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The Fictions of the “Illegal” Occupation in the West Bank and Gaza

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“Everybody knows about Mississippi Goddam”

Nina Simone¹

“Ceci n’est pas une pipe”²

INTRODUCTION

Academic and policy discussions dealing with the State of Israel’s control of the West Bank and Gaza strip (WBGs), are permeated by judgments about legality. Whenever confronted with an institutional imperative to act in reaction to any political, economic, or security/military development in the WBGs, discussions among academics, policy makers or governmental and non-governmental institutional actors working on the ground are quickly framed as questions of whether this development is legal. As observed by Ben-Naftali, Gross, and Michaeli, “legality” in the context of these discussions overwhelmingly refers to the question of “Israel’s compliance or noncompliance with its obligations as an occupying power (. . .).”³ The vocabulary, style of arguments, and the reference criteria for these discussions about legality are found in international humanitarian law—specifically the law of occupation as well as international human rights law. The role-play that these discussions systematically re-enact is one in which participants howl at each other arguments of condemnation and justification.

Ben-Naftali et al. also correctly and meticulously argued that the routinization of this style of arguments and counter-arguments has operated to legitimize the occupation. Thus, the continuous exchange of arguments about Israel’s compliance and non-compliance with its obligations as an occupying power obfuscated the exceptional and prolonged character of Israel’s control over the WBGs and constrained the normative horizons of policy discussions and political

¹ NINA SIMONE, *Mississippi Goddam*, on NINA SIMONE IN CONCERT (Philips Records 1964).

² René Magritte, *La trahison des images* (The Treachery of Images) 60 x 81cm oil on canvas, Los Angeles County Museum of Art (Belgium 1929).

³ Oran Ben-Naftali et al., *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT’L L. 551, 551–52 (2005).

controversies.⁴ Indeed, the reiteration of arguments and counter-arguments about the legality of certain policies under the law of occupation is symptomatic of the indeterminacies and blurring of boundaries (occupation–non-occupation, annexation–non-annexation, temporary–indefinite, rule–exception) that characterize Israel’s relationship with WBGS. In all the debates about say the legality of the separation barrier, the building of settlements, land expropriations, or targeted assassinations Israel’s continuing control of the WBGS remains a given. Suppose that the legality of any measure by the Israel Defense Forces (IDF) in the WBGS was challenged before the Israeli High Court of Justice on the ground that it is inconsistent with the law of occupation. The outcome of such case may, for instance, alter the conditions for when land can be expropriated,⁵ or might even alter the path of the separation barrier.⁶ These alterations could very well introduce marginal changes in how the WBGS are governed and will most certainly produce winners and losers among Israelis and Palestinians. Even more, an in depth analysis of the sum of winnings and of losses may lead us to the conclusion that the change in the regime governing WBGS make the Palestinian civilian populations under occupation as a group better off in their relationship with the occupier compared to the situation *ex ante*. These changes however would not alter the background structure of the relationship between Israel and WBGS. The fact of occupation, and inequality between occupier and occupied hardwired into the law of occupation, would remain the invisible frame of reference and an institutional constraint limiting any improvement in the relative position of the occupied civilians vis-à-vis the occupying power.

It would appear then, that the discourse of condemnation vs. justification that underlays much of scholarly and policy discussions about Israel’s control of the WBGS has produced the paradoxical situation in which the more practices of the occupying power are audited for compliance with the legal regime of occupation, the more the systemic connections between these practices become invisible and immune to critical evaluations. I will not attempt to explain why the discourse of condemnation and justification became so predominant. Perhaps these compulsive reiterations of legal

⁴ *Id.* at 609–12.

⁵ PAL. Y. B. INT’L L. 134, 150 (1984) (translating H CJ 390/79 Dweikat v. Government of Israel [1979] (Isr.)).

⁶ H CJ 7957/04 Mara’abe v. Prime Minister of Israel [2005] (Isr.).

condemnations and justifications are the way international lawyers sublimate their political bias or conflicts in an issue that legal scholarly circles have always considered as politically contentious or sensitive. Or maybe, it is another manifestation of the historic trend since the end of the Second World War towards more convergence and cross-fertilization of international human rights law and international humanitarian law.⁷ Instead, I would like to explore the implications of two insights brought to the foreground by the preceding discussions.

First, there is the curious and normatively significant observation, that the conceptual and doctrinal tools available to international lawyers to engage the legal status of the WBGS have a blind spot that, in the long run, legitimized Israel's control of the WBGS. International lawyers have had difficulties in capturing and incorporating in their analysis the systemic aspects of the occupation, and were immersed in quarrels on the legality of certain actions taken within it.⁸ Second, a key project to overcome this legitimation effect would be one that contributes to articulating a legal perspective from which the systemic connections between the different practices of the occupying power are visible and the object of critical evaluations.

Ben-Naftali et al. engaged that project by centering their analysis around the question of the legality of the occupation per se.⁹ They meticulously reconstruct both international law and the law of occupation to articulate the foundational principles that can serve as the normative reference to distinguish between legal and illegal occupations. Their reconstruction analytically assumes that the question of the legality of the occupation per se is distinct and logically independent from the question of whether the occupier is complying with the norms constituting the regime of occupation.¹⁰

In this Article, I also propose to contribute to the project of articulating a legal perspective from which the systemic connections between the practices or policies of the occupying power in the WBGS are visible. My contribution builds on the argument of Ben-Naftali et al., but parts company along the way to take a different route. I subscribe to the parts of their analysis in which they

⁷ Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

⁸ Ben-Naftali et al., *supra* note 3, at 551–52.

⁹ *Id.* at 555.

¹⁰ *Id.* at 609; *see infra* note 20.

effectively demonstrate how the structure of the legal discourse on the WBGS has operated to legitimize the occupation. At the same time, I argue that centering analysis on the question of the legality of the occupation *per se* does not resolve or, perhaps more accurately, avoids the indeterminacies they have identified (occupation–non-occupation, annexation–non-annexation, temporary–indefinite). The question of the legality of the occupation *per se* merely carries these indeterminacies to a different level. This is particularly visible if one attempts to incorporate the Gaza disengagement in their framework.¹¹ Furthermore, from the perspective of the project of making the systemic character of Israel’s occupation of the WBGS visible, the focus on the question of legality of the occupation *per se* has the following two disadvantages.

First, reorienting the conversation to focus on legality of the occupation is not neutral. This reinforces a number of legal/institutional assumptions. For example, the question of whether Israel’s occupation of the WBGS is legal will have to assume that as occupied territories the WBGS are distinct territorial units. This assumption more concretely means that as “occupied territories” the WBGS have a special governance regime. Actions of the occupying power are determined by the situation inside the WBGS, and reflect a pragmatic balancing of considerations of military necessity and humanity. One significant negative aspect of such an assumption is that it shifts attention away from the role of the structural dynamics between Israel and the WBGS in determining how the governance of the WBGS has evolved over a long period. Second, the focus on the legality of the occupation *per se* is not politically neutral, to the extent that it implicitly incorporates a specific substantive position on the future of the Palestinians and the nature of the political solution to the conflict.¹²

¹¹ Ben-Naftali, *supra* note 3, at 551 (footnote 3 specifically excluded from the scope of their paper the disengagement from Gaza and its impact on the question of the legality of the occupation *per se* as opposed to the legality of certain actions of the Israel Defense Forces). On the legal debate about the legal consequences of Gaza disengagement *see* Claude Bruderlein, *Legal Aspects of Israel’s Disengagement Plan under International Humanitarian Law*, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (Nov. 2004), <http://www.dci-pal.org/english/Doc/GUA/DisEng/LegalDiseng.pdf>.

¹² I refer specifically to the two-states solution embodied in the Oslo Accords, and later confirmed with the Quartet’s “Performance-based Roadmap to a Permanent Two-States Solution to the Israeli-Palestinian Conflict” (“Road-map”). *See* Press Statement, U.S. Dep’t of State, *A Performance Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict* (Apr. 30, 2003) [hereinafter *Roadmap*], <http://2001-2009.state.gov/r/pa/prs/ps/2003/20062.htm>. There are left and right critiques of the two states

These difficulties confronting the project of articulating a legal perspective that makes visible the occupation itself, to use the expression in Ben-Neftali et al. are not unique to their approach. They are in fact the expression of a more general analytical bias they share with the mainstream legal perspectives on Israel's relationship with the WBGS. The mainstream perspective assumes that Israel's control of the WBGS is a concrete example of the more abstract and universal legal institution of occupation. International humanitarian law, and the law of occupation more specifically, provide, first and foremost in the mainstream perspective, an analytical grid of intelligibility for all the concrete practices of Israel as an occupying power. Legal analysis in the mainstream approach is a matter of comparing the concrete practices of the occupying power with the abstract norms of the law of occupation. In other words, in the context of mainstream legal perspectives on the WBGS and occupation, legal analysis can best be described as a project of indexing the differences between, on the one hand, the concrete practices of the occupying power; and, on the other, an idealized image of the occupation regime and the rights, powers, privileges, and duties of the occupier implied in it.

In contrast this paper turns the mainstream legal discourse on Israel's control of the WBGS on its head. The starting point of my research is a simple question: How are the WBGS actually governed? This question can be broken down into several, more basic questions. What are the different regulatory instruments or practices that are used to govern the WBGS? How are these different governmental practices conceptually linked together? Formulated differently, the question is how are these different practices of governance rationalized to work together in the best possible way? My analysis will attempt to provide the answer without deducing the elements of the regime that govern the WBGS from an abstract definition of occupation.¹³

This reorientation of the legal discourse on the WBGS will bring to the surface several aspects in the regime governing these territories

solution among Israelis and Palestinians. These reflect intense political debates among Israelis and the Palestinians on how to understand the conflict and the elements of a final settlement for the conflict. A map of the different positions among Palestinians and Israelis is outside the scope of this paper. It suffices to emphasize that the two-states solution may not express a consensus among Palestinians and among Israelis.

¹³ See generally Lecture Series: Michel Foucault, *Naissance de la Biopolitique: Cours au Collège de France (1979)* (following the line of analysis), available at <http://www.lib.berkeley.edu/MRC/foucault/nb.html>.

that are usually latent in the mainstream discourse. First, governing the WBGS involves a multiplicity of formal and informal regimes, spread vertically on many levels of governance. The interaction among these regimes and their effects on shaping space, the lives of their inhabitants, and the distribution of fortunes amongst them can hardly be described or explained through a hermeneutic of the rules of the international law of occupation. A rethinking of governance in the WBGS from a perspective outside the framework of the law of occupation might reveal that many governing practices in the WBGS are not unique to their situations as occupied territories and can better and more accurately be described as adaptations of Israeli internal policies formulated in the context of a state building project and the management of territory and populations consistent with it. Moreover, such a perspective would make it possible to observe how the law of occupation itself was instrumental in facilitating the control of territories by one group of people, as well as the dispossession and subordination of another.

Second, the perspective of the law of occupation ignores the role of third parties in governing the WBGS. The fact of occupation (or “the effective control of a power . . . over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory”)¹⁴ generates a set of legal relationships between the occupying power and the occupied populations. Governing practices within the framework of the law of occupation are the responsibility of the occupying power. The actions and governing practices of third parties, in particular donor countries or international relief and development assistance agencies, no matter how deeply involved, are marginal and in many instances invisible. A holistic view of governance in the WBGS, one that decenters the framework of the law of occupation, reveals a curious trend towards more involvement of donors in the actual governance of the WBGS and a working division of labor with Israeli authorities. From this perspective, there is a world of Hohfeldian privileges¹⁵ that shape the governing practices of donors and aid agencies and that reflect unacknowledged policy choices affecting the present situation in the WBGS and the normative horizons for political resolution of the conflict.

¹⁴ EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 4 (1993).

¹⁵ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

Third, and perhaps most importantly, considering the multiple governance regimes, actors and policies implemented cumulatively in the WBGS since 1967, the insistence of mainstream legal discourse on describing Israel's control of the WBGS as an occupation, as understood in international humanitarian law, is ideological. It is ideological in the simple sense that describing Israel's control of the WBGS as an occupation is a "representation of the imagined relationship of individuals to their real conditions of existence."¹⁶ The ideological character of this representation implies, first and foremost, that it is a constitutive element in the governing structure in the WBGS. In other words, describing Israel's relationship with WBGS as occupation is in itself an instrument of Israeli control over the Palestinian populations in the WBGS. It contributes to the reproduction of the relations of domination between Israel and the Palestinians.

