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Expert Opinion

The Legality of Prolonged and *De Facto* Permanent Fragmentation and Separation of Occupied Territories in the Context of the Gaza Blockade

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1. The issue

The undersigned has been requested to assess the legality or illegality of the Israeli policy which consists of, or results in, a permanent separation between the West Bank and the Gaza. Both areas belong to the Palestinian territory which was invaded and then occupied by Israel in 1967. Their separation has a number of severely detrimental effects for the Palestinian population of both parts of the territory, but in particular for the population of the Gaza Strip due to the closure of that area proclaimed in 2007. This separation policy employs various instruments, in particular a naval and aerial blockade of the Gaza Strip and the closure of its land borders, at times partial, at times total. This separation policy must be regarded in conjunction with a policy of fragmentation of the Occupied Palestinian Territory, in the West Bank and also, until the Israeli withdrawal in 2005, in the Gaza Strip which has changed, and was meant to change, the settlement structure of the Palestinian population of the West Bank. These policies and practices employ a variety of instruments which raise specific legal questions, and they must be assessed in the light of a number of different legal aspects. Yet all these policies and practices put the viability of the Palestinian State into jeopardy. The Opinion has therefore to deal with the legal evaluation of these policies and practices taken as a whole.

The present Opinion is tasked to

- assess the legality of these policies and practices,
- assess the possibility of remedies or countermeasures against policies practices found to be illegal,
- elaborate possible steps to be taken by third parties in this respect,
- design a legal framework for measures taken to remedy certain problems.

2. The history of the Israeli occupation and the separation policy

Until the end of the First World War, Palestine was part of the Ottoman Empire. Then, it was placed under the mandate system according to Art. 22 of the League of Nations Covenant. It became a class "A" Mandate to be administered by Great Britain. When the mandate was about to expire according to its terms, Great Britain withdrew from Palestine and Israel declared its independence on May 14, 1948. As the partition plan proposed by the UN General Assembly[1] was rejected, an armed conflict broke out in Palestine and between Israel and its Arab neighbours. The hostilities were terminated by armistice agreements concluded between Israel and each of its neighbours in 1949. The armistice line between Israel and Jordan was drawn by the agreement of 3 April 1949. Jordan annexed the area situated in the former mandate territory east of the armistice line. This "Green Line" still constitutes the boundary between Israel and the "West Bank", except that Israel declared the annexation of East Jerusalem, i.e. the city area east of the Green Line, which is not recognized by the rest of the World.[2] The armistice line between Israel and Egypt was drawn by the agreement of 24 February 1949. It drew the line between Israel and the Gaza Strip which is still valid today. The Gaza Strip was placed

[1] Resolution 181 (II) of 29 November 1947.
[2] See Security Council resolution 298 of 25 Sept. 1971.

under Egyptian administration, but not annexed by Egypt. During the 1967 armed conflict, Israel invaded and then occupied both the West Bank and the Gaza Strip. Thus, those territories of the former Palestinian mandate which had not become Israeli territory were again placed under a single territorial regime, namely that of Palestinian territory occupied by Israel.[3] Although two different military commanders were in charge, one for "Judaea and Samaria", the other for the Gaza Strip, Israel treated the area occupied in 1967 as a single territorial unit.[4] The relevant documents of the United Nations address the "Occupied Palestinian Territories" without making any difference between the West Bank and the Gaza Strip.[5] This situation did not change when Egypt[6] and Jordan[7] concluded peace treaties with Israel. Neither was the West Bank returned to Jordan nor the Gaza Strip handed back to Egyptian administration. When negotiations concerning an arrangement between Israel and the Palestinian people were conducted in the late 1980ies and early 1990ies, the West Bank and the Gaza Strip were treated as a unity. This is expressly confirmed by the instruments which resulted from this negotiation process between 1993 and 1995,[8] and still maintained by the Israeli Supreme Court in 2007.[9]

A policy of fragmentation of the occupied territory was, however, introduced by Israel by a number of measures which all make life for Palestinians more difficult. They restrict the freedom of movement of the Palestinian population, hinder all kinds of trade and the provision of essential services and have affected, and were meant to affect, the Palestinian settlement structure. The core element of this fragmentation is the Israeli settlements policy. The establishment of Israeli settlements has displaced Palestinians and has led to a system of infrastructure (roads and the use of water resources) which disregards essential interests and needs of the Palestinian population in favor of the settlements. It has entailed corresponding security concepts as security now not only means the security of the occupying forces, but also security of the settlements. The use of roads has become difficult or even impossible for Palestinians by the construction of roadblocks and the establishment of numerous checkpoints. From the point of view of the law of occupation, this policy has been facilitated by the categorization of the occupied territories in different types of areas (A, B and C) by the Interim Agreement of 1995, a result certainly not intended by the Palestinian party to the Agreement. In Area C, most powers of the Occupying Power have not been transferred to the Palestinian Authority, a fact used by the Israeli administration to create all kinds of restrictions for the Palestinian population. Life has become difficult for Palestinians in Area C, East Jerusalem and Area H2 of Hebron where Israel maintains its full control and all the settlements are. This includes, inter alia, building restrictions for Palestinians[10] and other severe limitations on land use. The

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[3] *Ajuri v. IDF Commander*, Israel HCJ 7015/02, Judgment of 3 Sept. 2002, [2002] Isr.LR 1, para. 22.
[4] HCJ, *loc.cit.* note 3.
[5] This is in particular true for the fundamental Security Council resolution 242 of 22 November 1967.
[6] Treaty of Peace between the Arab Republic of Egypt and the State of Israel, 26 March 1979, Art. II.
[7] Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, 26 Oct. 1004, Art. 3 (2) and Annex 1(a), sec. 2 I G.
[8] Declaration of Principles, 13 September 1993, 32 ILM 1525 (1993); Gaza-Jericho Agreement, 4 May 1994, UN Doc. A/49/180 = S/1994/727, 20 June 1994, Annex; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995; for details see below text accompanying notes 85 - 87.
[9] *Hamdan et al. v. Commander of the Southern Command et al.*, HCJ 11120/05, Judgment of 25 July 2007, para. 14.
[10] B'Tselem, Planning and building in Area C, www.btselem.org/planning_and_building . See also Human Rights Committee, Concluding observations on the fourth periodic report of Israel, Doc. CCPR/C/ISR/CO/4, 21 November 2014, para. 9.

establishment of closed military areas is used to compel Palestinians living there to move away.[11] All these measures amount to a policy promoting the concentration of the Palestinian population in certain urban centers. The culmination of this policy was construction of a Wall in the occupied territory which shields many settlements and makes life for Palestinians still more difficult. The Wall renders many normal activities of everyday life next to impossible: access to agricultural land, marketing of agricultural and other products, access to schools, access to medical services. These measures, taken together, have been qualified as an unlawful *de facto* annexation by the ICJ[12] and by other UN organs. This development is also a matter of concern as it puts the "contiguity" of the Palestinian State at risk.[13] Thus, an Israeli policy of fragmentation can be observed within the West Bank (and formerly also in the Gaza Strip) which is considered to be problematic under international law as violating international humanitarian law, international human rights law and the right to self-determination of the Palestinian people.[14]

As to the separation of the Gaza Strip,[15] movement of persons and goods was restricted by Israel since 1989 and stopped completely following the Intifada of 2000. This first closure already had deleterious effects on the Palestine economy. In addition, Israel bombed the Gaza Seaport in 2000, while still under construction, and in 2001 the Gaza Airport, as a reaction to the said Intifada, thus cutting Gaza off from the outside world. Israel still prohibits their reconstruction.

A step further affecting the relationship between the West Bank and the Gaza Strip was the Israeli disengagement in 2005. It ended the Israeli administration of the Gaza Strip by an IDF military commander. But the "Agreement on Movement and Access" concluded between the Government of Israel and the Palestinian Authority on 15 November 2005 maintained the "link between Gaza and the West Bank".[16] It provided *inter alia* for bus and truck convoys between the two parts of the Palestinian territory. The border between Israel and the Gaza Strip as well as the airspace over the Gaza Strip and access by sea remained under strict Israeli control. Whether this withdrawal of Israeli troops and administration from the Gaza Strip terminated the belligerent occupation of that area as a matter of law is controversial. Israel maintains that the disengagement has ended the occupation and by the same token the responsibilities of Israel flowing from the regime of occupation. The international community at large and relevant third States,[17] but also the Israeli Supreme Court[18] do not accept that view.

