

## OPINION NOTE

# The Occupied Palestinian Territory and international humanitarian law: a response to Peter Maurer

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**Editor's note:** *This opinion note presents a Palestinian perspective on the relevance and effectiveness of international humanitarian law to Israel and the Occupied Palestinian Territory. It continues the discussion initiated by ICRC's president Peter Maurer, in the previous issue of the Review, on the legality and humanitarian consequences of Israeli policies and practices regarding certain key issues related to the occupation, namely the routing of the West Bank Barrier, the building of Israeli settlements in the Occupied Palestinian Territory and the annexation of East Jerusalem. A response piece by Alan Baker, former legal adviser of Israel's Ministry of Foreign Affairs, to Peter Maurer's article was published in the same issue.*

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In his article 'Challenges to international humanitarian law: Israel's occupation policy',<sup>1</sup> the president of the International Committee of the Red Cross (ICRC), Mr Peter Maurer, addresses the challenges that the application of international

humanitarian law (IHL) faces in the Middle East in general and in the context of the Israeli–Palestinian conflict in particular. Mr Maurer focuses on three main issues in relation to Israel’s military occupation of the Palestinian territory: East Jerusalem, settlements and the Annexation Wall. Furthermore, he touches on the ICRC’s confidentiality policy and suggests that the ICRC engage in public dialogue with parties to the conflict, especially when confidential dialogue fails to improve the lives of the affected people.

This response provides a legal perspective with respect to the issues raised by Mr Maurer and explains how Israel, the Occupying Power, has upset the fragile balance established by occupation law/IHL between the Occupying Power’s duties and rights, notably by over-emphasising the latter to the detriment of the former. Furthermore, this response attempts to shed light on the impact of the three policies on the daily life of Palestinians. This opinion note also responds to Mr Maurer’s point regarding the ICRC’s engagement in public dialogue with parties to a conflict in order to improve the lives of those affected.

## **The ICRC’s confidentiality policy**

I have always viewed the ICRC’s confidentiality policy with concern, especially when serious violations of IHL that may amount to war crimes and crimes against humanity are committed and when the core principles of IHL are manipulated to justify the military occupation of territory. While the wisdom behind the quiet diplomacy of the ICRC is linked to its neutrality, the absence of public positions may sometimes be perceived by perpetrators of crimes as an indication of their acceptance, thereby encouraging further criminal acts. For this reason, it is important that the ICRC raises its voice against all serious violations of IHL, especially when these violations are continuous. Hence, any decision by the ICRC to be more vocal about violations is welcome and much needed.

The value of Mr Maurer’s suggestion to engage in more public dialogue with parties to the conflict resides in the fact that it is coming from a neutral and respected humanitarian organisation which expresses its exasperation with ongoing violations of international law. The ICRC would not have decided to engage in public dialogue unless Israeli violations had reached a level at which confidentiality was no longer of assistance. This should add to pressure on Israel to review its policies in order to ensure respect for the rights of Palestinian civilians living under military occupation. Furthermore, it may encourage third-state parties to apply other forms of pressure on Israel to stop its violations of IHL.

1 See Peter Maurer, ‘Challenges to international humanitarian law: Israel’s occupation policy’, in *International Review of the Red Cross*, Vol. 94, No. 888, Winter 2012, available at: [www.icrc.org/eng/assets/files/review/2013/irrc-888-maurer.pdf](http://www.icrc.org/eng/assets/files/review/2013/irrc-888-maurer.pdf) (last visited 8 February 2014).

## Occupied or disputed territories?

Israel traditionally rejects the international consensus with respect to the status of the West Bank (including East Jerusalem) and Gaza Strip as an occupied territory to which IHL applies. This position has been frequently expressed by Israeli officials and scholars.<sup>2</sup> However, it is noteworthy that the Israeli Supreme Court considers the West Bank and Gaza (before the disengagement) as territories under belligerent occupation.<sup>3</sup>

Once the Israeli military occupation of the West Bank and Gaza Strip began in 1967, Israel declared, in a military order, that it would apply the Fourth Geneva Convention to the occupied territory.<sup>4</sup> However, this provision was revoked shortly thereafter, following pressure from Israeli politicians who viewed the occupation as an act of liberation.<sup>5</sup> Since then Israel has not accepted the *de jure* applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory. It has declared that it will abide by the humanitarian provisions of the Fourth Convention, but has failed to indicate which of these provisions it would apply.<sup>6</sup>

