their legal obligations as referenced in the Opinion. The GA also called upon all High Contracting Parties to the Fourth Geneva Convention to ensure respect by Israel of its obligations under the Convention.

UN Under-Secretary-General for Political Affairs Kieran Prendergast announced in October 2004 that the Secretary-General would send to the President of the GA a letter outlining the structure and planned activities of the register of damages caused by the Wall's construction. The intent was to establish, as soon as possible, a body that will be able to examine requests and eligibility for registration, as well as to verify the facts and extent of damage and of the causal link between the Wall's construction and the damage sustained. No further public reference was made regarding the structure of this mechanism during 2004.

Beyond this, no substantial public action appeared to be taken in late 2004 on this matter. The Government of Switzerland, as called upon in Resolution ES-10/15 as the depositary of the Geneva Conventions, began a series of consultations on the matter, including the consideration of the possibility of resuming the Conference of High Contracting Parties to the Fourth Geneva Convention. These consultations were ongoing as of December 2004.

VI. CONCLUSION

The construction of the Annexation Wall has received substantive attention by the international community since the plans thereto were announced in 2002. This attention is without doubt justifiable, as the Wall reflects the consistent failure of the Israeli authorities to respect international law, as fundamental provisions from numerous international legal regimes - inter alia, human rights, humanitarian, and public - have been flouted. Despite the findings of the ICJ, Israeli officials continue to construct the Wall in the OPT and to implement its

[107] For more information see chapter on Obligations of the International Community in this report.
[108] *Ibid.*

associated legal and administrative regimes. The direct result is the annexation of Palestinian land and the isolation of the Palestinian population. The indirect result is increased pressure on the Palestinian population to voluntarily relocate from the Seam Zone and other areas gravely impacted by the Wall.

Israeli claims regarding the need for the Wall - that it is necessary to provide security for Israelis - fail to acknowledge that international law establishes parameters which must be respected and that any such actions must be taken in accordance with rule of law. Ariel Sharon and other officials have tried to change the discourse about the Wall, calling it "the anti-terrorist fence," or the "security fence," but such attempt belie the fact that it is the reality on the ground upon which an assessment of legality must be based, not the label. As such, the Wall remains a breach of international law, a breach which Israel and the international community are under an obligation to bring to an end.

FAMILY UNIFICATION

Palestinians waiting outside the Israeli Ministry of Interior, Annexed East Jerusalem
(Rouba Al-Salem, 2005)

FAMILY UNIFICATION

I. OVERVIEW

Israeli authorities have long sought to prevent the repatriation of Palestinians and those of Palestinian descent into the 1967 Palestinian Occupied Territories (OPT). In light of systematic Israeli efforts to divide the Palestinian people, this had differing-but equally grave-impacts on the Palestinian populations of East Jerusalem and the rest of the OPT. Israel has sought to prevent Palestinians from residing or acquiring residency in East Jerusalem, and its de facto-annexation.[1]

A key means through which such efforts are implemented is through the denial of family unification to Palestinians in the OPT who marry spouses from outside this area, whether the spouse is from the Diaspora or a citizen of Israel. The means have changed frequently since 1967. Its intent has, nevertheless, remained consistent, as has its devastating impact on the right to family life and related rights of Palestinians in general, and Palestinian residents of the West Bank and Gaza Strip in particular. This intent, as stated explicitly by a succession of Israeli ministers and other government officials and occasionally enshrined in government policy and law, has been to allow as few Palestinians as possible from the OPT to acquire status in Israel by accepting "the minimum possible number of applications"[2] for family unification. It presumes that the unification of families in territories controlled by Israel is neither a "vested right" nor a "personal right that is acquired whose exercise may be demanded at any time," but instead "a special benevolent act of the Israeli authorities."[3] The extent of such Israeli benevolence is to be determined, not by Israel's responsibilities under international law, but by its own, inescapably political assessment of the implications of Palestinian repatriation to the territories it controls.

Since its inception the official rationale for this policy has been that Palestinians pose a generic threat to Israel that would be exacerbated by their obtaining residency in Israel or the OPT, and especially, by their acquiring the freedom of movement in Israel associated with Israeli citizenship or permanent residency. This thesis considers the percentage of Palestinians residing in annexed East Jerusalem and Israel a "demographic threat" to the declared Jewish character of the state, and portrays Palestinian applications for family unification in Israel and the OPT as attempts to fulfil the right to return of refugees under international law – a right that Israel has systematically

[1] See Annex to the Chapter on "The Occupied Palestinian Territories in 2004: The Political Framework." Although the Israeli annexation of East Jerusalem in 1980s and the political unification of the city were denounced by the international community, through the quasi-constitutional "Basic Law: Jerusalem (1980)," Israel has sought to assert under Israeli law the political indivisibility of Jerusalem in violation of international law.

[2] HCJ 106/86 cited in Al-Haq, *Application Denied*, 1991, page 3.

[3] Position of the military government as presented by the State Attorney's Office before the High Court of Justice (HCJ), cited in B' Tselem, *Israel's Position on Family Unification in the Occupied Territories*, www.btselem.org, undated.

denied Palestinian refugees since 1948.[4] When, however, Israel has had to defend its policy in the international arena or has enshrined it in domestic legislation, the "demographic threat" has instead been portrayed as a threat relative to the security of the State of Israel.

The policy's impact has been to deny the right to family life to countless Palestinian families divided between East Jerusalem and other parts of the OPT; between the OPT and Israel; and between Israel or the OPT and foreign countries. The primary means by which Palestinians have been prevented from acquiring or retaining status in Israel and the OPT respectively has been Israel's policy on the unification in either territory of families split between the two. This policy has consistently been designed to undermine the presence in Israel and East Jerusalem in particular, and Israel and the OPT more generally, of Palestinians married to, or close relatives of, Israeli citizens or permanent residents of the OPT. At various times such applications have therefore been rejected, delayed, left unprocessed or processed over a disproportionately long period of time extending to many years by the various branches of the Israeli Interior Ministry, and by the military authorities in the West Bank and Gaza Strip.

Palestinians in the OPT are doubly affected by Israel's policy on family unification. They cannot be united with their families in Israel or in East Jerusalem; and they cannot be united in other parts of the West Bank and Gaza Strip with family members resident abroad. The main developments in this arena in 2004 focused on the July 2004 renewal of the *Nationality and Entry into Israel Law* (the Nationality Law) passed by the Israeli Knesset in 2003, and its impact on Palestinians in East Jerusalem and elsewhere in the OPT. The year 2004 has also seen the continuation of the unofficial suspension of family unification of all residents of the OPT in the wake of the outbreak of the current *intifada* in September 2000. It should be noted that although East Jerusalem is considered occupied territory under international law, Israeli authorities consider Palestinian East Jerusalemites to be permanent residents of Israel (provided they prove that East Jerusalem is the center of their life), so they are subject to restrictions under the Nationality Law, rather than the unofficial suspension affecting other residents of the OPT.

II. ISRAEL'S POLICY ON FAMILY UNIFICATION: A BRIEF HISTORY

A. Family Unification of Permanent Residents of the OPT (excluding East Jerusalem)

After approximately 400,000 refugees, half of them already displaced for the first time in 1948, fled from the West Bank and Gaza Strip during the 1967 war,[5] Israel conducted a census of the areas it occupied and delivered identity cards granting the right to permanent residency only to

[4] Cf. Israeli Minister Dani Naveh, 2002: family unification of Palestinians in Israel and the East Jerusalem is "..an attempt to realize the so-called right of return through the back door"; the state of Israel "... clearly has the elemental right to protect itself and preserve its character as a Jewish state, as the state of the Jewish people..." – *Proposal to Agenda: The New Policy of the Ministry of the Interior on Naturalization*, 22 May 2002, cited in HaMoked and B'Tselem, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, January 2004, page 18. Neither statement rests on any basis in international law that would allow restricting the numbers of Palestinians allowed to establish or retain residency in Israel or the OPT purely because they are Palestinians.

[5] BADIL Resource Centre, *Press Release*, 6 June 2002, http://www.badil.org/Publications/Press/2002/press261-02.htm.

those it counted in the census. This denied the right to permanent residency in the OPT to those who were forced to flee or were expelled during the 1967 war, adding to the existing denial of the right to permanent residency to those who had been forced to flee or been expelled during the war of 1948. Israel's occupation in 1967 also enabled Palestinians from the OPT to renew contacts with their families and other Palestinians in Israel that had been severed in 1948. It is in large part these contacts, developed across over a period of nearly four decades, that the Nationality Law severs – and, arguably, exists to sever, thereby encouraging Palestinian emigration from both Israel and the OPT.

Israel's policy on the unification of the families of permanent residents of the OPT falls into four phases. Between 1967 and 1973, Israel permitted family unification of limited numbers of refugees from the 1967 war, members of whose families had remained in the OPT; approximately 45-50,000 refugees returned from 140,000 applications submitted by those newly under the jurisdiction of Israel as an Occupying Power.[6] Between 1973 and 1983, family unification applications were processed but most were denied on the basis of unannounced criteria, frequently after an application process lasting several years: Israeli scholar and former Deputy Mayor of Jerusalem Meron Benvenisti has estimated the yearly number approved during this period at 900-1,200[7]. In 1983, a new policy was announced intended to "reduce, as much as possible, the approval of requests for family unification" submitted by OPT residents, on the grounds that such requests had become "a means of *immigration* [sic] into the area."[8] The number of applications approved each year sank to a few hundred, from a population of some 1.3 million Palestinians then resident in the OPT.

In 1985, Israel worsened the dilemma of families awaiting unification by determining that,

> Visits in the region [here, the OPT and Israel] are not allowed by persons for whom a request for family unification had been submitted, until decision on the request for family unification has been made.[9]

Given that applications for family unification frequently took years to elicit a decision and such applications were frequently rejected, residents of the OPT were compelled to choose. They could apply for family unification for their spouses resident abroad,[10] and thus be unable to live with them for an indefinite period, with no guarantee that their application would ultimately be successful and the high likelihood that it would not. Alternatively, they could attempt to live with their spouses by, instead, applying on their behalf for successive permits to visit the OPT – though these permits, too, were frequently refused, or approved only with lengthy interruptions between them. Such visit permits were, consequently, often overstayed for family unity to be

[6] B'Tselem *Implementation of the Family Unification Policy*, undated, www.btselem.org.
[7] Meron Benvenisti, cited in *ibid*.
[8] *Ibid*.
[9] *Ibid*.
[10] Where appropriate reference to "spouse" in this chapter encompasses other close family members and dependents.

maintained, placing the overstayer at constant risk of deportation from the OPT. A drive to deport those who did overstay led to the deportation of many – including pregnant women – in 1989.[11]

The Oslo Accords had only a very limited and, in many respects, a negative impact on Israel's family unification policy in the OPT. Independently of Oslo, beginning in 1993, Israel had claimed to be implementing a new and more lenient policy regarding requests for family unification. This introduced a yearly quota of 2,000 successful family unification applications on behalf of OPT Palestinians, with each application including spouse and children under 16. This introduction of a quota constituted the first explicit, albeit indirect, acknowledgement that Israel assesses applications for family unification neither on their individual merits, according to its obligations under international law, nor on the basis of a detailed examination of the security record of applicants (the previous policy, whereby as few applications as possible were accepted, could still be defended, however disingenuously, as merely an unwarrantedly conservative and discriminatory reading of Israel's obligations under international law. A quota policy applicable exclusively to Palestinians could not.) The success or failure of applications is instead determined by discriminatory criteria relevant only to Palestinians: the numbers of non-Palestinians under Israel's jurisdiction who are entitled to family unification in any single year were not subject to an ethnic cap, numerical or otherwise.

In the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 1995 (Oslo II), Israel did pledge to "promote and upgrade family reunification" in order to "reflect the spirit of the peace process"[12] – but no change in the quota policy announced prior to this Agreement followed from this pledge. The Palestinians who were allowed to return to the West Bank and Gaza in the framework of the Oslo process did so without any reference to family unification. The nominal control accorded the Palestinian National Authority (PNA) did not extend to control over border crossings, nor over the formulation of policy on who might enter and leave the OPT. In particular, Article IX (1) (d) of Annex I of the Interim Agreement stipulated that "the provisions of this Agreement shall not prejudice Israel's right, *for security and safety considerations*, to… prohibit or limit the entry into Israel of persons and of vehicles from the West Bank and the Gaza Strip' [emphasis added,]" thus leaving control over family unification in Israel and the OPT at Israel's sole discretion. Nominal powers over the Population Registry in the OPT were transferred to the PNA in November 1995. At this point, the PNA requested that the annual quota for successful family unification applications introduced in 1993 be increased or revoked; Israel refused, and family unification procedures were frozen until 1998, when they resumed with no change in the 1993 quota. The authority transferred to the PNA proved, then, to be meaningless in practice insofar as family unification was concerned.

[11] See Al-Haq, "The Right to Unite: the Family Reunification Question in the Occupied Palestinian Territories," *Occasional Paper* No.8, 1990, page 6.

[12] Palestinian Interim Agreement on the West Bank and Gaza Strip, 1995, Appendix 1, Annex III, Article 28 (11).

In 2000, the yearly quota was increased to 4,000. Two years later, the family unification procedure was suspended for residents of the OPT. The year 2004 closed without any legislation or military order being issued explaining the rationale for this suspension, still less how it complies with Israel's obligations under international humanitarian and human rights law.

B. FAMILY UNIFICATION OF PERMANENT RESIDENTS OF EAST JERUSALEM

The procedure for Palestinian East Jerusalemites to obtain family unification with their spouses resident in the OPT generally followed that applicable to permanent residents of Israel due to Israel's consideration of them as such. However it should be noted that until 1994, the office of the Israeli Interior Ministry in East Jerusalem would only process applications for family unification submitted by a male spouse on behalf of a female spouse, justifying the policy based on the ethnically discriminatory reasoning that in Arab society "the wife follows her husband."[13]

Until 1997 the spouse of a Jerusalem permanent resident who is from other parts of the OPT was immediately granted permanent resident status once the application for family unification on behalf of the former had been approved. In 1997, a new policy was introduced, known as "graduated process." This delayed the granting of permanent residency status to a successful applicant for family unification with a Palestinian Jerusalemite for a period of five years and three months after the application was approved.[14] This trial period was ostensibly designed to allow Israeli authorities to verify that both spouses were indeed living in Jerusalem according to the Interior Ministry's notoriously stringent definition of "centre of life," regularly providing housing bills to prove their place of residency and to verify the validity and continuation of the marriage.[15] During this period, the applicant for family unification first received a series of short-term renewable permits to enter Israel, but no social rights or health insurance. Only then did they receive temporary residency status.

The "graduated process" left in place obstacles prior to the approval of Palestinian family unification that had been enhanced by a permit system introduced in 1991, which ended freedom of movement within and between the West Bank and Gaza Strip on the one hand, and East Jerusalem and Israel on the other. Alien spouses awaiting family unification could not live with their families in East Jerusalem on pain of deportation, and the resulting likelihood that their application would be denied. Jerusalemite spouses who moved to other parts of the OPT while waiting for approval of their alien spouse's application for family unification risked losing their Jerusalem residency on the grounds that their "centre of life" was no longer in the city. The family was thus forced to live separated for a period in many cases totalling years, in order to

[13] See HaMoked and B'Tselem, *Forbidden Families*, *supra* note 4, page 4.

[14] The equivalent period for an OPT resident applying for family unification with an Israeli citizen was set at four years.

[15] All Palestinian "permanent residents" of East Jerusalem, regardless of whether they are involved in processes of family unification, are liable to have their permanent residency status revoked, and with it their right to live in the city, if they cannot prove to the Interior Ministry's satisfaction that their "centre of life" is in Jerusalem. Such revocation appears to be irreversible. See Usama Halabi, "Revoking Permanent Residency: a Legal Review of Israel's Policy", *Jerusalem Quarterly File* 9, 2000.

obtain family unification without any guarantee that they would obtain it at all – an intolerable situation that encouraged moving from East Jerusalem to other parts of the OPT or to foreign countries in the interim.

This "graduated process" was replaced by the passage of the Israeli Cabinet Decision of 12 May 2002 and the subsequent Nationality Law that suspended the regime of family unification altogether. The graduated process had permitted detailed and sustained assessment of the security records and the good faith of successful applicants for family unification. Its very stringency undermines Israel's official justification for urgent changes to the family unification policy regime in 2002 – namely, that security considerations did not permit the policy's continuation under the changed circumstances that began in September 2000, whereby Palestinians were deemed to pose a greater risk than they had done in the past.

C. FAMILY UNIFICATION AND CHILD REGISTRATION

Israel's policy concerning the registration in the Israeli population registry of children born in Jerusalem has evolved in tandem with, and for the same reasons as, changes in its policy concerning family unification. Prior to the introduction of the Nationality Law, children of parents one of whom is an Israeli citizen, or both of whom are permanent residents of Israel, were automatically registered in the Israeli population registry. Children of parents, (only one of whom is a permanent resident and neither of whom is a citizen) are, however, automatically given the residency status of the father, unless the mother objects – in which case it was the Israeli Interior Ministry that decided which status to grant the child, giving its officials the discretionary power to deny Palestinian children legal residency status in illegally-annexed East Jerusalem. Palestinian Jerusalemite mothers of children whose father was a resident of other parts of the OPT experienced great difficulty in having their children registered on their ID by the Interior Ministry in East Jerusalem. This was true even if the mother was a Jerusalemite who had submitted a family unification application on behalf of the spouse residing in other parts of the West Bank or Gaza Strip.

The Nationality Law, however, created an entirely new scenario. Children born in the OPT to parents one or both of whom are permanent residents of Jerusalem (and neither of whom is an Israeli citizen) are no longer registered in the Israeli Population Registry through a Child Registration Form, as used to be the case. They must instead have an application for family unification filled out on their behalf if they are to reside legally in Jerusalem with either or both of their parents. Since the family unification procedure has been suspended, these children can no longer be registered, nor can they acquire legal status in East Jerusalem except at Israel's discretion. They can live with up to one of their parents, but not with both; and they can in theory be deported for lack of an ID when they reach the age of 16. The (supposedly unintended) ramifications of this are explored below.

In October 2004, the Israeli Interior Ministry was ordered by Jerusalem's Central Appeals Court to register children born in East Jerusalem to permanent residents on their mother's ID if the mother so wished – as the mother almost invariably has wished since the introduction of the permit system in 1991, in order to preserve the child's right to live legally with her in Jerusalem, especially in cases where approval of family unification for a spouse from other parts of the OPT was pending, and in the likely event that applications on their behalf failed.[16] Whether the Interior Ministry would obey this court ruling had, at the close of 2004, yet to be seen.

III. A NOTE ON STATISTICS

Statistics provided by Israeli authorities in charge of processing applications for family unification have consistently been scarce, vague and/or contradictory. Some of those provided by Israeli government sources detail the numbers of applications approved but not those denied. Others detail the number of applications submitted and not those approved.[17]

The effect has been to make the relative impact of successive incarnations of Israeli policy unquantifiable. It could be argued that this dearth of statistics has been deliberate, designed to obscure the degree to which the impact of Israel's policy on family unification has been not only wholly disproportionate but irrelevant to the reasons Israel has officially invoked to justify it. It has thus helped Israel hide those effects of its policy that would be unacceptable to a foreign audience, effects determined by incentives – e.g. fear of the "demographic threat" outlined above – that would be far more obviously unacceptable were they invoked in legislation.

IV. UNIFICATION OF OPT PALESTINIANS AND FAMILY RESIDENT ABROAD

The longest-lasting method by which Palestinian residents of the OPT have been denied the right to family life has been the denial of applications for family unification to OPT residents with family members resident abroad.

The effects of this denial were compounded by the "unofficial" suspension of all family unification for residents of the OPT in September 2000. Since 1967 it has been extremely difficult for OPT residents to obtain family unification. Since 2002 it has been impossible.

Although this policy was not publicly announced nor enshrined into Israeli law, it meant that citizens of Arab countries could no longer live in East Jerusalem, or elsewhere in the OPT.[18] Requests for family unification on behalf of citizens of Arab countries continue to be accepted;

[16] "Interior Ministry Ordered to Register Children of East Jerusalemites in Mother's ID," *Al-Quds*, 28 October 2004, page 1.
[17] See Yair Ettinger, "There's no Hurry to Grant Citizenship to Arabs Married to Israelis," *Ha'aretz*, 25 August 2004. No explanation was provided as to whether these figures were classified information (and if so why) or whether they simply did not exist (and if so why not).
[18] Ettinger, *supra* note 17.

the General Security Services (GSS) which examines the security records of citizens of Arab countries, does not process them, and, since a GSS security assessment is a prerequisite to an application's being granted or denied, the applicants receive no decision.

My story is difficult to explain. In 1998, I married my relative Iyad Isma'il Mas'oud Abu-Qutna. At the time, he resided in Jordan, and we decided to get married during a visit I made to Jordan. I had a visit permit issued on behalf of my husband in the same year. He does not have Palestinian citizenship. He entered the West Bank with a visitor's permit and we lived in Jenin Refugee Camp. On 30 March 1998, I applied for family unification to obtain a Palestinian ID card for my husband, in order for him to be able to live legally in the West Bank. The visit permit expired and my husband continued to reside illegally in the West Bank. At that time, the situation was calm and we did not face major difficulties.

The tragedy began with the eruption of al-Aqsa [sic] *intifada* throughout the West Bank in September 2000 when Israeli occupying forces invaded Palestinian cities and villages. My husband was in a state of constant fear. On 9 February 2001, I gave birth to our firstborn baby Muhammad. I registered him in my ID card, because his father does not have an [OPT] ID card. When the Israeli occupation forces invaded cities and refugee camps, my husband was afraid of being arrested and banished from the West Bank. He could not sleep and was constantly watching the movement of the Israeli army. He would leave the house when he felt that the Israeli army was about to invade the city and the camp. This situation affected our family life a great deal. We felt unsafe and insecure.

On 9 May 2002, I gave birth to our second baby, Habiba. I registered her on my ID card. The situation was getting worse. There were invasions and curfews on a daily basis. People were arrested and killed. My husband lost his job because he was afraid to leave the house and get arrested. As a result, I had to work in a kindergarten in order to cover the daily expenses of the family. The situation worsened even more. My husband continued to live in a state of fear and worry.

On 19 June 2002, the Israeli army invaded the refugee camp. What we had waited for and feared for five years came to pass. The Israeli army raided our house in the camp. When the army asked my husband to bring his ID card, he said, "I do not have an ID card. I am a Jordanian and have a Jordanian passport and a Jordanian ID card." The soldiers then took my husband and the documents. They tied him up and put a blindfold over his eyes and put him in a military jeep. He was taken to Salem Military Camp, west of Jenin, and then to 'Ofer prison, near Ramallah. He was held until 26 July 2002, when he was deported to Jordan.

I felt that my life had been destroyed. Who will bring my husband back? Visit permits have been frozen by the Israeli occupation forces. Therefore, my husband cannot come

back to the camp and to his children. I felt a huge emptiness in my life. I was afraid and worried, due to the absence of my husband. I then had to leave my work in order to take care of my two children, who miss their father's affection and care. My husband was taken from me in the midst of these difficult circumstances. I face numerous difficulties in handling the expenses of my children and the house. Without the help of well-wishers, we would have died of starvation.

The banishment of my husband to Jordan has imposed further responsibilities on me. I am currently in a bad psychological state, given the fact that I last visited my husband on 26 September 2002. He lives in Jordan and is unemployed. He too is in a very bad psychological state due to being away from his wife and his children. This is not to mention the fact that we cannot reside in Jordan, due to the unfair Jordanian laws, which prevent us from living there either. I visited my husband in Jordan only once, because we do not have enough money. Now I live in the camp and my husband lives in Jordan. Is there anybody who can unite the family?

Extracts of Al-Haq Affidavit No. 1850/2004
Given by: Amal Ibrahim Abu-Qutna, (Resident of Jenin Refugee Camp, West Bank).

This directive affects all Palestinians in the OPT, including East Jerusalem, who wish to apply for family unification with any citizen of an Arab country – e.g. Jordan, more than half of whose population is of Palestinian descent. It also affects the relatives in the OPT of Palestinian refugees who acquired citizenship of any other Arab country, in 1948 or since. The sweeping nature of the directive undermines the purported security rationale used to deny the right to family life to Palestinians of the OPT through the Nationality Law. In this regard, the Prime Minister's Office acknowledged that the order amounted to an unofficial clause of the Nationality Law, and that it extended the security rationale of that law, limited to Palestinians of the OPT and those of Palestinian descent, to any citizen of any Arab state,

> The suspension of family reunification will include citizens from Arab *countries for the same security reasons* [emphasis added] that the law suspending the family reunification of residents of the Palestinian National Authority was passed.[19]

On this reasoning not only all Palestinians but all citizens of all Arab states, whether or not they are Arab, are deemed to pose a generic threat to Israel.

In defending the application of the law to the case of OPT Palestinians, the Israeli Interior Minister had invoked (in at least one case inaccurately[20], in others too vaguely to verify) the case of Palestinians who had acquired legal status in Israel through family unification and were

[19] Prime Minister's Office response to a question posed by *Ha'aretz*, cited in *ibid*. (emphasis added).
[20] See the example of Shadi Tubasi, detailed at HaMoked and B'Tselem, *Forbidden Families*, *supra* note 4, page 14.

subsequently involved in acts of violence against the State or its citizens. In the case of its sweeping denial of family unification to all citizens of Arab countries. Israel has failed to provide even this justification.

I grew up and lived in Libya until the age of 24. My parents are both from the Palestinian refugee camp of Jenin in the West Bank, where my father lived for years before immigrating to Libya to look for work. Both of them had Palestinian residency IDs that they lost due to previous Israeli law that revoked the residency rights of any Palestinian who resides outside the West Bank for more than three to six months. At the age of 24, I moved with my family to Jordan where in 1998 I married a Palestinian who lives in Jenin Refugee Camp. Although I did not have a Palestinian ID, I entered the West Bank with a visitor's permit, and faced no substantial problems. Once my permit expired, I remained in Jenin, hoping that my husband's request for family unification, which he submitted the same year, would be processed. I started working as a biology teacher in a school 12 kilometres west of the camp.

In 2000, following the beginning of the *intifada*, I started to face severe difficulties in travelling school, especially because of the abundance of Israeli permanent and flying checkpoints. So far, I have been stopped several times by Israeli soldiers who inquire about my ID, which I say I have forgotten at home. I started to avoid the checkpoints, which means that the costs I incur for transportation have increased, and I constantly live in fear of coming across Israeli soldiers who might arrest me. In addition to that, since 1998, I have not managed to visit my family in Jordan, because if I do I will not be able to return.