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[11] See for instance the establishment of a shooting range south of Hebron, information posted by B'Tselem: Firing Zone 918, www.btselem.org/south_hebron_hills/firing_zone_918.

[12] See ICJ, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, paras. 132 *et seq.*

[13] The need to preserve the contiguity of the Palestinian State and problematic Israeli measures endangering that contiguity have been discussed in particular with regard to certain settlements, see J. Purkiss, 'E-1 construction severs contiguity of Palestinian State', *Palestine Monitor,* http://palestinemonitor.org/details.php?id=lctktea1411y14nrxq0qk.

[14] For further details see below sec. 4.1. .

[15] Detailed information on these developments is found in: United Nations, Office of the Coordination of Humanitarian Affairs (OCHA); *Easing the blockade. Assessing the Humanitarian Impact on the Population of the Gaza Strip,* Jerusalem 2011; Gisha, *A costly divide – February 2015. Economic repercussions of separating Gaza and the West Bank,* Position Paper, 2015, p. 4 *et seq.*; see also 'Blockade of the Gaza Strip', http://wikipedia.org/wiki/Blockade_of_the_Gaza_Strip.

[16] www.unsco.org/Documents/Key/AMA.pdf.

[17] See below note 50 and accompanying text.

[18] *Hamdan* case, see above note 9.

Gaza continued to be governed by the Palestinian Authority with the seat in Ramallah. When the 2006 elections brought Hamas into power, economic sanctions against the new PA were imposed by Israel and also by the Quartet. The situation changed when in 2007 Hamas *de facto* took over all governmental powers in the Gaza Strip. The sanctions against the PA were lifted, but Israel imposed a far reaching closure of the Gaza Strip. A naval and aerial blockade of the Gaza Strip was declared. The closure of the land border implied restrictions on the movement of persons as well as on the export and import of goods with variations over time.[19] As to imports, the ban concerned not only military or dual use goods, but different civilian goods at different times. As to exports, Israel imposed a complete prohibition of all exports of agricultural goods from Gaza to Israel and the West Bank. This constituted a further fatal blow for the economy of the Gaza Strip as 85% of the goods exported from this area were sold in the West Bank.[20] Shipments of goods to Europe and some Arab countries have been allowed in small quantities, but they had to pass through Israel. No commercial traffic by sea or air is allowed by Israel. The Rafah border crossing between the Gaza Strip and Egypt was closed for any commercial traffic in both directions, however re-opened in 2011 and closed again in 2013. All this has put the provision of supplies necessary for the survival of the civilian population in jeopardy. In particular, the export ban has paralyzed the industrial sector in the Gaza Strip. Some 83% of the factories had to shut down or work at half their capacity. As possibility of export earnings is seriously restricted, there are not enough resources for paying imports, even where such imports were allowed by Israel. As the economy of the Gaza Strip is not self-sufficient, this leads to an economic collapse. At the end of 2011, the unemployment rate was 30,3 %, the double of what it was in 2000. By 2014, it rose to 45%.[21] Between 1994 and 2010, the GDP of the Gaza Strip had a negative growth of 14%.

The restrictions on the movement of persons have had severe negative consequences for the access of the Gaza population to health and educational services, and also for family ties. The economic collapse also impeded the remaining foreign aid projects.[22] Whether and, if so, to what extent the policy of separation is being reversed after the armed conflict of 2014 is too early to say at the time of writing.

The whole of these measures has been justified by Israeli officials as a "separation policy" dictated by security concerns. But these concerns are not very well concretized by relevant public statements of Israeli government and military officials.[23] For example, the spokesperson for the Israeli Coordinator of Government Activities in the Territories (COGAT) acknowledged in an interview that the decisions regarding sale of goods from the Gaza Strip to the West Bank "are of a political nature, and thus can only be taken by the Prime Minister's Office".[24] Maj. Gen. Eitan Dagot, former COGAT, reportedly stated that the visitation rights of families of prisoners from Gaza who are held in Israel have been cancelled as part of a government policy to "separate" Gaza from the West Bank in order to pressure

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[19] For a detailed evaluation, see Gisha, *loc. cit.* note 15, p. 6 *et seq.*

[20] For detailed information see Gisha, Center for freedom of movement, Position paper, June 2012; also Gisha, *loc.cit.* note 15, p. 7.

[21] The World Bank, Gaza Fact Sheet, 2014.

[22] T. Qarmout/D. Béland, 'The politics of International Aid to the Gaza Strip', 41 *Journal of Palestine Studies* 32-47 (2012), at p. 41 *et seq.*

[23] *Separation Policy*: List of references prepared by Gisha, http://gisha.org/UserFiles/File/publications/separation_policy_2014.pdf.

[24] Irin Humanitarian News and Analysis, OPT: Promises of Export fall short for Gaza's manufacturers, 15 February 2012, http://www.org/report/94872/opt-promises-of-exports-fall-short-for-gaza-s-manufacturers

Hamas and support the [Fatah-led] Palestinian Authority.[25] More recently, in 2014, then-Deputy Defense Minister Danny Danon stated in response to a parliamentary question regarding the official status of the Separation Policy: "Starting in the summer of 2007, following the takeover of the Gaza Strip by terrorist organizations, Israel has been implementing a Separation Policy between the Gaza Strip and Judaea and Samaria [the West Bank]. This policy is backed by the decisions of the Government of Israel ... According to this policy, there is no restriction on export fromGaza abroad. However, marketing from the Gaza Strip to Judaea and Samaria and Israel is only approved in specific instances and for international organizations."[26] The main purpose of the closure measures seems to be to prevent infiltration of Hamas personnel or followers into the West Bank which is suspected to cause unrest there. A major purpose of the blockade and of import restrictions is to prevent introduction of material into the Gaza Strip which might be used for armament or fortification (building of tunnels) purposes. Yet there is a growing awareness that the policy is not only ineffective, but counterproductive. The indiscriminate firing of rockets on Israeli territory did not stop. Economic standstill and lack of all kinds of opportunities for the entire population, in particular for the youth and the middle class, foment extremism and entail a serious worsening of the security situation. The World Bank speaks of a "vicious cycle of economic decline and conflict".[27] Survival depended for a while on a shadow economy fueled by smuggling through the tunnel system, which, however, is now to a large extent being prevented by Egypt.

It has to be emphasized that despite the many Israeli measures establishing a divide between the West Bank and the Gaza Strip, the two parts of the Occupied Territory continue to be regarded by most relevant actors as a single territorial unit as they were from the beginning of the occupation in 1967. The essential point in the present context is that the agreements confirm the unity of the occupied territory consisting of both the West Bank and the Gaza Strip.[28] The following relevant texts are to be mentioned:

- <u>The International Court of Justice</u>:

In its Advisory Opinion of 4 July 2004 concerning the construction of a Wall in the Palestinian Occupied territory,[29] the ICJ emphasized the unity of the entire Occupied Territory:

> "The territories situated between the Green Line ... and the former Eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of an occupying Power. Subsequent events in these territories ... have done nothing to alter this situation. All these territories (including

[25] Barak Ravid, 'Israel should reduce use of administrative detention for Palestinians, top officials say', Haaretz.com, 3 May 2012, available at http://haaretz.com/blogs/diplomania/israel-should-reduce-use-of-administrative-detention-for-palestinians-top-official-says-1.428118

[26] Letter to MK Zehava Gal-On, re: Response to question concerning the marketing of goods from the Gaza Strip via Kerem Shalom Crossing, 4 February 2014, unofficial translation, available at http://gisha/org/userfiles/File/HiddenMessages/parliamentary_question/galon/Danon_response_to_parliamentary_question_on_movement_of_goods.pdf.

[27] The World Bank, *Economic Monitoring Report to the Ad Hoc Liaison Committee*, September 22, 2014, p. 4.

[28] See already above notes 4-9.

[29] Advisory Opinion, *loc.cit.* note 12, para. 78.

East Jerusalem) remain occupied territories and Israel continues to have the status of an occupying Power."

The same applies to the Gaza Strip which became an occupied territory during the armed conflict between Israel and Egypt which took place at the same time. The Gaza Strip, being also a part of the former Mandate, was not returned to Egypt when Israel withdrew from the Sinai Peninsula in and concluded a Peace Treaty in 1979.[30] It remained part of the single occupied territory, i.e. the territory which came under Israeli occupation in 1967.

