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# *De facto* and *de jure* annexation: a relevant distinction in International Law?

Israel and Area C: a case study

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## ABSTRACT

Since the occupation of the Arab territories in 1967, Israel has been carrying out policies of *de facto* annexation, notably through the establishment of settlements and the construction of the Separation Wall. However, current public declarations and legislative measures suggest that, similarly to what happened in East Jerusalem and the Golan Heights, the State may be shifting towards measures of *de jure* annexation of Area C of the occupied Palestinian territories. Based on this case study, the present dissertation will assess whether there are conceptual differences between the notions of occupation, *de facto* and *de jure* annexation, identifying concrete measures in each case. It will also try to foresee the consequences of formally annexing either particular settlements or the whole Area C at both the domestic and the international level. The former will focus on the benefits for Israel at the internal level and on the impact on its existing human rights violations, while the latter will tackle third state obligations. The overall objective is to determine if making this distinction is relevant in international law and practice.

**KEYWORDS:** occupation - *de facto* annexation – *de jure* annexation – settlements – third state obligations – human rights

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## LIST OF ACRONYMS

AG – Advocate General (of the Court of Justice of the European Union)

API – First Additional Protocol

AO – Advisory Opinion (of the International Court of Justice)

EJ – East Jerusalem

EU – European Union

GH – Golan Heights

HCI – (Israeli) High Court of Justice

ICC – International Criminal Court

ICCPR - International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ - International Court of Justice

IDF – Israel Defense Forces

IHL – International Humanitarian Law

IHRL – International Human Rights Law

ILC – International Law Commission

IVGC – Fourth Geneva Convention

NSBL – Nation-State Basic Law

PA – Palestinian Authority

PLO – Palestine Liberation Organization

oPt – occupied Palestinian territories

SA – South Africa

SD – self-determination

SR – Special Rapporteur

UNGA – United Nations General Assembly

UNHCHR - United Nations High Commissioner for Human Rights

UNSC – United Nations Security Council

WB – West Bank

## 1. Introduction

### 1.1. Research question

Ever since the 1967 war, Israel, as belligerent occupying power and in violation of international law, has been carrying out different policies of *de facto* annexation of the West Bank. Through the establishment and extension of settlements and the construction of the Separation Wall, Israel has been gradually creating “facts on the ground” in the occupied territories, without yet claiming sovereignty over them. Only two exceptions apply to this lack of formal declaration: the annexation of East Jerusalem, due to its enormous symbolic value, and that of the Golan Heights, due to its important defensive value. Some authors have identified this regime as “creeping” annexation<sup>1</sup> or “occup’annexation.”<sup>2</sup>

Nevertheless, the last legislature (2015-2019) has seen a strong increase in annexationist tendencies. While the expansion of settlements has escalated, the Knesset<sup>3</sup> has also become more involved, and legislation such as the Settlement Regulations Law or the Nation-State Basic Law have raised concerns at both the domestic and the international level.<sup>4</sup> The ruling coalition has no longer tried to be subtle and public discourse and policies have shown a true intent to annex the West Bank piecemeal or completely. Declarations such as “today, the Israeli Knesset shifted from a path to establish a Palestinian state, to a path of extending sovereignty to Judea and Samaria”<sup>5</sup> and “when we entered the Knesset, it was well-known that a Palestinian state would be established. Today, everyone is talking about annexation.”<sup>6</sup> have been common and

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<sup>1</sup> See Omar M. Dajani, ‘Israel’s Creeping Annexation’ (2017) 111 AJIL Unbound 51. Professor James Crawford also talks about “creeping expropriation” in James Crawford, ‘Opinion on Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories’ (2012) para 4.

<sup>2</sup> CNCD 11.11.11 ‘Occup’annexation: the Shift from Occupation to Annexation in Palestine’ (2018).

<sup>3</sup> The Israeli Parliament.

<sup>4</sup> Peter Beaumont, ‘EU Leads Criticism After Israel Passes ‘Nation-State’ Law’ *The Guardian* (London, 19 July 2018) <[www.theguardian.com/world/2018/jul/19/israel-adopts-controversial-jewish-nation-state-law](http://www.theguardian.com/world/2018/jul/19/israel-adopts-controversial-jewish-nation-state-law)> accessed 7 July 2019. Yonah Jeremy Bob, ‘High Court to Hear Petitions Vs. Settlements Regulations Law on Sunday’ *The Jerusalem Post* (Jerusalem, 21 May 2018) <[www.jpost.com/Israel-News/High-Court-to-hear-petitions-vs-Settlements-Regulations-Law-on-Sunday-558865](http://www.jpost.com/Israel-News/High-Court-to-hear-petitions-vs-Settlements-Regulations-Law-on-Sunday-558865)> accessed 7 July 2019.

<sup>5</sup> Declaration of Naftali Bennett, former Minister of Education. Toi Staff, ‘Outpost Bill Cheered, Jeered as Step Toward Annexing West Bank’ *The Times of Israel* (Jerusalem, 5 December 2016) <[www.timesofisrael.com/outpost-bill-cheered-jeered-as-step-toward-annexing-west-bank/](http://www.timesofisrael.com/outpost-bill-cheered-jeered-as-step-toward-annexing-west-bank/)> accessed 6 July 2018.

<sup>6</sup> Declaration of Ayelet Shaked, former Minister of Justice. “Shaked: Now is the Time to Annex Area C’ *Arutz Sheva* (Beit El, 16 June 2019) <[www.israelnationalnews.com/News/News.aspx/264656](http://www.israelnationalnews.com/News/News.aspx/264656)> accessed 6 July 2018.

openly pronounced. A few days before the April 2019 elections, Netanyahu even stated “Will we move to the next stage? The answer is yes. I will apply [Israeli] sovereignty — and I don’t differentiate between settlement blocks and specks of isolated settlements.”<sup>7</sup> This public discourse has been accompanied by the introduction in the Knesset of several bills to annex different parts of the West Bank.<sup>8</sup> This is the reason why we believe these past few years have seen the start of the shift towards *de jure* annexation.

The present Master thesis will focus on this shift, analyzing Israeli actions from the angle of the differences existing in international law among the regimes of occupation, *de facto*, and *de jure* annexation. The distinction between the two latter seems to be purely doctrinal and jurisprudential since, as we will see below, state declarations in international fora refer to “annexation” full stop.<sup>9</sup> Furthermore, the consequences in international law attributed to the settlements and the wall, the principal measures of *de facto* annexation, seem to be the same as the ones that would ensue after a formal annexation; namely, the lack of legal effects and the engagement of third state obligations.

It is therefore interesting to assess whether distinguishing between *de facto* and *de jure* annexation has any useful purpose in international practice. By providing a definition for each, assessing which measures amount to what, and analyzing the consequences that declaring formal annexation would have, we will try to answer the following questions: 1. Are there conceptual differences between *de facto* and *de jure* annexation?; 2. Do they entail different ramifications in the Israeli case?; 3. Is this distinction relevant in international law?

Before starting our research, we departed from a series of hypothesis, the confirmation or negation of which has helped us in answering the above-mentioned questions:

1. At the internal level, formal annexation of particular settlements will aggravate, but will not change in substance, Israel’s existing human rights violations derived

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<sup>7</sup> Michael Schaeffer Omer-Man, ‘Annexation is Happening Whether Netanyahu is Reelected or not’ +972 Magazine (Tel Aviv, 7 April 2019) <<https://972mag.com/annexation-is-happening-netanyahu-election/140885/>> accessed 6 July 2018.

<sup>8</sup> See them all at Yesh Din, ‘Annexation Legislation Database’ (Yesh Din, 2019) <[www.yesh-din.org/en/legislation/](http://www.yesh-din.org/en/legislation/)> accessed 31 May 2018.

<sup>9</sup> The tendency to refer to “*de facto*” annexation is especially present among international experts and representatives of NGOs. The International Court of Justice seemed to establish this tendency in its ruling on the Wall. See *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004. Omar Dajani (n 1) and CNCD 11.11.11. (n 2). See also UNHCHR ‘Report of the Special Rapporteur on the situation of human rights in the Palestinian occupied territories since 1967’ (2018) UN Doc A/73/45717 and Michael Sfard, ‘The *de facto* Annexation is not New’ (2018) 23 (4) Palestine-Israel Journal 104.

from its policies of *de facto* annexation. On the other hand, it will have positive outcomes for Israel in domestic law.