Extracts from Al-Haq Affidavit No. 1883/2004
Given by: Najat Isma'il Mas'oud Abu-Qutna, (Resident of Jenin Refugee Camp, West Bank).

V. WITHDRAWAL OF CARDS FROM ABSENTEE RESIDENTS

In accordance with its policy of what became known as the "quiet deportation" of Palestinian East Jerusalemites from Jerusalem, Israel has, since 1967, sought to reduce the number of Palestinians in the OPT by withdrawing the ID cards of residents who leave for a prolonged period, preventing either them or members of their families from returning to the OPT with resident permits. The policy continues.

VI. THE NATIONALITY LAW AND ITS CONSEQUENCES

In March 2002, then-Israeli Interior Minister Eli Yishai suspended the processing of applications for family unification submitted by permanent residents of East Jerusalem seeking unification with Palestinian residents of other parts of the West Bank and Gaza Strip, pending what he described as a necessary reformulation of Israeli policy on the issue. On 12 May 2002 the Israeli

Cabinet adopted Yishai's recommendations by issuing an administrative decision suspending the granting of Israeli citizenship or permanent resident status in Israel to residents of the OPT. Other applications "would be reviewed taking into consideration the descent of the person involved"[21] – that is, whether the applicant, regardless of his or her country of citizenship, was of Palestinian descent, howsoever defined. The suspension was rationalised, in the words of the administrative order, "in light of the security situation and because of the implications of the process of immigration and settling in Israel of aliens of Palestinian descent, including through family unification [emphasis added]."[22]

On 31 July 2003, the Knesset enshrined a slightly modified version of the Cabinet Decision in Israeli law as the Nationality Law, on the basis that this would have to be renewed, and the validity of its rationale reconsidered by the Knesset, within a year, each time for a period no longer than a year. On 21 July 2004, the Knesset extended the Nationality Law for six months, effective in August 2004. On the evidence to date it seems plausible that future decisions to extend or repeal the Nationality Law will not be determined by convincing arguments for why the law should be extended, when several UN committees and countless international and local human rights organisations have demonstrated that it breaches numerous provisions of international human rights and humanitarian law. Such decisions will instead be determined exclusively by changes in Israel's assessment of the security threat posed by Palestinians of the OPT, and the political viability of perpetuating so flagrantly discriminatory a law in the face of international public opinion ranged against it.

This suspension of the granting of citizenship to any resident of the OPT *de facto* cancelled the procedure of family unification. In practice, the law prevents Palestinian residents of the OPT married to Israeli citizens or Palestinians permanent residents in East Jerusalem from living legally with their spouses in those respective areas. Their spouses are already prevented from living in the OPT on pain of losing their Israeli citizenship rights or, if they are permanent residents of Jerusalem, their right to live in other parts of the OPT. The discriminatory nature of this measure is evident in the fact that Israeli settlers in the OPT are, by contrast, subject to the jurisdiction of Israeli municipal law. Their residence in the OPT, illegal under international law, does not carry with it any risk of losing their citizenship, unlike that of Israeli spouses of Palestinian residents of the area.

The vast majority of the spouses of residents of the OPT who hold Israeli citizenship are Palestinian citizens of Israel. The Nationality Law adds a new level to the existing system of racial discrimination in Israel and the OPT, based on ethnic origin, and directed exclusively against Palestinians. The Nationality Law thus discriminates between Palestinians and non-Palestinians, reserving the right to family life under international law to the latter. The law serves as another

[21] "The Treatment of those Staying Illegally in Israel and the Family Unification Policy Concerning Residents of the Palestinian Authority and Foreigners of Palestinian Descent," *Israeli Cabinet Decision No. 1813*, 12 May 2002, as translated by Adalah
[22] *Ibid*.

incarnation of Israel's four-decades-long denial of the right to family life of Palestinian residents of the OPT, their spouses, children and parents, *de facto* encouraging their emigration from any part of Mandate Palestine.

The Nationality Law has, then, exacerbated existing measures denying the right to family life to Palestinians from the West Bank and Gaza Strip. The main scenarios arising from the Law are detailed below. Not all possible scenarios have been covered; the implications of the scenarios not covered are addressed in those that are.

One potent illustration of the incoherence of the Nationality Law derives from the freezing of all applications for family unification in process at the time of the suspension. This freeze extended to applications that had already been approved, but whose beneficiary was currently engaged in one of the stages of the graduated process detailed above. In the wake of the suspension and subsequent legislation, some successful applicants for family unification are thus allowed to enter Israel and annexed East Jerusalem on temporary permits during the day to work, but must return to the areas of residence in the OPT (excluding East Jerusalem) at night. Those who were within the first 27 months of the graduated process at the time of the suspension can reside, work and sleep in Israel and East Jerusalem but not acquire the social and health rights granted to those with temporary resident status, since these are granted only after 27 months of the graduated process. Those who were further advanced in the graduated process must continually renew their temporary permits to reside in Israel or East Jerusalem, with no prospect of ever acquiring permanent residency and, as a consequence, no stability or security in their right to family life and related rights. The precise number of those affected by this suspension is unclear: Israel has provided no statistics concerning them.

A. EAST JERUSALEM: PERMANENT RESIDENTS

The Nationality Law discriminates disproportionately against Palestinian East Jerusalemites, and in particular against Palestinian East Jerusalemite women. Since they can no longer apply for family unification on behalf of their alien spouses, Palestinian East Jerusalemites must either live in Jerusalem with their illegal spouse, who will then be at constant risk of deportation, or move to other parts of the OPT and risk revocation of their permanent residency in Jerusalem.

> I live in the village of al-Khas, east of Bethlehem, and hold a West Bank ID. In 1996, I got engaged to Nasiba Ibrahim Mousa Hamada, 25, from Sour Baher, Jerusalem Governorate, who holds a Jerusalem ID (Blue Card). In 1997, she was issued with an Israeli marriage document from the Israeli Ministry of Religious Affairs and from the Shari'a Court in Jerusalem. In the same year we got married and lived in al-Khas. After marriage, I went directly to the Israeli Interior Ministry to apply to obtain a Jerusalem ID card. The Ministry asked me to rent a home in Jerusalem in order to pay a housing tax (the Arnona) and the water and electricity bills. As I am a worker and my income cannot cover all these expenses, I have not taken any of these steps.

We have three girls. Two were born in Jerusalem: Ahlam, (six), and Rahma, (two) and a half, while the third, Ilham, (four), was born in Bethlehem. The three girls are registered in my ID card. When I asked al-Maqased Hospital for the documents required to apply to the Interior Ministry for my daughters to be registered in the Israeli Population Registry, they asked me to present the family unification application, which I do not have. I was therefore obliged to register them in my West Bank identity card instead.

My wife suffers because she does not live in Jerusalem and faces difficulties with respect to obtaining the health insurance (Kupat Holim), and the fact that I cannot visit her family with her. In 2002, I attempted again to obtain a Jerusalemite ID card. I appealed to an Arab lawyer from Jerusalem who wanted to charge 17,000 shekels as service fees in order to obtain a one-year temporary residency permit in Jerusalem followed by a temporary identity card for another year on my behalf, but he refused to attempt to obtain a permanent identity card on my behalf. As the sum required is large and success is not guaranteed, I refused the offer. At present I still live with my wife and children in the West Bank and I have not been able to obtain the Jerusalemite ID card especially since the Israeli authorities froze granting identity cards and family unification procedures to West Bank Palestinians. It is worth noting that my mother also holds the Jerusalemite ID card – she is from Jerusalem – but my brothers, sisters and I (six children in total) are not registered in our mother's identity card because in the 1970 and 1980s there was no [relevant] difference between the identity cards of the West Bank and of Jerusalem. For this reason, my father had registered us in his West Bank ID card. I remember that my mother, Rahma, 57, attempted in 1993 to obtain family unification on behalf of her sons and daughters, but her application was rejected.

Extracts from Al-Haq Affidavit No. 1833/2004
Given by: Lutfi 'Umar Hmeidan, (Resident of al-Khas village, nearby Bethlehem, West Bank).

B. JERUSALEM: REGISTRATION OF CHILDREN BORN TO JERUSALEMITES IN THE OPT

Under the Nationality Law children born in the West Bank and Gaza Strip to parents one or both of whom are permanent residents of Jerusalem (and neither of whom are Israeli citizens) are no longer registered in the Jerusalem Population Registry through a procedure of child registration. An application for family reunification with the parent(s) resident in Jerusalem must instead be submitted on the child's behalf. Since the procedure of family unification has been suspended, such a child cannot be registered in Jerusalem, particularly if he was born in other areas of the OPT.

The Nationality Law prohibits the expulsion from Israel of a child at least one of whose parents is legally resident in Israel – but only until such a child reaches the age of 16. Parents legally

resident in Jerusalem may therefore be deprived of their children, and thereby of their right to family life, when their children turn 16, for the sole reason that the child was not born in East Jerusalem but elsewhere in the West Bank and Gaza Strip. If, for example, the mother went into labour during a visit to her family in other areas of the OPT, or wished to be with her family when giving birth, or was visiting her husband resident there who is no longer able to apply for family unification in Jerusalem, the child could not be registered.

The law thus discriminates disproportionately against Palestinian women residents of Jerusalem and, in particular, against the poorer among them. Those especially discriminated against fall into two categories: Jerusalemites who have had to move to other parts of the OPT in order to live with their families and are at risk of having their Jerusalem IDs revoked; and against those who live illegally in Jerusalem with a Jerusalemite, and hence are not entitled to health insurance or other social rights. Since an East Jerusalemite woman must constantly seek to prove that East Jerusalem is the center of life, through the payment of taxes, as well as national and health insurance, a wealthier woman may nonetheless be able to do so by maintaining two homes: one in East Jerusalem and the other with her family in other areas of the West Bank. She is more likely to be able to afford giving birth in a Jerusalem hospital, ensuring that her child can, in theory at least, be registered on her ID, live with her legally, and be able to pass on Jerusalem residency to his or her own children.

A poorer woman on the other hand may not be able to financially afford this option of maintain homes. Moreover, if she does give birth in other parts of the OPT, her child will not be registered in Jerusalem and will, when he or she reaches the age of 16, be at risk of expulsion from Jerusalem to other parts of the OPT, causing the disintegration of the family unit. Palestinian women residents of Jerusalem are thus coerced into giving birth in Jerusalem, regardless of the medical or financial implications, to guarantee their children their rights under international law: the right to be registered at birth, to acquire a nationality, and to leave and to return to one's country. As a consequence of the Nationality Law, then, Palestinians who cannot give birth in Jerusalem can be deprived of their children; and their children can live with up to one of their parents – but not with both.

C. UNIFICATION OF OPT PALESTINIANS WITH A RESIDENT OR CITIZEN OF ISRAEL

The clearest impact of the Nationality Law has been to prevent Palestinians from the West Bank and Gaza Strip from living with their Palestinian spouses who are permanent residents or citizens of Israel – if the couple had not completed the process of family unification applications prior to the Cabinet Decision of 12 May 2002.

I am a citizen of Seida village, Toulkarem Governorate. In 1998, I married Filistin 'Adnan, an Israeli citizen from Kawkab Abu-al-Heija, a village inside Israel. At the outset of our marriage, we lived in my wife's village, because the situation was fine and there was no danger in living inside the Green Line without the special permit usually required of citizens of the West Bank who live inside the Green Line. This situation continued until 28 September 2000, when al-Aqsa [sic] *intifada* broke out and armed attacks inside the Green Line began. After this the situation started to deteriorate, my residency in Kawkab Abu-al-Heija became dangerous, obliging me to return to my own village.

My wife Filistin, who holds Israeli nationality, submitted a family unification application to the Israeli Interior Ministry in Akka. This would entitle me to live with her legally, and is usually conducted by exchanging a West Bank ID for the blue Israeli ID. To prove that we are residents of Kawkab Abu-al-Heija, the Israeli authorities asked us to submit documents such as a tenant's contract, water, electricity and telephone bills, and an Israeli marriage certificate. They also demanded a document from the Kawkab Abu-al-Heija' village council and a document proving my good conduct from the Palestinian National Authority. I submitted all of the required documents with the application to obtain the Israeli ID. The Interior Ministry gave me one appointment after another for interviews until [al-Aqsa] *intifada* broke out in 2000, when the Knesset issued a law prohibiting the issuing of Israeli IDs to West Bank citizens, meaning that all family unification applications have been frozen.

On 13 June 2003, while my wife and I were visiting my wife's family in Kawkab Abu-al-Heija, I was arrested by the Israeli intelligence services, who imprisoned me for 80 days in al-Jalama jail. During this period, the Israeli intelligence services questioned me on several issues, including al-Aqsa [sic] *intifada*, the situation in the West Bank, and why I was living inside the Green Line without a permit. I was released on 29 October 2003. A few days later, my wife went to the Israeli Interior Ministry to reapply for family unification on my behalf. Two months later, the Israeli Interior Ministry notified my wife that her family unification application had not been rejected but at present Israeli IDs were not being issued because of the suspension of family unification. They advised that the most important condition for the approval of my application would be that I not reside inside the Green Line, and that I should wait until the current laws are overruled.

I have two children who were born inside the Green Line. After long suffering, my wife was able to register them in her ID, but they do not get the social insurance allowances usually given to Israeli children because their father holds a West Bank ID. Currently, my wife is facing difficulties because the Israeli Interior Ministry has discovered that she is living in the West Bank, prohibited by Israeli law. They have also threatened to revoke her Israeli ID and citizenship. My wife and children are thus forced to live in Kawkab Abu-al-Heija to prove that she and her children live inside the Green Line, where my

children are enrolled in schools. This situation deprives me of my wife and children because they only visit during school holidays. The financial and psychological burdens it imposes upon me are severe.

Extracts from Al-Haq Affidavit No. 1994/2004
Given by: Samir Ahmad Muhammad 'Ajaj, (Resident of Seida, nearby Toulkarem, West Bank).

VII. INTERNATIONAL LAW AND ISRAEL'S POLICY ON FAMILY UNIFICATION

The right to family life is protected under international human rights and humanitarian law applicable to the OPT. Israel's policy on family unification since 1967 in general, and the recent Nationality Law in particular, directly breach the international law relating to family life, and other rights derived from this right. Al-Haq contends that they also indirectly breach a number of other provisions of international law to which Israel is bound, including the Fourth Geneva Convention's prohibitions on collective punishment and on forced transfer from occupied territory.

A. INTERNATIONAL HUMANITARIAN LAW

The right to family life is also guaranteed in international humanitarian law (IHL). Article 27 of the Fourth Geneva Convention states that "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights…" The International Committee of the Red Cross' (ICRC) official Commentary interprets this article as,

> Intended to safeguard the marriage ties and that community of parents and children which constitutes a family... Respect for family rights implies not only that family ties must be maintained but further that they must be restored [emphasis added] should they have been broken as a result of wartime events.[23]

The article thus applies specifically to the family ties broken as a result of the 1967 war – ties that many family members have been attempting to restore through their applications for family unification since 1967. This provision of the Fourth Geneva Convention reiterates Article 46 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention (the Hague Regulations), which provides that the "family honour and rights [of the population of an occupied territory] must be respected" by an Occupying Power. The status of the Hague Regulations as customary international law enhances the fundamental nature of the family rights guaranteed to persons protected by the international legal regime governing situations of occupation. It is evident that Israel has a duty as the Occupying Power to safeguard these rights, and that it has consistently failed to do so.

[23] See *The Geneva Conventions of 12 August 1949, Commentary - Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* Pictet, Jean S. (ed.), ICRC, 1958, pages 202-3.

Article 47 of the Fourth Geneva Convention holds that,

> Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory… nor by any annexation by the latter of the whole or part of the occupied territory.

Israel's illegal annexation of occupied East Jerusalem has clearly deprived Palestinian Jerusalemites married to residents of other parts of the OPT, or with close relatives there with whom they may wish to live in fulfillment of their right to family life, of the ability to exercise their right to family life in East Jerusalem. Israel's family unification policy is thus in breach of these provisions of the Fourth Geneva Convention.

Israel's family unification policies can also be interpreted as constituting two policies prohibited by the Fourth Geneva Convention, distinct from the right to family life which they most obviously violates. These are the prohibitions on collective punishment and forced transfer in, respectively, Articles 33 and 49 of the Fourth Geneva Convention. Article 33 states that,

> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and *likewise all measures of intimidation* [emphasis added] or of terrorism are prohibited… Reprisals against protected persons… are prohibited.

B. International Human Rights Law

An expansive right to family life is enshrined in international human rights law, including in Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 23 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 7 through 10 of the United Nations (UN) Convention of the Rights of the Child (CRC). Israel is a State Party to each of these conventions, and is thus bound by them.

In particular, Article 10 (1) of the ICESCR states that,

> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

Article 10 (3) of the same Convention reiterates that,

> Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions...

Israeli family unification policies discriminates against children and young persons of Palestinian parentage: it not only denies them special measures of protection and assistance but assigns them special measures that deprive them of the right of family life, actively removing protection and assistance. Article 23 (1) of the ICCPR states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Palestinian families under Israeli jurisdiction, far from being protected, are consistently undermined. Article 23 (2) states that,

> The right of men and women of marriageable age to marry and to found a family shall be recognized.

Under Israeli jurisdiction, this right is recognized to all but Palestinian families: the restrictions placed on them make the recognition of this right a recognition in name only.

In addition to these rights to family life, Israel has a duty under international human rights law to guarantee the human rights of those under its jurisdiction without discrimination of any kind on such grounds as race, colour, sex, language, religion, political opinion, national origin, property, birth or any other status. This obligation is upheld in Articles 2 and 26 of the ICCPR and Article 2 of the ICESCR.

While Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) states that,

> This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

General Recommendations elaborated by the Committee on the Elimination of All Forms of Racial Discrimination (CERD) reiterate that,

> Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;[24]

Israel's family unification policies breaches the principle of non-discrimination by denying these rights to Palestinian in the OPT, rendering them meaningless by preventing their exercise within Israel or the OPT. Clearly present and past aspects of Israel's family unification policy are discriminatory against Palestinians and Palestinians only, thereby rendering Israel's family unification policies discriminate; and in flagrant breach of the ICERD.

[24] CERD, *General Recommendation 30: Discrimination Against Non-Citizens*, 64th Session, 23 February-12 March 2004, (CERD/C/64/Misc.11/rev.3), paragraph 2.

Israel is also a state party to the Convention on the Nationality of Married Women (CNMW), Article 3 (1) of which states that,

> Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalisation procedures…

Family unification policies as practiced by Israel allows its authorities to deny this right if the alien wife of the Israeli national in question is a resident of the West Bank and Gaza Strip, a citizen of an Arab state or a citizen of any state who happens to be of Palestinian descent. For these categories of alien not only are there no "specially privileged" naturalisation procedures; there are no naturalization procedures at all.

Further, the CRC explicitly encourages State parties to enable the unification of the families of their citizens and residents, through allowing the entry of family members to their territory. Israeli policy regarding child registration in East Jerusalem violates the fundamental principle underlying the CRC – the best interest of the child. Article 9 (1) of the CRC further holds that,

> State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

Clearly a law that provides for the child's deportation to other parts of the OPT or, conceivably, abroad, when she or he reaches the age of 16 does not meet this principle. Applying the process of family unification to these children is itself is a breach of Article 10 (1) of the CRC which states that,

> In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

In addition, Israeli family unification policies clearly violate these provisions of the CRC, *inter alia* by requiring applications for family unification on behalf of a child born in the West Bank and Gaza Strip (with the exclusion of East Jerusalem) while simultaneously suspending the procedure, making such applications impossible. They also violate the rights to be registered immediately after birth, and, potentially, the right to acquire a nationality.

The violation of these rights implies the violation of Article 13 (2) of the Universal Declaration of Human Rights (UDHR), which guarantees that "everyone has the right to leave any country, including his own, and to return to his country." Palestinians without ID cards are unable to move freely within their own country, much less to exercise their right to leave and enter it at will. In relation to this, several aspects of Israel's policy on family unification place disproportionate and discriminatory restrictions on the freedom of movement of Palestinians from OPT. Such restrictions are permitted only on condition that they are consistent with other rights guaranteed by international human rights law. Israel's movement restrictions towards the families of those legally resident in Israel or the OPT, since they deny the rights to family life and to freedom from discrimination on an open-ended basis, are manifestly disproportionate, and thereby inconsistent with Israel's obligations under international human rights law. The principle of proportionality in international law judges the consistency between the achievement of a certain goal and the means employed to achieve that goal, a principle that Israeli family unification policies manifestly breach.[25]

International organisations and human rights non-governmental organizations (NGOs) have repeatedly condemned the Nationality Law, asking that it be repealed on the grounds that it discriminates against Palestinian citizens of Israel and Palestinian resident in the OPT, and breaches their human rights as guaranteed under international law. The UN Human Rights Committee (HRC) called on Israel in 2003 to revoke the Nationality Law and to reconsider its policy with a view to facilitating family unification of all citizens and permanent residents.[26] On two occasions CERD has also, echoing the HRC called on Israel to revoke the law and urged it to reconsider its policy with a view to facilitating family unification on a non-discriminatory basis.[27] In these opinions the Committee invoked Article 5 of ICERD. Under Article 5 (d) (iv),

> States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, *notably in the enjoyment of the right to marriage and choice of spouse"* [emphasis added]. [28]

International law recognises the right of states to determine who may enter their territory. The question at issue is not whether foreign nationals or persons protected under international law have an inalienable right to enter Israel or any other state: they do not. It is, first, whether citizens

[25] For a full discussion of the principle of proportionality in international law see R.P. Mazzeschi, review of E. Cannizzaro, *Il Principio Della Proporzionalità Nell'Ordinamento Internazionale. Milan: Giuffrè, 2000, European Journal of International Law*, Volume 13:4.

[26] HRC, *Concluding Observations: Israel*, (CCPR/CO/78/ISR)Seventy-Eighth Session, 21 August 2003, (paragraph 21).

[27] Decision of CERD, 22 August 2003 (CERD/C/63/Misc. 11/Rev.1).

[28] CERD reiterated this opinion when the Nationality Law was extended in July 2004, demanding that Israel provide it with an urgent report no later than 31 December 2004.[28] Israel failed to meet this deadline. At the time this chapter went to print, Israel had still not provided this report.

and residents of any state have a right to apply to live with their spouses and children in that state with reasonable expectation of success; and, second, whether residents of occupied territory are permitted to exercise their particular right to family life as protected persons under international humanitarian law.

Israel frequently deports those whom it discovers residing "illegally" in Israel and the OPT. Further to the policy's breaches of the right to family life iterated above, it has been argued that, on the basis of recent decisions of the HRC, "it appears that considerations of human rights have now taken precedence over the rights of states to determine who may remain in their territories."[29] The impact of deporting someone residing illegally in Israel or the OPT is frequently to deny their spouse and/or their children the right to family life or other fundamental human rights.

In the case of family unification, the deportation of those who have been compelled to live illegally with their families in Israel or the OPT in order to exercise their right to family life, will, ipso facto, deprive all those concerned of the right to family life. Israel is not entitled to deprive its own citizens or protected persons of the right to family life except in exceptional circumstances. It appears that Israel's arguments on security grounds are insufficient to demonstrate the existence of such exceptional circumstances. These circumstances cannot, in any case, justify the breach of the fundamental prohibition of discrimination. It can thus be argued that Israel's failure to guarantee the right to family life of deportees and/or their families in at least one of the areas that it controls removes from it the right to deport those would-be applicants for family unification who currently reside illegally in Israel or the OPT.

VIII. CONCLUSION

Palestinian residents of the OPT who wish to remain there are *de facto* prevented from marrying anyone but another resident of their respective region of the OPT – the West Bank, Gaza Strip or East Jerusalem. Such a situation cannot plausibly be portrayed as being consistent with Israel's fulfilment of its duties under international law towards Palestinian residents of the OPT, nor towards its own Palestinian citizens.

Israel's family unification policies denies the right to family life to all Palestinians resident in the OPT. It discriminates not only against residents of the OPT married to permanent residents of East Jerusalem, or to Israeli citizens, their children and other close relatives, but against all Palestinians of the OPT outside Jerusalem who may wish to marry an Israeli citizen or a Jerusalemite, and against all Jerusalemites who may wish to marry a Palestinian resident in other parts of the OPT. The Nationality Law continues the Israeli practice of discrimination against Palestinians of the OPT married to foreign nationals. This applies also to members of their families who did not possess OPT ID cards – whether because these ID cards had

[29] Burchill, R. "The Right to Live Wherever You Want? The Right to Family Life Following the UN Human Rights Committee's decision in Winata," *Netherlands Quarterly of Human Rights*, Volume 21:2, June 2003.

been confiscated due to an extended stay abroad, or simply because the family members in question had not been present, or had not been included in the Israeli census of the OPT of 1967.

It has been demonstrated that the security rationale presented by the State in justifying its changes to the family unification policy regime that existed prior to the entry into force of the Cabinet Decision of 12 May 2002 is too vague or too incoherent or both for the law as it was introduced and stood at the close of 2004 to be justified. Further, these changes would violate international law even were they detailed and coherent, on the grounds that they breach the principle of proportionality. Were the statistics provided by the State with respect to the involvement in acts against the State of persons who had acquired legal status in Israel through family unification to be verifiable, let alone verified, a debate might be had on what, if anything, they signify. According to international law, however, that debate would have to conclude that the actions of some persons who obtained legal status in Israel through family unification cannot justify depriving every Palestinian resident of the West Bank and Gaza Strip of the right to family life in Israel and the OPT.

The denial of the right to family life to all residents of the OPT on the basis of the alleged actions of some former residents of the OPT who acquired status in Israel would clearly constitute acts of intimidation, prohibited under Article 33 of the Fourth Geneva Convention. If the security rationale put forward by Israeli officials is in fact, as was claimed at the time, the grounds for the Nationality Law, Palestinian residents of the OPT are undergoing collective punishment by being deprived of the right to family life for actions that they have not committed.

One cannot meaningfully analyse individual cases of the denial of family unification in isolation. Israel does not and, historically, has not considered each application for family unification in isolation nor, therefore, on its merits. Decisions to grant or deny family unification have been based on considerations other than whether in each individual case there might have been legitimate reasons to deny the right to family life to individual applicants for family unification who happened to be Palestinian. They have instead been premised on the assumption that Israel is entitled to deny the right to family life to any Palestinian solely because he or she is Palestinian – since it is in their capacity as Palestinians, and not as individuals or in light of their own past actions, that applicants for family unification are deemed to pose a threat to Israel. The quota policy that was applied between 1993 and 2000 clearly demonstrated that Israel views the purpose of its policy on family unification through a prism irrelevant to its professed security concerns, since such concerns would have been left unaddressed by a policy of quotas.