- The United Nations General Assembly:

In its resolutions adopted after the Israeli disengagement, the General Assembly speaks of the "Occupied Palestinian Territory" as a whole, without indicating any differentiation between the West Bank and the Gaza Strip.[31]

- The Security Council

The Security Council explicitly addresses the status of the Gaza Strip:[32]

> *"The Security Council,*
>
> ...
>
> *Stressing* that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be part of the Palestinian state, ..."

- The Human Rights Council

The relevant resolution of the Human Rights Council explicitly addresses the status of the Gaza Strip and confirms the position of the unity of the entire occupied Palestinian territory. In several places, it speaks of the "Occupied Palestinian Territory, particularly .. the occupied Gaza Strip".[33]

- Agreements between Israel and the Palestinian side

The agreements concluded between Israel and the PLO, later the PA regularly emphasize the unity of status of the West Bank and the Gaza Strip:[34]

Declaration of Principles, Art. IV:

> "... The two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period."

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[30] See above note 6.
[31] GA resolution 63/96 of 18 December 2008.
[32] SC resolution 1860 of 8 January 2009.
[33] Resolution S-9/1, 12 January 2009, PP 12, OP 1, 2, 8 and 11(a).
[34] References above note 8.

Gaza-Jericho Agreement, Art. XXIII, para. 6:

> "The two Parties view the West Bank and the Gaza Strip as a single territorial unit, the integrity of which will be preserved during the interim period."

Annex I, Art. IX(1)(a):

> "There shall be safe passage between the Gaza Strip and the Jericho Area for residents of the Gaza Strip and the Jericho Area ..."

Interim Agreement, Art. XI (1):

> "The 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."

Art. XVII (1):

> "In accordance with the DOP, the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit ..."

Art. XXXI (8):

> "The two Parties 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."

- *Agreement on Movement and Access, 15 November 2005*

This agreement, concluded between the Government of Israel and the Palestinian Authority[35] on the occasion of the Israeli withdrawal from the Gaza Strip,[36] maintained the "link between Gaza and the West Bank". It provided *inter alia* for bus and truck convoys between the two parts of the Palestinian territory.

- <u>The Supreme Court of Israel</u>

In cases decided before[37] and after[38] the Israeli disengagement from the Gaza Strip, the Israeli Supreme Court maintained the view of the "unity of Gaza and the Judea and Samaria area". The statement made by the Supreme Court in 2002 is particularly clear:[39]

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[35] On the occasion of the deliberations concerning the disengagement, Palestinian President Abbas expressed the resolve of the PA to preserve "the geographical and legal unity of the Palestinian homeland", declaration reproduced in Geoffrey Aronson, 'Issues arising from the implementation of Israel's disengagement from the Gaza Strip,' 34 Journal of Palestinian Studies 49-63 (2005), at 53.

[36] See above note 16.

[37] *Ajuri v. The Commander of the IDF Forces in the West Bank*, HCJ 7015/02, Judgment of 3 Sept. 2002.

[38] *Hamdan* case, above note 9.

[39] *Ajuri* case, above note 37.

"Judaea and Samaria and the Gaza Strip are effectively one territory subject to one belligerent occupation by one occupying power, and they are regarded as one entity by all concerned, as can be seen, *inter alia,* from the Israeli-Palestinian interim agreements."

- <u>The Quartet</u>

The concept developed by the Quartet, which consists of the United Nations, the United States, the EU and Russia, for a settlement between Israel and the Palestinian side and the creation of a Palestinian State is also based on the unity between the West Bank and the Gaza Strip. A statement dated 21 June 2010[40] *inter alia*

"promotes Palestinian unity based on ... the reunification of Gaza and the West Bank under the legitimate Palestinian Authority ..."

The Quartet believes that negotiations should lead to

"... the emergence of an independent, democratic and viable Palestinian state in the West Bank and Gaza ..."

3. The legality or illegality of the separation policy – legal yardsticks

In order to assess the legality or otherwise of the separation policy, several different areas of international law have to be taken into account. This was also the approach adopted by the International Court of Justice in its Advisory Opinion on the *Construction of a Wall in the Occupied Palestinian Territory.* The following areas of international law are relevant and will be analyzed below:

- The right to self-determination, which is the cornerstone of the rights of the Palestinian people;
- The law of armed conflict, in particular the law of belligerent occupation and possible post-occupation duties, as well as rules limiting the right of blockade and siege;
- Human Rights law;
- Specific treaty law, namely the Oslo Agreements
- UN Law, namely obligations flowing from binding SC resolutions;
- General rules of international law concerning access between separate parts of a State territory.

[40] http://www.un.org/News/dh/infocus/middle_east/quartet-21jun2010.htm

4. The illegality of the separation policy

4.1 The right to self-determination

The core principle of international law which renders the separation policy unlawful is the right of the Palestinian people to self-determination. The ICJ has stated, and it is not really controversial as a matter of principle, that the Palestinian people is an entity possessing this right. In the words of the ICJ:

> "(T)he existence of a 'Palestinian people' is no longer in issue."[41]

The Court notes in particular the recognition of the Palestinian people by Israel itself.

The right of self-determination includes the right to shape the political structure of governance for the people. That right must necessarily have a territorial basis. It is the right of a people to determine its political order within a given territory. For the Palestinian people, this territorial basis currently is the territory of the Palestine mandate not assigned to Israel by the 1949 Armistice Agreements, i.e. all territories which have become occupied territory in 1967. This clearly results from the reasoning of the Court in the *Wall* case. The Court addresses the route of the wall and states that it amounts to a *de facto* annexation reducing the geographic scope of the occupied territory belonging to the Palestinian people.[42] There is also a risk that the construction of a wall affects the demographic composition of the Occupied Territory, in particular by forcing major parts of the Arab population to move away. The Court concludes:[43]

> "That construction ... severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligations in respect of this right."

Thus, the Court holds the prior step of Israel's policy of fragmentation, namely the construction of a Wall, to be a violation of the right of the Palestinian people to self-determination. The following critical step, namely the separation of the Gaza Strip, cannot be regarded differently. Both fragmenting the Palestinian territory by the construction of a Wall and splitting the remaining Palestinian areas of the former mandate into two different parts affect the viability of the Palestinian State. As a matter of fact, they make the building of a Palestinian State more difficult, if not impossible. These measures, thus, constitute a violation of the Palestinian right to self-determination.

4.2 The law of armed conflict

4.2.1 The law of belligerent occupation

[41] Advisory Opinion, *loc.cit.* note 12, para. 118.
[42] Advisory Opinion, *loc.cit.* note 12, para. 121.
[43] Para. 122.

The next area of international law which is relevant for the question of the illegality of the separation policy is the law of armed conflict, or international humanitarian law. Within this field of international law, the law of belligerent occupation is of particular importance for this question.

It is not controversial that the customary law of belligerent occupation applies to the territories occupied by Israel in 1967. This law involves certain responsibilities of the Occupying Power, also a prohibition of status changes. The relevant rules are formulated in the Hague Regulations of 1907[44] (in particular Art. 43). The Fourth Geneva Convention of 1949[45] applies as well. This is denied by Israel, but confirmed by the ICJ[46] and by numerous statements of UN organs.[47]

As stated above, both the West Bank and the Gaza Strip were administered by Israel as one unit. In 2005, however, Israel withdrew from the Gaza Strip. In relation to this territory, it is therefore controversial whether the status of the Gaza Strip remained that of an occupied territory. The Government of Israel considers that it has *de facto* relinquished the control over the Gaza Strip. A situation of occupation exists, according to Art. 42 and 43 of the Hague Regulations, where a foreign Power is *de facto* able to exercise a governmental authority over a territory. Israel claims that it no longer exercises the requisite *de facto* control and that, therefore, the regime of occupation has been terminated as far as this area is concerned.[48] This view is shared by a number of authors.[49] Yet Israel has not completely relinquished the relevant control over the Gaza Strip.[50] There are a number of elements which, taken together, are proof of a continued *de facto* control. First, the Gaza Strip cannot simply be separated from the rest of the occupied territory, namely the West Bank. Under the Oslo Interim Agreement, both Israel and the Palestinian authorities view the West Bank and the Gaza