Israel's argument against the *de jure* applicability of the Convention is mainly premised upon its own interpretation of Common Article 2 of the Geneva Conventions.<sup>7</sup> According to this interpretation, the article applied only when the occupied territory belonged to a High Contracting Party.<sup>8</sup> In Israel's view, both Jordan and Egypt were Occupying Powers in the West Bank and Gaza Strip respectively and did not have sovereign rights over the territory. Furthermore, the territory did not belong to any sovereign to whom it should be returned.<sup>9</sup> In other words, the applicability of the Fourth Geneva Convention depends on the

2 For further information on this, see David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, SUNY series in Israeli Studies, University of New York Albany, 2002, pp. 32–33. See also Ardi Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territories', in *Harvard International Law Journal*, Winter 2003, p. 69.

3 See Israeli High Court of Justice (HCJ) 2056/04, *Beit Sourik Village Council v. The Government of Israel et al.*, 48(5) PD, p. 807, 2004; and HCJ 393/82, *Jami'at Ascan et al. v. IDF Commander in Judea and Samaria et al.*, 37(4) PD, p. 785, 1983.

4 The Military Order Concerning Security Regulations that is annexed to Proclamation No. 3 of 7 June 1967 states, *inter alia*, that military tribunals would be established by the area commander. Art. 35 of the Order states that 'the military tribunal and its administration shall apply the provisions of the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War in all legal proceedings. And in case of contradiction between the present Order and the Convention, the provisions of the Convention shall prevail.' Military orders are available in Arabic and Hebrew.

5 D. Kretzmer, above note 2, pp. 32–33.

6 See generally Yehuda Blum, 'The missing reversioner: reflections on the status of Judea and Samaria', in *Israel Law Review*, Vol. 3, 1968.

7 See generally Meir Shamgar, 'Legal concepts and problems of the Israeli military government – the initial stage', in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects*, Hebrew University, The Harry Institute for Legislative Research and Comparative Law, Jerusalem, 1982.

8 *Ibid.* See also Adam Roberts, 'Prolonged military occupation: the Israeli-Occupied Territories since 1967', in *American Journal of International Law*, Vol. 84, No. 1, 1990, p. 64.

9 Y. Blum, above note 6.

*status quo ante* of the occupied territory and inasmuch as no sovereign was ousted from it, the territory does not qualify as occupied.<sup>10</sup>

In an article entitled ‘International humanitarian law, ICRC and Israel’s status in the Territories’,<sup>11</sup> also written in response to the piece by the ICRC president, Alan Baker appears to reject the international consensus with respect to the legal status of the Palestinian territory and more specifically reject the United Nations (UN) as an authoritative body whose resolutions must be respected and adhered to by states. At the same time, he invokes UN General Assembly Resolution 181 (known as the ‘Partition Plan’) to support his argument with respect to the status of the West Bank and Gaza Strip. In this context, he states that the resolution refers to the area that is located between the west of the River Jordan and the green line as ‘Judea and Samaria’. It is true that the resolution uses this term to describe the area, but it should be borne in mind that the same resolution refers to the area located between the River Jordan and the Mediterranean Sea, including the so-called ‘Judea and Samaria’, as ‘Palestine’.<sup>12</sup>

Israel’s interpretation of Article 2 of the Fourth Geneva Convention has been the subject of wide criticism, including from eminent Israeli scholars.<sup>13</sup> The international community at large has confirmed on numerous occasions that the West Bank (including East Jerusalem) and Gaza Strip is occupied territory to which IHL applies. This position has been adopted by the UN and other international humanitarian organisations, including the ICRC, as clearly expressed by Mr Maurer in his paper. The UN Security Council first recognised this status in Resolution 242 of 22 November 1967, in which it emphasised the ‘inadmissibility of the acquisition of territory by war’ and called for the ‘withdrawal of Israel armed forces from territories occupied in the recent conflict’.<sup>14</sup> The UN affirmed that the Fourth Geneva Convention applies to the territory in many other subsequent resolutions.<sup>15</sup> In its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice (ICJ) stated the following:

[T]he Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that the Convention is

10 M. Shamgar, above note 7.

11 Alan Baker, ‘International humanitarian law, ICRC and Israel’s status in the Territories’, in *International Review of the Red Cross*, Vol. 94, No. 888, Winter 2012, available at: [www.icrc.org/eng/assets/files/review/2013/irrc-888-baker.pdf](http://www.icrc.org/eng/assets/files/review/2013/irrc-888-baker.pdf) (last visited 10 February 2014).