I develop this argument in two stages. In Part II, I propose an account of governance in the WBGS particularly since the outbreak of the second *Intifada* (September 2000). I describe the transformation of Israel's control on the WBGS since 1967 towards a system of a de facto final settlement of the territorial dispute between Israel and the Palestinians, and of the pending issues including Jerusalem and the right of return. I argue that a key instance in this transformation is the Israeli Gaza disengagement plan, which henceforward would be the template for dealing with all areas where there is a demographic concentration of Palestinians.

In Part III, I critically reexamine the structural legal account of the system of control that has congealed in the WBGS since September 2000. I argue that the legal account of governance in the WBGS as belligerent occupation is inadequate for two reasons. First, descriptively the governance regime that congealed in the WBGS, does not fit the most widely accepted understanding of occupation in international humanitarian law. Second, assuming *arguendo* that Israel's relationship with the WBGS can be best described as occupation, such description would inevitably have to qualify essential aspects of governance in the WBGS (i.e., regime features that are constitutive and have persisted overtime) as merely aberrations. Finally, in the conclusion I outline the policy implications of my argument and the challenges confronting international lawyers'

¹⁶ LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY, AND OTHER ESSAYS* 162, 162 (Ben Brewster trans., 1971).

engagement with the Palestinian right to self-determination, particularly in light of the United Nations General Assembly’s Resolution on the status of Palestine in the United Nations.¹⁷

I THE BARE OCCUPATION

In this section I propose an analysis of the regime of Israeli control over the West Bank and the Gaza strip since the outbreak of the Second Intifada in September 2000. I demonstrate how, during this troubled decade, Israel has managed to alter its mode of control so as to hold on to the effective military control over the territories while abdicating any governing responsibility towards the civilian populations under its military control.

The separation between governance and control does not represent a fundamental change in Israel’s approach to the occupied Palestinian territories. But it does announce the onset of a new stage¹⁸ in the history of Israeli occupation that could be best described as *Gaza-fication*. The term refers to the generalization of an existing trend in Israel’s policy towards Gaza to encompass the parts of the West Bank that were categorized under Oslo as area A, containing the major Palestinian-populated areas. In this context, the Gaza Disengagement Plan in 2005 is not a policy unique to Gaza, but the template for a new mode of Israeli control of the Palestinians structured around the separation between military control and governance of people. This mode of control is new for at least two reasons. First, it is new because it represents a different mode of structuring the relationship between the Palestinians and the Israeli economy. The difference is most clearly manifest in the regulation, specifically the reduction to the absolute minimum of Palestinian labor flows to the Israeli economy. Second, it is new because contrary to previous regimes, disengagement is understood by the political and military establishment in Israel as final rather than a transitory arrangement awaiting the outcome of the peace process.

¹⁷ G.A. Res. 67/19, U.N. Doc. A/RES/67/19 (Nov. 29, 2012).

¹⁸ Oren Yiftachel, *Neither Two States Nor One: The Disengagement and “Creeping Apartheid” in Israel/Palestine*, 8 ARAB WORLD GEOGRAPHER 125, 125–26 (2005); Ghazi-Walid Falah, *The Geopolitics of ‘Enclavisation’ and the Demise of a Two-State Solution to the Israeli–Palestinian Conflict*, 26 THIRD WORLD Q. 1341, 1341–42 (2005).

A. A Governance Matrix

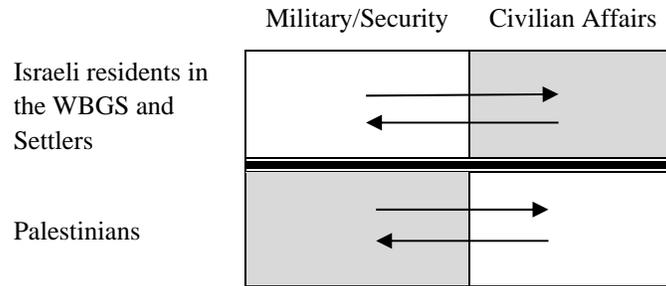
During the period between 1967 and 1994, the Israeli government put in place a governing regime organized around ethnic distinctions and functional differentiations. There was on the one hand a regime to govern *Palestinians*, their property, villages, urban centers and unregistered lands. And there was, on the other hand, a regime to govern *Israeli residents in the WBGS and in the settlements*. Furthermore, and cutting across the Palestinian/Israeli distinction, the Israeli occupation also differentiated between *military/security* and *civilian* affairs in its treatment of people, territory, and governmental functions.

The distinction between civilian governance and military control and security is not analytically grounded in a specific theoretical framework that describes the state, or the functions of modern governments. It was more a function of the specificities of how the Israeli occupation of the West Bank and the Gaza Strip has evolved since 1967. What counts as military control over the territory is not a matter of localized responsibility to establish public order. It does not include, for instance, the localized control that the Oslo Accords assigned to the Palestinian security apparatus in area A. In the WBGS, as it was governed by Israel since 1967, security and/or military control is a residual power enjoyed by the Israeli army by virtue of its qualitative superiority over any competing military/security force, as well as its ability to project military power anywhere in the WBGS. Similarly, governance over civilians is much less clear, but in the context of Israeli rule over the WBGS, it came to be associated with the power to administer the life of the Palestinians residents of the WBGS *as a group*, in the aggregate. This includes, for instance, the public law power to set and pursue macroeconomic goals, public health, education policy, or population policy. Such a delimitation of the different spaces for governance does not reflect a distinction between two logically independent categories, or between two causally independent spheres.

Despite considerable developments in the way the WBGS were governed, the formalization and maintenance of the ethnic distinction (Palestinian vs. Israeli residents in the WBGS and in the settlements) and functional differentiation (military/security vs. civilian) remained a constant in the various territorial rearrangements, military redeployments, institutional and legal restructuring and peace plans that followed the launching of the Oslo process. As noted by Palestinian lawyer Raja Shehadeh the Oslo regime “would not have

been possible had [these distinctions] not constituted an operative principle of the Israeli occupation long before the negotiations had begun.”¹⁹ Accordingly it is possible to heuristically conceptualize governance in the WBGS as a process of interaction between four different regimes that can be represented using the following schema:

Figure 1: Governance Matrix in the WBGS



Within this schema, ethnicity is destiny. The functional differentiation between civilian and military affairs, on the other hand, is one of opportunity. In other words, over the long years of occupation and during the Oslo years, the Israeli government has introduced legal and institutional changes, the effect of which was to change whether certain matters were treated as military/security or civilian affairs to serve immediate policy objectives. The Military Commander’s order no. 947 (November 8, 1981), carving out a bundle of governmental functions from the jurisdiction of the military commander to establish the civilian administration for Judea and Samaria,²⁰ is perhaps the clearest example of such rearrangements of opportunity. The Oslo Accords also give numerous examples of the malleability of the military/civilian distinction inside the governance matrix of WBGS.

On the Israeli WBGS residents’ side of the matrix, the clearest example of the malleability of the military civilian distinction could be found in settlement policies and the different mechanisms to seize land in the WBGS for the purpose of constructing settlement. During

¹⁹ RAJA SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES 79 (1997).

²⁰ See Jonathan Kuttab & Raja Shehadeh, *Civilian Administration in the Occupied West Bank, Analysis of Israeli Military Government Order No. 947*, AL-HAQ (Jan. 1982), <http://www.alhaq.org/publications/publications-index/item/civilian-administration-in-the-occupied-west-bank>.

the period 1968–1979, Israel seized almost 47,000 dunums²¹ of private land for the purposes of building settlements. The key justification for the seizure orders was that the settlements performed defense and military functions. This justification was consistent with the government discourse at the time about its policies in the newly occupied West Bank, particularly in the Allon plan.²² However, and as a result of the High Court’s decision in the *Elon Moreh* case rejecting the government’s use of security to justify land seizures in the West Bank,²³ the Israeli government resorted to a combination of administrative tools to continue its seizure policy, including declaration of land as state land²⁴ or as absentee property,²⁵ expropriation for public needs, and through zoning, urban development plans, tax incentives, and other forms of government grants and subsidies.²⁶ Finally, and following the Oslo Accords, the Israeli army issued a number of requisition orders to construct a network of bypass roads connecting the settlements with Israeli urban centers inside the green line.²⁷ The government argued, and the High Court upheld the argument, that these orders are justified by “absolute security needs.”²⁸ The military commander always issued land seizure orders. What made a seizure order a military/security affair had nothing to do with administrative pedigree.²⁹ In the period before *Elon Moreh* case, and later in the case of bypass roads, the military commander issued the seizure orders by virtue of his authority as an occupier that enjoyed effective military control on the WBGS. In the remaining cases, the military commander issued the seizure orders in

21 YEHEZKEL LEIN WITH EYAL WEIZMAN, *LAND GRAB: ISRAEL’S SETTLEMENT POLICY IN THE WEST BANK* 48 (Yael Stein ed., Zvi Shulman & Shual Vardi trans., 2002) (1 dunum = 0.247 acre).

22 Yigal Allon, *Israel: The Case for Defensible Borders*, 55 FOREIGN AFF. 38 (1976) (a rearticulation of the Allon plan for a Jordanian solution to the Palestinian question first articulated in 1967).

23 HCJ 390/79 Dweikat v. Government of Israel [1979] (Isr.).

24 LEIN & WEIZMAN, *supra* note 21, at 51.

25 *Id.* at 58.

26 *Id.* at 73.

27 Samira Shah, *On the Road to Apartheid: The Bypass Road Network in the West Bank*, 29 COLUM. HUM. RTS. L. REV. 221, 223 (1997).

28 LEIN & WEIZMAN, *supra* note 21, at 50.

29 Joel Singer, *The Establishment of a Civil Administration in the Areas Administered by Israel*, 12 ISR. Y.B. HUM. RTS. 259, 278 (1982) (this article cites a 1982 interview published at the Jerusalem Post dated 19 Feb. 1982, where the Head of the Civil Administration stated, “Civil administration does not mean that this is an administration operated by civilians, but an administration dealing with the affairs of civilians”).

application of Jordanian public laws and administrative procedures as amended during the occupation.

But these rearrangements of opportunity between matters civilian and military/security were constrained by, and remained within the bounds of the ethnic distinction between Palestinians and Israeli residents in the WBGS and in the settlements. As described by Palestinian lawyer Raja Shehadeh, the formalization and consolidation of an ethnic distinction in the governance of the WBGS had a curious genealogy. It started by extending the application of certain Israeli laws extra-territorially (i.e., beyond the Green Line) to include Israeli citizens living in the WBGS including criminal laws (1967). Later in 1982, the applicability of a series of laws including Entry into Israel Law, Chamber of Advocates Law, Income Tax Ordinance, and National Insurance Law was extended to include those in the WBGS who were entitled to Israeli citizenship pursuant to the law of return.³⁰ The military commander also enacted a number of regulations that excluded the settlements and other areas and land under Israeli ownership and control from the military and civil administration of the WBGS, including the creation of regional councils and other local councils and the creation of the “Courts of domestic jurisdictions” applying Israeli laws in the same areas.³¹ By 1994, Israeli residents in the WBGS and settlers lived in a regulatory enclave. Their spaces, forms of community life, and legal privileges and duties are regulated by Israeli civilian institutions and regulations. In effect, since 1967 ethnicity has been “the main determinant of the allocation of rights, powers and resources”³² in the WBGS.

Finally, the four regimes in the matrix are not independent from each other. The correlative of a military/security regime of movement restrictions for the Palestinians is a civilian regime of economic investment in infrastructure, and tax incentives to support a regime of free movement of the settlers between the WBGS and Israel of the green line. Correlation in this context means that the regime of restricted movement for the Palestinians and free movement for the

³⁰ SHEHADEH, *supra* note 19, at 91–92.

³¹ *Id.* at 88–89, 92–93. *See also* RAJA SHEHADEH, *THE LAW OF THE LAND: SETTLEMENTS AND LAND ISSUES UNDER ISRAELI MILITARY OCCUPATION* 36–44 (1993); EYAL BENVENISTI, *LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES INTO ISRAEL* 3–15 (1990); LEIN & WIEZMAN, *supra* note 21, at 67–71.

³² OREN YIFTACHEL, *ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE* 16 (2006).

Israelis are one and the same regime described from the perspectives of the Palestinians and Israeli residents of the WBGs respectively.