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[44] Convention (IV) Respecting the laws and Customs of the War on Land, 18 Oct. 1907, Annex: Regulations concerning the Laws and Customs of the War on Land.
[45] Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter GC IV).
[46] Advisory Opinion, *loc.cit.* note 12.
[47] See *inter alia* the resolutions of the UN General Assembly, the Security Council and the Human Rights Council, referred to above notes 31, 32, 33.
[48] Israel Ministry of Foreign Affairs, 'The Operation in Gaza, 27 December 2008-18 January 2009: Factual and Legal Analysis (July 2009), p. 11, available at www.jewishvirtuallibrary/org/source/.../GazaOpReport0708.pdf . The issue was thoroughly debated in relation to the Operation Cast Lead (Report of the Commission established by the Human Rights Council, UN Doc. A/HRC/12/48 – "Goldstone Report") and on the occasion of the *Gaza Flotilla* or *Mavi Marmara* incident. Three different fact-finding commissions dealt with that incident, one established by the Human Rights Council (hereinafter HRC Commission, report in UN Doc A/HRC/15/21), another one appointed by the UN Secretary-General (hereinafter Palmer Commission, so named after its chairman, report available at www.UN.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf), a third one nominated by the Government of Israel (hereinafter Turkel Commission, report available at www.turkel-committee.com).
[49] Benjamin Rubin, 'Disengagement from the Gaza Strip and Post-Occupation Duties' 42 *Isr.LR* 528-563 (2009); Yuval Shany, 'The Law Applicable to Non-Occupied Gaza: A comment on *Bassiouni v. The Prime Minister of Israel,* 42 *Isr.LR* 101-116 (2009); Turkel Commission para. 47; Palmer Commission para. 72 (not clearly decided). On various options discussed in connection with the disengagement plan see also Aronson, *loc.cit.* note 35, at 58 *et seq.*
[50] For a detailed analysis, see Yoram Dinstein, *The International Law of Belligerent Occupation,* CUP, Cambridge 2009, pp. 276 *et seq.*; Robert Kolb/Sylvain Vité, *Le droit de l'occupation militaire,* Bruylant, Brussels 2009, pp. 177 *et seq.*; Shane Darcy/John Reynolds, 'An Enduring Occupation: the Status of the Gaza Strip from the Perspective of International Humanitarian Law', 15 *JCSL* 211-243 (2010), in particular at 227; HRC Commission para. 64; Goldstone Report para. 273 *et seq.*

Strip as a single territorial unit.[51] Despite the takeover by Hamas in 2007, this is still the view of the Palestinian Authority. Second, the Gaza Strip is under a kind of constant siege. The airspace is *de facto* and *de jure* controlled by Israel.[52] Maritime activities are also severely restricted and monitored by Israel[53]. The land borders with Israel are fenced off and access or exit is only possible through Israeli controlled checkpoint. Israel maintained several measures of control concerning the Rafah Crossing between Egypt and the Gaza Strip, following the 2005 Access and Movement Agreement. Over long periods and recently again, Egypt has closed its border with the Gaza Strip, which enhanced Israel's grip on this territory. Third, experience has shown that Israel has the military power to re-enter the territory by military force. All these elements taken together show that Israel has sufficient *de facto* control to justify the conclusion that it still is the occupying power, with the ensuing responsibilities for the welfare of the population.

These responsibilities are relevant for assessing the legality or otherwise of the separation policy. According to Art. 43 of the Hague Regulations, the fundamental obligation of an occupying Power is "to restore, and ensure, as far as possible, public order and safety ..." The French text, which is the only authoritative one, describes the scope of this obligation in a somewhat broader manner: "la securité et la vie publics".[54] In modern parlance, this is a duty of good governance. It is a duty to ensure living conditions which are as adequate as possible under the circumstances. As has been shown above, the separation policy has severe negative consequences for the living conditions in both parts of the occupied territory. The policy has led to economic decline and even collapse. This is not compatible with the obligation of good governance.

It raises, however, the question whether cutting off the Gaza Strip can nevertheless be justified as an exceptional measure to safeguard Israel's security interest, in particular to defend itself against, and to prevent, attacks against Israel launched from the Gaza Strip. It is generally recognized that an occupying Power is entitled to take steps which are necessary and proportionate to safeguard its security interests.[55] It is, however, implicit in the duty of good governance that is must do so in a way similar to that used by a State in maintaining order in its own territory, i.e. in a "law enforcement mode".[56] Cutting off essential supplies more or less completely is not a measure belonging to what can be subsumed under law enforcement, it is an act of hostility which is typical for the "armed conflict mode". This is evident for the blockade in the technical sense, namely the declared naval and aerial blockade barring access to the Gaza coast. But also the closure of the land border is not a typical measure of law enforcement. It amounts to a situation which in the terminology of land warfare amounts to a siege. This being so, two questions have to be asked: first, is cutting off essential supplies for the civilian population generally lawful under the law of armed conflict? Second, what are the specific restraints imposed by the law of belligerent occupation on establishing and maintaining such a measure? The first question will be answered further below. As to the second

[51] Art. XI (1) of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 Sept. 1995, 36 *ILM* 551 (1997).
[52] Art XIII(4) Annex I to the Interim Agreement.
[53] Art. XIV Annex I to the Interim Agreement.
[54] Dinstein, *op.cit.* note 50, p. 89.
[55] E. Benvenisti, 'Occupation, Belligerent', MN 24 and 27, in R. Wolfrum (ed.), *Max Planck Encyclopedia in Public International Law (MPEPIL)*, www.mpepil.com.
[56] K. Watkin, 'Use of force during occupation: law enforcement and conduct of hostilities', 94 *IRRC* 267-315 (2012), at pp. 284, 294 *et seq.*

question, Dinstein[57] has correctly stated: "When hostilities go on in an occupied territory, the law of belligerent occupation does not disappear. It has to be applied in contiguity with LOIAC [Law of International Armed Conflict] norms relating to combat."[58] This means that even in the case of armed resistance, the law on the conduct of hostilities does not simply replace to duty of good governance. The applicable standard for measures taken to counter armed resistance is necessity and proportionality. This is a question of degree. A certain control of the goods entering the Gaza Strip would certainly be acceptable as necessary. But the far reaching cutoff, which ruins the economy of the Gaza Strip and makes the Gaza Strip dependent on foreign assistance (if this can reach Gaza at all), could hardly be regarded as necessary, at least not as proportionate. Measures which, as explained above,[59] are inefficient and counterproductive cannot be regarded as necessary.

It must therefore be concluded that a policy consisting of a complete or nearly complete separation of the Gaza Strip from the rest of the occupied territory is not compatible with the fundamental duty of the occupying Power to ensure public order and safety.

Belligerent occupation is a temporary factual situation. The rules of belligerent occupation, therefore, do not grant any *de iure* authority, they only restrain the *de facto* powers of the occupying power in order to preserve essential interests of the population. Any transfer of *de iure* powers is reserved to the final settlement of the conflict. Therefore, in addition to the duty of good governance, there is also a prohibition of status changes which might create a *fait accompli* prejudging the final outcome of the conflict.[60] This is reflected in Art. 47 GC IV, which prohibits any status change which might deprive the population of the occupied territory of the benefits of the Convention. The denial of the benefits of good governance by a unilateral status change decided by the occupying power would fall under this prohibition.

Certain violations of the duty of good governance constitute grave breaches of GC IV and/or war crimes. Unlawful confinement of members of the population or unlawful destruction of property are grave breaches according to Art. 147 GC IV. Where measures of the fragmentation policy force parts of the Palestinian population to move away from their land, this amounts to an "unlawful deportation or transfer", also a grave breach under that article. The transfer of parts of the population of the occupying power into the occupied territory, a core element of the Israeli settlements policy, is prohibited under Art. 49 GC IV and is a grave breach according to Art. 85(4)(a) AP I, but Israel is not party to the latter treaty. Yet such transfer is also a war crime according to Art. 8(2)(b)(viii) of the ICC Statute. Although Israel is not a party to that treaty, the provision might nevertheless be applicable as the scope of the ICC's jurisdiction extends to any situation occurring on the territory of a party to the Statute (in this case Palestine) even if the perpetrator does not belong to a party bound by the Statute.[61]

4.2.2 Post-occupation duties

[57] Dinstein, *op.cit.* note 50, p. 100.
[58] Concerning the rules on actual fighting, see below 4.2.3.
[59] Text accompanying note 27.
[60] Benvenisti, MN 24, *loc.cit.* note 55; Kolb/Vité, *op.cit.* note 50, 187 *et seq.*
[61] For more discussion see below 5.3.