12 See the text of GA Res. 181, 29 November 1947.

13 A. Roberts, above note 8; David Kretzmer, ‘The law of belligerent occupation in the Supreme Court of Israel’, in *International Review of the Red Cross*, Vol. 94, No. 885, Spring 2012, pp. 207–236; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009.

14 SC Res. 242, 22 November 1967.

15 See e.g. SC Res. 452, 20 July 1979; SC Res. 471, 5 June 1980; SC Res. 681, 20 December 1990; and SC Res. 904, 18 March 1994.

applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.<sup>16</sup>

The ICRC provided a similar argument from the beginning of Israel's military occupation in 1967.<sup>17</sup> Based on this clear pronouncement by the ICJ and the ICRC's position taken earlier, Israel's arguments regarding the *de jure* non-applicability of the Fourth Geneva Convention, interpretation of Common Article 2 of the Geneva Conventions and the *status quo ante* of the occupied territory are untenable. It should be emphasised here that the Gaza Strip is still under Israeli military occupation as it is subject to Israel's effective control, a point that was also stressed by the ICRC president in his piece.<sup>18</sup>

### Three main issues

East Jerusalem, settlements and the Annexation Wall are among the main issues in the Palestinian–Israeli conflict. Other issues include the Palestinian refugees' right to return in accordance with UN General Assembly Resolution 194 and international law, sovereign rights over natural resources including water, and Palestinian prisoners in Israeli jails. Each of these issues may be seen as constituting a multiplicity of violations that affect Palestinians' daily lives and as amounting to the protracted denial of their right to self-determination.

#### East Jerusalem

Shortly after its occupation of the West Bank and Gaza Strip, Israel took concrete steps to annex East Jerusalem. These steps included: the removal of the Mandelbaum Gate, which functioned as a crossing point between East and West Jerusalem; the approval of laws to create a legal framework for annexation; the extension of West Jerusalem Municipality's jurisdiction to East Jerusalem; and the application of Israeli laws to the city and its Palestinian inhabitants.<sup>19</sup> The then Israeli minister of foreign affairs, Abba Eban, informed the UN Secretary-General that the steps taken by Israel did not constitute an act of annexation and that they

16 International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 101.

17 M. Shamgar, above note 7, p. 32.

18 'International jurisprudence, some army manuals, and legal scholarship tend to propose a consistent approach to the notion of effective control based on the ability of the foreign forces to exert authority, in lieu of the territorial sovereign, through their unconsented-to and continued presence in the territory in question': see Tristan Ferraro, 'Determining the beginning and end of occupation under international humanitarian law', in *International Review of the Red Cross*, Vol. 94, No. 885, Spring 2012, p. 141.

19 Usama Halabi, *Israeli Laws and Judicial System as Tools for Accomplishing Political Objectives in Jerusalem – Main Stages in Consolidating Israeli Control over Jerusalem Contrary to International Law*, Civic Coalition for Defending Palestinians' Rights in Jerusalem (CCDPRJ), June 2007, available at: [www.civiccoalition-jerusalem.org/system/files/documents/israeli\\_laws\\_and\\_judicial\\_system\\_as\\_tools\\_for\\_accomplishing\\_political\\_objectives\\_in\\_jerusalem\\_06-2007.pdf](http://www.civiccoalition-jerusalem.org/system/files/documents/israeli_laws_and_judicial_system_as_tools_for_accomplishing_political_objectives_in_jerusalem_06-2007.pdf) (last visited 1 March 2014).

were only administrative in nature.<sup>20</sup> Israel's actions were greeted with international condemnation. The UN Security Council condemned the steps and stated that 'all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status'.<sup>21</sup> In July 1980, an Israeli basic law was enacted that declared 'Jerusalem, complete and united' as 'the capital of Israel'.<sup>22</sup> As such, the annexation of East Jerusalem was given a 'legal' façade. The UN Security Council expressed concern over this step, reiterating 'the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem', and reaffirming its 'determination, in the event of non-compliance by Israel with the present resolution, to examine practical ways and means in accordance with relevant provisions of the Charter of the United Nations to secure the full implementation of the present resolution'.<sup>23</sup>

