



NRC

**NORWEGIAN
REFUGEE COUNCIL**

المجلس النرويجي للاجئين

The Legal Status of East Jerusalem

December 2013



NORWEGIAN
REFUGEE COUNCIL
المجلس النرويجي للاجئين

The Legal Status of East Jerusalem

December 2013

December 2013

Written by: Adv. Yotam Ben-Hillel

Cover photo: Bab al-Asbat (The Lion's Gate) and the Old City of Jerusalem. (Photo by: JC Tordai, 2010)



This publication has been produced with the assistance of the European Union. The contents of this publication are the sole responsibility of the authors and can under no circumstances be regarded as reflecting the position or the official opinion of the European Union.

The **Norwegian Refugee Council (NRC)** is an independent, international humanitarian non-governmental organisation that provides assistance, protection and durable solutions to refugees and internally displaced persons worldwide.

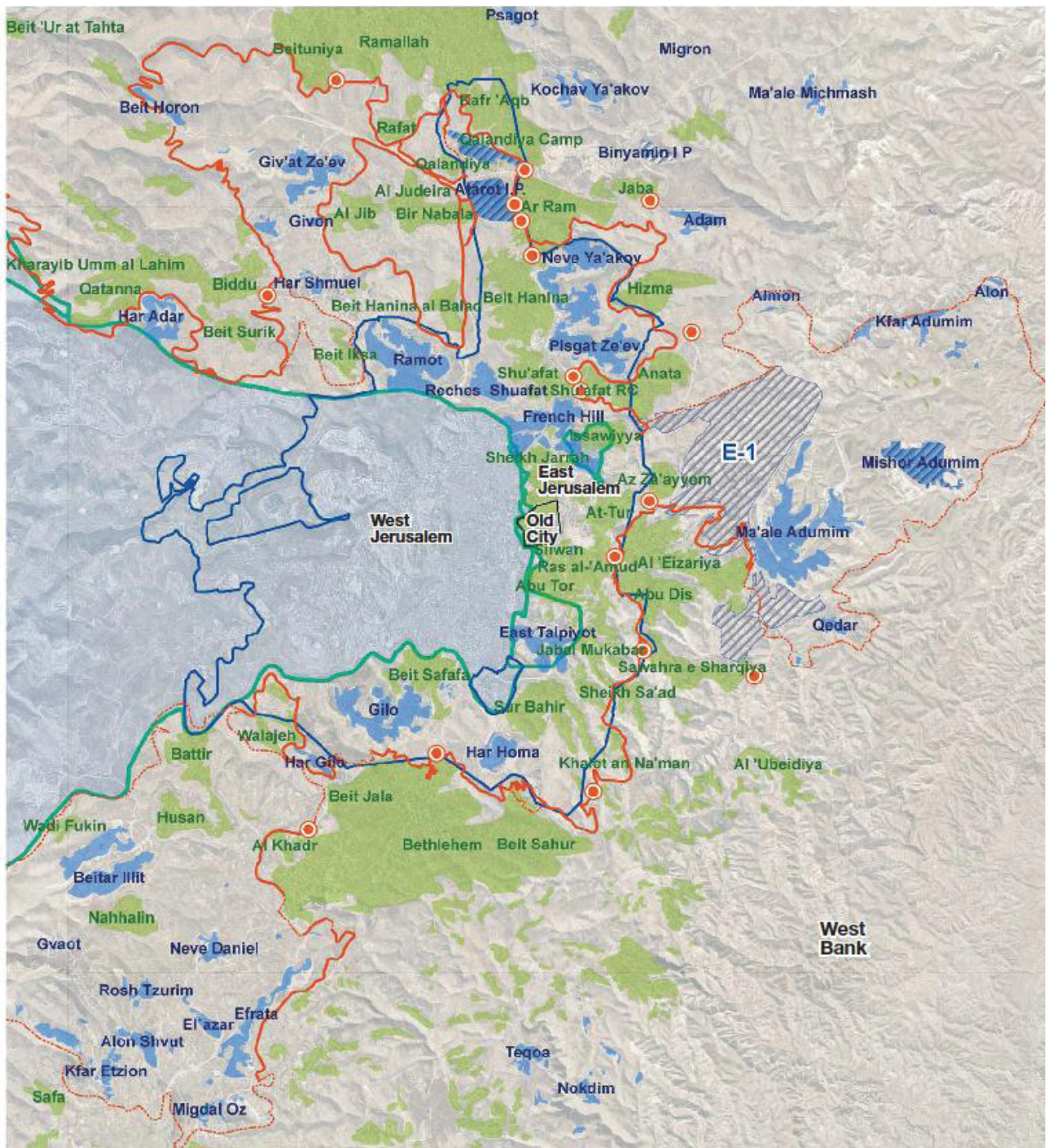
The author wishes to thank Adv. Emily Schaeffer for her insightful comments during the preparation of this study.











Table of Contents

| | |
|---------------------------------------------------------------------------------------|-----------|
| Table of Contents | 3 |
| 1. Introduction | 5 |
| 2. Background | 6 |
| 3. Israeli Legislation Following the 1967 Occupation | 8 |
| 3.1 Applying the Israeli law, jurisdiction and administration to East Jerusalem | 8 |
| 3.2 The Basic Law: Jerusalem, Capital of Israel | 10 |
| 4. The Status of East Jerusalem According to International Law | 12 |
| 4.1 The Law of Occupation | 12 |
| 4.1.1 Occupation and Annexation | 12 |
| 4.1.2 Other Relevant Principles | 14 |
| 4.2 The principle of self-determination | 17 |
| 4.3 Relevancy to East Jerusalem | 19 |
| 4.4 The Stance of the International Community | 21 |
| 4.5 The conflict between Israeli and International Law | 22 |
| 5. The Civil Status of East Jerusalem’s Palestinian Residents | 24 |
| 5.1 Israeli Law | 24 |
| 5.2 International Law Perspective | 25 |
| 5.3 The Stance of the Israeli Courts | 28 |
| 6. Conclusions | 29 |

Jerusalem and its Environs

Scale 1:100,000 



-  Green Line
-  Old City
-  Municipal Boundary
-  Barrier- Completed
-  Route of the Barrier- Planned
-  Checkpoint/ Terminal
-  Palestinian Built-up Area
-  Israeli Built-up area Beyond the Green Line
-  Industrial Park
-  E-1 Master Plan

Map by: *Terrestrial Jerusalem*

1. Introduction

The debate over Jerusalem's status is not merely a legal one. To a great extent it is a political discussion which involves national aspirations mixed with religious claims. It is also a rather old debate and, as some would claim, one that did not begin as a result of the Israeli occupation and annexation of Jerusalem following the 1967 War, nor even in the wake of the war in 1948, but in fact thousands of years ago, before the common era.

With this in mind, the analysis presented in this document focuses only on the legal aspects pertaining to the status of Jerusalem. Moreover, disregarding the fact that the legal status of *Jerusalem as a whole*, following the 1948 War, is the subject of great debate,¹ this document will only address questions regarding the legal status of *East Jerusalem*² and the legality of Israel's claim of sovereignty over East Jerusalem since 1967.

This document will begin with a short background on the legal situation subsequent to the November 1947 partition plan, adopted by the United Nations (UN), followed by a description of the Israeli occupation and subsequent annexation of East Jerusalem and the Israeli legislation aimed at strengthening its hold over the area. The document then analyses this legislation from an international law perspective.

An analysis of the legal status of East Jerusalem is not complete without a discussion of the *civil status* of Palestinian residents in East Jerusalem. This will be dealt with in the second part of the document. As we shall see, these residents have a unique status under Israeli law, which may be revoked relatively easily, resulting in a perpetual threat of displacement.

¹ See, e.g. Antonio Cassese, "Legal Considerations on the International Status of Jerusalem", *The Palestine Yearbook of International Law*, Vol. III, 1986, 13, and the references mentioned there.

² The term "East Jerusalem" refers today to all the land that was annexed to the State of Israel following the 1967 war. See chapter 3 below.

2. Background

On 29 November 1947, the General Assembly of the UN adopted a resolution (referred to as the UN Partition Plan for Palestine) that recommended the termination of the British Mandate in Palestine and the establishment of separate independent Arab and Jewish states in Mandatory Palestine.³ As for Jerusalem,⁴ the General Assembly recommended the creation of a separate entity (*corpus separatum*), demilitarised and neutral, and the establishment of a special international regime in the city administered by a UN-affiliated Trusteeship Council.⁵ Following the adoption of the resolution, which was ultimately rejected by the Palestinian Arab community, a civil war erupted between Jewish and Arab communities throughout Palestine. On 14 May 1948, the British Mandate over Palestine ended, and Israel proclaimed its independence. Following this proclamation, the armed conflict then spread, culminating in the 1948 War with Palestinians and a number of Arab states on one side and the new State of Israel on the other.

During the 1948 War, Israel captured the western area of Jerusalem. Virtually the entire Palestinian urban population of 28,000 had left or been driven from the western quarters of the city and became refugees.⁶ At the same time, the eastern part of Jerusalem (part of what is now termed as ‘East Jerusalem’), including the Old City, and the West Bank came under Jordanian control.