The Supreme Court of Israel has not endorsed the view that belligerent occupation continues, but has neither accepted the stance of the Israeli government that Israel, by virtue of its withdrawal, has liberated itself from all responsibilities it had pursuant to the law of occupation.[62] It held that Israel still had, as a consequence of its long-term occupation of the Gaza Strip, certain post-occupation responsibilities.[63] These responsibilities flow, in particular, from the fact that the Gaza Strip is not viable as an isolated territory,[64] but has been made dependent, during the years of occupation, on supplies from the outside, in particular from Israel. According to the Court, Israel is therefore obliged to maintain and allow a certain flow of goods and services into the Gaza Strip. It would follow from this concept that Israel could fulfil these responsibilities by allowing access of goods and services from the West Bank into Gaza. Be it noted that this concept has been criticized by authors defending a more absolute stance in both senses (continuation of occupation v. no remaining responsibility at all).[65] Yet as a practical matter, the Israeli government will avoid contradicting the holding of its Supreme Court and will try to fulfil its post-occupation duties. Whether current Israeli practice corresponds to this requirement is another question.

4.2.3 Restraining access to and exit from Gaza – the "blockade"

As already indicated, the policy of separation is promoted by a series of measures which bar access to the Gaza Strip from any side and in any way. It is an element of these measures that there is no traffic between the Gaza Strip and the West Bank. Another element is a blockade in the traditional sense of barring access by sea to a port or coast (naval blockade) or by air (aerial blockade). The first controversy is whether these measures as a whole constitute only one measure, so to say a blockade in a general sense,[66] or whether the different measures have to be viewed and assessed separately.[67]

Blockade is a method of warfare which has a centuries old tradition. There are established rules on it. It is therefore appropriate to start the analysis with these specific rules including their recent development. Yet the effects of blockades and sieges have always been atrocious. It is in the very nature of these methods that they do not only hurt the military, but also and even more the civilian population which happens to stay in the blockaded or besieged location. In the case of Gaza, the effect which the naval blockade has on the civilian population depends on the lack of alternative means of supplies which follows from the closure of the land border. Thus, the legality of the naval blockade cannot really be determined without taking into account the closure of the land border, and *vice versa*.[68]

Because of their disastrous effects on the civilian population, there is a trend in the modern law of warfare to limit the right of blockade and siege. These modern rules are formulated in the San Remo Manual on Naval Warfare (Sec. 102), which constitutes an expression of customary law:

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[62] *Bassiouni Ahmed v. Prime Minister of Israel*, HCJ 9132/07, Judgment of 30 Jan. 2008.
[63] Rubin, *loc.cit.* note 49, in particular at pp. 534 *et seq.*; Shany, *loc.cit.* note 49.
[64] See above text accompanying notes 20 and 21.
[65] See Dinstein, *op.cit.* note 50, p. 279.
[66] HRC Commission para. 59.
[67] Palmer Commission para. 70; Turkel Commission para. 62.
[68] This is admitted by the Turkel commission, para. 89.

> The declaration or establishment of a blockade is prohibited if
> (a) It has the sole purpose of starving the civilian population or denying it other objects essential for its survival, or
> (b) The damage to the civilian population is, or may be expected to be, excessive in the relation to the concrete and direct military advantage anticipated from the blockade.

This provision expresses two fundamental principles of international humanitarian law which are not limited to naval warfare: the prohibition of the starvation of civilians and the principle of proportionality. Any siege or blockade established in modern warfare must pass this double test.

Both questions have been hotly debated in relation to the *Mavi Marmara* incident, when Israel enforced the naval blockade by using a considerable amount of force. Three international or quasi-international commissions have addressed the problem[69] and have come – not surprisingly – to divergent results.

As to the first test, despite the severe hardship which the blockade in conjunction with the closure of the land border has caused and continues to cause for the civilian population, it is difficult to maintain that the purpose pursued by Israel amounted to "starvation".[70] It is argued that causing a food shortage is not the same as starvation. It is the second test, the requirement of proportionality, which, it is submitted, renders the blockade unlawful. Assessing proportionality requires a comparison and balancing between two different facts which are next to impossible to compare, namely a military advantage on the one hand and civilian damage on the other. Nevertheless, proportionality is a reasonable limitation of the use of force and therefore part of positive law. The degree of hardship caused by the measures of blockade and closure has already been described. This is acceptable as a matter of law only if it is not excessive in relation to the military advantage. The demoralization of the population which might be caused by the hardship is not a valid military advantage which could be entered in the proportionality equation. The essential military advantage which counts is the prevention of the import of weapons and materials which could be used to build weapons and military installations such as the tunnel system. Many of these materials are "dual use", i.e. can be used for military purposes, but may also be needed for military ones. In the light of recent experience, it must be concluded that the measures have not been effective in restraining the production of weapons and the building of military installations. A control targeted on military materials and certain dual use materials will very probably have a similar, if not a better result. Recent measures mediated by the UN point into that direction. A closer look at the effects of the Israeli measures for the closure of the Gaza Strip thus reveals that the security advantages they yield are too low as compared to the civilian damage they cause.[71] They are thus "excessive" – a violation of the principle of proportionality.[72]

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[69] See above note 48.
[70] Turkel Commission para. 75 *et seq.*, Palmer Commission para. 77 ; not really decided HRC Commission para. 52.
[71] See above 2. *in fine*.
[72] HRC Commission para. 53; *contra* but not convincing Turkel Commission para. 89, Palmer Commission para. 79. See also Aeyal Gross/Tamar Feldman, "We Didn't Want to Hear about Calories': Rethinking Food Security, Food Power and Food Sovereignty – Lessons from the Gaza Closure', Conference paper no. 60 for discussion at Food Security: A Critical Dialogue, Yale University, September 14-15, 2013.

To the extent that the blockade in conjunction with the closure of the Gaza Strip amount to causing starvation, this is a war crime pursuant to Art. 8(2)(b)(xxv) of the ICC Statute.

4.2.4 Collective punishment

In its relevant resolution,[73] the Human Rights Council has also stated another reason why the blockade and closure of Gaza are unlawful, namely that they constitute a forbidden collective punishment:

> "*Recognizing* that the Israeli siege imposed on the occupied Gaza Strip, including the closure of border crossings and the cutting of supply of fuel, food and medicine, constitutes collective punishment of Palestinian civilians and leads to disastrous humanitarian and environmental consequences."

The prohibition of collective punishment is stated in Art. 33 GC IV and also constitutes customary law.[74] A "collective punishment" is a value deprivation imposed as a reaction to an allegedly unlawful or reprehended behaviour against persons which are not responsible for that behaviour. Punishment in this connection are not only criminal sanctions in a narrow sense (detention or executions), but many different kinds of value deprivations. Deportations are often cited as examples. Thus, a good argument can be made that the hardship imposed by Israel on the population of the Gaza Strip as a reaction to the hostile action by Hamas against Israel, and meant as a means of coercion, constitutes a collective "punishment".[75]

4.3 Human rights law

The application of human rights law to the problem of Israel's separation policy presupposed, first, that the scope of application of this body of law is not limited to a State's own territory, but binds a State everywhere where it exercises an authority which can be qualified as "jurisdiction". This rule of extraterritorial application of human rights is now almost universally accepted, but still disputed by a minority of States, including Israel. However, the statements of the ICJ and of international human rights bodies are unanimous and clear in this respect.[76] The main argument put forward by the opponents of the prevailing view, namely the negotiating history of the ICCPR, is not convincing.[77]

In times of armed conflict, relevant forms of jurisdiction which entail the application of human rights law are the *de facto* authority of an occupying power[78] and the authority exercised by a detaining power in relation to the detainees.

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[73] Resolution quoted above note 33.
[74] J.-M. Henckaerts/L. Doswald-Beck/ICRC, *Customary International Humanitarian Law*, Cambridge 2005, vol. I, p. 374 *et seq.* (Rule 103).
[75] HRC Commission para. 54; partly admitted by the Turkel Commission para. 104.
[76] R. Kolb, 'Human Rights and Humanitarian Law', MN. 22 *et seq.*, *MPEPIL*, *op.cit.* note 55.
[77] ICJ, *Wall* case, *loc.cit.* note 12, para. 109
[78] Kolb/Vité, *op.cit.* note 50, pp. 308 *et seq.*, 315 *et seq.*

A number of human rights guarantees are particularly relevant in the present context, namely

- freedom of movement (Art. 12 ICCPR);
- the right to family protection (Art. 24 ICCPR);
- guarantees of decent living conditions under the ICESCR (in particular the right to an adequate standard of living [Art. 11], the right to health [Art. 12] and the right to education[Art. 13]).