The unilateral annexation of East Jerusalem constituted a form of land acquisition through means of force, which is prohibited under international law and the UN Charter.<sup>24</sup> Principle 1 of the UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations states, *inter alia*, that 'no territorial acquisition resulting from the threat or use of force shall be recognised as legal'.<sup>25</sup> This principle is recognised as reflecting customary international law. Based on this, Israel's annexation of East Jerusalem is illegal and does not negate its legal status as occupied territory. As unilateral annexation of a territory or part of it cannot change its legal status, it follows that the civilian population of the territory remains protected within the meaning of the Fourth Geneva Convention. Article 47 of the Convention states that annexation of the whole or part of an occupied territory does not deprive protected persons of the protection accorded to them by the Convention.<sup>26</sup>

Annexation is contrary to the underlying principle of occupation law, particularly the fact that the Occupying Power does not acquire any sovereignty over the territory it occupies. Therefore, if the displaced sovereign loses *de facto*

20 Ruth Lapidoth, 'Jerusalem – some jurisprudential aspects', in *Catholic University Law Review*, Vol. 45, 1995–1996, p. 668.

21 See SC Res. 252, 21 May 1968.

22 See Basic Law: Jerusalem, Capital of Israel. An unofficial translation of the Basic Law is available on the website of the Israeli Knesset, at: [www.knesset.gov.il/laws/special/eng/basic10\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic10_eng.htm) (last visited 19 February 2014).

23 See SC Res. 476, 30 June 1980.

24 Art. 2(4) of the UN Charter provides: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

25 GA Res. 2625 (XXV), 24 October 1970.

26 The article states 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 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'.

possession of the occupied territory, it nonetheless retains it *de jure*. This principle is uncontested, and a well-recognised jurisprudence establishes that occupation constitutes a temporary situation neither operating nor implying any devolution of sovereignty.

As a result of Israel's policies in East Jerusalem, Palestinians are continuously denied the exercise of their human rights. Movement restrictions that are imposed in East Jerusalem take a heavy toll on their rights, *inter alia*, to family, health, education, worship, and work, as they make it impossible for Palestinians from other parts of the occupied territory to have free access to the city. Palestinians wishing to enter Jerusalem are required to obtain a special permit by the Israeli authorities. To get such a permit, applicants have to undergo a complex process and in most cases the permit is not granted. The usual pretext for permit rejection is 'security'. Due to the fact that Israel annexed East Jerusalem and applied Israeli law, Israel treats the presence of Palestinians from other parts of the West Bank in the city without a permit as 'illegal'. Even in cases where the applicant is in need of urgent medical care that is not available in hospitals in the other cities of the Occupied Palestinian Territory, the permit may not be granted.<sup>27</sup>

Another central right that is violated as a result of the annexation is the right to family life. Palestinians from Jerusalem who wish to marry a Palestinian from another part of the occupied territory cannot live together in the city as long as one spouse does not hold a Jerusalem ID card.<sup>28</sup> If the couple decides to live together in another city, the spouse who holds the Jerusalem ID card may have his/her ID card revoked, which deprives him/her of health services and other social rights and from living in Jerusalem again. According to the Jerusalem Legal Aid Center, 14,232 Jerusalemites had their ID cards revoked by Israeli authorities between 1967 and the end of October 2012.<sup>29</sup> This number includes only those who were directly affected by ID card revocation – in all cases, such revocations also impacted other family members of the directly affected persons. If these were included, the number would be much higher. Furthermore, the number does not include many Palestinians who left the country in and around 1967 and have not been able to return. These restrictions on the right to family life apply to the Palestinian population only.

The enactment of the 2003 Nationality and Entry into Israel Law has imposed further restrictions on Palestinian spouses who wish to live together in East Jerusalem. Israeli authorities claim that this law is temporary, but it has been in force since 2003 and is renewed on an annual basis. The most recent renewal of the Law took place on 19 March 2014. A 2005 amended version of the Law provides that Palestinian men over thirty-five years of age and Palestinian women over twenty-five years of age can submit a family reunification application to the Israeli authorities. This seemingly positive development has added another complication to the already difficult family unification application process. It is common in Palestinian society

27 Al-Haq has documented many such cases. Affidavits are available at Al-Haq's office.

28 Palestinian inhabitants of Jerusalem are given special ID cards, which allow them to live in the city. They are treated as permanent residents.