2. Once again from an internal perspective, formal annexation of Area C will have important consequences, both at the domestic level and on human rights current violations.
3. From an international law point of view, *de jure* annexation will not change the substance of third state obligations arising from the commission of an unlawful act. However, from a political point of view, the distinction between *de facto* and *de jure* annexation is relevant in international law and practice.

Section II of this thesis will focus on the definitions of occupation, *de facto* and *de jure* annexation, in order to determine what measures and practices amount to what, and which ones are thus permitted under international law and which ones are not. After defining the regime of occupation and considering the possibility that the Israeli one has become illegal, it will focus on the policies that amount to *de facto* annexation and on the recent legislative measures that blur the distinction between *de facto* and *de jure* annexation. In this line, we will try to argue that the violations of Palestinians' rights cannot be justified in an occupation that is no longer temporary, even less if the annexation is "only" a *de facto* one. Thus, we will follow the Special Rapporteur's argument according to which, in order to be effective, international law must extend its absolute prohibition of annexation to "those incremental, yet substantive, measures being taken (...) to lay the ground for a future claim of sovereignty."<sup>10</sup>

Section III is devoted to the *de jure* annexation. Analyzing the precedents of East Jerusalem and the Golan Heights and the international community's response at the time, it will assess whether two law proposals that replicate their wording of "extending civil law, jurisdiction and administration" over territories in the West Bank constitute formal annexation. This analysis will also serve to highlight how the reaction of the international community differs when faced with measures of *de jure* annexation. Then, it will analyze the repercussions that these proposals would have, if approved, at the domestic level and on current Israeli violations of IHL and IHRL.

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<sup>10</sup> UNHCHR 2018 report (n 9), para 30.



In order to get a clearer understanding, we will divide this assessment into two subsections: one will focus on the partial annexation of settlements, and the other on the complete annexation of Area C. The main reason to study them separately concerns the different consequences they entail. Since one of them seeks to annex just a part of the territory where no Palestinians live, and the other seeks to annex the whole of Area C, the impact on human rights obligations is higher in the latter, particularly in what regards Palestinians' right to self-determination, their political rights and the prohibition of discrimination.

The last section of Section III will focus on the ramifications of these annexationist laws on third state obligations. Israel's own obligations deriving from the commission of an internationally wrongful act will not be addressed, since the government would have made up its mind to annex, and reminding its obligations of cessation and reparation would be pointless. Moreover, bearing in mind the current partiality of the US in the Israeli-Palestinian conflict, we will briefly examine their impact on the policies of the European Union as a potential leading figure in the maintaining of the two-state solution.

## 1.2. Methodology

Thus, the present work is an assessment of legal aspects, taken into consideration within the political milieu. It will ascertain, through a case study of Israel's policies in Area C of the oPt, if there are differences in theory and in practice that justify making a distinction between *de facto* and *de jure* measures of annexation. In order to do so, we have carried out a qualitative research, relying mostly on the analysis of international law instruments, UN resolutions and ICJ rulings as primary sources. On the other hand, we have also made good use of the available doctrine on the subject, as well as of reports of UN bodies and local NGOs, and of media articles of local newspapers as secondary sources.

These analyses have been complemented through the realization of semi-structured qualitative interviews on the field, mainly with International Law professors, but also with representatives of civil society. The main objective was to gather information concerning the consequences that formal annexation would have at the domestic level, an information that, being no experts in Israeli law, would have been difficult to obtain otherwise. However, we also wanted to gather different inputs on other

aspects, such as probability of annexation and opinions on politics and complicated legal issues, which is why we have also tried to meet professionals coming from both sides of the Green Line and, among those living in Israel, with authors having different points of view regarding the occupation itself.

The above-mentioned method has been the most suitable one because it has allowed us to tackle each of our research questions in a specific way. The UN bodies' reports and the doctrine have been extremely useful in identifying the conceptual differences among the regimes of *de facto* and *de jure* annexation, while the NGO reports have helped in distinguishing among the recent measures which ones can be identified as what. Through the analysis of states' *opinio iuris*, represented in international fora such as the UNSC and the UNGA, and the analogy with past experiences (East Jerusalem and the Golan Heights, Crimea, Chagos Archipelago, South Africa), we have managed to assess whether the *de facto-de jure* dichotomy is useful in international law and to end any doctrinal controversy on certain issues. Finally, the inputs from the interviews have been extremely helpful in the analysis of the potential consequences of formal annexation of the settlements and Area C.

The present piece of work will not provide any suggestions on how to proceed with the identified negative ramifications. Neither will it delve on controversial issues that have been sufficiently covered in other pieces of work or clearly asserted by the international community, such as the illegality of the occupation, whether Gaza is still occupied, or the appropriateness of the charges of apartheid in the current situation. Finally, although it was first projected to do so, limitations of space have precluded us from examining at all the question of whether the facts on the ground can change the illegality of the measures, in relation with the *ex injuria jus non oritur* principle.

Finally, there is, in the existing literature, extensive academic work on Israel's policies of *de facto* annexation, particularly in what regards settlement encouragement and the Separation Wall. More recently, NGO reports and some academic articles have been focusing on this step towards formal annexation, echoing the high increase in political annexationist tendencies and the enactment of laws that blur the distinction between *de facto* and *de jure* annexation. On the contrary, there is little or no academic work consecrated to analyzing the differences among these institutions, specifically to foreseeing the consequences of laws that have not been adopted yet but that could easily

be advanced in this next legislature. This is the reason why we have chosen this research topic: on the one hand, because of its novelty within a conflict that has been so vastly studied; on the other hand, because of its contemporariness and the important consequences that may materialize in the near future.

### 1.3.Context

For the purposes of this thesis, we will only focus on annexation regarding the West Bank, concretely, on Area C. Under the II Oslo Accord of 1995, the West Bank was temporarily divided into three different areas; areas A and B were handed over to the recently created Palestinian Authority, although Israel kept security control over area B; on the opposite side, area C remained under full civil and military Israeli control.<sup>11</sup> The accords set up an interim regime, where Israel was supposed to gradually redeploy from Areas A and B and part of Area C, and hand control over to the PA, although the final status would be subject to permanent negotiations.<sup>12</sup> The stalemate of the Accords and of the general peace process has nonetheless meant that what was conceived to be temporary has become permanent, allowing Israel to benefit indefinitely from its control of Area C and establish facts on the ground.<sup>13</sup>

Although the Oslo Accords view Gaza and the West Bank as a single territorial unit<sup>14</sup>, their treatment has been completely different. Whether the Gaza Strip, from where Israeli troops withdrew in 2005, is still under occupation is subject to controversy<sup>15</sup>; suffice it to say that the Prosecutor of the International Criminal Court affirmed, in the Marmara Advisory Opinion, that the international community considered Gaza to remain under occupation.<sup>16</sup> What is more relevant, Gaza has been kept out of Israel's annexationist

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<sup>11</sup> Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (1995) Article XI <[https://ecf.org.il/media\\_items/624](https://ecf.org.il/media_items/624)> accessed 8 May 2019.

<sup>12</sup> Ibid, Article XIII.

<sup>13</sup> Menachem Klein, 'The Endurance of the Fragile Oslo Accords' (2018) 23 (2) Palestine-Israel Journal <<https://pij.org/articles/1837/the-endurance-of-the-fragile-oslo-accords>> accessed 12 July 2019.

<sup>14</sup> Israeli-Palestinian Interim Agreement (n 11) Article XII.

<sup>15</sup> Some authors argue that Gaza is no longer under occupation, since the Israeli control does not amount to "effective control," despite the intense blockade Shany, 'The Law Applicable to Non-Occupied Gaza: a Comment on Bassiouni v. Prime Minister of Israel' (2009) 42 Israel Law Review 101. See also Hanne Cuyckens, 'Is Israel Still an Occupying Power in Gaza?' (2016) 63 Netherlands International Law Review 275, 285 and B'Tselem 'The Gaza Strip – Israel's Obligations under International Law' (2017) <[www.btselem.org/gaza\\_strip/israels\\_obligations](http://www.btselem.org/gaza_strip/israels_obligations)> accessed 7 May 2019.