The right to freedom of movement relates to movement within the country where a person is residing. For the purposes of this guarantee, Palestine, i.e. the occupied territory as defined above, has to be regarded as one country. Therefore, the guarantee covers freedom of movement for the residents of the West Bank to the Gaza Strip and vice versa. Israel as the occupying Power is obliged to grant that right. The leading case on rights to travel decided after the Hamas takeover in 2007 (the *Hamdan* case[79] maintains the principle of the unity of the occupied Palestinian territory and must be understood as accepting the right to travel between the two parts in principle and founds the denial of a travel permit exclusively on security considerations which limit that right. In more recent decisions,[80] however, the Court (by a majority of 2 to 1) seems to have accepted the government's position which justifies the denial of a permit by the rule that "foreign nationals" have no right to enter Israel. That rule certainly exists, but it has to cede in front of the *lex specialis* of freedom of movement within the occupied territory. The dissenting opinion of Justice Rubinstein, on the other hand, relies on the *Hamdan* decision, which leads to an individualized scrutiny of the limitation of the right to travel.

The guarantee is not absolute. Art. 12 allows exceptions which "are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals ... and are consistent with the other rights recognized in the present Covenant". This exception could be applied to travel restrictions imposed for the sake of the security of the occupying Power. The restriction must, however, be necessary and (this is implied) proportionate for security purposes. In the *Hamdan* case, the Court was reluctant to challenge the government's view in this respect. Yet a complete travel ban without the possibility of an individualized security check cannot be regarded as necessary. It has been shown that it is counterproductive.[81] It is certainly not proportionate for achieving the security of the occupying Power. In addition, it is not consistent with another right guaranteed by the Covenant, namely – as has been shown – with the right to self-determination.[82]

The parallel application of human rights law and international humanitarian law raises the question whether the possibility to impose restrictions in regard to protected persons (i.e. the population of an occupied territory) pursuant to Art. 27 para. 4 GC IV also applies in respect of human rights guarantees. This is at least arguable. Yet the measures justified by Art. 27 para. 4 GC IV are only those which are "necessary as a result of the war". Thus, what has been said regarding necessity of exceptions to the guarantee of Art. 12 ICCPR would also apply to Art. 27 para. 4 GC IV.

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[79] See note 9.
[80] *Izzat v. Minister of Defence*, HCJ 495/12, Judgment of 24 Sept. 2012, information provided in www.mezan.org/en/a.php?id=15763 .
[81] See above text accompanying notes 22 and 23.
[82] See above 4.1.

The policy of separation also entails travel restrictions which make it difficult, if not impossible for members of families to unite. This is a violation of the right to family protection. In this respect, it has to be emphasized that a third of Gaza's residents has relatives in the West Bank and Israel.[83] What has been said on the exceptions to the freedom of movement applies *mutatis mutandis* also to Art. 23 ICCPR.

As to the rights enshrined in the ICESCR, the severe negative effects of the blockade on the living conditions in Gaza have been demonstrated above. Therefore, in particular Art. 11 ICESCR is violated. The cases decided by the Israeli Supreme Court related to persons who wanted to obtain a specific training or university degree in the West Bank. The denial of the opportunity to do so constitutes a violation of the right to education (Art. 13 ICESCR). In the same sense, the ICJ held the construction of a wall in the occupied Palestinian territory to be, *inter alia,* a violation of the right to education.[84]

4.4 Specific treaty law: the Oslo Agreements

The relationship between the Palestinian people and Israel was reshaped by a series of agreements concluded by the two parties between 1993 and 1995, the Palestinian people at the time being represented by the PLO. These agreements became known as the Oslo Agreements. They are agreements concluded between two subjects of international law who consented to be bound by them. They are therefore treaties as defined by the Vienna Convention on the Law of Treaties (VCLT). Neither Israel nor Palestine are parties to that convention, but it codifies rules of customary law which are binding in the relation between Israel and the Palestinian Authority.

These agreements, mainly negotiated in Oslo, were concluded in three phases: the Declaration of Principles, Washington, 13 September 1993;[85] the Gaza-Jericho Agreement, Cairo, 4 May 1994;[86] the Interim Agreement, Washington, 28 September 1995.[87]

Although the program established by these agreements has in important parts not been implemented, they are still valid. This is *inter alia* proven by the fact that they form the basis of the practical division of competences between Israel, the Occupying Power, and the Palestinian Authority. The division of the occupied territory into different areas (Areas A, B and C with a different division of competences in each of them) is based on the Interim Agreement and is still practiced.

The essential point in the present context is that the agreements confirm the unity of the occupied territory consisting of both the West Bank and the Gaza Strip.[88] The separation of the link stipulated by the agreements thus constitutes a violation of these treaties.

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[83] Gisha, *A costly divide, loc.cit.* note 19, p. 2, on the practical impediments concerning travel for family reasons p. 8 *et seq.*
[84] Advisory Opinion, *loc.cit.* note 12, paras. 133 and 134.
[85] See above note 8.
[86] See above note 8.
[87] See above note 8.
[88] See already above notes 51 to 53.

4.5 UN Law – the binding force of Security Council resolutions

As described above,[89] various UN organs have stated their view that the occupied West Bank and Gaza Strip form a single territorial unit. But the resolution of the Security Council[90] is, from a legal point of view, more then an authoritative view, it is legally binding. The resolution obligates all States, not only Israel, and in particular the States involved in the peace process, to treat the occupied Palestinian territory as one single territorial unit. Therefore, the Separation Policy, which is incompatible with the said resolution, constitutes a violation of Art. 25 UN Charter which prescribes the binding force of SC resolutions. The Separation Policy is also a violation of those resolutions of the Security Council which enjoin Israel to fulfill its obligations under GC IV,[91] as this policy is a violation of that Convention.[92]

4.6 Other rules of international law

In addition to the specific areas of international law analyzed so far, other general rules of international law are also relevant. The West Bank and the Gaza Strip are two parts of Palestine separated by the territory of another State, namely Israel. Although similar cases, which might serve as a precedent or indicate the existence of a customary rule, differ due to their diverse political contexts, some basic principles may be ascertained by an analysis of these cases. Such situations comprise exclaves (e.g. the exclaves of the former colony of Goa in Indian territory[93]) or that of countries consisting of two separate parts (East and West Pakistan between the partition of former British India in 1947 and the creation of Bangladesh 1971; United Arab Republic during the merger of Egypt and Syria 1958-1961).

As to the connection between East and West Pakistan, both India and Pakistan acknowledged a right of overflight (the only reasonable way of passage), as a matter of principle in applying the general rules of the Chicago Convention on transit flights.[94] The suspension of this transit right and the role of a relevant bilateral agreement became controversial between India and Pakistan, and Pakistan brought the case before the ICAO Council. The controversy was finally settled by negotiations. It is important in the present context that the principle of transit right was recognized by both parties, and that only the modalities and restrictions of this right were really controversial.

In the *Right of Passage* case before the ICJ concerning exclaves of the former Portuguese colony of Goa in Indian territory, Portugal argued that there existed a general principle of law to the effect that the State separating the territory of an exclave from the main territory is obliged to grant free passage to and from the exclave. The ICJ did not reject that argument, but instead relied on the relevant *lex specialis,* namely a local custom.[95]

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[89] See text accompanying notes 31 *et seq.*
[90] Note 32; the stance of the Security Council has not changed since the adoption of that resolution.
[91] SC resolution 1544, 19 May 2004, PP 2 and OP 1.
[92] See above 4.2.1.
[93] See *Right of Passage over Indian Territory (Portugal v. India),* Merits, Judgment of 12 April 1960.
[94] K. Hailbronner/I. Röcker, 'International Civil Aviation Organization, Jurisdiction of, Case', MN 2, *MPEPIL, op.cit.* note 50.
[95] T.H. Irmscher, 'Enclaves', MN 12 *et seq., MPEPIL, op.cit.* note 55.