29 Information gained through private correspondence with the Jerusalem Legal Aid Center.

that people marry at an early age. The majority of men marry in their early twenties and women marry around the same age, if not earlier. The amendment would then mean that Palestinian men wishing to apply for family reunification have to wait at least ten years after their marriage before they become eligible. This increases the number of forcibly separated families and widens the circle of people and families that suffer as a result of the annexation.<sup>30</sup>

Under IHL, the Occupying Power must respect the laws in force in the occupied territory. It is also a fundamental principle of the law of occupation that the Occupying Power is not the sovereign of the territories it occupies, as occupation is meant to be temporary in nature. Article 43 of the regulations annexed to the Hague Convention (IV) of 1907 states:

[T]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Imposition of the Israeli laws on East Jerusalem violates this provision, which reflects customary international law. Further, under the Fourth Geneva Convention, the Occupying Power is under a legal obligation to respect the rights of protected persons in all circumstances, including ‘their honor and their family rights’.<sup>31</sup> According to the ICRC Commentaries on the Fourth Geneva Convention, this provision ‘is intended to safeguard the marriage ties and the community of parents and children which constitutes a family, “the natural and fundamental group unit of society”’.<sup>32</sup> It also stresses that ‘the family dwelling and home are therefore protected’ and that ‘they cannot be the object of arbitrary interference’.<sup>33</sup>

Furthermore, Israeli policies in Jerusalem may amount to a form of apartheid. Restrictions on Palestinian family unification have been carried out based on an Israeli law that discriminates against Palestinians. The law prevents Palestinians as a group from exercising their right to freedom of movement and residence and as a consequence prevents them from living together as families and from developing in the city. Under Article 2(c) of the International Convention on the Suppression and Punishment of the Crime of Apartheid, ‘any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of

30 For further information on the 2003 Nationality and Entry into Israel Law, see the website of the Legal Center for Arab Minority Rights in Israel (Adalah), at: [www.adalah.org](http://www.adalah.org).

31 See Art. 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949.

32 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1960, p. 202.

33 *Ibid.*

a racial group or groups basic human rights and freedoms, including . . . the right to freedom of movement and residence', constitute an act of apartheid.<sup>34</sup> As the right to family life and family unification within this context is based primarily on persons' right to move freely and to choose their place of residence within the occupied territory, the 2003 law may be seen as a legislative measure that enforces apartheid.

## Settlements Policy

The establishment and expansion of settlements in the Occupied Palestinian Territory is another Israeli policy that aims at land annexation and undermines any possibility for the establishment of an independent Palestinian state on all of the territory that was occupied in 1967. Settlements stand today as an insurmountable obstacle to the conclusion of a genuine peace agreement that is based on justice and international law. New settlements are being built and the existing settlements are being expanded in spite of the 'peace' talks between the two parties. Apparently, peace talks are utilised as a cover by Israel to expand its settlement policy and to create facts on the ground to the detriment of Palestinians' sovereign rights. This was clear from the outset of Israeli occupation, as reflected in statements by Israeli officials. According to Shlomo Gazit, the first coordinator of the Israeli government's 'operations' in the occupied Palestinian territory:

it was clear that the Israeli settlements in the Territories, and especially in the densely populated areas, had far-reaching political consequences. These settlements are intended to establish new facts to affect the future political solution. It was clear that establishment of the Israeli civilian settlements is a kind of statement of policy, whose weight is not much less than the Knesset's decision in 1967 to annex East Jerusalem: this settlement was established on land from which Israel does not intend to withdraw.<sup>35</sup>

Under IHL, the Occupying Power may 'not deport or transfer parts of its own civilian population into the territory it occupies'.<sup>36</sup> According to the ICRC, deportation or transfer within the meaning of this specific paragraph of Article 49 of the Fourth Geneva Convention differs from the meaning of deportation and transfer used in paragraph 1 of the same article.<sup>37</sup> Paragraph 1 prohibits the transfer and deportation of protected persons from an occupied territory by force – that is, against their will – while paragraph 6 prohibits the deportation or transfer of

34 For further information on Israel's apartheid policy and on whether the Palestinians and Israelis form racial groups for the purpose of apartheid definition under international law, see generally Virginia Tilley (ed.), *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, Pluto Press, London and New York, 2012.