In 1949, with mediation from the UN, general armistice agreements were concluded between the parties in conflict. On 3 April 1949, Israel and Jordan signed an armistice agreement in Rhodes.⁷ Articles V and VI of that agreement fixed the armistice demarcation line between Israeli and Arab forces (often later referred to as the “Green Line”, owing to the green colour used to mark it on maps). In UN General Assembly and Security Council Resolutions passed after the signing of the armistice agreement, the international community’s position regarding Jerusalem’s legal status remained resolute, with repeated calls for the immediate and unconditional “demilitarisation” and “internationalisation” of Jerusalem.⁸

While the UN attempted to create a *corpus separatum* in Jerusalem, in accordance with the partition plan, the parties established facts on the ground that prevented this from happening. On 5 December, 1949, the Israeli Prime Minister David Ben-Gurion declared that “Jewish Jerusalem [West Jerusalem] is an organic and integral part of the State of Israel”.⁹ However, a few days later, the internationalisation of Jerusalem under the UN Trusteeship Council was reaffirmed by the General Assembly.¹⁰ Despite this, on 13 December 1950, in his

³ G.A. Res. 181 (II), U.N. GAOR, 2nd Sess., U.N. Doc. A/519 (1947).

⁴ According to the Partition Plan, the boundaries of Jerusalem included “the present municipality of Jerusalem plus the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem; the most western, 'Ein Karim (including also the built-up area of Motsa); and the most northern Shu'fat”. See *Ibid.*, Part III(B).

⁵ *Ibid.*, Part III.

⁶ Michael Dumper, *The Politics of Jerusalem Since 1967*, New York, 1997, p. 67.

⁷ Israel-Jordan, General Armistice Agreement, Apr. 3, 1949, 42 U.N.T.S. 303.

⁸ For example refer to: UN General Assembly, Palestine-Progress Report of the United Nations Mediator, 11 December 1948, A/RES/194. See also, UN General Assembly, Palestine: question of an international regime for the Jerusalem area and the protection of the Holy Places, 9 December 1949, A/RES/303.

⁹ *Divrei HaKnesset* (Knesset Record), Session 93, 5 December 1949, p .5.

¹⁰ UN General Assembly, Palestine: question of an international regime for the Jerusalem area and the protection of the Holy Places, 9 December 1949, A/RES/303.

announcement before the Knesset (the Israeli parliament), Ben-Gurion declared Jerusalem to be the capital of Israel and repeated the Israeli government's stance according to which Jerusalem should remain under Israel's control. Ben-Gurion added that the creation of a *corpus separatum* would contradict the will of the residents of Jerusalem and harm "an historical and natural right of the people living in Zion".¹¹

On 24 April 1950, the Jordanian National Assembly approved the annexation of the West Bank to Jordan (with the eastern part of Jerusalem included in the West Bank). The international reaction towards Jordan's action was quite similar to the reaction regarding Israel's previous similar action. Almost all the states of the world, including the Arab League, repudiated this Jordanian action.¹² Following this criticism, on 31 May 1950 Jordan announced before the Arab League that the unification of the two banks of the Jordan River under Jordanian rule was not meant to harm the final settlement of the question of Palestine.¹³

The General Assembly of the UN then dealt with the status of Jerusalem a few times during the early 1950s but did not reach any decision on the matter. This question was raised again only following the 1967 War.¹⁴

¹¹ *Divrei HaKnesset* (Knesset Record), Session 96, 13-14 December 1949, p. 6.

¹² See Larry Kletter, "The Sovereignty of Jerusalem in International Law", *Columbia Journal of Transnational Law*, Vol. 20(1), 1981, 319, pp. 344-345.

¹³ Moshe Hirsch and Debra Housen-Couriel, Supervised by Ruth Lapidot, *The Jerusalem Question – Proposals for its Resolution*, The Jerusalem Institute for Israel Studies, 1994, p. 6 [Hebrew].

¹⁴ *Ibid.*, p. 5.

3. Israeli Legislation Following the 1967 Occupation

In June 1967, further conflict broke out between the State of Israel and its neighbours. During this 1967 War, Israel occupied the West Bank, including East Jerusalem, the Golan Heights, the Sinai Peninsula and the Gaza Strip. Immediately after the 1967 War the Government of Israel unilaterally annexed about 70,500 dunams (approximately 17,400 acres) of the Jordanian Jerusalem and West Bank land to the municipal boundaries of West Jerusalem. In addition to the areas of Jerusalem that had previously been controlled by Jordan (approximately 6,500 dunams), the annexed lands included an additional 64,000 dunams, most of which belonged to 28 Palestinian villages in the West Bank; the remaining annexed lands were within the municipal boundaries of Bethlehem and Beit Jala. With this annexation, the total area of Jerusalem tripled, making Jerusalem Israel's largest city, in both territory and population.¹⁵ This annexed territory is known today as "East Jerusalem".

The demarcation of Jerusalem's new municipal borders was based on alleged security concerns (delineation of defensible borders) and demographic considerations, *i.e.*, ensuring a Jewish majority in the city. The principle at the base of these demographic considerations was "maximum territory and minimum population". This translated into a practice of annexing as much territory as possible to the municipal boundaries, which could be used for building new settlements for a Jewish population, while at the same time excluding heavily populated Palestinian areas from the new boundaries.¹⁶

3.1 *Applying the Israeli law, jurisdiction and administration to East Jerusalem*

In order to enable these changes and strengthen its hold over the annexed area, Israel took several legal steps. On 27 June 1967, the Knesset adopted an amendment to the Law and Administration Ordinance, stipulating in Article 11b that "the law, jurisdiction and administration of the State shall apply to all the area of the Land of Israel which the government has determined by Order".¹⁷ On the next day, 28 June 1967, the Israeli government instituted the Law and Administration Order, which applied the "law, jurisdiction and administration of the State" to East Jerusalem.¹⁸ The Knesset then authorised the Minister of the Interior to extend the boundaries of any municipality to include any area designated by government order.¹⁹ Accordingly, the Minister of the Interior expanded the borders of what had been West Jerusalem to include the recently occupied sector of the West Bank mentioned above.²⁰ Israel then, by proclamation under the Municipalities Ordinance,

¹⁵ B'Tselem, *A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem*, May 1995, p. 10.

¹⁶ *Ibid.*, and the sources that are mentioned there; Bimkom and Ir Shalem, *The Planning Deadlock: Planning Policy, Land Regularization, Building Permits and House Demolitions in East Jerusalem*, December 2004, pp. 13-14 [Hebrew].

¹⁷ Law and Administration Ordinance (Amendment No. 11) – 1948, Laws of the State of Israel No. 499, 28 June 1967, p. 74. The term "Land of Israel" (*Eretz Israel*) means the territory of mandate Palestine, which includes the West Bank.

¹⁸ The Law and Administration Order (No. 1) – 1967, Israeli Collection of Regulations No. 2064, 28 June 1967, p. 2690.

¹⁹ Municipalities Ordinance (Amendment No. 6) – 1948, Laws of the State of Israel No. 499, 28 June 1967, p. 74.

²⁰ Order by the Minister of the Interior, Israeli Collection of Regulations No. 2063, 28 June 1967, p. 2670.

stipulated that the annexed territory was included within the boundaries of the Jerusalem Municipality.²¹

The round of rapid enactment of legislation after the 1967 War concluded with the enactment of the Protection of Holy Places Law on 28 June 1967, which provided that “the Holy Places shall be protected from desecration and any other violation and from anything likely to violate the freedom of access of the members of different religions to the places sacred to them or their feelings with regard to those places”.²² It seems that by enacting this law and demonstrating respect to religious places sacred to all religions, Israel tried to firstly alleviate possible international criticism that it expected due to its annexation measures; and secondly reduce friction between the different communities in Jerusalem, which was important to help build support for continued Israeli control over the city.²³

According to the formal Israeli stance at the time, this newly enacted legislation did not amount to a claim of sovereignty over East Jerusalem.²⁴ The UN, however, viewed the legislative measures as thinly-disguised annexation, despite Israel's protestations to the contrary, and condemned Israel for the *de facto* annexation.²⁵ The Israeli Supreme Court refrained, at that time, from stating plainly that the area of East Jerusalem had been annexed to Israel. However, some judges addressed this issue directly. Thus, in a High Court of Justice decision from 1969 Justice Binyamin Halevi asserted that following the aforementioned legislation “the united Jerusalem is an integral part of Israel”.²⁶

Another case, decided before the High Court of Justice in 1970, explored this issue of annexation further. It involved two Palestinians of East Jerusalem, who ran an antique store in East Jerusalem and were accused by the Israeli military prosecutor of the West Bank, according to the Jordanian Antique Law applied in the West Bank (which continued to apply in the West Bank after the Israeli occupation of 1967), of illegally exporting antiques from the West Bank to their store in East Jerusalem. The brothers petitioned the High Court of Justice and claimed that the transfer of the antiques did not qualify as “exporting” since East Jerusalem was not considered to be “abroad” from the West Bank. The High Court dismissed the petition, stating that following Israeli legislation after the 1967 War, East Jerusalem was no longer under the jurisdiction of the Jordanian Antique Law and, therefore, was considered to be “abroad”. Referring to this situation, Justice Yitzhak Kahan asserted that East Jerusalem “was annexed to the State of Israel and it is part of its territory”.²⁷ Yet, the two other Judges in the same case refrained from stating this explicitly and one of them, Justice Haim Cohen,

²¹ Municipalities Ordinance (Declaration on the Enlargement of Jerusalem's City Limits), Israeli Collection of Regulations No. 2065, 28 June 1967, p. 2694.

²² The Protection of Holy Places 1948, Laws of the State of Israel No. 499, 28 June 1967, p. 75, Article 1.

²³ Terry Rempel, “The Significance of Israel's Partial Annexation of East Jerusalem”, *The Middle East Journal*, Vol. 51(4), 520, Autumn 1997, p. 526 and sources mentioned therein.

²⁴ Abba Eban, who served as the Foreign Minister of Israel at that time, wrote to the U.N. Secretary-General that “the [legislative] measures adopted relate to the integration of Jerusalem in the administrative and municipal spheres, and furnish a legal basis for the protection of the Holy Places of Jerusalem” (Report of the Secretary-General at 3, U.N. Doc. A/6753 (1967), reprinted in 6 Int'l Leg. Mat. 846 (1967) at: John Quigley, “Jerusalem: The Illegality of Israel's Encroachment”, *The Palestine Yearbook of International Law* Vol. 9, 19, 1996/1997, p. 30).

