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# Establishing Guidelines

To Determine whether the Legal Status of 'Area C' in the Occupied Palestinian Territory represents Annexed Territory under International Law



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## ACKNOWLEDGEMENTS

*The editor would like to extend sincere gratitude to the IHL Clinic of the Kalshoven-Gieskes Forum on International Humanitarian Law, based at Leiden Law School. In particular, the editor wishes to thank Dr. Robert Heinsch, Dr. Giulia Pinzauti, and the Leiden IHL Clinic students and supervisors for their significant contribution in researching and drafting the report.*

*Further the editor would also like to thank Maha Abdallah, Nada Kiswanson and Grazia Careccia for their inputs and support. Appreciation also goes to the staff at Al-Marsad Arab Human Rights Centre and Al-Haq's staff, for their time in providing field trips. In addition, the editor wishes to thank Hamza Dado for his graphic design.*

**Authors** *This report is based on an original document prepared by the IHL Clinic of the Kalshoven-Gieskes Forum on International Humanitarian Law, based at Leiden Law School. It has been amended and edited for factual and geographic accuracy by researchers of Al-Haq. The final responsibility for the content lies with Al-Haq who is the main publisher of the report.*

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**ISBN** *978-9950-327-64-1*

**Design** *Hamza Dado*

**Publisher** *Al-Haq - © All Rights Reserved -2020*

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2020

## TABLE OF CONTENTS

<b>TABLE OF ABBREVIATIONS .....</b>	<b>6</b>
<b>INTRODUCTION .....</b>	<b>8</b>
<b>PART I: THE LEGAL FRAMEWORK – ANNEXATION IN INTERNATIONAL LAW .....</b>	<b>10</b>
1. INTRODUCTION .....	11
2. DEFINITION OF ANNEXATION .....	11
3. STATUS OF ANNEXATION UNDER INTERNATIONAL LAW .....	13
3.1. ILLEGALITY .....	13
3.2. CONSEQUENCES OF ILLEGAL ANNEXATION UNDER INTERNATIONAL LAW .....	14
4. THE DIFFERENCES BETWEEN BELLIGERENT OCCUPATION AND SOVEREIGNTY .....	17
5. CONCLUSION .....	21
<b>PART II: METHODOLOGY .....</b>	<b>22</b>
1. INTRODUCTION .....	23
<b>PART III: ANNEXATION GUIDELINES AND APPLICATION TO AREA C .....</b>	<b>26</b>
GUIDELINE 1: ASSERTION OF TITLE OVER THE OCCUPIED TERRITORY – DE JURE ANNEXATION .....	27
GUIDELINE 2: DE FACTO ASSERTION OF TITLE .....	28
GUIDELINE 3: APPLICATION OF THE OCCUPYING POWER'S DOMESTIC LEGISLATION IN THE OCCUPIED TERRITORY AND/OR EXERCISE OF LEGISLATIVE POWERS BEYOND THE LIMITS OF OCCUPATION LAW .....	35
GUIDELINE 4: APPLICATION OF THE OCCUPYING POWER'S JUDICIAL AUTHORITY IN THE OCCUPIED TERRITORY .....	42
GUIDELINE 5: ALTERATION OF THE OCCUPIED TERRITORY'S DEMOGRAPHICS .....	45
GUIDELINE 6: IMPOSITION OR REVOCATION OF CITIZENSHIP STATUS OF THE OCCUPIED TERRITORY'S POPULATION .....	51
GUIDELINE 7: DE FACTO ALTERATION OF THE BORDERS OF THE OCCUPIED TERRITORY .....	53

## TABLE OF CONTENTS

GUIDELINE 8: LONG TERM ALTERATION OF THE INFRASTRUCTURE OF THE OCCUPIED TERRITORY FOR THE BENEFIT OF THE OCCUPYING POWER .....	56
GUIDELINE 9: TREATMENT OF THE OCCUPIED TERRITORY'S ECONOMY AS PART OF THE OCCUPYING POWER'S ECONOMIC AREA .....	59
GUIDELINE 10: EXPLOITATION OF THE OCCUPIED TERRITORY'S NATURAL RESOURCES BY THE OCCUPYING POWER FOR ITS OWN BENEFIT .....	66
GUIDELINE 11: ERASING THE NATIONAL IDENTITY OF THE POPULATION OF THE OCCUPIED TERRITORY .....	71
GUIDELINE 12: SUPPRESSION OR RESTRICTION OF CIVIL AND POLITICAL RIGHTS OF THE POPULATION OF THE OCCUPIED TERRITORY .....	75
CONCLUSION .....	79
<b>PART IV: CONCLUSIONS ON THE ANNEXATION OF AREA C .....</b>	<b>80</b>
1. FINDINGS ON THE LEGAL STATUS OF AREA C .....	81
2. CONCLUSION .....	84

## TABLE OF ABBREVIATIONS

<b>ARSIWA</b>	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
<b>ECJ</b>	European Court of Justice
<b>EU</b>	European Union
<b>EUMM</b>	EU Monitoring Mission for Georgia
<b>GCIV</b>	Fourth Geneva Convention
<b>HCJ</b>	High Court of Justice
<b>HR</b>	Regulations annexed to the 1907 Hague Convention
<b>ICA</b>	Israel Civil Administration
<b>ICC</b>	International Criminal Court
<b>ICJ</b>	International Court of Justice
<b>ICRC</b>	International Committee for the Red Cross
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>IHL</b>	International humanitarian law
<b>ILC</b>	International Law Commission
<b>IOF</b>	Israeli Occupying Forces
<b>OPT</b>	Occupied Palestinian Territory
<b>PA</b>	Palestinian Authority
<b>UN</b>	United Nations
<b>UNCTAD</b>	UN Conference on Trade and Development
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>UNGA</b>	United Nations General Assembly
<b>UNSC</b>	United Nations Security Council
<b>VAT</b>	Value Added Tax
<b>VCLT</b>	Vienna Convention on the Law of Treaties of 1969





# INTRODUCTION

The 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II) divided the West Bank into three Areas. Area A includes those parts of the West Bank that are under full Palestinian civil and security control. In Area A, which includes (parts of) six major West Bank cities, the Palestinian authorities assumed “the powers and responsibilities for internal security and public order,” and the administration of civil spheres, such as health, education, policing and other municipal services. However, since 2002, Israel has retained responsibility for overall security in all areas of the West Bank, and does not abdicate full authority over Area A.

Area B includes those parts of the West Bank that are under full Palestinian civil control and joint Israeli-Palestinian security control. Within Area B, which

encompasses many Palestinian villages and towns, the Palestinian authorities were vested with the same functional authorities as in Area A, including public order for Palestinians. However, Israel retains overriding responsibility for security.

Area C includes those parts of the West Bank that are under full Israeli civil and military control, including land registration, planning, building and designation of land use. It contains the bulk of Palestinian agricultural and grazing land, water sources and underground reservoirs. Area C includes more than 61 percent of the West Bank.

The purpose of this report is twofold. First, it identifies a set of Guidelines outlining criteria that might indicate *de jure* or *de facto* annexation. Secondly, it examines the application of those Guidelines to the situation in Area C of the West Bank in order to assess whether and to what extent Area C has been annexed by Israel. To this end, the following methodology will be used. Firstly, the relevant legal framework that regulates annexation and occupation will be identified and assessed.

As will be explained in the report, belligerent occupation is not prohibited under international law provided that it is temporary and that it does not lead to the forcible acquisition of territory through annexation. In this regard, the report’s objective is to distinguish the legal situation of occupation, where an Occupying Power acts within its administrative powers and in accordance with the laws of occupation, from the illegal exercise of sovereignty over the occupied territory. For this purpose, a number of “Annexation Guidelines” are proposed, that may indicate when territory has been annexed. The last part of the report will conclude on whether and to what extent Area C has been annexed by Israel.

The report contains seven comparative case examples that involve situations of occupation and/or annexation; namely, Crimea, Georgia, East Jerusalem, the occupied Syrian Golan, East Timor, Western Sahara and Northern Cyprus.



# PART I

## The Legal Framework Annexation in International Law

### 1. Introduction

This section's objective is to identify the definition of annexation, to delineate its specific characteristics, its legal status according to international law, and its consequences within the international community. Further, it sketches the distinction between occupation and annexation and briefly describes the law of occupation and the limits of the Occupying Power's authority upon the occupied territory.

### 2. Definition of annexation

Annexation 'refers to a unilateral act of a State through which it proclaims its sovereignty over the territory of another State. It usually involves the threat or use of force, as the annexing State usually occupies the territory in question in order to assert its sovereignty over it'.<sup>1</sup> The above definition shows that annexation can occur without prior occupation, but that is so only in rare cases, while in the vast majority of annexation cases occupation is presupposed. Hence, more narrowly, annexation is defined as the forcible acquisition of territory by one State usually at the expense of another, and it presupposes an effective occupation of the annexed territory, as well as the intention to annex it.<sup>2</sup>

Thus, for the purposes of the present report, annexation is considered to be characterised by two fundamental constitutive elements; *corpus*, ie, physical occupation, and *animus*, i.e, intention to integrate permanently. This latter characteristic distinguishes annexation from belligerent occupation, which is considered to be merely a temporary factual situation that affects neither the Occupied Power's statehood nor its sovereignty.<sup>3</sup> On the contrary, annexation has traditionally been counted among the modes of acquisition of territorial

<sup>1</sup> 'Annexation (prohibition of)', ICRC Glossary, available at <<https://casebook.icrc.org/glossary/annexation-prohibition>> accessed July 2020. See also Jean Pictet (ed), *Commentary of the Geneva Conventions of 12 August 1949, Volume IV – Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), 275; Pal Wrangé and Sarah Selaoui, 'Occupation/Annexation of a territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy' (European Parliament, Belgium, 2015) 7, available at <[www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO\\_STU\(2015\)534995](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2015)534995)>

<sup>2</sup> Rainer Hoffman, 'Annexation', *Max Planck Encyclopedia of Public International Law* (February 2013), available at <<http://opil.ouplaw.com.ezproxy.leidenuniv.nl:2048/view/10.1093/law/epil/9780199231690/law-9780199231690-e1376>>.

<sup>3</sup> Pictet (n 1).

sovereignty, although it is qualitatively different.<sup>4</sup>

A distinction needs to be made between two types of annexation: *de jure* and *de facto*. *De jure* annexation occurs with an official declaration from the Occupying Power expressly crystallising the intention to annex (or else integrate, merge or incorporate) the occupied territory.<sup>5</sup> In this regard, annexation is the 'forcible seizure followed by unilateral assertion of title'.<sup>6</sup> Such was, for example, Iraq's declaration of a 'comprehensive and eternal merger' with Kuwait on 6 August 1990.<sup>7</sup>

Apart from the above formal way of annexation, a *de facto* situation of 'creeping annexation' occurs through the adoption of a series of measures and actions on the ground that indicate the implied intention of the Occupying Power to permanently incorporate the occupied territory. The International Court of Justice (ICJ) in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter *Wall Advisory Opinion*) elucidated the notion of *de facto* annexation as a regime creating a '*fait accompli*' on the ground that could well become permanent'.<sup>8</sup> It should be noted that there has not been much reflection in legal literature as to when facts on the ground can be said to have become permanent. This research aims to contribute a set of non-exhaustive guidelines to bridge this lacuna.

<sup>4</sup> Namely *acquisition of terra nullius*, *cession* following a treaty or by adjudication for the peaceful transfer of territory, *prescription* through the legitimisation of a doubtful title to territory by passage of time and presumed acquiescence of the former sovereign, and lastly *accretion*, meaning the physical process by which new land is formed close to or becomes attached to existing land. For a brief definition of annexation *a contrario* to the other forms of territory acquisition, see Hoffman, (n 2). See also James Crawford, *The Creation of States in International Law* (2nd ed., OUP 2006).

<sup>5</sup> Hoffman (n 2).

<sup>6</sup> As put by Judge Lauterpacht in the ICJ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Provisional Measures Order) of 13 September 1993, ICJ Reports 1993, 325, Dissenting Opinion [82].

<sup>7</sup> See UNSC Res 662 (1990), Iraq-Kuwait, UN Doc S/RES/662.

<sup>8</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136 <www.icj-cij.org/en/case/131> [121], hereinafter *Wall Advisory Opinion*.

### 3. Status of annexation under international law

#### 3.1. Illegality

Annexation is prohibited under Article 2(4) of the United Nations (UN) Charter, since it involves the 'threat or use of force against the territorial integrity or political independence of any state'.<sup>9</sup> This provision lies on fundamental principles of international law: the principles of sovereign equality and territorial integrity;<sup>10</sup> the principle of non-intervention, which is a corollary of the latter;<sup>11</sup> and the principle of self-determination of peoples.<sup>12</sup> Principle 1(10) of the United Nations General Assembly (UNGA) Declaration on Friendly Relations (1970) also expressly refers to the prohibition of acquisition of a territory by the threat or use of force. It is equally relevant to mention United Nations Security Council (UNSC) Resolution 242 that emphasises the 'inadmissibility of the acquisition of territory by war'.<sup>13</sup> Furthermore, the prohibition of the use of force and the right to self-determination are part of customary international law and are categorised as *jus cogens* norms according to the interpretation of the ICJ<sup>14</sup> and the International Law Commission (ILC).<sup>15</sup>

Lastly, annexation may be considered as an act of aggression under Article 1(1) of the UN Charter, as defined in Article 3(a) of UNGA Resolution 3314 on the Definition of Aggression, which identifies 'any annexation by the use of force of the territory of another State or part thereof' as a situation that 'shall (...) qualify as an act of aggression'. The act of aggression can give rise to individual criminal responsibility under Article 8 bis 2(a) of the Rome Statute, giving rise to International Criminal Court (ICC) jurisdiction over this crime once certain

<sup>9</sup> UN Charter (signed on 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

<sup>10</sup> *ibid*, art 1(2).

<sup>11</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter, UNGA Res 2625 (24 October 1970) UN Doc. A/RES/25/2625, Principle 3.

<sup>12</sup> UN Charter (n 9), art 1(2) and 55; International Covenant for Economic Social and Cultural Rights (adopted on 16 December 1966, entered into force 3 January 1976) UNTS Vol.993, 3, art 1; International Covenant for Civil and Political Rights (adopted on 19 December 1966, entered into force 23 March 1976) UNTS vol. 999, 171, art 1.

<sup>13</sup> UNSC Res 242 (22 November 1967) UN Doc S/RES/242.

<sup>14</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14, [100–101]; *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, [102]; *Wall Advisory Opinion*, (n8) [199].

<sup>15</sup> ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001) Supplement No.10 (A/56/10), art 26 (5), art 40 (4), (5).

requirements are met.<sup>16</sup>

Some scholars consider that there may be a few exceptions to the unlawful character of annexation.<sup>17</sup> It is argued that a territory can be *legally* annexed when it is legitimised by a legal referendum, established in light of the right to self-determination.<sup>18</sup> However, this argument needs to be assessed on a case-by-case basis since it is likely to collide with other international law principles, such as sovereignty, territorial integrity and non-intervention.

A second exception may be the signing of a peace treaty following an illegal annexation, provided that the treaty was not signed under coercion.<sup>19</sup> Lastly, a third exception may be the recognition of annexation as a lawful act by the international community leading to its historical consolidation.<sup>20</sup> However, both exceptions would overcome *jus cogens* norms, which does not seem reasonable to defend.

### 3.2. Consequences of illegal annexation under international law

It is a longstanding principle of international law that no rights can arise from illegal acts; *ex injuria jus non oritur*. Indeed, 'the [illegal] act in question is tainted with invalidity and is incapable of producing results beneficial to the wrongdoer in the form of a new title or otherwise'.<sup>21</sup> Since annexation violates international law and *jus cogens* norms, it cannot give rise to situations that are legal or accepted as such. Therefore, various consequences stem from the acquisition of title over territory through annexation.

The ILC, in Chapter III of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), provides a helpful insight into the consequences stemming from serious breaches of obligations under peremptory

<sup>16</sup> Rome Statute of the ICC (adopted on 17 July 1998, entered into force 1 July 2002) UNTS Vol. 2187, No 38544, Resolution ICC-ASP/16/Res 5 on the activation of the jurisdiction of the Court over the crime of aggression, adopted at the 13th plenary meeting, on 14 December 2017.

<sup>17</sup> Hoffman (n 2).

<sup>18</sup> Wrangé and Selaoui (n 1), 7.

<sup>19</sup> *ibid* 14.

<sup>20</sup> Hoffman (n 2).

<sup>21</sup> As put by Judge Lauterpach; see Lassa Oppenheim, *International Law: A Treatise* Vol.1 (H. Lauterpach ed, 8<sup>th</sup> edn, 1955) 141-2.

norms. Specifically, Article 41(2) states that 'no State shall recognize as lawful a situation created by a serious breach [of peremptory norms] nor render any aid or assistance in maintaining that situation'.<sup>22</sup> The Commentary to Article 41 also specifies further the application of the duty of non-recognition in situations involving the acquisition of territory through the use of force and the denial of the right to self-determination, both of which occur in cases of annexation.<sup>23</sup>

Further support for the obligation of non-recognition is evident in the UNGA Declaration on Friendly Relations, which states that 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal'. This was also reaffirmed in the UNGA Declaration on the Strengthening of International Security (1970) and was again re-emphasised in the context of aggression in UNGA Resolution 3314 (XXIX) (1974). In addition, various organs of the UN, and most significantly the UNSC, have consistently called upon States not to recognise annexations of territory, reconfirming their illegal status.<sup>24</sup> The ICJ has also played a key role in highlighting the importance of the obligation of States not to recognise an illegal situation in both its *Namibia* Advisory Opinion<sup>25</sup> and the *Wall* Advisory Opinion.<sup>26</sup>

Another consequence stemming from annexation of territory is that the situation created on the ground is *null and void*. This was the reasoning followed by the UNSC in Resolution 478 (1980) in relation to the Israeli annexation of East Jerusalem and more explicitly in Resolution 662 (1990) in relation to the Iraqi annexation of Kuwait.<sup>27</sup> Adding to this, under Article 52 of the Vienna Convention on the Law of Treaties (VCLT), any annexations that are the product of a treaty procured by coercion in the form of threat or use of force will also be void.<sup>28</sup>

<sup>22</sup> ILC, (n15), art 41(2).

<sup>23</sup> ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (2001) A/56/10, Commentary to Article 41.

<sup>24</sup> See eg Commission of Human Rights Res 2005/8, 14 April 2005 (non-recognition of the Israeli annexation of Syrian Golan Heights), UNSC Res 478 (2 August 1980) UN Doc S/RES/478 (non-recognition of the Israeli annexation of East Jerusalem); UNSC Res 662 (9 August 1990), UN Doc S/RES/662 (non-recognition of the Iraqi annexation of Kuwait); more recently UNGA Res 68/262 (27 March 2014) A/RES/68/262 (non-recognition of alteration of the status of Crimea and the city of Sevastopol).

<sup>25</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) 1971 <<http://www.icj-cij.org/en/case/53>>.

<sup>26</sup> *Wall* Advisory Opinion, (n 8) [7].

<sup>27</sup> UNSC Res 478 (20 August 1980) UN Doc S/RES/478; UNSC Res 662 (9 August 1990) UN Doc S/RES/662.

<sup>28</sup> VCLT (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331, art 52.

Based on the above, any subsequent exercise of sovereign authority over the population of the occupied territory will also be considered null and void.<sup>29</sup> The result is that the territory remains occupied and the rules of international humanitarian law (IHL) as well as international human rights law (IHRL) continue to apply.<sup>30</sup> Any subsequent argument made by the Occupying Power that the occupation has ceased because the territory has been annexed is also invalid.<sup>31</sup> This is supported by the Commentary to Article 47 of the 1949 Fourth Geneva Convention (GCIV) which emphasises the fundamental principle that 'an Occupying Power continues to be bound to apply the Convention... even when... it claims during a conflict to have annexed all or part of an occupied territory'.<sup>32</sup>

<sup>29</sup> Hoffman (n 2).

<sup>30</sup> Wrangé and Selaoui (n 1), 14.

<sup>31</sup> *ibid* 15.

<sup>32</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 25 UNTS 287 (GCIV), Commentary to Article 47 <<https://ihl-databases.icrc.org/ihl/COM/380-600054?OpenDocument>>.

## 4. The differences between belligerent occupation and sovereignty

Annexation and belligerent occupation have different characteristics that are important to distinguish. This section addresses the definition of occupation and the interpretation of the most relevant principles and provisions of the law of occupation, in the context of the research question.