By preventing thousands of Palestinian families from living legally anywhere in Israel or the OPT, Israel is in effect showing them the door. The Nationality Law speeds the quiet deportation of Palestinians from the OPT and Israel, that Israel has consistently pursued since 1967. The Nationality Law is thus merely the newest incarnation of a policy that dates back, not to 1967, but to 1948. It is, then, not only the Nationality Law but also the entire basis and assumptions of Israel's policy on family unification since 1967 that must be addressed with all due urgency.

Israel must fulfil its responsibilities towards both its own citizens and permanent residents and the protected persons under its jurisdiction. States parties should be unrelenting in their demands Israel to amend its family unification policies, in accordance with their commitments under international law to ensure respect for the provisions thereof which they have signed up to, and to remove their discriminatory character. Only a total reformulation of Israel's policy on family unification could bring this about.

VIOLATIONS OF THE RIGHTS OF PALESTINIAN WOMEN

Palestinian Women in East Jerusalem
(Atef Safadi, 2003)

VIOLATIONS OF THE RIGHTS OF PALESTINIAN WOMEN

I. OVERVIEW

Without a doubt, the human rights of Palestinian women in the Occupied Palestinian Territories (OPT) has been severely undermined by Israel's occupation of the West Bank and Gaza Strip in 1967.

With the beginning of the current *intifada*, Israel escalated its violations of human rights and humanitarian law in the OPT. As a result, human rights violations such as the unnecessary or excessive use of force, wanton destruction of property, and other measures by Israeli occupying forces, highlighted in this report, have all exacerbated the existing physical, economic, and psychological pressures faced by Palestinian society, especially women. As reiterated by the United Nations (UN) Special Rapporteur on Violence Against Women following her official mission in 2004 to the West Bank and Gaza Strip, the occupation has pervaded all aspects of life and entailed violations of economic, social and cultural rights, as well as civil and political rights,"[1] and which has contributed to the creation of an atmosphere of *legitimized violence* [emphasis added] as a method of conflict resolution."[2]

Furthermore, the drastic deterioration of the society's political and economic situation, has also led to an increase in conservatism, conformity to traditional norms of honour, and patriarchic domination, all of which has undermined the status of Palestinian women. In addition, since the beginning of the current *intifada*, Israel's targeting of Palestinian National Authority (PNA) law enforcement and security institutions and infrastructure has strengthened the authority of traditional and tribal structures, and has further weakened already inadequate protection mechanisms. Objectified as the guardians of the honour of society and national identity under attack, assaults on women during an armed conflict is often seen as attacks on the entire community to which they belong, and "is viewed as a means of demoralizing, or transmitting a message of intimidation, to their men folk."[3] As the UN Special Rapporteur on Violence Against Women noted, "at the intersection of occupation and patriarchy, women experience a multilayered discrimination and multiple forms of violence."[4]

[1] Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk, "Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Addendum, Mission to Occupied Palestinian Territory," 2 February 2005, (E/CN.4/2005/72/Add.4), paragraph 13.

[2] *Ibid*.

[3] International Committee of the Red Cross (ICRC), *Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document*, (Ref. 0840), Geneva, 2004.

[4] Report of the UN Special Rapporteur on Violence Against Women, *supra* note 1.

II. INTERNATIONAL LAW AND THE PROTECTION OF PALESTINIAN WOMEN'S RIGHTS

A. INTERNATIONAL HUMAN RIGHTS LAW

Discriminatory practices and violations of the rights of women are both a historical and a contemporary phenomenon, with women worldwide facing discrimination not only from state organs, but also from their own families and private institutions.[5]

In international human rights law, the norm of equality and non-discrimination, on a range of grounds including gender, represents the core of the modern human rights regime.[6] In its General Comments, the Human Rights Committee (HRC) asserts the responsibility of states to provide for the equal enjoyment of rights and to put an end to discriminatory practices in the public and private spheres. State Parties are to ensure that "traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights."

While entire communities suffer the consequences of armed conflict, women are particularly affected.[7] As confirmed by the 1993 Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, "violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of human rights and humanitarian law," and they require a "particularly effective response."[8]

The United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which is the central international human rights instrument for the realisation of equality between men and women's enjoyment of their full range of civil, political, economic, social and cultural rights, [9] also reiterates that "the eradication of *apartheid*, all forms of racism, racial

[5] Rehman, Javaid, *International Human Rights Law: A Practical Approach*, Pearson Education Limited, UK, 2003.

[6] Article 2 of the Universal Declaration of Human Rights (UDHR). In addition, Common Article 2 to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the state parties "undertake to guarantee the rights enunciated in this Covenant will be exercised without discrimination of any kind, including sex." The legal protection provided by other human rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC), equally apply to women and girls on the basis of non-discrimination.

[7] As early as 1974, the UN General Assembly (GA) adopted the Declaration on the Protection of Women and Children in Emergency and Conflict Situation, which called on states to ensure that Women and children belonging to the civilian population … who live in occupied territories, shall not be deprived of shelter, food, medical aid or other inalienable rights, in accordance with the provisions of the UDHR, the ICCPR, the ICESCR, the CRC or other instruments of international law. UN General Assembly (GA) Resolution 3318(XXIX) of 14 December 1974.

[8] *See Vienna Declaration and Programme of Action*, Article 38, 13 October 1993, (A/CONF.157/24 (Part 1).

[9] *Women, Peace and Security*, study submitted by the UN Secretary General (SG) Pursuant to Security Council (SC) Resolution 1325, 2000, UN Publications, 2002. As of November 2004, 179 States were parties to this Convention.

discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyments of the rights of men and women."[10]

On 2 November 1991, Israel signed and ratified CEDAW. That this Convention applies to the OPT is evident in the 1997 Concluding Observations by the UN Committee on the Elimination of All Forms of Discrimination Against Women regarding Israel's combined first and second periodic reports, which recommends that Israel should ensure the implementation of the Convention throughout the territory under its jurisdiction.[11]

Nevertheless, Israel's actions in and continued occupation of the OPT have undermined the CEDAW-guaranteed protection from all forms of discrimination against women. In addition, Israeli has refused to acknowledge that the rights within CEDAW apply to all women within its jurisdiction, including those in the OPT.[12] In its Third Periodic Report submitted to the CEDAW Committee in 2001, Israel has again omitted any reference to Palestinian women in the OPT.

The UN Declaration on the Elimination of Violence Against Women, adopted unanimously by the UN General Assembly (GA) in 1993, asserts that violence against women is,

> Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[13]

While CEDAW has no explicit provision regarding violence against women, in its General Recommendations, the CEDAW Committee clarified that,

> Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of Article 1 of the Convention (para.7).[14]

It is clear that violence against women and the state's responsibility to prevent and punish such

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[10] HRC, *General Comment 28 on Equality of Rights between Men and Women (Article 3)*, (CCPR/C/21/Rev.1/Add.10,) 2000.
[11] Committee on the Elimination of Discrimination Against Women, *Consideration of Report Submitted by State Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Initial and Second Report of State Parties: Israel*, 8 April 1997, (CEDAW/C/ISR/1-2).
[12] Report of the Committee on the Elimination of Discrimination against Women to the UN GA, Fifty-Second Session, 12 August 1997, (A/52/38/Rev.1, Part II, para.170, 1997). Even in the case of East Jerusalem, which Israel claims to be part of its territorial jurisdiction, its authorities have failed to report on the implementation of CEDAW vis-à-vis Palestinian women in the city, and have pursued discriminatory policies against them, most notably in the area of family unification.
[13] UN GA, *Declaration on the Elimination of Violence Against Women* (A/RES/48/104) adopted 20 December 1993.
[14] Committee on the Elimination of Discrimination against Women, *General Recommendation 19: Violence Against Women*. (Eleventh Session, 1992). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies. (U.N. Doc. HRI\GEN\1\Rev.7, 2004).

acts, as well as to ensure reparations, are under the domain of CEDAW. In this regard, the 1993 Beijing Declaration for Action recognized violence against women as a gross violation of women's human rights, and that "states have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the state or by private persons, and provide protection to victims."[15] Thus the consistent failure by the Israeli authorities to take action against the Israeli occupying forces, Border Police, and settlers who harass or incite acts of violence against women based on their gender, constitutes a violation of Israel's obligations under CEDAW.[16]

B. INTERNATIONAL HUMANITARIAN LAW

International concern with the promotion and protection of women's rights has also been reflected in the provisions of international humanitarian law, which considers this issue in conjunction with armed conflicts.[17] As noted by the Women's Rights Division of Human Rights Watch, in a number of conflicts worldwide, an alarming connection exists between political violence and the violation of women's rights.[18] Already during the first *intifada*, Palestinian women's organization had noted that the level of violence against Palestinian women "correlated to the level of violence against the Palestinian people by Israeli forces."[19]

Fundamental human rights obligations, most notably those relating to the rights to life, freedom from torture, and other humiliating or degrading treatment, and other non-derogable rights, grant protection to women and remain applicable even in the event of armed conflict. But international humanitarian law gives extensive protection to women during an armed conflict, as they benefit from all the provisions that protect the victims of such conflicts.[20]

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[15] *Report of the Fourth World Conference on Women, Beijing*, 4-15 September 1995, (A/CONF.177/20 and Add.1), United Nations Publication Chapter I.

[16] In December 2000, the Optional Protocol to CEDAW came into force. As of November 2004, 69 State parties to CEDAW had become party to the Optional Protocol However Israel is not currently a state party to this Protocol.

[17] Gardam, Judith, "Women, Human Rights and International Humanitarian Law," *International Review of the Red Cross* (No. 324), 30 September 1998.

[18] Human Rights Watch, *World Report 2001*, New York.

[19] Shammas, Maha Abu-Dayyeh, "The Second Palestinian *Intifada*: Social and Psychological Implications for Palestinian Women Resulting from the Israeli Escalation of Violence," available on Women's International League for Peace and Freedom, at http://www.peacewomen.org/resources/OPT/ShamasVAW.html.

[20] During an international armed conflict or foreign occupation, women are among the protected groups accorded special attention by the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). Under these conditions, they benefit from all the provisions that guarantee fundamental rights, including respect of life and physical and moral integrity, and that prohibit practices such as coercion, corporal punishment, torture, collective penalties, reprisals, pillage, and the taking of hostages. Women also have the right to trial by an independent and impartial court established by law respecting the generally recognised principles of judicial procedure. Article 48 of Additional Protocol One, reflective of customary international law, notes that the parties to a conflict "shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

According to Article 27 of the Fourth Geneva Convention "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault." [21] Even where the principle of differentiated treatment for women is not specifically mentioned, it nevertheless remains accorded to them.[22]

III. DIRECT VIOLATIONS OF PALESTINIAN WOMEN'S HUMAN RIGHTS

A. THE EXCESSIVE USE OF FORCE: DEATHS AND INJURIES

Although they are rarely combatants, and far more Palestinian men civilians and combatants alike have by killed by the Israeli forces, a significant number of Palestinian women have been injured or killed during the last four years of the current *intifada*. Palestinian women (along with men and children) have had their fundamental right to life, protected under international human rights and humanitarian law, repeatedly violated and threatened by the Israeli occupying forces' excessive use of force against Palestinian civilians.

With hundreds of Palestinian women injured since the beginning of the current *intifada*. In most cases, the majority of women were typically not involved in violent resistance or active confrontations with Israeli occupying forces. Since 2000, Palestinian women and children have been killed or injured in their homes; while traveling to or from work or school; at checkpoints or as bystanders during assassination operations or cross fire. Other women have died as a result of being denied access to medical treatment at checkpoints, and from Israeli shelling in residential areas. According to Al-Haq's documentation, from 28 September 2000 to 25 September 2004, 3,044 Palestinians were killed by Israeli forces in the OPT, 179 of whom were women and girls. Of the women killed during this period, 26 were bystanders killed during Israeli extra-judicial executions, along with 39 children and 121 men.

B. ARREST AND DETENTION

Of the 40,000 Palestinians detained since the beginning of the *intifada*, 300 have been women. As of end of December 2005, about 125 women (including 11 between the ages of 14 and 17) are being held in two prisons inside Israel,[23] which in itself is a violation of international humanitarian law.[24]

[21] Although this particular concern is not legally defined, it covers certain concepts such as physiological specificity, honour and modesty, pregnancy and childbirth. See Krill, Françoise, "the Protection of Women in International Humanitarian Law," International Committee of the Red Cross, *International Review of the Red Cross* (No 249), 31 December1985.

[22] An express reference tends to strengthen the scope of the principle, rather than to limit its application, *ibid.*

[23] The two prisons are Telmond Hasharon Prison and Nevi Tretza (al-Ramla). Prison Statistic form Prisoner's Support and Human Rights Association Addameer.

[24] Article 76 of the Fourth Geneva Convention states that "protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein."

The conditions in which the women are being held raise concerns for their health and well-being. Palestinian women prisoners suffer from poor conditions of detention, inadequate access to health care and food, severe shortage of clothing, and lack of on-site medical doctors or social workers. Furthermore, the prisoners' private needs, such as their hygiene needs during menstruation, are not adequately respected or taken into consideration. Such conditions have grave repercussions on their physical and mental integrity, and reflect a systematic breach of the right to health of Palestinian women in Israeli custody.

> On 26 October 2004, Thoriyeh Hamour, a 23-year-old prisoner from Jenin, suffered acute stomach pains, and demanded to see the doctor. She was told that he was unavailable, and was then examined by a nurse who advised her that she should drink water in large quantities. This is what is advised in most of the medical cases. Some patients need a psychiatrist or a social specialist. However, the prison administration does not respond to these demands. Female prisoners also complained about the lack of care and attention from the prison-appointed dentist. The only treatment they offer is taking out the tooth if they suffer from pain. Latifa al-Sa'di, 22 years old, has been in prison for two years, during which period she suffered from repeated tooth pains. The treatment offered was extracting six teeth.
>
> **Extracts fom Al-Haq Affidavit No. 2711004**[25]
> Given by: Prisoner Lina Jarbouneh, from Jenin in the West Bank, taken in Nivi Tretza Prison.

Moreover, some newborns continue to live with their mothers in the prison in unbearable conditions. The prison administration fails to respond to the mothers' psychological and physical needs, including clothing and food, and denies the fathers contact with their children during visits.

> The prison administration failed to take into consideration the special condition of 21-year-old Jerusalemite Mirvat Taha, who gave birth to her child inside the prison. They did not receive any special treatment during pregnancy, and were not provided with food necessary for a pregnant woman. Mirvat recalls that she panicked when she experienced labour pains on 7 February 2003. She was taken handcuffed to the hospital with six female and male members of the Israeli prison facilities. Her hands and legs were shackled while she was lying on the bed. Despite repeated requests to bring her mother and husband to be with her on this day, the prison administration did not respond. Mirvat was forced to leave the hospital the next day, even before seeing her son Wael, whose health condition necessitated him to stay one more day in the hospital. Wael lives with his mother in the prison amidst unbearable conditions. The prison administration did not provide Wael with his special needs, including clothing and food, and prevented him from sleeping on

[25] This affidavit was taken by Al-Haq's lawyers in the Legal Unit during their prison visits, and not by its fieldworkers, which explains the different classification system.

a bed of his own. It also refused to allow toys in, and prevented his father from carrying him during his visit. Mirvat Taha pointed out that her son suffers from severe and dangerous nervousness to the extent that he slaps his face and his mother's face, and that he keeps shouting and crying.

Extracts from Al-Haq Affidavit No. 12503
Given by: Prisoner Mirvat Mahmoud Taha, resident of East Jerusalem, West Bank, taken in Nivi Tretza Prison.

Additionally, Israeli prison and detention authorities subject Palestinian female prisoners to various forms of torture and ill treatment during investigation and detention periods, including beating and solitary confinement. Israeli investigators systematically threaten Palestinian female prisoners in a manner that perpetuates gender-based violence that is founded on the perception of women as inferior to men. Information gathered during visits by Al-Haq's lawyers indicates that Israeli prison authorities threaten Palestinian women prisoners, especially younger ones, with harming their family relatives to force them to provide information or to plead guilty.

On 16 June 2004, at around 2:00 a.m., Israeli occupying forces conducted an incursion into Rafidiya, a part of the city of Nablus. During this incident, they arrested both my father and I. They tied my hands and blindfolded us, and put us into the military jeep while hurling sexual insults at us. We were taken to Shafi Shamron settlement, where after medically examining us, they took us into a room. When they took off the blindfolds I recognised my friend Asil and her father in the room. They told my father that they would take me away for interrogation during which three interrogators questioned me for six hours, and accused me of planning an attack. I continued to deny the charges. Nevertheless, one of the officers took me into another room where he asked me to sign papers admitting that I was planning to carry out the attack. He threatened me that if I did not sign these papers, he would harm my family, [and] arrest and torture them. …

Extracts from Al-Haq's Affidavit No. 2022/2004
Given by: Majd Naser Salem al-Kukhn, (Resident of Nablus, West Bank).

Another particularly degrading form of ill-treatment includes the use of strip searches, a practice directed solely against Palestinian women prisoners, and not used with Israeli women detainees or prisoners. In cases in which prisoners have refused to comply with orders to take off their clothes, information gathered during visits to Palestinian female prisoners by Al-Haq's lawyers indicate that they have often been forcibly tied up and stripped when they are taken to or returned from the court. If the prisoner refuses, she is tied and undressed by force. There have also been allegations of Palestinian female prisoners being verbally insulted in a manner that degrades their status as women. In addition, prison authorities are reported to allow male jailers to enter

and search female prisoners' rooms at any time and without prior notice.[26] More seriously, Israeli interrogators deliberately threaten Palestinian women prisoners with rape. According to sworn affidavits gathered by Al-Haq's lawyers during their prison visits, this method is systematically used by the Israeli interrogators. In this regard, prisoners report that such threats make women prisoners, especially young girls, confess and provide false information out of fear that such threats will be carried out.[27]

Although political and criminal prisoners must so far as possible be detained in separate institutions. In the case of al Ramla prison, only a narrow physical path separates Palestinian political prisoners from Israeli criminal ones. As a result, the former are continuously exposed to acts of harassment and intimidation by Israeli criminal prisoners; Israeli prison officials fail to put an end to these actions, despite repeated complaints. Moreover, these authorities deny Palestinian women many of the rights granted to their Israeli counterparts in terms of medical care, food (both quantity and quality), and family visits.

Due to the importance that many Palestinian female prisoners attach to their families' visits, Palestinian female prisoners have indicated to Al-Haq's lawyers that Israeli authorities exploit their ability to allow or deny such visits to extract confessions or punish them. In cases in which visits are allowed, families are forced to wait for long hours before being allowed to meet with them. A glass partition and iron bars separate the prisoner and the family, strictly limiting direct contact, and particularly affecting those prisoners who are mothers, and are either denied visits by their children, or are prevented from touching or holding them during these visits.

Since the start of the current *intifada*, there has been a gradual increase of the number of Palestinian women being held in administrative detention as a means of exerting pressure on their husbands or other relatives to turn themselves in. Many of these detention orders have been renewed. To date, eight women are being administratively detained (with no charge), 77 are being held pending trial, and 41 have been sentenced.

Unlike Israeli women prisoners, Palestinian women prisoners in the OPT are denied their right to equal protection under the law. The Israeli military court system fails to meet minimum international standards on rights to a fair and regular trial. Palestinian women detainees in the OPT are subjected to failure or delays in notifying legal counsel of the location, date and timing of court hearings; reliance on evidence presented by the prosecution but to which the defense is denied; and lack of effective appeals procedures. In addition, Israeli authorities make the access of Palestinian lawyers during visits increasingly difficult. Lawyers are often subjected to acts of

[26] Non-governmental Organization (NGO) Alternative Report in Response to the "List of Issues and Questions with regard to the Consideration of Periodic Reports (CEDAW/PSWG/2005/II/CRP.1/Add.7): Israel's Implementation of the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in the Occupied Palestinian Territories," by Al-Haq, Palestinian Centre for Human Rights (PCHR), and Women's Centre for Legal Aid and Counseling (WCLAC), May 2005.

[27] Al-Haq Affidavit No. 2711004 (Legal Unit) cited in *Ibid*.

harassment and intimidation by prison authorities, aimed at discouraging them from carrying out visits by forcing them to wait for long hours before allowing them to meet their clients, or barring them from direct contact with detainees during such meetings. These practices violate a number of provisions of the CEDAW.[28]

In addition to the violations of the relevant CEDAW provisions, these Israeli practices also violate standards set in international human rights and humanitarian law related to minimum standards of fair trial and the treatment of prisoners.[29]

C. MOVEMENT RESTRICTIONS

Israel's regime of control over the Palestinian civilian population, exercised through its curfews, road closures, roadblocks, and the construction of the Annexation Wall, have violated the right to freedom of movement of the Palestinian civilian population in the OPT.[30]

In this regard, restrictions continue to have severe negative repercussions for Palestinian women, and their access to medical, educational, and economic services. Thus, these restrictions have created difficult conditions for women attempting to procure food and basic necessities for their households, and have exacerbated the negative impact on the Palestinian economy. Access to health care has also been greatly affected. In addition to increasing their own personal risks, reduced access to health services as a result of movement restrictions puts much pressure on women, who traditionally are responsible for taking care of the family's health and other basic needs.

In this regard, Israel's Annexation Wall currently being constructed in the West Bank further worsens the isolation caused by Israel's measures of control over the occupied Palestinian population, "and will only serve to further limit the access that affected communities have to humanitarian assistance, to essential services and to their livelihoods."[31] By March 2004, the Annexation Wall has displaced approximately 2,173 households, constituting 6,379 men and 5,082 women.[32]

The construction of the Annexation Wall on Palestinian land has further restricted women's independence, and its completion will result in fewer women seeking employment and formal education. A United Nations Development Fund for Women (UNIFEM) study in 2001 reports that for Palestinian women, this Wall,

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[28] Articles 2, 12 and 15 regarding policy measures by state parties, health and equality before the law.

[29] These guarantees are reiterated in Article 75 of Additional Protocol One to the Four Geneva Conventions, reflective of international customary law.

[30] For more information see Chapter on "Movement Restrictions" in this report.

[31] Under-SG Jan Egeland, UN Office for the Coordination of Humanitarian Affairs (OCHA) on the Protection of Civilians in Armed Conflict , UN Open Meeting of the Security Council, 9 December 2003, http://www.peacewomen.org/resources/Human_Rights/EgelandOCHA2003.html.

[32] See Palestinian Central Bureau of Statistics, (PCBS), "Statistical Monitoring of the Socio-Economic Conditions of the Palestinian Society (Second Quarter 2004)," October 2004.

> Will mean isolation from education, social networks and services, economic activity, markets and information, as well as from the numerous support services that women's NGO's now offer Palestinian women, from education and skills training to community meeting centres. Girls' and boys' education has been and will continue to be disrupted.[33]

Today, the wall continues to dramatically hinder Palestinian women's movement on either side of the structure within the West Bank. Women who live on the western side of the wall are experiencing about an 85.7% decrease in mobility, while women on the eastern part have found their movement to have decreased by 63.3%.[34] Moreover, it prevents families on opposite sides of the Wall from freely seeing each other, thereby severing their social and cultural ties.

> I live with my 37-year-old husband Jamal Mousa 'Atiyya, and my five children in al-Wata al-Tantour area, 100 metres from 'Ayda camp, in a house consisting of two rooms, a kitchen and a bathroom. … We all suffer because of the construction of the Separation Wall around Bethlehem. A concrete wall nine metres high has been constructed from al-Quba north of Bethlehem through 'Ayda camp and it stretches to Beit Jala. … We have difficulties in reaching Bethlehem, as we have to walk one kilometre to reach an opening in the Wall near 'Ayda camp. This is a rough area, and it's especially difficult when we carry our foodstuffs or other needs. … I currently do not visit Bethlehem, although my family, who carry West Bank identity cards, live in Beit Jala. I visit them once a month or once every two months due to the difficulties I meet on the way to their home after the building of the Separation Wall. At the same time, my family cannot visit me, despite the short distance between my home in al-Wata and their home in Beit Jala, which I can see from my home. The difficulties of our daily life and the threat of evacuation from our home have worsened the psychological situation of my children and I. We move only in the surrounding area. Our children do not even go out to play. They prefer to stay at home and when they play together, they do so very aggressively. … Moreover, the opening to 'Ayda camp has been closed and now it takes me around two hours to go from our home to Beit Safafa or Beit Jala, while in the past it took me only five minutes. … This situation made me become more nervous and frustrated with my husband and children. Just thinking of going to Jerusalem or any other place to buy what I need,, using these rough, unpaved roads makes me depressed and angry. Formerly, the vegetable and gas delivery trucks and taxis used to reach our home, but now they cannot approach this area. All of this has increased my burdens as my husband goes to work and I have to walk with the children to their school in Beit Safafa, because they are afraid of the Israeli soldiers continually present in this area.

[33] UNIFEM, "Gender Profile of the conflict in the Occupied Palestinian Territory," 2001, http://www.womenwarpeace.org/opt/docs/opt_pfv.pdf.

[34] See "NGO Alternative Pre-Sessional Report on Israel's Implementation of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in the Occupied Territories," to the Pre-Sessional Working Group by Al-Haq, PCHR, and WCLAC, January 2005.

Extracts from Al-Haq Affidavit 1948/2004
Given by: Adiba Ibrahim Saleh As'ad, (Resident of al-Tantour al-Wata, 'Ayda Refugee Camp, nearby Bethlehem, West Bank).

Rural women whose livelihoods and household incomes depend on agriculture will be severely affected by the de facto annexation of Palestinian agricultural land and wells. A survey conducted in March 2004 found that Israel has confiscated 270,558 dunums of land for the wall, mostly in the Tulkarem governorate. Significantly, 270,558 of these dunums were agricultural land, the main source of income of people in these areas.[35]

Agriculture is the main employment sector of women in the West Bank, with 34.1% of women currently working in the field.[36] Unable to cultivate their land as they wish, hundreds of these female farmers have thereby lost significant income.

The Annexation Wall also isolates Palestinian women from their extended families, on whom many rely for support. In addition, it may potentially change marriage customs in the West Bank, by affecting the scope of choice of life partners. Families living on the eastern side of the wall fear that if their daughters marry men on the western side of the wall, Israeli-imposed movement restrictions will prevent them from visiting each other, and that they won't be able to see their grandchildren.

International human rights recognise the right to freedom of movement.[37] Additionally, under international humanitarian law, an occupied civilian population must be able to move freely, without fear of harassment, attack or injury, in order to maintain access to means of subsistence and to conduct day-to-day activities, [38] a requirement which Israeli restrictions over the Palestinian population overwhelmingly fail to meet.