²⁵ S.C. Res. 252, U.N. SCOR, 23d Sess., U.N. Doc. S/8590/Rev.2 (1968); S.C. Res. 478, U.N. SCOR, 35th Sess., U.N. Doc. S, 14113 (1980).

²⁶ HCJ 171/68 *Hanzalis v. Ecclesiastical Court of the Greek Orthodox Church*, (1969) 23(1) PD 260, 269. In this regard, see also HCJ 223/67 *Ben-Dov v. Minister of Religions*, (1968) 22(1) PD 440 (Supreme Court Chief Justice Shimon Agranat, p. 442).

²⁷ HCJ 283/69 *Rweidi v. Military Court, Hebron District*, (1970) 24(2) PD 419, 424.

stipulated only that “there is no hindrance to apply the Israeli law on occupied territories even without the aim to annex them to Israel”.²⁸ In this way, the High Court effectively confirmed the *de facto* annexation of East Jerusalem to Israel and the subsequent application of Israeli domestic law to it.

3.2 *The Basic Law: Jerusalem, Capital of Israel*

In 1980, the Knesset enacted the Basic Law: Jerusalem, Capital of Israel.²⁹ This Law stipulates, in Article 1, that “Jerusalem, complete and united, is the capital of Israel”. Although this Law did not change the internal Israeli legal framework relating to East Jerusalem (which had already been confirmed by the legislation enacted after the 1967 War), the Law did clearly express the Israeli political position, which claimed the right to apply its sovereignty over East Jerusalem.³⁰ Given that the entire city – “complete and united” – is declared to be the capital of Israel, there is no doubt that the Knesset considered East Jerusalem annexed.³¹ Furthermore, an Israeli Supreme Court ruling from 1993 stipulated that the Basic Law: Jerusalem, Capital of Israel is an explicit manifestation of Israeli sovereignty over East Jerusalem and that the territory of “united Jerusalem” is part of the territory of the State of Israel.³²

In 2000, the Knesset amended the Basic Law: Jerusalem, Capital of Israel. The amendment, which served to reinforce Israel’s *de facto* legal tenure over East Jerusalem, began with the addition of Article 5, which stated that the “borders of Jerusalem include, for the purposes of this Basic Law, among other things, the entire territory described in the Municipalities Ordinance”.³³ The amendment also added Article 6, which established that “there shall not be transferred to any foreign agent, political or governmental, or to any other similar foreign agent, whether permanently or for a defined period, any authority that relates to the border of Jerusalem and which was lawfully granted to the State of Israel or to the Jerusalem Municipality”. Finally, the Knesset added Article 7, which states that “the provisions of Articles 5 and 6 may only be amended by a Basic Law that is passed by a majority of the members of Knesset” [meaning – at least 61 members of the Knesset].

On 22 November 2010 the Knesset enacted a law, which stated that before signing and ratifying any withdrawal from a territory on which the law, jurisdiction and administration of

²⁸ *Ibid.*, p. 423. In regard to a similar opinion see H CJ 205/82 *Abu Salach v. Minister of the Interior*, (1983) 37(2) PD 718, 720 (in this later case this statement pertained to the status of the Golan Heights).

²⁹ Basic Law: Jerusalem, Capital of Israel, Laws of the State of Israel No. 980, 5 August 1980, p. 186, Article 1. Israel has no written constitution in one single document, but rather a number of Basic Laws pertaining (at least theoretically) to all aspects of life including fundamental features of government and protection of human rights. According to a Knesset decision from 1950, these Basic Laws constitute chapters of the future constitution of the State of Israel, which will be formulated once the task of enacting the Basic Laws is concluded. To date, this work has not been completed. The normative superiority of Basic Laws over ordinary legislation was confirmed in 1995, when the Israeli Supreme Court assumed the power of judicial review of Knesset legislation violating a Basic Law. Some Basic Laws (and sometimes only specific sections of these laws) may only be amended by a special majority of the Knesset members, defined in the Basic Law itself.

³⁰ Eyal Benvenisti, Eyal Zamir, “Private Claims to Property Rights in the Future Israeli-Palestinian Settlement”, *The American Journal of International Law*, Vol. 89(2) (April, 1995), 295, p. 307.

³¹ Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University press (2009), p. 18.

³² H CJ 4185/90 *Temple Mount Faithful Association v. Attorney General*, (1993) 47(5) PD 221, 282-285.

³³ Article 5 relates here to the proclamation made under the Municipalities Ordinance (Declaration on the Enlargement of Jerusalem’s City Limits), stipulated that the annexed territory was included in the boundaries of the Jerusalem Municipality. See *supra* note 21.

the State of Israel apply, the government should seek the approval of the Knesset and, in addition, hold a referendum.³⁴ The purpose of the law, which was broadly criticised,³⁵ seems to have been to place another obstacle in front of any agreement that would include Israeli withdrawal from territories on which, according to the Knesset, Israeli law applied (i.e., East Jerusalem and the Golan Heights).

As we can see, despite its attempts to diminish the wide ranging ramifications of the relevant legislation passed after the 1967 War and the evasion of terms such as “annexation” and “sovereignty” in that legislation, there is no doubt today that Israel considers East Jerusalem

to be annexed to it. Also, the facts Israel has laid on the ground throughout the years, which accompanied the aforementioned legislation, seem to clarify Israel's intentions. Although elaboration on all those measures designated for strengthening the Israeli hold of East Jerusalem goes beyond the scope of this document, it is worth mentioning, as non-exhaustive examples, the massive expropriation of lands on which Israeli settlements were later established;³⁶ the extensive planning for the Israeli population with restrictive planning for Palestinian population;³⁷ the route and construction of The Wall that mostly follows the municipal borders (as extended in 1967) and emphasises the boundaries of the annexation;³⁸ and the usage of other Israeli domestic legislation in order to take over Palestinian properties.³⁹ Some of these practices will be further discussed below.



The Wall in Qalandiya, the northern part of East Jerusalem. Photo: JC Tordai, 2010.

³⁴ The Administration and Law Procedures Law (The Cancellation of the Application of the Law, Jurisdiction and Administration) (Amendment), 5771-2010, Laws of the State of Israel No. 2263, 28 November 2010, p. 58. According to this law, the Knesset must approve the agreement by a majority of its members and then the final approval will be subject to a national referendum, unless approved first by 80 or more members of the Knesset. However, it is important to note that the law itself is not a Basic Law – i.e. it is not superior to other laws enacted by the Knesset – and, in addition, it may be changed (or even cancelled) by regular-majority Knesset decision.

³⁵ See, i.e., Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967, Richard Falk, U.N. Doc. A/HCR/16/72 (10 January 2011) pp. 7-8. A petition challenging the law was filed to the Israeli High Court of Justice on 13 December 2010 (HCJ 9149/10 *Dr. Mohammad S. Watad v. Israeli Knesset et al.*). As of the writing of this paper, this petition is still pending.

³⁶ See, in this regard: B’Tselem, *A Policy of Discrimination*, *supra* note 15.

³⁷ See, in this regard: Bimkom and Ir Shalem, *The Planning Deadlock*, *supra* note 16.

³⁸ See, in this regard: B’Tselem, *A Wall in Jerusalem: Obstacles to Human Rights in the Holy City*, 2006.

³⁹ See, in this regard: NRC, *The Absentee Property Law and Its Implementation in East Jerusalem: A Legal Guide and Analysis*, May 2013; The Civic Coalition for Defending Palestinians' Rights in Jerusalem, *Dispossession and Eviction in Jerusalem: The cases and stories of Sheikh Jarrah*, December 2009.

4. The Status of East Jerusalem According to International Law

According to Israeli domestic law, therefore, not only does Israeli law apply to the territory of East Jerusalem, Israel also considers East Jerusalem an integral part of its territory. However, the territory of a state or its sovereign borders is a matter to be decided by international law, and not according to the domestic law of a state.⁴⁰ It is, therefore, essential to examine the way that international law views the Israeli passing of legislation with regard to East Jerusalem.

4.1 *The Law of Occupation*

As mentioned above, following the 1967 War the West Bank, including East Jerusalem, came under Israel's occupation. Israel's actions regarding this territory should, therefore, be scrutinized first and foremost according to the principles of international humanitarian law that deals specifically with times of armed conflict and includes a specific set of rules for the situation of occupation.⁴¹

4.1.1 Occupation and Annexation

The situation of occupation is, by its nature, temporary. Thus, the framework of the laws of occupation seek to maintain the status quo until a legitimate sovereign, chosen through international agreement or other legitimate process, takes responsibility over the occupied territory. In 1907, the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its annexed regulations (together referred to as the "Hague Regulations") came into force. The Hague Regulations are now widely recognised as customary international law, and thus are binding on Israel, including with regard to the occupied Palestinian territories.⁴²

In 1949, in the wake of World War II, four conventions for the protection of war victims were adopted in Geneva. The most relevant to our discussion is the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War from 1949⁴³ (hereinafter: "the Fourth Geneva Convention"), which added a range of duties, incumbent on

⁴⁰ Amnon Rubenstein and Barak Medina, *The Constitutional Law of the State of Israel*, sixth edition, 2005, p. 924 [Hebrew]; Yoram Dinstein, "Zion in International Law Will be Redeemed", *Hapraklit* Vol. 27, 1971, 5, p. 7 [Hebrew].

⁴¹ The fact that Israel has the status of an occupying power in the West Bank, including East Jerusalem, is shared by most international law scholars and was approved by the International Court of Justice (*see* ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 43 IL M 1009 (2004), par. 78). *See also*: ICRC, Official Statement, Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 Dec 2001.