Article 42 of the Regulations annexed to the 1907 HCIV considers a territory occupied 'when it is placed under the authority of the hostile army'. This definition of belligerent occupation demands an effective control of the Occupying State's army over the occupied territory. This requirement has been confirmed by the ICJ in the *Wall* Advisory Opinion as well as in the *DRC v Uganda* case, and by the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>33</sup> Taking into account those judicial decisions, the International Committee for the Red Cross (ICRC) concluded that this requirement should be defined by three cumulative criteria: (i) the presence of foreign armed forces; (ii) the exercise of authority by foreign forces; and (iii) the absence of the local authorities' consent.<sup>34</sup>

Occupation has four fundamental characteristics which distinguish it from annexation. Firstly, the Occupying Power is an administrator of the occupied territory and not a sovereign.<sup>35</sup> Secondly, the occupation is of temporary and not permanent character.<sup>36</sup> Thirdly, the situation lies on a trustee-beneficiary relationship between the Occupying Power and the occupied territory's population. Lastly, there is a duty of conservation, whereby the Occupying Power is precluded from introducing long-term changes in the occupied territories.<sup>37</sup> In this regard, it is important to distinguish a short-term occupation from a prolonged occupation.

<sup>33</sup> *Wall* Advisory Opinion (n 8) [78]; *Armed Activities on the Territory of the Congo (DRC v Uganda)*, 19 December 2005, 172-7; *Prosecutor v M. Naletilić and V. Martinović*, Judgment, Case No IT-98-34-T, Trial Chamber, 31 March 2003, 216-8; *Prosecutor v. Tadić*, Judgment, Case No IT-94-1-T, Trial Chamber, 7 May 1997, 580. See also *Prosecutor v J. Prlić et al.*, Judgment, Case No IT-04-74-A, Appeals Chamber, 29 November 2017, n 964 (using the notion of 'actual authority' over the occupied territory).

<sup>34</sup> See more in ICRC, 'Report of the Expert meeting on Occupation and Other Forms of Administration of Foreign Territory' (ICRC 2012) 17-23 <[www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf)>.

<sup>35</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge 2009) 49 ff; Orna Ben Naftali, 'Illegal Occupation: Framing the Occupied Palestinian Territory', (2005) 3(3) *Berkeley Journal of International Law* 551, 560.

<sup>36</sup> *ibid* 592-4.

<sup>37</sup> *Prosecutor v M. Naletilić and V. Martinović*, Judgment, Case No IT-98-34-T, Trial Chamber, 31 March 2003, 214; *Wall* Advisory Opinion, (n 8) [121]; Ben-Naftali (n35) 592-4.

The latter consists of a situation that lasts for a long period of time,<sup>38</sup> a factor which may have practical effects on the behaviour of the Occupying Power and on the needs of the occupied population. As discussed in more detail below, a majority of scholars advocate for a different interpretation of the law of occupation in light of the characteristics of prolonged occupation.<sup>39</sup> However, occupation laws are applicable despite the length of the occupation.<sup>40</sup>

An analysis of occupation law might help distinguish the Occupying Power's legitimate actions as a mere administrator from its unlawful actions as sovereign.<sup>41</sup> This assessment can help identify *de facto* annexation, where the Occupying Power acts as a sovereign, exceeding the limits imposed by occupation law.<sup>42</sup>

Occupation law establishes the duties and limits of the Occupying Power's authority regarding the occupied territory and its local population. Article 43 of the Regulations annexed to the 1907 Hague Convention (HR) states that the Occupying Power 'should take all measures in its 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'. Thus, it summarises the general rule regarding the applicable legislation in the occupied territory, which is the preservation of 'the laws [already] in force in the country'. Likewise, this provision reflects the spirit and logic of the occupation law framework, which is to create a duty of maintenance of the *status quo* of the occupied territory.<sup>43</sup> This principle can be restricted in certain exceptional circumstances, namely the security of the Occupying Power, military necessity and the benefit of the local population.<sup>44</sup> In this regard, some academics argue that in a prolonged occupation it would be 'inconceivable for the legal system in the occupied territories to have remained

38 There is no delimited period, as the term 'prolonged' does not exist in IHL. See below ie, the Israeli occupation over Palestine and Moroccan occupation over Western Sahara.

39 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 235; ICRC (n 34), 13; Yutaka Arai-Takahashi, 'Preoccupied with occupation: critical examinations of the historical development of the law of occupation', (2012) 94(885) *International Review of the Red Cross* 51, 68.

40 ICRC, (n 34) <[www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf)>.

41 See also Aeyal Gross, *The Writing On The Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017) 167.

42 Dinstein (n 35) 49.

43 Dinstein (n 35) 89ff; Ben-Naftali (n 35) 578.

44 ICRC (n 34) 6; David Kretzmer, 'The law of belligerent occupation in the Supreme Court of Israel', (2012) 94(885) *International Review of the Red Cross* 207, 228ff.

frozen in a time capsule'.<sup>45</sup> This may require more changes in order to adapt to the evolution of the society and to the needs of the local population, especially in sectors such as health, education, infrastructure, laws, etc. The longer the occupation lasts, the more may be the need for transformations aimed at progressing societal needs,<sup>46</sup> which inherently contradicts the conservationist principle enshrined in Article 43 HR.<sup>47</sup> However, in an ICRC Expert Meeting, many participants argued that in a prolonged occupation some changes could fall within the ambit of Article 43 but it was agreed that the duration of the occupation cannot be used as a justification for transformations that exceed what is allowed under occupation laws.<sup>48</sup> Moreover, it bears emphasising that these 'necessary' changes should be justified and should explicitly benefit the occupied population.<sup>49</sup>

Articles 64 to 67 GCIV determine that the penal laws previously in force in the territory remain applicable. However, these provisions also recognise the possibility of creating new penal laws under certain conditions, such as for the security of the Occupying Power or the benefit of the local population.<sup>50</sup> It is also worth noting that Articles 48 and 49 HR establish a general prohibition on the creation of new taxes, unless they are created for the needs of the army or for the administration of the occupied territory.

Regarding the applicable judicial system, Article 66 GCIV accepts the jurisdiction of 'properly constituted, non-political military courts... that sit in the occupied territory', in the assessment of potential violations of new norms.<sup>51</sup> Also, in view of the right of appeal regulated under Article 73 GCIV, Article 66 specifies that a (new) court of appeal should preferably sit in the occupied territory. Nevertheless, as stated in Article 64(1) GCIV, the general rule is that the local courts of the occupied territories continue to have jurisdiction over the application and interpretation of local laws.<sup>52</sup>

45 Dinstein (n 35).

46 Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84(1) *The American Journal of International Law* 44, 52.

47 Arai-Takahashi (n 39).

48 ICRC, (n 34) 70.

49 ICRC, (n 34) 6; Kolb and Hyde (n 39) 235.

50 Dinstein (n 35) 110-6.

51 Art 66 GCIV.

52 Art 64 GCIV; Dinstein (n 35), 132.

Another important pillar of occupation law is the prohibition of forcible transfer and evacuation of population (unless 'imperative reasons of security' so demand), as stated in Article 49 GCIV and in Customary Rule No 130 of the ICRC Study on Customary IHL. The Occupying Power shall not intentionally change the demographics of the occupied territory, neither actively nor by creating a coercive environment from where people feel forced to leave.

Articles 46(2), 53 and 55 HR, as well as Customary Rule No 51 of the ICRC Study, regulate the seizure of property and the use of land by the Occupying Power. There are different rules depending on the public or private nature of the property, as well as on the type of property. In this sense, 'movable public property that can be used for military operations may be confiscated', including 'depots of arms, means of transport, stores and supplies', among others.<sup>53</sup> 'Immovable property, which includes public buildings, real estate, [natural resources], agricultural estates, must be administered according to the rule of usufruct'.<sup>54</sup> Private property must be respected; Article 46 HR stipulates that private property cannot be confiscated. Destruction or seizure of such property is prohibited except when required by imperative military necessity.<sup>55</sup> In these situations, compensation should be made, as stated in Article 53(2) of the HR.<sup>56</sup> Furthermore, the destruction of property also falls under a general prohibition, as prescribed in Article 53 GCIV, unless it is 'absolutely necessary by military operations'.<sup>57</sup>

Furthermore, Article 46(1) HR imposes a duty upon the Occupying Power to respect family rights and 'religious convictions and practice'; this provision is directed at the preservation of the cultural identity of the occupied population. Article 56 HR, prohibits the seizure or destruction of municipal cultural property, 'dedicated to religion, charity, education, arts, science' and history. Moreover, Article 58 GCIV states that the Occupying Power should permit 'ministers of religion to give spiritual assistance to their religious communities'. Lastly, Customary Rule No 41 foresees the duty of the Occupying Power to prevent the illegal exportation of

53 ICRC, Customary International Humanitarian Law Study, Rule 51 <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul)>; IV Convention respecting the Laws and Customs of War on Land (Hague IV) and its annex: Regulations concerning the Laws and Customs of War on Land (HR) (adopted 18 October 1907 and entered into force 26 January 1910), art 53(1).

54 *ibid*, art 55 HR.

55 *ibid*, arts 46(2) and 53(2) HR.

56 Art 53 HR.

57 Art 53 GCIV.

cultural property.

Additionally, occupation law establishes a number of provisions that set up the Occupying Power's social duties regarding the occupied territories in order to restore and ensure public order and safety, as referred to in Article 43 HR. These duties essentially relate to education (Article 50 GCIV), health and basic supplies (Articles 55-57 GCIV).

Finally, neither the Occupying Power nor the authorities of the occupied territory can deprive protected persons in the occupied territory of their rights under GCIV by introducing institutional changes, concluding agreements, annexing the occupied territory in whole or in part or through any other modification of the legal status of the territory (Article 47 GCIV).

## 5. Conclusion

The foregoing part has provided a general definition of annexation and assessed its status under international law. The analysis has shown that annexation consists of two main elements, *corpus* and *animus*. Annexation can take the form of *de jure* and/or *de facto* integration of territory. A unilateral act of annexation violates numerous international treaty rules and peremptory norms of customary international law and is generally considered illegal under international law. In consequence, annexations are to be considered null and void, while the international community has a duty of non-recognition. In addition, the last section of this part has identified key differences between annexation and belligerent occupation, something of fundamental importance since the former is prohibited under international law and the latter is not, provided that the laws of occupation are respected.



## PART II | Methodology

### 1. Introduction

Based on a review of the law of belligerent occupation in Part I, the starting point of our analysis is that the spirit of the law of occupation is to uphold the temporary character of this regime. Although IHL does not prescribe a maximum duration for a regime of military occupation, and occupation can have a protracted character, the Occupying Power should aspire to end the occupation, rather than to perpetuate its control over the occupied territory for future generations. In line with the above, violations of the law of occupation, and in particular of those rules that are meant to safeguard the temporary character of the occupation, can often be seen as indicators of the Occupying Power's intent to permanently integrate the occupied territory.

Against this backdrop, we have conducted a comparative analysis of seven case studies (see Annex of this report) to identify the common measures and actions taken by Occupying Powers in different contexts, continents and historical periods in the process of annexing a territory in whole or in part. We have thus established a series of common measures and facts on the ground that, in our view, may denote an intention to permanently incorporate the occupied territory in whole or in part. This is because the measures in question violate the limits of an Occupying Power's authority in the occupied territory under the law of occupation, or suggest that the Occupier is planning for future generations, which is against the temporary nature of the occupation. Overall, these measures suggest that the Occupying Power may be acting as a sovereign in the occupied territory, rather than as an administrator.

Applying the methodology described above, we have identified a total of 12 Guidelines indicating annexation. They are explained in more detail below. For ease of reference, for each guideline, this part provides references to the case studies in which we observed the relevant measures being undertaken.

It should be noted that, by their very nature, the guidelines should be seen as *indicative factors* of annexation, rather than as necessary elements thereof.<sup>58</sup> In other words, they simply represent pointers towards annexation. However, in order to determine whether a particular factual situation constitutes a case of annexation, it should be analysed on its own and in light of all relevant

<sup>58</sup> As such, the set of guidelines below does not purport to be definitive or exhaustive.

circumstances. Ultimately, the test to be applied to assess the situation is whether through the creation of those facts on the ground the Occupying Power has erased the occupied population's claim to sovereignty. Finally, it bears emphasizing that none of the guidelines identified below is in itself essential for annexation to occur; nor are all of them cumulative. It is possible that in a given factual scenario some guidelines may be fulfilled with a higher degree of intensity (qualitative and/or quantitative) than in other contexts, yet both situations can be regarded as examples of annexation.

Israel has occupied East Jerusalem, the West Bank and the Gaza Strip since 1967. Following the signing of Oslo I and Oslo II Accords, in 1993 and 1995, the West Bank was divided into three administrative zones: Areas A, B and C, as can be seen in *Annex 1*. Area A comprises Palestinian villages and towns and is under the control of the Palestinian Authority (PA). Area B comprises Palestinian villages and towns, over which the PA exercises control over civil affairs and the Israeli army exercises control over security. Finally, Area C comprises the rest of the Palestinian territory (the lands excluding Areas A and B). This area amounts to more than 60% of the West Bank and it is mainly composed of lands.<sup>59</sup> Area C is under complete Israeli military control and administration,<sup>60</sup> while certain civil matters are regulated by the Israel Civil Administration (ICA) which was established by military decree in 1981.<sup>61</sup>

Each Guideline will be applied to Area C, in order to determine if the criteria indicating annexation are fulfilled and to assess the extent to which Area C has been *de facto* annexed by Israel in whole or in part.

59 B'tselem, 'Acting the landlord: Israel's policy in Area C, the West Bank' (June 2013), 11 <[www.btselem.org/publications/201306\\_area\\_c\\_fulltext](http://www.btselem.org/publications/201306_area_c_fulltext)>.

60 Al-Haq, Report 'Plight of Palestinian Bedouin depicts impact of illegal Israeli occupation and practices in Palestinian Territory' (2014) 6-7; Eyal Benvenisti, *The International Law of Occupation* (Oxford 2013) 210.

61 B'Tselem (n 59).



## PART III | Annexation Guidelines and Application to Area C



### Guideline 1: Assertion of Title over the Occupied Territory – *De jure* Annexation

An annexation can be easily recognised if the Occupying Power expressly asserts title over the occupied territory. This can be done through the adoption of laws, treaties or even statements that declare the integration, incorporation, merger or annexation of the territory. As already explained in Part I of this report, this type of annexation is defined as *de jure* annexation.

Examples of *de jure* annexation include the Israeli Basic Law passed in 1980 annexing East Jerusalem, the 1981 Golan Heights Law that extended the applicability of Israeli legislation, jurisdiction and administration over the Syrian Golan,<sup>62</sup> as well as the 1967 law adopted by Indonesia, making East Timor its 27<sup>th</sup> province. Additionally, the Green March together with official statements of the Kingdom of Morocco regarding the integration of Western Sahara, arguably amount to the *de jure* annexation of Western Sahara by Morocco. Likewise, the Crimean annexation in 2014 involved the signing of a 'Treaty' of incorporation into Russia.

#### Application to Area C

As was mentioned above, Area C constitutes around 60 per cent of Occupied Palestinian Territory (OPT) in the West Bank and is under full Israel control in relation to security and land-related civil matters.<sup>63</sup> Since the occupation of the West Bank in 1967 however, there has been no express Israeli declaration or statement comparable to the East Jerusalem Basic Law, asserting title over Area C. For this reason, Area C of the West Bank cannot be defined as having been *de jure* annexed. However, on 1 July 2020, Israeli Prime Minister Netanyahu has stated plans to implement a phased annexation of the West Bank, starting with the annexation of the settlements, and followed by the annexation of the lands of the Jordan Valley, in Area C.<sup>64</sup>

<sup>62</sup> Unlike the 1980 Basic Law annexing East Jerusalem, this law did not expressly state that it was annexing the occupied Syrian Golan, but it is regarded (eg by the UN General Assembly) as having resulted in the annexation of that territory.

<sup>63</sup> *ibid.*

<sup>64</sup> Shalom Yerushalmi and TOI Staff, "Netanyahu to initially annex 3 settlement blocs, not Jordan Valley — officials" (10 June 2020), available at: <<https://www.timesofisrael.com/netanyahu-to-initially-annex-3-settlement-blocs-not-jordan-valley-officials/>>.



## Guideline 2: *De facto* Assertion of Title

Official governmental statements, future planning, agreements with Third Parties and declarations by the Occupying Power in relation to the status of the occupied territory can be strong indicators that the Occupying Power treats the occupied territory as part of its State or that it intends to integrate it. Here the Occupying Power makes no explicit and official assertion of title over the occupied territory. Rather, *de facto* assertion of title can be implied through its statements or declarations.

For example, the Moroccan government has consistently referred to the territory of Western Sahara as the 'The Southern Regions'. Although Western Sahara has not been formally annexed, it is clear that the terminology used is indicative of the Moroccan perception of the territory as a Moroccan region.

Moreover, Russia's intention to integrate South Ossetia and Abkhazia can be evinced from the conclusion of 'alliance and integration' treaties with each of the two regions. Although the conclusion of treaties would typically suggest statehood and independence of the relevant territories, the content of the treaties in reality suggests their *de facto* integration into Russia.<sup>65</sup> In the case of East Jerusalem, several official statements preceding the *de jure* annexation in 1980 indicated the Israeli intention to integrate the occupied territory.<sup>66</sup> Similarly, President Putin's statements two days prior to the referendum in Crimea highlighted Russia's intent to permanently incorporate the territory.

States have legitimacy and capacity to conclude treaties with other States. However, as a general rule, this sovereign prerogative is limited to their territory and cannot create obligations or effects upon third parties, without their consent.<sup>67</sup> Thus, the fact that an Occupying Power concludes an agreement with another country, which produces effects upon the occupied territory, and without consulting the

<sup>65</sup> Tracey German, 'Russia and South Ossetia: conferring statehood or creeping annexation?' (2016) 16(1) Southeast European and Black Sea Studies 155. Similarly see Alexander Cooley and Lincoln A. Mitchell, 'Engagement without Recognition: A New Strategy toward Abkhazia and Eurasia's Unrecognized States' (2010) 33(4) The Washington Quarterly 59, 60.

<sup>66</sup> Michael Karayanni, *Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories*, Center for International Legal Education (OUP 2014) 4.

<sup>67</sup> See VCLT, art 34.

latter, possibly reflects its intention of permanently imposing its sovereignty on the occupied territory. The same is true for agreements of the Occupying Power with international organisations and/or international corporations, which affect the occupied territory.

For example, in Western Sahara, the Moroccan government has concluded a number of agreements with foreign powers, for example with the EU, that have direct effects upon the occupied territory of Western Sahara and its natural resources. Additionally, Indonesia concluded treaties with Australia, which had a direct effect on the exploitation of natural resources belonging to East Timor.

As already explained, occupation is meant to be temporary. The Occupying Power must exercise its rights under the laws of occupation conservatively, instead of making permanent changes to the occupied territory. An important indicator that the Occupying Power possesses the intention to annex the occupied territory is the drafting and development of future plans that entail a degree of permanence, for the Occupying Power's own benefit. For example, such plans can be about the future development of the economy, infrastructure, or the relations with other States. What is important here is not the content of the plan itself, but rather the fact that the Occupying Power is actively planning for the future. It could be argued that certain future planning may be necessary in order to facilitate the growth and development of the occupied territory and its population. However, extensive future planning may serve the interests of the Occupying Power alone.

Such activity suggests that the Occupying Power treats the occupied territory as its own and that it is not aspiring to end the occupation. This is likely to demonstrate the *animus* of the Occupying Power to annex the territory, since planning for the territory and its population's future is a right reserved for the sovereign power and not for the Occupying Power. At the same time, such future planning activity is likely to go beyond the limits set by the laws of occupation and specifically Article 43 HR.

Future planning is mostly evident in the case of *de jure* annexation of East Jerusalem, where the intention to permanently integrate is unambiguous with the intended developments proposed in the Masterplan on East Jerusalem<sup>68</sup> and

<sup>68</sup> Rami Nasrallah, 'Planning the Divide: Israel's 2020 Master Plan and its impact on East Jerusalem' in Mandy Turner and Omar Shweiki (eds), *Decolonizing Palestinian Political Economy: Rethinking Peace and Conflict Studies* (Palgrave Macmillan 2014) 158-175.