D. VIOLATIONS OF THE RIGHT TO HEALTH

Palestinian women's right to health has been particularly eroded as a result of the movement restrictions discussed in the chapter regarding movement restrictions in this report. The additional burdens placed upon Palestinian women as a result of the occupation, including those resulting from the economic strain of becoming the head of their household and the emotional strain of the loss of loved ones, has adversely affected their health. In addition to caring for themselves,

[35] PCBS, *supra* note 32.
[36] See "NGO Alternative Pre-Sessional Report," *supra* note 34.
[37] It identifies two principal rights: the right to leave any country including the country of one's nationality; and the right of anyone lawfully within a State to move freely within that State and freely choose a residence therein. Moreover, while the ICCPR allows states to restrict movement "as necessary to protect national security, public order, public health or morals," this must be conducted in a manner that is proportionate, indiscriminate and consistent with other rights recognized by the Covenant. For more information, see the Chapter on "Movement Restrictions" in this report.
[38] For more information regarding the illegality of this practice, see Chapter on "Movement Restrictions" in this report.

women have an important role in promoting and maintaining the health of their family and community. Since they play a crucial role in tending sick family members, they need to be supported and assisted in maintaining their own health and that of their family.[39]

In this regard, it is worth noting that the poor economic situation in the OPT, most notably resulting from Israel's systematic policy of closures and curfews, significantly undermines the Palestinian civilian population's access to health services in general. According to the results of a survey in July-September 2004, 39.4% of households surveyed in the OPT cited the high cost of medical treatment as a factor preventing them from seeking health services, while 36.1% attributed this to Israeli closure. 39.8% cited the Israeli military checkpoints, and 8.9% identified the construction of the Annexation Wall as the main factor.[40]

Israeli road closures, curfew, checkpoints, and the Annexation Wall have made it increasingly difficult for Palestinians to reach health care facilities. With the construction of the Annexation Wall, hundreds of Palestinian women have been unable to reach hospitals, clinics, and other health facilities, with severe repercussions for their physical and mental well-being.

Since the beginning of the current *intifada*, pregnant Palestinian women have been unable to access appropriate health care and hospitals, primarily as a result of movement restrictions. Between 2002 and 2004, the number of home deliveries increased from 8.2 to 14%.[41] In several instances, this has forced women to give birth at checkpoints which has caused birth complications, and in some cases loss of life. From September 2000 to October 2004, at least 61 women were forced to give birth at military checkpoints, and there were 36 stillbirths.[42]

> On 28 August 2003, I experienced increased labour pains and thought I was going to give birth to my baby. For that reason, my husband Da'oud and I left our home located in Salem village at approximately 5:40 a.m. and took a taxi driven by village resident Muhammad Fawzi to the Beit Fourik checkpoint. An ambulance was waiting for us on the other side of the checkpoint, because my husband called the Palestine Red Crescent Society (PRCS) before we left home and told them that I was in labour. … Upon reaching the checkpoint and getting out of the taxi that drove away, it appeared to us that there was not any ambulance. We tried to cross the checkpoint, but the soldiers shouted at us and ordered us not to proceed and told us to stay where we were. … My pains increased and my shouts became louder, and my husband tried to convince them to let us pass to the hospital or go back home. But no answer came. After half an hour of pain and humiliation, I had

[39] ICRC, "Women and War: Health" *Fact-Sheet*, 31 October 2001.

[40] See PCBS, "Impact of the Israeli Measures on the Economic Conditions of Palestinian Households, 10th Round - July-September 2004," November 2004.

[41] Figures provided by the United Nations Children's Fund (UNICEF), cited in Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk, "Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women," (E/CN.4/2005/72/Add.4), 2 February 2005, paragraph 24.

[42] Baker, Laila, "At Checkpoints-Babies are Born to Die," *Palestine Report*, Volume 11, Number 29, January 2005, http://www.palestinereport.org/article.php?article=638.

no option but to go towards one of the concrete cubic stones at the checkpoint, and sit behind it to hide myself from the soldiers, and there I gave birth to my baby girl whom I wanted to call Mira. I put my baby inside my clothes to protect her. I was crying from pain, feeling that I may die at any moment. Moreover, blood was coming from my daughter's mouth, while my husband was unable to do anything but to repeat what I was saying to make the soldiers understand and feel pity towards me. After a few minutes, one of the soldiers approached me check if what my husband was saying was true. … He allowed my husband to go and bring a car from the opposite side, about 100 metres from us, to take us to the hospital. … The car rushed to Rafidiya hospital in Nablus. But when the doctors examined the baby, she was dead.

Extracts from Al-Haq Affidavit No. 2027/2004
Given by: Roula Muhammad Ghazi Suleiman Shtayya, (Resident of Salem village, nearby Nablus, West Bank).

International humanitarian law contains numerous provisions aimed at preserving the health of civilians in situations of armed conflict, and places a duty on an Occupying Power to preserve the proper functioning of health services during armed conflict situations.[43] Furthermore, during times of occupation, any preferential treatment in existing policies regarding pregnant women and mothers of young children must be respected.[44]Article 89 of the Fourth Convention provides that "expectant and nursing mothers in occupied territories shall be given additional food, in proportion to their physiological needs."

Israeli-imposed restrictions violate Article 12 of CEDAW, which stipulates that,

> States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

In its General Recommendations, the CEDAW Committee stressed that states parties should ensure that adequate protection and health services, including trauma treatment and counseling, are provided for women in especially difficult circumstances, "such as those trapped in situations of armed conflict and women refugees."[45]

[43] Such as those requiring parties to a conflict to protect civilians from becoming victims of violence or of other effects of hostilities; to guarantee them adequate food, shelter, and clothing in order to maintain good health; to provide for persons in need of medical assistance; permit relief actions; and protect medical establishments, personnel, and supplies.
[44] Article 50 of the Fourth Geneva Convention states, "the Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to occupation in favour of … expectant mothers and mothers of children under seven years."
[45] CEDAW, *General Recommendation 24 Regarding Women and Health*, 1999, (A/54/38/ Rev.1).

In addition, the right of access to health services is enshrined in a number of human rights instruments, including the ICESCR,[46] the CRC,[47] and ICERD.[48] In its General Comment on the right to health, the Committee of Economic, Social and Cultural Rights (CESCR) note that "the right to health is closely related to and dependent upon the realization of other human rights, including the rights to non-discrimination [and] equality."[49] Furthermore, it stresses that "the realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information."[50]

E. VIOLATIONS OF THE RIGHT TO EDUCATION

Although Palestinian society has traditionally boasted a high literacy rate,[51] including amongst its female population, it is not surprising that Israeli policies during the current *intifada* have proved to be one of the major obstacles to the realisation of their fundamental right to education.[52] Since education is considered a prerequisite for making informed choices, undermining Palestinian women's access to education weakens their ability to participate fully in society, to earn a living, and to improve future prospects.

In the case of Palestinian women, the closure of schools and disruption of the educational process as a result of curfews, closures, siege and shelling from the beginning of the current *intifada*, has disproportionately affected their ability to exercise their right to education.[53] Having to travel through checkpoints affects female students and teachers uniquely as they are subject to sexual harassment by Israeli soldiers, and "some have become afraid of traveling to school because they must walk long distances in deserted areas to avoid soldiers and settlers."[54] Some parents, fearing for the daughters' safety, have even restricted their children from attending school altogether.

Additionally, since the beginning of the *intifada*, Israel has barred Palestinian students from the Gaza Strip from traveling to the West Bank to pursue their studies. Those who already were studying in the West Bank when this policy came into effect have so far been unable to travel back home to the Gaza Strip to visit their families, for fear that they may not be allowed to return.

[46] For example, the CESCR requires states to take steps towards the progressive realization of the right of all people to the enjoyment of the highest attainable standard of physical and mental health. While these rights are not immediately enforceable, insofar as they have been developed, they must be granted to everyone without any discrimination of any kind, including on the basis of sex.

[47] Article 24.

[48] Article 5 of CERD.

[49] CESCR, *General Comment No. 14 Regarding the Right to the Highest Attainable Standard of Health*, (E/C.12/2000/4), 2000.

[50] *Ibid*.

[51] In 2004, 96.5% of all males, and 88% of all females in the OPT were literate. See PCBS, "Literacy Rate of Palestinian Population (15 Years and Over) by Age Group."

[52] ICRC, Addressing the Needs of Women Affected by Armed Conflict, *supra* note 15.

[53] From the beginning of the *intifada* through 15 July 2004, Israeli forces closed 1,289 schools; destroyed through shelling 282 schools; and disrupted the educational process in 489 schools through curfews,53 siege, and closures. See PCBS, *supra* note 40.

[54] UNIFEM, *supra* note 33.

According to the provisions of international humanitarian law, an Occupying Power must ensure the functioning of national and local institutions devoted to the care and education of children.[55] In addition, the right to education is recognised in numerous human rights instruments, including the ICESCR, the CRC and CEDAW.[56] As reiterated by the CESCR , "education has a vital role in empowering women," and must [therefore] be accessible to all … without discrimination on any of the prohibited grounds.[57] In this regard, it also stresses that accessibility requires that "education has to be within safe physical reach," [58] a factor severely curtailed by Israeli policies indicated above.

F. FAMILY UNIFICATION

As has been illustrated in the chapter on family unification in this report, Palestinian women have also been suffering because of Israeli policy aimed at stopping family unification procedures where one spouse is a resident of the OPT. This has particularly affected Palestinian families, where one spouse is resident of Jerusalem while the other one is a resident of other areas within the OPT. Israeli policies have also affected families, where one spouse is an Israeli or Arab citizen, while the other is a resident of the OPT. [59]

> I live in the refugee camp of Jenin, nearby the city of Jenin, where I grew up and studied. Later on, I started working in the Municipal Services of Jenin. When I saved enough money, I decided to get married. At the beginning of 2004, I left for Jordan, where I was introduced to my cousin Ikram Ibrahim Hussein Abu Sereiyeh, who resides in a village close to al-Rusayfa in Jordan. After we got married, I returned to the West Bank and applied for a visitor's permit for my wife as she does not carry a Palestinian ID. Since there was peace between the PLO and Israel, the situation was somewhat stable, and it was easy to get a visitor's permit issued. A few months after my wife entered the West Bank and moved in with me in Jenin, I applied for family unification. As far as I remember, the number of the application is 12974. And when the visiting period ended, she remained illegally. We lived on the hope that our family unification request would be granted. With the beginning of [Al Aqsa] *intifada* things turned upside down, which magnified the dangers of my wife not possessing an ID. The danger increased with the frequent incursions by the Israeli army into Palestinian towns and villages. Their raids into homes made us fear that she may get arrested and then deported. This fear dominated our lives and affected our children. Now my wife is unable to leave the refugee camp of Jenin, which means she

[55] Article 50 of the Fourth Geneva Convention

[56] Article 10 of CEDAW requires State Parties to guarantee women rights to that of men in the field of education and access to information

[57] CESCR, *General Comment 13 Regarding the Right to Education*, (E/C.12/1999/10), 1999.

[58] *Ibid*.

[59] In this regard, the recently promulgated Nationality and Entry into Israel Law has had severe repercussions on families where one spouse is a resident of the OPT. For more information regarding the law and its repercussions, see the Chapter on "Family Unification" in this report.

lives in isolation as if in a big prison. In addition, she has not been able to see her family for approximately 10 years, and has been in a bad state of mind since then.

Extracts from Al-Haq Affidavit No. 2036/2004
Given by: Yaser Mustafa Husein Abu-Siriyya, (Resident of Jenin Refugee Camp, nearby Jenin, West Bank).

Since May 2002, Israel has frozen hundreds of family unification applications, thereby affecting the lives of many Palestinian men, women and children who have been in the process of obtaining family unification for years. With no legal means available to unify the family, this is either forcing them to live separated from each other, or to have one of the spouses overstay their visiting permits.

Often the only way to maintain the unity of the family, beyond being forced to leave Israel and the OPT, is to reside "illegally" in either area in permanent fear of being investigated and expelled. This places immense burdens on the psychological state of Palestinian women, and undermines their freedom of movement, their right to work and care for their family, and other related rights.

In the case of Palestinian women who are permanent residents of East Jerusalem, many have ended up living outside East Jerusalem in other areas of the OPT in order to maintain the unity of the family, while renting a home in Jerusalem and paying municipal taxes and utility bills there, to demonstrate that the city is their "centre of life," thereby retaining their Jerusalem IDs. In many cases, the need to maintain two homes, one in Jerusalem and one in the rest of the West Bank, has more than doubled the economic burden on many women as household caretakers since the beginning of the intifada in 2000. Furthermore, women who lose their Jerusalem IDs lose access to health and other social services and do not thereby acquire a West Bank ID. They risk being left without any Jerusalem residency rights at all.

Moreover, Palestinian women residents in East Jerusalem wishing to register their children must go through tedious bureaucratic process of registering the child and to proving that Jerusalem has been the centre of their lives, or risk the revocation of their IDs. If the child is born outside of Jerusalem, in other parts of the West Bank, it is very difficult for the woman to register him/her, even if she has a Jerusalem ID and resides in the city.

Additionally, this policy is in breach of Israel's fundamental international legal obligations under international human rights and humanitarian law.[60] Israel's policy regarding family unification directly and indirectly violate a number of provisions of the CEDAW, such as their equal rights with men to "acquire, change or retain their nationality " and enjoy equal rights with men with respect to the nationality of their children.[61] Amongst others, it violates Article 16 related to the

[60] For more information regarding the law and its repercussions, see the Chapter on "Family Unification" in this report.
[61] Article 9 of CEDAW.

prohibition of discrimination against women in all matters relating to marriage and family relations.

G. PROPERTY DESTRUCTION, INCLUDING HOUSE DEMOLITION

As highlighted in the Chapter on "Property Destruction" in this report, since 1967, Israeli occupying forces have continued to resort to house demolitions in the OPT, a policy that has increased both in frequency and intensity since the beginning of the current *intifada*. Most notorious is the common and recurring practice in the OPT that the Israeli occupying forces demolish (in total or in part), or seal the houses of persons who have committed offences, or who are suspected of having committed such offences.[62]

Targeting not only persons suspected to have committed offences against Israelis, but also their families, this punitive and widespread practice has adversely affected thousands of Palestinians, particularly women and children. Palestinian women, whose lives typically revolve around the domestic sphere, have been very hard hit by Israel's policy of mass home demolition, property destruction, and land confiscation.

The impact of all these measures on women has been acute, and has added disproportionate economic, social and psychological burdens to their already difficult lives as a result of the political situation. Due to the traditional divisions of labour within society based on sex, Palestinian women shoulder the larger share of household responsibilities and are the main caretakers of their families. Notwithstanding the heavy material loss due to the destruction of property, families usually find themselves without basic necessities such as clothes, food and furniture, which increases the burden and responsibilities within the domestic sphere for Palestinian women to provide basic needs and alternative housing.

Due to the traditional division of labour amongst Palestinian men and women, Palestinian women often find themselves responsible for the basic household needs of the family. This has created an enormous source of stress for women whose houses have been destroyed by the Israeli occupying forces. A report on the social and psychological impact of the escalation of Israeli violence on Palestinian women found that Palestinian women are the most adversely affected victims of the shelling of homes,

> They have been forced to leave the house at night to take shelter with relatives, only to return by day to assess the damage, clean up, cook for the day, and wash clothes. Sometimes, returning in the morning is to discover the house blown up or bulldozed, with all the entire family's possessions destroyed. Family photos, schoolbooks, toys, plants, gifts — all of these sustain our memories and identity, connecting us to the past, giving us confidence and faith in ourselves. In a single night and by the push of a button, a Palestinian family can see it all go up in smoke.[63]

[62] For more information see Chapter on "Property Destruction" in this report.

[63] Shammas, Maha Abu-Dayyeh, *supra* note 19.

A home is not merely a building that provides shelter, but has great personal value, particularly to women and children who spend more of their daily time within the household than men. As a result, they have been the most adversely affected victims of house demolitions and shelling. Since social expectations of women and mothers place with them the responsibility for taking care of their children's wellbeing and re-establishing a sense of protection, safety, and comfort, there is no doubt that this has exacerbated the burden of Palestinian women.

In addition to violating Article 2 of CEDAW, which requires any State Party to the Convention to eliminate "all discrimination against women," the house demolition policy as practiced by Israeli authorities, violates several other fundamental provisions of international human rights law, and constitutes a war crime under international humanitarian law.[64]

H. VIOLENCE, HARASSMENT AND INTIMIDATION

Palestinian women are routinely harassed, intimidated, and abused (sometimes sexually) by Israeli soldiers and Border Police whom women encounter at checkpoints and during the occupation of their homes, and are subjected to threats of sexual violence and humiliation in public spaces and in front of their families.

> I currently live in the city of Hebron, in an area known as Ras Khila. In front of my home, almost 10 metres away, there is an Israeli military outpost, and the houses of Israeli settlers. On 8 May 2004, I noticed an Israeli soldier standing at the checkpoint with a knife in his hand. That day my 10-year-old daughter Maram Sa'di Jaber came back home frightened, and told me that at 10:30 am, he had grabbed her and threatened to hurt her with the knife
>
> **Extracts from Al-Haq Affidavit No. 1800/2004**
> Given by: Sabriyya 'Abd-al-Muhsen Muhammad Iskafi, (Resident of the city of Hebron, West Bank).

Moreover, Israeli settlers in the OPT routinely threaten the safety and security of Palestinian women and their children. According to a 2004 survey, 7.1% of households in the OPT were exposed to harassment or assault by Israeli soldiers and settlers, compared to 1.3% in 1999.[65] Particularly in Hebron, the only city in the OPT besides East Jerusalem where settlers live amongst the Palestinian population, Al-Haq has documented numerous cases of settler violence against the Palestinian civilian population, such as the assault and shooting of women and children. Rather than protecting them, Israeli soldiers often have taken part in the harassment and assaults. In one case of intimidation, Israeli soldiers had sexual intercourse in a women's garden, under a window of the children's room. One woman in her seventh month of pregnancy was pushed over by a soldier in front of ten settler women who watched and laughed. Complaints made to

[64] Article 50 of the Hague Regulations and Articles 53 and 33 of the Fourth Geneva Convention.
[65] PCBS, "Main Findings of the Victimization Survey," *Press Release*, February 2005.

Israeli soldiers and police are either ignored or the complainants are subjected to revenge by soldiers and settlers. As a result, most Palestinian women who are subjected to acts of harassment and violence do not report such incidents. In East Jerusalem, Israeli settlers have used tear gas against Palestinian women and their children, as well as psychological violence and pressure through shouting profanities and breaking objects.[66]

> On 20 November 2003, I left Martyr Sa'id al-'As Basic School for Boys in al-Khader in the Old City where I teach. I was with three other teachers when about 30 metres from the school gate we suddenly encountered about ten armed Israeli soldiers. … At a distance of ten metres away, I saw the soldiers aiming their weapons at us. We approached one of the soldiers who yelled at us to "come" in Hebrew and he asked us in Hebrew for our identity cards. The other teachers gave him their identity cards, and I realised that I did not have my identity card. … He demanded that my colleagues remain while I returned home to get my card. However, upon coming back, I was met by a different soldier who ordered me in Arabic to empty my bag and to lift up my robe while pointing his gun at me. I was wearing pants and a blouse, and he ordered me to lift my blouse, and so I did. Meanwhile, a teacher from a secondary school for girls passed by, and he also ordered her to do the same, which she did. … While the soldier was searching my clothes, one of my colleagues, Sawsan Masa'id, smiled. The soldier saw her smiling, so he gave me and my colleagues our identity cards but withheld Sawsan's identity card. He then ordered us to leave, and we left at 12:15 p.m., while Sawsan was held until 1:30 p.m. as punishment because she smiled.
>
> **Extracts from Al-Haq Affidavit No. 1743/2004**
> Given by: Samah Mustafa Muhammad al-Hroub, (Resident of Beit Jala, nearby Bethlehem, West Bank).

Although Article 2(e) of CEDAW stipulates that state parties are obliged to take "all appropriate measures to eliminate discrimination against women by any person, organization or enterprise," even when complaints are made, police responses to such acts of violence are less than adequate.

IV. INDIRECT VIOLATIONS OF WOMEN'S HUMAN RIGHTS

A. ADDITIONAL TASKS AND RESPONSIBILITIES

In addition to being subjected to direct violations of their rights, Palestinian women experience a range of difficulties and problems as a result of Israel's violations of international law in the OPT. For example, when women experience the unexpected death of family members, especially those who were the main breadwinners for the household, they are profoundly affected, both psychologically and financially. The number of female-headed households increased from 8%

[66] See "NGO Alternative Pre-Sessional Report," *supra* note 34.

in 1998.to 9.8% in 2003.[67] Moreover, approximately 30% of all households headed by females lived in poverty, indicating a feminisation of poverty in the OPT.[68]

The disproportionate number of poor households headed by women can be attributed to how women have traditionally depended on men for the family income, and do not necessarily possess the education or vocational skills to eke out a livelihood, or earn an adequate living in the wage labour market. Israel's aforementioned movement restrictions have also hindered women from successfully seeking employment. Another effect of these factors is that more women are moving in with their kin or detained husbands' families, causing them to lose their autonomy and suffer psychological hardships.

While women do not constitute the majority of Palestinians directly affected by Israeli violence, they are burdened with additional responsibilities because of it. In households in which a person is injured, the main caregiver is the wife or the mother of the injured. As one survey noted,

> That most of the burden of care [for the injured] was endured by women, in addition to the housework which added more psychological and physical pressure in her general health."[69]

Between 29 September 2000 and 8 February 2005, approximately 28,457 Palestinians were injured.[70] As a result, many women are taking on the additional responsibility of caring for the injured. Tasked with finding the means to cope both financially and caring for injured and disabled family members, women are putting the needs of their family members before their own, assuming an attitude of self-sacrifice in order to attend to their household. One additional source of significant strain amongst Palestinian women is the large number of male relatives being held in Israeli prisons. Since the beginning of the *intifada*, it is estimated that approximately 40,000 Palestinians have been imprisoned,[71] the majority being men of working age. A 2002 study based on fieldwork found that 12% of the households surveyed had a member being held in prison, and,

> [In] 51% of the cases, the prisoner was between the age of 21-29 years old, and in 31% of the cases the prisoner was married, while in 28% he was the oldest son. Thus, these families were left with no main provider, which put more pressure on women to find an alternative option for the loss of main income.[72]

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[67] *The Reply of Palestine to the Beijing +10 Questionnaire*, 2004.

[68] In 2004, 36.7% and 24.6% of households surveyed, reported the need for food and financial assistance as a first priority respectively. See PCBS, "Main Indicators in Gender Statistics," Statistics for 2003/2004, www.pcbs.org/gender/indicator_04.aspx.

[69] Kuttab, Eileen, and Barghouti, Riham. "The Impact of Armed Conflict on Palestinian Women," an Executive Summary of an April 2002 Report of the Institute of Women's Studies, for a project initiated by UNIFEM and United Nations Development and Population Program, page 6, available at http://www.womenwarpeace.org/opt/docs/UNIFEMSTUDYFINALApril2002.pdf.

[70] PRCS statistics.

[71] Statistic from Addameer.

[72] Kuttab and Barghouti, *supra* note 69, page 6.

Furthermore, women have to deal with their children, who are suffering from sharply increased levels of psychological and behavioural disorders, caused by the loss of friends, family members, classmates and neighbours, and the detention of family members, among other traumas relating to Israeli violations in the OPT. Post Traumatic Stress Disorder (PTSD) is also very prevalent among Palestinian children who have been traumatised by the shelling of their homes, witnessed the killing or injury of a loved one, or other violence committed by the Israeli occupying forces. The Gaza Center for Mental Health has found that around 55% of Palestinian children living in areas that the Israelis bombed or shelled suffer acute symptoms of PTSD, while 35% suffer from moderate levels, and another 9% experience low levels of PTSD. Amongst Palestinian school-age children in general, 34.% have developed PTSD symptoms.[73]

B. THE PSYCHOLOGICAL IMPACT OF THE CURRENT *INTIFADA* ON WOMEN AND THEIR FAMILIES

Numerous studies have highlighted the grave consequences of gender-based repression in the social sphere on the psychological wellbeing of women.[74] As one psychologist noted, the psychology and mental health of the individual, including women, must be understood in light of the relationship between occupiers and occupied.[75] In other words, Palestinian women in particular are suffering psychological problems as a result of the added pressures they are burdened with as an indirect result of Israeli practices in the OPT.

Even where women have not yet been directly affected by the loss, injury, or detention of a loved one, they are affected by "a key psychological fact" that at any time they can experience such harm, and the arbitrariness of Israel's violence and actions in the OPT, which "leaves the subjugated population confused, not knowing what to expect from their oppressors, and in turn, fearing for the worst all the time."[76] In a survey of women in Jenin, Nablus, and Bethlehem, "they all mentioned the loss of lives, loss of beloved ones, loss of homes, destruction of homes, economic hardships, inability of children to reach school, fear from sending them to school and many other subjects as major factors affecting their personal, familial and social modes of coping with political violence."[77]

> On 13 April 2002, the Israeli army arrested my son Shadi at a military checkpoint in Beit Fajjar. On 2 July 2003, Shadi was tried in an Israeli court and was sentenced to six actual life sentences and 20 years' imprisonment, charged with being a member of al-Aqsa Martyrs Brigades and with planning military operations. On 22 October 2003, the Israeli army

[73] Quota, S. and Odah, J., "The impact of conflict on children: The Palestinian experience," *Journal of Ambulatory Care Management*, January-March. 2005.
[74] *Women, Peace and Security, supra* note 9.
[75] Sabbagh, Suha, "Interview with Dr. Eyad el-Sarraj: Gender Relations During the Three Psycho-development Phases under Occupation in *Palestinian Women of Gaza and the West Bank*, Suha Sabbagh (ed.); Indiana University Press, 1998.
[76] *Ibid*.
[77] *Ibid*.

demolished our home located in al-Hawouz area in Hebron City, destroying all our furniture and belongings. … Shadi was the only source of income for the family before his arrest. … The expenditures of the family increase every day, and particularly my husband's medical care, and I myself had a heart attack on 15 April 2002 when I heard about the arrest of my son. … Moreover, I cannot work for reasons related to my health, and I do not have the time, as I am responsible for all the household chores and management. We live in a state of austerity and sometimes we do not find anything to eat. … These recent changes have considerably affected the life of my children, husband, and I. Before, we had a fixed salary, our situation was stable, and I was the housewife. But our life has now become very bad and we do not have any income except the assistance I get from donors and the Zakat money.

Extracts from Al-Haq Affidavit No. 1801/2004
Given by: Rima Hijazi Yasin Abu-Shakhdam, (Resident of Hebron, West Bank).