<sup>16</sup> Article 53(1) Report on the Situation on Registered Vessels in Comoros, Greece and Cambodia (Report of the Prosecutor, Annex A) ICC-13-1 (6 November 2014) para 23-29.

intentions, mainly for two reasons: first, the lack of desire to incorporate their Palestinian population; and second, the fact that the State does not exercise any civil or military control within Gaza, and therefore annexation cannot be disguised as such (unlike in Area C of the West Bank.) Although some Knesset members have advanced proposals to annex the whole West Bank, this is not seriously envisioned, since Areas A and B entail the same issues as Gaza.<sup>17</sup>

Just a quick look at the 2019 map<sup>18</sup> allows us to see how far behind the two-state solution has been left and how intense the creeping annexation has been. Almost 60% of the West Bank – all of Area C – is mainly consecrated to the settlement enterprise.<sup>19</sup> This means that around 413.000<sup>20</sup> settlers have established themselves in approximately 131 government-sanctioned settlements and approximately 110 outposts,<sup>21</sup> as opposed to the 180.000 – 300.000 Palestinians living in the remaining one percent of Area C.<sup>22</sup> Besides being subject to forced evictions, denial of construction permits and house demolitions from the government side, Palestinians are also victims of settler violence. All these measures, together with restrictions of their freedom of movement and systematic violations of human rights may leave them no other choice than to leave their place of residence, thus resulting in a *de facto* settlement expansion.<sup>23</sup>

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<sup>17</sup> Interview with Amichai Cohen. Dean of the Faculty of Law at the Ono Academic College and Director of the Center for Security and Democracy at the Israel Democracy Institute. Carried out in his office at the IDI in Jerusalem on 26 May 2019 at 12:00h.

<sup>18</sup> For an accurate view, see the Settlements Map developed by the Israeli NGO Peace Now <<https://peacenow.org.il/maps/peacenow-desktop/index.html>> It takes a few minutes to upload, but it is worth the wait.

<sup>19</sup> UNHCHR 2018 report (n 9) para 47.

<sup>20</sup> As of 2017, according to the Israeli Central Bureau of Statistics. This figure excludes the settlers in East Jerusalem. Office of the European Union Representative (West Bank and Gaza Strip, UNRWA) ‘Six-Month Report on Israeli Settlements in the occupied West Bank, including East Jerusalem (Reporting period July-December 2019)’ (2019) <[https://eeas.europa.eu/delegations/palestine-occupied-palestinian-territory-west-bank-and-gaza-strip/57606/six-month-report-israeli-settlements-occupied-west-bank-including-east-jerusalem-reporting\\_en](https://eeas.europa.eu/delegations/palestine-occupied-palestinian-territory-west-bank-and-gaza-strip/57606/six-month-report-israeli-settlements-occupied-west-bank-including-east-jerusalem-reporting_en)> accessed 2 May 2019.

<sup>21</sup> Outposts are considered illegal even within Israeli law, since they were built without government recognition. However, they benefit from government tolerance and, seldom, also assistance. B’Tselem ‘Statistics on Settlements and Settler Population’ (2019) <[www.btselem.org/settlements/statistics](http://www.btselem.org/settlements/statistics)> accessed 3 May 2019.

<sup>22</sup> UNHCHR 2018 report (n 9) para 47.

<sup>23</sup> UNHCHR ‘Report of the United Nations High Commissioner for Human Rights on the Israeli Settlements in the Occupied Palestinian Territories, including East Jerusalem, and in the Occupied Syrian Golan’ (2019) UN Doc A/HRC40/42, 5-7.



As the occupation reaches its 51<sup>st</sup> anniversary, it is now so entrenched that current generations are sometimes not able to see it. According to a 2017 study, about 60% of Israelis think that Ariel, Kiryat Arba, and Ma’Ale Adumim, three of the biggest settlements in the West Bank, are located within Israel.<sup>24</sup> According to Oded Haklai, this is one of the purposes of the settlements: to change the status of these territories in the mindset of Israelis.

Public opinion is thus shaped by politics and legislation. And the current political debate has been mainstreaming annexation ever since Donald Trump was elected president. The previous government, formed by ministers from Likud (right wing), Kulanu (center), Jewish Home (right wing, nationalist) and Shas (ultra-Orthodox),<sup>25</sup> has been prolific in annexationist laws and public declarations, animated by the belief that there is “a window of opportunity” for annexation.<sup>26</sup> This historic moment is the result of a mixture of positive factors: on the one hand, Trump’s pro-Israel administration, shown

<sup>24</sup> Watch the full study explained by its author at Oded Haklai ‘Why more and more Israeli Jews think the settlements are in Israel’ (Fathom Journal, 2017) <<http://fathomjournal.org/1967-why-more-and-more-israeli-jews-think-the-settlements-are-in-israel/>> accessed 7 May 2019.

<sup>25</sup> For more information on Israeli political parties, see The Israel Democracy Institute ‘Elections and Parties’ <<https://en.idi.org.il/israeli-elections-and-parties/>> accessed 8 May 2019.

<sup>26</sup> Toi Staff, ‘Settlers Hail ‘Historic Opportunity’ After Report Trump Won’t Oppose Annexation’ *The Times of Israel* (Jerusalem, 13 May 2019) <[www.timesofisrael.com/settlers-hail-historic-opportunity-after-report-trump-wont-oppose-annexation/](http://www.timesofisrael.com/settlers-hail-historic-opportunity-after-report-trump-wont-oppose-annexation/)> accessed 9 July 2019.

in the moving of the Embassy to Jerusalem, the recognition of Israeli sovereignty over the Golan Heights and the apparently annexationist plans that have been leaked so far of the Deal of the Century.<sup>27</sup> On the other hand, the Brexit and the far right wing wave have resulted in a European Union focused on its own internal crisis.<sup>28</sup>

Consequently, when we started writing this dissertation, it seemed like the likelihood of annexation – at least of specific settlements – was very high. However, Netanyahu's failure to form a coalition after the April 2019 elections may have reduced considerably this historic opportunity.<sup>29</sup> Taking into account that new elections will be in September and that a coalition will not be formed until October, that would leave more or less a year before the US presidential elections in November 2020. A year to approve and enact a controverted annexation law without having the guarantee that Trump will be reelected seems like a difficult and risky task to carry out, which means that the window of opportunity may have shrunk.<sup>30</sup>

#### 1.4. Preliminary aspects. Applicable norms.

The international community has largely declared the Palestinian territories to be under belligerent occupation<sup>31</sup>, despite Israel's denial.<sup>32</sup> The State considers them "disputed territories" to which Israel has a sovereign claim, and refers to them as "Judea and Samaria".<sup>33</sup> The official reasoning is that the Fourth Geneva Convention (which is one of the instruments that governs the laws of occupation) does not apply *de jure*, but

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<sup>27</sup> Ibid. See also René Backmann, 'L'Arnaque Historique du Plan de Paix Américain' *Mediapart* (Paris, 9 Avril 2019).

<sup>28</sup> Interview Michael Sfard, activist and Human Rights Lawyer. Carried out through telephone, on 10 June 2019 at 12:00h.

<sup>29</sup> Interview with Yuval Shany. Chair of the United Nations Rights Committee and Hersch Lauterpacht Chair in International Law at the Hebrew University of Jerusalem. Carried out in his office at the Israel Democracy Institute on 19 June 2019 at 15:30h. Interview with Michael Sfard (n 30).

<sup>30</sup> Ibid.

<sup>31</sup> The first UNSC resolution, number 242 (1967), urged Israel to withdraw from "the territories occupied in the recent conflict." UNSC Res 242 (22 November 1967) S/RES/242. This position has been reiterated in subsequent UNSC resolutions, as well as in UNGA resolutions which explicitly refer to the "territories occupied by Israel", such as resolution 2546 (1969), and on the ICJ Advisory Opinion on the Wall. It is also the stance of the ICRC and the European Union.

<sup>32</sup> The State argues that the West Bank and Gaza were under no sovereign government prior to their annexation by Jordan and Egypt, and therefore the Fourth Geneva Convention does not apply, since there is no "occupation of the territory of a *High Contracting Party*." (see article 1 common to all Geneva Conventions). Eyal Benvenisti, *The International Law of Occupation* (2<sup>nd</sup> edn, OUP 2012) 204.