5800 Jerusalem 2050 'Futuristic Vision for Metropolitan Jerusalem'.<sup>69</sup>

## Application to Area C

There has been a plethora of statements indicating that many members of the current Israeli government support the moves to annex Area C. Indeed, Minister of Education Naftali Bennet has made statements that Israel must maintain permanent control over the West Bank, allegedly for security reasons, and the only way to do this is by applying Israeli law to Area C.<sup>70</sup> Naftali Bennett's position in regards to the annexation of Area C has been consistent for many years especially since his 'Israel Stability Initiative', which was published in 2012. This Initiative laid out the plans for annexation of Area C 'because the idea of creating a Palestinian state there is over'.<sup>71</sup> At the same time, the 2012 Levy Committee, established by Prime Minister Netanyahu, published a report of findings stating that 'Israel has had every right to claim sovereignty over these territories [Area C]' and that the 'establishment of Jewish settlements in Judea and Samaria is not illegal...'.<sup>72</sup> This raises concerns that Israel intends to extend its jurisdiction over the settlements, thereby annexing large tracts of Area C.<sup>73</sup> Furthermore, the Minister of Agriculture, Uri Ariel, recently suggested that instead of ceding land to Palestinians in Area C, Israel should expel 'a few thousand Arabs' from Area C and then effectively annex it.<sup>74</sup>

The Minister of Education, Naftali Bennett, has proposed a bill that would extend

<sup>69</sup> *ibid.*

<sup>70</sup> David Horovitz, 'Naftali Bennett: We're literally the border between Islamic State and the free world' *The Times of Israel* (7 January 2016) <[www.timesofisrael.com/naftali-bennett-were-literally-the-border-between-islamic-state-and-the-free-world/](http://www.timesofisrael.com/naftali-bennett-were-literally-the-border-between-islamic-state-and-the-free-world/)>.

<sup>71</sup> The Palestine Chronicle, 'Maximum Land with Minimum Palestinians: The Annexation of Area C' (29 June 2013) <[www.palestinechronicle.com/maximum-land-with-minimum-palestinians-the-annexation-of-area-c/](http://www.palestinechronicle.com/maximum-land-with-minimum-palestinians-the-annexation-of-area-c/)> accessed July 2020; also see 'C1. Naftali Bennet, "The Israel Stability Initiative", February 2012' (2012) 41(4) *Journal of Palestine Studies* 195-196.

<sup>72</sup> E.E. Levy, Tehiya Shapira, Alan Baker (the Levy Commission), 'The Levy Commission Report on the Legal Status on Building in Judea and Samaria' (12 June 2012) 12-13 <<http://www.regavim.org/levy-report-translated-into-english/>> accessed July 2020.

<sup>73</sup> Nasser Ishaq and Pekka Hakala, 'Area C: More than 60% of the Occupied West Bank Threatened by Israeli Annexation' (European Parliament Policy Department, April 2013) 11.

<sup>74</sup> Ariella Mendlowitz, 'Israeli Minister: Remove Arabs from Area C and Annex West Bank; "It's Ours"' (Breaking Israel News, 8 June 2016) <<https://www.breakingisraelnews.com/69434/israeli-minister-remove-arabs-area-c-annex-west-bank/#/MIODavKDQYiYeSBHy.97>> accessed July 2020.

Israeli sovereignty over the settlement of Ma'ale Adumim,<sup>75</sup> stating that the military rule in Area C should end with the annexation of settlements.<sup>76</sup> Moreover, Naftali Bennett stated that settlements in the West Bank should be incorporated into Israel, while the remaining Areas A and B would be given some sort of 'autonomy short of statehood'.<sup>77</sup> This indicates that Bennett considers that Israel has a legitimate claim over the entirety of Area C, which is strengthened by the presence of settlements. Additionally, Yoav Kisch, of the Land of Israel caucus, stated that Israel should exercise its sovereignty over Ma'ale Adumim, because the territory belongs to Israel.<sup>78</sup> A proposed legislation put forward by the Likud political party for the application of Israeli sovereignty over the West Bank is sponsored and led in the Knesset by MK Kisch, who stated, in his official capacity, that 'there will be no better historic opportunity to do this'.<sup>79</sup>

Prime Minister Netanyahu also made reference to the Israeli intention to annex Area C when he openly supported the proposed bill that would legitimise the settlement activities in Area C.<sup>80</sup> Moreover, the general reference to the area as Judea and Samaria suggests that the territory is treated as part of Israel. This is also evident in the arguments used by some Israeli officials to justify any future imposition of sovereignty over Area C; 'we are using the word "sovereignty" and not annexation, we are applying sovereignty to what is already ours'.<sup>81</sup> Similar bill proposals have also been put forward by the Minister of Transportation, Yisrael Katz, who envisions a strengthened Jerusalem by integrating surrounding

<sup>75</sup> Hezki Baruch, 'Bennett: We'll propose law to annex Ma'ale Adumim' *Arutz Sheva* (1 January 2017) <<https://www.israelnationalnews.com/News/News.aspx/222579>>.

<sup>76</sup> Yoel Domb, 'Ma'ale Adumim sovereignty law submitted to Knesset committee' *Arutz Sheva* (17 January 2017) <[www.israelnationalnews.com/News/News.aspx/223415](http://www.israelnationalnews.com/News/News.aspx/223415)>.

<sup>77</sup> Peter Beaumont, 'Far-right Israeli minister plans bill to annex one of biggest settlements' *The Guardian* (3 January 2017) <<https://www.theguardian.com/world/2017/jan/03/far-right-israel-minister-naftali-bennett-bill-annex-maale-adumim-settlement-palestinian-territories>>.

<sup>78</sup> The Knesset Land of Israel caucus, is an Israeli lobby whose aim is to "strengthen our hold of all parts of Eretz Israel", an area including the territory of the West Bank. Raphael Ahren, "Coalition chief heading caucus that seeks to retain entire West Bank", *Times of Israel* (11 June 2013) available at: <<https://www.timesofisrael.com/coalition-chief-heading-caucus-that-seeks-to-retain-entire-west-bank/>>.

<sup>79</sup> Amihai Attali, 'New Likud bill seeks to annex Israeli settlements in West Bank' (YNet, 28 January 2018) <<https://www.ynetnews.com/articles/0,7340,L-5077220,00.html>>.

<sup>80</sup> Peter Beaumont, 'Netanyahu backs annexation of 19 West Bank settlements' *The Guardian* (3 October 2017) <<https://www.theguardian.com/world/2017/oct/03/netanyahu-backs-annexation-of-west-bank-settlements>>.

<sup>81</sup> Domb (n 73).

territory and Jewish population,<sup>82</sup> as well as by Members of the Knesset of the Zionist Union, who support a complete annexation of Area C.<sup>83</sup>

In light of the above, Israeli government officials have made significant statements in their official capacity, all of which are evidence of the Israeli intention to integrate Area C. Despite the fact that there has been no official declaration of annexation, some of the above statements made in official capacity indicate at the very least that there exists an intention to annex Area C, at least in part. Other statements suggest that *de facto* annexation has already occurred, at least in the eyes of the person(s) making the statement. This is because some government officials believe that Israel has a legitimate claim over Area C and therefore consider that the territory *already* belongs to Israel.

However, the extent to which this Guideline is fulfilled towards the whole of Area C is debatable. It is more accurately argued that this Guideline is fulfilled in relation to the settlements, as the declarations indicating an intention to integrate are stronger in relation to this part of Area C. Most of the government officials' statements concern the settlements and the application of Israeli sovereignty over them. Additionally, it must be stressed that the six settlement regional councils in the West Bank, control substantial amounts of land surrounding the settlements, with recent estimates placing the controlled land at one million dunums (approximately 250,000 acres).<sup>84</sup> So while this does not automatically mean that the whole of Area C is or will be *de facto* annexed – a substantial proportion of the Area C lands does fall under this Guideline.

In addition, another recent future plan has been proposed by the Ministry of Housing, Ministry of Agriculture and the Israel Land Fund which seeks to establish three new settlements in the Jordan Valley,<sup>85</sup> while simultaneously expanding

82 Toi Staff, 'Challenging Netanyahu, senior minister floats annexation of Jerusalem-area settlements' *The Times of Israel* (22 January 2017) <[www.timesofisrael.com/challenging-netanyahu-senior-minister-floats-annexation-of-jerusalem-area-settlements/](http://www.timesofisrael.com/challenging-netanyahu-senior-minister-floats-annexation-of-jerusalem-area-settlements/)> accessed July 2020.

83 Arutz Sheva, 'Left-wing MK plans bill to annex Area C' (17 January 2017) <[www.israelnationalnews.com/News/News.aspx/225177](http://www.israelnationalnews.com/News/News.aspx/225177)>

84 Palestine News Network, 'IOA encouraging Settlement Regional Councils to Seize more Land in Area C' (3 June 2019), available at: <<http://english.pnn.ps/2019/06/03/iof-encourages-settlement-regional-councils-to-seize-more-land-in-area-c/>>.

85 90% of which is within Area C; see B'Tselem, 'The Jordan Valley' (published 18 May 2011, updated 6 October 2013) <[https://www.btselem.org/index.php/jordan\\_valley](https://www.btselem.org/index.php/jordan_valley)> accessed July 2020.

existing settlements.<sup>86</sup> Similarly, the development of the future Jerusalem '5800' Master Plan includes the building of an airport in the Jordan Valley near Jericho which will accommodate 35 million passengers yearly.<sup>87</sup> This is another example of future planning that indicates both permanence and profits for the Israeli State. Such acts of planning for the future show that Israel, as the Occupying Power, is not intending to end the occupation. Additionally, the examples of future planning mentioned above strongly indicate that Area C, in its entirety is affected. For this reason, it can be considered that this guideline is satisfied.

Israel's official position is that Area C is not and will not be annexed. At the same time, however, there is ample evidence that shows that Israel is making alterations in the occupied territory that are inherently permanent. Again, Israel maintains that these alterations are not permanent and that they can be reversed at any time. Israel's argument is unpersuasive when taking into account the continuous future planning in Area C. It is a paradox to argue that current alterations are reversible and that the temporary character of an occupation is respected, while at the same time planning for infrastructural or other developments stretch far into the future. Such acts indicate that Israel is either intending to *de jure* annex Area C sometime in the future, or that it has already *de facto* annexed it and treats it as part of its own territory.

Israel has entered into bilateral agreements with third parties; states, international organisations, and international corporations, on issues such as trade, investment, and the provision of services. These agreements affect the occupied territory, including Area C. Such agreements may indicate that Israel considers Area C as its own territory, for which it can conclude binding international agreements.

Firstly, regarding international trade agreements, as already mentioned above, Israeli settlement businesses often label products made in Area C of the West Bank as 'Made in Israel', in order to benefit from beneficial bilateral trade agreements with third parties, namely the EU.<sup>88</sup> With respect to international investment, OECD's Review of Israel's investment policies mentions that even though Israel's

86 Madeeha Araj, 'New Settlements in the Jordan Valley, Judaization of Occupied Jerusalem Continues' (Palestine News Network, 27 December 2017) <<http://english.pnn.ps/2017/12/27/new-settlements-in-the-jordan-valley-judaization-of-occupied-jerusalem-continues/>> accessed July 2020.

87 Ari Ben Goldberg, 'Australian hi-tech investor unveils audacious 30-year Jerusalem master plan' *The times of Israel* (3 June 2012) <[timesofisrael.com/ambitious-30-year-jerusalem-master-plan-unveiled/](http://timesofisrael.com/ambitious-30-year-jerusalem-master-plan-unveiled/)>.

88 See Guideline 12.

investment legislation does not apply to the West Bank, 'the Government does apply the investment incentives under the Law of Encouragement of Capital Investment to certain industrial areas in the West Bank. Foreign-owned enterprises may be established in those areas and are eligible for applying for grants under that law'.<sup>89</sup> Indeed, Israel entered into contracts with hundreds of foreign and multinational corporations that are either established in Israeli settlements in the West Bank, and especially in the Jordan Valley, or that directly support settlement expansion and development, for example by providing construction materials, banking and financial services to settlers, extraction of natural resources, etc.<sup>90</sup>

The UN Human Rights Council adopted a Resolution, on 24 March 2016, requesting the UN High Commissioner for Human Rights to produce a database of all business enterprises engaged in certain Israeli settlement activity in the OPT.<sup>91</sup> Israel has reacted to the database by stating that '[t]hese companies just can't make the distinction between Israel and the settlements and are ending their operations all together'.<sup>92</sup> Hence, it seems that Israel treats the settlements located in Area C as inseparable from Israel, and the entire Area C as a territory for which it can conclude agreements with states, international organisations and foreign corporations, a prerogative belonging to a sovereign.

Thus, this Guideline seems to be fulfilled for the settlements in the West Bank, as well as for the entirety of Area C, considering that Israel is demonstrating a sense of entitlement to conclude agreements over any (and every) part of Area C.

<sup>89</sup> OECD, 'Accession of Israel to the OECD: Review of international investment policies', 12 <<https://www.oecd.org/israel/49864025.pdf>>.

<sup>90</sup> See UN Human Rights Council, 'Database Pursuant Human Rights Council Resolution 31/36', available at <[www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Pages/DatabaseHRC3136.aspx](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Pages/DatabaseHRC3136.aspx)> accessed July 2020; see also Human Rights Watch (n 205).

<sup>91</sup> UN Human Rights Council, Resolution adopted by the Human Rights Council on 24 March 2016, 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan', A/HRC/RES/31/36.

<sup>92</sup> As reportedly stated by a senior Israeli official; see MEMO, Middle East Monitor, 'UN to blacklist 190 companies doing business in occupied Palestine' (26 October 2017) <<https://www.middleeastmonitor.com/20171026-un-to-blacklist-190-companies-doing-business-in-occupied-palestine/>> accessed July 2020.



### Guideline 3: Application of the Occupying Power's Domestic Legislation in the Occupied Territory and/or Exercise of Legislative Powers Beyond the Limits of Occupation Law

From Articles 43 HR and Articles 48-49 and 64 GCIV and the temporary nature of occupation, it is evident that the Occupant assumes an administrative role over the occupied territory, preserving and respecting the laws in force. Therefore, the Occupying Power cannot arbitrarily impose its sovereignty through the application of its own domestic laws; this can only be justified if absolutely necessary for the maintenance of security or for humanitarian considerations. If this exception is used excessively, the Occupying Power becomes more of a sovereign than an administrator.

Application of the Occupier's domestic law marks all the cases of *de jure* annexation that we have examined, which suggests that this is a key indicator of annexation. Effectively, by extending its legislation to the occupied territory, the occupier treats it as an extension of its territory. For example, in 1967 and 1981 Israel extended its domestic laws in order to be applicable to East Jerusalem and the occupied Syrian Golan. In the case of the occupied Syrian Golan, demolitions of abandoned houses were carried out under the umbrella of the Israel Land Administration. Additionally, when military orders declared abandoned houses as 'absentee property' they merely channeled Israeli domestic law under the Abandoned Areas Ordinance of 1948.

Similarly, after the official integration of East Timor, Indonesian laws were fully applicable to the occupied island. This measure, by itself, reflected a violation of the law of occupation, since it was an application of the Occupying Power's sovereignty over the occupied territory. The applicable legislation included the 1945 Constitution, the Broad Outlines of State Policy of 1973, regular laws and statutes, as well as the Five-Year Development Plan.<sup>93</sup>

The occupied Western Sahara is another example of where the legislation of the Occupying Power is enforced upon the occupied territory. The Moroccan Constitution, the Penal Code and other administrative laws, such as the Press

<sup>93</sup> Hoadley S, 'Indonesia's Annexation of East Timor: Political, Administrative and Developmental Initiatives' (1977) Southeast Asian Affairs 139.

Code and the Law of association are *de facto* applied in the occupied Western Sahara.<sup>94</sup>

It should be noted that even if there is no direct application of the Occupying Power's domestic laws to the occupied territory, the military commander (who has the legislative power over the occupied territory) cannot exceed their powers under the law of occupation. When that occurs - for example, if the military commander were to enact new laws or transform the local laws beyond recognition in defiance of Article 43 HR - it may indicate that the Occupying Power, through the military commander, intends to integrate the occupied territory.

## Application to Area C

After the 1967 occupation, the West Bank was placed under military rule with the military commander assuming legislative and governmental functions.<sup>95</sup> The military legislation enacted after 1967 exists alongside local laws – mainly Jordanian law in the West Bank – and the British Defence Emergency Regulations of 1945, which were put in place during the British mandate.<sup>96</sup> According to an Al-Haq briefing, 20 years after the occupation, much of the Jordanian laws were transformed beyond recognition by subsequent military orders that have been justified on either security concerns or the alleged interest of the local population.<sup>97</sup> At the same time, the British Defence Regulations were resurrected by military decrees, despite being revoked in 1948 and not used during the Jordanian rule.<sup>98</sup>

One of the most controversial legislative measures undertaken by Israel is the extraterritorial application of Israeli domestic laws to individual settlers

94 OHCHR, 'Report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindouf 15/23 May and 19 June 2006' (8 September 2006); Human Rights Watch, 'Human Rights in Western Sahara and in the Tindouf Refugee Camps: Morocco/Western Sahara/ Algeria' (December 2008) <[www.hrw.org/sites/default/files/reports/wsahara1208web.pdf](http://www.hrw.org/sites/default/files/reports/wsahara1208web.pdf)>.

95 The Association of Civil Rights in Israel, 'One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank' (October 2014), 6 <[www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf](http://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf)> accessed July 2020.

96 Luigi Danielle, 'Enforcing Illegality: Israel's Military Justice in the West Bank' (2017) 44 WIL 21, 25 <[http://www.qil-qdi.org/wp-content/uploads/2017/11/03\\_Israeli-Military-Justice-System\\_Daniele\\_FIN.pdf](http://www.qil-qdi.org/wp-content/uploads/2017/11/03_Israeli-Military-Justice-System_Daniele_FIN.pdf)> accessed July 2020.

97 Al-Haq, 'Briefing Papers on Twenty Years of Israel Occupation of the West Bank and Gaza' (1987) <<http://www.alhaq.org/publications/publications-index/item/twenty-years-of-israel-occupation-of-the-west-bank-and-gaza>> accessed July 2020.

98 *ibid.*

living in Area C, while Palestinians are subjected to military laws.<sup>99</sup> This policy was achieved after the Knesset passed a law which states that Israeli courts have jurisdiction over acts or omissions of Israelis that take place/occur in the Palestinian territories.<sup>100</sup> According to the 2017 report of the United Nations High Commissioner for Human Rights, this extraterritorial application of Israeli law creates two parallel and concurrent legal systems in the same occupied territory based on nationality, ethnicity and origin.<sup>101</sup> Not only is this a human rights violation,<sup>102</sup> it is also contrary to Article 43 HR and the obligation of the Occupying Power to respect the laws in force in the occupied territory. The approach taken by the HCJ provides a significant illustration of this. The HCJ has found that the Basic Law: Human Dignity and Liberty applies *in personam* to Israeli settlers.<sup>103</sup> Although there have been cases where the HCJ had to assess the applicability of such constitutional laws to Palestinians, it has avoided to do so and has instead made vague comments on the primacy and applicability of IHL and IHRL over domestic legislation.<sup>104</sup>

The consequence is that Palestinians are subjected to Jordanian law that was established before the occupation as well as to Israeli military orders, whereas Jewish settlers have, since the 1980s, been subjected to Israeli domestic laws before Israeli courts in defiance of the principle of territoriality.<sup>105</sup> It should also be noted that since 1970, Israelis residing in the occupied territories are allowed to vote in the Knesset elections by virtue of a law passed in the Knesset.<sup>106</sup> This has allowed Israelis by virtue of their nationality to participate in the elections for

99 UNGA Human Rights Council, 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan' (13 April 2017) A/HRC/34/39 3.

100 See Law for Amending and Extending the Validity of Emergency Regulations (Judea and Samaria – Jurisdiction in Offenses and Legal Aid) 2007, art 2(a) and (c) <<http://nolegalfrontiers.org/israeli-domestic-legislation/isr19ed2?lang=en>> accessed July 2020.

101 UNGA A/HRC/34/39 (13 April 2017) (n 94) 3

102 It violates the right of equality before the law and the right to a fair trial under arts 2 and 4 of the ICCPR.

103 HCJ 1661/05, Gaza Beach Regional Council et al v. Knesset of Israel et al., 59 (2) PD 481 (2005) [80]: 'the Basic Law provides rights to every Israeli settler in the evacuated area. This application is personal. It derives from Israel's control over the evacuated area. It reflects the perception that Israelis situated outside the state but in territory under its control by way of belligerent occupation are governed by the state's Basic Laws regarding human rights.'

104 HCJ 7957/04 Mara'abe and Others v Prime Minister of Israel and Others (15 September 2005), official English translation at <[http://elyon1.court.gov.il/files\\_eng/04/570/079/A14/04079570.a14.pdf](http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf)> accessed July 2020. The Court stated (para 26) that 'it is unanimously agreed that international humanitarian law is the central source of [Palestinians'] rights' while making no reference to the constitutional law.