Additionally, past studies have shown that in periods of conflict, women generally are more prone than other sectors of society to depression and PTSD. Research conducted in the OPT has revealed the extreme psychological repercussions that the loss of a child has on mothers. In this regard, symptoms of depression, anxiety "are not only found to be common amongst Palestinian women, but are also more intense than those experienced by their male counterparts."[78]

Of 401 Palestinian households surveyed in 2001 in the OPT, 50% reported mental or physical illness as a result of the conflict, and those most suffering from mental illness were women.[79] In December 2003 the UN SG stressed, "the incidence of psychological trauma continued to climb, and that 43% of Palestinian women had requested psychological support."[80] Furthermore, as noted in a report by the Economic and Social Commission for Western Asia in 2002, the death of male heads of households, destruction of homes, and men's frustration as a result of unemployment and immobility have all resulted in an increase in incidences of gender-based violence within families, such as incest and domestic violence.

Israeli policies have also impacted the family structure and gender roles in the OPT, causing another source of stress within the household. While the domestic domain was previously the private one of the woman, increasing unemployment rates amongst the family's male members has confined many of them to the household. This has further limited women's power and decision-making capacity in the household. Coupled with the frustrations of the immobile men, it has magnified tensions within marriages, increasing rates of domestic violence. In 2002, a poll conducted by the Palestinian Center for Public Opinion, commissioned by a Palestinian women's organisation, showed that Palestinian women have been exposed to increased domestic violence since the beginning of the *intifada* two years previously. 86% of respondents said violence

[78] *Ibid*.
[79] UNIFEM, *supra* note 33.
[80] *Ibid*.

against women had "significantly or somewhat increased as a result of changing political, economic and social conditions in the OPT."[81]

Moreover, women, including female university students, have become separated from their extended families by the construction of the Annexation Wall and its associated regime, which has increased movement restrictions imposed on the Palestinian civilian population, thereby accentuating their loss of valuable means of psychological support.

In many cultures, community ties and responsibilities provide a strong support network that is intricately woven into the fabric of society. Their absence results in overwhelming feelings of loneliness, loss, isolation, helplessness, and loss of control over one's life:[82]

> The physical separation between family members negatively affected family members' sense of security, avoidance of open communication in an attempt to be over protective, disruption of communication because of fear, in addition to other related feelings, such as trans-generational traumitization, parentification of the children, and abrupt role changes in the family hierarchy.[83]

C. THE DOUBLE VICTIMISATION OF WOMEN DURING THE *INTIFADA*

While all Palestinians have had their rights violated by the Israeli occupation of the Palestinian territories, Palestinian women have been doubly victimised because of the increased social pressures and violence directed against them.

As a result of the movement restrictions and Israeli military presence in the OPT that make it hazardous for Palestinian women to travel, women are more than ever confined to the home. Communities are fractured, families are separated, and support networks are eroded by Israel's harsh movement restrictions, thereby contributing to "the systematic breakdown of social interaction, leaving a void in which instability, uncertainty and vulnerability to abuse and suffering appear to be all that remain."[84]

Historically, throughout the world, there has been a strong correlation between political strife and the violation of women's rights. The Israeli occupation has significantly hindered Palestinian women's social and political development. While Palestinian women made great gains in social and political rights, especially compared to their peers in neighbouring Arab countries, their position in society has regressed considerably as a result of political volatility in Palestinian society since the beginning of the current *intifada*.

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[81] Women's Asylum News, Refugee, Women's Resource Project, Asylum Aid, Issue 26, October 2002. http://www.asylumaid.org.uk/New%20RWRP/WAN/Oct02%20email.doc.

[82] *Ibid*.

[83] Abu-Baker, Khawla, (ed.) *Women, Armed Conflict and Loss: The Mental Health of Palestinian Women in the Occupied Palestinian Territories*, Women's Studies Centre, November 2004, page 11.

[84] Shammas, Maha Abu-Dayyeh, *supra* note 19.

The underdevelopment of viable law enforcement capacities and legal frameworks and institutions, largely the bi-product of Israel's repressive measures during the current *intifada*, traditional structures of authority, such as the tribal system, have been revived. Reinforcing patriarchal values and norms, it has only disempowered Palestinian women even further.[85]

D. WOMEN VICTIMS OF SOCIAL VIOLENCE AND PRESSURE

1. DOMESTIC VIOLENCE

Since the beginning of the current intifada, existing statistics suggest an alarming trend of increased domestic violence within Palestinian society. The widespread death, imprisonment or unemployment of many Palestinian men has "increased poverty and social tensions that contribute to increased domestic violence."[86] This reality situation has forced an increasing number of women to seek paid employment outside the home. This in turn has created a sudden reversal of gender roles in Palestinian society, creating instability within the family, and causing many men to resort to violent means to assert their power over the family. A survey by the one women's centre found that,

> Fathers, brothers and husbands became more aggressive and more stressed while living under continuous apprehension. Men were not used to staying at home for such a long period of time. They were not used to dealing with the children's needs, crying, screaming, etc. Additionally, the lack of income and unemployment affected men's status at home and in society. All these factors increased men's frustrations and, as confirmed by the service providers, women became the punching bag for men's frustrations. External political violence exerted by the political enemy, and the internal violence enforced by the patriarchal system and its values, situated women in a very delicate and vulnerable position.[87]

It comes as no surprise that the prevailing insecurity has resulted in increased rates of domestic violence, and sexual abuse, including incest and rape. However, due to the prevalence of the culture of privacy and shame in Palestinian society, which dictates that these issues are kept within the domestic domain, access to adequate statistics is lacking, thereby making any efforts to establish the incidence and extent of such abuse difficult.[88]

In the past, the PNA has paid little attention to women's issues, or to strengthening their rights or confronting gender discrimination, most notably in the domestic sphere. Existing laws do not

[85] *Ibid*.

[86] Report of the UN Special Rapporteur on Violence Against Women, *supra* note 1, paragraph 48.

[87] Abu-Baker, Khawla, (ed.) *Women, Armed Conflict and Loss: The Mental Health of Palestinian Women in the Occupied Palestinian Territories, supra* note 83.

[88] According to the Palestinian Working Women's Society sexual abuse within the family accounts for 75% of all sexual assault cases in Palestinian society.

offer sufficient protection to women who are victims of violence. The Personal Status laws that regulate women's rights within the family are not unified, and contain discriminatory provisions.[89]

2. CRIMES OF HONOUR

Violence in the name of culture, tradition, and religion is a massive obstruction to women's rights, and has been used by to argue against the full recognition of women's rights, and to maintain customs and traditions that are harmful to them. One gross violation of the rights of Palestinian women being committed with alarmingly greater frequency in the OPT are "crimes of honour." [90]

The concept of "honour crimes," is a term that focuses on the perceived chastity and sexual virtue of women, and has been used to refer to "acts of violence, usually murder, committed by male family members against female family members who are perceived to have brought dishonor upon the family,"[91] by allegedly transgressing socially imposed values and norms governing her behavior. However in the case of the OPT, information indicates that there have been cases where women have been killed "to cover up shameful crimes committed by male members of the family," including rape or sexual assault.[92]

However, like other forms of abuse of women, it remains largely undocumented, and the full scope of its presence in the OPT is not readily known. One of the reasons behind the sparse statistics on femicide in Palestinian society is the inaction by PNA law enforcement officials regarding cases of violence against women. Although this failure can be attributed in large part to Israel's actions in the OPT, which have undermined the ability of security forces and institutions to function efficiently, reports by local and international human rights organisations have all indicated that in many instances, PNA law enforcement officials have been unwilling to enforce existing laws, even in the cases where they could have acted.[93] Even in the most serious of cases, including those committed by family members, prosecutions are rare, and women victims are encouraged to seek a solution within the confines of the family or immediate community, thereby keeping many of them at risk.[94]

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[89] In the case of Muslim women in the West Bank and Gaza Strip, they are subject to Jordanian and Egyptian law respectively. In the case of Christian Palestinian women, laws are established by their respective churches to govern each denomination. See Report of the Special Rapporteur on Violence against Women, *supra* note 1.

[90] Between 2000-2004, there were 21 cases in the Gaza Strip alone. See WCLAC, "Palestinian Women's Health During the Second *Intifada*: Some Facts and Figures," April 2005.

[91] Human Rights Watch, "Item 12 - Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women and 'Honor Crimes,' Oral Intervention at the 57th Session of the UN Commission on Human Rights, 6 April 2001, available at http://hrw.org/english/docs/2001/04/06/global268.htm.

[92] Report of the UN Special Rapporteur on Violence against Women, *supra* note 1, paragraph 57.

[93] Amnesty International, "Israel and the Occupied Territories, Conflict, Occupation and Patriarchy: Women Carry the Burden," (AI Index: MDE 15/016/2005), 31 March 2005.

[94] *Ibid*.

The Jordanian Penal Code No. 16 of 1960 does little to protect women from such crime. For example, Article 340 of the code includes a mitigating circumstances clause, whereby the perpetrator of an honor crime may be immune from punishment "if it is shown that the victim committed an adulterous act."[95] Furthermore Article 286 of this Code stipulates that "actions regarding incest shall be pursued only upon the complaint of a male relative or an in-law, up to a fourth-degree kinship," thereby making it difficult for the victim or a female relative to complain.[96]

Unfortunately for women receiving threats of killing in the name of honour, to date there are no safe houses for them to seek out shelter. Furthermore, there is little procedure in place for those women who seek the help of law enforcement personnel, who have to use their best judgment and creativity to help the women under threat. There is no standardised procedure in dealing with these cases. And tragically, women who do seek help are often released back to those whom are threatening them.

In international human rights law, honour crimes violate numerous fundamental rights of women, including the right to life; freedom from torture and cruel, inhuman, or degrading treatment; and the right to equal protection from the law.[97] Thus the UN Commission on Human Rights has called on states to ensure that they "investigate promptly and thoroughly all killings committed in the name of passion or in the name of honour … and to ensure that such killings … are neither condoned nor sanctioned by government officials or personnel."[98] As Article 5 of CEDAW that States Parties must take all appropriate measures to,

> Modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices, including femicide, which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

[95] Article 340 of the Jordanian Penal Code states that "he who discovers his wife or one of his female relatives committing adultery with another, and he kills, wounds or injures one or both of them, is exempt from any penalty." It adds that "he who discovers his wife, or one of his female ascendants or descendants or sisters with another in an unlawful bed and he kills, wounds or injures one or both of them, benefits from a reduction of penalty". In September 2003, parliament went into session with the amended Article 340 on its agenda for ratification. Although the upper house in Jordan twice approved the proposals to amend this article, they were again rejected by the lower house. To date, amendments to Articles 340 and 98 remain pending. Cited in "Jordan: Special Report on Honour Killings," 18 April 2005, available at http://www.irinnews.org/print.asp?ReportID=46677.

[96] Report of the UN Special Rapporteur on Violence against Women, *supra* note 1, paragraph 60(b).

[97] Becker, Julia, "Crimes of Honor: Women's Rights and International Human Rights Law," School of International Training, International Studies, Organizations and Social Justice, Geneva, Spring 2004, http://www.sit-edu-geneva.ch/crimes_of_honor.htm. For more information, see The "Honour Crimes" Project jointly co-ordinated by the Centre of Islamic and Middle Eastern Laws (CIMEL) at the School of Oriental and African Studies, London University and the International Centre for the Legal Protection of Human Rights (Interights) available http://www.soas.ac.uk/honourcrimes/.

[98] UN Human Rights Commission, Resolution 2004/37 Extra-Judicial, Summary or Arbitrary Execution", 20 April 2004, cited in the Commission's Report to the Social and Economic Council, (E/CN.4/2004/L.11/Add.4.).

3. PROBLEMS OF INCREASED SOCIAL PRESSURE

There are other troubling indicators regarding the status of Palestinian women that stem from the increase of social pressures they have to endure within an already patriarchal society. Because their parents fear that they cannot financially support them and that the sharpened increase of gender-related violence might tarnish their daughters' perceived "honour," an increasing number of young women are withdrawn from public interaction or are marrying at an earlier stage.[99]

Press reports on women who have carried out attacks against civilian targets inside Israel show they have in common experience in losing one or more family members, friends, and neighbours to Israeli violence. Others have experienced social marginalisation or pressure.[100]

One of the most socially destructive Israeli practices has been the recruitment of collaborators and informants.[101] In this regard Israeli agents have exploited the ideals of women's "honour" and virginity, in an attempt to blackmail Palestinian women into collaborating with them, either by threatening to expose, both real or alleged, pre-martial or extra-martial relationships to obtain the necessary information.

As a result, these women face near certain death, either being discovered as a collaborator (considered the worst type of crime in Palestinian society) or for the exposed "honour crimes," which warrant killing by one's own kin. This has contributed to the withdrawal of an increasing number of females from public interaction, leading to earlier marriages and increased conservatism.[102]

4. POLITICAL RIGHTS

Following the signing of the Oslo Accords, women activists began to create a new agenda that is focused on women's rights and women's empowerment, and to devise strategies for the political arena emerging under the PNA. Shortly afterwards, women's groups presented to the PNA a women's bill of rights, with the anticipation that it would become part of the Constitution of a future Palestinian state. Named the Declaration of Principles on Palestinian Women's Rights, it calls on the Palestinian leadership to ratify all international conventions concerning the individual

[99] Studies by the World Health Organization have highlighted the risks arising from that traditional practice of early marriage, including its direct impact on maternal and infant mortality rates and early pregnancy, and have alluded to the fact that they amount not just to a violation of the child's health, but also dignity. See UN Committee on the Rights of the Child, *Summary Record of 486th session: Bolivia*, CRC/C/SR.486, 19 April 1999. Similarly, in its Concluding Observations on state parties' reports, the UN Committee on the Rights of the Child has repeatedly warned against the harmful repercussions of early marriages on young girls, and called upon states to fulfill their legal responsibilities of eradicating this phenomenon. For example, see *Concluding Observations of the Committee on the Rights of the Child on Yemen*, (CRC/C/15/Add.102), 10 May 1999.

[100] By November 2004, eight Palestinian women have committed bombings of civilian targets inside Israel.

[101] Shammas, Maha Abu-Dayyeh, *supra* note 19.

[102] *Ibid*.

rights of women, including CEDAW, to guarantee equal rights to them, and enable them to participate in all levels of decision-making.[103]

Since the establishment of the PNA, human rights and women's organisations and activists have become increasingly active on promoting the issues of concern to them. Equally as important, they have lobbied jointly to introduce new laws or amend existing ones affecting their health, social welfare, employment, or personal status laws, to ensure that they better protect women's rights.[104]

The fact that Palestinian women are playing an increasingly important role in society was reflected during the Palestinian local elections. During the registration period for the Palestinian elections in 2004, approximately 46% of the estimated number of eligible voters during these elections were women.[105] It is also worth noting that during the first phase of the Palestinian local elections which took place in 26 districts of the West Bank in December 2004, 16% of candidates were women, and 53 women won seats.[106] However, much still needs to be done by the PNA to ensure that gender equality and respect for women's rights are integrated into policymaking, and in constitutional, electoral, and judicial reform, and that there is more effective participation of Palestinian women in political life.

In 2004, women's organisations and human rights activists lobbied for a 20% quota for women in the Local Council Elections, and for amending the Palestinian Election Law in order to establish the quota by law,[107] a move that enjoyed substantial support at the time.[108] While these amendments were passed in the first reading of the PLC at the end of 2004,[109] the majority of women candidates who secured seats did so without use of the quota at all.[110]

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[103] Sabbagh, Suha, *supra* note 75.

[104] Al-Haq continues to take the lead in drafting suggested amendments and feedback arising from the discussions amongst members of the lobbying groups on women's issues, and of forwarding them to the concerned specialised committee working on the law in the PLC. For more information on the status of the amendments to these laws, see (WCLAC), *Annual Report 2004.*

[105] Palestinian Central Elections Commission (CEC), "46% of Registered Voters are Youths, 46% are Women," 23 November 2004.

[106] Similarly, in the second round that took place in 10 districts in the Gaza Strip on 27 January 2005, 16 % of all candidates were women candidates, 20 of whom won seats on local councils. See National Democratic Institute (NDI) for International Affairs Report on Palestinian Elections for Local Councils: Round One, 15 March 2005, http://www.accessdemocracy.org/library/1816_palestinianelectionreportrd1_033105.pdf.

[107] This effectively provided for two reserve seats for women on each council. In case where women candidates failed to win at least these two seats, the two women with the largest number of votes amongst all the female candidates become automatically entitled to take these 2 seats. See NDI, I*bid.*

[108] In an opinion poll conducted by the Opinion Polls and Survey Studies Center at An-Najah National University in July 2004, 64.2% agreed that the elections law should include an article that ensures a particular proportion of seats for women (Women's Quota). See CEC, "64.2% Agree to Accredit Women Quota in Electoral Law," 27 July 2004.

[109] However, they failed to get majority voting during the second reading at the beginning of 2005. See WCLAC, *supra* note 104.

[110] 34 and 15 of the total number of women who secured seats in the West Bank and Gaza Strip respectively were elected outright. See NDI, *supra* note 106.

Article 7 of CEDAW states that all appropriate measures must be taken "to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men." [111] In addition, States Parties have an obligation "to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens."[112]

Other human rights standards such as the Beijing Declaration and Platform for Action reiterate that the full participation of women in all spheres of society on the basis of equality "including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace." [113]

Moreover, there is a need for the PNA to strengthen the involvement of Palestinian women in political negotiations process with Israel, to ensure that their needs and interests filter into the provisions of any future peace settlement. To date, Palestinian women have had few opportunities for representation or inclusion in the on-going peace process, which the UN SG states, "has detrimental effects on the long term sustainability of a settlement because all voices and interests are not heard." [114]

V. CONCLUSION

Though Palestinian women, whose voices are respected on all levels of Palestinian society, are all more than mere victims, their well-being and flourishing are severely undercut firstly by the Israeli occupation and then secondly by social practices within Palestinian society that are exacerbated by Israeli policy.

As this chapter serves to highlight, the reason why Palestinian women's lives are not adequately protected is not due to the absence of an international legal basis, but because it is impossible to promote and protect their basic rights without also safeguarding the basic rights of their sons, brothers, fathers and husbands. While all Palestinians lack the ability to exercise their political rights, Palestinian women in particular have found themselves in a dilemma in which they are seeking equal social rights within a nation that itself is not yet free. As noted by the UN Special Rapportuer on Violence Against Women,

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[111] According to General Recommendations of the CEDAW Committee, "the obligation specified in article 7 extends to *all areas* [emphasis added] of public and political life." See *General Recommendation 23 Regarding Women in Political and Public Life*, 13 January 1997.

[112] *Ibid*.

[113] Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), paragraph 13.

[114] *Women, Peace and Security, supra* note 9. In addition, in October 2000, UN Security Council Resolution 1325 called for an increased representation of women in mechanisms of conflict resolution by ensuring "increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict."

> There is a consensus among analysts that the deepening of the conflict in the OPT and the expansion of the tools of occupation has weakened the negotiation power of the Palestinian women to challenge the patriarchical gender contract, which has, in part, become a defence mechanism to keep the society intact.[115]

The international community will not succeed in remedying this situation merely by adopting new rules, but must first and foremost see that the rules already in force are respected. The responsibility to apply the provisions giving special protection to women, and for that matter all the rules of international humanitarian law, is a collective one. It rests first and foremost with the High Contracting Parties to the Fourth Geneva Convention, which have undertaken to respect and ensure respect for these rules.

To date, the alleviation of the suffering of women has not been a priority for the PNA, as is indicated not only by its lack of statistics and research on violence against women, but also the lack of programmes to eliminate it. The PNA must also actively develop legislation that recognises and protects women's rights and equality, and develop infrastructure that better serves women in need of protection, such as safe houses. Law enforcement officials must develop policy to protect them from social violence. If not, as one Palestinian women's rights activist noted,

> We run the risk that attitudes which are developed in response to the external political threat will be internalized and come to be embedded in local value systems and culture.[116]

But no matter how much development effort is made on the part of the PNA, Palestinian women will not truly be free so long as their rights are hostage to the decisions and policies of the Israeli occupation.

[115] Report of the Special Rapporteur on Violence against Women, *supra* note 1, paragraph 50.
[116] Shammas, Maha Abu-Dayyeh, *supra* note 19.

ISRAEL'S ADMINISTRATION OF JUSTICE

Israeli Soldiers arresting a Palestinian Youth in Ramallah
(Wafa 2003)

ISRAEL'S ADMINISTRATION OF JUSTICE

I. OVERVIEW

Since the beginning of Israel's occupation of the West Bank and Gaza Strip in 1967, more than half a million Palestinians have been detained by Israel.[1] According to the results of a survey conducted by the International Committee of the Red Cross (ICRC), by 1999, approximately 45% of Palestinian males under the age of 40 reported having been imprisoned.[2]

Palestinians in the Occupied Palestinian Territories (OPT) continue to be subject to the jurisdiction of the Israeli military court system. Shortly after 1967, the Israeli judicial system was re-organised in a manner that extended the powers given to the military governor to include penal and rights issues which are usually within the jurisdiction of the civil courts.[3] Palestinians are brought before Israeli military courts, which operate through a set of military orders that provide a legal framework for the prolonged occupation of the OPT.[4] Based on British Defence Regulations, these orders are promulgated by the Israeli military government.[5] They grant Israeli occupying forces wide arrest and detention powers, including a broadly defined notion of what constitutes "security offences."[6]

Since 1967, it has been common practice for Israeli occupying forces to make large- scale arrests following "incidents" involving attacks against Israeli targets. Arrests generally take place at the instructions of the General Security Service (GSS),[7] are made at any time of the day or night, and can occur anywhere: in homes, on university campuses, at checkpoints or when travelling to and from the OPT. In addition, military orders do not require Israeli authorities to inform a Palestinian at the time of arrest, of the reasons for their detention, [8] and detainees are usually not granted legal counsel until after the initial period of detention.

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[1] Palestinian Ministry of Prisoners and Ex-Detainees, as cited in "Palestine: Ministry of Prisoners' Affairs: 2004 Worst for Prisoners in 30 Years," 3 January 2005, available at http://www.noticias.info/Archivo/2005/200501/20050104/20050104_44004.shtm.

[2] Cited in ICRC, "Israel, Occupied Territories, and Autonomous Territories: Focus on Detention," *Newsletter*, 30 November 2004, available at http://www.icrc.org/web/eng/siteeng0.nsf/iwpList265/D9B35CA15162750DC1256F8200391BC9.

[3] "'Legal' Cover for Illegitimate Practices: Arbitrary Arrests and Prison Conditions of Palestinian Political Prisoners in Israeli Prisons and Detention Centers," Speech by Al-Haq's General Director Randa Siniora at the Zayed Center for Coordination and Follow Up, United Arab Emirates, 28 April 2003.

[4] Since 1967, the Israeli military has issued over 2,500 military orders, which control and regulate the daily lives of Palestinians in the OPT. For more information see Chapter on "The Legal Framework Governing the Occupied Palestinian Territories" in this report.

[5] *Ibid.*

[6] Prior to the Oslo Accords, these offences could range from reading banned books to threatening the physical integrity of Israeli military and civilian personnel. See Phillips, Melissa, T*orture for Security: The Systematic Torture and Ill-Treatment of Palestinians by Israel*, Al-Haq, 1995.

[7] Otherwise known as the *Shin Bet* or the Shabak. The head of the GSS answers to the Prime Minister.

[8] Hunt, Paul, *Justice? The Military Court System in the Israeli-Occupied Territories*, Al-Haq and Gaza Center for Rights and Law, February 1987.

Under Article 78 of Military Order No. 378 of 1970,

> Any soldier may, without a warrant, arrest any person contravening the provisions of this order or who, there is reason to suspect, has committed an offence in the West Bank under the terms of this order.

Although Israeli military authorities are required to issue an arrest warrant within 96 hours of an individual's arrest, during that period however, detainees may nevertheless be subjected to interrogations, and the evidence gathered is admissible as evidence in Israeli courts.[9] In addition, a military court is authorised to issue an arrest warrant for a period of up to six months, and may authorize the continued detention of the accused until the end of the case, in circumstances in which a charge has been brought before a military court.

During the current *intifada*, Israel's policy of detaining any Palestinian on "security" grounds continued unabated. According to one Palestinian human rights organisation concerned with detainees' rights from the beginning of this *intifada* in September 2000 until November 2004, more than 28,000 Palestinians had been arrested.[10]

In 2002, and to provide the legal pretext for detaining Palestinians following its heavy military incursions into the West Bank during that same year, Israel issued Military Order No.1500, which gave every Israeli soldier in that area not only the authority to arrest Palestinians without giving him/her a reason, but also without first receiving authorization for the arrest from a superior officer. Article 1 of this order defined a "detained person" as a person who is detained during the progress of military operations, and whose arrest was due to the threat he/she presented to the security of the area, army and the public. In addition, the order allowed for the detention of any Palestinians for a period of up to 18 days before a military judge reviews the detention order,[11] or he is allowed access to legal counsel.[12]

As a result, this enabled Israeli occupying forces to round up and arbitrarily detain thousands of Palestinians in the OPT, during the Israeli military offensives "Operation Defensive Shield" and "Operation Determined Path," taking place between February and June 2002, in what became known as one of largest mass arrest campaigns of Palestinians since 2000. In this regard, it is estimated that at least 7,000 Palestinians were detained during both offensives.[13]

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[9] "Israel's Noncompliance with the International Covenant on Civil and Political Rights[ICCPR]: Supplemental Information Additional to the Second Periodic Report of the State of Israel Concerning its Implementation of the International Covenant on Civil and Political Rights," Al-Haq and Al-Mezan Center for Human Rights, February 2003.

[10] Statistics by the Palestinian Prisoner's Support and Human Rights Association (Addameer).

[11] Article 2 Israeli Military Order No. 1500.

[12] Article 3, *ibid*.

[13] See UN Commission on Human Rights, "Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories, Occupied by Israel Since 1967 Submitted in Accordance with Commission Resolution 1993/2A and 2002/8," (E/CN.4/2003/30), 17 December 2002.

These arrest campaigns were largely arbitrary, involving the arrest of tens or hundreds of men, women and minors in the middle of the night at their homes, at checkpoints, or at hospitals while receiving treatment for injuries sustained during demonstrations. Despite having effectively placed Palestinian towns under military control, mass arrest campaigns were conducted house-to-house searches or by summoning via loudspeaker all Palestinian males aged between 16 and 50 to report back to Israeli soldiers. Arrested persons were blindfolded, handcuffed and subjected to other forms of humiliating and inhuman treatment.[14] The manner and scale of arrests indicates that the majority of these arrests were conducted based on nationality, gender and age and without substantial evidence, and were designed to punish and intimidate the Palestinian civilian population, regardless of individual penal responsibility.