B. Gaza-fication of the Occupation

For the Israeli political and military establishment Gaza always represented more of a demographic. More concretely, this meant that the guiding concern for Israel's policies in the Gaza strip has been one of containing Palestinian demographic presence and movement in order to preserve the Jewish character of the state. On the other hand, the West Bank presented a territorial problem. In other words, the problem for the military and political establishment in relationship to the West Bank was essentially one of figuring out how to manage the military occupation of 1967 so as to incorporate more territories from the West Bank to Israel. The main justification for these territorial ambitions was articulated in terms of secure and defensible boundaries.³³ Between 1972 and 1992, Israel constructed 132 settlements housing 231,200 Israelis in the West Bank and East Jerusalem.³⁴ In contrast during the same period, Israel constructed in Gaza only 16 settlements housing 4,800 Israelis.³⁵

After the successful fragmentation of the West Bank by the combination of settlement activities, bypass roads, and the separation barrier, Israel's territorial ambitions in the West Bank have reached an upper limit. Short of ethnic cleansing and forced population transfers,³⁶ Israel cannot hope to annex more land from the West Bank. The consequence is to turn the fragments of Palestinian populated areas in the West Bank into what Lagerquist described as a "residual curiosa in an Israeli landscape stretching from the

³³ Allon, *supra* note 22, at 39; World Zionist Federation, *Settlement in Judea and Samaria: Strategy, Policy and Plans* (Sept. 1980), available as an annex to UN Doc. No. A/36/341, S/14566 (19 June 1981) (Letter from the Acting Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People to the Secretary-General); see also Rami S. Abdulhadi, *Land Use Planning in the Occupied Palestinian Territories*, 19 J. PALESTINE STUD. 46, 47-51 (1990).

³⁴ Leila Farsakh, *Palestinian Labor Flows to the Israeli Economy: A Finished Story?*, 32 J. PALESTINE STUD. 13, 20 (2002).

³⁵ *Id.*

³⁶ Some have made the argument that the routing of the separation barrier in combination with Military Order No. 378 (Oct. 2, 2003) declaring "closed" the zone between the separation barrier and the 1967 borders, is in fact a prelude to actual population transfer. See Peter Lagerquist, *Fencing the Last Sky: Excavating Palestine after Israel's "Separation Wall,"* 33 J. PALESTINE STUD. 5, 21 (2004).

Mediterranean to the Jordan River.”³⁷ From an Israeli perspective, this has transformed the Palestinian problem in the West Bank to one of managing population growth, and movement. From the perspective of the Israeli establishment the priority objective in managing Palestinian population growth and movement would be to defend against what they perceive as a threat to the “ethnic character of the state.”³⁸ This also meant that the mode of Israeli control and containment in Gaza would henceforward be the template for control and containment in the West Bank. I develop further this narrative by distinguishing between three stages.

1. Expansion, Integration and Dispossession (1967–1994)

From 1967 to 1994, civilian functions of government were actually aspects of the military and security control over the WBGS. During this period, the administration of Palestinians under occupation was ultimately in the hands of the Israeli prime minister and a small ministerial committee in which the minister of defense had direct responsibility over the occupied territories. Policy decisions relating to the Palestinians as a group (including economic policies, tax policies, land planning and development, infrastructure development, health and education) were integrated in the Israeli governmental system.³⁹ Policy decisions were implemented by two ministerial sub-committees and channeled through the Ministry of Defense (Department for Coordinating Operations) to the military administration in the WBGS.⁴⁰ The military government’s civilian budget was always included in the budget of the Ministry of Defense.⁴¹ According to Meron Benvenisti, the WBGS “never constituted a fiscal burden on the Israeli treasury.”⁴² In fact, and primarily through taxes and deductions imposed on Palestinians

³⁷ *Id.* at 6.

³⁸ Yiftachel, *supra* note 18, at 126.

³⁹ Mona Rishmawi, *The Administration of the West Bank under Israeli Rule*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND THE GAZA STRIP 267–68 (Emma Playfair ed., 1992).

⁴⁰ *Id.*

⁴¹ Hisham Jabr, *Financial Administration of the Israeli Occupied West Bank*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND THE GAZA STRIP 390 (Emma Playfair ed., 1992).

⁴² MERON BENVENISTI, DEMOGRAPHIC, ECONOMIC, LEGAL, SOCIAL AND POLITICAL DEVELOPMENTS IN THE WEST BANK 30 (1987).

employed officially in Israel, Palestinians contributed large sums to Israeli public consumption.⁴³ In comparative terms Palestinians in the WBSG ended up more taxed than Jordanians and Israelis.⁴⁴

During this period, three transformations are particularly relevant for the purpose of this paper:

a. Mainstreaming the Settlements

There was first what can be best described as the mainstreaming of the settlements in the West Bank. Mainstreaming of the settlements in the context of the West Bank refers to the process through which the position of the settlements in Israel (both geographically and regulatory) has become ambiguous. On the one hand, West Bank settlements can be considered as frontiers and the settlers as pioneers both notions being central to nation building in settler-societies. On the other hand, these same settlements have evolved to become suburbs of the major Israeli urban centers. Mainstreaming could be best traced by distinguishing between three stages⁴⁵ of the development of settlement in the West Bank, all within a governance matrix that distinguishes sharply on the basis of ethnicity between Palestinian Arabs, and Israeli Jews.

The first stage ran between 1967 and 1974, and it was a period of consensus about the goals of the settlement policies. During this period, the Israeli government thought of the West Bank and Gaza as assets for future negotiations. Settlement activities were authorized mainly for military/security purposes along what was later referred to as the “Allon Plan.”⁴⁶ Accordingly settlements were encouraged along the Jordan valley and in East Jerusalem. The main forms of settlements created during this period (outside east Jerusalem) were agricultural cooperative communities. As mentioned earlier, land seizures from the Palestinians were realized mainly as temporary measures for military necessity.

The second stage ran between 1974 and 1977, and was a period of controversy about the goals of the settlement policy. The mainstream Labor Party-controlled government remained committed to the Allon Plan. The counterpoint, represented by the movement Gush

⁴³ *Id.*

⁴⁴ Jabr, *supra* note 41, at 382 (Table 12.1. Comparison of income tax paid by taxpayers in Jordan, Israel, and the Occupied Territories).

⁴⁵ See *infra* Table 1: Three Stages of Settlement Policy in the West Bank.

⁴⁶ Allon, *supra* note 22.

Emunim,⁴⁷ was ideologically committed to the religious idea that the entire historic Palestine is a promised land to the Jewish people. But it was also committed to the idea that settling the frontiers and Judaizing the land are essential to modern Zionism. This meant that, contrary to the Allon Plan, the settlement priorities should be the central parts of the West Bank, Judea and Samaria. In addition to the continuation of the settlement activity along the Jordan valley and in Eastern activity, there were a number of confrontations between the Labor controlled Israeli government and Gush Emunim, including of course the famous situation of the *Elon Moreh* settlement and the High Court decision.⁴⁸ According to B'Tsaalem, “between July 1974 and December 1975, members of Gush Emunim made seven unsuccessful attempts to establish a settlement at various sites in the Nablus area without government permission.”⁴⁹

The third stage ran between 1977 and 1993, and this period was again a period of consensus about the goals of the settlement policy. The mainstream (the Likud controlled Israeli government and Gush Emunim) adopted World Zionist Organization settlement plan⁵⁰ as implemented by the Sharon Plan. During this period, the Israeli Government reversed its relationship to the West Bank. Henceforward, the future annexation of land from the West Bank became strategically vital. The Israeli government made it a priority to settle the central parts of the West Bank around major Palestinian demographic centers. During this stage, the mechanism for land seizures shifted from the ostensibly temporary measures justified by military necessity to reclassifying land as state land. The process seems to have started in 1968 when the Israeli government suspended the process of land registration that began in Palestine during the

⁴⁷ For information on Gush Emunim and its role in the settlement of the WBGS, see David Newman, *Jewish settlement in the West Bank: the role of Gush Emunim*, 16 OCCASIONAL PAPERS SERIES, U. DURHAM CENTER FOR MIDDLE E. & ISLAMIC STUD. (1982); David Newman & Tamar Hermann, *A Comparative Study of Gush Emunim and Peace Now*, 28 MIDDLE E. STUD. 509 (1992); Elisha Efrat, *Jewish Settlements in the West Bank: Past, Present and Future*, 1 ISR. AFF. 135, 139–43 (1994); LEIN & WEIZMAN, *supra* note 21, at 13; David Newman, *From Hitnachelut to Hitnatkut: The Impact of Gush Emunim and the Settlement Movement on Israeli Politics and Society*, 10 ISR. STUD. 192 (2005); Robert H. Mnookin & Ehud Eiran, *Discord “Behind the Table”: The Internal Conflict Among Israeli Jews Concerning the Future of Settlements in the West Bank and Gaza*, 2005 J. DISP. RESOL. 11, 20–21 (2005).

⁴⁸ H CJ 390/79 Dweikat v. Government of Israel [1979] (Isr.).

⁴⁹ LEIN & WEIZMAN, *supra* note 21, at 13.

⁵⁰ Drobless, *supra* note 33.

British Mandate (1928).⁵¹ This was followed by transferring massive areas to the ownership of the Israeli state and registered in a special register (1974) that was eventually “merged with the Israel Lands Administration Authority, where Israeli state lands are registered.”⁵² Land was also seized as a result of regional planning schemes particularly ones relating to the building of roads in the West Bank.⁵³

In addition to land seizures, and starting with the Sharon Plan, the Israeli government went far in providing a package of incentives⁵⁴ to attract settlers to the West Bank. These measures transformed the dynamic of settlement in the West Bank from one of pioneering and settling the frontiers to one of suburbanization. The main settlement communities that emerged during this stage were mostly gated communities and “bedroom, dormitory settlements,”⁵⁵ that attracted mainly ex-urban, Ashkenazi middle class, professionally based in the major urban centers in Tel Aviv and Jerusalem.

In settlement as suburbanization, the 1948 armistice borders of the West Bank, or the Green Line, are visible and invisible, porous and impermeable. The Green Line is porous for Israeli citizens living in the settlement and impermeable to Palestinians. For Israeli planners, the Green Line is invisible to the extent that planners start from the assumption that Israeli territories and the West Bank are one territorial unit. The Green Line is visible to Israeli planners to the extent that the distinction between Israeli territories and occupied territories dramatically affects the commercial value of the land, making settlements beyond the Green Line economically attractive for suburbanization.⁵⁶

⁵¹ SHEHADEH, *supra* note 19, at 81.

⁵² *Id.* The preoccupation land regime is similar to the one in Israel before 1948. Compare with the development of the Israeli land regime between 1948–1966. See Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder*, 33 N.Y.U. J. INT’L L. & POL. 923 (2001).

⁵³ SHEHADEH, *supra* note 19; see also YIFAT HOLZMAN-GAZIT, LAND EXPROPRIATION IN ISRAEL: LAW, CULTURE, AND SOCIETY 129–49 (2007).

⁵⁴ LEIN & WEIZMAN, *supra* note 21, at 73–84 (Lein and Weizman give an exhaustive description of the incentives packages.).

⁵⁵ David Newman, *The Territorial Politics of Exurbanization: Reflections on 25 years of Jewish Settlement in the West Bank*, 3 ISR. AFF. 61, 64 (1996).

⁵⁶ *Id.* at 65 (David Newman described this pattern of suburbanization as “discontinued” wherein “the crossing of the old Green Line boundary causes a sudden discontinuity in the land market, characterized by an extremely sharp (rather than gradual) fall in land prices. The proximity of this region to the urban core, coupled with land prices and economic incentives usually only to be found in more remote regions resulted in this micro-region becoming transformed into an attractive proposition for the potential home buyer.”).

The combination of land transfers, regional and road plans, and other measures taken by the Israeli government to expropriate land in order to build settlement and integrate their populations in the Israeli polity,⁵⁷ establishes the spatial ethnic duality in the West Bank and Gaza. In addition, it has produced in the West Bank a pattern of spatial organization best described by Yiftachel as “fractured regionalism.”⁵⁸ Fractured regionalism refers to a particular mode of organizing territory. It describes a landscape in which territorially separate and unequal ethnicities are scattered in noncontiguous regions.⁵⁹ But for Yiftachel, fractured regionalism also describes a particular formation of collective political identities.⁶⁰ As a mode of organizing territory, fractured regionalism constitutes the backdrop against which political identities are constituted. It provides the background condition that determines what forms of intra-group and intergroup social mobilization are possible, and the nature of their political claims vis-à-vis the state. This political geography of the WBSG might help us make some general observations about the governance of the WBSG during the period of 1967–1993 and arguably during subsequent periods.