It is submitted that such a local custom was also established as to the West Bank and Gaza during the first 25 years of occupation when traveling between the two parts of the Occupied Territory was practically unrestricted.[96] The agreements concluded between Israel and the PLO or the PA in the 1990ies[97] and 2000s recognize and confirm that practice. They limit and regulate it. This is in particular true for the Agreement concluded between Israel and PA on the occasion of the withdrawal of Israeli troops from the Gaza Strip.[98] It states:

> "Israel will allow the passage of convoys to facilitate the movements of goods and persons."

Security concerns may justify proportional restrictions of this right of passage, but they may not make it disappear.

4.7 Conclusion as to the lawfulness of the separation and fragmentation policy

It has been shown that the policy of fragmentation of the Palestinian territory and in particular the policy of separation between the Gaza Strip and the West Bank violate various norms of international law:

- the right to self-determination,
- fundamental rules of the law of belligerent occupation,
- the prohibition of blockades causing disproportionate damage to the civilian population,
- the prohibition of collective punishment.

The security needs cannot justify the various measures taken in the pursuit of these policies, at least not to the extent in which they are indeed taken.

5. Ensuring compliance with applicable law

There are manifold procedures for the purpose of ensuring compliance with international law. Some of them which are particularly relevant in the present context are analyzed below.

5.1 International dispute settlement

International dispute settlement is consent based. If there is no agreement on other procedures, the standard means of peaceful settlement of disputes is negotiations. This is mentioned as the standard procedure in the Oslo Agreements. These agreements themselves are the result of negotiations conducted under third party mediation, in particular a mediation conducted by Norway. The so-called Quartet also performs mediated negotiations. This type of problem solving must probably remain the first choice.

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[96] 'Travel between the West Bank and the Gaza Strip', http://www.hamoked.org/Topic.aspx?tID=sub_30.
[97] See above notes 51 to 53.
[98] Agreement on Movement and Access, 15 November 2005, see above note 16.

A more formalized procedure leading to a binding result is arbitration. Arbitration is also provided for in the Oslo Agreements,[99] but a special *compromis* is necessary. There is no unilateral recourse to arbitration. An example for the successful use of this procedure is the Taba Arbitration.[100]

5.2 Human rights law

Human rights law has a number of specific compliance procedures.

The most common one is the reporting system established by a number of human rights treaties. It has played a certain role in relation to the Middle East conflict. Israel has raised objections against these reporting duties in relation to the occupied territory. But the relevant treaty bodies have not accepted Israel's denial and have dealt with Israel's behaviour regarding the OPT.[101] It has demanded Israel to lift the blockade of the Gaza Strip.[102] As the examination of national reports leads to a dialogue between the Human Rights Committee and the State concerned, this is an opportunity to raise questions relating to occupation policies.

Another standard procedure used by the Commission on Human Rights, now the Human Rights Council is that of thematic rapporteurs, which has also been used in relating to various issues of Israel's occupation policy.[103] Since 1993, there is also a country mandate, namely that of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.[104]

The procedure of individual "communications" is not relevant as Israel is not a party to any treaty (protocol) providing for this type of procedure.

The Human Rights Council has also established inquiry procedures relating to various instances of the conflict between Israel and its neighbours or the OPT. Israel has consistently refused to cooperate with the inquiry commissions or rapporteurs and does not accept their findings.[105]

5.3 The law of armed conflict and international criminal law

Specific dispute settlement procedures under the law of armed conflict are the inquiry procedure according to Art. 132 GC IV and the Fact-finding Commission according to Art. 90 AP I. A special *compromis* is necessary for an inquiry under the GC. The fact that Israel is not a party to AP I does not prevent the use of the Art. 90 procedure, but a special *compromis* is of course necessary in this case, too.

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[99] Art. XXI of the Interim Agreement, above note 8.

[100] *Case concerning the location of boundary markers in Taba between Egypt and Israel*, Arbitral Award of 23 December 1988, RIAA vol. XX, 1-118.

[101] This position is summarized in Human Rights Committee, Concluding observations on the fourth periodic report of Israel, Doc. CCPR/C/ISR/CO/4, 21 Nov. 2014, para. 5.

[102] Human Rights Committee, *loc.cit.* note 101, para. 12.

[103] See e.g. Special Rapporteur on the right to food, *Report on the mission to the Occupied Palestinian Territories*, UN Doc E/CN.4/2004/10/Add.2.

[104] Commission on Human Rights, resolution 1993 2A.

[105] Press release of the Israeli Foreign Ministry dated 24 September 2009.

A number of violations of the law applicable to belligerent occupation constitute grave breaches of the Geneva Conventions (Art. VIII(2)(a) ICC Statute) and, more generally, war crimes (Art. VIII(2)(b) ICC Statute). The most relevant one in relation to the fragmentation policy is Art.8(2)(b)(viii) ICC Statute, namely the transfer of parts of the occupying Posers own civilian population into the occupied territory.[106] This is an important element of the settlements policy.

Since Palestine has ratified the ICC Statute, the ICC has jurisdiction over war crimes committed, by whomever, in the territory of Palestine, i.e. in the OPT (Art. 12(2)(a) ICC Statute). On that basis, the Prosecutor has initiated a preliminary assessment of the situation in Palestine.[107] This does not (yet?) constitute the opening of an investigation, but is a necessary step before the opening of an investigation can be decided according to Art. 53 para. 1 of the ICC Statute.

5.4 Measures taken by third States

The role of third States and of international organizations is a crucial means of ensuring compliance with the rules of international law at issue in the present context. This may not always have attracted the attention it deserves. It has been criticized, for instance, that the stance of third States and of international organization in relation to Israeli occupation policies and in particular to the restricions on the delivery of aid in Gaza might have exacerbated rather than alleviated the situation.[108]

In its Advisory Opinion concerning the *Construction of a Wall in the Occupied Palestinian Territory*, the ICJ clearly formulated the basic principles which have to guide the action by third States to ensure and promote compliance by Israel with the basic legal rules governing the situation of occupation (Reply D to the question put by the General Assembly). Although the Court explicitly only addresses the construction of the wall, its finding applies also to other unlawful elements of the separation policy which have been ascertained above:

> "All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."

According to the Court, the basis for these obligations of <u>all</u> States, i.e. States which are not parties to the Palestinian conflict, is twofold:

1. The majority of the relevant norms create obligations *erga omnes*.
2. Art. 1 common to the Geneva Conventions enjoins all Sates to respect and to ensure respect for the Conventions.

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[106] L. Doswald-Beck/J.-M. Henckaerts/ICRC, *op.cit.* note 74, vol 1, p. 576.
[107] Press release dated 16 Jan. 2015, ICC-OTP-20150116-PR1083.
[108] Qarmout/Béland, *loc.cit.* note 22, at pp. 35 *et seq.* and 43 *et seq.*

As practically all States are parties to the Geneva Conventions, the scope of application of the two principles is practically equal. This Expert Opinion will concentrate on the second principle.

In its opinion, the Court does not elaborate on the question what measures States could take in order to fulfill this obligation. It only says that they must respect the Charter and international law. This excludes at least the use of force. But positively speaking, what kind of measures are to be envisaged? On an abstract level, the measures to be envisaged are those which have the potential of inducing Israel (and where necessary the Palestinian Authority) to comply with the applicable rules. This Expert Opinion tries to develop a kind of catalogue of such measures.[109]

This is the catalogue of possible measures:

- Political dialogue,
- Internalization of norms,
- Public statements,
- Non-public demarches,
- Unilateral restrictive measures, countermeasures,
- Conditionality of trade and assistance,
- Individual responsibility, fight against impunity,
- Evocation of State responsibility,
- International dispute settlement,
- International cooperation.

Political dialogue: In the reality of the international system, both the development and the application of international law are determined by a political discourse between relevant actors, and only to a limited extent on high handed enforcement. This is the basis of the functioning of the UN system. A responsible use of this discourse is necessary. The duty to ensure the respect of the Conventions implies a duty to use the potential of such discourse. Especially those States which, for historic or political reasons, have the chance of being listened to by parties to a conflict are called upon to use this opportunity, be it bilaterally or in appropriate fora.

The discourse will not always take the form of a dialogue. Some other forms are described as well.

Internalization of norms: It is important for the respect of international law that the deciding persons (in particular State officials) know the law and have a positive attitude towards the law. This is what is called, in sociological terms, the internalization of norms. States parties to the Conventions have a number of opportunities to promote the internalization of norms by the agents of other States, including the parties to a conflict. Training courses offered by friendly States or in conjunction with military aid are relevant examples. This is a particularly useful part of the discourse just described.