Following arrest, the detainee is either interrogated on the site, recommended for administrative detention or awaits transfer to other interrogation facilities.[15] Palestinians are interrogated by either military or security personnel, or members of the police, in order to extract what in the majority of cases is a written confession which forms "the primary and decisive evidence against a detainee."[16]

During that time, several factors increase a detainee's vulnerability, including the fact that he or she has no absolute right to consult a lawyer before or during interrogation;[17] that he is subjected in most cases to psychological or physical ill-treatment (which in many cases has amounted to torture); that he has no right to an independent registered doctor;[18] and that there is no legal requirement to provide an interpreter, even though the confession to be signed by detainees is written in Hebrew, a language not his/her own. Bail applications for security detainees are very rarely successful; suggesting that the general rule applied in security cases is that persons awaiting trial shall be detained in custody.

When a Palestinian detainee is brought before a military court, there may be several hearings for extension of detention on the grounds that the Israeli authorities need additional time to continue their "enquiries." Although a detainee may appeal the detention order, and the extensions of detention, in the case of the latter, the request for such an extension is rarely denied to the military prosecutor.

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[14] They were "stripped to their underpants, blindfolded, handcuffed, paraded before television cameras, insulted, kicked, beaten and detained in unhygienic conditions," See *ibid*, paragraph 34.

[15] Talhami, Maher, "Breaking Body and Spirit," Physicians for Human Rights- Israel, December 2004, available at http://www.phr.org.il/phr/files/articlefile_1115802101983.doc.

[16] Hunt, *supra* note 8, page 12.

[17] According to Israeli military orders, whether or not a detainee receives legal advice is subject to the discretion of the Prison Commander, and the right granted only if the meeting does not impede the course of investigation. In practice, a lawyer is often denied access till the interrogation is over, not by the Prison Commander, but by the interrogator himself. In addition, although an official agreement was concluded between the ICRC and Israel, thereby granting the former access to a detainee not later than 14 days after his or her arrest, nevertheless the practical benefits of this service is entirely dependent upon the ICRC being informed by the Israeli authorities of the date of a person's arrest, *ibid*, page 15.

[18] Although according to Israeli military orders, a detainee has the right to medical treatment, they are provided by prison personnel who do not necessarily have to be registered doctors. *Ibid*.

In 2004, more than 2000 arrests were made. Four years into the current *intifada*, more than 7,000 Palestinian prisoners were still held on political charges in Israeli prison centres and detention facilities, including 107 women and 380 minors.[19] The year 2004 also saw the opening of new jails to accommodate the large numbers, such as the Shatta prison in the Bisan Valley inside Israel.[20]

A. ISRAEL'S POLICY OF ADMINISTRATIVE DETENTION

Administrative detention, also known as preventative detention, is the imprisonment of individuals by the executive without charge or trial using administrative rather judicial procedures.[21] Israel made use of administrative detention from the first years of its military occupation of the West Bank and Gaza Strip.[22] In 1970, Israel enacted its own laws relating to administrative detention. Until then, it had made use of provisions for the imposition of administrative detention that had existed under the British Mandate in the form of the British Defence Emergency Regulations of 1945. According to these Regulations, a Military Area Commander was entitled to detain any person if he was of opinion that it is,

> Necessary or expedient to make the order for securing the public safety…the maintenance of public order or the suppression of mutiny, rebellion or riot.[23]

These regulations did not oblige the aforementioned Commander to limit the duration of such an order, restrict his discretion or prescribe rules of evidence.

In 1970, Israel issued its first specific provision for administrative detention in the form of Article 87 of Military Order No. 378 of 1970 which stipulates that an

> [Israeli] military commander, or anybody to whom he delegates his authority in his capacity, may issue an order determining that an individual be detained in whatever place of detention specified by the order[24]

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[19] Figures are for September 2004. See Al-Haq, "Letter to UN Special Rapporteur on the Right to Health regarding Palestinian Political Prisoners' Hunger Strike," 1 September 2004, available at http://asp.alhaq.org/zalhaq/site/templates/viewArticle.aspx?fname=../ePublications/104.htm. As of 3 January 2005, statistics by the Palestinian Ministry of Prisoners' Affairs and Ex-Detainees puts the figure at 8,000, as cited in "Palestine: Ministry of Prisoners' Affairs: 2004 Worst for Prisoners in 30 Years," *supra* note 1. Similarly Israeli human rights organisation B'Tselem puts the total number held by both the Israeli Occupying forces and in the Israel Prison Service (IPS), by December 2004, at a total of 7,787 Palestinians. See B'Tselem, "Statistics on Palestinians in the Custody of the Israeli Security Forces," available at http://www.btselem.org/english/Statistics/Detainees_and_Prisoners.asp.

[20] *Ibid*.

[21] Playfair, Emma, "Administrative Detention in the Occupied West Bank," *Occasional Paper No.1,* Al-Haq 1986.

[22] In 1980s, due to mounting internal and international pressure, resort to this policy was phased out, only to be re-introduced in August 1985 through an Israeli cabinet decision. In fact, the first order of administrative detention made since its use had been phased out was issued on 31 July 1985 and confirmed on 2 August, and thus preceded the Israeli cabinet's announcement of its decision to re-introduce the measure. See *ibid*.

[23] Regulation No. 108 cited in *ibid*.

[24] At the end of this duration, the Military Area Commander provides a legal notification to the Legal Advisor of the Military Area. Although amended by subsequent military orders, this order continues to form the legal basis governing administrative detention. In the Gaza Strip, an unnumbered order from 1970, similar to Order No. 378 exists. See Al-Haq, *In Need of Protection*, Ramallah, 2002.

Although Israeli authorities claimed that they are using the policy of administrative detention as preventative rather than as a punitive measure, and only against "those whose activities are considered hostile and constitute a continuous threat to security and public safety,"[25] in practice this proved to be far from being the case. By 1970, there were approximately 1,000 Palestinians incarcerated under administrative detention orders.[26] However up and till the beginning of the first *intifada* in 1987, Israel applied it on an individual basis, rather tan using it as a means of mass arrests. Thus between 1985-1987only a relative much smaller number of Palestinians were administratively detained by the Israeli authorities.[27]

Following the beginning of the first *intifada*, Palestinians witnessed an increased resort to this measure by Israeli military authorities. As a result, by 1989,

> Of the 50,000 Palestinians whom the Israeli authorities acknowledge having arrested since 9 December 1987, 10,000 have been placed under administrative detention.[28]

To do so, the provisions governing administrative detention were amended to grant any Israeli military commander the authority to issue administrative detention orders. In this regard, Israeli Military Order No. 1226 of 1988 amended Military Order No. 378, empowering not only Israeli military commander, but any soldier or police officer to issue administrative detention orders.

Since the beginning of the current *intifada* in 2000, Israeli military authorities once again increased their implementation of administrative detention vis-à-vis Palestinians, most notably to punish them for their political opinions, including non-violent political activities.[29] From September 2000 to September 2002, cases involving the administrative detention of Palestinians increased from less than 100 to 1,860.[30]

In the case of some Palestinians, administrative detention orders are issued as soon as they have been arrested, while "others are subjected to prolonged interrogation before being served with the order for which no charges are filed."[31] As a result, Ansar III Detention Center (Ketziot) was re-opened to hold administrative detainees.[32]

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[25] From a Public Letter issued on 9 June 1989 by the Director of Human Rights and International Relations Department at the Israeli Ministry of Justice, cited in Al-Haq, *A Nation Under Siege: Al-Haq's Annual Report on Human Rights in the Occupied Territories*, Ramallah, 1989, page 286.

[26] Playfair, Emma, *supra* note 21.

[27] Although administrative detention was abandoned by the Israeli policy in 1982, it was revived three years later in the wake of the "Iron Fist Policy" of Israeli Defence Minister Rabin. See Al-Haq, *In Need of Protection, supra* note 24.

[28] Al-Haq, *Nations Under Siege, supra* note 25, page 285.

[29] B'Tselem, "Administrative Detention in Occupied Territories," www.btselem.org.

[30] UN General Assembly (GA), "Report of the Special Rapporteur of the Commission on Human Rights, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967," A/757/366/Add.1), 16 September 2002.

[31] Defence for Children International-Palestine Section (DCI-Palestine), "Administrative Detention," in Children Behind Bars, Issue No. 26, 22 October 2004, at http://www.dci-pal.org/english/Display.cfm?DocId=292&CategoryId=10.

[32] Located inside a closed military training area in the Nagab Desert inside Israel, it was the first one to be used as the main detention centre for administrative detainees during the first *intifada*. In the past, it was notorious for poor prison conditions and the systematic use of torture. See "Israel's Non Compliance Report," *supra* note 9.

Before an administrative order can be issued, Palestinians detainees accused of "security" offences are brought within 8 days before a military judge who reviews the evidence against him.[33] "Serious" charges are tried before three-judge panels while lesser ones are tried before one judge.[34]

All judges in the Israeli military court system are serving Israeli army officers, an element that calls into question their independence and impartiality as judges, and the quality of justice that they dispense. Administrative detention can be based on secret evidence, to which the detainee is denied access.[35] Almost all information presented to the court is classified, which the review judge reserves the right not to disclose.[36] In addition, he/she has the right to vary the rules of evidence to accept evidence that could not be relied on in court.

In many cases, court decisions are based on confessions made by defendants, including those made prior to their access to legal counsel. Since a detainee cannot cross-examine primary witnesses to present a meaningful defence, challenges to the court's ruling remain difficult in most cases.

If the decision to administratively detain is in the affirmative, as in the majority of cases, generally orders between 3-6 months in duration are passed down, which under military regulations could be extended/renewed indefinitely.[37] In fewer cases, he or she may take the period spent by the detainee in custody prior to the issuing of the order into account, thereby reducing the time still to be spent in administrative detention.

Since administrative detention orders are reviewed, Israeli authorities have asserted that this type of detention is not arbitrary.[38] Nevertheless, existing review procedures are severely inadequate, and have been amended in the past in a way that undermines a detainee's access to justice. For example, while Military Order No. 1466 of 1999 imposed a three month review of approved administrative detention order, subsequent Military Order No. 1532 effectively revoked this requirement. At times they have been temporarily suspended by virtue of Israeli military orders, as was the case during Israel's heavy incursions into the West Bank in 2002.[39]

[33] In May 2002, Israeli military authorities issued Military Order No. 1503, which stipulated that the administrative detention of a Palestinian does not have to be reviewed before a military judge within 18 days of the day of his arrest. In June 2002, Israeli Military Order No. 1506 amended this time period was changed to 10 days, and in 2003 was further reduced to 8 days by virtue of Military Order No. 1532.

[34] In this regard, it is worth noting that the definition of what constitutes a threat to the "security of the area" or "public security" is not defined, thereby granting wide discretion to the military commanders to interpret it.

[35] Article 87 of amended Military Order No. 378.

[36] To date, in no case has a military court or the Israeli High Court ordered any of the classified material to be revealed.

[37] Based on Israeli Military Order No. 1229 in the West Bank and Military Order No. 941 in the Gaza Strip, which authorized the issuing of administrative detention without designating a maximum period of time for it. See Addameer, "Palestinians Detained by Israel," *Fact-sheet*, 17 August 2004. See also written statement by Palestinian Center for Human Rights to the Human Rights Commission at http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2003.NGO.199.En?Opendocument.

[38] Al-Haq, *A Nation Under Siege*, *supra* note 25.

[39] Israeli military authorities even issued Military Order No. 1506, which effectively cancelled the right of Palestinians that had been administratively detained during these incursions the right for review.

In the case of appeals, Palestinian administrative detainees can submit appeals of their detention order, before an appeal judge in an Israeli military court, where a process similar to that at the initial hearing takes place.[40] Israeli military judges generally uphold the warrants, and appeals challenging these decisions are regularly denied. Like the original hearing and the review, there is also no requirement that the appeal is open to the public.[41]

Once again, the decision can be based on confidential material or "secret evidence" not provided to the detainee or his lawyer. This places the detainee's counsel in the impossible position of trying to prove to the judge that the order in question is not required for security reasons, without having access to any details of the evidence on which the administrative order is based.

Clearly, these limitations make the possibility of determining the value of the review and appeals procedure by the Palestinian detainee and his lawyer meaningless, and undermine their ability to effectively challenge the order.

In 2004, administrative detention is still a common practice of Israeli military authorities. By August 2004, there were still over 850 Palestinians administratively detained.[42] Although there were no cases of children held under administrative detention prior to the current *intifada*, a significant number of children were arrested and detained after 2000.[43]

B. CONDITIONS OF PRISON AND DETENTION

Following the conviction and sentencing of any Palestinian, the detainee is taken either into the custody of the Israel Prison Service (IPS) or the Israeli military authorities, depending on the type of penalty and the "offence" in question.[44] Since the beginning of the occupation, Palestinians in Israeli custody have been subjected to systematic breaches of their fundamental rights. Al-Haq and other local and international human rights human rights organizations have documented and intervened on this issue for decades.

The conditions of detention have changed little since Al-Haq reported in 1989 that prisons and detention centres are "generally characterized by severe overcrowding, insufficient and poor quality food and inadequate medical services."[45] Palestinians are detained in Israeli prison and military detention camps, the majority of which are located inside Israel, in contravention of international law.[46] By August 2004, there were five interrogation centres, six detention centres, three military detention camps and approximately twenty prison facilities in which Palestinians are held.[47]

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[40] In 1988, Article 5 of Israeli Military Order No. 1226 amended Military Order No. 378, thereby granting an administrative detainee the right to appeal his detention before an appeals committee.
[41] See Israeli Military Orders No. 378 of 1970 and No. 1311 of 1990.
[42] Addameer, "Palestinians Detained by Israel," *supra* note 37.
[43] See further below.
[44] Talhami, Maher, *supra* note 15.
[45] Al-Haq, *A Nation Under Siege*, *supra* note 25, page 165.
[46] See further below.
[47] Addameer, "Palestinians Detained by Israel," *supra* note 37.

Although there is an Israeli Prison Ordinance which consists of 114 clauses, and which is legally binding for Israel's Minister of Interior, none of these clauses guarantee prisoners' rights or spell out obligations upon the relevant Israeli authorities, with regard to facilities where Palestinians are held.[48]

Since the beginning of the current *intifada*, detention conditions of Palestinians in Israeli facilities, which already failed to meet the international minimal standards for detention conditions, have deteriorated further. Human rights organisations monitoring the condition of Palestinians in Israeli custody also report a lack of access to basic elements and services that would ensure humane living conditions. Prison cells are overcrowded and suffer from poor hygienic standards. In addition to insufficient or poor quality of food, prisoners are often denied a change of clothing, are subjected to regular strip searches carried out in view of the other prisoners in such a way as to cause humiliation, and may be placed in solitary confinement or isolation for extended periods. In addition, there are reports from human rights organisations which confirm that prison officers impose fines for disciplinary infringements. [49]

Furthermore, although large numbers of detainees suffer health problems due to poor detention conditions, as noted by Physicians for Human Rights-Israel, "the affidavits show that the physician's examination is usually superficial, and generally does not include a physical examination of the detainee."[50] Moreover, it is often conducted by authorities that are not properly trained in health matters, and who belong to the system itself.[51] In this regard, it is estimated that the number of sick prisoners rose from 700 in 2003 to more than a thousand in 2004, including dozens suffering from serious conditions.[52] Requests for more extensive medical treatment remain pending for prolonged periods.

According to a report released by the Palestinian Ministry of Prisoners and Ex-Detainees, "2004 was the worst year for Palestinian prisoners, as detention conditions inside Israeli jails deteriorated to a level never seen in 30 years."[53] In response to the continued deterioration in detention conditions faced by Palestinian prisoners, on 15 August 2004, Palestinian prisoners in six major Israeli facilities began a hunger strike that represented the largest of such protests by Palestinians since Israel's 1967 occupation of the West Bank and Gaza Strip. More than 2,500 prisoners, including 52 women, participated in this strike, as an action of last resort, after demands to prison administrators to improve their prison conditions remained unfulfilled.[54]

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[48] Addameer, "The Infinite Violation of Human Rights," http://www.addameer.org/.

[49] See for example, DCI-Palestine Section, "DC/PS Calls on Israeli Authorities to Respect the Right of Palestinian Children Detainees," 18 August 2004, available at http://www.pcdc.edu.ps/dci_on_child_prisoners.htm.

[50] Talhami, Maher, *supra* note 15, page 6.

[51] In addition, it is worth mentioning that neither the Israeli military authorities nor the IPS allow an independent external review of the prisoners' health conditions. See for example, Physicians for Human Rights-Israel (PHR-Israel), "General Information," 10 February 2005, available at www.phr.org.il.

[52] Palestinian Ministry of Prisoners and Ex-Detainees, *supra* note 1.

[53] *Ibid*.

[54] According to an ICRC delegate who visited several places of detention during the strike, Palestinian prisoners submitted 146 demands for improvement of their prison conditions, including "removal of glass windows in family meeting rooms, and an end to body searches." See ICRC, "Israel, *supra* note 2, page 6.

During the strike, which lasted for 18 days, Israeli Security Minister, Tzachi Hanegbi, was quoted as saying that "they can strike for a day, a month, until death. We will ward off this strike and it will be as if it never happened."[55] This display of flagrant disregard for the health and well-being of the Palestinian prisoner population, appearing to have aligned the Israeli government position with the abusive policies of the Israeli prison authorities, and thereby perpetuating a situation in which there was a substantial risk that the human rights of the protesting prisoners would be violated with government endorsement.

Rather than taking necessary steps to uphold the protestors' rights to dignity and life, the Israeli authorities failed to resolve the protest in a manner that complies with their international legal obligations. Instead, Israeli prison authorities threatened to force-feed the prisoners, and embarked on a wide range of illegal disciplinary measures, such as the confiscation of salt from the cells of hunger-striking prisoners on the first day of the strike, despite medical warnings that this would pose an imminent threat to their physical well being, if not life.[56] Prior to the start of the protest, Israeli prison police reportedly stormed prison cells and confiscated radios, newspapers and even personal items, apparently to break the prisoners' will. In addition, the Israeli newspaper Haaretz reported that "barbecues had been set up to grill meat near the strikers' cells in order to make it harder for them to resist their hunger."[57]

C. TORTURE AND OTHER FORMS OF ILL-TREATMENT

Torture and other forms of ill-treatment against Palestinian detainees from the OPT has been commonly used by Israeli authorities vis-à-vis Palestinian detainees. In this regard, and as one study correctly noted,

> The conditions conducive to the rise of torture as an instrument of State policy are the authorities' perception of an active threat to the security of the State from internal and external sources; the availability of a security apparatus which enables the authorities to use the vast power at their disposal to counter that threat by repressive means; and the presence within the society of groups defined as enemies or potential threats to the State.[58]

This study further notes that in situations of war and occupation, torture is used "as part of State policy of control and repression of the population and as an instrument of interrogation or psychological warfare," [59] with a central assumption that "the victims are guilty…[and] that it is the only way to elicit information necessary for the protection of the state and its citizens."[60]

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[55] Quoted in Nabulsi, Karma, "Palestinians want an End to their Solitary Confinement," *The Guardian*, 28 August 2004, available at http://www.guardian.co.uk/comment/story/0,3604,1292678,00.html.

[56] See Al-Haq, "Letter to UN Special Rapporteur on the Right to Health," *supra* note 19.

[57] As reported in Amayreh, Khalid, "Hungerstrike," *Al-Ahram Weekly*, Issue No. 704, 19-25 August 2004, available at http://weekly.ahram.org.eg/2004/704/re2.htm.

[58] Kelman, Herbert, "The Policy Context of Torture: A Social-Psychological Analysis," *International Review of the Red Cross*, Volume 87, No. 857, March 2005, page 128.

[59] *Ibid*, page 129.

[60] *Ibid*, page 133.

In the case of Palestinian detainees, they are routinely subjected to abuse and beatings at the hands of soldiers and military police already during arrest, and on the way to detention facilities.[61]

> At around 10:00 p.m. on Sunday 9 May 2004, I was in my home in the village of Abu- Dis when I suddenly heard three to four gun shots. I called my brother Fadi since he was out in the village, to check up on him. When his phone rang, a stranger answered my call and told me that Israeli Border Guards who had raided the village had fired at my brother and wounded him. I immediately left the house to look for him. When I arrived at Abu-Dis Club, I saw a Palestinian ambulance and several village residents. As I approached them to see what had happened to Fadi, an Israeli patrol suddenly advanced towards us from the opposite direction. The youths all urged each other and me to run away, which we did. I entered into a narrow street close to a girls' school and jumped off a high fence. Minutes later, I felt that I had been hit more once, particularly in my arm. I heard a short conversation between the guards indicating that they had plans to use live fire. I stopped and saw them standing at the edge of the fence with their guns aimed at me.
>
> One of the Border Guards came towards me and tried to pull me to the ground. Then the rest of them advanced towards me and started beating me up. Later on, they forced me into one of their military jeeps. After they tied my hands behind my back and blindfolded me, they drove with me to one of their military camps, known in the village by the name of Mu'askar al-Jabal. There I was beaten again by Israeli soldiers. Half an hour later, I was taken to the settlement of Ma'ale Adumim, where while I was still blindfolded and tied, and forced to sign a paper that read that I was not hurt. This was despite that by then I had realized that I was hit by a rubber-coated metal bullet, and that I was hit in my arm, my right ear, and incurred several injuries on my back and legs. Nevertheless, I was not given any medical attention at the settlement's police station where they kept me. After some interrogation by one of the police, they released me, put me in a jeep, and then dropped me off on one of the main roads next to the settlement …. It was already 2:00 a.m. the following day. I called a friend who came and picked me up with his car. When I reached home, I was told that my brother Fadi had died as a result of a lethal head injury.
>
> **Extracts from Al-Haq Affidavit No. 1785/2004**
> Given by: Diya' Sha'lan Khader Bahar, (Resident of the village of Abu-Dis, nearby East Jerusalem, West Bank).

Once in detention, the abuse of Palestinians traditionally includes both psychological and physical forms of ill-treatment. Despite the Israeli High Court of Justice ruling in September 1999, Israeli and Palestinian human rights organisations and UN treaty mechanisms have documented numerous cases of ill-treatment and abuse of Palestinians in Israeli prisons. It appears evident that resort to a number of methods, including those that amount to torture and that were outlawed

[61] Talhami, Maher, *supra* note 15, page 6.

by the Court continue, including beatings, prolonged shaking, solitary confinement, deprivation of food, sleep and essential needs, and verbal and psychological abuse.[62]

Furthermore, Palestinians continue to be subjected to the "shabh" position,[63] which involves tying the detainee's legs to a small stool and his hands behind his back with a bag covering his head sometimes for more then 48 hours continuously in which he is given only five-minute break between each sitting.[64]

> On 25 February 2004, a large number of Israeli soldiers arrested my 30-year-old brother Ahmad Daragma in his house in the southern part of the village of Toubas, nearby Jenin, after three years of hunting him down. Ahmed was at first taken to Al Jalameh prison where he was interrogated for 80 days. During that period he was subjected to the harshest and most ugly ways of ill-treatment and torture, including the shabah position, to force him to confess to the charges against him. During the interrogation period at the hands of Israeli security officials, his left arm was broken … which indicated the severity of the torture that he was subjected to, not to mention the pain he suffered in his back, neck, and other areas. Later on, he was transferred to Jalbou prison, where he remained for two months without being given any medical attention other than pain-relief pills …. He was then transferred to al Ramla Prison hospital where he underwent surgery …. A few days ago, he was brought to the military court in Salem, located west of Jenin. The hearing was attended by my parents, who were overwhelmed by the poor state in which they found him when he appeared in court. Ahmad was carried in by two soldiers, with his left hand covered by a piece of cloth, and with signs of having been subjected to beatings all over his body. The court decided to extend his detention period.
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> **Extracts from Al-Haq Affidavit No. 1957/2004**
> Given by: Muhammad Lutfi Muhammad Daraghma, (Resident of the village of Toubas, nearby Jenin, West Bank).

As one Israeli human rights organization noted, threats of rape or murder, "whether directed at the detainee himself or his relatives (and some relatives are indeed arrested as a form of pressure)," is also endemic, and "may certainly be considered to constitute the use of mental torture."

[62] Public Committee Against Torture in Israel (PCATI), "Torture in Israel-Background," available at http://www.stoptorture.org.il/eng/background.asp?menu=3&submenu=1, and "Back to a Routine of Torture: Torture and Ill-treatment of Palestinian Detainees during Arrest Detention and Interrogation," September 2001-April 2003.

[63] See UN Commission on Human Rights, "Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories, Occupied by Israel since 1967 Submitted in Accordance with Commission Resolution 1993/2A," (E/CN.4/2002/32), 6 March 2002.

[64] Addameer, "Torture in Israeli Prisons," available at http://www.addameer.org/detention/torture.html.

D. ACCESS TO A LAWYER DURING DETENTION

Palestinian prisoners frequently face difficulties in obtaining access to defence counsel. Palestinian lawyers may only defend their clients before military courts in the OPT, where they are normally tried.[65]

In addition, according to Article 3 of Military Order No. 1500, the detained person can be prohibited from meeting with an attorney for the entire duration of the detention period. Lawyers can be barred from visiting their clients for up to 90 days after the arrest of the Palestinian detainee.[66] In addition, all lawyers are subject to travel limitations and movement restrictions such as by checkpoints inside the OPT or closures of the West Bank and Gaza Strip, which hinders their ability to travel and to enter Israel. In several instances, Israeli authorities have moved detainees to other prison facilities without notifying their families or lawyers, thereby causing delay in visits by the latter. In many cases, lawyers are not informed of the date of their client's hearing.[67]

E.THE GRANTING OF FAMILY VISITS TO PRISONERS

Since the beginning of the current *intifada*, Israeli authorities have rendered family visits extremely difficult for Palestinian prisoners, including children. This is particularly so in light of the fact that the Israeli prison authorities make no effort to inform families of the place of detention of their relatives.[68]

Even where family members have managed to receive authorised visiting permits, Israel's regular closures of the OPT and other movement restrictions imposed by the Israeli authorities make it difficult for family members to make the journey to the prisons. In addition, Israeli authorities continue to impose unnecessary security measures during visits, including stringent searches and denying all physical contact, including through the placement of glass panels separating the prisoners from their visitors.