<sup>33</sup> Samuel Osborne, 'Israeli Deputy Foreign Minister Denies Palestinians Live Under Occupation: 'This is Judea and Samaria' Independent (London, 2 November 2017) <[www.independent.co.uk/news/world/middle-east/israel-deputy-foreign-minister-palestinians-occupation-settlements-judea-samaria-tzipi-hotovely-a8033611.html](http://www.independent.co.uk/news/world/middle-east/israel-deputy-foreign-minister-palestinians-occupation-settlements-judea-samaria-tzipi-hotovely-a8033611.html)> accessed 12 July 2019.

the State voluntarily applies its humanitarian provisions, and the Israeli High Court (hereinafter HCJ) has never contested this position.<sup>34</sup> On the contrary, it has relied on this statement to apply the laws of occupation when Palestinians from the occupied territories file complaints against the Israeli public administration,<sup>35</sup> while the State has done the same in some cases.<sup>36</sup>

Even though it is not the purpose of this thesis to analyze in detail the international law of occupation, we believe it is necessary to make some important remarks, mainly in order to distinguish this institution from that of annexation, since this distinction will guide us throughout the following pages. Consequently, we will now proceed to explain the main principles that govern both institutions.

The two major instruments that regulate belligerent occupation are the Hague Regulations of 1907<sup>37</sup> and the Fourth Geneva Convention (hereinafter IVGC) of 1949. Afterwards, the First Additional Protocol of 1977 (hereinafter API) strengthened this institution by the fundamental guarantees laid down in article 75.<sup>38</sup> As has been set out in these provisions, occupation is temporary and does not affect the sovereignty of the occupied state<sup>39</sup>; this is mainly what differentiates the “regretful, yet legal, reality of occupation from the illegal act of annexation.”<sup>40</sup> The occupying power is to act in the best

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<sup>34</sup> David Kretzmer, ‘The Law of Belligerent Occupation in the Supreme Court of Israel’ (2012) 94 (885) *International Review of the Red Cross* 207, 209-2013. See also François Dubuisson, ‘La Construction du Mur en Territoire Palestinien Occupé Devant la Cour Suprême d’Israël : Analyse d’un Processus Judiciaire de Légitimation’ in Bruylant (ed), *Droit du Pouvoir, Pouvoir du Droit : Mélanges Offerts au Professeur Jean Salmon* (2007) 893 and 894.

<sup>35</sup> As explained by Eyal Benvenisti, at first the High Court only applied the Hague Regulations as customary international law, but ended up applying the fourth Geneva Convention when military commanders started invoking it to support their allegations. Eyal Benvenisti (n 34) 210. The HCJ observed that not all of the provisions of the IVGC amount to customary law; however, since the State accepted to apply *de facto* its humanitarian provisions, the Court has never had to decide what are the constituent elements of occupation. David Kretzmer (n 36) 209-2013.

<sup>36</sup> For instance, the Israeli government invoked article 53 the Fourth Geneva Convention in order to justify the necessary expropriation of private land to set up the Separation Wall in 2002. See *Beit Sourik Village Council v The Government of Israel* (2004) HCJ 2056/04, para 15.

<sup>37</sup> Israel is not a party to the Fourth Hague Convention, to which the Hague Regulations are annexed. ICJ AO on the Wall (n 9) para 89.

<sup>38</sup> ICRC ‘Lesson 9 - The Law of Armed Conflict: Belligerent Occupation’ (2002) 2.

<sup>39</sup> ICRC. ‘Commentary on article 47 of the Fourth Geneva Convention’ (ICRC, 1958) <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C4712FE71392AFE1C12563CD0042C34A>> accessed 3 May 2019.

<sup>40</sup> Michael Sfar ‘Israel and Annexation by Lawfare’ (2018) *The New York Review* <[www.nybooks.com/daily/2018/04/10/israel-and-annexation-by-lawfare/](http://www.nybooks.com/daily/2018/04/10/israel-and-annexation-by-lawfare/)> accessed 28 April 2019.



interest of the people under occupation, who are protected persons under the IVCG, and must administer the territory in good faith.<sup>41</sup>

What is most important, the occupying power cannot annex the occupied territory. The annexation of territories through war, be it defensive<sup>42</sup> or an act of aggression, is unlawful and does not produce any effects in international law. In fact, the IVGC stipulates that its provisions continue to be applicable to protected persons despite annexation,<sup>43</sup> and third states have a legal obligation not to recognize or legitimize in any way the consequences of the annexation.<sup>44</sup> This unlawfulness is a result of the general prohibition of the use or threat of force introduced by the UN Charter, but has also been largely confirmed by State practice through Security Council and UNGA resolutions.<sup>45</sup> Which means that the prohibition can be considered to have the status of *ius cogens*<sup>46</sup>, and no exceptions or derogations can apply.<sup>47</sup>

To date, there are 187 Security Council (binding) resolutions addressing the Palestinian question.<sup>48</sup> The latest one, adopted in 2016,<sup>49</sup> focuses once again on the illegality of settlements, demanding Israel to cease such activities and underlining the

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<sup>41</sup> For a broader understanding, see the application of the Legality Test to the Israeli occupation at UNHCHR 'Report of the Special Rapporteur on the situation of human rights in the Palestinian occupied territories since 1967' (2017) UN Doc A/72/43106, 15-21.

<sup>42</sup> The State of Israel argues that the 1967 war was a riposte in self-defense under article 51 of the UN Charter against the aggression of Syria, Jordan and Egypt. Therefore, the annexation of East Jerusalem and the Golan Heights was a result of a defensive war and, therefore, lawful. Without entering into historical debates as to the defensive character of this war, this argument contradicts the very institution of self-defense, which is limited to restoring the *status quo ante*, and several UN Security Council resolutions, such as Resolution 242 and 492. Eliav Liebllich 'The Golan Heights and the Perils of "Defensive Annexation"' (2019) Just Security <[www.justsecurity.org/63491/the-golan-heights-and-the-perils-of-defensive-annexation/](http://www.justsecurity.org/63491/the-golan-heights-and-the-perils-of-defensive-annexation/)> accessed 4 May 2019. See also Yehuda Blum's position as explained in Benjamin Rubin 'Israel, Occupied Territories' (MPEPIL 2009) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1301?rskey=svRcUv&result=5&prd=EPIL>> accessed 5 May 2019.

<sup>43</sup> See article 47 of the Fourth Geneva Convention.

<sup>44</sup> International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts' (2005).

<sup>45</sup> Mainly the UNGA Friendly Relations Declaration 2625 (1970) and the UNGA resolution 3314 (XXIX) on the definition of Aggression, as well as Security Council resolution 242 (1967). See Rainer Hofmann 'Annexation' (MPEPIL 2013) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1376?rskey=tdYZDj&result=1&prd=EPIL>> accessed 4 May 2019.

<sup>46</sup> Norms having the character of *ius cogens* are peremptory norms of general international law, which the international community as a whole recognizes that cannot be derogated from and that need be modified by a norm having the same character. Jochen A Frowein 'Ius Cogens' (MPEPIL, 2013) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1437?prd=EPIL>> accessed 3 July 2019.

<sup>47</sup> UNHCHR 2018 report (n 9) para 24.

<sup>48</sup> To check the list, see Security Council Report 'UN Documents for Israel/Palestine' <[www.securitycouncilreport.org/un\\_documents\\_type/security-council-resolutions/?ctype=Israel%2FPalestine&cbtype=israelpalestine](http://www.securitycouncilreport.org/un_documents_type/security-council-resolutions/?ctype=Israel%2FPalestine&cbtype=israelpalestine)> accessed 4 May 2019.