First, most accounts of the development of the settlement activities in the West Bank emphasize that the fragmentation of Palestinian communities is, at least since the formulation of the Drobless Plan in 1980, unique to the WBSG as occupied territories especially that, as such, their future status would be matter for negotiation. In fact, the plan itself clearly stated that:

It is therefore significant to stress today, mainly by means of actions, that the autonomy does not and will not apply to the territories but only to the Arab population thereof. This should mainly find expression by establishing facts on the ground. Therefore, the state-owned lands and the uncultivated barren lands in Judea and Samaria ought to be seized right away, with the purpose of settling the areas between and around the centers occupied by the minorities so as to reduce to the minimum the danger of an additional Arab state being established in these territories. Being cut off by Jewish settlements the minority

⁵⁷ See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 135–40 (1993).

⁵⁸ YIFTACHEL, *supra* note 32, at 111–15, 298.

⁵⁹ *Id.* at 112.

⁶⁰ *Id.*; see also Oren Yiftachel, *Centralized Power and Divided Space: ‘Fractured Regions’ in the Israeli ‘Ethnocracy,’* 53 *GEOJOURNAL* 283 (2001).

population will find it difficult to form a territorial and political continuity.⁶¹

This, however, is not entirely accurate, to the extent that it gives only half of the picture of the development of settlements in the WBGS in the period between 1967 and 1993. What fades into the background are the continuities with Israeli settlement activities since 1948 and the use of planning and housing policies as instruments for nation-building. Yiftachel argued that in the Israeli case, nation-building was constituted not only through the Jewish/Arab dynamics of control and resistance, but also through intra-Jewish dynamics of control and resistance. The continuity in settlement policy and patterns strongly support the conclusion that the unit of analysis appropriate to understanding governance in the WBGS should not be constrained by the legal description of the WBGS as occupied territories within the meaning of international humanitarian law. From the perspective of the governing power managing the population and territory in the WBGS, the unit of analysis since 1967 has been the entire territory of mandatory Palestine. Actions and policies in the WBGS have always been aspects of a broader scheme to manage demographic distribution and territorial settlement that concern the entire territory of mandatory Palestine.

Second, one important consequence of fractured regionalism in the WBGS and inside the Green Line was, according to Yiftachel, to enable a highly centralized governing regime.⁶² Furthermore, and in the context of the WBGS, fractured regionalism had, in addition to the dispossession and control of the Palestinians, and the preservation of the distribution of power between Ashkenazi, Mizrahi and other Jewish groups, the consequence of constituting the settlers movement as a political force with disproportional power in formal Israeli political institutions.⁶³

⁶¹ Drobless, *supra* note 33, at 8–10.

⁶² Yiftachel, *supra* note 60 (Yiftachel argued that for Palestinian Arabs in Israel fractured regionalism encouraged the formation of regionally based political identity. As opposed to Palestinians in the WBGS, Palestinian Arabs in Israel identified themselves as a regionally based minority within an Israeli polity formulating claims that do not lead to political separation in an independent nation state.). See also Oren Yiftachel, *Between Nation and State: 'Fractured' Regionalism Among Palestinian-Arabs in Israel*, 18 POL. GEOGRAPHY 285 (1999).

⁶³ Newman, *From Hitnachelut to Hitnatkut*, *supra* note 47, at 205. (“Given the fact that, even at its peak, the settler population never numbered more than 0.5 percent of the total Israeli population, its representation in the Knesset, through different political parties, far exceeded its proportionality. In the Sharon Administration (2002–2006) ten members

b. Economic Integration

The Israeli government took several measures that led to the integration of the Palestinian economy of the WBGs into the Israeli economy. These measures included creating a customs union, harmonizing taxation and wage deductions for social services,⁶⁴ introducing Israeli banking practices to the WBGs, and giving the Palestinian populations in the WBGs standing permission to enter and work in Israel with some conditions including that they were not allowed to stay overnight.⁶⁵ The economic consequences of this integration translated into some improvement in the standards of living (compared to pre-1967), low growth rates (except for 1986, and 1992),⁶⁶ integration of the Palestinian workforce in the Israeli economy as low-skilled, low-wage workers, and a decline in the contribution of industry to the Palestinian GDP (compared to the beginning of the occupation).⁶⁷ These results may appear contradictory, as low growth and higher standards of living are not generally correlative. Sara Roy described this characteristic path of economic transformation in the context of the Gaza strip as “de-development.” In contrast to peripheral modes of development, de-development is a process that weakens the ability of the economy to accumulate capital, and is not associated with the formation of political and economic alliances between the dominant and the dependent economies.⁶⁸

of the Knesset resided in West Bank and Gaza settlements, providing the settler movement with a foot hold which no other protest movement in Israel’s history had previously succeeded in attaining in the formal corridors of government.”).

⁶⁴ BENVENISTI, *supra* note 42, at 30–32. Palestinians officially employed in Israel did not receive the same national insurance benefits as Israeli workers. Deductions were designed to protect the competitiveness of the Israeli worker. The funds from the deductions (approx. 20% of the wage) were transferred to the Israeli treasury, and particularly to a deduction fund. According to Meron Benvenisti’s estimates the sum accrued in the fund between 1970 and 1986 amounted US\$ 800 million (US\$ 1 billion with interest). Three quarters of the fund was returned to the territory as a contribution to the budget of the Civilian Administration. The remainders were used for Israeli public consumption.

⁶⁵ BENVENISTI, *supra* note 57, at 127.

⁶⁶ BENVENISTI, *supra* note 42, at 6–10; WORLD BANK, EMERGENCY ASSISTANCE TO THE OCCUPIED TERRITORIES 31–32 (1994).

⁶⁷ For the period until 1986, see BENVENISTI, *supra* note 42, at 22–23.

⁶⁸ Sara Roy, *The Gaza Strip: A Case of Economic De-Development*, 17 J. PALESTINE STUD. 56, 58 (1987).

c. Setting the Stage for Autonomy

During this period, the Israeli government started to formalize a regulatory distinction between the civilian affairs and military/security affairs through the establishment of the Civil Administration under the authority of the military commander of the West Bank. Joseph Singer, head of international law branch in the Military Advocate General's unit, and a key actor in the design of military order 947,⁶⁹ presented this as routine change in the management in occupied territories, and as simple formalization of actual practice within the military government of the West Bank.⁷⁰ However, he also quoted a Ministry of Defense spokesman who said that the creation of the civil administration was a prelude to further reorganizations. Most importantly, the Civil Administration would gradually be taken over by civilians, and that its establishment was important to set the stage for a possible autonomy scheme for the Palestinians.⁷¹

⁶⁹ KUTTAB & SHEHADEH, *supra* note 20.

⁷⁰ Singer, *supra* note 29, at 279.

⁷¹ *Id.* at 278.

Table 1: Three Stages of Settlement Policy in the West Bank

Stages	Settlement Policy	Type of Settlement	Prime location for settlement	Land Seizure Mechanism	Involved Parties
Consensus 1967-1974	Allon Plan	Agricultural Cooperative Communities ⁷²	East Jerusalem Jordan Valley Judean desert	Article 52 of The Hague Regulations ⁷³	Government Jewish Agency until 1971 Settlement Department (World Zionist Organization) ⁷⁴
Contestation 1974-1977	Mainstream: Allon Plan Counterpoint: “Eretz Yisrael Ideology”	Agricultural Cooperative Communities Unauthorized outposts ⁷⁵	East Jerusalem Jordan Valley Central mountain regions of the WB (Judea and Samaria)	Article 52 of The Hague Regulation Declaring <i>Miri</i> and <i>Mawat</i> Land as State Land. ⁷⁶	Government Settlement Department (WZO) <i>Gush Emunim</i>

⁷² This column refers to the main types of settlement established in any one of the stages. Other types of settlements (e.g., industrial villages) were established during this period. For a breakdown of the types of settlements between 1967-1981 see Drobbles, *supra* note 33, at 16–17.

⁷³ Article 52 of The Hague Regulations states:

Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country. These requisitions and services shall only be demanded on the authority of the commander in the locality occupied. The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.

Regulations Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, Annex at art. 55 [hereinafter Hague Regulations]. The Israeli Supreme Court sitting as the High Court of Justice developed a peculiar interpretation of Article 52 of The Hague Regulations. First, it expanded its scope to include immovable property. Second, it adopted a wide understanding of the test “necessities of the army of occupation” to include (1) what is necessary for the occupying power to fulfill its duty under Article 43 of The Hague Regulations “to restore, and ensure, as far as possible, public order and safety,” and (2) the security needs of the occupying state; see David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT’L REV. RED CROSS 207, 216 (2012); For an overview of the different position regarding the interpretation of Article 52, see YUTKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW 217–38 (2009).

⁷⁴ LEIN & WEIZMAN, *supra* note 21, at 21.

⁷⁵ Nir Shalev, *The Ofra Settlement: An Unauthorized Outpost*, B’TSELEM (Dec. 2008), http://www.btselem.org/download/200812_ofra_eng.pdf.

⁷⁶ *Miri* and *Mawat* are types of land regimes under Ottoman Land Law (1858); see SHEHADEH, *supra* note 31, at 14–30; Kedar, *supra* note 52. The strategy of declaring *Miri* and *Mawat* land state land is not necessarily consistent with customary international law and The Hague Regulations. Article 55 of The Hague Regulations states: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real property, forests, and agricultural estates belonging to the hostile State, and situated in the

Stages	Settlement Policy	Type of Settlement	Prime location for settlement	Land Seizure Mechanism	Involved Parties
Contestation 1974-1977 (continued)				Settlers taking <i>de facto</i> possession of the land	
Consensus 1977-1993	Drobes and Sharon plans Erestz Yisrael ideology	Residential Communities Unauthorized outposts	East Jerusalem Central mountain regions of the WB (Judea and Samaria)	Declaring <i>Miri</i> and <i>Mewat</i> Land as State Land. Settlers taking <i>de facto</i> possession of the land	Government Settlement Department (WZO) <i>Gush Emunim</i> then offshoot movements (e.g., Amana)

2. *Contraction and Fragmentation: The Oslo Years (1994–2000)*

The post Oslo regime followed the trends of the previous period. Three specific transformations are important for the purpose of this paper.

a. *Transfer of Authority*

The authorities of the Civil Administration were transferred gradually to the institutions of the Palestinian authority. The *Declaration of Principles on Interim Self Government Arrangements* (13 September 1993) established the principle restated in all subsequent agreements, according to which upon entry of force of the declaration, “a transfer of authority from the Israeli military government and its Civil Administration” to the Palestinian Council/Palestinian Authority will commence.”⁷⁷ It also established the principle that these transfers of powers will not derogate from Israel’s overall security and military control. Article VIII of the Declaration of Principles reads:

In order to guarantee public order and internal security for the Palestinians of the West Bank and the Gaza Strip, the Council will establish a strong police force, while Israel will continue to carry the responsibility for defending against external threats, as well as

occupied country. It must protect the capital of these properties, and administer them in accordance with the rules of usufruct.” Hague Regulations, *supra* note 73, art. 55. At the same time, declaring *Miri* land as state land simply makes the complaint against land seizures order inadmissible before the High Court because a private plaintiff would not have a legal standing to contest the order. See LEIN & WEIZMAN, *supra* note 21, at 51.

⁷⁷ GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 318 (2000).

the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order.⁷⁸

These principles effectively translated into the dissolution of the Israeli Civil Administration and the transfer of its authorities to the Palestinian Council. The agreements also specified that the budget and accounts of the Civil Administration would be transferred to the institutions of Palestinian Authority (PA) as soon as the PA establishes its revenue collection system. The PA assumed the responsibility for above budget expenditure and in case of shortfall in tax collection.

In tandem with transfer for some governmental authorities from the Israeli Civil Administration to the Palestinian Authority, this period witnessed the qualitative increase in the role of donors in the governance of the West Bank. During the period from 1967–1994, there were multiple donors providing assistance to the Palestinians consisting of states, voluntary private initiatives, various international organizations, and the United Nations Relief and Works Agency for Palestine Refugees. Donors acted individually, without any systematic coordination. The choice of what projects to fund was partly determined by the donor’s political interests and partly by the limits put in place by Israel. Donors had no influence on setting policy objectives or defining priorities for projects directed to the Palestinians, and they needed permission of the military government in the WBGS before starting any projects. Permits were rarely granted to productive projects. Instead, permits were granted to projects that could reduce the budgetary burden of the Israeli government (charitable projects, consumption-oriented projects).⁷⁹ Aid through multilateral agencies was limited to those affiliated with the United Nations.⁸⁰

After 1994, the institutional framework for channeling aid to the WBGS was constitutive of the Oslo process. The expansion of aid programs from US \$200 million per year before Oslo, to nearly four times that amount immediately after, meant that donors needed to set up a network of institutions and decision making bodies to identify new projects, set-up priorities, channel funds and monitor project implementation. Donors coordinated their activities on all levels

⁷⁸ *Id.* at 319.