⁴² Legal norms are considered customary, and thus are binding on all states, when the overwhelming majority of states operate according to these norms for a lengthy period of time, out of belief that this practice is rendered obligatory by the existence of rule of law requiring it. In regard to the Hague Regulations, *see*: IMT, *The Trial against Goering, et al.*, Judgment of 1 October 1946, International Military Tribunal in Nuremberg, *The Trial of the Major War Criminals*, (1947), Vol. 1, pp. 64-65; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 41, par. 89.

⁴³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

the occupying power, toward the civilian population of the occupied territory – the protected persons – that found themselves under the control of the occupying power.⁴⁴

Some of the international humanitarian law principles and provisions relevant to the situation in East Jerusalem will be elaborated on below.

No transfer of sovereignty

The law of occupation rests on the very basic tenet, according to which the use of force cannot lead to or cause any transfer or change of sovereignty. According to Eyal Benvenisti, “the foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty”.⁴⁵

The notion that sovereignty cannot be acquired through military conquest arises from the general prohibition on the use of force,⁴⁶ and it applies even where the conquest of land by force is allegedly done in self-defence pursuant to Article 51 of the UN Charter. The basis for this assertion is the limitation to the right of self-defence, namely that the force used be proportionate to the threat of immediate danger. Based on this constraint, when the threat has diminished, the state purporting to defend itself no longer sustains the right to self-defence. Therefore, the right to have recourse to self-defence does not include the right to permanently seize the territory of the other party.⁴⁷

Restrictions to changes to local laws and introducing new legislation

Article 43 of the Hague Regulations, which established the basic tenets of the role of the occupying power in administering an occupied territory, including the temporary nature of occupation, stipulates that “[t]he Authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”.

⁴⁴ The leading opinion of international law commentators is that at the time of 1949, the Fourth Geneva Convention represented the mixture of both conventional and customary law. However, since the 1990s, the overwhelming majority of modern legal scholars have taken the view that the bulk of the provisions of the Fourth Geneva Convention have now solidified into customary international law (*see* Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Leiden, Boston (2009), pp. 59-64). The official Israeli government position is that it does not reflect customary international law but the Israeli government has declared that it was willing to respect the Convention’s “humanitarian provisions” (*see, e.g.* HCJ 698/80 *Kawasme v. Minister of Defence*, (1980) 35(1) PD 617, pp. 627-628; HCJ 3278/02 *Hamoked - The Center for the Defence of the Individual v. IDF Commander*, (2002) 57(1) PD 385, p. 396; HCJ 7862/04 *Abu Dahar v. IDF Commander*, (2005) 59(5) PD 368, p. 376). Although Israel is a party to the Convention, the official Israeli government position is that it does not apply to the occupied Palestinian territories (for elaboration on the Israeli position and its rejection by the international community *see, e.g.*, Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli “Illegal Occupation: Framing the Occupied Palestinian Territory”, *Berkeley Journal Of International Law*, Vol. 23(3), 2005, 551, pp. 567-570).

⁴⁵ Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press (1993), pp. 5-6.

⁴⁶ The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945 (UN Charter), Article 2(4).

⁴⁷ Ben-Naftali, Gross and Michaeli, “Illegal Occupation”, *supra* note 44, pp. 570-572; Robert Y. Jennings, *The Acquisition of Territory in International Law* (1963), pp. 54-55.

Thus, Article 43 does not confer sovereign powers on the occupying power, but rather limits its authority to maintain public order and civil life, “while respecting, unless absolutely prevented, the laws in force in the country”.⁴⁸ The occupying power may not extend its own legislation over the occupied territory nor act as a sovereign legislator. It must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation. Article 43 is an exceptional clause of limitation, the goal of which is not to create privileges for the occupying power, but rather to impose restraints on it.⁴⁹ The occupying power must act in the best interests of the local population except where prevented from doing so by military necessity.⁵⁰

Article 64 of the Fourth Geneva Convention, which aims to clarify the rule set out in Article 43 of the Hague Regulations, adds that introducing new legislation (or changes to the current legislation) by the occupying power may be made when it is ‘essential’ to the realisation of three objectives: (i) to implement international humanitarian law; (ii) to maintain the orderly government of the territory and (iii) to ensure the security of the occupying power and the local administration.⁵¹

Another important provision, in particular regarding cases of annexation, is Article 47 of the Fourth Geneva Convention. Article 47 stipulates that “protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory”. One of the changes specified by the Article is “any annexation... of the whole or part of the occupied territory” by the occupying power. It should be noted that the reference to annexation in Article 47 cannot be considered as implying recognition that acquiring sovereignty through annexation is legal. According to Jean S. Pictet, “occupation as a result of a war... cannot imply any right whatsoever to dispose of territory... A decision on that point can only be reached in the peace treaty”.⁵²

4.1.2 Other Relevant Principles

The law of occupation is imperative for the discussion not only in regard to the illegality of annexation. In light of the above, and as Article 47 stipulates that the annexation must not lead to protected persons being deprived of the rights and safeguards provided for them by the law of occupation, an international humanitarian law perspective is also important in order to examine the Israeli legislation and practices in East Jerusalem. Some of the main

⁴⁸ Ben-Naftali, Gross and Michaeli, “Illegal Occupation”, *supra* note 44, p. 571.

⁴⁹ Marco Sassoli, “Article 43 of the Hague Regulations and Peace operations in the twenty-first Century”, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27, 2004, pp. 5-6. Available at: <http://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf> (Site was last accessed on 9 October 2013).

⁵⁰ David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, Albany, 2002, p. 63.

⁵¹ Despite the heading of Article 64, which refers to ‘penal legislation’, this applies to the entire domestic legal system. See: Jean S. Pictet, *Commentary – The Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, 1958, p. 337; Marco Sassoli, “Legislation and Maintenance of Public Order and Civil life by Occupying Powers”, *The European Journal of International Law*, Vol. 16(4), (2005), 661, pp. 669-670.

⁵² Pictet, *Commentary – The Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *Ibid.*, pp. 275-276.

principles enshrined by the law of occupation will be elaborated on below, followed by an examination of some of the Israeli practices in East Jerusalem in light of these principles.

Prohibition on forcible transfer

Article 49 (1) of the Fourth Geneva Convention stipulates that “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive”.

Forcible transfer entails consequences including the abandonment of one’s home and possessions and potentially losing one’s rights in the property. Whereas deportation requires the displacement of persons across a national border, forcible transfer may take place within national boundaries or the occupied territory.⁵³ The seriousness of this act is emphasized by the inclusion and categorization of forcible transfer as a grave breach of the Fourth Geneva Convention.⁵⁴ The Rome Statute of the International Criminal Court qualifies forcible transfer as a war crime, and additionally, as a crime against humanity when carried out as part of a widespread and systematic attack against a civilian population.⁵⁵

The forcible nature of deportation or eviction is not limited to physical force, but may encompass threat of force or coercion. The act of deportation or forcible transfer is prohibited, irrespective of the motive and the purpose of such displacement. Even the fact that an eviction or deportation order is issued pursuant to judicial proceedings is irrelevant to this rule.⁵⁶

Prohibition on transfer of occupying power’s population into occupied territory

Article 49 (6) of the Fourth Geneva Convention stipulates that the transfer of civilians from the occupying power into the territory it occupies is strictly forbidden. It also constitutes a grave breach of the Convention (Article 147 of the Convention).⁵⁷ This prohibition has been codified in the Rome Statute of the International Criminal Court as a war crime, which explicitly states that the transfer is prohibited whether conducted “directly or indirectly” by the occupying power.⁵⁸

⁵³ See: *Prosecutor v. Radislav Krstic* (Trial Judgment), International Criminal Tribunal for the former Yugoslavia (ICTY), 2 August 2001, par. 521; Dinstein, *The International Law of Belligerent Occupation*, *supra* note 31, pp. 161-162.

⁵⁴ Fourth Geneva Convention, Article 147 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 85(4)(a).

⁵⁵ In regard to war crimes, see Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (Rome Statute), Article 8(2)(a)(vii) and Article 8(2)(b)(viii). In regard to crime against humanity see Rome Statute, Article 7(1)(d).

⁵⁶ Arai-Takahashi, *The Law of Occupation*, *supra* note 44, pp. 329-331. With regard to the comprehensive prohibition on deportation or forcible transfer it should be noted that assigned residence of protected persons within the occupied territory – a measure which is taken for imperative reasons of security – is permitted by International Humanitarian Law (see Fourth Geneva Convention, Article 78(1)).

⁵⁷ This prohibition is not specified as a grave breach in the Convention itself; Article 85(4)(a) of Protocol I appends it to the list of the grave breaches.

⁵⁸ Rome Statute, Article 8(2)(b)(viii).

Article 49(6) was intended to prevent a practice adopted by certain countries during the Second World War, who transferred parts of their own population to occupied territory in order, among other reasons, to colonise those territories.⁵⁹ It is, therefore, clear how this prohibition complies with the principles of occupation law mentioned above. Transferring nationals of the occupying power to the occupied territory contradicts totally the supposed temporary nature of the occupation and the aspiration of occupation law to maintain the status quo – including a demographic one – in the occupied territory. In addition, presence of nationals of the occupying power in the occupied territory may bring about confrontations, possibly violent, with the local population. Consequently, the occupying power might breach his obligation to maintain public order and civil life.



The settlement of “Har Homa” (Jabal Abu Ghneim) in East Jerusalem. Photo: JC Tordai, 2010.

Property Rights under Occupation Law

International humanitarian law has long recognized that property rights should be protected from most types of state intervention. However, the protections granted to immovable property in areas under occupation vary, and are based on the type of use by the occupying power.