<sup>49</sup> UN 'Resolution 2334 (2016)' S/RES/2334 (2016).



lack of international recognition to any changes on the Green Line.<sup>50</sup> Needless to say, settlements are prohibited under article 49 of the IVGC.<sup>51</sup> Under the Additional Protocol to the IVGC – to which Israel is not a party –<sup>52</sup> and the Rome Statute – to which it still is not, but to which Palestine acceded in 2015<sup>53</sup> –, they amount to a war crime in international armed conflicts.<sup>54</sup>

The establishment of settlements constituted one of the first stages in Israel's creeping annexation, a way of creating facts on the ground.<sup>55</sup> In this line, the International Court of Justice, regarding the Separation Wall, refers to this concept of “*fait accompli*” that would be “tantamount to *de facto* annexation.”<sup>56</sup>

Noting that the distinction between *de facto* and formal annexation will be addressed in the next section, it is nevertheless important to mention now other applicable international instruments. The fact that settlements are considered unlawful by the vast majority of the international community raises the question of how other states must proceed faced to this illegality. We can find the answer in the Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>57</sup> Article 41 establishes that a serious breach of an obligation arising from a peremptory norm – such as the systematic violation of the Palestinian's right to self-determination and of the prohibition to transfer Israel's own population to the occupied territories – gives way to three obligations for third states: a) to cooperate to bring to an end the unlawful act; b) not to recognize as

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<sup>50</sup> The Green Line was set out in the 1949 Armistice border between Israel and Jordan. Although the latter stressed that the line was not supposed to create international borders, the term is nowadays used by the UN to refer to the pre-1967 borders, which do not include the West Bank, East Jerusalem, Gaza, and the Golan Heights.

<sup>51</sup> See article 49, paragraph 6 of the Fourth Geneva Convention. <<https://ihl-databases.icrc.org/ihl/WebART/380-600056>> accessed 10 July 2019.

<sup>52</sup> Settlements are also considered a grave breach of the IVGC under article 85 (4) (a) of the I Additional Protocol, and therefore a war crime. Even though Israel is not a party of the API, the prohibition to transfer its own population to occupied territories has been accepted as part of international customary law. ICRC, ‘IHL Customary Law Database: Rule 130. Transfer of Own Civilian Population into Occupied Territory’ (ICRC, December 2018) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule130#Fn\\_84AA34DB\\_00002](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule130#Fn_84AA34DB_00002)> accessed 4 June 2019. See also Diakonia IHL Resource Center ‘Litigating settlements: The Impact of Palestine's Accession to the Rome Statute on the Settlement Enterprise’ (2015) 5.

<sup>53</sup> ICC ‘The State Parties to the Rome Statute’ <[https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#P](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#P)> accessed 13 July 2019.

<sup>54</sup> As set out in article 8, b) (viii) of the Rome Statute. UNGA, *Rome Statute of the International Criminal Court* (last amended 2010, International Criminal Court, 2011) <[www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatutengl.pdf](http://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatutengl.pdf)> accessed 10 July 2019.

<sup>55</sup> Ori Nir and Debra Shushan ‘From Creeping to Leaping: Annexation in the Trump-Netanyahu Era’ (Americans for Peace Now 2018) 1.

<sup>56</sup> ICJ AO on the Wall (n 9) para 121.

<sup>57</sup> International Law Commission (n 46)

lawful the situation; and c) not to aid or assist in maintaining that situation.<sup>58</sup> These obligations have been specifically set out concerning Israel in the Wall Advisory Opinion, but were first developed in the ICJ Advisory Opinion on Namibia.<sup>59</sup>

Last, but not least, international human rights instruments apply alongside IHL, being reconciled, when incompatible, by the latter's character of *lex specialis*.<sup>60</sup> In particular, we will analyze in the next section the impact of annexation on the right of Palestinians to self-determination, political rights, and non-discrimination. The former is enshrined in common article 1 to both International Covenants of 1966<sup>61</sup> and in the UNGA resolution 2625 (XXV). These provisions affirm Palestinians' right to freely choose their political status, pursue their development, and dispose of their resources, thus shaping the political and economic aspect of internal self-determination.<sup>62</sup> On the other hand, the Palestinian people are also entitled to the external dimension of the right, which allows for independence in the context of colonial, alien or racist domination.<sup>63</sup> The right to self-determination has been said to have *ius cogens* status<sup>64</sup> and create obligations *erga omnes*.<sup>65</sup>

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<sup>58</sup> This is without prejudice to the obligation not to aid or assist in the *commission* of the wrongful act, established in article 16, which applies to all kinds of rules and not only to peremptory norms. James Crawford (n 1) para 74-77.

<sup>59</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) 1971.

<sup>60</sup> Orna Ben Naftali 'PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies' in Orna Ben-Naftali (ed) *International Humanitarian Law and International Human Rights Law* (OUP 2011) 139. See also Nils Melzer, 'International Humanitarian Law: a Comprehensive Introduction' (2016) ICRC, p 29. The ICJ has also established that human rights law applies in the context of belligerent occupation in its Advisory Opinion on the Wall and in the Case Concerning Armed Activities in the Territory of the Congo.

<sup>61</sup> Israel ratified both Covenants on 3 October 1991.

<sup>62</sup> Ebru Demir, 'The Right to Internal Self-Determination in Peacebuilding Processes: A Reinterpretation of the Concept of Local Ownership from a Legal Perspective' (2017) 8 *The Age of Human Rights Journal* 18.

<sup>63</sup> Christine Griffioen, *Self-Determination as a Human Right: the Emergency Exit of Remedial Secession* (Science Shop of Law, Economics and Governance, Utrecht University, 2010) 35.

<sup>64</sup> Although the status of self-determination as *ius cogens* is somewhat contested by the doctrine, the commentary to article 50 of the ILC Draft Articles on the Law of Treaties mentioned it as such. UN 'Draft Articles on the Law of Treaties with Commentaries' (1966) 2 *Yearbook of the International Law Commission* 187, 248.

<sup>65</sup> As stated by the ICJ in its Advisory Opinion on East Timor. *Case Concerning East Timor (Portugal v Australia)* (Judgement) [1995], ICJ Rep 90, 16. From the Latin, "in relation to everyone". *Erga omnes* obligations are owed to the international community as a whole, and therefore all states have a legal interest in their protection. The right to self-determination and certain fundamental provisions of international humanitarian law have been characterized as *erga omnes* obligations. Jochen A Frowein, 'Obligations *erga omnes*' (MPEPIL, 2008) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1400>> accessed 3 July 2018.

On the opposite side, political rights may be derogated under IHL.<sup>66</sup> Together with the prohibition of discrimination and the principle of equality before the law, they are gathered in the ICCPR, which binds Israel to comply with its provisions. Nonetheless, the issue of political rights in the West Bank is a complicated one, since it falls from the competence of the Palestinian Authority, which is operating under an expired mandate. Without entering to consider the PA's inability to guarantee the most basic political rights and its growing authoritarian character, the State of Israel systematically violates these rights through arbitrary detentions, restrictions on freedom of movement and the expansion of settlements.<sup>67</sup>

However, these rights, as well as the prohibition of discrimination, will gain a completely different dimension when we analyze them in the context of annexation, especially in the hypothesis of a full formal annexation of Area C. At this stage, and having set out the context and the applicable instruments, we may try to answer our research questions: Are there conceptual differences between *de facto* and *de jure* annexation? Would there be any legal consequences from Israel's shift towards the latter? Does the distinction, in the end, serve any purpose?

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<sup>66</sup> In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ stipulated that the ICCPR applies in armed conflict, with the exception foreseen in its article 4, which allows to derogate certain provisions in situations of emergency. Aeyal M. Gross, 'Human Proportions: are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 EJIL 1, 2.

<sup>67</sup> On the opposite side, settlers in the West Bank have full political rights in Israel. See the profile of the West Bank in Freedom House, 'Freedom in the World 2018', which concludes that the freedom status is: not free. <<https://freedomhouse.org/report/freedom-world/2018/west-bank>> accessed 10 May 2019.

2. Current Israeli practices and how they amount to *de facto* annexation. Has the occupation become illegal?

Hoffman's definition of annexation presupposes two elements: *corpus* – the effective occupation of the territory – and *animus* – the intent to permanently acquire title over it.<sup>68</sup> Both elements are self-evident in the case of Israel and the West Bank; the first one shows through more than 50 years of occupation; the second one can be seen in the many public declarations, policies, and legislation that have been adopted in the past years, particularly during this latest legislature. We will address these practices in the following pages, determining that it is no longer question to talk about occupation, it is now the moment to differentiate between *de facto* and *de jure* annexation, and try to foresee the ramifications of taking the final step towards formal, illegal, annexation of the West Bank. Keeping in mind that Israel already crossed this line when it annexed East Jerusalem and the Golan Heights, two precedents that will be analyzed in Section III of this dissertation.