> I live in the village of Doha, with my family of eight, and currently work for the United Nations Relief and Works Agency for Palestine Refugees in the Near East [UNRWA] as a school teacher in the D'heisha Refugee Camp. I was never arrested in the past, nor did I

[65] In the case of the Israeli High Court, very few detainees have the grounds to have their case stand in this Court. In addition, it requires their legal counsel to be members of the Israeli Bar Association. Since Palestinian lawyers from the OPT have no access to the Israeli legal training system, they cannot qualify under the Israeli Bar. This means that Palestinian detainees' choice of defence counsel is narrowed down to Israeli citizens or Palestinian lawyers with Jerusalem identification cards.

[66] Addameer, "Palestinians Detained by Israel," *supra* note 37.

[67] *Ibid.*

[68] Talhami, Maher, supra note 15. Although Israeli military orders gives families the right to be informed "without delay" about reasons for arrest and detention, they enable the Israeli military authorities to keep the detention secret for eight days if a court order is obtained. See B'Tselem, *The Interrogation of Palestinians During the Intifada: Ill-Treatment, "Moderate Physical Pressure" or "Torture,"* March 1991.

have any "security"-related problems with the Israeli occupation authorities. On 24 February 2004, my son, who was born in 1985, was arrested by the Israeli occupying forces. He underwent interrogation for one month in Maskobiya prison, and was then transferred to Nitzan prison in Ramla, where he is still detained. He was charged with belonging to Islamic Jihad and making explosives. However, he was not found guilty of killing any Israeli.

The problem I face is the fact that I am denied the opportunity to visit my son in prison for "security" reasons. However, I was not given detailed reasons for the rejection. During my son's stay in prison, no measures were taken against him on security grounds, nor was he held in solitary confinement. My wife managed to receive a permit to visit him at the beginning of his arrest, and it still gets renewed. I am being denied a visiting permit, even though I never faced any "security" related charges …nor have I ever been restricted from travelling abroad.

Extracts from Al-Haq Affidavit No. 1918/2004
Given by: Hashem 'Abd-al-Fattah 'Abd-al-Hamid Dayya, (Resident of the village of Doha, near Bethlehem, West Bank).

F. THE CASE OF PALESTINIAN MINORS[69]

There is a difference in the definition of a child in Israel and in the OPT. While the Israeli Juvenile Offenders Ordinance considers an Israeli person to be a minor until the age of 18, in accordance with the international definition of a minor,[70] Israeli Military Order 132 applicable in the OPT to Palestinian children defines a minor as someone under the age of 16.[71] As a result, Palestinian children in the OPT are often tried and sentenced as adults.

By December 2004, there were 246 child prisoners, nine of whom were administrative detainees.[72] 77% of the child prisoners had been arrested from their homes.[73] Palestinian children suffer from ill-treatment during and after their arrest, during interrogation, such as beatings, being forced to remain in agonising positions, sleep and food deprivation, or threats with rape.[74]

[69] For a review of the situation of Palestinian women prisoners and detainees, please see the Chapter on "Violations of the Rights of Palestinian Women" in this report.
[70] Article 1 of the Convention on the Rights of the Child.
[71] Palestinian Ministry of Detainees' and Ex-Detainees' Affairs, Child and Youth Department, "Palestinian Political Child Prisoners in Israeli Prisons - Monthly Update," December 2004.
[72] According to the statistics provided, 182 of those were pending trial, while the remaining 52 were children serving actual prison sentences. See *ibid*.
[73] *Ibid*.
[74] DCI - Palestine, "Violations of Palestinian Children's Rights Stemming from the Israeli Occupation," 24 September 2004, available at http://www.dci-pal.org/english/PrinterF.cfm?DocId=285&CategoryID=2.

As with all detainees, such ill-treatment continues throughout their detention. The year also saw an increase in the length of sentences received by children. For example, by June 2004, 26% of children during the course of 2004 to that point were sentenced between one and three years, compared with 11% of children sentenced in 2003.

They serve their sentences in five different facilities, two of which are administered by IPS and three of which are administered by the Israeli military. Both of the former and one of the latter facilities administered by the former, and one of the three administered by the latter are located in Israel, in contravention of international law.[75] Furthermore,

> There are no military courts or judges designated especially for children, no officers trained specifically for the interrogation of children, no probation officers and no social workers to accompany them.[76]

On Thursday 15 April 2004, at around noon, I was heading to an area close to the Nabi Samu'el area. When I arrived there, I saw around ten youngsters throwing stones at a group of Israeli Border Police, who were guarding the workers and the equipment that is constructing the Annexation Wall. Suddenly, I saw two of them chase the youngsters while firing tear gas. I ran until I arrived at a fenced-off area. When I tried to climb over the fence, one of the border police officers suddenly grabbed me and hit me on my face. I started crying. When I asked him why he had hit me, he said that it was because I was throwing stones at them. Trembling with fear, I denied the allegation.

He twisted my arm behind my back and dragged me on the ground to their green jeep. Then one of the guards picked me up and put me on the bumper. He then took off my belt and tied my left arm to the jeep. There were around 30 of them, and every time one of them passed me, he hit me. I stayed there tied to the jeep for four hours, crying and in pain. I was also cold since I was only wearing a T-shirt. People were watching me, unable to help. During this time, they kept firing tear gas, which got into my eyes and they turned red ... Then they took me to the settlement of Hadashah close to the village. An hour later an officer came and ordered me to go home.

Extracts from Al-Haq Affidavit No. 1937/2004
Given by 13-year old Muhammad Sa'id 'Isa Badwan, (Resident of the village of Biddo , near East Jerusalem, West Bank)

In addition, Israeli policy towards these children "includes attempts to coerce them into confessing or inducing them to collaborate with the Israeli authorities."[77] It is estimated that "more than

[75] DCI-Palestine, "Status of Palestinian Children's Rights: Israel's Violations of the Rights and Security and the rights of Children deprived of their liberty during the Second *Intifada*," (29 September 2000-30 June 2004).
[76] See UN Commission on Human Rights, "Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories, *supra* note 63, paragraph 49.
[77] DCI-Palestine, "Violations of Palestinian Children's Rights," *supra* note 75, page 6.

90% of children sign a confession within the first 48 hours of their arrest," which puts into question the interrogation methods currently employed by Israel to extract those confessions.[78] Just like their adult counterparts, Palestinian children also experience poor physical conditions of detention, including overcrowded cells and low hygienic standards.

Furthermore, they have limited access to education or to recreational outlets, and are regularly denied access to a lawyer or to a relative.[79] Since a large majority of Palestinian child prisoners are held within Israel itself, this compounds the challenge which those children face to receive family visits, as many of their relatives are unable to receive permits to enter Israel, or are not automatically granted the right to visit them.80

II. THE LEGAL FRAMEWORK

A. INTERNATIONAL HUMAN RIGHTS LAW

1. FAIR TRIAL AND ACCESS TO COUNSEL

The right to a fair trial is guaranteed under international human rights law, and is particularly significant because it provides an essential safeguard for the protection of other fundamental norms. Article 10 of the Universal Declaration of Human Rights (UDHR) provides that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal." Similarly, the International Covenant on Civil and Political Rights (ICCPR) guarantees that,

> In the determination of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[81]

As noted by the United Nations (UN) Special Rapporteur on Torture, the right to judicial review applies to all forms of deprivation, including administrative detention.[82] In this respect, anyone arrested or detained on a criminal charge, "shall be entitled to trial within a reasonable time or to release."[83]

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[78] "Rights Groups Back Palestinians," Agence France Presse, quoting Director of DCI-Palestine Section, 27 June 2004, available at www.phr.org.il

[79] Palestinian Ministry of Detainees and Ex-Detainees Affairs, Child and Youth Department, *supra* note 71.

[80] DCI-Palestine, "Violations of Palestinian Children's Rights," *supra* note 75.

[81] Article 14(1).

[82] See "Report of the Special of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment," (A/57/173), 2002, paragraph 17.

[83] Article 9(3) of the ICCPR.

Under international human rights law, the imprisonment of individuals without charge or trial amounts to arbitrary arrest. Article 9 of the UDHR and Article 9(1) of the ICCPR state that "no one shall be subjected to arbitrary arrest or detention." Article 9(2) of the same Covenant also reiterates that,

> Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Moreover, administrative detention must be of a short duration and cannot be for an indefinite period. In this regard, the ICCPR allows for administrative detention provided it prevents acts of violence or clear dangers to security, is not used as a punishment, and conforms to international minimum standards, a criteria which Israeli practice in the OPT does not meet.

Under Article 4 of the ICCPR, a State Party may take measures which derogate from its obligations under the Covenant in time of public emergency. However, the UN Human Rights Committee (HRC) has made it clear that there are rights which may not be suspended by a State Party, including the principle of legality in criminal law, and the recognition of everyone as a person before the law.[84] Furthermore, derogations are subject to the principles of necessity and proportionality, which signifies that only essential measures may be taken, and that even those may be applied only "to the extent strictly required by the exigencies of the situation."[85]

Thus, even in times of emergency, Israeli policies of detention must still conform to international minimum standards of fair trial and be based on grounds and procedures established by law. These rights apply to all people without distinction, and include basic rights such as to be informed promptly of the reasons for detention,[86] to inform or have family members informed of their arrest and place of detention, to effectively challenge the legality of detention,[87] and the right to access a lawyer. [88]

In its Concluding Observations on Israel, the HRC reiterated that the present measures/processes of administrative detention also

[84] HRC, *General Comment 29 regarding States of Emergency* (Article 4), (CCPR/C/21/Rev.1/Add.11), 31 August 2001, paragraph 7.
[85] *Ibid*, paragraph 4.
[86] Article 9(2) of the ICCPR states that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest."
[87] HRC, *Concluding Observations: Israel*, (CCPR/C/97/Add.93), 18 August 1998. Similarly, the European Court of Human Rights has repeatedly emphasised the need for judicial review of detention including during emergency situations. See European Court of Human Rights, *Brannigan and McBride v. United Kingdom*, 17 *European Human Rights Reports*, 539, 26 May 1993.
[88] Article 11 of the UDHR states that "everyone charged with a penal offence has the right to…all the guarantees necessary for his defence." In addition Article 14 of the ICCPR states that one of the minimum guarantees of a detainee is his ability to "communicate with counsel of his own choosing." See also Rule 93 of the Standard Minimum Rules and Principles, and Principle 17 of the Principles on Detention.

> *Limit the effectiveness of judicial review* [emphasis added] thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 [concerning the right to liberty and security of person] more extensively than what in the Committee's view is permissible pursuant to article 4. In this regard, the Committee refers to its earlier concluding observations on Israel and to its General Comment No. 29.[89]

According to the HRC's General Comments, "the fundamental requirements of fair trial must be respected [even] during a state of emergency."[90] In addition, measures which derogate from the provisions of the ICCPR cannot be inconsistent "with the State party's other obligations under international law, particularly the rules of international humanitarian law."[91]

The presumption of innocence is also a fundamental principle of the right to fair trial. As noted by the HRC, a prosecution must establish its case beyond reasonable doubt in order to secure a conviction. Since it can be extended indefinitely, administrative detention also violates the basic right of the detainee to know his/her period of detention. As a result, administrative detention as practiced by Israeli authorities in the OPT qualify as a form of punitive detention.

In the case of children, the Convention on the Rights of the Child (CRC), the Minimum Rules for the Administration of Juvenile Justice, and the UN Rules for the Protection of Juveniles Deprived of their Liberty all establish minimum standards for the protection of minors deprived of their liberty. Although Article 37(b) of the CRC, to which Israel is a State Party, stipulates that the imprisonment of a minor should be used only as a measure of last resort and for the shortest appropriate period, during which he "shall have the right to prompt access to legal and other appropriate assistance."[92] To date Palestinian children continue to be arrested by Israeli forces as the first resort, and imprisoned for long periods of time.

2. FREEDOM FROM TORTURE AND ILL-TREATMENT

International human rights law also maintains that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and that all detainees must be treated with humanity. This principle is upheld in the UDHR,[93] as well as in Article 7 of the ICCPR which sets forth the non-derogable principle that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Similarly, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which Israel is a State Party, prohibits, under all circumstances, the use of torture and other excessive forms of punishment. The prohibition against torture is a norm of *jus cogens*, from which no derogation is permissible.

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[89] HRC, *Concluding Observations: Israel*, *supra* note 87, paragraph 12.
[90] HRC, *General Comment 29*, *supra* note 84, paragraph 16.
[91] *Ibid*, paragraph 9.
[92] Article 37(d).
[93] Article 5 of the UDHR states that "no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

Other human rights standards such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), 94 and the Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules),[95] further outline basic principles applicable in situations where individuals are deprived of their liberty. Principle 6 of the Body of Principles reiterates that "no person under any form of detention or imprisonment shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment," and that "no circumstances whatever may be invoked as a justification for…[such] treatment or punishment." Thus Israeli officials and agents can not invoke superior orders or exceptional circumstances such as war, or a threat of war, a threat to national security, international political instability or any other public emergency as a justification for torture.[96] Furthermore, UN bodies have affirmed the need for states to

> Design realistic and effective mechanisms for the full implementation of these standards, and to provide the necessary administrative and judicial structures for their continuous monitoring.[97]

Article 4 of CAT also requires state parties to take "effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction," and to ensure that "all acts of torture are offences under its criminal law." In this regard, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "judicial control of interference by the executive power within the individual's right to liberty is an essential feature of the rule of law."[98]

Nevertheless, as emphasized by the UN Committee Against Torture in its Concluding Observations regarding Israel's Periodic Report, "the ruling [of the High Court] did not contain a definite prohibition of torture."[99]

Any disciplinary action carried out by prison authorities must be carried out pursuant to law or regulation of the necessary authority, and may never amount under any circumstance to a form of torture.[100] Nevertheless, the UN Committee Against Torture raised concerns that, despite numerous allegations of torture and ill-treatment by Israeli law enforcement officials and security

[94] Adopted by UN GA Resolution 43/173 of 9 December 1988.
[95] Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
[96] Article 6 of the Body of Principles.
[97] UN GA, "Human Rights in the Administration of Justice," (A/RES/43/153), 8 December 1998.
[98] See Report of the Special of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (A/57/173), 2002, paragraph 15.
[99] Committee Against Torture, *Conclusions and Recommendations: Israel*, (CAT/C/XXVII/Concl.5), 23 November 2001.
[100] HRC, *Concluding Observations: Israel, supra* note 87.

personnel, "very few prosecutions have been taken against alleged perpetrators," which violates Article 7(1) of the Convention.[101] In the event of an allegation, the Department for the Investigation of Police Misconduct has the discretion to decide that a police officer or Israeli "security" agent should be subjected to disciplinary action instead of criminal proceedings.[102]

Further, Article 37 of the CRC prohibits state parties from subjecting anyone "to torture, or other cruel, inhuman or degrading treatment or punishment,"[103] and reiterates that they must be treated with humanity and respect, and "in a manner which takes into account the needs of persons of his or her age."[104] In 2002, concern was raised by the UN Committee on the Rights of the Child regarding allegations and complaints of torture and ill-treatment of Palestinian children by police officers during arrest and interrogations. The Committee called on Israel to investigate effectively those cases, bring the perpetrators to justice, and provide victims with adequate compensation and recovery.[105]

3. PHYSICAL CONDITIONS OF DETENTION

Under international human rights law, Israeli authorities have an obligation to treat all Palestinians deprived of their liberty with dignity and humanity as required by Article 10(1) of the ICCPR.[106] In this regard, various provisions of the Standard Minimum Rules seek to guarantee a minimum physical condition of detention. For example, it stipulates that accommodation provided to detainees should meet minimum standards of health; that detainees must be enabled to keep their persons clean; and that they should be provided with adequate food and drinking water.[107] Furthermore, Principle 29 of the Body of Principles stipulates that places of detention shall be visited regularly by qualified and experienced persons external to the prison administration.

B. INTERNATIONAL HUMANITARIAN LAW

1. FAIR TRIAL AND OTHER JUDICIAL GUARANTEES

International humanitarian law contains many provisions relating to the situation of people deprived of their freedom, and as the ICRC points out, considers as protected persons under the Fourth Geneva Convention,

[101] UN Committee Against Torture, *Conclusions and Recommendations: Israel, supra* note 99.
[102] *Ibid.*
[103] Article 37(a)
[104] Article 37(c). Similarly Article 10 of the ICCPR stipulates that juvenile offenders "shall be accorded treatment appropriate to their age and legal status."
[105] UN Committee on the Rights of the Child: *Israel*, (CRC/15/Add.195), 9 October, 2002.
[106] According to Article 10 of the ICCPR, State Parties must ensure that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."
[107] See Principles 10, 15, 19 and 20 of the Standard Minimum Rules.

> Those in the event of territorial occupation [who are] suspected or accused of committing acts hostile to the occupying power, persons tried for such acts and penal law prisoners, …(for instance, Palestinians detained or interned by Israel).[108]

As an Occupying Power, Israeli must therefore provide Palestinian detained persons with fundamental guarantees of a fair trial and the rule of law, e.g., access to legal counsel, rules of evidence, reviews and appeals, proportionality of penalties to the offence, and non-retroactivity. Article 72 of the Fourth Geneva Convention regulates the lawful detention of civilians by the Occupying Power, by guaranteeing any suspect the right to obtain the assistance of a qualified lawyer of his choice, and to be visited by a lawyer freely.

Moreover, a protected person's right of communication under the Convention can only be forfeited when such a person is "under definite [emphasis added] suspicion of active hostility to the security of the occupying power," and "only in those cases where absolute military security so requires."[109] In this regard, the ICRC Commentary reiterates that this,

> Can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow. This Article should never be applied on mere suspicion.[110]

In addition,

> Such person shall be treated with humanity, and in case of trial shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and full privileges of a protected person under the Convention at the earliest date consistent with the security of the State or the Occupying Power, as the case may be.[111]

The legal principle that no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees, has been deemed customary by the ICRC. Common Article 3 of the Four Geneva Conventions stipulates that an Occupying Power must ensure,

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[108] ICRC, "Visiting People Deprived of their Freedom," 6 August 2001, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/40816EA847FF0984C1256B6600600BF8.

[109] According to Article 5 of the Fourth Geneva Convention in cases where "an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communications under the present Convention." Although the Commentary of the ICRC admits to the fact that "sabotage is hard to define, as no definition of it is given in any text in international law, the term "sabotage" should be understood to mean acts whose object or effect is to damage or destroy material belonging to the army of occupation or utilized by it." See *ibid*, page 57.

[110] *Ibid*, page 58.

[111] Article 5 of the Fourth Geneva Convention.

> The passing of sentences and the carrying out of executions without previous judgment, pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[112]

Furthermore, when listing which rights to communication can be forfeited, the right to counsel is not amongst them.[113] In this regard, it is worth noting that among the violations identified in article 147 of the Fourth Geneva Convention as grave breaches are wilfully depriving a protected person of the rights of fair and regular trial.

In addition, Article 75 of Additional Protocol One, reflective of customary international law, contains fundamental guarantees which apply to all persons who are captured in connection with an armed conflict, regardless of whether or not they benefit from more favourable treatment under the Geneva Conventions or the Additional Protocols. These guarantees include prompt notification of any charges and the opportunity to be prosecuted before an impartial and regularly constituted court that respects "generally recognized principles of regular judicial procedures," and to present a defence. Even if persons arrested by Israeli occupying forces are accused of war crimes or crimes against humanity, they "should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law."[114]

Furthermore, the Fourth Geneva Convention requires that administrative detention orders be reviewed by a "competent body," so that the review of an order affecting the detainee's liberty may not be left to the discretion of a single person. However, it is clear that Israel has abused the system of administrative detention. The provisions of international humanitarian law maintain that all individuals must be granted the right to a judicial review of the lawfulness of their detention (even under the terms of Article 5). Thus, Palestinian detainees may not be subjected on national security grounds to indefinite administrative detention without judicial review.

In the case of mass arrests, Article 33 of the Fourth Geneva Convention forbids punishing any protected person for any violation that he or she did not personally commit, and prohibits actions against them that may amount to forms of collective punishment, reprisals, intimidation or terrorism. The ICRC Commentary reiterates that the suspicion must not rest on a whole class of people; collective measures cannot be taken and there must be grounds justifying action in each individual case.

To date the majority of Palestinians are detained in locations outside the OPT, in clear violation of Article 76(1) of the Fourth Geneva Convention, which states that "protected persons accused of offences shall be detained in the occupied country, and if convicted, they shall serve their sentences therein."

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[112] As the ICRC Commentary reiterates that "all civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors." See *Commentary - Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Pictet, Jean S. (ed.), 1958, page 39.

[113] See ICRC Commentary regarding Article 5 of the Fourth Geneva Convention, *ibid*.

[114] Article 75(7) of Additional Protocol One to the Four Geneva Conventions.

2. HUMANE TREATMENT

As protected persons,

> Palestinians detained by Israel… are therefore entitled to the relevant provisions of that Convention, including respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs.[115]

The Fourth Geneva Convention states that,

> No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.[116]

As the ICRC Commentary reiterates, such "coercion is forbidden for *any purpose or motive whatever"* [emphasis added].[117] In addition, Article 32 of the Fourth Geneva Convention also affords protected persons deprived of their liberty with general protection against violence of any kind; adverse discrimination; coercion; corporal punishment; and torture.[118] Such actions are prohibited, regardless of "whether they form part of penal procedure or are quasi-or extra-judicial acts, and whatever the means employed."[119]

Moreover, the Fourth Geneva Convention guarantees that civilians shall retain their civil capacity and exercise the rights associated with it, as much as the imprisonment allows.[120] As a High Contracting Party to the Fourth Geneva Convention, Israel is under an international legal obligation to place these persons from the beginning of their detention period in places which meet all health conditions and safety guarantees, and to provide sufficient food, clothes, and medical care for them.[121]

The Convention also specifies that as a Detaining Power, Israel must encourage intellectual and recreational pursuits among internees, particularly children,[122] and grants Palestinian detainees the right "to receive visitors, especially near relatives, at regular intervals and as frequently as possible."[123]

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[115] ICRC, *supra* note 2, page 6.
[116] Article 31.
[117] ICRC Commentary, *supra* note 112, page 220.
[118] Articles 27-43 of the Fourth Geneva Convention.
[119] Article 32, *ibid*.
[120] Article 80 of the Fourth Geneva Convention states that "Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status."
[121] For example, see Article 76 of the Fourth Geneva Convention regarding treatment of detainees; Articles 89 and 90 regarding food and clothing respectively; Article 91 regarding medical attention; and Article 93 on religious duties.
[122] Article 94, *ibid*.
[123] Article 116, *ibid*.

In the case of children, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict reiterated that

> All forms of repression and cruel and inhuman treatment of women and children, including imprisonment…in the course of military operation or in occupied territories shall be considered criminal.[124]

Furthermore, among the violations identified in Article 147 of the Fourth Geneva Convention as grave breaches are wilfully causing great suffering or serious injury to body or health, and wilfully depriving a protected person of the rights of fair and regular trial.

C. ISRAELI CASE LAW

Although actions by the Israeli military authorities and its agents are formally subject to judicial review by the Israeli High Court,[125] traditionally, the Court has taken the position that,

> In a dispute …involving questions of a military-professional character.. the professional arguments of those actually responsible for the security in the occupied territories are valid.[126]

This has greatly undermined efforts to safeguard some of the most fundamental rights of Palestinian prisoners and detainees, and to challenge the "security reasons" presented to him during every stage of the proceedings.

1. ACCESS TO LEGAL COUNSEL

In the case of Palestinian detainees in Israeli detention, they may not have contact with a lawyer until after interrogation, a process that may last weeks. Although they sometimes state in court that their confessions were coerced, judges generally do not exclude such confessions.

In 2002, following Israel's military incursions into the West Bank, and the mass arrest of thousands of Palestinians based on Military Order No.1500, a petition by four human rights non-governmental organizations challenged the legitimacy of Article 3 of this order which prohibits Palestinian prisoners from meeting their lawyers.[127] Although Israeli law prohibits the admission of forced confessions, most convictions in security cases are based on confessions made before legal representation was available to defendants.

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[124] Adopted by UN GA Resolution 3318(XXIX) of 14 December 1974.
[125] B'Tselem, "The Interrogation of Palestinians During the *Intifada*," *supra* note 68.
[126] Amira et al. v. *Minister of Defence et al.,* HC 258/79.
[127] Hamoked, et. Al. v. the Military Commander of the West Bank, HCJ 2901/02 cited in Ayoub, Nizar, *The Israeli High Court of Justice and the Intifada: A Stamp of Approval for Israeli Violations in the Occupied Territories*, Al-Haq, 2003.

Although the Israeli High Court of Justice noted that the detainee's ability to meet a lawyer is one of his most basic rights, it stated that there may be reasons or cases during which the exercise of this right by the detained may be suspended. Refusing to question the government's position that the purpose of the current military operations was to control "the Palestinian terrorism network," it reasoned that such procedures were "legal" because they responded to a need related to the safety and security of the public, and was in accordance with a specific military order issued by the military commander of the West Bank.[128] Generally speaking, no petitions for revoking of an order preventing a meeting between a Palestinian who is interrogated by the GSS and his lawyer have been accepted by the Court.[129]

2. ON CONDITIONS OF DETENTION

During the 2002 military incursions into the West Bank, Israeli occupying forces arrested thousands of Palestinians and detained them at Ofer Camp, located in a closed military zone near the city of Ramallah. Following reports by Palestinian and Israeli human rights organizations regarding the excessively bad detention conditions at Ofer, and the subjection of Palestinian detainees to cruel treatment, including the deprivation of water and food, four non-governmental organisations submitted a petition to the High Court of Justice, protesting the circumstances of detention and the subjection of Palestinian prisoners to various psychological and physical torture and humiliation practices.[130] Rather than discussing the essence of the case and the circumstances of detaining the thousands of arrested Palestinians inside a camp which was not originally equipped to detain prisoners, or examining Israeli practices against them during their detention period, in December 2002, the Israel High Court rejected the petition.

3. TORTURE AND ILL-TREATMENT

In 1987 the Israeli Cabinet established a Commission of Inquiry headed by former Israeli High Court President Judge Moshe Landau, to examine interrogation methods and procedures used by the GSS.[131] Although Israeli law contains explicit limitations on the admissibility of evidence not given of free will,[132] the Landau Commission report confirmed that "in practice, Israeli courts

[128] *Ibid.* One of the reasons cited by the High Court justices for their decision was the general nature of the claim and that it did not contain specific and individual claims related to specific persons. This argument disregarded the fact that the petition did not appeal the detention cases themselves. Following the arrest of thousands of individuals, the petitioners could not plead individual cases as there was not enough information about any one individual precisely because of the fact that these detainees were denied access to lawyers.

[129] In some cases, the petition was withdrawn to prevent rejection of the petition, which may have nevertheless resulted in financial costs. See Public Committee Against Torture, "Back to a Routine of Torture," *supra* note 62.