105 Danielle, (n 91).

106 Knesset Elections Law (Amendment No 2) 1970, art 147.

the institutions governing the territory they reside in, whereas Palestinians are not able to do so.<sup>107</sup>

Apart from the extraterritorial application of Israeli domestic laws to individual settlers, Israeli laws are also “applied”, though indirectly, by virtue of tactics employed by the military commander. This is achieved by “channelling” Israeli laws through military orders. For example, Israeli civil law has been channelled in this way into the territory of settlements, to regulate the governmental institutions in the settlements.<sup>108</sup> Similarly the military commander has enacted many orders that extend the applicability of Israeli civil and administrative laws to Israeli settlers individually,<sup>109</sup> thus creating a sense that the settlers never left Israel.<sup>110</sup> The difference from the above extraterritorial application is that here, Israeli domestic law is reflected in the military orders and not applied through the Knesset. Professor Rubinstein has described this as ‘enclave-based justice’ while Benvenisti has argued that the manner in which Israeli legislation is applied extraterritorially to Israeli settlements results in the ‘1967 borders [being] erased from a legal perspective with regards to any objective reflecting Israeli interests’.<sup>111</sup>

Another legislative measure has been the law passed by the Knesset in February 2017 for the regulation of land in the West Bank.<sup>112</sup> The objective of the law is ‘to regulate Israeli settlement in Judea and Samaria and to allow its continued establishment and development.’<sup>113</sup> The law has been considered a breach of international law and in defiance of the December 2016 UNSC Resolution declaring Israeli settlements illegal and in violation of international law.<sup>114</sup> By passing this law, the Knesset has legislated on settlements directly but extraterritorially, as if it has legislative jurisdiction over the territory (including Area C in which the majority of settlements are present). This is, again, a strong indicator of a possible

<sup>107</sup> The Association of Civil Rights in Israel (n 90) 18.

<sup>108</sup> UNGA A/HRC/22/63 (n 257).

<sup>109</sup> These include: Order Concerning the Administration of Local Councils (Judea and Samaria) (No 892) 5741-1981; Order Concerning the Administration of Regional Councils (Judea and Samaria) (No 783) 5739-1979; Regulations for Regional Councils (Judea and Samaria) 5741-1981.

<sup>110</sup> The Association of Civil Rights in Israel (n 90).

<sup>111</sup> Eyal Benvenisti, *Legal Dualism: The Absorption of the Occupied Territories into Israel* (Westview Press 1989)

<sup>112</sup> Regulation of Settlement in Judea and Samaria Law, 5777-2017.

<sup>113</sup> Library of Congress, ‘Israel: Law for the Regulation of Settlement in Judea and Samaria, 5777-2017’ <[www.loc.gov/law/help/israel-settlement/judea-and-samaria.php#\\_ftn1](http://www.loc.gov/law/help/israel-settlement/judea-and-samaria.php#_ftn1)> accessed July 2020.

<sup>114</sup> UNSC Res 2334 (23 December 2016) UN Doc S/RES/2334.

*de facto* annexation of Area C and/or of an intention to *de jure* annex the territory in the future.

Apart from the application of Israeli domestic law in the occupied territory, there also seems to be an abuse of the legislative powers granted to the military commander under the laws of occupation. This is mainly caused by the fact that settlers are residing in the occupied territory in violation of Article 49 GCIV. The applicability of two different legal systems by virtue of nationality has created a system of discrimination against Palestinians because of the inherent harsh nature of military laws. A good example can be found in the laws concerning detention. The provisions on detention that apply to Israeli citizens, both in the occupied territories and in Israel, are regulated by Israeli domestic laws.<sup>115</sup> On the other hand, those that apply to Palestinians are regulated under the Order Concerning Security Provisions.<sup>116</sup> The latter does not limit the use of extreme measures of detention and allows soldiers to detain without a detention order.<sup>117</sup>

Additionally, many military laws were enacted to alter the Jordanian planning law and subsequently to completely exclude Palestinians from the planning system in the West Bank. Such alterations are directly violating occupation law and specifically Article 43 of the HR which provides that the laws in force before the occupation should be respected. For example, the military commander annulled, through a military order, the provisions of Jordanian Planning Law that enabled Palestinian village councils to serve as Local Planning Committees.<sup>118</sup> It is indeed difficult to see how such a move can be justified on grounds of military necessity.

Moreover, Military Order No 658 Concerning the Law of excise on Local Products Law on 1 July 1976, introduced a new Value Added Tax (VAT) imposed on the sale of goods, on the rendering of services and on imported goods,<sup>119</sup> which reflected

<sup>115</sup> The Criminal Procedure Law (Enforcement Powers – Detentions) 5756-1996, and in the Criminal Procedure Law (Detainee Suspected of Security Offenses) (Temporary Order) 5766-2006.

<sup>116</sup> Security Provisions Order (No 1651) of 2009 <<http://nolegalfrontiers.org/military-orders/mil019ed2.html?lang=en>>.

<sup>117</sup> *ibid*, art 31(a).

<sup>118</sup> Norwegian Refugee Council, ‘A Guide to Housing, Land and Property Law in Area C of the West Bank’ (February 2012) <<https://www.nrc.no/globalassets/pdf/reports/a-guide-to-housing-land-and-property-law-in-area-c-of-the-west-bank.pdf>> accessed July 2020.

<sup>119</sup> Marc Stephens, ‘Taxation in the occupied West Bank 1967-1989’ (Al-Haq March 1990), 32.

the domestic Law on Fees on Local Products no.16 (1963).<sup>120</sup> Dinstein states that the VAT, together with other forms of indirect taxation, was standardized by Israel 'in order to avoid cheating, evasion and unfair competition'.<sup>121</sup> This "new" law was challenged before the Supreme Court of Israel, in the VAT case, on the ground that it was incompatible with Articles 48 and 49 HR because it was not introduced for the needs of the army or for the administration of the occupied territory.<sup>122</sup> The Court, however, found that the tax legislation was in accordance with the laws of occupation because it was identical to any other type of legislation allowed to be introduced on the basis of necessity under Article 43 of the HR.<sup>123</sup> It is important to note that this tax was 'legitimised' in 1994 after the signing of the Paris Protocol. However, Article VI of the Protocol states that 'the present Israeli VAT rate is 17%. The Palestinian VAT will be 15% to 16%'.<sup>124</sup> According to a 2014 UN Conference on Trade and Development (UNCTAD) report, the result is that the Palestinian National Authority cannot set the VAT rate less than 2% from the Israeli rate, leaving a very small margin for amending the VAT rate.<sup>125</sup>

In light of the above, it can be argued that this guideline is definitely fulfilled in relation to the settlements because of a) the extraterritorial application of Israeli domestic laws to individual settlers and institutions, b) the channelling of Israeli laws through military orders with effects on the territory and on individual Israelis, c) the recent Knesset law that applies to the settlements. These are strong indicators of creeping annexation, or at the very least of Israel's intention to incorporate the settlements.

There are a lot of indications that Israel, as the Occupying Power is exceeding the limits imposed by the laws of occupation while exercising its legislative powers

120 United Nations Conference on Trade and Development (UNCTAD), 'Palestinian Fiscal Revenue Leakage to Israel under the Paris Protocol on Economic Relations' UNCTAD/GDS/APP/2013/1 (22 September 2014) <<http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1034>> accessed July 2020.

121 Yoram Dinstein, 'The International Law of Belligerent Occupation and Human Rights' in *Israel Yearbook on Human Rights* (Volume 8, Tel Aviv University, 1978) 166.

122 VAT case H CJ 69/81, *Abu Aita et al v Commander of Judea and Samaria et al* 37(2) PD 197, as quoted in Dinstein (n 35) 128.

123 *ibid.*

124 Gaza-Jericho Agreement, Annex IV, Protocol on Economic Relations between the Government of the State of Israel and the PLO, representing the Palestinian people (Paris, 29 April 1994), Article VI <<http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Gaza-Jericho%20Agreement%20Annex%20IV%20-%20Economic%20Protoco.aspx>>.

125 UNCTAD, (n 115).

in relation to the entirety of Area C. As has already been mentioned, Article 43 HR preserves the local laws of the occupied territory and only allows for new laws to be enacted if there is military necessity. Though all legislative measures are justified under this 'exception' it can hardly be argued that military necessity can be invoked in all cases. Simultaneously, the exercise of the legislative powers by the military commander often resembles that of a sovereign and not of an administrator.



## Guideline 4: Application of the Occupying Power's Judicial Authority in the Occupied Territory

Under occupation law (especially Articles 54, 66 and 73 GCIV), it is clear that the domestic jurisdiction of the Occupying Power does not and shall not apply in the occupied territory. Instead, local courts retain their jurisdiction and military courts are responsible for enforcing those provisions in accordance with Article 64 GCIV. In regards to appeals, the wording of the abovementioned provisions shows that the Appeal Courts are not obliged to sit in the occupied territory. The application of the Occupying Power's domestic judicial authority over the occupied territory, is therefore outside the powers granted to it under occupation law and may be considered an indicator that the occupying power is extending its sovereignty to the occupied territory.

For instance, in the case of Western Sahara, the Sahrawi are often subjected to the jurisdiction of Moroccan civil courts. Moroccan criminal courts have jurisdiction over potential violations of the Moroccan Penal Code in the occupied territory.<sup>126</sup> This exercise of sovereign powers is likely to be violating occupation laws, as the general rule is the maintenance of the *status quo*.

### Application to Area C

Occupation law relies on the principle of territoriality, meaning that the entire occupied territory is under the jurisdiction of military courts regardless of the nationality of the perpetrators.<sup>127</sup> The regime of occupation clearly stipulates that the 'Occupying Power is not the sovereign of the territories', and thus cannot benefit from sovereign prerogatives in the occupied territory, such as the extraterritorial application of national legislation.<sup>128</sup> Israeli settlers living in Area C are not subjected to the jurisdiction of Israeli military courts. If they commit a crime, they will be prosecuted under Israeli domestic law and before Israeli civil

<sup>126</sup> Human Rights Watch, (ibid) 40ff, 43.

<sup>127</sup> Orna Ben-Naftali, Aeyal Gross, Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', (2005) 23 Berkeley J. Int'L. 584-587, 584; Al-Haq, 'Legitimising the Illegitimate?' (2010), 17, 24 <[www.alhaq.org/publications/publications-index/item/legitimising-the-illegitimate](http://www.alhaq.org/publications/publications-index/item/legitimising-the-illegitimate)> accessed July 2020.

<sup>128</sup> ibid 409; see Guideline 4.

courts.<sup>129</sup> It seems unreasonable to argue that the occupying power can apply their jurisdiction extraterritorially despite the fact that some States attempt to do so.<sup>130</sup> The extension of the Occupying Power's judicial system to the OPT, may demonstrate its intention to permanently integrate the territory.<sup>131</sup>

On the other hand, Palestinians are subjected to the military jurisdiction of the Occupying Power. In 1967, the Israeli Occupying Forces (IOF) established the jurisdiction of military courts in the OPT based on security and public order.<sup>132</sup> The Military Advocate General who drafts the military orders and the Military Commander have powers over the appointment of military judges chosen from the IOF legal staff. The jurisdiction *rationae materiae* of the military courts is established under military orders that enumerate the 'security offenses' over which the courts can adjudicate. These military orders are called security provisions orders.<sup>133</sup> Therefore, military courts have jurisdiction over 'security offenses', regardless of where the offense is committed; this often includes civil affairs offences justified under a 'threat to public order'.<sup>134</sup> Israeli authorities have not respected these limits and have broadened the scope of jurisdiction of military courts to situations unrelated to security matters, which include tax evasion and unauthorised building.<sup>135</sup> Thus, a number of military trials of such civil affairs have taken place over the years<sup>136</sup> in violation of occupation law.

Lastly, it is important to mention the HCJ's jurisdiction as an authority of judicial review of the military court system and as a first instance court that admits individual petitions from Palestinians. There is a *de facto* recognition of the HCJ's

<sup>129</sup> Daniele (n 91) 29-30; see Guideline 4.

<sup>130</sup> S Weill, 'The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories' (2006) 866 International Review of the Red Cross, 403. Israel cannot invoke extraterritorial jurisdiction on the basis of nationality regarding settlers, because the situation where they live was created by Israel in violation of occupation law, and under the principle *ex injuria jus non oritur*, no legal right can arise from an illegal act.

<sup>131</sup> Ben-Naftali et al (n 122) 586.

<sup>132</sup> Military Proclamation No 2 Concerning Regulation of Authority and the Judiciary (West Bank) (1967), published in CPOA; Danielle (n 91).

<sup>133</sup> Danielle (n 91) 29; See for example Order regarding Security Provisions No 378 (20 April 1970) <[www.scribd.com/document/144678918/Israel-Military-Order-No-378-on-Security-Provisions](http://www.scribd.com/document/144678918/Israel-Military-Order-No-378-on-Security-Provisions)>; Security Provisions Order (No 1651) of 2009 <<http://nolegalfrontiers.org/military-orders/mil019ed2.html?lang=en>>.

<sup>134</sup> B'Tselem, 'The Military Courts' (11 November 2011) <[www.btselem.org/military\\_courts](http://www.btselem.org/military_courts)> accessed July 2020.

<sup>135</sup> Kathleen Cavanaugh, 'The Israeli Military Court System in the West Bank and Gaza', (2007) 12(2) Journal of Conflict & Security Law 197, 206.

<sup>136</sup> Valentina Azarova, 'The Pathology of a Legal System: Israel's Military Justice System and International Law', (2017) 44 QIL 5, 10.

jurisdiction over events taking place in the OPT. In this regard, its jurisdiction as a court of appeal is acceptable under Article 66 GCIV. However, its jurisdiction as a first instance court can be questioned, namely because it sits in Israel.<sup>137</sup>

Noting all the above, it can be argued that Israeli settlers and settlements are used as an extension of Israeli (domestic) judicial authority in the OPT.<sup>138</sup> This may demonstrate the intention of the Occupying Power to extend its judicial power to the OPT, specifically to the settlements. Furthermore, the situation in the rest of Area C is far from meeting the legal standards of occupation law, namely of Article 66 GCIV. Israeli authorities often extend the *ratione materiae* jurisdiction of Israeli military courts to non-security offenses, which should not be within their jurisdiction. Additionally, they also apply their jurisdiction extraterritorially, over territory where they do not have administrative authority, such as Area A and B. Taking into account the misuse of Israel's military judicial authority in the occupied territory, namely the on-going expansion of the jurisdiction of the military courts in all of the West Bank, it is possible to conclude that the present Guideline is fulfilled in the entirety of Area C. Thus, it is possible to say that there is a 'judicial annexation' of Area C as a whole.<sup>139</sup> It should however be noted that there also seems to be a special intensity of applicability of the judicial authority in the Israeli settlements over which Israeli civil courts have jurisdiction.

137 Al-Haq (n 122) 20.

138 Daniele (n 91) 37.

139 Ben-Naftali et al (n 122) 554; Daniele (n 91) 30.



## Guideline 5: Alteration of the Occupied Territory's Demographics

One common characteristic of annexation is that the Occupying Power, soon after establishing effective control over the occupied territory, pursues the creation of an ethnically homogenous region by altering the demographic composition of the occupied area, usually with nationals of the Occupying State. The main objective of achieving an ethnically homogenous region is to provide a justification for the Occupying Power to extend its sovereignty over the territory.

In most cases, this translates to the forcible displacement of the occupied population often through the creation of a coercive environment (for example through the destruction of property and other measures that indirectly force the local population to flee and find asylum in other countries or internally), and the establishment of civilian and commercial settlements in the occupied territory. These actions violate Articles 49 and 53 GCIV and Articles 46(2), 53, 55, 56 HR.

For example, in Northern Cyprus, approximately 272,000 people<sup>140</sup> were internally displaced, according to ethnic groups, as a result of the 1974 intervention, while at the same time a significant number of Anatolian settlers immigrated to the occupied area.

In East Timor, more than 200,000 persons were forcibly displaced - many fled in the hope of finding refuge and others moved to West Timor, as a consequence of the occupation and systematic killings perpetrated by Indonesian troops.<sup>141</sup> The military also forced a high number of Timorese into military-controlled camps. The same tactic was employed in South Ossetia and Abkhazia with the forcible transfer and persecution of the local population by the Occupying Power, in parallel with the transfer in of settlers.<sup>142</sup>

After Morocco occupied Western Sahara, the majority of Sahrawi people living

140 International Displacement Monitoring Centre, available at <[www.internal-displacement.org/countries/cyprus/](http://www.internal-displacement.org/countries/cyprus/)> accessed July 2020.

141 UNGA Report of the International Commission of Inquiry on East Timor (31 January 2000) UN Doc A/54/726, S/2000/59, 131-133.

142 *ibid* 133; Open Society Justice Initiative and Coalition for International Justice, 'Unfulfilled Promises Achieving Justice for Crimes Against Humanity in East Timor' (November 2004) 12, 13.

there fled to Algeria where they acquired refugee status.<sup>143</sup> At the same time, Morocco moved around 350,000 Moroccans into Western Sahara territory and continued to do so over the years.<sup>144</sup> Nowadays, the majority of the population of the occupied Western Sahara is Moroccan.<sup>145</sup> These measures appear to be aimed at changing the demographics of the occupied territory by transferring the population of the Occupying Power and creating an environment where the local population is coerced or forced to leave.

Similarly, after the 1967 'Six-Day War', in the occupied Syrian Golan, thousands of Syrian inhabitants were displaced from the occupied Syrian Golan and subsequently prevented from returning to their homes. Although it is difficult to find exact figures on the population of the occupied Syrian Golan and the demographic changes post-1967, it is generally agreed that today only five villages are inhabited with an estimated population of 18,000-25,000 Syrians<sup>146</sup> mostly members of the Druze community.<sup>147</sup> Israel initiated many settlement projects, through military orders, allocating land and water for the sole purpose of building settlements.<sup>148</sup> Additionally, the government has encouraged its population to move to the Golan by providing financial incentives and increased water allocation for their farms.<sup>149</sup> It is estimated that there are 33 settlements in the Golan with a population of 21,000 settlers, almost equal to the occupied Syrian population.<sup>150</sup>

143 Human Rights Watch, 'Morocco/Western Sahara: Events of 2008' <[www.hrw.org/world-report/2009/country-chapters/morocco/western-sahara](http://www.hrw.org/world-report/2009/country-chapters/morocco/western-sahara)>; Western Sahara Initiative (CLAIHR), 'Fact-Finding mission to Algiers and the Saharwi Refugee Camps near Tindouf, Algeria June 1997' (1997) <[www.arso.org/CLAIHR.htm](http://www.arso.org/CLAIHR.htm)>.

144 Security Council Report, 'Chronology of Events: Western Sahara' (revised 5 December 2017) <[www.securitycouncilreport.org/chronology/western-sahara.php](http://www.securitycouncilreport.org/chronology/western-sahara.php)>; Western Sahara Initiative (ibid).

145 Human Rights Watch, (n 138).

146 IDMC, 'Syria: Forty years on, people displaced from the Golan remain in waiting' (31 October 2007) <[www.internal-displacement.org/middle-east-and-north-africa/syria/2007/new-country-profile](http://www.internal-displacement.org/middle-east-and-north-africa/syria/2007/new-country-profile)>.

147 Ray Murphy and Declan Gannon, 'Changing the Landscape: Israel's Gross Violations of International Law in the Occupied Syrian Golan' (Al-Marsad Report, November 2008) <[http://golan-marsad.org/wp-content/uploads/Changing\\_The\\_Landscape.pdf](http://golan-marsad.org/wp-content/uploads/Changing_The_Landscape.pdf)>; W Harris, 'War and Settlement Change: The Golan Heights and the Jordan Rift, 1967-77' (1978) 3(3) Transactions of British Geographers 309; BBC, 'Golan Heights Profile' *BBC News* (27 November 2015) <[www.bbc.com/news/world-middle-east-14724842](http://www.bbc.com/news/world-middle-east-14724842)>.

148 Jonathan Molony, Michelle Stewart and Nancy Tuohy-Hamil, 'From Settlement to Shelf: The Economic Occupation of the Syrian Golan' (Al-Marsad Report, December 2009) <<http://golan-marsad.org/wp-content/uploads/From-settlements-to-shelf.pdf>>.

149 UN Human Rights Council, 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan' UNGA A/HRC/31/43 (20 January 2016); UNGA A/HRC/34/39 (13 April 2017), (n 94).

150 *ibid*.