It is interesting to mention that definitions of annexation do not distinguish between *de facto* and *de jure*.<sup>69</sup> States, during their interventions in General Assembly plenary meetings, do not generally refer to any of them and issue condemnations of “annexation” plainly.<sup>70</sup> On the other hand, after the ICJ mentioned that the wall and its regime could become tantamount to “*de facto* annexation” in its Advisory Opinion<sup>71</sup>, it seems like this term has gone mainstream among experts and civil society.<sup>72</sup> But why is this distinction made?

Before we can answer this, it is necessary to assess if there are any conceptual differences between *de facto* and *de jure* annexation, which was our first research question. Section II will be devoted to answering it. In order to do so, we will first define each of these concepts, as well as that of occupation, so that we can set the basis for a

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<sup>68</sup> Rainer Hofmann (n 47).

<sup>69</sup> Ibid. See also Enciclopedia Britannica, ‘Annexation’ <[www.britannica.com/topic/annexation](http://www.britannica.com/topic/annexation)> accessed 30 May 2019.

<sup>70</sup> For instance, in the general debate where UNGA resolution 68/262 on the territorial integrity of Ukraine was adopted, only Turkey made reference to the “*de facto* situation”, while Costa Rica mentioned the “fait accompli”, while the rest of the intervening states just mentioned “annexation” full stop. UNGAOR, ‘UNGA Sixty-Eighth Session: 80<sup>th</sup> Plenary Meeting’ (2014) UN Docs, A/68/PV.80

<sup>71</sup> ICJ AO on the Wall (n 9) para 121.

<sup>72</sup> n 1.

thorough examination of Israeli practices and legislation, and determine what amounts to what (2.1.). We will use the occupation-related section to introduce briefly the debate over the potential illegality of the occupation, which is directly related to questions of self-determination and the prohibition of acquisition of territory through the use of force. By providing both definitions of *de facto* and *de jure* annexation, we will identify the differences and briefly point out the reason why this distinction is made. Then, we will identify and focus on those measures that constitute *de facto* annexation, which, disguised under the general regime of occupation, have drawn the picture of what some have called “creeping annexation” or “occup’ annexation”. We will briefly go over the policies (2.2), because they have been extensively covered in other pieces of academic work, only to continue with the recent legislative measures (2.3). The examination of the latter will help us realize that the boundary between *de facto* and *de jure* is not that easy to identify.

Differentiation is important because, as Orna Ben-Naftali argues, indeterminacy is the main characteristic of the Israeli regime in the oPt.<sup>73</sup> Obfuscating the boundaries between occupation and annexation, temporary and indefinite, the rule and the exception, has been the strategy that has allowed for carrying out clearly illegal measures and affording less protection to individuals.<sup>74</sup> This has been greatly expressed in the following statement: “In the hybrid reality of occupation and annexation the present government and Knesset are seeking to create, the Palestinians lose out on both: they are afforded neither the protections and rights of international law nor those of Israeli law.”<sup>75</sup>

## 2.1. What is *de facto* annexation? Differences with the regime of occupation and *de jure* annexation.

Defining the concepts of occupation and annexation may be useful for discerning which measures amount to what and, especially, which measures, however oblique they may be, are permitted under international law and which ones are not. On the other hand, trying to provide a definition and showcasing the differences between *de facto* and *de jure* annexation will help us in the assessment of whether the current Israeli government is shifting towards the latter. It will also help us determine, in Section III, what would be

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<sup>73</sup> Orna Ben-Naftali (n 62) 132.

<sup>74</sup> *ibid.*

<sup>75</sup> The Association for Civil Rights in Israel (ACRI), ‘Direct Legislation of the 20<sup>th</sup> Knesset Imposed on the West Bank: Legislative Initiatives to Promote Annexation and Weaken the Laws of Occupation’ (2018) 17.

the impact of formal annexation on human rights and IHL violations, as well as the ramifications at the national level that may push for this declaration and the potential consequences on third state obligations. At the core of this assessment is the idea that, as long as the annexation remains *de facto*, there is an appearance of temporality that reversibility – in practice – “justifies” the violations of Palestinian rights and the inaction of the international community.

Eyal Benvenisti defines the phenomenon of occupation as “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.”<sup>76</sup> Israel’s denial of the occupation is based on several issues,<sup>77</sup> although the one that raises after reading this definition is that of the sovereign claim.<sup>78</sup> Whether Israel has a title to the “Land of Israel” is an issue that we will not address here, although mentioning it is important for the purposes of this thesis. This sovereign claim to the whole Land of Israel can be seen in the fact that Israel has never defined its boundaries. In fact, the 1949 armistice agreements specified that such lines do not prejudice future frontiers,<sup>79</sup> even though the general consensus places the limit at this pre-1967 borders.<sup>80</sup> By systematically denying the Green Line as a boundary, Israel benefits from this territorial ambiguity and from its control of Area C to establish facts on the ground, thus incurring in *de facto* annexation.

This is the reason why Israel does not want to be perceived as occupying power in the territories, because that would do away with its pretense to be sovereign.<sup>81</sup> Faced with this claim to the “disputed” territories, it is hard for third states not to identify Israel’s measures as annexation; in an analogy, when Morocco affirms it is the true sovereign in Western Sahara,<sup>82</sup> it is difficult for states not to consider this claim when analyzing the

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<sup>76</sup> (Emphasis added). Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli, ‘Illegal Occupation: Framing the Occupied Palestinian Territory’ (2005) 23 Berkeley Journal of International Law 551, 560.

<sup>77</sup> That there was no prior sovereign governing the oPt, that the territories were occupied after a war on self-defense. Tal Becker, the Legal Advisor to the Ministry of Foreign Affairs of Israel, explained that these reasons, together with the existence of negotiations, make the application of the laws of occupation to the Israeli case a special situation. Speech on the “Challenges and Opportunities of Israel at the International Level” at the Legal Network Conference at the Inbal Hotel of Jerusalem on 19 July 2019.

<sup>78</sup> Dore Gold, ‘From ‘Occupied Territories’ to ‘Disputed Territories’”(2002) Jerusalem Center for Public Affairs <[www.jcpa.org/jl/vp470.htm](http://www.jcpa.org/jl/vp470.htm)> accessed 30 May 2019.

<sup>79</sup> ‘Israel and Jordan: General Armistice Agreement (with Annexes).

<sup>80</sup> As can be seen in many UNSC and UNGA resolutions. For instance, the latest UNSC Res 2334 (2016) establishes that “it will not recognize any changes to the 4 June 1967 lines”.

<sup>81</sup> François Dubuisson, in discussion with the author, June 2019.

<sup>82</sup> ‘Morocco's Claims Over the Western Sahara Gain International Attention Upon EU Decision’ (*European Forum for Democracy and Solidarity*, 19 June 2018) <[www.europeanforum.net/headlines/morocco-s-claims-over-the-western-sahara-gain-international-attention-upon-eu-decision](http://www.europeanforum.net/headlines/morocco-s-claims-over-the-western-sahara-gain-international-attention-upon-eu-decision)> accessed 14 July 2019.

legal consequences of Morocco's actions. In any case, it suffices to note that UN and the ICJ have largely affirmed that the Palestinian territories are under occupation, ending any possible controversy.<sup>83</sup>

Under the laws of occupation, an Occupying Power may legitimately take some measures that restrict the rights and freedoms of the people under occupation,<sup>84</sup> which must be justified on security needs and/or on achieving the welfare of the local population.<sup>85</sup> The element of discretion underlying these lawful restrictions has sometimes allowed Israel to disguise its annexationist interest as security measures. The settlements and the Wall are the clearest examples, but there are other cases where the illegality is not as easy to determine. For instance, the construction of roads and other infrastructure has been a lawful measure when it has permitted both Palestinian and Israeli to access them, as opposed to the construction of roads that lead the way to the settlements or the infrastructure built within them, which purport to support the annexation.<sup>86</sup>

This leads us to consider, even if briefly, the postulate that an occupation, which is *per se* a neutral situation, can nonetheless become illegal in time.<sup>87</sup> The international community has been focused on studying the legality of particular Israeli measures<sup>88</sup>, instead of assessing the legality of the regime as such.<sup>89</sup> Nonetheless, determining that the Israeli occupation has become illegal would heighten the political responsibility of the international community to bring the occupation to an end,<sup>90</sup> thus having a similar political impact as formal annexation would have. Under the laws of state responsibility, which dictate that an unlawful act must cease, an illegal occupation must be ended immediately, without prior negotiations.<sup>91</sup>

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<sup>83</sup> ICJ AO Wall (n 9) para 78. UNSC resolution 242 (1967) and subsequent.