⁷⁹ Jabr, *supra* note 41, at 392.

⁸⁰ MERON BENVENISTI, JUDEA-SAMARIA AND GAZA DISTRICT: A SIXTEEN-YEAR SURVEY (1967–1983) 63 (1983).

within the Ad Hoc Liaison Committee (AHLC) at the highest level composed of key political donors. On the operational level, various coordination committees were put in place: the Joint Liaison Committee (JLC) (PA, Israel, and local representatives of major donors), and the Local Aid Coordination Committee (LACC) (PA and local donors representatives). For very specific implementation and coordination on the project level, two more committees were set up mirroring the JLC and LACC: Task force on Project Implementation, and Sector-specific Working Groups.⁸¹

The World Bank played a “central” role in the assistance process.⁸² The World Bank facilitated the meeting between different donors, helped track donor assistance, and played a major role in assessing economic conditions and developing packages for projects for donor support. Finally, during the Oslo years, the World Bank was responsible for managing special funds to support the nascent Palestinian technical and administrative infrastructures and to support the start-up and the recurrent costs of the PA.⁸³ The channeling of aid was predominantly through the institutions of the PA.⁸⁴

b. From an Occupation Regime of Separate and Unequal to an Internationally Recognized Regime of Autonomy

The Oslo Accords formalized the territorial and ethnic distinctions not as the acts of a military occupier, but as an internationally recognized framework to govern the WBGS. The territorial division of the West Bank and the Gaza Strip into three different areas (A, B, C), although conceived as interim, became the stable background condition for all subsequent developments and redeployments. To recall, areas A and B included the major Palestinian urban centers. In A and B, the Palestinian Council enjoys “all civilian powers and

⁸¹ ANNE LE MORE, INTERNATIONAL ASSISTANCE TO THE PALESTINIANS AFTER OSLO: POLITICAL GUILT, WASTED MONEY 181 (2008).

⁸² WORLD BANK, *supra* note 66; Rex Brynen, *International Aid to the West Bank and Gaza: A Primer*, 25 J. PALESTINE STUD. 46, 51 (1996).

⁸³ *Id.*

⁸⁴ In the period from 1994–1997, 64% of donor assistance took the form of budget support to the PA. These included start-up costs for emergency employment projects necessitated by the total or partial closure of the WBGS. *See* United Nations Special Coordinator in the Occupied Territories (UNSCO), Report on the Palestinian Economy, Special Focus: Donor Disbursements and Public Investments (Jan. 27, 1999), <http://domino.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/962cf87f47b9ad2f85256873005c8e21?OpenDocument>.

responsibilities including planning and zoning.”⁸⁵ In addition, the Palestinian Council enjoys the authority to maintain security among Palestinians. Israel retained residual security powers and military control over the WBGS. That is, these redeployments and re-allocation of governmental powers could be overridden by Israel’s power to address “external threats” and to protect Israelis and “confront the threat of terrorism.”⁸⁶ In addition, Israel has retained the authority to maintain security among Israelis and between Israelis and Palestinians. Area C was defined broadly as any territory that is not specifically designated as A or B. Israel retained full territorial jurisdiction over area C. Spatially, this makes the distribution of powers between Israel and the Palestinian Council in area C the default in WBGS. It includes, in addition to the settlements, the spaces between areas A and B, something like the cosmic dark matter that fill-in the spatial fabric of the WBGS. Some estimated that area C represented approximately 70% of the WBGS.⁸⁷ Although the agreements provided for an eventual redeployment from area C so that those territories could eventually become categorized as either areas A or B, such redeployments did not take place. One of the most important principles in the redeployments applicable to all different categories of territories was that the transfer of functional jurisdictions to the Palestinian Council in areas A and B in no way applied to Israeli citizens residents in the WBGS.⁸⁸

The distinction between areas A, B, and C made possible the establishment of a regime governing the movement of people inside the WBGS and the flow of goods and services in and out of the WBGS. The Oslo Accords enabled the Israeli authorities to control movement of Palestinians *inside* the West Bank between areas A and B, and area C. This translated into a network of checkpoints, roadblocks, and a permit system that henceforward would regulate movement of Palestinians inside the WBGS.⁸⁹ The regime effectively classified roads inside the West Bank (all roads in the WBGS are most likely to pass through area C) on the basis of whether or not Palestinians were allowed to circulate. Some roads become

⁸⁵ Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., art. XI(2)(b), Sept. 28, 1995, in WATSON, *supra* note 77, art. XI(2)(b), at 355.

⁸⁶ *Id.* at 357 (regarding art. XIII(2)(a)).

⁸⁷ *Id.* at 110; SHEHADEH, *supra* note 19, at 37.

⁸⁸ Interim Agreement, *supra* note 85, at 360 (regarding art. XVII(2)(c)).

⁸⁹ *Forbidden Roads: Israel’s Discriminatory Road Regime in the West Bank*, B’TSELEM (Aug. 2004), http://www.btselem.org/download/200408_forbidden_roads_eng.pdf.

completely prohibited to Palestinian (vehicles and persons) circulation,⁹⁰ others partially so, and the rest merely restricted.⁹¹ Most importantly, this complex of checkpoints, roadblocks, and permit system gave the Government of Israel the possibility to enforce an internal closure in the West Bank. Usually ordered in response to a Palestinian attack in Israel, internal closure consists of stopping, for Palestinians, all movement between Areas A, B, and C. According to Amnesty International's statistics the first internal closure was ordered in 1996 for twenty-one days in response to a suicide attack in Israel resulting in more than fifty deaths. In 1997 and 1998 there were a total of twenty-seven deaths and forty days of total or partial closures in the West Bank.⁹² The legal correlative for a system of movement restriction for Palestinians is a system of freedom of movement for the settlers and Israelis inside the WBGS and also across the Green Line.

Land expropriation changed in character in that it was conducted in a piecemeal fashion often on a neighborhood level allowing the continuing growth of settlements particularly in the Jerusalem area.⁹³ The Israeli government justified the expropriations in West Bank to develop the bypass roads with military necessity.⁹⁴

c. Economic Disengagement

The Oslo economic regime reversed the previous periods' trend toward economic integration in two specific aspects. The transfer of civil responsibilities to the Palestinian Council implied the transfer of many regulatory functions that could affect the economy. In addition to budgetary separation, the Palestinian Council had some authority in setting trade policy, customs rates for some products and the power to set the level of taxation including the value added tax within a specified range (15%–16%). Labor movement on the other hand became significantly more difficult. Palestinian residents in the

⁹⁰ *Id.* at 14 (Table 1: Completely Prohibited Roads).

⁹¹ *Id.* at 12–19.

⁹² *Israel and the Occupied Territories, Surviving Under Siege: The Impact of Movement Restrictions on the Right to Work*, AMNESTY INTERNATIONAL 14 (Sept. 2003), <https://www.amnesty.org/en/documents/mde15/001/2003/en/>.

⁹³ Eitan Felner, *A Policy of Discrimination: Land Expropriation, Planning and Building*, B'TSELEM, (May 1995), http://www.btselem.org/publications/summaries/1995_policy_of_discrimination.

⁹⁴ Shah, *supra* note 27, at p. 223; B'Tselem, *supra* note 89, at pp. 6–7; LEIN & WEIZMAN, *supra* note 21, at p. 50.

WBGs no longer had a general permit to enter Israel. Furthermore, beginning in 1993, the Israeli government frequently resorted to a closure policy. The Office of the United Nations Special Coordinator for the Middle East Peace Process estimated that between 1994 and 1999 Israel imposed a total of 443 days of comprehensive closure on the WBGs.⁹⁵ During comprehensive closures, movement of goods and people in and out of the WBGs and between the West Bank and the Gaza Strip becomes severely restricted.⁹⁶ At the same time, the economic protocol annexed to the *Israel-Palestine Interim Agreement on the West Bank and the Gaza Strip* (September 1995), in combination with the control over external borders as per the security arrangement, entrenched the role of Israel the biggest trading partner rendering the West Bank and the Gaza Strip individually dependent on the Israeli economy.⁹⁷

3. Disengagement (2000–2010)

The policy of disengagement consists of a unilateral decision by the Israeli government to redeploy its troops, settlements and economic activities outside a unilaterally chosen perimeter, thereby minimizing the point of friction between the Israeli army and citizens and the Palestinians, while at the same time maintaining the ability to control access to this perimeter and to project military power when needed. Disengagement was introduced both in Gaza and the West Bank. In the 2004 Gaza disengagement plan, Israel decided to withdraw its civilian settlements, economic and military installations outside the perimeter of the Gaza strip with the exception of the borders with Egypt.⁹⁸ Israel retained control over the borders, sea access, and airspace. The plan also included withdrawal from selected

⁹⁵ United Nations Special Coordinator in the Occupied Territories (UNSCO), Report on the Palestinian Economy (June 30, 2001), <http://unispal.un.org/UNISPAL.NSF/0/F25244DC8C25B79485256B1A006D9CD1> (last visited June 13, 2013); see also Radwan A. Shaban, *The Harsh Reality of Closure*, in DEVELOPMENT UNDER ADVERSITY: THE PALESTINE ECONOMY IN TRANSITION 45 (Ishac Diwan & Radwan Shaban eds., 1999); LEILA FARSAKH, PALESTINIAN LABOUR MIGRATION TO ISRAEL: LABOUR, LAND AND OCCUPATION (2005).

⁹⁶ Yehezkel Lein, *Civilians Under Siege: Restrictions on freedom of Movement as Collective Punishment*, B'TSELEM (Jan. 2001), http://www.btselem.org/press_releases/20010111.

⁹⁷ Sara Roy, *The Palestinian Economy and the Oslo Process: Decline and Fragmentation*, 24 THE EMIRATES OCCASIONAL PAPERS 1 (1998).

⁹⁸ *Gaza Disengagement Plan*, ISRAELI MINISTRY OF FOREIGN AFFAIRS (Aug. 15, 2005), <http://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Israeli%20Disengagement%20Plan%2020-Jan-2005.aspx>.

settlements and military sites in the northern part of the West Bank. The same *modus operandi* underlies, albeit on a much larger scale, the decision to build the separation barrier.

Disengagement institutionalizes the policy of closure that became routine during the Oslo years, especially after the outbreak of the Second Intifada. As such, it is not a reversal of the Oslo Accords, but the deployment of many aspects of its regime. Put differently, the disengagement would be inconceivable without the institutional rearrangements contained in the Oslo Accords. This policy sometimes involved making territorial concessions. For the first time in the history of the settlement movement since 1948, the government decided to willingly evacuate and demolish civilian settlements.⁹⁹ It also involves territorial gains. The routing of the Separation Barrier allowed Israel to annex 16.6% of the West Bank, composed of lands between the barrier and the 1949 armistice line containing 80% of the settlements' population in the West Bank.¹⁰⁰ The territorial implications of disengagement as a policy, however, were not merely about gaining square kilometers. The policy of disengagement introduced a territorial regime that was in many aspects the opposite of "fractured regionalism." Fractured regionalism, although it interrupted the territorial continuity of areas populated by the Palestinians, did presume, and in fact required, the presence of a certain level of routinized interaction with the settlement, and the centralized authority of the military government with its role in channeling resources to fund public services. Disengagement interrupted Palestinian regional continuity without interaction with settlement, and no civilian responsibilities on the part of the Israeli army.

During this period, the normalization of closures as disengagement exacerbated the donor community's confusion, inherent in the Oslo accords, regarding the scope and allocation of *legal* responsibilities between the PA and Israel over the different aspects of the lives of Palestinian civilians. The Oslo Accords, particularly because of their *interim* nature, were subject of an intense legal controversy.¹⁰¹ The

⁹⁹ Yiftachel, *supra* note 18.

¹⁰⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 1, at 38, 51 (July 9).