35 Shlomo Gazit, *Trapped Fools: Thirty Years of Israeli Policy in the Territories*, Frank Cass, UK and Portland, OR, 2003, p. 217.

36 See Art. 49, para. 6, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949.

37 J. Pictet (ed.), above note 32, p. 283.

the Occupying Power's own civilians to the occupied territory irrespective of how it is carried out, whether by force or wilfully.<sup>38</sup> Transfer within the meaning of paragraph 6 is prohibited, whether it is carried out forcibly or upon the will of the citizens, because the main goal behind this prohibition is to prevent the colonisation of an occupied territory.<sup>39</sup> In other words, the voluntary movement of the Occupying Power's nationals into an occupied territory is prohibited in order to prevent colonisation taking place.

A recently uncovered document shows that the then legal adviser to the Israeli Ministry of Foreign Affairs in 1967, Theodor Meron, drafted a Memorandum for the Ministry on the matter of 'Settlement in the Administered Territories', in which he expressed the view that settlement in the Occupied Palestinian Territory contravenes explicit provisions of the Fourth Geneva Convention, including Article 49(6).<sup>40</sup>

Settlement in the Occupied Palestinian Territory may be seen as a compound and continuing crime. In the course of occupation, privately owned land is appropriated and damaged. Under Article 147 of the Fourth Geneva Convention, 'extensive destruction and appropriation of property, not justified by military necessity', qualifies as a grave breach of the Convention. If read in conjunction with Article 8(2)(a) of the Rome Statute of the International Criminal Court,<sup>41</sup> grave breaches enumerated in Article 147 of the Convention, including appropriation and destruction of properties, amount to war crimes.<sup>42</sup> In addition, deporting or transferring parts of the Occupying Power's civilian population into the territory it occupies also constitutes a war crime under the Rome Statute.<sup>43</sup>

Settlements themselves have been built on hilltops around the main Palestinian cities and close to villages. A special network of roads has been established to connect these settlements to each other and to Israel. Some of the roads are made for exclusive use by Israeli citizens. The movement of settlers is facilitated at the expense of Palestinians' right to property and to freedom of movement within the occupied territory. Settlements and their associated regime of road networks, as well as the Wall, have divided the West Bank into parts and thus prevented the Palestinian people from exercising the right to self-determination, including the establishment of a Palestinian state on all of the occupied territory. Furthermore, Palestinians' natural resources are exploited for the benefit of settlers.

38 *Ibid.*, pp. 278–280 and 283.

39 *Ibid.*, pp. 278–280.

40 The English translation of the document is available at: [www.soas.ac.uk/lawpeace/mideast/resources/file48485.pdf](http://www.soas.ac.uk/lawpeace/mideast/resources/file48485.pdf) (last visited 12 March 2014).

41 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc A/CONF. 183/9.

42 It should be noted that Israel has not ratified the Rome Statute of the ICC.

43 Under Art. 8(b)(viii) of the Statute, 'the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory', amounts to a war crime.

For example, water allocation for settlers is much higher than that allocated for Palestinians.<sup>44</sup>

In addition to the violations of IHL that emanate from settlement construction, Palestinians and their private property are assaulted and trespassed on by Israeli settlers almost on a daily basis.<sup>45</sup> Settler violence against Palestinians largely goes unpunished. Even in cases where the assaulting settlers are prosecuted, the severity of the punishment is inadequate given the nature of the crime.

## The Annexation Wall

Once Israel started the construction of the Wall, it became clear, contrary to Israel's claims, that it was intended to be permanent and that its route was carefully planned to include Israeli settlements and other fertile agricultural land of the occupied West Bank. Upon its completion, the Wall will include 80 per cent of the settlements in the West Bank.<sup>46</sup> It is estimated that 100,000 dunums of fertile agricultural land was appropriated and/or destroyed during phase one of the Wall's construction.<sup>47</sup> The ICJ showed foresight when it concluded in 2004 that 'the construction of the wall and its associated regime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the Wall by Israel, it would be tantamount to *de facto* annexation'.<sup>48</sup> If the Wall was constructed for 'security considerations', as claimed by Mr Baker in his paper,<sup>49</sup> it would have been built along the Green Line.