<sup>84</sup> Danio Campanelli, 'The Law of Military Occupation Put to the Test of Human Rights Law' (2008) 90 (871) *International Review of the Red Cross* 653, 667.

<sup>85</sup> Eyal Benvenisti, 'Occupation, Belligerent' (MPEPIL 2009) para 28 – 31.

<sup>86</sup> Interview with . Ziv Stahl. Director of the research department at Yesh Din. Carried out through Skype on 1 July 2019 at 14:00h. Interview with Michael Lynk. Special Rapporteur on the situation of human rights in the Palestinian occupied territories since 1967 and Associate Professor of Law at Western University in Ontario. Carried out through Skype on 2 July 2019 at 14:30h.

<sup>87</sup> Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law* 551, 558.

<sup>88</sup> The annexation of East Jerusalem and the Golan Heights, the settlements, the Wall. UNSC resolutions 242 and 478, the ICJ AO on the Wall.

<sup>89</sup> Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli (n 78) 552. Interview with Michael Lynk (n 88).

<sup>90</sup> Interview with Michael Lynk (n 88).

<sup>91</sup> International Law Commission (n 46) article 30. Yaël Ronen, 'Illegal Occupation and Its Consequences' (2008) 41 *Israel Law Review* 201, 228.

Relying only on what the laws of occupation stipulate, the Special Rapporteur has elaborated a test on the legality of the occupation that sits on four tenets: 1) the belligerent occupier cannot annex; 2) the occupation must be temporary, and thus the occupier must seek to end it; 3) the occupier must act in the best interest of the people under occupation and; 4) the occupier must administer the territory in good faith.<sup>92</sup> After applying this test to the Israeli occupation, the Special Rapporteur determined that Israel “has crossed (the) red line”. Nevertheless, he also recommended the United Nations to commission a study and ask for an Advisory Opinion from the ICJ on the issue.<sup>93</sup>

The question of whether the Israeli occupation has become illegal still divides the doctrine, and discussing it in depth is out of the scope of this dissertation.<sup>94</sup> Backing the Special Rapporteur’s conclusion, we believe that, even if it were only for the formal annexation of East Jerusalem and the Golan Heights, as well as for the *de facto* annexation of the settlements, the Israeli occupation has turned into an unlawful one. A certainty that would only accrue with the *de jure* annexation of any of the settlements and/or of the whole Area C.

What are, then, the differences between the regime of occupation and that of annexation? The intent to act as sovereign. Historically, annexation has been considered as a binary issue; a territory is either annexed or not.<sup>95</sup> Nonetheless, annexation is more of a process, from which a formal declaration is not the only, nor the most important step.<sup>96</sup> In this sense, Professor Cohen singles out a process of assimilation, in which life in the occupied territories is so similar to that in Israel in such a way that, in the minds of peoples, they could as well amount to Israel proper.<sup>97</sup> And this process of assimilation intends to make “the status quo in the West Bank a permanent state of affairs.”<sup>98</sup> The following assessment of policies (2.2.) and legislative measures (2.3) will allow us to

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<sup>92</sup> For a complete understanding, see UNHCHR 2017 report (n 43) 9 – 21.

<sup>93</sup> Ibid 22.

<sup>94</sup> See other pieces of work on the issue, such as Ariel Zmach, ‘Can Occupation Resulting from a War of Self-Defense Become Illegal?’ [2015] Minnesota Journal of International Law 316 and Yaël Ronen, ‘Illegal Occupation and Its Consequences’ (2008) 41 Israel Law Review 201. See also Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli (n 78) and UNHCHR 2017 report (n 43).

<sup>95</sup> Amichai Cohen ‘Israel’s Control of the Territories – An Emerging New Legal Paradigm’ (2016) 21 Palestine Israel Journal <<https://papers.ssrn.com/abstract=2782275>> accessed 18 May 2019.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Dov Lieber, ‘Plan to Apply Israeli Law in West Bank: Equal Rights or ‘Creeping Annexation’?’ *The Times of Israel* (Jerusalem, 15 May 2016) <[www.timesofisrael.com/plan-to-apply-israeli-law-in-west-bank-equal-rights-or-creeping-annexation/](http://www.timesofisrael.com/plan-to-apply-israeli-law-in-west-bank-equal-rights-or-creeping-annexation/)> accessed 18 May 2019.



understand that, despite the veil of ambiguity surrounding the entire regime, there are many factors that unequivocally point towards annexation.

Why, then, does the international community not condemn them as such? The settlements have been declared as “not having legal validity” in UNSC resolutions that have also confirmed the inadmissibility of the acquisition of territory by force, but these resolutions have never explicitly mentioned the word “annexation”.<sup>99</sup> Likewise, the Court has declared that the Wall and its associated regime “**would be** tantamount to *de facto* annexation” if it became permanent.<sup>100</sup> We can see in this precaution of the international community in openly declaring that a particular act constitutes annexation a glimpse of the importance of the distinction between *de facto* and *de jure* annexation: while the former gives states a bigger margin of appreciation, the latter makes, as we will see below, for much easier qualifications.

The Special Rapporteur gives, in his 2018 report, a comprehensive definition of *de facto* annexation that is useful to recall here:

“[A] descriptive term to illustrate the actions of a state in the **process** of consolidating – often through oblique and incremental measures – the legislative, political, institutional and demographic **facts to establish a future claim of sovereignty** over a territory acquired through force or war, but **without the formal declaration** of annexation.”<sup>101</sup>

On the other hand, *de jure* annexation can be defined as the “**formal declaration** by a state that it is **claiming permanent sovereignty** over territory which it had forcibly acquired from another state.”<sup>102</sup> In this sense, the one and only aspect that differentiates *de jure* annexation from *de facto* one is the way in which the intent to acquire permanent title over the territory is demonstrated; in the first case, it will be enacted in law or formally declared; in the second, it will have to be appreciated through different practices, legislation, and policies.<sup>103</sup> Many questions arise from such a formality that could somehow seem trivial: can the mere fact that annexation has not been formally declared justify that Palestinian’s rights are not respected? Do these regimes entail different

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<sup>99</sup> UNSC resolutions 242 (1967), 446 (1979), 452 (1979), 465 (1980), and 2334 (2016).

<sup>100</sup> ICJ Wall AO (n 9) para 121.

<sup>101</sup> (Emphasis added). UNHCHR 2018 report (n 9) para 29.

<sup>102</sup> Ibid.

<sup>103</sup> Valentina Azarova, ‘Israel’s Unlawfully Prolonged Occupation: Consequences under an Integrated Legal Framework’ (2017) European Council on Foreign Relations, 7.

consequences in practice? In order to answer this last question, we must first distinguish between the international and the domestic level: the former will be addressed now, while the consequences of shifting from *de facto* to *de jure* annexation in the Israeli case will be examined in Section III.

As has been stated before, the prohibition of acquisition of territory by force means that, in international law, annexation and its repercussions are null and void.<sup>104</sup> The annexed territory is deemed to be still under occupation, and its inhabitants continue to be under the protection of the IVGC.<sup>105</sup> One may wonder if these effects are only proper to formal annexations; indeed, the *de jure* annexation of East Jerusalem and the Golan Heights resulted in the adoption of Security Council resolutions claiming the nullity of any measures aimed at altering the status of the territories. However, the UNSC has also approved resolutions in which it declared the inadmissibility of acquisition of territory by force and the lack of legal validity of the establishment of settlements.<sup>106</sup> On the contrary, the outcome has not been the same with regards to the Separation Wall; a SC resolution on it could not pass due to the US veto, which has nonetheless not prevented the General Assembly from issuing one.<sup>107</sup> The ICJ stipulated in its AO the obligation of third states not to recognize as lawful the regime derived from its construction, although this was a result of the violation of a peremptory norm, and not because of its designation as *de facto* annexation.<sup>108</sup> Other measures of *de facto* annexation have not resulted in this claim of invalidity, such as the systemic declarations of state land or the Settlement Regulations Law. This might be because the former is just another step involved in the bigger picture of the settlement enterprise, which has been the object of condemnation. Regarding the Regulations Law, it may be that the international community is waiting to see if the HCJ will or will not strike it down as unconstitutional. In any case, the fact that the two main measures of *de facto* annexation have led the international community to denounce their lack of legal effects allows us to draw two conclusions: first, that, despite the above-

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<sup>104</sup> n 47.