The foundation of this notion is found in Article 46 of the Hague Regulations which lays down the general obligation of respecting private property in occupied territory. The article mandates that private property must be respected and “cannot be confiscated”.⁶⁰ Thus, Article 46 forbids confiscation, namely, the permanent taking of private property with the transfer of title to it. However, private property is not wholly exempt from interference by the occupying power. One example is seizure of private property – a temporary possession by the occupying power of privately owned property for military use only. It is commonly accepted that seizure of immovable private property in occupied territory is permitted under the law of occupation.⁶¹

In regard to public property, Article 55 of the Hague Regulations states that: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance

⁵⁹ Pictet, *Commentary – The Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 51, pp. 275-276.

⁶⁰ Hague Regulations, Article 46.

⁶¹ See Dinstein, *The International Law of Belligerent Occupation*, *supra* note 31, pp. 226-227. The Israeli High Court of Justice has ruled that Articles 23(g) and 52 of the Hague Regulations do not prevent temporary seizure of land for military needs and upon payment of compensation for the use of the property (*see, e.g.* HCJ 401/88 *Abu Rian v. Commander of the Military Forces in Judea and Samaria*, (1988) 42(2) PD 767, p. 770).

with the rules of usufruct”.⁶² Thus, according to Article 55, the occupying power is entitled to administer the property and reap its fruits; however, it is obliged to preserve the property and ensure its continued existence. The occupying power must ensure that the capital of public property remains unharmed. Under the usufructuary rule, the title and ownership of immovable public property do not pass on to the occupying power, which only acquires possession. The absence of title also means that the occupying power is forbidden to sell it.⁶³

Another example of permitted interference by the occupying power is the expropriation of private land, namely, the transformation of private property into public property for public use, subject to adequate compensation granted by the government or the occupying power.⁶⁴ Article 43 of the Hague Regulations, which obligates the occupying power to preserve and maintain public order and safety, has been interpreted by many experts to permit the expropriation of private property when it is carried out using fair procedures and in accordance with the local laws in force in the occupied territory prior to its occupation.⁶⁵ In addition, in order for expropriation to be legal, it should also be designed to benefit the local population within the framework of Article 43.⁶⁶

The Fourth Geneva Convention added some supplemental provisions in regard to property rights. One of them is Article 53, which provides that “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations”.⁶⁷ In addition, Article 147 provides that the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” constitutes a grave breach of the Convention.

In summary thus far: Based on the principle of inalienability of sovereignty through the use of force, the law of occupation reflects the supposedly temporary nature of occupation and prohibits the occupying power from acquiring sovereignty through annexation or introducing new laws unnecessary for the preservation of public life and order of protected persons. In addition, the law of occupation contains a set of specific rules compelling the occupying power to refrain from committing forcible transfer, making demographic changes in the occupied territory and harming property rights of protected persons, except in very specific circumstances.

4.2 *The principle of self-determination*

The assertion that sovereignty cannot be acquired through military conquest is also supported by the tenet of self-determination.

The principle of self-determination – *i.e.* the right of all peoples to freely decide their own political status and to freely pursue their own cultural, economic, and social development – is

⁶² Hague Regulations, Article 55.

⁶³ Arai-Takahashi, *The Law of Occupation*, *supra* note 44, p. 198.

⁶⁴ Dinstein, *The International Law of Belligerent Occupation*, *supra* note 31, p. 225.

⁶⁵ Arai-Takahashi, *The Law of Occupation*, *supra* note 44, pp. 236-238.

⁶⁶ *See, e.g.*, H CJ 393/82 *Jamait Askhan v. IDF Commander in Judea and Samaria*, (1983) 37(4) PD 785, p. 809.

⁶⁷ In regard to destruction of property, which is not “imperatively demanded by the necessities of war”, *see* also the Hague Regulations, Article 23(g).

perceived today as one of the fundamental principles of international law and it is widely recognised as having attained the status of *jus cogens*.⁶⁸ The tenet of self-determination is also enshrined in Articles 1(2), 55 and 56 of the UN charter, the common Article 1(1) of the 1966 international covenants of human rights⁶⁹ and in a number of General Assembly resolutions.⁷⁰

The growing weight of the right to self-determination has led to international support for the lawful struggle for self-determination of people subject to foreign domination – including occupation.⁷¹ The 1977 Additional Protocol I to the Fourth Geneva Convention, which added additional duties on the occupying power toward the civilian population of the occupied territory, declares that the Protocol applies to situations where people under a foreign occupation exercise their right to self-determination. Article 1(4) stipulates that “[t]he situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”.⁷² Article 1(4) was designed to cover partial or total occupation of a territory which has not yet been fully formed as a state⁷³ or lacking clear international status.⁷⁴

A core principle underlying the right to self-determination is that sovereignty lies in the people of the territory and not in its governing force.⁷⁵ Therefore, in cases of occupation, no valid title can be transferred to the occupying power in disregard of the will of the population residing in the territory.⁷⁶

⁶⁸ Arai-Takahashi, *The Law of Occupation*, *supra* note 44, pp. 65-66. The doctrine of *jus cogens* asserts the existence of fundamental legal norms from which no derogation is permitted.

⁶⁹ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976; International Covenant on Economic, Social, and Cultural Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976. Regarding the application of international human rights law to the occupied Palestinian territory *see* ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 41, pars. 102-113.

⁷⁰ *See, e.g.*, Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (14 December 1960); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

⁷¹ Ben-Naftali, Gross and Michaeli, “Illegal Occupation”, *supra* note 44, pp. 565-566.

⁷² Protocol I, Article 1(4). It should be mentioned that, contrary to the Fourth Geneva Convention, Israel is not a party to the First Additional Protocol.

⁷³ Claude Pilloud, Yves Sandoz, Christophe Swinarski, Bruno Zimmermann et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, 1987, Geneva, p. 54.

⁷⁴ Ben-Naftali, Gross and Michaeli, “Illegal Occupation”, *supra* note 44, p. 566.

⁷⁵ Ardi Imseis, “On the Fourth Geneva Convention and the Occupied Palestinian Territory”, *Harvard International Law Journal*, Vol. 44(1) (2003) 65, p. 97.

⁷⁶ Ben-Naftali, Gross and Michaeli, “Illegal Occupation”, *supra* note 44, p. 574, and other sources mentioned there.

4.3 Relevancy to East Jerusalem

It stems from the above analysis that the Israeli annexation of East Jerusalem is completely contrary to the most fundamental principles of international law. Thus, whether or not the Israeli occupation of the West Bank, as argued by Israel, was initially an act of self defence, the occupation should not lead to any transfer or change in sovereignty.⁷⁷ As elaborated above, since 1967 Israel has taken several legislative steps which consolidated East Jerusalem to the rest of Israel and annexed this territory. In addition, contrary to international law, Israel has continuously settled much of its Israeli Jewish population in East Jerusalem and thus completely changed the demographic status quo in the territory.⁷⁸

In order to facilitate its actions in the occupied territory, Israel has used a variety of legal tools. Applying Israeli domestic law to East Jerusalem has enabled Israel to enforce its land laws on the annexed territories, including those passed after the 1967 War. This legislation includes, *inter alia*:

1. Land expropriation: Israeli domestic legislation that facilitates the transfer of privately-owned land to the state for the use of the public as a whole⁷⁹ has been used to facilitate the expropriation of large areas of Palestinian lands in East Jerusalem and build settlements on them, which are essentially for the use of the Israeli Jewish population.⁸⁰
2. Absentee property legislation: Israeli domestic legislation to transfer Palestinian property considered to be ‘absentee’ to the State of Israel, which was enacted in the early days of the State,⁸¹ has been used to confiscate lands in East Jerusalem belonging to Palestinians residing outside of Jerusalem, in the areas of the West Bank that were not annexed to Israel or in other Arab countries. Much of this land has then been handed over to Jewish settler groups.⁸²
3. Property owned by Jews prior to 1948: In 1970, the Knesset passed the Law and Administration Procedures Law (the 1970 Law), which pertains, *inter alia*, to property in East Jerusalem that was owned by Israelis (in practice, only Jewish Israelis) prior to the 1948 War and transferred to the Jordanian Custodian of Enemy Property between 1948 and 1967.⁸³ During the Jordanian rule over the West Bank (including East Jerusalem) Palestinians – some of them refugees – settled in these empty houses in East Jerusalem. Following the 1967 War, control over these properties was transferred to the Israeli Custodian General. The 1970 Law requires the Custodian General to release these properties to their pre-1948 owners or the

⁷⁷ On the different narratives on this regard, *see, e.g.*, Yehuda Z. Blum, “East Jerusalem is not ‘Occupied Territory’”, *Hapraklit*, Vol. 28(2), October 1971, 183; Henry Cattan, “the Status of Jerusalem Under International Law and United Nations Resolutions”, *Journal of Palestine Studies*, Vol. 10(3), (Spring, 1981), 3, p. 12.

⁷⁸ *See e.g.*, B’Tselem, *A Policy of Discrimination*, *supra* note 15; UNOCHA, *East Jerusalem: Key Humanitarian Concerns*, March 2011, pp. 49-64.

⁷⁹ Land Ordinance (Acquisition for Public Purposes) of 1943, Official Gazette, 1305, from 10 December 1943.

⁸⁰ B’Tselem, *A Policy of Discrimination*, *supra* note 15.

⁸¹ The Absentee Property Law, 5710-1950, Laws of the State of Israel No. 37, 20 March 1950, p. 85.

⁸² In this regard, *see*, NRC, *The Absentee Property Law and Its Implementation in East Jerusalem*, *supra* note 39.