[130] *HaMoked, et al. v. the Military Commander of the West Bank*, HCJ 2901/02, issued on 7 April 2002 and amended on 15 April 2002.

[131] Two widely reported scandals led to the establishment of this commission: the first was related to the extra-judicial killing of two Palestinians involved in the hijacking of an Israeli bus in 1984, otherwise known as the "Bus 300 Affair," and the second one known as the "Nafsu Affair," which concerned the conviction of an Israeli officer for a false confession extracted under torture. See Al-Haq, *In Need of Protection, supra* note 24.

[132] The formal position under Israeli military law; the same laws apply in the OPT, unless stated otherwise. See B'Tselem, "Interrogation of Palestinians During the *Intifada*," *supra* note 68.

have long admitted confessions obtained by pressure and not conforming to the criterion of free will."[133]

Addressing the giving of false testimony by the GSS about confessions extracted under torture, and more generally, GSS interrogation methods, the Commission confirmed that interrogation techniques involved the use of force, and that they were employed pursuant to superior orders.

More dangerously, the Commission stated that the internal guidelines used by the GSS were not manifestly illegal, and deemed certain types of "moderate force permissible, even unavoidable in order to save lives."[134] In fact the Commission went so far as stating that in dealing with persons who pose a "security threat" to Israel, the use of a "moderate degree of pressure," including physical pressure, in order to obtain crucial information, is unavoidable under certain circumstances.[135] In addition, it argued that the GSS could rely on the "defence of necessity" provision laid down in Israeli Penal Code as a legal justification their practices, and which stated that,

> A person shall not bear criminal liability for an act which was immediately necessary in order to save the life, freedom, person or property, be it his own or that of another, from a concrete danger of severe harm stemming from the conditions existing at the time of the act, and having no other way but to commit it.[136]

In addition, in a secret annex, the report laid down guidelines on the levels of force permitted during interrogations, in an attempt to redefine practices which clearly constitute torture according to international standards.

In September 1999 the High Court of Justice outlawed several interrogation techniques widely used by the GSS, on the grounds that the use of moderate physical pressure of this nature is not inherently required by the interrogation, and were therefore unlawful. These methods included violent shaking; hooding, shabeh; playing loud music and sleep deprivation.[137]

However, the ruling did not contain an explicit and complete definition of these practices as torture. In addition, the Court acknowledged that "the necessity defence" is open to all, particularly

[133] In fact Military Order No. 378 gives Israeli military courts wide powers to ignore such limitations, and have usually ruled that a confession did not violate the criterion of free will. See *ibid*, page 14.
[134] Al-Haq, *In Need of Protection, supra* note 24.
[135] *Ibid*.
[136] Verbatim translation of article 34(11) of the Israeli Penal Code cited in B'Tselem, "Legitimizing Torture: The Israeli High Court of Justice Rulings in the the Bilbeisi, Hamdan and Mubarak Cases: An Annotated Sourcebook," January 1997, available at http://www.btselem.org/Download/199701_Legitimizing_Tortur%20_Eng.doc, page 4.
[137] Al-Haq, *In Need of Protection, supra* note 24.

an investigator acting in an organizational capacity of the state in interrogations of that nature,"[138] and effectively enables Israeli security agency officials to rely on this argument to exert "moderate physical pressure" against detainees deemed to be "ticking bombs," or considered to possess information about an imminent attack, without being criminally liable. In addition, the Court's ruling gave the Israeli legislative branch the final say in determining whether it is appropriate for Israel "to sanction physical means in interrogations, and the scope of these means which deviate from the 'ordinary' investigation rules."[139]

Human rights organisations continue to receive continued allegations regarding the use of interrogation techniques against Palestinian detainees, including minors, by Israeli forces.[140] In this regard, as one Israeli human rights organisation noted, "the bodies which are supposed to keep the GSS under scrutiny and ensure that interrogations are conducted lawfully, act instead as rubber stamps for decisions by the GSS."[141]

In addition, UN treaty monitoring bodies and human rights organizations continue to question the degree to which Israel has fulfilled its legal obligation under international law to investigate allegations of ill-treatment or torture.[142] Even where investigations of these complaints have been carried out by Israeli authorities in the past, serious doubts have also been raised regarding their impartiality.[143]

Since the ruling, the Attorney General's Office has approved dozens of cases involving allegations of torture, on the ground that the "defence of necessity" applies to their perpetrators.[144] As the HRC noted, "the part of the report of the Landau Commission that lists and describes authorized methods of applying measures remains classified," thereby giving rise to abuse. Furthermore it stressed that the continued use of the aforementioned interrogation techniques "constitutes a violation of Article 7 of the Covenant in any circumstance."[145] According to Amnesty International, it also made Israel at the time, "the only country in the world known to have effectively legalized torture by officially allowing such methods."[146]

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[138] According to the ruling, "an act committed under conditions of necessity does not constitute a crime, [and is] instead ..deemed an act worth committing in such circumstances." " Not only is it legitimately permitted to engage in the fighting against terrorism, it is our moral duty to employ the necessary means for this purpose." *See Public Committee Against Torture et. Al. v. the State of Israel*, HCJ 5100/94, paragraph 33, available at http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.HTM.

[139] *Ibid*.

[140] UN Commission on Human Rights, "Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories, Occupied by Israel Since 1967 Submitted in Accordance with Commission Resolution 1993/2A," (E/CN.4/2004/6), 8 September 2003.

[141] PCATI, "Back to a Routine of Torture," *supra* note 62.

[142] See UN HRC, *Concluding Observations: Israel, supra* note 87.

[143] UN Commission on Human Rights, "Report of the Special Rapporteur of the Commission on Human Rights," *supra* note 140.

[144] Public Committee Against Torture, "Back to a Routine of Torture," *supra* note 62.

[145] UN HRC, *Concluding Observations: Israel, supra* note 87.

[146] Amnesty International, "Israel: Amnesty International calls on Israel's High Court to respect international law by rejecting torture," (AI INDEX: MDE 15/2/98), 7 January, 1998, available at http://web.amnesty.org/library/Index/ENGMDE150021998.

III. CONCLUSION

Sentencing Palestinians under Israel's military legal system and orders is one of the clearest examples of the presence of a discriminatory approach to "justice" for Palestinians in the OPT.

For many years, Israeli military orders, have been consistently criticised by the local and international human rights organizations and concerned UN bodies as failing to meet the minimum international standards on judicial procedures. Force continues to be used during detention and imprisonment, regardless of the charge or allegation, and often in order to extract information regarding a possible, rather than immediate or verifiable threat. To date, thousands of Palestinians have been subjected to long periods of detention without charge or trial and without access to legal counsel; and have endured torture and other forms of cruel, inhuman and degrading treatment in detention.

Refusing to challenge the Israeli military authorities' claims of security, the High Court failed to address the circumstances during which Israeli authorities consider torture as a legitimate and legal option, or to reiterate the prohibition under international law on torture under all circumstances.

Under the pretext of "security," Israel has issued numerous military orders that have served to sustain and tailor the detention of Palestinians, most notably through administrative detention in a manner that effectively denied Palestinian detainees any meaningful protection of their rights.

Resorting to legal pretexts and justifications in order to grant legitimacy to its violations of Palestinians' fundamental rights, Israel formally claims to ensure Palestinians access to judicial or semi-judicial bodies to which the detainees may appeal, including the military courts, military objections committees and the Israeli High Court. However, in this regard, it remains important to highlight that the Israeli High Court has rarely challenged the notion of what constitutes a threat to security as provided by Israeli military authorities.

Supported by both the Israeli government and the judiciary, administrative detention, as practiced by the Israeli military authorities, violates the right to a fair trial on many levels, as has been noted by international human rights organisations and intergovernmental bodies for a number of years, and constitutes a serious violation of international human rights and humanitarian legal standards which are binding on Israel. Therefore, and as this chapter seeks to highlight, the proceedings and decisions issued by these judicial bodies effectively leave access to "justice" as formally "afforded" to Palestinians in the West Bank and Gaza Strip devoid of any meaning.

OBLIGATIONS OF THE INTERNATIONAL COMMUNITY

Ceremony to commemorate the Death of UN Special Representative Sergio Vieira de Mello in August 2003 outside the United Nations Truce Supervision Organization's Office in Jerusalem.
(UNTSO, 2005)

OBLIGATIONS OF THE INTERNATIONAL COMMUNITY

I. INTRODUCTION

Previous chapters have detailed a number of violations of international humanitarian law and human rights law in the Occupied Palestinian Territories (OPT). These violations give rise to secondary duties of reparation by the perpetrator but they may also incur duties on third party actors. States, as the traditional and sovereign subjects of international law, carry most of these and will consequently take up most of the analysis in the present chapter. But recent developments of international law warrant an additional discussion of the duties of non-state actors.

II. OBLIGATIONS OF STATES

The obligations under international law do not end at national borders. This is particularly the case when the violating state is in denial of its obligation to cease the illegal action such as in the case of Israel denying the de *jure* applicability of the Fourth Geneva Convention and denying its obligations under international human rights law with regard to the Palestinian population of the OPT. In such circumstances, third-party states carry duties pertaining to Israel's illegal actions and omissions. These duties arise from the obligation to respect and ensure respect for certain conventional provisions by other state parties, the duty to prosecute those responsible for grave breaches of the Four Geneva Conventions and certain *erga omnes* obligations under international customary law. These sources of third party duties, although they partially overlap, will, in the interest of greater clarity, be examined successively.

A. OBLIGATION TO RESPECT AND ENSURE RESPECT

Article 1 common to all four Geneva Conventions notes that, "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." States must make sure that they themselves, as well as all other High Contracting Parties, are not in breach of the Convention's provisions. In regards to the obligation of third-party states to ensure respect, the International Committee of the Red Cross (ICRC) has noted,

> It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.[1]

[1] ICRC, *The Geneva Conventions of 12 August 1949, Commentary-Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Pictet, Jean S. (ed.), 1958, page 16.

In accordance with the Geneva Conventions, High Contracting Parties must therefore use lawful means at their disposal to bring states in breach of their obligations into compliance with the Conventions. In a significant statement on this obligation in its opinion on the Construction of a Wall in the OPT, the International Court of Justice (ICJ) emphasised that "…every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with"[2] and hence "under an obligation, while respecting the United Nations (UN) Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."[3]

The question then remains how to implement the obligation to restore respect for the Fourth Geneva Convention by violating states. There are a range of lawful means by which this can be done, including measures to exert diplomatic pressure, coercive measures, and measures taken in cooperation with international organisations. At the lower end of the range is the use of diplomatic pressure and public denunciation. Next are such actions as expulsion of diplomats, non-renewal of trade privileges or agreements, reduction or suspension of aid, restrictions and/or ban on arms trade or military technology, ban on investments, restriction of exports, and freezing of capital. At the top of the range are countermeasures and the use of force undertaken through the UN.[4] To the extent that third-party states are inactive on the question of Israel's violations of the four Geneva Conventions, they are in breach of their own positive obligation to ensure respect thereof. As noted by the ICRC, "[i]t is clear that Article 1 is no mere empty form of words, but has been deliberately invested with imperative force. It must be taken in its literal meaning."[5] Unfortunately, many states are not implementing their obligations under this provision. A prime example of this can be found in G. W. Bush's letter to Ariel Sharon in April 2004, in which the US President endorsed the continued existence of Israeli settlements in the West Bank.[6] The US use of its veto power in the UN Security Council (SC) also reflects badly on its commitment to implementing Common Article 1.[7]

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[2] International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, June 2004, paragraph 158.

[3] *Ibid*., paragraph 159.

[4] Palwankar, U., "Measures Available to States for Fulfilling Their Obligations to Ensure Respect for International Humanitarian Law," *International Review of the Red Cross*, No. 298, January-February 1994, pp. 9-25. A countermeasure is an act which would normally be illegal but which is rendered lawful by a prior illegal act committed by the state against which the act is directed.

[5] See ICRC, *supra* note 1, at page 17.

[6] Regarding Israeli settlements in the OPT, the letter expressed the US position that it "[i]n light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949." See White House Press Office, "Bush's Letter to Sharon," published in *Jerusalem Post*, 14 April 2004, http://www.jpost.com.

[7] For example, on 26 March 2004, the US vetoed a UN SC draft resolution that enjoyed the approval of 11 out of 15 member states, and which would have condemned Israel's assassination of the founder and spiritual leader Sheikh Ahmed Yassin in March 2004. See "US Sinks UN Resolution on Yassin," *BBC News*, http://news.bbc.co.uk. Similarly on 5 October 2004, a US veto blocked a resolution that would have demanded that Israel halt all military operations in northern Gaza and withdraw from the area. The draft resolution had received 11 votes in favour, with Germany, Romania and the United Kingdom abstaining. See UN News Center, www.un.org/apps/news.

The preceding discussion only concerns international humanitarian law, as embodied in the Fourth Geneva Convention, and not human rights law. However, regarding the latter body of law, one may search for an equivalent in the UN Charter. According to Article 55(c), "the United Nations shall promote" […] "universal respect for, and observance of, human rights and fundamental freedoms." The human rights in question are those provided for in the UN conventions collectively known as the Universal Declaration of Human Rights, most notably the International Covenants respectively on civil and political rights, and economic, social and cultural rights. Article 56 of the UN Charter provides: "all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." This places an obligation on each UN Member state, which in practice means virtually every state in the world, to take positive action to ensure universal respect for human rights. In other words, these two articles, though too often disregarded, create a duty for UN member states to respect and ensure respect for the UN human rights conventions among state parties to these.

B. DUTY TO PROSECUTE THOSE RESPONSIBLE FOR GRAVE BREACHES

Article 146 of the Fourth Geneva Convention places on all High Contracting Parties the duty to provide effective penal sanctions for persons committing, or ordering to be committed, any of the 'grave breaches' detailed in Article 147. Furthermore, it obliges each High Contracting Party to search for such persons and to bring them to justice, either before a domestic court or a foreign court, by regular extradition.[8] In other words, grave breaches are war crimes with mandatory universal jurisdiction. In an important corollary, Article 148 of the Convention prohibits High Contracting Parties from absolving themselves, or other such Parties, of any liability incurred by itself or by another High Contracting Party in respect of grave breaches. This prohibits using individual criminal responsibility for grave breaches as a bargaining chip in peace agreements.

This does not mean that the High Contracting Parties have no duties with regard to other breaches. Article 146 provides that each High Contracting Party "shall take measures necessary for the suppression of" such breaches. In light of the Statutes and case law of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court, it is clear that war crimes is a much broader category than that of grave breaches. Under the fundamental principle of individual criminal responsibility, where there is crime, there must be liability. The difference between grave breaches and other war crimes is merely that in the latter case, the High Contracting Parties have less clearly defined procedural obligations on how to make sure that the criminals are held responsible.

As shown in previous chapters, war crimes, including grave breaches, are common in the OPT. The High Contracting Parties therefore have a duty to actively search for the perpetrators and to bring them to justice under effective domestic penal legislation that reflects the rules of

[8] See ICRC, *supra* note 1, at page 590.

international humanitarian law. The active search must, of course, remain within the limitations of general international law. If a suspect is present on the territory of a High Contracting Party, this Party has a duty to apprehend the suspect and bring him or her to justice. If the suspect is on the territory of another state, the searching state may request his or her extradition by regular procedure. Dismissal of a case based on lack of jurisdiction or inadmissibility, outside of generally recognised principles of international law, would be a breach of duty under the Geneva Conventions. Al-Haq is not aware of any prosecutions, on-going throughout 2004, that were initiated by High Contracting Parties against perpetrators of grave breaches or other war crimes in the OPT.[9]

C. *ERGA OMNES* OBLIGATIONS

Some of the international obligations violated by Israel are *erga omnes*. Such obligations are "the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection."[10] The ICJ has held that "[t]he obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self determination, and certain of its obligations under international humanitarian law."[11] Going one step further, the Court concluded that violations of these obligations create not only a right for other states to demand redress but effectively places obligations on them to do so. These include the duty of non-recognition of the illegal situation, of non-assistance in maintaining the illegal situation and of actively ensuring that the illegality is brought to an end.[12] This raises separate questions of the precise content of the *erga omnes* obligations and of how these should be enforced.

As for the content of the *erga omnes* obligations, the right to self determination and "certain" duties under international humanitarian law need to be substantiated. The right of self-determination of the Palestinian people is violated by the strangulation of the Palestinian economy, the suffocating restrictions on the PNA, the Annexation Wall fracturing the Palestinian territory and imprisoning the Palestinian population, the Israeli settlement policy dispossessing Palestinians of their land and, above all, the prolonged occupation. The *erga omnes* obligations of international humanitarian law concern rules that are fundamental to the respect of the human person and "elementary considerations of humanity."[13] This refers to the basic principles of international humanitarian law such as the protection of the civilian population and civilian objects, and the

[9] A case brought in Belgium on 18 June 2001 against Israeli Prime Minister Ariel Sharon was dismissed by the Belgian Supreme Court on 24 September 2003. A case brought in the United Kingdom in October 2002 against then General Shaul Mofaz was dismissed in February 2004 on the basis of official immunity. In October 2002, Swedish prosecutors refused to pursue a case against Israeli Prime Minister Ariel Sharon.

[10] *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962), Second Phase, ICJ (1970) 32, paragraph 33. See also ICJ Advisory Opinion on Wall, *supra* note 2, paragraph 155.

[11] See ICJ Advisory Opinion on Wall, *ibid*, paragraph 155.

[12] *Ibid*, paragraph 159. Although the scope of the Advisory Opinion was limited to the Annexation Wall, the general language used by the Court clearly reflects broader legal principles.

[13] See *ibid*, paragraph 157.

distinction between combatants and non-combatants.[14] These principles are violated by blatant Israeli attacks on Palestinians and encroachments on their property committed in disregard of their protected status under international humanitarian law.

To this must be added "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination,"[15] in other words the most fundamental human rights. The exact list may be debated, but it surely includes the right to life, the right not to be subjected to torture, and the right not to be discriminated against on racial grounds, all three of which are sadly relevant to the Israeli occupation of the West Bank and the Gaza Strip. Bilateral agreements between Israel and another state or international organization may give the latter party further responsibilities. For instance, the European Union's (EU) Association Agreement with Israel provides in its Article 2,

> Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.

Action or inaction by the EU that clearly and expectably aggravates the likelihood, frequency, or severity of Israel's human rights violations in the OPT would be in disregard of this provision. Inversely, it creates, in conjunction with the 'suspension clause' in Article 79(2) of the Agreement,[16] a conventional basis for European action against Israeli human rights violations, action which could potentially lead all the way to a suspension of the agreement.[17]

As for the enforcement of these obligations, the general international law of state responsibility, as reflected in Articles 40 and 41 of the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, provides that a gross or systematic failure ("serious breach") of a state to fulfil an obligation arising under a peremptory norm of general international law entails for all other states the obligation, respectively, to cooperate to bring to an end through lawful means the serious breach and not to recognise as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation. All states are obliged, within their respective means and while honouring the UN Charter, to work towards these goals.

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[14] *Legality of the Use or Threat of Nuclear Weapons*, ICJ (1996) 256, paragraph 78.

[15] *Barcelona Traction, Light and Power Company, Limited, supra* note 10, at 32, paragraph 34.

[16] Article 79(2) provides, in its most relevant part: "If either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take appropriate measures." The remainder of the provision sets out substantive and procedural rules tempering the possibility of recourse to suspension.

[17] Report by the Euro-Mediterranean Human Rights Network (EMHRN), *A Human Rights Review on the EU and Israel – Relating Commitments to Actions*, December 2004, page 15. Available in April 2005 from http://www.euromedrights.net/english/emhrn-documents/pressreleases/09_12A_2004.htm.

D. STATE COOPERATION TO BRING SERIOUS BREACHES TO AN END

According to Article 41(1) of the Draft Articles,

> States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 [a gross or systematic failure by a State to fulfil a peremptory norm of international law.

The channels of international cooperation are international organisations, particularly the UN, international conferences and bi- and multi-lateral agreements. The collective action may consist of all measures which are not inherently illegal under international law, such as diplomatic pressure, public denunciation, expulsion of diplomats, non-renewal of trade privileges or agreements, reduction or suspension of aid, restrictions and/or ban on arms trade or military technology, ban on investments, restriction of Israeli exports, freezing of capital and countermeasures. In respect of the *erga omnes* obligations of international humanitarian law, the duty to cooperate to bring violations to an end adds an extra dimension to the previously discussed duties under common Article 1 of the four Geneva Conventions. There is not only a duty to respect and to ensure respect thereof but also to cooperate in achieving those goals. The duty of states to cooperate in the realisation of the Palestinians' right to self-determination has to some extent been implemented through the numerous UN resolutions calling for the creation of a Palestinian state. Yet, today there is still no such state. The UN SC has the power and ability to follow up on these resolutions and turn them into reality. The states that are represented on it must cooperate to make this possible.

E. NON-RECOGNITION AND NON-ASSISTANCE

Article 41(2) of the Draft Articles stipulates,

> No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [a gross or systematic failure by a State to fulfil a peremptory norm of international law], nor render aid or assistance in maintaining that situation.

The ILC has indicated that such norms include the basic rules of international humanitarian law, the prohibition of racial discrimination, as well as the right to self-determination.[18] No state may undertake any action that gives legal recognition, explicitly or implicitly, or helps maintaining, even without recognition, a situation contravening these norms. Since previous chapters have shown numerous Israeli breaches of these norms in the OPT, actions by states which may aid or assist in, for example, the construction of the Wall, or in the maintenance of the settlements, would be a violation of the customary obligation of non-recognition and non-assistance.

[18] ILC, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, pages 283-284.

Since all states have a legal interest in the observance of these erga omnes obligations, the Palestinian National Authority (PNA) cannot waive them. If for instance the PNA were to recognise the legal existence of certain Israeli settlements in the West Bank, it would not affect the obligation of non-recognition and non-assistance that other states have with regard to the Israeli settlement policy's serious violation of the peremptory norm of self-determination.[19] Since the issuance of the ICJ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, states are beginning to note this obligation. According to one news report, donor countries in the OPT have been examining those projects to which they are providing financial assistance, to ensure that they are not aiding or assisting in the Wall's construction or the settlements.[20]

III. OBLIGATIONS OF NON-STATE ACTORS

While states traditionally carry the burden of obligations under international law, the international legal regime does not exclude obligations of non-state actors, including transnational corporations and other business enterprises.[21] As such, corporations could breach international law either through direct violations (e.g., illegal labour practices) or indirect violations (e.g., providing material support to governments which are actively committing abuses). Corporations that provide assistance in the construction of the Wall thereby disregard the principles contained in the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms).

These norms were adopted on 13 August 2003 by Resolution 2003/16 of the UN Sub-Commission on the Promotion and Protection of Human Rights. It is the first universal instrument to go beyond mere guidelines for how transnational corporations ought to behave and propose minimum human rights standards that these corporations must respect. The UN Norms currently have the legal status of "soft law". As such, "the legal authority of the Norms now derives principally from their sources in international law as a restatement of legal principles applicable to companies, but they have room to become more binding in the future."[22] Meanwhile, the provisions in the UN Norms pertaining to their implementation, in paragraphs 15-18, clearly show their aspiration to become hard law.

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[19] See *ibid*, at pages 289-290.

[20] Hass, A., "US Won't Fund Separate Roads for Palestinians," *Ha'aretz*, 30 November 2004.

[21] As observed by Louis Henkin during a conference on the 50th anniversary of the UDHR, "*Every individual* includes juridical persons. *Every individual and every organ of society* excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all." Henkin, L. "The Universal Declaration at 50 and the Challenge of Global Markets," *Brooklyn Journal of International Law*, 25(1), 1999, page 25.

[22] Weissbrodt, D., & M. Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," 97 *American Journal International Law*, 2003, page 915.

The first paragraph of the UN Norms states,

> States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. *Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups* [emphasis added].

They note that such corporations must not support, solicit, or encourage states or any other entities to abuse human rights, adding "…[t]hey shall further seek to ensure that the goods and services they provide will not be used to abuse human rights."[23]

The corporations that support the Israeli authorities' violations of international law through the provision of materials or equipment are disregarding these principles. There have been particular allegations regarding the possible involvement of the Irish corporation Cement Roadstone Holdings (CRH). CRH has a 25% stake in Mashav, an Israeli holding company that in turn fully owns Nesher, the only cement production company in Israel. In a meeting with Amnesty International – Ireland, CRH indicated that "in all probability," cement produced by Nesher was being used in the construction of the Wall.[24] Several companies, notably Caterpillar,[25] have provided the heavy equipment necessary for the punitive demolition of Palestinian homes and construction of the Wall and Israeli settler homes, including uprooting trees to create buffer zones around settler areas.

These companies are under a secondary obligation to "provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken."[26] In other words, the companies should immediately cease all support to Israeli violations in the OPT. Further, they should provide reparation to those who have been adversely affected by such support.

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[23] *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 13 August 2003, paragraph 11.

[24] Communication from S. Love, Amnesty International - Ireland, 3 December 2004.

[25] It is worth noting that the Caterpillar Corporation has expressed a commitment to corporate responsibility, stating that, "Caterpillar accepts the responsibilities of global citizenship. Wherever we conduct business or invest our resources around the world, we know that our commitment to financial success must also take into account social, economic, political, and environmental priorities. We believe that our success should also contribute to the quality of life and the prosperity of communities where we work and live." Caterpillar, *Code of Worldwide Business Conduct*, 1 October 2000. However, despite this verbal commitment, this has not extended to a change in their business practices which result in the violation of Palestinians' rights. In a letter dated 19 April 2004, Caterpillar CEO James Owens stated, "nevertheless, the fact remains that with more than two million of our machines and engines in use throughout the world, we simply do not have the practical ability or legal right to determine how our products are used after they are sold." The letter was available in April 2005 at http://www.catdestroyshomes.org/article.php?id=181.

[26] See *UN Norms on the Responsibilities of Transnational Corporations, supra* note 23, paragraph 18.

IV. CONCLUSION

International law has definitively stepped beyond its traditional bilateral framework. Rules of international law, both customary and conventional, clearly place duties on the international community, and specifically on the states that compose it, to put an end to Israeli violations of international law. To the extent that these states prioritize other concerns, they are in contravention of their own international legal duties. Civil society and human rights organisations have a key role in reminding states, and other international actors, of their obligations. The UN has recently taken important steps towards ensuring such respect, especially with the ICJ's Advisory Opinion on the Wall and the UN General Assembly Resolution of 20 July 2004 calling for its implementation. But the Wall is still being built and it is only a part of the pattern of Israeli violations in the OPT. There is still much to be done. The SC, in particular, needs to support its fellow UN organs and take a principled stand and strong action to end these violations.