As outlined by Mr Maurer in his paper, the construction of the Wall 'to the extent it deviates from the Green Line established at the end of the 1948 Arab–Israeli war not only violates IHL but further undermines the living conditions of the affected communities'.<sup>50</sup> The Wall has so far separated Palestinian villages and neighbourhoods from each other and from services provided in nearby cities. For example, eight Palestinian communities close to the village of Barta'a in the north of the West Bank have been separated from services they receive from the city of Jenin.<sup>51</sup> In cases of emergency, access of health personnel and Civil Defence members to this area is gravely hindered because of delays and searches at checkpoints that are part of the Wall system. The situation of these eight

44 See Elisabeth Koek, *Water for One People Only: Discriminatory Access and 'Water-Apartheid' in the OPT*, Al-Haq, 2013.

45 Al-Haq has documented many of these assaults. For some examples see affidavits 9360/2014, 9338/2014, 9355/2014, 9342/2014.

46 ICJ, above note 16, para. 119.

47 Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, UN Doc. A/58/311, 22 August 2003, para. 26. (Editor's note: 100,000 dunums equals 10,000 hectares.)

48 ICJ, above note 16, para. 121.

49 A. Baker, above note 11, p. 1519.

50 P. Maurer, above note 1, p. 1507.

51 Office for the Coordination of Humanitarian Affairs (OCHA), *The Humanitarian Impact of the Barrier*, July 2013, available at: [www.ochaopt.org/documents/ocha\\_opt\\_barrier\\_factsheet\\_july\\_2013\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_barrier_factsheet_july_2013_english.pdf) (last visited 1 March 2014).

communities is not unique. Upon the completion of the Wall in western Bethlehem, over 23,000 persons living in nine villages will have restricted access to basic services, including health services and education.<sup>52</sup> In addition, many communities have been separated from their agricultural land, on which they rely for survival. These are just a few examples of how the Wall impacts Palestinians' daily lives and increases their suffering.

In this way, Israeli policies violate the Hague Convention (IV) of 1907 and its annexed regulations, and the Fourth Geneva Convention, in particular the legal obligation to respect the rights of protected persons in all circumstances.

## Manipulation of IHL principles by Israel

Israel traditionally justifies its violations of IHL under different pretexts. Explanations provided by Israel are rarely consistent with the provisions of IHL. Examples in this respect are numerous.

Israeli justifications for the construction of the Wall are one example. Israel invoked the state of necessity to justify the construction of the Wall. This justification was rejected by the ICJ. In its Advisory Opinion on the Wall, the Court cited an earlier case<sup>53</sup> to argue that the necessity argument 'can only be accepted on an exceptional basis' and that it 'can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met'.<sup>54</sup> The Court therefore was not convinced that the route of the Wall was planned to protect Israel's security from suicide attacks.<sup>55</sup>

House demolitions are another example of violations that Israel commits and justifies in a manner that is inconsistent with its obligations under the provisions of the Fourth Geneva Convention. Since the start of Israel's occupation in 1967, Israel has demolished thousands of Palestinians' houses. Many of these houses have been demolished because a family member participated in what Israel calls a 'terrorist' attack.<sup>56</sup> This act qualifies as a form of collective punishment as Israel is in fact punishing an entire family for the alleged conduct of one of its members. However, Israel does not recognise such acts as collective punishments prohibited

52 *Ibid.*

53 ICJ, *Case concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 25 September 1997, *ICJ Reports 1997*, p. 7, para. 51.

54 *Ibid.*

55 Above note 16, para. 140.

56 The number of houses demolished under this pretext has decreased noticeably over the past few years. However, the policy is still effective in spite of a recommendation to stop it in 2005 by a military committee headed by Major General Udi Shani as it proved to be 'counterproductive'. According to Al-Haq, the most recent house demolition under this pretext took place on 5 February 2014 and targeted the house of Mujahed Sawalmeh's family in the Al-Far'ah refugee camp in Tubas. For further information on this, see Al-Haq affidavit 9335/2014. For further information on the recommendation and subsequent calls opposing it, see Amnon Straschnov, 'Don't destroy terrorists' homes', in *Haaretz*, 6 July 2008, available at: [www.haaretz.com/print-edition/opinion/don-t-destroy-terrorists-homes-1.249175](http://www.haaretz.com/print-edition/opinion/don-t-destroy-terrorists-homes-1.249175) (last visited 17 March 2014).

under Article 33 of the Fourth Geneva Convention. It has referred to the demolitions as ‘deterrence’, intended to dissuade others from attacking Israeli soldiers or civilians. In so doing, Israeli authorities ignore the protected status of the family members and their home.<sup>57</sup> In other words, it is a message to those who think about committing similar acts and their families that they will face the same consequences. To avoid referring to such actions by their correct name – that is, collective punishment – and evade possible criminal responsibility for an act that qualifies as a war crime, Israel calls it ‘deterrence’. By providing this justification, Israel violates IHL and the core humanitarian tenets referred to by the president of the ICRC.