Public statements: Political dialogue, i.e. a discourse between parties listening and talking to each other, is not always possible. The conflict in and around Palestine frequently is an example of this phenomenon. In such situation, violations of IHL must trigger public statements by third States. It is a

[109] The list is to a certain extent inspired by the European Union Guidelines on promoting compliance with international humanitarian law (IHL), OJEU 2005/C 327/04.

violation of the said duty to ensure respect of the Conventions to remain silent in front of significant breaches thereof. This is an obligation which is honored in practice by many States, perhaps not by enough States.

Non-public demarches: A verbal reaction to violations must not necessarily be public. There are situations where non public demarches may be more effective. Public demarches may stiffen the reaction by the addressee, which non public demarches will not or rarely do. But due to a certain lack of transparency which is necessarily involved in this instrument to ensure compliance, its effectiveness is somewhat speculative.

Unilateral restrictive measures, countermeasures: Deprivation of certain advantages is a classical reaction to violations of the law, in modern terminology "counter-measures". Such measures include restraints on financial transactions performed by the target State or by persons acting for the target State, travel restrictions for such persons, import or export restrictions. As a rule, only n injured State may take countermeasures involving the non-performance of an obligation of the State taking the measure. But most norms which are violated by the separation policy, i.e. the right to self determination, international humanitarian law, human rights law at least its core rules) constitute *erga omnes* obligations in the sense of Art. 48 para. 1 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARS).[110] In this case, certain countermeasures may also be taken by third States (Art. 48 par.2 ARS), namely claiming the cessation of the unlawful act and requesting assurances of non-repetition as well as demanding compensation of damages to the Injured State. Whether a non-injured State can take further measures is left open by the savings clause of Art. 54 ARS and is subject, at least to an extent, to political will.

Conditionality of trade and assistance: A related form of measures reacting to, or trying to prevent, IHL violations is the conditionality of trade or assistance: A particular item may not be traded if it can be anticipated that it will/might be used for IHL violations. A certain aid is only granted if it is associated with measures taken to ensure respect of IHL. This is of particular relevance for conditions attached to arms exports or military aid, but not limited to them.

As to arms exports, an important new treaty prescribing this type of conditionality is the Arms Trade Treaty of 2 April 2013.[111] Its Art. 6 para. 3 reads:

> "A State shall not authorize any transfer of conventional arms ... , if it has knowledge at the time of authorization that the arms ... would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."

A similar principle is formulated by the EU in the Council Common Position 2008/944/CSFP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. The Common Position establishes eight criteria for export controls, among them

[110] Jochen A. Frowein, 'Obligations erga omnes', MN 3 and 4, *MPEPIL, op.cit.* note 55.
[111] Adopted by GA resolution 67/234, 2 April 2013, UN Doc. A/CONF.217/2013/L.3.

"Criterion Six: Behaviour of the buyer country with regard to the international community, as regards in particular its ... respect for international law.
Member States shall take into account, *inter alia*, the record of the buyer country with regard to:
...
(b) its compliance with ... international humanitarian law."

As regards non-military import or export, an important case in point is trade to and from Israeli settlements in the OPT. As indicated above, these settlements are a serious violation of GC IV. Thus, if a State allows the export of building equipment for use in the construction of settlements, this may constitute an unlawful aid or assistance in the commission of an internationally wrongful act (Art. 16 ARS), but also (as the case may be: at least) a violation of the duty to ensure respect of GC IV.

Allowing the import of items produced in the settlements (mainly agricultural products) means to allow the settlements to reap the profit of an unlawful activity. This is also a form of aid and assistance which is unlawful pursuant to Art. 16 ARS. For that very reason, it is also a violation of Common Art. 1 GC.

However, trade restrictions fall under the prohibition of quantitative restrictions pursuant to Art XI General Agreement on Tariffs and Trade (GATT). They are thus lawful under the GATT if they are covered by the so-called security exception of Art. XXI GATT. That provision allows GATT contracting parties to fulfill their "obligations under the Charter of the United Nations for the maintenance of international peace and security". It is submitted that the same applies for other norms of *ius cogens*. The GATT cannot be understood as preventing the States parties to it to comply with their obligations of a peremptory character. This lies in the very definition of *ius cogens*.

Individual responsibility, fight against impunity:
Many violations of the law of occupation and armed conflict which are occurring in the OPT constitute grave breaches of the GC and war crimes.[112] According to Arts. 129 GC III and 146 GC IV, each party to the respective Convention is obliged to bring persons having committed such grave breaches before its own courts, regardless of their nationality. There is, thus, a duty to prosecute persons alleged to have committed grave breaches of the GC and to apply, for that purpose, the principle of universal jurisdiction. As to war crimes under customary international law, the principle of universal jurisdiction applies as well.[113] This is of particular relevance for the war crime of transferring parts of the civilian population of the occupying Power into the occupied territory.[114]

The application of this rule may, however, encounter obstacles derived from the rules granting immunity to certain State organs or officials. The ICJ, in the *Arrest Warrant* case *Congo v. Belgium*,[115] has held that the minister of foreign affairs of a country enjoys complete immunity even for war crimes and crimes against humanity while he or she is in office, and after he or she left office if these crimes constituted official acts. It is debatable how far this recognition of immunity goes in the case

[112] See above 4.2.1. and 4.2.3.
[113] Doswald-Beck/Henckaerts/ICRC, *op.cit.* note 106, p. 604 *et seq.* (Rule 157).
[114] See above 4.2.1. *in fine*.
[115] ICJ, *Case concerning the Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, Judgment of 14 Feb. 2002.

of other State officials. The reasoning of the Court is very much geared towards the necessity to ensure an unhindered diplomatic intercourse, the foreign minister being the head of the diplomatic service of a country. Thus, the rule of immunity may not apply to other State officials and not to members of the military.

Immunity does not apply where an alleged perpetrator is prosecuted before the ICC (Art. 27 ICC Statute). As Palestine has successfully ratified the Rome Statute, any State party to it (not only Palestine) may refer the situation of the occupied Palestinian territory to the Prosecutor (Art. 14). The Prosecutor may also initiate an investigation *proprio motu* (Art. 15). She has initiated a preliminary investigation.[116]

Evocation of State responsibility: State responsibility may be invoked, as a matter of principle, by the injured State. As already indicated, it may be invoked by a State which is not injured only in the case of the violation of an *erga omnes* obligation. Accordingly, all States have the right to demand compensation for victims of violations which occurred in the OPT, for instance persons whose houses have unlawfully been destroyed or who have been unlawfully evicted from their land. By virtue of common Art. 1 GC, there is an obligation to exercise this right.

In addition, there have been cases where third States were directly the victims of violations of the law of occupation. The most important example are destructions of houses or installations which foreign donors have given to the Palestinian population. If and to the extent that these demolitions are not justified under the law of occupation, the donor countries or organizations (e.g. the EU) are injured in the sense of the law of State responsibility. They are entitled to claim damages.

International dispute settlement, institutions: The examples of possible measures to be taken by third States suffice to show that there is a potential for controversy between third States and the occupying power. What institutions can be used to solve these controversies? The usual procedure used in international practice, namely negotiations, is of course the first option. There are other voluntary procedures which may be used.

Israel has not recognized the obligatory jurisdiction of the ICJ under the so-called optional clause of Art. 36 ICJ Statute. Its ad hoc acceptance of the ICJ in a concrete case is highly improbable. If there can be a judicial settlement of a dispute between Israel and a third State, resort to arbitration would probably be a solution, if any, because this can be tailor made for the interests which parties to the litigation would like to protect and preserve.

Fact-finding and inquiry[117] are procedures which may also be initiated by third States.

International cooperation: Various procedures have been shown which have the potential to induce parties to a conflict, in particular an occupying power or a detaining power, to comply with IHL. These procedures or tools are options for each specific "third" State. But they will be more effective if they are not just used by one State alone, but by many States together. This is the case for international cooperation in devising or using the tools described.

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[116] Press Release quoted note 107.
[117] See above 5.1. and 5.2.

Conclusion as to the possibilities of third States: It has been shown that some of these tools to ensure compliance with IHL are formal procedures, others are informal. What matters is the appropriate mix of their use. Their effectiveness deserves to be made the object of further research. Their use, although – as has been shown – to a large extent obligatory, still depends on political will.

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