⁸³ The Law and Administration Procedures Law [Consolidated Version], 5730-1970, Laws of the State of Israel No. 603, 13 August 1970, p. 138.

owners' heirs. In contrast, Palestinian residents of East Jerusalem who, prior to 1948, owned property in West Jerusalem or elsewhere in what is now considered Israel, west of the Green Line, cannot reclaim their property because it has been transferred to the Custodian of Absentee Property. Thus, Jewish Israelis who owned property prior to 1948 in East Jerusalem (or have inherited such property) are able to claim this property and, if successful, return to their houses; Palestinians, on the other hand, do not enjoy the same benefit.⁸⁴

Using the 1970 Law has enabled Israeli settlers to take over properties that were owned by Jews before 1948 thus facilitating the expansion of settlements within existing Palestinian communities in East Jerusalem. In several cases, Palestinians residing in these properties were forcibly transferred by the Israeli authorities while settlers occupied the houses.⁸⁵

4. Planning and building: Over the years, Israeli authorities have adopted planning policies that have severely constrained the development of Palestinian areas in East Jerusalem leading to a severe housing shortage.⁸⁶ This, in addition to the procedures that have been put into force by the Jerusalem Municipality, makes it almost impossible for Palestinian residents of East Jerusalem to obtain a building permit.⁸⁷ Consequently, very few new licensing files have been opened for East Jerusalem and very few building permits are issued for Palestinian residents in the area.⁸⁸ Despite all this, Israeli authorities have enforced harsh administrative and punitive sanctions, as specified in the Israeli Planning and Building Law,⁸⁹ including house demolitions, heavy fines and, in many cases, criminal proceedings against Palestinians who have built 'illegally'.⁹⁰

By continuing with the actions described above, Israel has breached its obligations not to alter the original legislation in the occupied territory unless the changes are necessary for the preservation of public life and order and for the benefit of protected persons. In addition, the legislation introduced by the Israeli authorities raises great concerns in relation to its compatibility with international law standards. As this legislation arguably facilitates, *inter alia*, transfer of Israeli population to the annexed territory, forcible transfer of protected persons, confiscation and demolition of property in contradiction with the law of occupation, it would be fair to say that it was not merely the annexation itself that was problematic in terms of basic international law norms. Examining the Israeli legislation and its related practices demonstrates a *modus operandi* of systematic disrespect for other provisions of international humanitarian law, pertaining specifically to obligations toward protected

⁸⁴ For further discussion of the 1970 Law and its legality, from international law perspective, see NRC, *The Absentee Property Law and Its Implementation in East Jerusalem*, *supra* note 39, pp. 39-46.

⁸⁵ Yitzhak Reiter and Lior Lehrs, "The Sheikh Jarrah Affair: The Strategic Implications of Jewish Settlement in an Arab Neighborhood in East Jerusalem", *The Jerusalem Institute for Israel Studies*, 2010; The Civic Coalition for Defending Palestinians' Rights in Jerusalem, *Dispossession & eviction in Jerusalem: The cases and stories of Sheikh Jarrah*, December 2009.

⁸⁶ Bimkom and Ir Shalem, *The Planning Deadlock*, *supra* note 16, pp. 9-51.

⁸⁷ *Ibid.*, pp. 9-66; OCHA, *The Planning Crisis in East Jerusalem: Understanding the Phenomenon of "Illegal" Construction*, April 2009, pp. 7-14.

⁸⁸ See Bimkom's data on building permits in East Jerusalem, available at: <http://www.bimkom.org> (Site was last accessed on 9 October 2013) [Hebrew].

⁸⁹ Planning and Building Law, 5725-1965, Laws of the State of Israel No. 467, 12 August 1965, p. 307.

⁹⁰ In this regard, see Bimkom and Ir Shalem, *The Planning Deadlock*, *supra* note 16.

persons. These provisions should have been respected regardless of the question of the illegality of the annexation.



House of Palestinian family in Sheikh Jarrah, East Jerusalem, that was transferred to the hands of settlers using the 1970 Law. Photo: JC Tordai, 2010.

4.4 The Stance of the International Community

Consistent with the analysis above, it is not surprising that both the Security Council and the General Assembly have strongly condemned throughout the years Israel's unilateral annexation of East Jerusalem and the legal validity of the normative steps that Israel has adopted to apply its sovereignty over East Jerusalem. In a long series of pointed decisions, these international institutions have repeatedly stressed that the practical and normative steps adopted by Israel in its annexation of East Jerusalem are in contravention to the rules of international law. In Resolution 252 (1968) the Security Council declared that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which tend to change the legal status of Jerusalem are invalid and cannot change that status".⁹¹ In Resolution 478 (1980), the Council criticised "in the strongest terms" the enactment of the Basic Law: Jerusalem, Capital of Israel, and determined that any measures seeking to alter the status of Jerusalem are "null and void".⁹²

This position of the UN bodies is one shared by all the world's states, with the exception of Israel. None of the states that conduct diplomatic relations with Israel on the ambassadorial level recognise the annexation, which is evidenced by them housing their embassies in Tel

⁹¹ S.C. Res. 252, *supra* note 25.

⁹² S.C. Res. 478, *supra* note 25. For more resolutions by UN bodies with regards to steps adopted by Israel in its annexation of East Jerusalem *see, inter alia*, S.C.Res.267, U.N. SCOR, 24th Sess., U.N. Doc. S/INF/24/Rev. 1 (1969); S.C. Res. 298, U.N. SCOR, 34th Sess., U.N. Doc. S/10338/Rev.I (1971); G.A. Res. 35/169E, U.N. GAOR, 35th Sess., U.N. Doc. A/35/L.42/Rev.1 (1980); G.A. Res. 41/162C, U.N. GAOR, 41st Sess., U.N. Doc. A/41/L.45, addendum pt. 1 (1986); G.A. Res. 49/36B, U.N. GAOR, 49th Sess., U.N. Doc. A/49/49 (1995); G.A. Res. ES-10, U.N. GAOR, 10th Emer. Sess., U.N. Doc. A/ES-10/L.5/Rev.I (1999).

Aviv instead of Jerusalem.⁹³ In addition, western countries considered friendly to Israel – such as the United States, the United Kingdom, France, Germany, Belgium, Italy, the Netherlands, Canada and Japan – have all expressed their refusal to acknowledge the legality of Israel’s annexation of East Jerusalem.⁹⁴

Thus, the UN as a whole, as well as its individual member states, has expressly withheld recognition of the Israeli annexation of East Jerusalem.

The stance, according to which the unilateral annexation of East Jerusalem by Israel is not valid under international law, was affirmed by the International Court of Justice (ICJ) in its 2004 *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁹⁵ It is important to note that the ICJ did not inquire specifically into the question of the legal status of East Jerusalem but rather addressed the question of the legality of the construction of the Wall and its consequences. However, in order to address these questions, the ICJ had to determine the legal status of the West Bank, including East Jerusalem.

In paragraph 75 of its opinion, the ICJ mentioned some of the measures that Israel has taken in order to change the status of East Jerusalem and cited Security Council resolutions condemning these measures. The ICJ mentioned, in particular, Resolution 478 (1980), stating that the enactment of the Basic Law: Jerusalem, Capital of Israel constituted a violation of international law. The ICJ then held: “The territories situated between the Green Line...and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power”.⁹⁶

It should be noted that although ICJ advisory opinions are not binding on the requesting organ or the involved states, they are considered as authoritative statements of the law, and past experience shows that they have considerable impact on the evolution of international law.⁹⁷ Bearing in mind the prestigious status of the ICJ, the proposition that the measures taken by Israel have not altered Israel's status as an occupying power in East Jerusalem has obtained a substantial affirmation in the aforementioned advisory opinion.⁹⁸

4.5 *The conflict between Israeli and International Law*

It stems from the arguments above that the Israeli annexation of East Jerusalem is incompatible with the provisions of international law. This conflict was addressed by the

⁹³ In 2006, the embassies of Costa Rica and El Salvador, the last embassies to be housed in Jerusalem, were moved to Tel Aviv.

⁹⁴ Cassese, “Legal Considerations on the International Status of Jerusalem”, *supra* note 1, pp. 29-30.

⁹⁵ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 41.

⁹⁶ *Ibid.*, par. 78.

⁹⁷ Moshe Hirsch, “The Legal Status of Jerusalem Following the ICJ Advisory Opinion on the Separation Barrier”, *Israel Law Review*, Vol. 38, 298, 2005, p. 306; Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge, 2003), pp. 1003-1004.

⁹⁸ Dinstein, *The International Law of Belligerent Occupation*, *supra* note 31, p. 19.

Israeli High Court of Justice in the *Rabah* case. The petitioners in this case claimed that the Israeli Court of Local Affairs in Jerusalem did not have jurisdiction over issues of alleged illegal building of Palestinian permanent residents in Jerusalem since the application of Israeli legislation to East Jerusalem was illegal. The High Court of Justice rejected the petition, stipulating that even if the Knesset enactment on the subject was incompatible with international law – and the High Court of Justice refrained from asserting this – the court (in that case – the Jerusalem Court of Local Affairs) must abide by domestic legislation.⁹⁹

As explained above, the Israeli annexation of East Jerusalem and the application of Israeli law to the annexed territory are illegal. This assertion is well anchored in international humanitarian law, as well as the fundamental notion that sovereignty lies with the people of territory and not in its governing force. It is also a logical conclusion derived from the general prohibition on the use of force. In light of this, the international community's response to the Israeli annexation, in its staunch refusal to recognise the annexation, was an obvious and inevitable outcome.