¹⁰¹ Eyal Benvenisti, *Responsibility for the Protection of Human Rights Under the Interim Israeli-Palestinian Agreements*, 28 ISR. L. REV. 297 (1994); Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim*

legal issue was to determine to what extent the signing of the interim accords and the creation of a Palestinian authority altered the scope of Israel’s legal responsibilities, as the occupying power, over the Palestinian civilian populations of the West Bank and the Gaza Strip. The controversy, although was never conclusively resolved, remained dormant during the years of Oslo. It simply did not have any significant impact on the channeling of donor assistance, during times of generalized optimism about the prospects of peace, and a political determination to build a peace at any cost.

With the outbreak of the Second Intifada the dormant controversy started to produce its delayed effects. From the perspective of the donors, the situation in the WBGs confronted them with a sense of an irresolvable dilemma. The dilemma stems from the realization that the necessary cost of responding to the dire needs of the civilian populations is to relieve Israel from its responsibilities as an occupier under international humanitarian and human rights law. At the same time, insisting that Israel, as an occupying power, should bear the primary responsibility to minimize the impact of its policies and security measures in the West Bank and Gaza will have a necessary cost depriving civilians from desperately needed aid.¹⁰²

During this period, Israel withdrew from many of the coordination committees both on the capital and local levels. Coordination took place in donors only committees. With frequent military operations, and the decline in the tax revenues, aid became the major source of funding for the PA budget. This role of donors, as responsible by default, was brought to the foreground with the announcement of the

Period, 26 DENV. J. INT’L L. & POL’Y 27 (1997); Dinstein, Y., *The International Legal Status of the West Bank and the Gaza Strip*, 28 ISR. Y. B. HUM. RTS. 37 (1999).

¹⁰² In November 2003, the International Committee of the Red Cross (ICRC) announced that it would not extend two economic security programs it had started in the middle of 2002 in the West Bank. The two programs benefited approximately 500,000 Palestinians. As a justification for this decision the ICRC emphasized that these two programs were temporary measures designed to help “vulnerable residents of the West Bank to overcome the hardships of the particularly acute emergency situation that prevailed following Israel’s military redeployment in the territory in April 2002.” However, and consistent with ICRC’s commitment to neutrality, the ICRC report subtly but poignantly stated in a language that should not be read as formulaic: “However, the ICRC stressed that Israel bore the primary responsibility for the welfare of the Palestinian population living under its occupation and that the ICRC would not relieve Israel of its obligations in this regard.” International Committee of the Red Cross [ICRC], *Annual Report 2003* 270 (2003). See also Cameron W. Barr, *Aid Gets Political for Red Cross*, CHRISTIAN SCI. MONITOR (Nov. 26, 2003), <http://www.csmonitor.com/2003/1126/p01s02-wome.html>.

Disengagement Plan. The Israeli government in fact proposed at an early stage of the discussions surrounding the plan, that certain assistance agencies (the World Bank) should take control of the evacuated settlements and industrial estates. With disengagement, bilateral and multilateral donors, humanitarian and development agencies, and NGOs in the West Bank, especially with disintegration of the authority exercised effectively by the PA because of the combined effect of Israeli closures and military operations, and the political confrontation with Hamas, have become *de facto* rulers.

II

UNDERSTANDING GOVERNANCE IN THE WBGS

This paper is concerned with understanding systems of social control and the role that legal regimes play in constituting them. The approach I tease out in this paper fundamentally questions a basic assumption in the disciplines of international law, international human rights law, and international humanitarian law about the relationship between law, power, and systems of social control. Stated simplistically, according to this basic assumption, rooted in liberal political philosophy, modern legal regimes of international law provide the framework for speaking truth to power. In contrast, I pursue an account of legal regimes as constitutive of systems of social control. In such an account, a legal strategy for resisting systems of social control is akin to understanding the rules of a computer system before hacking it.

In Part II, I have developed a descriptive account of one such system of social control, namely that of Israel in relationship to the Palestinians in the WBGS. This system has the following three characteristic features:

- The government of Israel maintains a strategic control over the territories and Palestinian populations of the WBGS with the ability to project military power at will. In international law such level of control satisfies the legally accepted definition of *effective control*,¹⁰³
- In the territories under its effective control, the government of Israel has set up a dual governance regime that distinguish

¹⁰³ United States Military Tribunal, Nuremberg, "Trial of Wilhelm List and Others (The Hostages Trial), Case No. 47, Judgment of 19 February 1947, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOL. III, p. 48, at p. 55.

between Palestinian-Arab persons and places and Israeli-Jewish persons and places; and

- The government of Israel has abdicated any responsibility over civilian affairs of the Palestinian Arabs in the WBGS. Jewish residents are Israeli citizens, and Jewish places are effectively integrated in the Israeli legal system, administration, and economy. International donors and humanitarian agencies are by default responsible for the welfare the Palestinians in the WBGS.

International lawyers’ understanding of governance in the WBGS has always been mediated by international humanitarian law. Legal debates about the status of the WBGS focus on applicability of the law of occupation and the consequences of such applicability in terms of rights, privileges and duties of occupying power vis-à-vis protected persons under its effective control. Since the occupation of the WBGS, the applicability debates have gone through two distinct phases. In the first phase from 1967 to 1994, there was a consensus among all interested parties that the WBGS were occupied territories. There was disagreement, however, on the body of rules applicable to these occupied territories (The Hague Regulations vs. Fourth Geneva Convention).¹⁰⁴ In a second phase from 1994 to 2013, the occupied status of the WBGS in itself became the focus of the disagreement.¹⁰⁵

In this section, I would like to bracket the applicability debate, fueled especially after the Gaza Disengagement Plan.¹⁰⁶ There might have been compelling policy reasons, and short-term advantages for the government of Israel, the Palestinian resistance movement including the Palestine Liberation Organization (PLO), third parties with interest in the political future, and humanitarian welfare of the Palestinians in the WBGS, or in global collective security to start from a working hypothesis that the legal regime of occupation is applicable on the WBGS.¹⁰⁷ But there is a point when the working

¹⁰⁴ Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968). See also *infra* note 129.

¹⁰⁵ See *supra* note 101.

¹⁰⁶ Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel’s Disengagement*, 8 Y.B. INT’L HUMANITARIAN L. 297 (2006); S.D. DIKKER HUPKES, WHAT CONSTITUTES OCCUPATION?: ISRAEL AS THE OCCUPYING POWER IN THE GAZA STRIP AFTER THE DISENGAGEMENT (2007).

¹⁰⁷ Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT’L L. 44, 46, 98 (1990) (arguing that despite the prolonged character of Israel’s occupation, the applicability of law of occupation (The Hague, and Fourth Geneva Convention) is of key importance in addressing critical problems in the WBGS including the settlements, deportations, and treatment of detainees).

hypothesis becomes obsolete. This is the situation when our commitment as international lawyers to the framework of the law of occupation i) can no longer describe the actual regime governing the WBGs; ii) produces absurd outcome and entangles us in irresolvable dilemmas.¹⁰⁸

Consider in the context of this paper the governance regime of the WBGs after the outbreak of the Second Intifada, and specifically the responsibilities of humanitarian agencies. The November 2003 decision of the International Committee of the Red Cross (ICRC) to end the food distribution programs in the West Bank because it did not want to relieve Israel from its responsibilities as an occupying power is precisely the type of situation in which a commitment to a working hypothesis has produced absurd outcomes and entangled us in irresolvable dilemmas.¹⁰⁹ This perception of irresolvable dilemma stems from a realization that the necessary cost of responding to the dire needs of the civilian populations is to relieve Israel from its responsibilities as an occupier under International Humanitarian and Human Rights Law. At the same time, insisting that Israel, as an occupying power, should bear the primary responsibility to minimize the impact of its policies and security measures in the West Bank and Gaza will have as a necessary cost depriving civilians from desperately needed aid. More specifically, the dilemma is experienced by aid workers because they confront a situation that requires a choice between two courses of action that conflict with an axiomatic aspect of their shared understanding of their role, the *modus operandi* of “do no harm.”¹¹⁰ Dilemmas of this sort are often the effects of unacknowledged constraints. The experienced necessity to make the impossible choice between on the one hand depriving vulnerable civilian populations from assistance; and on the other, subsidizing the power structure that produced the vulnerability does not occur in a vacuum. It is embedded in a legal/institutional context that defined the field of available alternatives.

This legal/institutional context constrains choice in at least two ways. First, there are constraints that result from path dependency.

¹⁰⁸ This is not a novel argument in the history of legal thought. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COL. L. REV. 809 (1935); Alf Ross, *Tû-Tû*, 70 HARV. L. REV. 812 (1957).

¹⁰⁹ See *supra* note 102.

¹¹⁰ MARY B. ANDERSON, *DO NO HARM: HOW CAN AID SUPPORT PEACE OR WAR* (1999).

They bring to the foreground the fundamental question of “How did we get here?” What are the past choices that shaped the legal/institutional context of aid in the West Bank and Gaza in such a way that an actor like the ICRC has to choose between depriving civilians from assistance and subsidizing the occupation? Second, there are constraints that result from the internalization of false necessities.

In this section, I first argue that, descriptively, governance in the WBGS as it is actually exercised (as opposed to how it ought to be exercised) at least since September 2000 no longer fits the legal template of a belligerent occupation. Second, I argue that a realistic understanding of governance in the WBGS should not focus on the unique status of the WBGS as occupied territories but on the structural connection between WBGS and the state of Israel. In other words, understanding governance in the WBGS should treat Israel and the WBGS as part of one political/economic reality. This essentially means, as articulated by Oren Yiftachel, that “events and processes taking place in most parts of Israel/Palestine are interlinked.”¹¹¹ Occupier and occupied are “enveloped” through a process of mutually dependent development.¹¹²

A. Occupation as a Fact and Occupation as a Regime

1. What Is Occupation?

Occupation is a legal regime. In a Westphalian world of sovereign nation-states, the legal regime of occupation regulates one, not infrequent, consequence of war: the effective exercise of power by one state over the territory of another. Occupation is temporary. It is an interim governance regime that lasts for the duration of the underlying hostilities, or of the effective control of the occupying forces. As such, it is the public law of occupied territories. It comprises rules that regulate the relationship between the occupying power and the civilian populations in occupied territories. It also regulates certain aspects of the activities of third countries, international organizations and NGOs in occupied territories, particularly with regard to the channeling of humanitarian assistance.

Governing occupied territories is not qualitatively different from the exercise of normal governmental powers. From the perspective of

¹¹¹ YIFTACHEL, *supra* note 32, at 6.

¹¹² *Id.*

the civilian populations in occupied territories, the jurisdictional affiliation of public authority matters for reasons that are exogenous to the occupation (e.g., nationalism).¹¹³ Whatever differences that may exist between governing as a sovereign and as an occupier ultimately flow from the role of the occupation regime in the larger system of interstate relations.

The modern regime of occupation was carved out by lawyers, army generals, and diplomats working out the details of the European state system after the Napoleonic wars, and more specifically, after the Franco-Prussian war of 1871.¹¹⁴ Although the immediate context of these debates was the legality of the acts of specific occupiers (e.g., Prussian army in the Alsace-Lorraine, or those of the Russian army in Bulgaria (1877–1878)), the stakes extended beyond the narrow partisan interests fueling these controversies. In the process, the modern regime of occupation was slowly differentiated from the older regime of conquest that enabled the unilateral assumption of sovereignty over territories acquired as a result of military action. This differentiation can be best understood as one instance in which diplomats, lawyers, and army generals were mediating between the conflicting political ideals (republicanism vs. old regime, nationalism vs. dynastic absolutism) and economic forces (nobility vs. bourgeoisie) that swept the continent during the nineteenth century. This meant that the modern occupation regime was instrumental in conserving the European status quo,¹¹⁵ and, at the same time, in

¹¹³ In international law disputes over territorial sovereignty, the attitude of the population towards the state exercising governmental authority may be relevant to establish the effectiveness of possession in cases of adverse possession. See MARCELO G. KOHEN, *POSSESSION CONTESTÉE ET SOUVERAINETÉ TERRITORIALE* 236–40 (1997).

¹¹⁴ For a history of the legal regime of occupation, see CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM* 200–01 (G.L. Ulmen trans., Telos Press, 2003). Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 *EUR. J. OF INT'L L.* 721 (2005); Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 *L. & HIST. REV.* 621 (2008).