Since 1967, Israel has revoked the residencies of more than 14,500 Palestinians in East Jerusalem, forcing their transfer.<sup>151</sup> The revocations have followed the Israeli policy of cultivating a 60 percent Jew, 40 percent Arab demographic balance in the city.<sup>152</sup> Israel's construction of civil and commercial settlements in East Jerusalem, the land confiscation and demolition of Palestinian property, the transfer of Israeli population into East Jerusalem and the restrictions to the freedom of movement of the Palestinians, along with the adoption of a series of relevant administrative measures, have significantly altered the demographic composition of East Jerusalem.

## Application to Area C

Israel has altered the demographic composition of Area C in two main ways. First, it permitted, supported and encouraged the establishment of an extensive number of settlements in Area C. It has been estimated that, at the end of 2019, there were around 426,925 settlers living in the West Bank, excluding East Jerusalem.<sup>153</sup> Israel has also created a large number of incentives for communities living in so-called 'National Priority Areas', which are also found in Area C. These benefits are afforded to settlers and include, *inter alia*, reduced housing prices in the settlements and easier purchase of apartments, free compulsory education from age three, priority in attribution of university scholarships, reduced lease fees on land intended for industrial use, grants for establishing agriculture enterprises, tax reductions, etc.<sup>154</sup> In addition, the average income is higher in the settlements and there is a lower unemployment rate, thus making the standard of living higher than that in Israel.<sup>155</sup> Moreover, Israel has created infrastructure such as housing, roads, green spaces, water pipes as well as sewage systems to serve Israeli settlers, thus, encouraging them to move to the OPT.<sup>156</sup> It is important to note that the

151 Refer to infographic available at: <<http://www.alhaq.org/publications/papers/VP-ResidencyRevocation-FINAL-20170612.pdf>>.

152 Demographic target for 2020 of 60% Jews and 40% Arabs set by the municipal authorities of Jerusalem in 2009: "Master plan 2000", local master plan for Jerusalem by the district commission. This target has also been adopted by the district master plan.

153 Population - Statistical Abstract of Israel 2019 - No. 70, Population of Jews and Others by Natural Region, 2018, available at: <<https://www.cbs.gov.il/en/publications/Pages/2019/Population-Statistical-Abstract-of-Israel-2019-No-70.aspx#losExcelos>>; B'Tselem, (n 310) 13.

154 Eyal Hareuveni, 'By Hook and Crook: Israeli Settlement Policy in the West Bank' (B'Tselem, July 2010) <[www.btselem.org/publications/summaries/201007\\_by\\_hook\\_and\\_by\\_crook](http://www.btselem.org/publications/summaries/201007_by_hook_and_by_crook)> accessed July 2020, 37-46.

155 *ibid*.

156 *ibid* 12, 40, 44, 45.

HCJ concluded that there were legitimate security concerns for the construction of the settlements.<sup>157</sup> However, this justification seems at odds with Article 49 GCIV, which establishes an absolute prohibition of forcible population transfers. Besides, it seems far-fetched to conclude that a settlement is an adequate and proportional means to respond to security concerns. Things have become even more concerning with the recent approval by the Knesset of a 'regularization law' that retroactively legalises settlements built on Palestinian private lands in the OPT. This bill was suspended and is currently under scrutiny by the HCJ.<sup>158</sup>

Secondly, Israel has caused the forcible removal of the local population (including Bedouin communities) from Area C. This was achieved through various measures on the ground. Israel has occasionally deported large numbers of Palestinians from the OPT, as was the case, for instance, when it deported 400 Palestinians to Lebanon.<sup>159</sup> This case reached the HCJ, through Palestinian petitioners, but the Court did not consider that the deportation violated any norm of IHL, namely because it did not consider it to be a collective deportation order. Instead, the HCJ interpreted the situation as 400 individual orders of deportation.<sup>160</sup>

In addition, Israel has created a coercive environment that has prompted Palestinians, including the Bedouin communities, in Area C to leave. Israel limits Palestinian construction and development in Area C, which contributes to inflation and reduces the available space for Palestinian communities to grow.<sup>161</sup> Around 70 per cent of Area C is 'off limits to Palestinian use and development'.<sup>162</sup> Thus, a lot of Palestinians build homes without permits and then live with the

157 David Kretzmer, 'The law of belligerent occupation in the Supreme Court of Israel' (2012) 94(885) *International Review of the Red Cross* 213.

158 See Guideline 4; The Association of Civil Rights in Israel, 'ACRI, Peace Now and Yesh Din Petition the High Court against the Expropriation Law', (5 March 2017) <[www.acri.org.il/en/2017/03/05/acri-peace-now-and-yesh-din-petition-the-high-court-against-the-expropriation-law/](http://www.acri.org.il/en/2017/03/05/acri-peace-now-and-yesh-din-petition-the-high-court-against-the-expropriation-law/)>; Shiomo Pyutrikovsky, 'Supreme Court Freezes Regulation Law' *Arutz Sheva* (17 August 2017) <[www.israelnationalnews.com/News/News.aspx/234052](http://www.israelnationalnews.com/News/News.aspx/234052)>; Tazpit Press Service, 'Legalization Bill Frozen, Leaving Judea, Samaria Communities in Limbo' (Breaking Israel News, 18 August 2017) <[www.breakingisraelnews.com/93415/high-court-freezes-regulation-law/#aVWcpkvAm78Z97pd.97](http://www.breakingisraelnews.com/93415/high-court-freezes-regulation-law/#aVWcpkvAm78Z97pd.97)>.

159 B'Tselem, 'The Mass Deportation of 1992', (2011) <[www.btselem.org/deportation/1992\\_mass\\_deportation](http://www.btselem.org/deportation/1992_mass_deportation)> accessed July 2020.

160 *ibid.*

161 B'Tselem (n 310) 5.

162 *ibid.*, OCHA, 'Area C of the West Bank: Key Humanitarian Concerns' (August 2014), available at <[https://www.ochaopt.org/sites/default/files/ocha\\_opt\\_area\\_c\\_factsheet\\_August\\_2014\\_english.pdf](https://www.ochaopt.org/sites/default/files/ocha_opt_area_c_factsheet_August_2014_english.pdf)> accessed July 2020.

constant fear of impending house demolitions.<sup>163</sup> In addition, Israel actively denies construction permits and maintenance licenses for water infrastructures in Area C. Any water structure built without a permit risks demolition as well. 'In contrast, Israeli settlers are not required to obtain a permit from the Israeli Civil Administration and, unlike Palestinian communities, all settlements in the OPT are connected to a water network.'<sup>164</sup> Therefore, when a Palestinian farmer has very limited access to water, consequently limiting their agricultural yields, while the agricultural settlement next door has abundant access to water, Palestinian farmers may eventually feel that they have no option but to leave.<sup>165</sup> These types of forced movements ultimately lead to the alteration of the demographic composition of Area C.

Palestinian Bedouin nomadic communities are especially struggling under the Israeli occupation.<sup>166</sup> Their livelihood and food security, particularly in Area C, has been adversely affected by the expansion of Israeli settlements, property demolitions and farming restrictions, as well as restrictions limiting freedom of movement by designating certain zones as 'closed' areas.<sup>167</sup> Moreover, Bedouin communities have no access to electricity and are only partially connected to water.<sup>168</sup> This again facilitates the creation of an environment where these communities are forced to leave Area C and settle in urban areas, in Area A or elsewhere, and become internally displaced persons.

In sum, various measures can be seen as part of a strategy to create a coercive environment in Area C that indirectly forces the local inhabitants to leave their

163 *ibid.*

164 Al-Haq, 'Water for One People Only: Discriminatory Access and 'Water-Apartheid' in the OPT' (2013) <[http://www.alhaq.org/ cached\\_uploads/download/alhaq\\_files/publications/Water-For-One-People-Only.pdf](http://www.alhaq.org/ cached_uploads/download/alhaq_files/publications/Water-For-One-People-Only.pdf)>.

165 B'Tselem (n 310) 13-15.

166 Similar discriminations are experienced by Palestinian Bedouins in the Naqab, who face house demolitions and forcible transfer by Israel. See Adalah, "Advancing the Human Rights of Arab Bedouins in the Naqab" (6 March 2019), available at: <<https://www.adalah.org/en/content/view/9696>>.

167 Al-Haq, 'Plight of Palestinian Bedouin depicts impact of illegal Israeli occupation and practices in Palestinian Territory' (2014) <[www.alhaq.org/publications/publications-index/item/plight-of-palestinian-bedouin-depicts-impact-of-illegal-israeli-occupation-and-practices-in-palestinian-territory](http://www.alhaq.org/publications/publications-index/item/plight-of-palestinian-bedouin-depicts-impact-of-illegal-israeli-occupation-and-practices-in-palestinian-territory)>; UNGA Report of the Secretary General, 'Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem' (13 September 2011), UN Doc A/66/356 <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/48843172ED03374F8525792E0060FFDC>>.

168 United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 'Vulnerability Profile of Palestinian Communities in Area C' (2013) <<http://data.ochaopt.org/vpp.aspx>>.

homes.<sup>169</sup> These measures include Israel's restrictive planning processes towards the local community;<sup>170</sup> the issuing of home demolition orders and seizure of property;<sup>171</sup> the obstruction to the development of infrastructure and services in Area C that could benefit the local population;<sup>172</sup> the discrimination between settlers and Palestinians; the restrictions on the freedom of movement of the local population.<sup>173</sup>

In light of the above, this Guideline seems to be fulfilled in relation to Area C. By intentionally changing the demographic composition of the territory, Israel is in breach of Article 49 of GCIV. Firstly, Israel supports and even encourages the settlements, which are established in Area C in violation of occupation law. Secondly, Israel violates Article 49 GCIV, as it deports Palestinians and creates a coercive environment where the occupied population feels forced to leave. In conclusion, all the measures mentioned above are indicators of Israel's intention to permanently change the demographics of Area C.

169 OCHA, 'Firing Zones and risk of forcible transfer' (4 July 2017) <<http://new.ochaopt.org/content/firing-zones-and-risk-forcible-transfer>>; UNGA Human Rights Council Resolution, 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan' (21 March 2017) UN Doc HRC/A/34/L.41.

170 B'Tselem (n 310) 15-18.

171 *ibid* 19-20.

172 *ibid* 20-23.

173 See Guideline 15; B'Tselem, 'Restrictions on Movement' (11 November 2017) <[www.btselem.org/freedom\\_of\\_movement](http://www.btselem.org/freedom_of_movement)>.



## Guideline 6: Imposition or Revocation of Citizenship Status of the Occupied Territory's Population

The Occupying Power often controls the acquisition of citizenship, and even imposes its own citizenship upon the local population in order to erase their previous nationality. These measures relate to one of the most important aspects of sovereignty, which is nationality. Often the Occupying Power, breaches international humanitarian law, by treating the occupied territory as an extension of its sovereign territory, imposing its own citizenship on the protected population, as a step towards permanent annexation.

The Turkish citizenship laws, which allow Turkish-Cypriots to automatically acquire Turkish citizenship by birth, are an illustration.<sup>174</sup> In a similar manner, the Israeli enforcement of citizenship on the Druze population of the occupied Syrian Golan underlines the same intention to permanently integrate the territory and its population.<sup>175</sup> Administrative actions taken by Russia as part of a 'passportisation' policy in South Ossetia and Abkhazia, saw Russian citizenship awarded to the vast majority of the local occupied population.<sup>176</sup>

### Application to Area C

No evidence could be found showing that Israel has tried to formally impose its citizenship on Palestinians in Area C, however statements made by the Israeli Minister for Justice have expressed evidence of intent. In February 2019 Minister Shaked stated, "If we apply Israeli law to Area C, I'll live peacefully with the fact that we gave 400-500,000 Palestinians Israeli citizenship and allow them to vote in the Knesset's elections".<sup>177</sup> However, as mentioned before, Israel has frozen the population registry and only registers children with a resident parent. This means

174 Turkish Citizenship Law, No 5901 (29 May 2009), art 42.

175 Lisa Hajjar, 'Israel's Interventions Among the Druze' in *Power and Politics of Difference* (Vol. 26, Fall 1996, MER 200).

176 Thomas Ambrosio and William A Lange, 'The architecture of annexation? Russia's bilateral agreements with South Ossetia and Abkhazia', (2016) 44(5) *Nationalities Papers* 677 with further reference to Vincent Artman, 'Documenting Territory: Passportisation, Territory, and Exception in Abkhazia and South Ossetia', (2013) *Geopolitics* 18 (3): 682-704, 690.

177 'I'm willing to give half a million Arabs citizenship' Arutz Sheva (16 February 2019), available at: <<http://www.israelnationalnews.com/News/News.aspx/259137>>.

that a substantial number of Palestinians are not registered. These individuals may not be eligible for the issuing of a travel document or other relevant identification documents.<sup>178</sup> Therefore, it is possible to say that the present guideline is partially fulfilled in relation to the local population that is not registered in Area C. Israel has indirectly restricted the possibility of the occupied population to acquire any sort of citizenship.

<sup>178</sup> See Guideline 6.



## Guideline 7: *De facto* Alteration of the Borders of the Occupied Territory

The Occupying Power often creates facts on the ground to alter the geography of the territory it intends to annex. In this regard, the annexing State commonly attempts to divide the occupied territory between the part it controls and the part that is controlled by other actors. These actions are used as a way to control and limit the free movement of the people in the occupied territory and its established borders.

In the case of South Ossetia and Abkhazia, Russia established obstacles and fences that reportedly have been moving further into Georgian territory, thus enlarging the occupied territory. More specifically, Georgia is divided from South Ossetia and Abkhazia through an 'Administrative Boundary Line'. However, the EU Monitoring Mission for Georgia (EUMM) 'has observed an increase in the construction of fences and obstacles, which has a negative impact on the local population' and has condemned the installation of fences by Russian troops.<sup>179</sup> Even more so, it has been reported that the lines between Georgia and South Ossetia and Abkhazia are unclear, hazy and fluid, as the barbed wire fences put up by Russian forces reportedly continuously move deeper into undisputed Georgian territory. As a result, the local population is being segregated from its land by an artificial line that Russia drew based on a military map from the Soviet era. Additionally, the local population is even being arrested by Russian border guards for finding themselves on the wrong side of this unmarked, uncertain and fluid line.<sup>180</sup> This process of fluid borderline has been characterised as 'creeping annexation'.<sup>181</sup> At the same time, '[w]hile South Ossetia's and Abkhazia's borders with Georgia hardened with the presence of Russian troops, their borders with Russia were

<sup>179</sup> EUMM, 'EUMM: Recent installation of fences near Ditsi is unacceptable', (Press Release of 28 May 2013) <[https://eumm.eu/en/press\\_and\\_public\\_information/press\\_releases/3862/](https://eumm.eu/en/press_and_public_information/press_releases/3862/)>.

<sup>180</sup> Andrew Higgins, 'In Russia's 'Frozen Zone,' a Creeping Border With Georgia' *The New York Times* (23 October 2016) <<https://www.nytimes.com/2016/10/24/world/europe/in-russias-frozen-zone-a-creeping-border-with-georgia.html>>; see also Delegation of the European Union to the Council of Europe, 'EU Local Statement on the Secretary General's 15th Consolidated report on the conflict in Georgia' (19 April 2017), <[https://eeas.europa.eu/delegations/council-europe/24837/eu-local-statement-secretary-general%E2%80%99s-15th-consolidated-report-conflict-georgia\\_en](https://eeas.europa.eu/delegations/council-europe/24837/eu-local-statement-secretary-general%E2%80%99s-15th-consolidated-report-conflict-georgia_en)>.

<sup>181</sup> Higgins, (n 173); see also Luke Coffey, 'The creeping Russian border in Georgia' (Al Jazeera, 27 August 2015) <<http://www.aljazeera.com/indepth/opinion/2015/07/creeping-russian-border-georgia-south-ossetia-abkhazia-150722111452829.html>>.

being weakened through bilateral “alliance” and “integration” agreements’.<sup>182</sup>

Israel has created a considerable number of facts on the ground. Examples include, the settlements (including agricultural and industrial), the development of infrastructure (e.g. bypass roads) and the building of the Wall and its associated regime. These are likely to amount – in the words of the ICJ – to *fait accomplis* on the ground ‘that could well become permanent, in which case, and notwithstanding the formal characterization... by Israel, it would be tantamount to *de facto* annexation’.<sup>183</sup>

Likewise, in 1981, the Moroccan authorities built a 2,700 km wall known as ‘the Berm’ dividing Western Sahara in two, with the objective of separating the occupied territory from the liberated territory controlled by Front Polisario.<sup>184</sup> This construction effectively altered the borders of Western Sahara. Therefore, it exceeds the powers of Morocco as an administrator and violates the occupation principle of conservation.<sup>185</sup>

## Application to Area C

The construction of the Wall that encloses most of the Israeli settlements in the West Bank, *de facto* modifies the borders established in the 1949 Armistice known as the ‘Green Line’, leading to the *de facto* annexation of the so-called ‘seam zone’, specifically the area between the Wall and the ‘Green Line’. According to the ICJ, the construction of the Wall violates international law and amounts to acquisition of territory by means of use of force.<sup>186</sup> This is because the Wall was built mostly in territory situated in Area C and beyond the ‘Green Line’. The Wall is 708 kilometres long; approximately twice the length of the 1949 Green Line and the seam zone is approximately 9.4 per cent of the West Bank territory.<sup>187</sup>

The alleged security reasons invoked by Israel for building the Wall along its

<sup>182</sup> Ambrosio and Lange (n 170) 681.

<sup>183</sup> Wall Advisory Opinion, (n. 8) [121].

<sup>184</sup> African Commission on Human & Peoples’ Rights, ‘Report of the fact-finding mission to the Sahrawi Arab Democratic Republic’ (24-26 September 2012) <[www.achpr.org/files/sessions/12th-ao/mission-reports/promotion\\_mission-2012/mission\\_report\\_sahrawi\\_cpta\\_eng.pdf](http://www.achpr.org/files/sessions/12th-ao/mission-reports/promotion_mission-2012/mission_report_sahrawi_cpta_eng.pdf)>.

<sup>185</sup> See The Differences between belligerent occupation and sovereignty section.

<sup>186</sup> Wall Advisory Opinion, (n 8).

<sup>187</sup> Lisa Monaghan and Grazia Careccia, ‘The Annexation Wall and its Associated Regime’ (Al-Haq 2002), 7 <[www.alhaq.org/publications/publications-index/item/the-annexation-wall-and-its-associated-regime](http://www.alhaq.org/publications/publications-index/item/the-annexation-wall-and-its-associated-regime)>.

current route are unpersuasive. The Wall was mostly built in Area C allegedly to create a buffer zone between the Wall and Israeli territory. According to Israel, this buffer zone (corresponding to the seam zone) is necessary to allow the IOF to capture terrorist suspects before they enter into Israeli territory. However, the expropriation of Palestinian land in Area C, which was necessary for the construction of the Wall, was illegal under IHL because it amounts to a *de facto* land confiscation.<sup>188</sup> Therefore, Israel should have built the Wall along the Green Line to protect its own security. Furthermore, the alleged buffer zone does not have a uniform width. Rather, the Wall cuts into the West Bank to incorporate Israeli settlements into Israel, while leaving out Palestinian communities. This is rather curious for a buffer zone. In any event, the assumption behind the buffer zone is that all of the alleged terrorists are on the West Bank side of the Wall, which is again curious given that there are many Palestinians in the seam zone. In any event, the Wall is not impenetrable, as lots of Palestinians cross it every year undisturbed. There are areas that are not guarded and are easy to cross through. Thus, the construction of the Wall along its current route does not seem motivated by security considerations alone.

The construction of the Wall and its associated regime has adversely affected and modified Palestinian lives. Israel controls the movement of Palestinians crossing the Wall and in and out of the seam zone in Area C through ‘checkpoints’ created at every entrance to the territory. This is a very controversial measure that places constraints on the freedom of movement of the occupied population, whose day-to-day activities have been affected by the construction of the Wall. This restriction includes the daily commute of farmers whose lands are in the seam zone,<sup>189</sup> access to education, healthcare and employment as well as any social activity as a consequence of the segregation of neighbourhoods and families located in Area C. Besides these consequences, the Wall has made the border modification a more permanent matter since Palestinians no longer have access to their lands located in the seam zone.

In light of the above, it can be argued that through the construction of the Wall and its associated regime, Israel has modified the borders of the OPT to include parts of Area C into its territory.

<sup>188</sup> Giulia Pinzauti, ‘Aspetti problematici della legittimità del “muro” in Palestina: il caso *Beit Sourik*’ (2005) 88 Rivista di diritto internazionale 441, section 4.

<sup>189</sup> Monaghan (n 180) 16.