## Conclusion

Israel’s occupation of the Palestinian territory is now almost fifty years in existence. Palestinians and international organisations and experts have been restating the obvious with respect to the legal status of the Palestinian territory and Israel’s violations of international law. Palestinians appreciate organisations and individuals, including the ICRC, that adopt positions and provide analyses regarding the relevance and applicability of international law, and consequently support the rights of the Palestinian population. However, in order for us, the Palestinians, and those who believe in their just cause and in the necessity of international law as a norm that should be applied to all equally, to exceed the limits of theoretical legal debates and discussions with respect to the Palestinian–Israeli conflict, we believe that concrete steps must be taken to restore the value of IHL universally and amongst Palestinians in particular. Unless such steps are taken, all analyses regarding the legal status of the Palestinian territory and Israel’s violations of international law are little more than an intellectual exercise.

Some peace proposals deal with settlements, the Wall and the annexation of East Jerusalem as irreversible facts. Such proposals are not a basis for a lasting and just solution founded on principles of international law.

Students often ask about the effectiveness of IHL in relation to the Occupied Palestinian Territory, given Israel’s complete disregard for these principles and the international community’s failure to date to take any concrete steps to ensure Israel’s compliance with this body of international law. My answer to this frequent question is the following: in spite of the fact that IHL in its present form has some lacunae that prevent it from dealing with the new realities of modern warfare and prolonged military occupation, it is, in principle, one of the most significant legal achievements of humanity.<sup>58</sup> Imagine a situation in which Israel, the

57 The definition of protected persons within the meaning of the Fourth Geneva Convention is provided in Art. 4 of the Convention.

58 Regarding prolonged occupation in particular, the ICRC believes that occupation law is, on the whole, adequate to meet the challenges of today’s occupations. The ICRC recently led a project that produced the report *Occupation and Other Forms of Administration of Foreign Territory*. The purpose of this initiative, which began in 2007, was to analyse whether and to what extent the rules of occupation law are adequate

Occupying Power, respected international law, or the High Contracting Parties to the Fourth Geneva Convention upheld their legal obligations and had taken action against Israel's occupation in its early stages rather than leaving the situation to reach the current level of deterioration. In such a scenario, the occupation would have probably ended already as it would not have been used as a façade for the colonial enterprise that Israel has pursued at the expense of the right of the Palestinian people to self-determination. On the contrary, Israel's continuous violations of IHL and its impunity have undermined the value of such an important branch of international law and consequently Palestinians have little faith in international law and in those responsible for its implementation.

Furthermore, peace would be easier to achieve and any agreement reached – more sustainable, had the provisions of international law been upheld impartially and since the very outset of Israel's occupation of Palestine. The Israeli–Palestinian conflict, sadly, represents a good example of the challenges to duly implementing IHL, and in particular the law of occupation, when one of the parties to the conflict wilfully disregards its basic tenets, such as the temporary nature of occupation and the prohibition on transferring sovereign rights onto the Occupying Power. This should be a lesson for the future: ensuring respect and implementation of IHL is paramount in order to preserve the value of the law and its ability to protect civilians and their rights from the effects of armed conflicts.

to deal with the humanitarian and legal challenges arising in contemporary occupations, and whether they might need to be reaffirmed, clarified or developed. The overall picture emanating from the expert consultations was that the law of occupation, because of its inherent flexibility, is sufficiently equipped to provide practical answers to most of the humanitarian and legal challenges arising from contemporary occupations. See Tristan Ferraro, *The ICRC Project on Occupation and Other Forms of Administration of Foreign Territory*, 2012, p. 2, available at: [www.icrc.org/eng/assets/files/review/2012/irrc-885-occupation-report.pdf](http://www.icrc.org/eng/assets/files/review/2012/irrc-885-occupation-report.pdf).