¹¹⁵ The modern regime of occupation was instrumental in prolonging the life of the territorial compromises struck in the Congress of Vienna (1815). As pointed out by Bhuta, the central problem in constituting a postrevolutionary European system was the coexistence of radically opposing visions of political legitimacy, republican and monarchical. Political legitimacy was to Vienna, what religion was to Westphalia. The Vienna compromise did not embody an idealist fantasy of a perpetual peace. In effect, it was merely an agreement among European rulers not to wage “just” wars on each other. Declaring war was a privilege of governments and instrumental to the stability of the continent provided it was exercised deliberately (pragmatically) to maintain the balance of power. (See Bhuta, *supra* note 114, at 732.) Towards the end of the nineteenth century the Vienna order came under considerable stress. The emergence of new powers on the

giving legal/institutional expression to the growing political power of nationalist movements and the bourgeoisie. More specifically, the regime of non-interference with private property in occupied territories, a core element of nineteenth law,¹¹⁶ was a central element in preserving the territorial and political *status quo* in a continent haunted by the possibility of revolutionary wars. What distinguished the occupier from the ‘legitimate’ sovereign was precisely its inability to change the constitutional order of the occupied territory. More specifically, what distinguished the occupier from the legitimate sovereign is its inability to change the regime of private property and the system of privileges associated with it including the authority to levy taxes and to decide on the level of public spending in occupied territories.¹¹⁷

At the same time, this same regime for enemy property was a manifestation of the rising power of the bourgeoisie and their strong interest in preserving the flow of commerce even in times of war.¹¹⁸

European scene (some of which were outside Europe, e.g., the United States and Japan), and the rising challenges of nationalism to the territorial *status quo* meant that diplomats and rulers could no longer assume that they are operating in a system stabilized by a balance of powers. The threat of war and the equilibrium of forces could no longer act as stabilizing factors. In such context, a system in which the ground rules legitimates the acquisition of sovereign title over land occupied in the course of military action is no less than a ticking bomb. This made it easier for the formation of general consensus on the inadmissibility of conquest in a European context, and on a new interim regime to govern occupied territories that limits the authority of the occupier in the interest of the ousted sovereign. This consensus was eventually articulated in The Hague Regulations (1899, 1907) in particular the famous Article 43. *See* Hague Regulations, *supra* note 73, at art. 43. The delinking of public authority from sovereign title, the central analytical divide at the heart of the regime of occupation, was in effect a delinking of war from political legitimacy, and of territorial change from regime change. The modern regime of occupation reproduced the logic of the Vienna settlement, in that it removed from the international plane the fundamental political conflict about political legitimacy.

¹¹⁶ ERNST H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 9 (1942).

¹¹⁷ Hague Regulations, *supra* note 73, art. 46, 48, and 55.

¹¹⁸ Institutional economist Karl Polanyi argued, convincingly, that the balance of power system couldn’t explain on its own the persistence of relative stability in the continent for a hundred years (1815–1914). He insisted on the importance of the historical victory of the bourgeoisie and its ideals on how to organize the economy, in directing the plays of wars and alliances to favor general stability in the continent. To illustrate this proposition, Polanyi referred to the observed changes in international law specifically with respect to the treatment of enemy property, and the fate of commercial relations in times of war. *See* KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 17–18 (2001). Against this background, the law of occupation codified in The Hague Regulations of 1899, appears mainly as a regime to manage the problem of enemy property in occupied territories. Feilchenfeld noted in retrospect that “The Hague Regulations were a late codification of a body of law adopted in an

However, as noted by Schmitt, the continuing success of this mediation, seemed to depend on the presence of a common constitutional conception of the state—specifically the Liberal (capital L) centralized state with its order based on the distinction between public and private, state and civil society and markets. This excluded the colonial wars between European countries from the applicability of the legal regime of occupation.

By the time Israel occupied the West Bank and the Gaza Strip in 1967, the international law of occupation had undergone important transformations. Most importantly, the changing nature of warfare, the emergence and development of international mechanisms for the protection of human rights, and the consolidation of an international norm protecting self-determination for territories under colonial rule, racial domination and foreign subjugation and exploitation, have transformed the regime of occupation in two distinct and related directions. On the one hand, and contrary to nineteenth century law that recognized the conflict between the occupier and ousted sovereign, the post-World War II conception of occupation presumed a fundamental conflict of interests between occupiers and the civilian populations of the occupied territories.¹¹⁹ An occupier can no longer

atmosphere of nineteenth century liberalism, shaped by the basic philosophy of that era, and drafted for the conditions of a nineteenth-century liberal world.” He also commented that the balance struck in The Hague Regulations between minimizing the effects of war on civilians, the sacredness of property and the protection of military interests assumed that “occupants would deal with economic *laissez-faire* structures and that, consequently, sufficient protection was afforded by restricting occupants to military and police powers and regulating interference with property.” See FEILCHENFELD, *supra* note 116 at 12, 17. Feilchenfeld’s claim seems plausible but, in the context of the present paper, it should not be taken literally. The Hague Regulations have limited the privileges of occupiers to take the private property of civilians in occupied territories to situations in which military necessity or the needs of the army of occupation require such takings. This still left a rather wide margin of discretion to occupying armies to restrict the flow of commerce and industry. In fact, accounts about the status of private property in occupied territories in the major wars between 1863 and 1914, are filled with instances of pillage, and destruction of private property. See DORIS APPEL GARBER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION (1863–1914): A HISTORICAL SURVEY* 280–86 (1949). Still The Hague Regulations and earlier attempts to articulate the specifics of the regime of occupation represent the record of deliberations between rulers. As such they provide an articulation of a shared conceptual framework containing their most elementary understanding of the institutional arrangement that governed their world. In this context, Polanyi’s claim was about giving a sociological/economic base for these conceptual frameworks. The question underlying his account was about identifying the class perspective from which the most important problem that arises in the management of the consequences of war was the protection of private property from political interference.

¹¹⁹ EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 29–31 (1993).

be presumed an “impartial trustee of the ousted sovereign or the local population.”¹²⁰ On the other hand, the legal regime of occupation was humanized¹²¹ to the extent that it addressed individuals directly (and not as subjects of the ousted sovereign) and grounded the guarantees of the law of occupation in respect for fundamental human rights.¹²²

2. *Occupation and the Duty to Govern*

The legal controversy about the status of Gaza after disengagement has been presented as a debate about a question of fact; namely whether the Israeli Defense Forces (IDF) has effective control.

Article 42 of The Hague Regulations (1899) provides the legal test for what constitutes effective control. International lawyers have repeatedly noted the remarkable ambiguity of its text. But there seems to be a consensus among state actors supported by national and international case law that the measure of effectiveness is a potential exercise of control. It is irrelevant for the purposes of determining the occupied status of a territory whether the occupying force has in fact “[taken] all the measures in [its] power to restore and ensure, as far as possible, public order and safety”¹²³ in the occupied territories. In other words, the responsibilities of occupiers vis-à-vis occupied population are not constitutive of occupation but a legal consequence of it. As noted by Yuval Shany, there are good policy reasons to support this understanding of effective control:

[. . .] by de-linking the existence of occupation from the actual exercise of governmental authority by the military power vis-à-vis the local population, this approach discourages the occupier from

¹²⁰ *Id.* at 30. For a reconstruction of occupation law that transforms it from a legal regime to protect the ousted sovereign to one that protects the right to self-determination see Alain Pellet, *The Destruction of Troy will not Take Place*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND THE GAZA STRIP 169 (Emma Playfair ed., 1992).

¹²¹ Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000).

¹²² Respect for and Implementation of Human Rights in Occupied Territories, G.A. Res. 2443 (XXIII), U.N. Doc. A/RES/2443(XXIII) (Dec. 19, 1968); Respect for Human Rights in Armed Conflicts, G.A. Res. 2444 (XXIII) (Dec. 19, 1968); United Nations, Report of the Secretary General, Respect of Human Rights in Armed Conflicts, UN Doc. No. A/7220 (1969); U.N. Secretary-General, *Respect for Human Rights in Armed Conflicts*, U.N. Doc. A /8052 (Sept. 18, 1970). See also John Quigley, *The Relation Between Human Rights Law and the Law of Belligerent Occupation: Does an Occupied Population Have a Right to Freedom of Assembly and Expression*, 12 B.C. INT’L & COMP. L. REV. 1 (1989).

¹²³ Hague Regulations, *supra* note 73, at art. 43.

shirking its obligation to govern the occupied territory. Arguably, the opposite test, which examines actual displays of authority, might encourage occupiers to refrain from maintaining law and order and providing governmental service in the occupied territory in order to evade assuming the duties introduced by the laws of belligerent occupation. This would leave the local population bereft of any governmental protection (as its own government is incapable of governing the area and the invader is unwilling to do so).¹²⁴

The underlying assumption of this policy justification for the criterion of effective control is fairly close to the surface. The modern legal regime for governing occupied territories is embedded in a global institutional arrangement linking political order, territoriality,¹²⁵ and monopoly of violence (the Westphalian state system). This arrangement is conceptually rooted in theories of social contract in which the fundamental political bargain is one of obedience in exchange for social peace. In other words, governance is constituted by the physical facts of territorial control and the ability to effectively solve coordination problems for the community. Arguably, in the framework of a Liberal political philosophy, this fundamental bargain can be articulated in terms of a duty to govern. This duty can be justified on moral grounds: if you are effective in realizing a morally necessary task, you have a duty to do so. But it could also be justified on grounds of social utility.

In this basic Westphalian schema, the regime of occupation is somewhat of an anomaly in that it governs the situation in which a governing authority enjoys a monopoly of violence but without the presumption of a social contract. This explains in part the theoretical and doctrinal difficulties surrounding the applicability of human rights norms in occupied territories.¹²⁶ And as an anomaly, the regime of occupation is interesting from a political theory perspective precisely because it brings to the foreground the fundamental assumptions implied in the Westphalian frame. Occupied are not citizens, and the acts of occupiers are not expressions of a general will. The law of occupation is an interim arrangement; it is the public law of citizens without a public. The duty to govern is an irreducible aspect of this regime as articulated in Article 43 of The Hague

¹²⁴ Shany, *supra* note 106, at 376.

¹²⁵ Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999), at 866–97.

¹²⁶ On the conceptual challenges raised at the intersection of Laws of War and International Human Rights Law, see Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19 MICH. ST. J. INT'L L. 299 (2013).

Regulations: “The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”¹²⁷

Although the normative bite of Article 43 has significantly declined during the twentieth century, in that it fails on its own to provide any clear instructions to occupants on how to govern, it remains the “cornerstone of the law of occupation.”¹²⁸ Later elaborations and interpretations of Article 43, expanded and contracted the power of the occupier “to reestablish and insure, as far as possible, public order and safety.” But none of these legal developments questioned the basic structure of Article 43 and the link between effective military control and a duty to govern.

The situation in Gaza, and increasingly so in the WB, however, is unique. The Government of Israel’s control over the WBGS does satisfy the “effective control” test. The steps taken by the Government of Israel to maintain effective control and to transfer responsibility over the welfare of the Palestinians to authority buffers such as the PA, bilateral and multilateral donors, and international humanitarian and development assistance agencies did take place gradually, deliberately, and with the recognition and support of relevant international actors in the context of a peace process. The separation between effective control and governance responsibility is a defining feature of the legal regime actually governing the WBGS. Put differently, and to the extent that the duty to govern is an irreducible element of the occupation regime, Israel currently controls but does not “occupy” the WBGS.

B. The Law of Occupation in the OPT

The applicability of the international law of occupation has been contested in different ways by the different parties to the Israeli/Palestinian conflict.

Since the beginning of the occupation,¹²⁹ the official position of the Israeli government was that the Fourth Geneva Convention Relative

¹²⁷ Hague Regulations, *supra* note 73, at art. 43.

¹²⁸ BENVENISTI, *supra* note 119, at 29–31.

¹²⁹ This sentence should be qualified. The Military Commander issued Proclamation no. 3 (June 1967) in which he instructed military tribunal in the area to apply the Fourth Geneva Convention and that in case of conflict between the Convention the Proclamation,

to the Protection of Civilian Persons in Time of War was not applicable on the WBGs.¹³⁰ The government of Israel however declared that it would apply the humanitarian provisions of the convention without providing any list. The Israeli High Court of Justice applied the provisions of the Fourth Geneva Convention in so far as they embody customary rules of international law. The case law of the High Court has produced a curious list of those rules that were considered *de facto* applicable as customary international law. Specifically, the High Court ruled that Article 49 prohibiting deportation for individuals representing security threat is inapplicable, while Article 78 allowing occupying power to impose assigned residence or to intern populations in the occupied territories for imperative reasons of security is applicable because it embodies a customary rule of international law.¹³¹ At the same time, the High Court did not question the applicability of The Hague Regulations. Israel also contested the applicability of the law of occupation *in toto* in two recent instances; namely, in Area A as designated by the Oslo accords, and in the wake of the Gaza disengagement.¹³² The positions of the Israeli government on the question of applicability were highly contested. The United Nations, the ICRC, and the states parties to the Geneva Conventions have all asserted the applicability the international law of occupation including the Fourth Geneva Conventions.¹³³

The applicability of the international law of occupation was also challenged indirectly and from the perspective of the occupied

the convention shall prevail. That section of the proclamation was amended later in 1967. See RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK (1985); Advisory Opinion, *supra* note 100, at 173–74.