## Guideline 8: Long-Term Alteration of the Infrastructure of the Occupied Territory for the Benefit of the Occupying Power

The Occupying Power, in order to permanently deepen its physical control over the occupied territory, commonly takes certain measures that result in long-term alterations to the occupied territory's infrastructure. These actions, when taken for the benefit of the Occupying Power and its population and not for the benefit of the occupied population, go against the prohibitions laid down in the HR, namely the duty of conservation enshrined in Article 43 HR.

For example, the 'TRNC Potable Water Supply Project' undertaken by Turkey's Ministry of Forest and Water Affairs was completed in 2014 and by the end of October 2015, Turkey began pumping drinkable water to Northern Cyprus through a pipeline running under the Mediterranean Sea.<sup>190</sup> In a recent letter to the UNSG, the Permanent Representative of the Republic of Cyprus to the UN stated that 'the full dependency of the Turkish Cypriot community on Turkey, constituted yet another significant parameter of Turkey's plan to dominate and fully control every single aspect of life in the occupied areas... The most indicative example... [being] the illegal water connection'.<sup>191</sup> The Permanent Representative also raised concerns for a similar upcoming 'agreement' regarding electricity connection between Turkey and the occupied areas.<sup>192</sup> Although one could argue that it benefits the occupied population in that water is a viable source of life. In a situation of temporary occupation however, it is questionable why the Occupying Power would embark in such a multimillion project that would connect the Occupying State with the occupied territory indefinitely.

An important example is the construction of the road system in East Jerusalem, by Israel, which has been directed towards the integration of the area within Israel proper. With regard to the occupied territory of Western Sahara, Morocco constructed a number of military shelters, buildings and other energy

190 See Success Stories: Cyprus is Supplied with Water by Firat, FIRAT, <<http://www.firat.com/en-us/success-stories/cyprus-water-supply-project>>.

191 Republic of Cyprus Ministry of Foreign Affairs, 'Ministry of Foreign Affairs Press Release on Turkey's policy for the integration of the Turkish Cypriot community' (5 October 2017) <[www.mfa.gov.cy/mfa/mfa2016.nsf/All/4279ADB6B2C32024C22581B0003C0E86?OpenDocument](http://www.mfa.gov.cy/mfa/mfa2016.nsf/All/4279ADB6B2C32024C22581B0003C0E86?OpenDocument)>.

192 *ibid.*

infrastructure systems that have not benefited the occupied population in any way.<sup>193</sup> The construction of the 12-mile bridge aimed at linking the annexed Peninsula of Crimea to Russia is another measure seeking the unification of both territories permanently.<sup>194</sup>

## Application to Area C

Israel has constructed a system of by-pass roads and highways in the West Bank, which are for the exclusive benefit of the settlers who reside in civil, commercial, military or industrial illegal settlements in the West Bank.<sup>195</sup> These roads also aim to create barriers between Palestinian lands and serve to isolate communities from each other. Even though Israel claims that the seizure of the land and construction of subsequent infrastructure have a temporary character and can be dismantled, the extended effects of these measures create permanent results. The alteration of the infrastructure constitutes a significant investment on the part of Israel, raising questions as to why a State would spend so much if it does not intend to maintain control over the concerned territory. As a matter of fact, the changes introduced entail a degree of permanence and it is debatable whether they can or will be reversed. These long-term changes in the infrastructure of the occupied territory are solely benefiting the Occupying Power and its population (including the settlers) to the detriment of the occupied population because they have been and will be developed on land expropriated or confiscated by the occupied population and because they are not directed towards developing the needs of the occupied population. Thus, they contravene the laws of occupation as they do not aim to create a better environment for the population of the occupied territory.

Apart from creating new facts on the ground, Israeli authorities have also embarked on a policy of destruction of Palestinian infrastructure. In 2017, Israeli authorities demolished a pipe that provided water to Palestinian farming and shepherding communities in the northern Jordan Valley. On 20 February 2017, the

193 UNSC, 'Report of the Secretary General on the situation concerning Western Sahara' (14 April 2008) UN Doc S/2008/251; UNSC, 'Report of the Secretary-General on the situation concerning Western Sahara' (6 April 2010) UN Doc S/2010/175; Western Sahara Resource Watch (n 271).

194 Shaun Walker, 'Russia's bridge link with Crimea moves nearer to completion' *The Guardian* (31 August 2017) <[www.theguardian.com/world/2017/aug/31/russia-bridge-link-crimea-moves-nearer-completion-ukraine](http://www.theguardian.com/world/2017/aug/31/russia-bridge-link-crimea-moves-nearer-completion-ukraine)>.

195 Harriet Sherwood, 'Protest closes Israel's 'apartheid road' through West Bank' (23 January 2019), available at: <<https://www.theguardian.com/world/2019/jan/23/israel-west-bank-route-4370-apartheid-road-protest>>.

Civil Administration again demolished a section of the pipe, after local residents had re-built it. According to a report by B'Tselem, 'Israel demolishes every water supply system that Palestinians try to erect themselves in Area C, subjecting them to intolerable living conditions in order to force them out of the area'.<sup>196</sup> This not only alters the current infrastructure of the occupied territory but also prevents Palestinians from developing their own infrastructure.

After analysing the situation on the ground, it is argued that this guideline is fulfilled. By altering the infrastructure of Area C in ways that appear irreversible, Israel shows an intention to retain permanent control over Area C.

<sup>196</sup> B'Tselem, 'Israel demolishes infrastructure, leaving Palestinian farmers without water for domestic and agricultural needs' (7 March 2017) <[www.btselem.org/video/150702#full](http://www.btselem.org/video/150702#full)> accessed July 2020.



## Guideline 9: Treatment of the Occupied Territory's Economy as Part of the Occupying Power's Economic Area

Under the law of occupation, and more specifically Articles 48-49 HR, the exercise of fiscal powers and the overall management of the occupied territory's economy should be conservative whereby the occupier is bound "to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound".<sup>197</sup> The restriction and hampering of the occupied population's economy and the imposition of measures and strategies that enhance the dependence of the occupied population's economy upon the Occupying Power could ultimately lead to integration of the two economies into one economic zone. As such, these measures can be considered a significant indicator of the Occupying Power's intention to annex the territory.

Taking the example of Northern Cyprus, the territory is heavily dependent on and influenced by the Turkish economy; in fact, it is difficult to see how the 'TRNC' could survive without Turkish support. The signing of the economic co-operation protocol and financial support agreement in January 1997 and a Partnership Council Agreement in July 1997 led to the subsequent creation of an Association Council aiming at 'achieving integration between the two countries in the economic and financial fields...'.<sup>198</sup> At the first meeting of the Association Council, it was decided that a Joint Economic Committee would be created with the goal of establishing a Joint Economic Zone 'to deepen the existing special relationship between the two countries'.<sup>199</sup> Consequently, the 'TRNC' has relied heavily on financial assistance from Turkey while also sharing the same currency. This has made its economy largely subordinate to Turkish monetary policies and markets<sup>200</sup> to the extent that inflation occurring in Turkey has caused subsequent

<sup>197</sup> Article 48, Hague Regulations (1907)

<sup>198</sup> Republic of Turkey Ministry of Foreign Affairs, 'Agreement between the Government of the Republic of Turkey and the Government of the Turkish Republic of Northern Cyprus on the establishment of an Association Council' <[www.mfa.gov.tr/agreement-between-the-government-of-the-republic-of-turkey-and-the-government-of-the-turkish-republic-of-northern-cyprus-on-the.en.mfa](http://www.mfa.gov.tr/agreement-between-the-government-of-the-republic-of-turkey-and-the-government-of-the-turkish-republic-of-northern-cyprus-on-the.en.mfa)>.

<sup>199</sup> Republic of Turkey Ministry of Foreign Affairs, 'Declaration by the Association Council Between Turkey and The TRNC March 31, 1998' <[www.mfa.gov.tr/declaration-by-the-association-council-between-turkey-and-the-TRNC\\_br\\_march-31\\_-1998-.en.mfa](http://www.mfa.gov.tr/declaration-by-the-association-council-between-turkey-and-the-TRNC_br_march-31_-1998-.en.mfa)>.

<sup>200</sup> CIA, 'The World Factbook: Cyprus' (last updated 6 November 2017) <[www.cia.gov/library/publications/the-world-factbook/geos/cy.html](http://www.cia.gov/library/publications/the-world-factbook/geos/cy.html)>.

inflation in 'TRNC'.<sup>201</sup>

Additionally, South Ossetia's and Abkhazia's economies are also largely dependent upon Russia, which accounts for the majority of their budget, investments, imports and exports and socio-economic development projects. Indicatively, it is reported that Russia accounts for 80-90% of Abkhazia's imports and exports,<sup>202</sup> while 99% of Abkhazia's foreign investment comes from Russia.<sup>203</sup> The close economic ties with Russia are further facilitated by the fact that both regions use the Russian ruble in practice.<sup>204</sup> Further, their economies are linked with Russia's economic policy measures, such as the equation of salaries.

In 2015, in Western Sahara, the General Confederation of Moroccan Enterprises announced a 609 million USD investment in the region;<sup>205</sup> this is an indication of permanency in the territories. Besides this, Western Sahara shares the same currency as Morocco (Moroccan Dirhams)<sup>206</sup> and the same telephone country code.<sup>207</sup> Equally relevant is the fact that Morocco has concluded trade and aviation agreements regarding the occupied territory with other international actors, such as the EU.<sup>208</sup> Such measures are arguably outside the scope of the Occupying State's powers since it does not have sovereign competence in the occupied territory.

In 2016, Morocco's national electricity agency issued a tender on the installation of high-tension electricity in the occupied Western Sahara. In addition, the Moroccan government has signed public-private contracts with foreign and

201 Okann Veli Safakli and Huseyin Ozdeser, 'On the Independence of the Central Bank of the Turkish Republic of Northern Cyprus' (2010) 11(1) Dogus Universitesi Dergisi 124, 127.

202 See International Crisis Group, 'Georgia's South Ossetia Conflict: Make Haste Slowly', (Report 183, 7 June 2007), 1 <<https://d2071andvip0wj.cloudfront.net/183-georgia-s-south-ossetia-conflict-make-haste-slowly.pdf>>.

203 Ambrosio and Lange, (n 170) 677-678.

204 *ibid*, note 5 therein; see also Andre WM Gerrits and Max Bader 'Russian patronage over Abkhazia and South Ossetia: implications for conflict resolution', (2006) 32(3) East European Politics 301.

205 CIA (n 272)

206 *ibid*.

207 *ibid*.

208 Fisheries Agreement with the EU (2006) and (2014), Liberalization Agriculture Measures Agreement (2012), which later was considered illegal by the Court of Justice in what regards to the region of Western Sahara (C/2016/973) [132]; Aviation Agreement (2017) which was approved by the EU Parliament <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0386+0+DOC+PDF+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0386+0+DOC+PDF+V0//EN)>; Report of the Fact-finding Mission to the Sahrawi Arab Democratic Republic – African Commission on Human and Peoples' Rights (2012); Western Sahara Resource Watch Report 'Label and Liability' 2012 <[http://www.wsrw.org/files/dated/2012-06-17/wsrw\\_labellability\\_2012.pdf](http://www.wsrw.org/files/dated/2012-06-17/wsrw_labellability_2012.pdf)>.

national companies for the construction of windmills and wind farms. These constructions can increase the green energy production in the occupied territory, which can lead to 40 per cent of Morocco's total green energy production.<sup>209</sup> These facts may underscore the intention of the Occupying Power in creating one permanent economic area instead of respecting the sovereign and economic boundaries of Western Sahara.

Regarding actions of an economic character, the Russian government, in a strategic move to integrate the Crimean economy, conceived a plan for the development of the Crimean Federal District and the Free Economic Zone on the Territory of the Republic of Crimea and the City of Federal Importance Sevastopol.<sup>210</sup> This economic plan has a duration of 20 years,<sup>211</sup> which is a clear example of a long-term intent to permanently integrate the territory.

## Application to Area C

Area C of the West Bank is of great economic significance. It is rich in natural resources, such as natural minerals, water resources and arable land and it holds great potential for urban, touristic, agricultural and business development. Israel's economic activities in Area C and its related policies appear to indicate that Israel is treating Area C as its own land. Further, these policies demonstrate Israel's intention to extend its economy to this area and to integrate the local Palestinian economy into its own, for the benefit of Israel. At the same time, certain measures seem to be aimed at keeping the Palestinian economy subjugated.

One of Israel's policies that could amount to integration of the two economies relates to Israeli settlements in Area C. Business settlements 'operate in "industrial zones" especially built for settlement businesses'.<sup>212</sup> As previously mentioned,

209 WSRW, 'Powering: The Punder' (2016) <[http://wsrw.org/files/dated/2016-11-01/poweringplunder\\_eng\\_web.pdf](http://wsrw.org/files/dated/2016-11-01/poweringplunder_eng_web.pdf)>; WSRW, 'Moroccan wind energy in occupied Western Sahara passing 40%' (31 October 2017) <<http://www.wsrw.org/a105x3994>>.

210 Kremlin, 'Law Establishing a Free Economic Zone in Crimea and Sevastopol' (1 December 2014) <<http://en.kremlin.ru/events/president/news/47116>>.

211 Zunarelli Studio Legale Associato, 'Crimea acquires the status of free economic zone for the next twenty-five years' (2 January 2015) <[www.studiozunarelli.com/en/how-to-do-business-in-russian-federation/crimea-acquires-status-free-economic-zone-next-twenty-five-years/](http://www.studiozunarelli.com/en/how-to-do-business-in-russian-federation/crimea-acquires-status-free-economic-zone-next-twenty-five-years/)>.

212 Human Rights Watch, 'Occupation, Inc.: How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights' (January 2016) [5] <[www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations-palestinian](http://www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations-palestinian)>.

the settlements violate IHL. The State of Israel provides financial incentives to Israeli and international businesses established in the West Bank, including in Area C, both in and around settlements. More specifically, '[a]lmost all settlement industrial zones are designated as national priority areas',<sup>213</sup> thus benefiting from reductions in the price of land, subsidies for the development of infrastructure and beneficial tax rates for both individuals and businesses.

The industrial and agricultural settlements established in Area C provide the Israeli economy with revenue of billions of shekels per year.<sup>214</sup> As reported by Al-Haq, Area C accommodates approximately 20 industrial settlements, which host hundreds of companies, 'ranging from small businesses serving local Israeli settlers to large factories that export their products internationally'.<sup>215</sup> Apart from benefiting from the special financial incentives afforded by Israel, these businesses also enjoy 'lax enforcement of environmental and labor protection laws'.<sup>216</sup> Moreover, agricultural settlements located in Area C, and more specifically in the Jordan Valley and near the Dead Sea, bring in profits estimated at 128 million USD per year and are involved in the export of agricultural products, such as grapes, dates and herbs, as well as in related services, such as packing, refrigerating etc.<sup>217</sup>

A large amount of the products manufactured or produced in Israeli settlements in Area C of the West Bank are exported abroad. Although Israel does not provide sufficient data of the estimated profit it makes from exports from settlements to third countries, it is estimated that exports from settlements to Europe – Israel's largest trade partner – are valued significantly higher than 300 million USD per year.<sup>218</sup> The exported products are often misleadingly labelled as 'Made in Israel', which may indicate Israel's consideration of Area C as its own territory and the products cultivated therein as Israeli products. As a consequence of such labelling, Israel benefits from the preferential trade agreements with third states, namely preferential tariff treatment. However, in 2010 the European Court of Justice (ECJ)

213 UNGA A/HRC/34/39 (13 April 2017), (n 94) [24].

214 Al-Haq, 'Business and Human Rights in Palestine' (2016) [16] <[www.alhaq.org/publications/publications-index/item/business-and-human-rights-in-palestine](http://www.alhaq.org/publications/publications-index/item/business-and-human-rights-in-palestine)> accessed July 2020.

215 *ibid* [20].

216 *ibid*.

217 *ibid* [19].

218 Human Rights Watch, (n 205) [101], with reference to World Bank, 'Fiscal Crisis, Economic Prospects' (23 September 2012), 13 <<https://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/AHLCRreportFinal.pdf>>.

ruled that products made in settlements in the occupied West Bank cannot be considered Israeli and therefore cannot benefit from the tax exemption according to the bilateral trade agreement between the EU and Israel.<sup>219</sup> Further, in 2015 the EU issued a Notice prohibiting the import of settlement products labelled as 'Made in Israel' reiterating its non-recognition of Israeli sovereignty over the OPT.<sup>220</sup> In response to the EU's position on Israeli labelling, former Israeli Minister of Finance, Yair Lapid, characterised it as 'a de-facto boycott of Israel', since, as he argued 'there is no difference between products which are produced over the Green Line and those that are produced within the Green Line'.<sup>221</sup>

Moreover, apart from agricultural and industrial settlements, Israel has supported the development of an Israeli tourist industry in settlements in Area C. Sites of historical, religious and natural interest are exploited for tourism purposes by Israeli companies operating in settlements. At the same time, Palestinians are deprived of the opportunity to make use of the touristic potential of Area C. For example, Palestinians are prohibited from developing their own business activities around the Dead Sea, while Israeli settlements exploit the touristic opportunities and gain profit from resorts, bar-restaurants and hotels established there. The Kalia Beach resort is an example of such settlement activity. Interestingly, the directions to Kalia Beach are given by reference to Jerusalem and Tel Aviv, indicating that tourists visiting the site might be unaware that it is located in Area C of the West Bank.<sup>222</sup> Similarly, the Baptismal Site on the Jordan River – Qasr al-Yahud – is administered by Israel's Nature and Parks Authority<sup>223</sup> and is designated as part of 'Israel' in the site's signposts.<sup>224</sup> At the same time, according to the World Bank, '[i]f current restrictions are lifted and investment climate in the West Bank improves, it is reasonable to assume that, in due course, Palestinian investors would be able to create a Dead Sea hotel industry equivalent to Israel's, producing value added of some 126 million USD per annum – or 1 percent of 2011

219 Case C-386/08 *Brita* [2010] EU:C:2010:91.

220 European Commission, 'Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967', (Brussels, 11 November 2015, 7834 final) <[https://eeas.europa.eu/sites/eeas/files/20151111\\_interpretative\\_notice\\_indication\\_of\\_origin\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/20151111_interpretative_notice_indication_of_origin_en.pdf)>.

221 Quote taken from Human Rights Watch (n 205) [101].

222 DeadSea.com, 'Kalia Beach' <<https://www.deadsea.com/explore/dead-sea-beaches/northern-beaches/kalia-beach/>>.

223 Israel Nature and Parks Authority, 'Baptismal Site on the Jordan River – Qasr al-Yahud' <[www.parks.org.il/sites/English/ParksAndReserves/baptismalSiteontheJordanRiverQasralYahud/Pages/default.aspx](http://www.parks.org.il/sites/English/ParksAndReserves/baptismalSiteontheJordanRiverQasralYahud/Pages/default.aspx)>.

224 Information drawn from site visit with Al-Haq on 29 November 2017.

Palestinian GDP. Investments to develop other attractive tourism locations in Area C could generate substantial additional revenues'.<sup>225</sup>

Israel also imposes restrictions upon the Palestinian economy, which suggests a desire to keep it subjugated under its authority, thereby maintaining control over one single economy. As was reported in the World Bank Report, '[t]he manner in which Area C is currently administered virtually precludes Palestinian businesses from investing there'.<sup>226</sup> This is because, as previously mentioned, Palestinian construction and development is prohibited on approximately 70 per cent of Area C land,<sup>227</sup> while 'less than 1 per cent of Area C land has been approved for Palestinian development, and much of this land has already been built up. Development is in any case only permitted when plans have been approved by Israeli authorities'.<sup>228</sup>

Israel's permanent land seizure that amounts to *de facto* confiscation of Palestinian land<sup>229</sup> restricts access to arable land that could create profit for the Palestinian economy. 'Dwindling water resources, high transaction and transport costs and shrinking markets have led to a decline'<sup>230</sup> in the development of the agricultural sector by Palestinians, while at the same time, agriculture developed by Israeli settlements in the same regions of Area C flourishes. Indicatively, the independent fact-finding mission in its Report for the UN Human Rights Council states that '[i]n the Jordan Valley, settlements set up in the 1960s and 1970s as farming communities on land formerly cultivated by Palestinians have developed into a high-technology irrigation agricultural zone and become major contributors to Israeli exports of date palm fruits'.<sup>231</sup>

Finally, a further element leading to the integration of the Palestinian economy

225 World Bank, 'WEST BANK AND GAZA: Area C and the Future of the Palestinian Economy', (Report No AUS2922, 2 October 2013), [ix] <<http://documents.worldbank.org/curated/en/137111468329419171/West-Bank-and-Gaza-Area-C-and-the-future-of-the-Palestinian-economy>>.