However, Israeli violations of international humanitarian law have not stopped with the act of the annexation. Over the years Israel has adopted a policy aiming to strengthen its grasp of East Jerusalem by facilitating Israeli settlements in the annexed territory, limiting Palestinian expansion and even implementing displacement-causing practices. Thus, Israel has used several tools, made possible by illegally-applied Israeli law, to expropriate Palestinian land for the purpose of building settlements, to takeover of Palestinian private property and to severely limit Palestinian planning and building. As mentioned above, all of these practices are extremely problematic in terms of international humanitarian law.

However, displacement of Palestinians in East Jerusalem is not always derived by practices related to housing, land and property. Rather, it is sometimes a direct outcome of the unique and very problematic civil status granted by Israel to the Palestinians of East Jerusalem. This will be dealt with below.

⁹⁹ HCJ 256/01 *Rabah v. Jerusalem Court of Local Affairs* (2002) 56(2) PD 930, 934-935. On the position of the Israeli High Court of Justice regarding the superiority of the Israeli domestic law in cases of clear collision between the Israeli and international law see also, e.g. HCJ 2690/09 *Yesh Din v. Commander of the IDF in the West Bank* (published in "Nevo", 28 March 2010), par. 6.

5. The Civil Status of East Jerusalem's Palestinian Residents

5.1 Israeli Law

Immediately after the 1967 War, Israel conducted a census in the areas annexed into Jerusalem. Palestinians who were physically there at the time were registered in the Israeli population registry and were granted Israeli identity cards, but not Israeli citizenship. In 1988, in the case of *Mubarak Awad v. Prime Minister of Israel*, the Israeli High Court of Justice ruled that the status that was given in 1967 to these Palestinians was defined as 'permanent residency'.¹⁰⁰ Although the formal system of rights given by Israel to permanent residents is quite similar to that of citizens,¹⁰¹ there is still a significant difference between the two under Israeli domestic law. Thus, for example, a permanent resident may vote in local elections, but is not entitled to vote in the Knesset elections. Also, under the Passports Law of 1952, a permanent resident is entitled to a *laissez passer*, but not to an Israeli passport. A permanent resident who settles in another country loses permanent residency status in Israel. A citizen, on the other hand, retains citizenship.¹⁰²

In the *Awad* case it was held that the law that governs the status of Palestinian residents of East Jerusalem is the Entry into Israel Law of 1952.¹⁰³ This assertion is very problematic and likens Palestinian Jerusalemites to immigrants entering Israel. The application of identical rules with regard to the expiry of residency to immigrants, who voluntarily acquired their status, and to East Jerusalem residents, who did not move to another country but rather continued to reside where they were but had a new status was imposed on them, unlawfully ignores the special situation of East Jerusalem residents. It forces upon East Jerusalem residents a type of legal cage, from which it is mostly prohibited to leave, in order to ensure that their residency status will not be lost. As will be explained below, this policy also contradicts provisions of international law.

It should also be noted that permanent residents are permitted, if they desire and meet certain conditions, to receive Israeli citizenship. These conditions include swearing allegiance to the State of Israel, proving they are not citizens of any other country, and demonstrating some knowledge of the Hebrew language. Most of the Palestinian residents of East Jerusalem did

¹⁰⁰ HCJ 282/88 *Mubarak Awad v. Prime Minister of Israel*, (1988) 42(2) PD 424.

¹⁰¹ Resident permits that are given to Palestinian residents have formalised (at least by law) their eligibility to work in Israel, to receive medical insurance and socio-economic benefits. They have granted these residents identifying documents (The Population Registry Law, 5725-1965, Laws of the State of Israel No. 466, 1 August 1965, p. 270, Article 24) and social rights (National Insurance pensions are paid according to the National Insurance Law [amended version], 5755-1995, Laws of the State of Israel No. 1522, 15 May 1995, p. 210 to someone who is a resident of Israel. The State Health Insurance Law, 5754-1994, Laws of the State of Israel No. 1469, 26 June 1994, p. 146 applies to anyone who is regarded a resident of Israel in accordance with the National Insurance Law).

¹⁰² According to Article 11(C) and Article 11A of the Entry into Israel Regulations, 5734-1974, Israeli Collection of Regulations No. 3201, 18 July 1974, p. 1517 a permanent resident will be considered to have settled abroad if he or she 1) lived for more than seven years in a foreign country; 2) received the status of permanent resident in a foreign country; or 3) became a citizen of a foreign country. It is important to note that as far as Palestinian residency rights are concerned, Israel considers the West Bank and the Gaza Strip to be a "foreign country".

¹⁰³ Entry into Israel Law, 5712-1952, Laws of the State of Israel No. 111, 5 September 1952, p. 354. See the *Awad* case, *supra* note 100.

not request Israeli citizenship.¹⁰⁴ As protected persons under international humanitarian law (see below) the State of Israel cannot force citizenship upon them, and cannot compel them to naturalise and to swear loyalty to it.

The attitude that views Palestinian residents of East Jerusalem as aliens, as reflected in the application of the Entry into Israel Law to them, marks these residents as unwanted in their own city. From the mid-nineties, this attitude was formalised in a broad Israeli policy of revocation of residency, which became known as the “quiet deportation”.¹⁰⁵ The revocation of residency status was based on the “centre of life” policy, according to which status may be revoked if the Minister of Interior determines that the individual’s “centre of life” has moved “outside of Israel”. This policy was often implemented retroactively, irrespective of the present residency situation of the individual in question. Thus, a current “centre of life” in Jerusalem did not grant rights if for any period of time in the past the “centre of life” was considered (by Israel) to be elsewhere.¹⁰⁶

Despite a temporary relaxation in the implementation of this policy at the beginning of the 2000s, data received from the Ministry of the Interior for the years of 2006 and 2008 shows that this policy has never stopped. On the contrary, it returned in much larger scale. In 2008, the Israeli Ministry of Interior revoked the residency of 4,577 residents of East Jerusalem, including the residency of 99 children. The year 2006 saw a similar explosion in the number of revocations, with the number standing at 1,363 persons. Thus, half of the revocations from 1967 through 2008 occurred between 2006 and 2008 alone. The sharp rise in revocation of residency status was explained by the Israeli Ministry of Interior as an illustration of improvement in work procedures and proper monitoring by the Ministry. Rather than enhancing the level of service provided for the welfare of the residents, this “improvement in work procedures” appears designed to trap Palestinians, thus condemning them to the State’s policy of revocation of residency.¹⁰⁷

5.2 *An International Law Perspective*

As was previously discussed, under international law, East Jerusalem is an occupied territory. Consequently, Israel’s actions regarding this territory should be scrutinized first and foremost according to the principles of international humanitarian law that deals specifically with times of armed conflict, including a situation of occupation.

¹⁰⁴ Notwithstanding a relatively steady rise in the number of East Jerusalem Palestinians who were naturalized in the past decade, according to some sources, until 2012 only approximately 10,000 Palestinian residents of East Jerusalem requested and received Israeli citizenship. See: Nir Hasson, “3,374 East Jerusalem residents received full Israeli citizenship in past decade”, *Haaretz*, 21 October 2012; Moshe Amirav, *The Jerusalem Syndrome – Israel’s Unification Policy Delusions, 1967-2007*, Jerusalem, 2007. p. 260.

¹⁰⁵ B’Tselem and HaMoked: Center for the Defence of the Individual, *The Quiet Deportation: Revocation of Residency of Palestinians in East Jerusalem*, April 1997; B’Tselem and HaMoked: Center for the Defence of the Individual, *The Quiet Deportation Continues: Revocation of Residency and Denial of Social Rights of East Jerusalem Residents*, September 1998.

¹⁰⁶ B’Tselem and HaMoked, *The Quiet Deportation, Ibid.*, p. 22; Ardi Imseis, “Facts on the Ground: An Examination of Israeli Municipal Policy in East Jerusalem”, *American University International Law Review* Vol. 15(5), 2000, 1039, pp. 1061-1062.

¹⁰⁷ HaMoked: Center for the Defence of the Individual, *Written Submission for Consideration Regarding Israel’s Third Periodic Report to the UN Human Rights Committee*, July 2010, pp. 3, 7-8; Nir Hasson, “Israel stripped thousands of Jerusalem Arabs of residency in 2008”, *Haaretz*, 2 December 2009.

Article 47 of the Fourth Geneva Convention, which was mentioned above, relates to the situation of those citizens – now protected persons – who, as a result of conflict, find themselves under the rule of a foreign power. The Article stipulates that these protected persons “who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory”, including the annexation of the whole or part of the occupied territory. Since, from a pragmatic perspective, it is clear that any country annexing territory may claim the legality of the annexation, the drafters of the Convention ensured that even if such a claim is made, it shall not be sufficient to deprive the protected persons of their rights as defined by international humanitarian law.¹⁰⁸ Also, according to Regulation 43 of the Hague Regulations the occupying power is obliged to preserve public life and order, “while respecting, unless absolutely prevented, the laws in force in the country”.¹⁰⁹ Another significant provision with this regard is Article 49(1) of the Fourth Geneva Convention, which was mentioned above, that prohibits the occupying power from carrying out any type of forcible transfer of the protected persons.

The aforementioned provisions jointly illustrate the occupying power’s obligations to respect the laws in force in the occupying territory, whilst refraining from introducing any new legislation destined to deprive the protected persons of their rights as defined by international humanitarian law. The status of the protected persons cannot be governed by the nationality legislation of the occupier, in particular where applying this legislation to the protected persons results in their forcible transfer and displacement.