¹³⁰ See *The Colonization of the West Bank Territories by Israel*, Hearing Before the Subcomm. on Immigration and Naturalization of the Comm. on the Judiciary, 95th Cong. 9 (1977) (statement of Professor Yehuda Blum). For a review of the Israeli position, see *Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territories*, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (July 2004), <http://www.ihlresearch.org/opt/feature.php?a=31>. See also BENVENISTI, *supra* note 119, at 108–24; Adam Roberts, *Prolonged Military Occupations: The Israeli Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 60–70 (1990).

¹³¹ HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 130.

¹³² See *Disengagement Plan of Prime Minister Ariel Sharon*, Apr. 16, 2004, available at http://www.knesset.gov.il/process/docs/DisengageSharon_eng.htm (last updated Jan. 20, 2010).

¹³³ Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territories*, 44 HARV. J. INT'L L. 65, 97 (2003) (footnote 283 and accompanying text).

populations of the WBGS. These challenges usually took the form of arguments for the concurrent application of norms of international human rights law in addition to the law of occupation.¹³⁴

Although most legal commentators discuss Israeli occupation policies from the perspective of the international law of human rights and of military occupations, it is unclear how these hermeneutic debates determined the direction and substance of occupation policies. In fact, and except for few and arguably very important exceptions, the High Court generally turned down petitions challenging the government’s actions whether dealing with security measures,¹³⁵ or with economic policies in the WBGS.¹³⁶ According to Ronen Shamir, between 1967 and 1986, the Palestinians of the WBGS submitted to the High Court 557 petitions, only 65 of which were adjudicated.¹³⁷ The High Court ruled for the petitioners in only five out of the sixty-five petitions.¹³⁸

It is even less clear how the debates about the applicability of humanitarian law or the legality of Israeli policies contribute analytically to understanding governance in the WBGS, or to assess the outcome of Israeli policies both in concrete cases and cumulatively. What is interesting in the landmark cases, in which the high court ruled against the government, was that although these decisions granted some relief to individual litigants, they did not alter the underlying policy objectives. Consider the often cited example of the *Elon Moreh* case. The Court’s decision “did not challenge the legality of expropriations in general,” but simply brought to the foreground a legal vulnerability attached to expropriations of private property justified by military necessity.¹³⁹ What is even more interesting is that the Court did emphasize the distinction between

¹³⁴ *Id.* See also *supra* note 122; Advisory Opinion, *supra* note 100, 177–81.

¹³⁵ BENVENISTI, *supra* note 119, at 118–23.

¹³⁶ HC 69/81 Bassil Abu Aita et al. v. The Regional Commander of Judea and Samaria et al. [1983] (Isr.). The official High Court translation of the decision is available at http://elyon1.court.gov.il/files_eng/81/690/000/Z01/81000690.z01.htm (last updated June 13, 2013) (upholding a decision of the government to extend value added tax to the WBGS).

¹³⁷ Ronen Shamir, “Landmark Cases” and the Reproduction of Legitimacy: *The Case of Israel’s High Court of Justice* 24 L. & SOC’Y REV. 781, 802 (1990).

¹³⁸ *Id.* The five cases are HCJ 390/79 Dweikat et al. v. Government of Israel et al. [1979] (Isr.) The remaining four as cited by Shamir are HCJ 320/80 Kawasme et al. v. Minister of Defense; HCJ 2/79 El Asad v. Minister of Interior HCJ 351/80 Jerusalem District Electricity Co. v. Minister of Energy et al; HCJ 802/79 Samara v. Regional Commander of Judea and Samaria.

¹³⁹ BENVENISTI, *supra* note 119, at 173.

seizing private property for military necessity, and administering state lands as two different bases for the military commander to gain possession of property in occupied territory that merit different legal treatments.¹⁴⁰ As mentioned earlier, declaring land possessed by the Palestinians as state land became after the *Elon Moreh* decision the most effective legal route to gain control over land in the WBGs.¹⁴¹

Shamir, relying on the example of the *Elon Moreh* decision, convincingly argued that debating occupation policies in the courts, at least among Israeli ruling elites, had the unintended cost of legitimating the system of administration in the WBGs.¹⁴² Legitimation for Shamir is a symbolic effect. Concretely it is reducible to a sense of enchantment with the promises of change through law, and with the ability of the institutions of the state to live up to its democratic pretensions. But symbolic legitimation still leaves completely unanswered the question of what determined the substantive content and the direction of occupation policies. What the example of the *Elon Moreh* decision reveals is that there are probably structural determinants that cannot be captured from the perspective of legal condemnation. This perspective assumes that Israeli policies in the WBGs and the structure of government associated with them are determined by and respond to their special character as *military* areas, occupied and then administered by Israel in the course of an armed conflict. The focus on the WBGs as military areas reifies a legal distinction (law of war vs. law of peace), and presents it as an irreducible element of the governance regime in force.

In the *Elon Moreh* decision, an important question was the relationship between the order of the military commander to seize the lands adjacent to the village of Rujeib (on a hill top east of the Jerusalem Nablus Road)¹⁴³ for military purposes, the earlier demonstrations by persons belonging to the settler movement Gush Emunim in the same area, and the discussions in the wake of these demonstrations that took place in the ministerial defense committee

¹⁴⁰ See HCJ 390/79 Dweikat, et al. v. Government of Israel et al, [1979] (Isr.), *supra* note 5, at 142 of the cited English translation.

¹⁴¹ According to statistics compiled by B'Tselem, at the end of 2007, the number of Israeli citizens living in the settlement *Elon Moreh* is 1,322. See B'Tselem, *Land Expropriation and Settlements*, <http://www.btselem.org/settlements/statistics> (last updated Jan. 21, 2010).

¹⁴² Shamir, *supra* note 137, at 795.

¹⁴³ 1 PAL. Y. B. INT'L L. 134, 136 (1984) (translating HCJ 390/79 Dweikat v. Government of Israel [1979] (Isr.)).

resulting in the decision to create the *Elon Moreh* settlement. The question that the case was reduced to was whether the land seizure order was an implementation of a political decision to settle, or actually necessary for the defense of the state. In other words, the court had to sort out the ambiguity in the institutional design of the state and in the discourse of rulers with respect to jurisdictional boundaries (the armistice line of 1949) but also about the determinants of occupation policies. What the case revealed was that, already in the 1980s, the settlement policy was driven by and reactive to broader political forces and social processes that cannot be contained within the armistice line of 1949, especially when the legitimacy and viability of this line are in question.

In this context, the interpretation of Article 52 of The Hague Regulations is only an element in an elaborate regime that frames the competition between two complex national groups over the control of territory. The central categories in this regime are territory and demography. This means that the unfolding of the occupation regime is determined by specific policy objectives with respect to the management of population growth and movement, and to the management of space. Other important consequences of the occupation policies (e.g., distribution of water resources) are determined by the policy objectives with regard to territory and demography. This regime can be described as ethnocentric because it “facilitates the *expansion, ethnicization, and control* of a dominant ethnic nation (often termed the charter or titular group) over contested territory and polity.”¹⁴⁴ This regime is not unique to governing the WBGS, but an extension of processes internal to the Israeli polity that took shape in the period between 1948 and 1967, and that determined the distribution of territory and resources between Palestinian Arabs, Mizrahi and Ashkenazi Jews.¹⁴⁵ In this process, the legal system was instrumental in so far as it provided the instruments to channel resources, and consolidate the control over territory.¹⁴⁶ Multiple legal regimes were deployed in tandem including property law,

¹⁴⁴ YIFTACHEL, *supra* note 32, at 11.

¹⁴⁵ *Id.* On the territorial restructuring in Israel and the role of land policy and property rules in creating ethnic hierarchies, see also Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 N.Y.U. J. INT’L L. & POL. 923 (2001).

¹⁴⁶ For a study of other contexts in which the legal system, particularly property rules, were used to distribute land along ethnic lines, see Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).

immigration, tax laws, local government, and zoning. What is specific about the WBGS, is that these legal regimes were supplemented by the international law of occupation and the legal and institutional framework for foreign aid.

CONCLUSION

Since the establishment of Israel's control in the WBGS in 1967, the international legal strategy for the Palestinian national struggle consisted in asserting and obtaining the recognition for the right of the Palestinian people to self-determination and the right of return. A key element in this legal strategy was the recognition of the WBGS as occupied territories within the meaning of International Humanitarian Law and the applicability of the international law of occupation as embodied in The Hague Regulations and the Fourth Geneva Convention. As occupied territories, Israel would not be entitled to acquire sovereign title over the WBGS. The law of occupation was considered an interim regime in which the rights and privileges of the occupants are limited by the right of the occupied to self-determination:

Occupied people continue in fact to have an existence of their own, in the absence of which the legal institution of belligerent occupation would cease to have any degree of autonomy: it becomes indeed inconceivable if the occupier gains sovereignty of the occupied territory. This definition holds true in all circumstances and allows one to distinguish the criterion of the rights of the occupier, which find their absolute limits in the respect of the sovereign rights of the people whose territory is occupied.¹⁴⁷

This international legal strategy culminated in the recent United Nations General Assembly Resolution to accord "Palestine non-member observer state status in the United Nations."¹⁴⁸

This legal representation of the status of the WBGS was also, with minor variations at the edges, the core of the legal positions of the United Nations, state actors and governmental and nongovernmental humanitarian relief and development assistance agencies active in the WBGS. In addition it constitutes a key starting point for peace initiatives including the one culminated in the Oslo accords.

¹⁴⁷ Pellet, *supra* note 120, at 174.

¹⁴⁸ Status of Palestine in the United Nations, G.A. Res. 67/19, U.N. Doc. A/RES/67/19 (Dec. 4, 2012).

But this legal strategy had also a dark side. Throughout the duration of Israel’s effective control over the WBGS, the law of occupation became constitutive of a regime of subordination aiming at the acquisition of land, and the control of Palestinian populations. It produced the paradoxical situation that Adam Roberts cautioned against in which:

[. . .] the law on occupations could be so used as to have the effect of leaving a whole population in legal and political limbo: neither entitled to citizenship of the occupying state, nor able to exercise any other political rights except of the most rudimentary character.¹⁴⁹

In this paper I attempted to provide a schematic description of governance in the WBGS. As a critical protocol I attempted to offer a legal/institutional account of how the WBGS are governed but from a perspective outside the legal framework of the law of occupation. I demonstrated that at least since the outbreak of the Second Intifada (but possibly since the signing of the Oslo Accords), the legal status of the WBGS could hardly fit the template of the law of occupation. From the perspective of a power that effectively control a contested territory, the governance challenge in the WBGS has become demographic, more specifically one of enforcing the containment of a group of people in enclave spaces. The responsibility to insure public order and safety has been transferred to authority buffers namely the Palestinian Authority, bilateral donor countries, and international humanitarian relief and development assistance agencies.

Perhaps this a moment in which one should consider the daunting possibility that the costs of a legal strategy based on a necessary link between asserting Palestinian right to self-determination and asserting the continued relevance of the legal regime of occupation are too high. The post-Oslo regime is undesirable on consequentialist grounds; it is also objectionable on normative grounds. A regime of Israeli control over the WBGS that gives the occupier military control without responsibility over civilians has maximized the ability of the occupier to inflict harm on the occupied civilian population in the form of destruction of the infrastructure necessary to the provisions of key public services such as health, education, transportation and power; and suffocation of whatever productive capacity in the hands of the occupied population. It also minimized for the occupier, the costs of maintaining indefinitely this system of control by transferring

¹⁴⁹ Roberts, *supra* note 107, at 52.

its costs to authority buffers such as the institutions of the Palestinian Authority and its donors. The post Oslo regime of Israeli control over the West Bank and the Gaza Strip is objectionable on normative grounds because it is perpetuating Palestinian subordination and forcing on the Palestinians a particular unviable final settlement of the conflict that is unrepresentative of the political dynamics inside the Palestinian polity in the WBGS, inside the green line and in exile. The challenge is ultimately to imagine a legal framework for understanding the situation in the WBGS that does not link the Palestinian right to self-determination to the law of occupation.