226 *ibid* [vii].

227 OCHA, 'Restricting Space: The Planning Regime Applied by Israel in Area C of the West Bank' (December 2009) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/B136572E8EE41FBA8525768D00514356>>; see also the 2014 update at <[www.ochaopt.org/sites/default/files/ocha\\_opt\\_area\\_c\\_factsheet\\_August\\_2014\\_english.pdf](http://www.ochaopt.org/sites/default/files/ocha_opt_area_c_factsheet_August_2014_english.pdf)> accessed July 2020.

228 Ishaq and Hakala (n 70), [5].

229 The same view was also supported by HRW in HRW (n 205) [5].

230 UNGA A/HRC/22/63 (n 257) [90].

231 *ibid* [92].

with the Israeli economy is their monetary and fiscal harmonization. Monetary integration is facilitated through the use of the same currency, i.e, the Israeli shekel. Not only does the common use of the shekel indicate the integration of the two economies, it also negatively impacts the Palestinian economy. According to UNCTAD, the development of Palestinian trade and agriculture is impeded 'by an uncompetitive exchange rate resulting from use of the Israeli currency, the exchange rate of which reflects the conditions and interests of the more advanced and structurally different Israeli economy'.<sup>232</sup> Further, it must be highlighted that long-term reforms in fiscal matters can only be introduced by a sovereign power and not by an administrator, as fiscal policy lies within the social contract. Nonetheless, as mentioned above in Guideline 4, Israel altered the *status quo ex ante* by introducing the VAT in 1976.<sup>233</sup> It has been argued that the effects caused on the economy by virtue of this tax have generally been negative. In fact, UNCTAD had concluded in 1989 that the 'VAT has evolved over the past few years to become one of the most serious fiscal constraints on the development of Palestinian industry and trade'.<sup>234</sup>

In view of the above, this Guideline is fulfilled in Area C of the West Bank. The economic integration does not only pertain to the settlements, but to the entirety of Area C. This is particularly evident in light of the fiscal and monetary integration of the two economic zones (use of Israeli shekel and VAT imposition), as well as the expansion of business settlements in Area C. Hence, the abovementioned facts strongly indicate that Israel has incorporated the economy of Area C as part of its own economy, and imposes restrictions and impediments for Palestinian development.

232 UNCTAD, 'The Besieged Palestinian Agricultural Sector', (New York and Geneva, 2015) [37] <[http://unctad.org/en/PublicationsLibrary/gdsapp2015d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/gdsapp2015d1_en.pdf)>.

233 Value Added Tax Law, 5736-1975 (the 'VAT Law').

234 UNCTAD, 'The Palestinian financial sector under Israeli occupation', UNCTAD/ST/SEU/3/Rev 1 (1989) [141] <[http://unctad.org/en/PublicationsLibrary/stseud3rev1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/stseud3rev1_en.pdf)>.



## Guideline 10: Exploitation of the Occupied Territory's Natural Resources by the Occupying Power for its Own Benefit

Exploitation of an occupied territory's natural resources in violation of Article 55 HR (that is, for the Occupant's own benefit or by depleting those resources) demonstrates an *animus* of 'owning' and using the sovereign resources of the occupied territory as its own. In other words, the Occupying Power's exploitation of the territory's natural resources for its own benefit demonstrates the exercise of sovereign powers over the occupied territory by the Occupant.

During the occupation of East Timor, Indonesia exploited the natural resources of East Timor, by controlling the East Timorese coffee crop and exploiting timber from the territory.<sup>235</sup> Indonesia chose a private Indonesian trading firm to handle the exports and imports, as well as to provide the trading services for the Maluku region.<sup>236</sup> Additionally, Indonesia concluded treaties with Australia regarding the future exploitation of the deposits of crude oil and natural gas found in the East Timor Sea.<sup>237</sup> These series of events led Portugal to present a claim before the ICJ against Australia.<sup>238</sup>

Morocco has also exploited Western Sahara's natural resources exceeding its powers under occupation law, concluding contracts with private companies to carry out these exploitation of oil resources, renewable energy, mineral phosphate reserves, coastal waters, agriculture products, sand and salt, without

235 'Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste' (CAVR 2005) 108, 148.

236 Hoadley (n 88) 140.

237 Hoadley (n 88) 59-60; Simone King, 'The Fate of Occupied Territory: Recognition, Non-Recognition, Self-Determination and Prolonged Occupation' (14 September 2005); Letter dated 29 January 2002 from the UNSG for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council (S/2002/161); Parliament of Australia, 'Report on East Timor' (7 December 2000) <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Completed\\_inquiries/1999-02/east\\_timor/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed_inquiries/1999-02/east_timor/report/index)>.

238 Yael Ronen, *Transition from Illegal Regimes under International Law* (CUP 2011) 59; see *East Timor* case (n 14); however, the ICJ declared lack of jurisdiction in the case.

the consultation of the Sahrawi people.<sup>239</sup> These actions by the occupying State exceed the latter's capacity as a mere administrator.

Similarly, Russia's attempt to control the oil resources in South Ossetia and Abkhazia shows an element of entitlement that indicates an *animus* of ownership. The expanded border of the South Ossetia region separating it from Georgia, and characterised as a 'creeping annexation',<sup>240</sup> resulted also, in the inclusion into South Ossetia of a part of the highly significant Baku-Supsa oil pipeline.

### Application to Area C

Area C of the West Bank is extremely rich in natural resources, including fertile agricultural land, water resources, natural minerals and more. Israel exploits Area C's natural resources for the benefit of the State of Israel and its own population. In contrast, Palestinians generally do not enjoy the fruits of their natural resources, neither directly through the enjoyment of the products nor indirectly through the making of profit from their financial exploitation.

Firstly, the land in Area C is fertile, thus making access to water crucial for farming and harvesting. However, while Area C is rich in natural springs and rainwater that can be harvested, Palestinians suffer from water shortages, which result in a decrease of agricultural development. Palestinian communities and farmers located in Area C have limited access to fresh water, as opposed to Israeli settlers who take the lion's share in the distribution of water. The three main sources of fresh water in Area C; the springs in the Jordan Valley, the Mountain Aquifer

239 UNSG Letter (n 230); Western Sahara Resource Watch (n 271), in which the NGO identifies the contract with Kosmos Energy (US) regarding oil reconnaissance and potential drilling operations, the contract for wind energy exploitation, the contract with Crystal Mountain Company (US) regarding the salt production and the contracts with Agrium Inc. (CAN), Potash Corporation (CAN) and Incitec Pivot (AUS) regarding the exportation of phosphates; Western Sahara Resource Report, 'P For Plunder: Morocco's exports of phosphates from occupied Western Sahara' (April 2017) <[www.wsrw.org/files/dated/2017-04-24/p\\_for\\_plunder\\_2016\\_web.pdf](http://www.wsrw.org/files/dated/2017-04-24/p_for_plunder_2016_web.pdf)>; Malainin Lakkhal, 'An Independent Western Sahara State is the Solution' (2012) 23(4) *Capitalism Nature Socialism* 40.; Front Polisario, the international community, as well as judicial bodies have spoken out against the situation. Letter dated 29 January 2002 from the UNSG for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council (S/2002/161); Front Polisario Letters to the EU of 13 October 2013, to the Government of New Zealand of 13 June 2014 and to the UNSG of 26 January of 2015.

240 Higgins, (n 173); see also Luke Coffey, 'The creeping Russian border in Georgia' (Al Jazeera, 27 August 2015) <<http://www.aljazeera.com/indepth/opinion/2015/07/creeping-russian-border-georgia-south-ossetia-abkhazia-150722111452829.html>>.

and the Coastal Aquifer, are all controlled by Israel.<sup>241</sup> In 1982, Israel passed the ownership of Palestinian water infrastructure to an Israeli company, Mekorot, thereby establishing Mekorot's monopoly in the West Bank, while at the same time integrating all of Palestine's water system into the Israeli system.<sup>242</sup> Al-Haq reports that Mekorot often reduces Palestinian water supplies while augmenting the water supply to Israel and the settlements. Hence, '[e]ighty per cent of the total water resources drilled in the area is consumed by Israel and the settlements'.<sup>243</sup> Neighbouring settlements enjoy enough water to develop agricultural products and run their farms, as well as maintain swimming pools and spas.<sup>244</sup>

Apart from this, Israel's excessive use of the existing resources risks depleting the territory's water supply. As reported by the independent fact-finding mission in its report for the UN Human Rights Council, '[i]n the Jordan Valley, deep-water drillings by Mekorot, the Israeli national water company, and Mehadrin, an agro-industrial company, have caused Palestinian wells and springs to dry up'.<sup>245</sup>

Secondly, the Dead Sea is rich in natural minerals with healing and cosmetic qualities.<sup>246</sup> The area around the Dead Sea has been declared as 'State Land' or 'closed military zone' since 1967 and is off-limits to Palestinians and potential Palestinian development. Israel vastly exploits the Dead Sea through the extraction of raw materials, such as sand, mud, gravel and silt for use in the cosmetic industry.<sup>247</sup> For instance, Israel has permitted Israeli cosmetics company, Ahava Dead Sea Laboratories Ltd, located in the Israeli settlement Mitzpe Shalem, to extract minerals and mud from the Dead Sea, while precluding any Palestinian company from doing so.<sup>248</sup> As was reported by the World Bank, Israeli companies profit from the sale of Dead Sea minerals (potash, bromine and other products)

241 Al-Haq, 'Water for One People Only: Discriminatory Access and 'Water-Apartheid' in the OPT' (2013) <[http://www.alhaq.org/cached\\_uploads/download/alhaq\\_files/publications/Water-For-One-People-Only.pdf](http://www.alhaq.org/cached_uploads/download/alhaq_files/publications/Water-For-One-People-Only.pdf)>.

242 *ibid.*

243 UNGA Human Rights Council, 'Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem' A/HRC/22/63 (7 February 2013) [82].

244 *ibid* [85].

245 *ibid* [82].

246 World Bank (n 218) 11.

247 Al-Haq (n 207) 26.

248 Al-Haq, 'Pillage of the Dead Sea: Israel's Unlawful Exploitation of Natural Resources in the Occupied Palestinian Territory' (2012), 21 <<http://www.alhaq.org/advocacy/topics/housing-land-and-natural-resources/621-israels-unlawful-exploitation-of-natural-resources-in-the-occupied-palestinian-territory>>.

by approximately 3 billion USD per year.<sup>249</sup> Israel's excessive exploitation of Dead Sea natural minerals causes environmental damage, since the minerals are non-renewable.<sup>250</sup> Ahava labels the products as 'Made in Israel', which indicates Israel's consideration of the territory as its own.

Thirdly, Israeli companies have been active in the quarrying industry in Area C since the mid-1970s. Currently, eleven Israeli owned quarries operate in this area, with licences granted by the Israeli Military Commander after 1967.<sup>251</sup> On the other hand, as the World Bank reports, Palestinian companies have not been issued permits to open quarries in Area C since 1994, even though the Oslo Accords provided for this and many pre-existing permits have expired.<sup>252</sup> As a result, only a very small number of Palestinian quarries are still operating legally in Area C. According to Yesh Din, in 2008, 12 million tons of gravel was extracted from Area C by Israeli and Palestinian quarries, while in 2015 the amount had risen to 17 million tons.<sup>253</sup> The gravel is used by Israel for its own benefit, not for the benefit of the Palestinian population. According to Yesh Din, '[o]ver 20 percent of the State of Israel's general consumption comes from the quarries owned by Israel in the occupied territories'.<sup>254</sup> In response to a petition filed by Yesh Din against Israel and eleven Israeli companies running quarries in the West Bank for the illegal exploitation of the OPT's natural resources, the HCJ ruled in 2011 that there was no violation of international law, in light of the prolonged occupation and the alleged benefits of quarrying by creating job opportunities for the Palestinian population.<sup>255</sup> However, as reported by Al-Haq, in reality only approximately 200 Palestinians are employed in quarries, while the revenue from the exports do not end up with Palestinians.<sup>256</sup> Further, Yesh Din states that '[o]fficial State documents indicate that the Israeli authorities have a long-term plan to rely on the mining potential in the West Bank for at least the next

249 World Bank (n 218) 11.

250 Al-Haq, (n 241)

251 Yesh Din, 'The Great Drain: Israeli quarries in the West Bank: High Court Sanctioned Institutionalized Theft' (14 September 2017) 7 <[www.yesh-din.org/en/great-drain-israeli-quarries-west-bank-high-court-sanctioned-institutionalized-theft/](http://www.yesh-din.org/en/great-drain-israeli-quarries-west-bank-high-court-sanctioned-institutionalized-theft/)> accessed July 2020.

252 *ibid* 13.

253 *ibid.*

254 *ibid.*

255 Yesh Din, 'Volunteers for Human Rights, et al v Commander of the IDF Forces in the West Bank, et al, Israeli High Court of Justice', HCJ 2164/09, Judgment, 26 December 2011.

256 Al-Haq (n 207) 24.

30 years'.<sup>257</sup> Hence, Israel's exploitation of Area C's natural stone indicates Israel's intention to permanently annex the territory in a twofold manner: firstly, Israel, through the Military Commander, restricts the Palestinian mining and quarrying of natural stone, thus violating Palestinians' right of permanent sovereignty over their natural resources; secondly, by licensing the establishment of new Israeli-owned quarries amidst the occupation, Israel violated the rules of usufruct, which would potentially allow for the temporary management of existing quarries, but not for the establishment of new (Israeli-owned) ones.

In view of the above, the present Guideline is fulfilled as Israel exploits the natural resources of Area C for its own benefit. Further, it risks permanently damaging the environment and depleting the OPT's natural resources. By so doing, Israel exceeds the limits of usufruct and acts like a sovereign power. Taking into account especially the exploitation of land and water resources, this Guideline should be considered fulfilled in the entirety of Area C. It is fulfilled with an even higher degree of intensity in relation to the industrial and agricultural settlements in Area C.

<sup>257</sup> Yesh Din (n 244).



## Guideline 11: Erasing the National Identity of the Population of the Occupied Territory

The people of a specific territory have the right to an identity as regards religion, language, customs or any other aspect through which they identify themselves as a people. The actions of the Occupying Power aiming to undermine any element that constitutes the identity of the people living in the occupied territory violates the HR, namely Article 46(1) that establishes the right to respect religious convictions and Article 56 that prohibits the seizure or destruction of cultural property. Undermining the identity of the people living in the territory can be an effective strategic move by an Occupying Power aiming to annex the territory, since its objective may be to erase any traces of the population's identity and potentially impose its own culture upon the occupied territory.

A good example is the cultural heritage destruction by Turkey in Northern Cyprus to alter the character of the island by destroying any evidence of Greek-Cypriot culture in the North. Additionally, it has been confirmed that during the intervention and subsequent occupation, many archaeological and religious sites were destroyed. A 1984 United Nations Educational, Scientific and Cultural Organization (UNESCO) report stated that 'in the area occupied by the Turkish army, museums and monuments have been pillaged or destroyed'.<sup>258</sup> Additionally, in a written question to the European Parliament, Charles Tannock, Ioannis Kasoulides and Theresa Villiers put forward the argument that the Turkish occupation of the northern part of the island resulted in further alterations of its character. This occurred mainly through the destruction of cultural heritage such as 'cultural treasures, religious sites... and anything that might remind the local population of the Greek-Cypriot presence in the Turkish occupied part of Cyprus'.<sup>259</sup> Such conduct is also highly likely to be in violation of the HR, the 1954 Hague Convention on the Protection of Cultural Property During Armed Conflict

<sup>258</sup> UNESCO, 'Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 1954' (1984 Reports) 25 <<http://unesdoc.unesco.org/images/0006/000623/062387eb.pdf>>.

<sup>259</sup> European Parliament, 'Condemning the destruction of the cultural heritage in the part of Cyprus occupied by Turkey' (Parliamentary Questions, 3 February 2005) <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2005-0317+0+DOC+XML+V0//EN&language=en](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2005-0317+0+DOC+XML+V0//EN&language=en)>.

and the 1949 Geneva Conventions and Protocols.<sup>260</sup>

Similarly, the cultural identity of the peoples of the occupied Syrian Golan was undermined through Israeli control of the education and imposition of Israeli curriculum in Arab schools. The Syrian education curriculum was replaced with Israeli curriculum,<sup>261</sup> a measure which again aims at creating a strong Druze identity separate from the Arab one, in the view that this would create 'an ideal buffer zone between Israelis and Arabs'.<sup>262</sup> In addition, although Syrian teachers retained their jobs in 1967, those who insisted on teaching the Syrian curriculum were dismissed.<sup>263</sup>

It must also be noted that since 1967, Israel has adopted measures that suppress the cultural identity of Palestinians living in East Jerusalem, while at the same time attempting to link its own history and culture with East Jerusalem. In its Report for the UNGA – Human Rights Council, the independent international fact-finding mission explicitly referred to Israel's restrictions on religious freedom, aggressive policies imposing its own culture and attempts to erase Palestinian cultural heritage.<sup>264</sup> The holy city of Jerusalem is especially targeted by Israel because of its great historical, cultural and religious significance. Israel has embarked on archaeological excavations in and around the Old City of Jerusalem, as well as in the construction of the 'City of David' archaeological site, which is intended to emphasise the Jewish cultural heritage, 'while disregarding – or worse undermining – the rich heritage of other cultures that have contributed to the millenary history of the city'.<sup>265</sup> At the same time, restrictions to Palestinians' movement towards their places of worship, denied access and limited entry due to checkpoints<sup>266</sup> undermine their cultural and religious identity. Furthermore,

260 See The Law Library of Congress, 'Cyprus: Destruction of Cultural Property in the Northern Part of Cyprus and Violations of International Law' (April 2009) <[www.loc.gov/law/help/cultural-property-destruction/cyprus-destruction-of-cultural-property.pdf](http://www.loc.gov/law/help/cultural-property-destruction/cyprus-destruction-of-cultural-property.pdf)>.

261 CIA, 'Syria-Israel: The Golan Heights in Perspective' (General CIA Records, published 1 January 1982, released 11 February 2009) <<https://www.cia.gov/library/readingroom/document/cia-rdp83b00851r000400150002-5>>.

262 Molony, Stewart and Tuohy-Hamil, (n 143).

263 Institute for Palestine Studies, 'The Golan Heights: Twenty Years After' (1987) 17(1) *Journal of Palestine Studies* 136, 140.

264 UNGA Human Rights Council, 'Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem' A/HRC/22/63 (7 February 2013).

265 *ibid* [59].

266 *ibid* [60].

education provided by Palestinian institutions is being undermined. For example, Israel does not recognise degrees from some Palestinian Universities,<sup>267</sup> thus local Palestinian organisations talk of the 'de-Palestinisation of education' in Jerusalem.<sup>268</sup>

Russia has furthermore promoted the Russian language and culture in the occupied territories to the detriment of the Georgian language and culture. In both regions, apart from Abkhaz and Ossetian, Russian is an official language. In practice, the Russian language is dominant in the conduct of 'state affairs', with most 'governmental' websites being available only in Russian.<sup>269</sup> Additionally, Russian television broadcasting in Russian dominates in both regions, even though there are local broadcasting companies, which broadcast smaller quantity and lower quality programmes.<sup>270</sup> At the same time, the EU has expressed its concern 'on a continuing deterioration of the access to education in the native language in the Georgian region of Abkhazia'.<sup>271</sup>

## Application to Area C

Israel's attempts at undermining the Palestinian identity (with regard to religion, language, customs or any other aspect that identifies them as a people) and imposing Israel's own cultural identity upon the occupied territory could be considered as a sign of Israel's intention to permanently incorporate the occupied territories.

Israel exercises significant control over the identity of the Palestinian and Bedouin

267 Information provided by Fayrouz Sharqawi from Grass Roots Jerusalem on 28 November 2017 during field visit. See also, Nir Hasson, "Israel Dragging Its Feet on Recognizing Social Work Degrees From Palestinian University" Haaretz (3 June 2018), available at: <<https://www.haaretz.com/israel-news/israel-dragging-feet-on-recognizing-palestinian-social-work-degrees-1.6138984>>; Tali Heruti-Sover, "Palestinian Al-Quds University Fights for Israeli Recognition" Al-Monitor (24 April 2013), available at: <<https://www.al-monitor.com/pulse/ft/originals/2013/04/palestinian-al-quds-university-fights-for-israeli-recognitio.html>>.