As explained above, the status of Palestinian residents of East Jerusalem, despite the title of “permanent residents”, does not grant the right to reside permanently in the city. The position adopted in the *Awad* case – that East Jerusalem residents are like other residents of Israel (as opposed to citizens), whose residency expires upon the relocation of the centre of one’s life – has led to a policy of massive revocations of East Jerusalem residence permits, as presented above. The ramification for revoking that status is a deprivation of a right of Palestinians to continue to live in their homes and the risk of being forcibly deported. It deprives them of freedom of movement within the occupied West Bank, which includes East Jerusalem. This policy is, therefore, contradictory to the provisions of Article 49. By applying its immigration legislation on the Palestinians of East Jerusalem, Israel has effectively deprived them of their status of protected persons.¹¹⁰ The extension of the domestic Israeli legislation – in this regard as in other legal areas – cannot comply with Israel's obligations to refrain from introducing any new legislation which is contrary to the best interests of the local population.¹¹¹

Following the 1967 War, Israel did not grant the Palestinian residents of East Jerusalem Israeli citizenship. However, they do have the opportunity to apply to become naturalised citizens of Israel. Though the majority of these Palestinians satisfy the conditions of naturalisation, as set out in the Israeli Citizenship Law,¹¹² most Palestinian Jerusalemites justifiably consider themselves as residents of occupied territory, whose status in Israel has been forced upon them. In addition, such actions are contrary to international law, including

¹⁰⁸ See Pictet, *Commentary – The Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 51, pp. 275-276.

¹⁰⁹ Article 43 of the Hague Regulations.

¹¹⁰ See Quigley, “Jerusalem: The Illegality of Israel's Encroachment”, *supra* note 24, p. 34.

¹¹¹ See, in this regard, *supra* text accompanying notes 48-51.

¹¹² See the Citizenship Law, 5712-1952, Laws of the State of Israel No. 95, 8 April 1952, p. 146, Article 5.

deprivation of the benefits of being protected persons and the right to self-determination. Consequently, the vast majority of them did not apply to become citizens of Israel.¹¹³

One of the requirements in the naturalisation procedure is swearing allegiance to the State of Israel. Thus, Israel has offered the Palestinian residents of East Jerusalem the opportunity to better their situation and ensure their right to live in the city, but conditioned it by applying for Israeli citizenship – a procedure that requires swearing allegiance to the State of Israel, which, under international law, is the occupying power of East Jerusalem. In this regard it is worth mentioning another international humanitarian law tenet, which is enshrined in Article 45 of the Hague Regulations. This article stipulates that “it is forbidden to compel residents of occupied territory to swear allegiance to the hostile power”. Conditioning fundamental rights – such as the right not to be transferred or deported from the occupied territory – on swearing loyalty to the occupying power, therefore contravenes the provisions of the Article.¹¹⁴

According to international law, East Jerusalem residents should be entitled, like any other person, to leave their home and to return to it, without thereby being at risk that their travels abroad or their departure to other areas of Palestine, and even their acquisition of status in another country, will lead to the deprivation of their rights to return to their homeland. The right of persons to leave and return to their country is secured in international human rights law.

Article 13(2) of the Universal Declaration of Human Rights (1948) states: “Everyone has the right to leave any country, including his own, and to return to his country”.¹¹⁵ Article 12(4) of the International Covenant on Civil and Political Rights (1966) (ICCPR), which was ratified by the State of Israel in 1991, continues and states the following: “No one shall be arbitrarily deprived of the right to enter his own country”.¹¹⁶ It should be noted, in this regard, that the United Nations Human Rights Committee, the body charged with monitoring the implementation of the ICCPR, held that the right to return to one’s country as per Article 12(4) of the Covenant is not available exclusively to those who are citizens of that country. It most certainly also applies, so the Committee held, to those who, because of their special ties to that country, cannot be considered a mere “alien”. As an example, the Committee points out that this right shall also be available to residents of territories whose rule has been transferred to a foreign country of which they are not citizens.¹¹⁷

The revocation of the residency status is problematic from another aspect. Many Palestinians who change their “centre of life” to places outside of Jerusalem, thus putting their residency status in danger, do so as a result of the Israeli policies, described in this document, that place before them extreme hurdles to remain in the city. Yet, and although some of these Palestinians reside out of the country for prolonged periods of time, their constant and

¹¹³ See *supra* note 104.

¹¹⁴ In this regard, see also: Quigley, “Jerusalem: The Illegality of Israel's Encroachment”, *supra* note 24, p. 34.

¹¹⁵ Article 13 (2) of the Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), *Adopted on Dec. 10, 1948*.

¹¹⁶ International Covenant on Civil and Political Rights, Article 12(4). This principle is enshrined in other human rights conventions. See: Article 10(2) of the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force 2 September 1990*; Article 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc A/6014 (1966), 660 U.N.T.S. 195, *entered into force 4 January 1969*.

¹¹⁷ The Human Rights Committee's General Comment 27, CCPR/C/21/Rev.1/Add.9 (1999), par. 20.

inherent connection to their hometown is undiminished. The Israeli practice of residency revocation ignores this aspect of life, which is a feature of modern life in the global village.¹¹⁸ This policy unwillingly binds them, physically and mentally, to a place from which it is prohibited to leave, in order to ensure that their residency status will not be lost.

5.3 *The Stance of the Israeli Courts*

The position of the Israeli High Court, with regard to the Palestinians living in the occupied Palestinian territories that were not annexed to Israel, is that they have the status of protected persons according to the international humanitarian law, and are therefore entitled to protections that international law grants protected persons.¹¹⁹

However, the approach towards the Palestinian residents of East Jerusalem was entirely different. As a result of the Knesset's legislation that applied the "law, jurisdiction and administration of the State" to East Jerusalem, the Israeli courts have always dealt with questions regarding the legal status of East Jerusalem residents (*i.e.*, in cases of revocation of their residency) through the eyes of Israeli law. The Israeli courts have never examined the question of whether or not East Jerusalem residents enjoy the protection given to them by international humanitarian law, nor the application to them of the principles of international human rights law.¹²⁰

In fact, when dismissing petitions that challenged decisions made by the Ministry of Interior to revoke the residency status of individual Palestinians the Supreme Court has based its assertions, above other things, on the fact that these Palestinians refrained from applying for Israeli citizenship. As a result, according to the courts, they were left with the status of "permanent residents", which may be revoked under certain circumstances.¹²¹ The revocation of residency status in such cases has been approved by the Supreme Court despite the international humanitarian law implication of such move – a deportation from an occupied territory. This has been done by the Court without scrutiny of the legality of the application of the Israeli law to East Jerusalem and without any discussion as to whether or not international law should be taken into consideration. The failure of the court to take into account customary international law principles in its decision making severely undermines the credibility of the court's approach on this fundamental issue.

¹¹⁸ In this regard, *see also* Application to Join as Amicus Curiae in the *Siag case*, *supra* note 120, pars. 133-139.

¹¹⁹ *See, e.g.*, H CJ 1661/05 *District Council of the Gaza Beach et al. v. Prime Minister - Ariel Sharon et al.*, (2005) 59(2) PD 481, 514-515; H CJ 606/78 *Ayoub v. Minister of Defense*, (1979) 33(2) PD 113, 119-120; H CJ 785/87 *Afu v. Commander of the IDF Forces*, (1988) 42(2) PD 4, 77-78.

¹²⁰ Several motions have been submitted to the Israeli courts in recent years challenging the policy of revocation of residency status of Palestinians in East Jerusalem, and based, among other things, on international humanitarian law and international human rights law. *See, e.g.*, Adm. Appeal 2392/08 *Siag v. Minister of the Interior*, Application to Join as Amicus Curiae, filed on 20 November 2008; H CJ 2797/11 *Qarae'en et al. v. Minister of the Interior*, filed on 7 April 2011. For different reasons, all these cases have not concluded in a verdict addressing the policy of residency revocation.

¹²¹ *See the Awad case*, *supra* note 100, p. 430; H CJ 7952/96 *Bustani v. Minister of Interior*, (published in "Nevo", 31 December 1996), par. 7; Adm. Appeal 5829/05 *Dari v. Ministry of Interior*, (published in "Nevo", 20 September 2007), par. 10.

6. Conclusions

In the wake of the 1967 War, Israel applied its “law, jurisdiction and administration” to a significant part of the West Bank, which is known as “East Jerusalem”. Israel has mostly refrained from describing these acts as “annexation” or declaring that this legislation constitutes an act of acquisition of sovereignty. Yet, with the passage of time, additional pieces of legislation, introduced by Israel, in addition to extensive Israeli measures on the ground, in particular the expansion of the settlements, have left little doubt about Israel’s intentions. The *de facto* annexation has grown stronger and deepened.

These steps have been broadly condemned by the international community – that considers East Jerusalem an occupied territory – and have been declared contradictory to international humanitarian law by many bodies, including the UN General Assembly, the Security Council and the International Court of Justice.

The annexation of East Jerusalem as an outcome of the 1967 War is not only illegal *per se*. It has also resulted in other measures taken by the Israeli authorities since 1967 which are very problematic in terms of international law. Whereas various practices adopted by Israel were designed to secure and maintain Israeli control over occupied East Jerusalem and impose Jewish demographic dominance by forcefully displacing Palestinians from their homes, it is primarily the policy of revocation of residency status that effectively prevents Palestinians, whose status has been revoked, to return to their homeland.

The revocation of residency policy is not only contrary to international humanitarian law and the basic tenet that everyone has the right to leave and return to his own country; it also conflicts with the reality of modern life and current patterns of human movement.

The net effect of the decision to annex East Jerusalem to Israel in violation of international law is to trap Palestinians in a legal cage; a cage that is in fact shrinking as settlements expand, Palestinian property is confiscated under different legislation, such as the Absentee Property Law, and restrictions on the right to build and develop for Palestinians become increasingly severe. Flight from the cage involves the permanent loss of home. The situation presents an intolerable dilemma for many Palestinians. The effective application of international law would, however, provide a key to the cage; a key to the realisation of the rights to property ownership, the right to security of tenure, the right to development and the right to leave and return to one’s own country.