268 The Civic Council for Education in Jerusalem, 'De-Palestinization of Education in Jerusalem: Education Challenges pose threat to Palestinian national identity' <[www.civiccoalition-jerusalem.org/uploads/9/3/6/8/93682182/fact\\_sheet\\_education\\_in\\_jerusalem\\_2017.pdf](http://www.civiccoalition-jerusalem.org/uploads/9/3/6/8/93682182/fact_sheet_education_in_jerusalem_2017.pdf)>.

269 Andre WM Gerrits and Max Bader 'Russian patronage over Abkhazia and South Ossetia: implications for conflict resolution', (2006) 32(3) *East European Politics* 297, 304 - 305.

270 *ibid*.

271 Delegation of the European Union to the Council of Europe, 'EU Local Statement on the Secretary General's 15th Consolidated report on the conflict in Georgia' (19 April 2017), <[https://eeas.europa.eu/delegations/council-europe/24837/eu-local-statement-secretary-general%E2%80%99s-15th-consolidated-report-conflict-georgia\\_en](https://eeas.europa.eu/delegations/council-europe/24837/eu-local-statement-secretary-general%E2%80%99s-15th-consolidated-report-conflict-georgia_en)>.

communities in Area C. For example, military order No. 101 forbids the gathering of more than ten people at a time in the same place, allegedly for 'security' reasons. Likewise, order No. 107 prohibits a range of schoolbooks, (including Arab grammar, the Crusades, and Arab nationalism) and order No. 1079 published a list of over a thousand banned items pertaining to Palestinian novels and poetry.<sup>272</sup>

There are many examples of measures that show how Israel is slowly imposing the Jewish identity over Area C, while at the same time trying to suppress expressions of Palestinian identity. These measures include the addition of Jewish symbols in the buildings belonging to settlers, signs written in Hebrew and Israeli flags raised within the Palestinian Territory.

Between 1 January and 18 August of 2016, Israeli authorities reportedly demolished all the structures of residents of al-Araqib, an 'unrecognised' Bedouin village, in Israel. Over the same period, 28 Bedouin structures were demolished in the Naqab, while various Bedouin crops were also destroyed fourteen times in several 'unrecognised' Bedouin villages.<sup>273</sup> The consequences of such acts are that the Bedouin community cannot continue to live their traditional way of life in accordance with their own identity and culture. This is especially true, in cases where Bedouin communities are forcibly relocated to 'permanent locations' in the West Bank (near the Abu Dis garbage landfill) where they do not enjoy the wide space their culture requires for the maintenance of their flocks<sup>274</sup> and for the setting up of their characteristic tents taking into account that they are a semi-nomadic society.

These actions seem to be part of a system designed to interfere with the normal life and identity of the Palestinian people whether located in Israel or in Area C. In conclusion, there are strong indications that Israel applies a policy that subjugates the cultural identity of the occupied population of Area C and systematically discriminates against the Palestinian population, which amount to apartheid.<sup>275</sup>

272 Poorna Mishra, 'The right to resist in occupied Palestine: denial and suppression' (Open Democracy 16 March 2015) <[www.opendemocracy.net/north-africa-west-asia/poorna-mishra/right-to-resist-in-occupied-palestine-denial-and-suppression](http://www.opendemocracy.net/north-africa-west-asia/poorna-mishra/right-to-resist-in-occupied-palestine-denial-and-suppression)>

273 Human Rights Watch, 'Israel/Palestine: Events of 2016' (18 March 2016) <[www.hrw.org/world-report/2017/country-chapters/israel/palestine](http://www.hrw.org/world-report/2017/country-chapters/israel/palestine)>.

274 B'Tselem, 'Acting the landlord: Israel's policy in Area C, the West Bank' (June 2013), 11 <[www.btselem.org/publications/201306\\_area\\_c\\_fulltext](http://www.btselem.org/publications/201306_area_c_fulltext)>.

275 Al-Haq, "Human rights organisations welcome Concluding Observations of the UN Committee on the Elimination of Racial Discrimination on racial segregation and apartheid on both sides of the Green Line" (21 December 2019), available at: <<http://www.alhaq.org/advocacy/16324.html>>.



## Guideline 12: Suppression or Restriction of Civil and Political Rights of the Population of the Occupied Territory

The suppression or restriction of civil and political rights of the occupied territory's population by the Occupying Power can be aimed at fragmenting local civil society, weakening it and enhancing the Occupying State's authority in the territory. Resistance against the occupier becomes more difficult if the occupied population has limited access to information, does not enjoy freedom of expression and assembly, and/or cannot move freely in the occupied territory.

In certain cases, freedom of expression and association may be restricted by the Occupying Power for security reasons. However, restrictions to civil and political rights must meet certain requirements of legality, necessity and proportionality under IHRL which applies alongside IHL.<sup>276</sup> The assessment whether the restrictions are justified must be carried out on a case-by-case basis. Moreover, Article 45 HR prohibits compelling the population of the occupied territory to swear allegiance to the Occupying Power. In this regard, the restrictions of certain human rights of the population can indirectly force them to become an ally of the occupying forces. Therefore, in these situations, the Occupying Power might also be violating the abovementioned provision.

Interference with the occupied territory's television, radio, newspapers, social media or any other kind of media broadcasting can play a significant role in asserting further control over the population. Misinformation and misguided propaganda through media can give the impression that the integration of territories is acceptable or accepted by the occupied territory's population. At the same time, the Occupying Power has the ability to regulate what the population has access to, effectively cutting them off from 'unwanted' information and subduing them to its own narrative.

In a number of case studies, the occupier significantly restricted or suppressed the civil and political rights of the local population. The Crimean annexation is a good example of a 'misinformation' campaign, since in the weeks prior to the referendum held in the Peninsula, broadcasting of Ukrainian television channels

276 See ICCPR, art. 19.

was halted, leaving only those coming from Russia. The violent takeover of some broadcast media was reported in some localities under pro-Russian control.<sup>277</sup> In fact, for more than a week prior to the referendum, Crimeans were not able to receive Ukrainian analogue television stations, but only Russian stations were on air.<sup>278</sup> Overall, the suppression of civil liberties by the annexing state can be used to fragment the civil society in the annexed territory and to impose their own ideas over the population.

Similarly, in Western Sahara, Morocco controls the majority of local media and has highly restricted the Sahrawi's freedom of expression. There are also significant restrictions to the freedom of association since it is exceptionally hard for organisations denouncing government abuses to get legal recognition. Furthermore, protests in this occupied territory are often shut down. Moroccan authorities have restricted the civil and political rights of the local population. The legislation in force is repressive, especially regarding freedom of opinion, association and press. Specifically, the authorities refuse to grant legal recognition to any Sahrawi organization which may expose human rights violations by Morocco, impose restrictions on foreign travel for some Sahrawi activists and in some cases, they confiscate Sahrawi passports.<sup>279</sup> Additionally, Morocco controls the majority of the media channels in the occupied territory.<sup>280</sup> These measures seem to prevent further criticisms to 'the institution of the monarchy or Morocco's territorial integrity'.<sup>281</sup>

277 UN Human Rights Council, 'Report of the Special Rapporteur on minority issues - Mission to Ukraine' (2015), UN Doc. A/HRC/28/64/Add.1 <[www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_hrc\\_28\\_64\\_add\\_1.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_hrc_28_64_add_1.pdf)>

278 Andreas Brenner, 'Referendum Day in Crimea's Simferopol', *DEUTSCHE WELLE* (10 November 2017) <[www.dw.de/referendum-day-in-crimeas-simferopol/a-17500378](http://www.dw.de/referendum-day-in-crimeas-simferopol/a-17500378)>.

279 OHCHR (n 89); Human Rights Watch, 'World Report: Events of 2007' (2008) 510 [www.hrw.org/sites/default/files/world\\_report\\_download/wr2k8\\_web.pdf](http://www.hrw.org/sites/default/files/world_report_download/wr2k8_web.pdf); Western Sahara Resource Watch, 'Interview with Jytte Gutland: 1 of 5 MEPs evicted from Western Sahara' <[www.wsrw.org/a105x4010](http://www.wsrw.org/a105x4010)>.

280 CIA, 'The World Factbook: Western Sahara' <[www.cia.gov/library/publications/the-world-factbook/geos/wi.html](http://www.cia.gov/library/publications/the-world-factbook/geos/wi.html)>.

281 Human Rights Watch, (n 271); Moroccan Press Code and Law Associations.

## Application to Area C

Israel has introduced policies aimed at fragmenting Palestinian civil society. There are military orders that apply to Area C which criminalise political activities<sup>282</sup> and documented cases of persecution of Palestinian political leaders.<sup>283</sup>

Likewise, the right to protest is heavily restricted; the placing of political posters or symbols and the attendance of demonstrations of any kind are offenses under the military law applied to the West Bank justified as acts that 'endanger the security' of Israel. Furthermore, socialising with an individual classified as a 'security threat' to Israel, even after the alleged activities have stopped, is also considered an offense.<sup>284</sup> The sanctions include arbitrary arrest and detention, and the use of tear-gas, rubber bullets and live ammunition against demonstrators.<sup>285</sup>

According to the Palestinian Center for Human Rights (PCHR), between 28 September 2000 and 31 March 2017, Israeli forces carried out 1,756 attacks against journalists. These attacks include 21 cases of killings, 501 cases of wounded journalists, 437 cases in which journalists were arrested and detained and 112 cases in which press cards and media equipment and material were confiscated. It should be mentioned that there are hundreds of other undocumented attacks.<sup>286</sup>

Specifically, in Area C, on 6 February 2017, Israeli soldiers stationed near the 'Yitzhar' settlement, southeast of Nablus, detained a Palestinian television crew that was on a hill in the area covering the changes made by Israeli settlers to a 20-dunum land, when the Israeli forces told them that Palestinians are not allowed in the area classified as Area C. They reportedly threatened the Palestinian crew stating that they would be arrested if they returned to the area.<sup>287</sup>

Another significant example is that Palestinians and Israeli settlers are treated

282 Addameer, 'Joint NGO Submission on Israeli Suppression of Palestinian Human Rights Activism against the Wall' (4 February 2010) <[www.addameer.org/files/pdf/joint-submission-israeli-suppression-of-palestinian-human-rights-activists.pdf](http://www.addameer.org/files/pdf/joint-submission-israeli-suppression-of-palestinian-human-rights-activists.pdf)> accessed July 2020.

283 Gideon Levy, "Reminder: Israel Is Still Holding a Palestinian Lawmaker as Political Prisoner Indefinitely" *Haaretz* (15 February 2019), available at: <<https://www.haaretz.com/israel-news/.premium-reminder-israel-is-holding-palestinian-lawmaker-as-political-prisoner-indefinitely-1.6937343>>.

284 *ibid* 12.

285 Mishra (n 265).

286 Palestinian Center for Human Rights (PCHR), 'Report Silencing the Press 2017' (31 March 2017) <<http://pchr.org/en/wp-content/uploads/2017/10/Report-Silencing-the-Press-No.-19en.pdf>>.

287 *ibid*.

differently under the same military laws. For example, Palestinians are prohibited from entering closed military zones without a permit even if their private land is located within the area,<sup>288</sup> while the seam zone direct access is completely closed off to Palestinians, since they need special permits.<sup>289</sup> In contrast to this, Israelis have open, unrestricted access to the seam zone.<sup>290</sup> This shows that through military orders, the Israeli authorities discriminate against Palestinians despite the fact that they constitute the protected population under occupation law. The military commander may well justify such legislative measures as being necessary for 'security reasons' but it is rather difficult to see how such discrimination against the Palestinian population is necessary.

Another common measure taken by Israel is the restriction of Palestinian access to main roads on its long and extensive borders. Israeli authorities also impose a significant number of restrictions on the freedom of movement of the local people. This is mostly evident with regard to people who live in the seam zone. The population that lives within the seam zone must pass through checkpoints every day to go school, to work, to visit family members or invite anyone to their homes, except on some rare occasions.<sup>291</sup>

In light of the abovementioned actions taken by Israel, it is possible to argue that this Guideline is fulfilled in respect of the entirety of Area C, since Israel applies policies that aim to fragment Palestinian civil society and therefore maintain its subjugation to the Israeli regime.

288 UNGA A/HRC/22/63 (n 257).

289 Human Rights Watch, 'Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories' (19 December 2010) <<https://www.hrw.org/report/2010/12/19/separate-and-unequal/israels-discriminatory-treatment-palestinians-occupied>>.

290 *ibid.*

291 B'Tselem, 'Restrictions on Movement' (11 November 2017) <[www.btselem.org/freedom\\_of\\_movement](http://www.btselem.org/freedom_of_movement)>.



## Conclusion

The Guidelines discussed in this part are based on an analysis of the spirit of the law of belligerent occupation and case studies of occupation that have arguably led to *de facto* annexation of territory (and sometimes *de jure* annexation) in different geographical and historical contexts. Guideline No 1 is specific to *de jure* annexation; Guidelines 2-12 represent indicative factors of creeping annexation. In applying the guidelines, it is worth noting that every situation is different and therefore should be analysed on a case-by-case basis and in light of all relevant circumstances. None of the guidelines is in itself essential for annexation to occur. Nor are all of them cumulative. However, a certain level of quantitative and/or qualitative intensity should be present to indicate an erosion of the sovereign powers of the occupied territory and ultimately its integration within the Occupying State. Ultimately, the guidelines should be used as indicative factors to guide scholars and practitioners in making a holistic assessment of the situation in a given case.



# PART IV

## Conclusions on the Annexation of Area C

### 1. Findings on the legal status of Area C

The purpose of this part of the report has been to explore the factual situation on the ground in Area C and to examine the applicability of the 12 Guidelines that were introduced in the previous part, in order to assess whether and to what extent Area C has been *de facto* annexed by Israel. The analysis showed that nearly all the indicators of creeping annexation are present in Israel's administration of Area C, either in parts of it or in the entire area.

Since the beginning of the Israeli occupation of the West Bank in 1967, there has not been an official declaration stating that Area C has been annexed (*de jure* annexation). However, some members of the Government have made statements in their official capacity that parts of Area C already belong to Israel, or should be officially annexed. Moreover, in the 50 years of military occupation thus far, Israel has created a considerable number of facts on the ground. Examples include, the settlements (including agricultural and industrial), the development of infrastructure (e.g. bypass roads), the building of the Wall, the designation of closed military zones and natural parks and the exploitation of Palestinian natural resources. These are likely to amount – in the words of the ICJ – to *fait accomplis* on the ground 'that could well become permanent, in which case, and notwithstanding the formal characterization... by Israel, it would be tantamount to *de facto* annexation'.<sup>292</sup>

Apart from these examples, which are more or less physically affecting the territory, other measures have also been taken which assist towards the realization of the creeping annexation. These include, for example: the control over the Palestinian economy; the application of Israeli domestic legislation and judicial powers over the settlers, and the creation of two parallel legal systems; the suppression of the occupied population's identity, and civil and political rights; continuous future planning, and so on. As has been shown above, all these measures are often justified – unconvincingly – on the basis of 'military necessity', while pragmatically, they raise concerns as to the extent to which the Israeli administration takes the protected population into consideration.<sup>293</sup>

The difficult legal question that this report attempts to tackle is: when can one argue that the *fait accomplis* that could well become permanent actually become

<sup>292</sup> Wall Advisory Opinion, (n. 8) [121].

<sup>293</sup> In accordance with the laws of occupation.

so? This is a challenging question to answer prospectively, because it usually requires a retrospective assessment. Moreover, Israel maintains the argument that the measures it has undertaken in Area C are temporary and reversible. However, it is important to look beyond Israel's official statements to discern what the situation on the ground is. It can be argued that an Occupying Power would not create facts on the ground of that magnitude in the first place unless it intended to maintain control of the occupied territory. Additionally, in our view, what can be inferred from the ICJ statement in paragraph 121 of the *Wall Advisory Opinion*, is that those facts on the ground have an inherent element of permanence. In other words, those facts on the ground are not temporary by nature. Therefore, if the Occupying Power does not take positive measures to undo them, they will stay and necessarily become permanent. It is therefore, in our view, unnecessary to identify the exact point in time when these facts on the ground become permanent. This is because permanence is a characteristic which they naturally possess and not one which can be acquired at some point in time. This, coupled with an Occupying Power that does not treat the occupation as temporary, strongly indicate that such facts on the ground are unlikely to be reversed. The Occupier should aspire to end the occupation. Instead, what we have observed in relation to Area C is that Israel is planning for future generations, as if the occupation is not going to end. This suggests that the facts on the ground created by Israel will effectively become permanent.

This raises a subsequent question: even assuming that one or more facts on the ground have become permanent, when does annexation occur? As has already been mentioned, this assessment has to be made on a case-by-case basis, by looking at each specific case of alleged annexation in its context and in light of all relevant circumstances. However, certain general principles can be drawn. In our view, a certain quantitative and qualitative intensity is required. For example, if the facts created on the ground are not very significant but the vast majority of the Guidelines are satisfied, it may be argued that annexation has occurred *de facto* by virtue of the fulfilment of the Guidelines quantitatively. This would be a situation where the facts on the ground created by the Occupying Power permeate all aspects of life of the occupied population. If, however, only a limited number of Guidelines are satisfied, this would require facts on the ground of a higher qualitative intensity for the situation to amount to annexation. For example, the full applicability of the Occupying Power's domestic legislation over the occupied territory and the complete incorporation and control by the Occupying Power of the two economies,

may of themselves strongly indicate *de facto* annexation because of their qualitative intensity. Ultimately, the test to be applied to assess the situation is the same, namely whether through the creation of those facts on the ground the Occupying Power has erased the occupied population's claim to sovereignty.

It should be noted that there seems to be a stronger argument of *de facto* annexation over certain parts of Area C than others. For example, in many of the above Guidelines, a lot of measures are the result of the continuous policy of settlement development and expansion and are thus directed over parts of Area C where settlements are situated. Examples include the extension and application of Israeli domestic law to settlers, the building of infrastructure for the benefit of the settlers and the open access that Israeli settlers have to military zones and the seam zone. At the same time, many resources are also exclusively directed to settlement activities while various land expropriations and declarations of natural parks feed into the settlement expansion policy. Taking these into account, it is our view that creeping annexation has undoubtedly been realized in the settlements, the closed military zones, the seam zones between the Green Line and the Wall, and in expropriated state lands and natural parks. It is difficult to conceptualize an Israeli incentive other than crystallizing a claim over these parts of Area C.

Having said this, what can definitely be argued is that the situation in the entirety of Area C, as it currently stands, could certainly amount to *de facto* annexation. This is because, even if the most invasive measures are directed at the settlements, the closed military zones, the natural parks and the seam zone, many of those measures create side effects on other parts of Area C. Palestinian villages are more like enclaves or detached islands, surrounded by settlements, that cannot grow or develop. Israel maintains the role of a sovereign instead of an administrator and the measures taken have an inherent degree of permanency; as already mentioned, these measures exceed the limits of its authority under occupation law and contradict the inherent temporary nature of occupation because they introduce long-term changes that are difficult to reverse.

All in all, it can be concluded that in the present case, the Guidelines appear to have been fulfilled both quantitatively and qualitatively. To this end, the position of this report is that the 1967 border has *de facto* been erased and Israel has managed to undermine to a large extent the sovereign claim of the occupied population over Area C. It appears that all that remains is an official declaration to integrate Area C within Israel proper, an unfortunate but pragmatic realization.

## 2. Conclusion

The objective of the present report was to identify criteria indicating when annexation occurs and to examine the potential annexation of Area C. In order to do this, the report followed a three-step approach divided in three parts respectively. The first part examined the relevant legal framework that governs occupation and annexation. The second part extrapolated 12 Guidelines drawing from seven case studies of annexations during occupation, which to our view, may indicate when annexation occurs. Last but not least, Part III dealt with the factual situation in Area C while analysing the extent to which the 12 Guidelines are fulfilled by virtue of facts on the ground created by Israel. The following conclusions were reached; a) there is a strong argument for the *de facto* annexation of the area which comprises the settlements, the closed military zones, the seam zone and the expropriated state land and natural parks; b) but beyond this, the view held in this report is that Area C is *de facto* annexed by Israel in its entirety and is not restricted to the areas listed under a).



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AL - HAQ

### About Al-Haq

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah in the Occupied Palestinian Territory (OPT). Established in 1979 to protect and promote human rights and the rule of law in the OPT, the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. Al-Haq conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. Al-Haq has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists- Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), ESCR-Net – The International Network for Economic, Social and Cultural Rights, the Palestinian Human Rights Organizations Council (PHROC), and the Palestinian NGO Network (PNGO). In 2018, Al-Haq was a co-recipient of the French Republic Human Rights Award, whereas in 2019, Al-Haq was the recipient of the Human Rights and Business Award.