<sup>105</sup> n 45.

<sup>106</sup> The most recent one being Security Council resolution 2334 (2016).

<sup>107</sup> UNGA, 'Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Including In and Around East Jerusalem' (2004) UN Doc A/RES/ES-10/15.

<sup>108</sup> Third state obligations arose from the violation of the right to self-determination and from certain IHL norms having attained customary status. ICJ Wall AO (n 9) para 156, 157 and 159.

mentioned precautions, they constitute, indeed, annexation; second, that, as such, they share the same legal consequences (or lack thereof) of formal annexation.

The fact that both types of annexation lead to the same consequences (at least in international law) reinforces the idea that the distinction has mainly a political interest. That a particular measure constitutes annexation is harder to establish without a formal declaration, and will greatly depend on the foreign policy of each state. Thus, the term “*de facto* annexation” gives freedom to states to either identify the measure as such even if a formal declaration has not taken place or to negate any claims of annexation as long as a formal declaration has not taken place.

## 2.2. Policies: the settlement enterprise and the Separation Wall.

Having introduced the conceptual differences existing between these three institutions, we will now address the measures that constitute *de facto* annexation. In other words, those that purport to create facts on the ground and blur the distinction made by the Green Line to a point where they are no longer reversible, and thus support Israel’s claim to sovereignty, without yet formally declaring the extension of sovereignty.

As we have seen through the previous definitions, annexation cannot only be achieved through lawfare. On the contrary, since the acquisition of territory by force was prohibited by the UN Charter, contemporary state practice shies away from formal declarations and denies, first, the occupation and, then, the annexation.<sup>109</sup> Bearing in mind the recent exception of Crimea and Sevastopol, where the process that started with Russian military presence and the celebration of a referendum culminated in the signing of a treaty of accession.<sup>110</sup>

In this part, we will briefly address how the two main non-legislative measures that Israel has been carrying out in order to establish its future claim to the territory of the West Bank cannot be justified as lawful practices under the laws of occupation. Both of them have been largely identified by the international community as *de facto* annexation;

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<sup>109</sup> Yaël Ronen, ‘A Century of the Law of Occupation’ (2014) 17 Yearbook of International Humanitarian Law 169, 2.

<sup>110</sup> ‘Treaty between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and on Creation of New Federative Entities within the Russian Federation’ signed on 18 March 2014. For a commentary and unofficial translation of the text, see Anatoly Pronin, ‘Republic of Crimea: a Two-Day State’ (2015) 3 (1) Russian Law Journal 133.

namely, the path of the Separation Wall and its associated regime and the declarations of state land and subsequent construction and promotion of settlements.<sup>111</sup>

As Eyal Benvenisti explains, it is unclear from where, among the rules of IHL, Israel has withdrawn the authority to establish the settlements.<sup>112</sup> The enterprise can no longer – if it ever could – be regarded as a military necessity, which is the only reason that allows for the requisition – not confiscation – of private property.<sup>113</sup> What is most important, settlements run contrary to the prohibition imposed on the occupier not to transfer its own population to the territory it occupies.<sup>114</sup> The whole enterprise can be seen through the lens of “the extension of Israeli jurisdiction” and “the roundabout process of *de facto* annexation.”<sup>115</sup> However, despite its repeated condemnation of settlements, the international community still subjects them to the future results of the peace process, as can be seen in UNSC res 2334 (2016) which calls only for the “cessation” of the enterprise. Thus, the perspective of a peace process contributes to the maintenance of this ambiguity surrounding Israel’s *de facto* measures.

For its part, the ICJ has already made a deep assessment of how the Separation Wall violates the laws of occupation in its Advisory Opinion.<sup>116</sup> Nonetheless, what can be more enlightening than the ICJ declaring that “the wall and its associated regime create a *fait accompli* on the ground”?<sup>117</sup> Some have argued<sup>118</sup> that the Court just states that the situation “**could well** become permanent, **in which case (...) it would be** tantamount to *de facto* annexation”.<sup>119</sup> To this, the only thing that can be retorted is that, 17 years and more than 10 billion NIS later, the wall **has** become permanent.<sup>120</sup>

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<sup>111</sup> Among others, UNSC resolutions 446 (1979), 452 (1979), 465 (1980) and 2234 (2016). See also the statement of the ICRC, ‘Conference of High Contracting Parties to the Fourth Geneva Convention’ (ICRC, 5 December 2001) para 5 <[www.icrc.org/en/doc/resources/documents/statement/57jrgw.htm](http://www.icrc.org/en/doc/resources/documents/statement/57jrgw.htm)> accessed 20 May 2019.

<sup>112</sup> Eyal Benvenisti (n 34) 226.

<sup>113</sup> See article 52 of the Hague Regulations. See also Yoram Dinstein, ‘The International Law of Belligerent Occupation and Human Rights’ (1978) 8 Israel Yearbook of Human Rights 104, 134-135 and Benjamin Rubin ‘Israel, Occupied Territories’ (n 44) 110. The ICJ also supports this vision in its Advisory Opinion on the Wall, ICJ (n 9) para 135.

<sup>114</sup> See article 49 (6) of the Fourth Geneva Convention.

<sup>115</sup> Eyal Benvenisti (n 34) 226.

<sup>116</sup> In order to read the full assessment of how the Wall violates IHL, see ICJ (n 9) 185 – 187, 189 and 192.

<sup>117</sup> ICJ (n 9) 121.

<sup>118</sup> Member of the Spanish Embassy, in discussion with the author, June 2019.

<sup>119</sup> (Emphasis added). ICJ (n 9) 121.

<sup>120</sup> That was the cost of the wall as of 2012. Furthermore, the maintenance costs amount to 1 billions NIS per year. Haggai Matar, ‘The Wall, 10 Years on: the Great Israeli Project’ 972 Magazine (Tel Aviv, 9 April 2012) <<https://972mag.com/the-wall-10-years-on-the-great-israeli-project/40683/>> accessed 11 July 2019. See also UNHCHR, ‘Report of the Special Rapporteur of the Commission on Human Rights, John Dugard,

In this line, and since Israel claims settlements to be temporary and needed as security measures, the concept of “*de facto*” annexation gives some room for third states who do not wish to condemn them too much as formal annexation. The same goes for the wall, disguised as a technical or security measure. However, when Israel’s intention to extend its jurisdiction is explicit, states can no longer deny the annexation and their efforts of qualification are much simpler, as we will see below in the case of East Jerusalem and the Golan Heights.

Apart from these two cases, there are other practices that raise concerns because the general public is not aware of them and the issue of annexation cannot be seen as clearly, although it is nonetheless present. The silent adoption of the Levy Report,<sup>121</sup> which stated that the laws of occupation do not apply in the West Bank and provided recommendations for authorizing outposts,<sup>122</sup> lays the ground for Israel to continue with settlement expansion. The extension of economic incentives for green electricity available in Israel to settlers<sup>123</sup> or the unification of the egg market in Israel and the West Bank<sup>124</sup>, so that settlers’ egg quotas can be transferred to farmers in Israel proper, whose quotas are smaller,<sup>125</sup> are just small examples of what will be addressed in the next section: creeping annexation through legislative measures.

### 2.3. Recently approved legislation: halfway between *de facto* and *de jure* annexation.

The 19th and 20th Knesset have been prolific in annexation proposals, to no avail. Sixty bills were presented to the Knesset between 2015 and 2019, although only eight of them were finally enacted. The Yesh Din Annexation Legislation Database gathers all, differentiating between: those that seek to apply Israeli law and jurisdiction, those that allow the government to assume the powers of the Military Commander; those where the

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on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A’ (2004) Un Docs E/CN.4/2004/6, para 12.

<sup>121</sup> E. E. Levy, Tehiya Shapira, Amb. Alan Baker, ‘The Levy Commission Report on the Legal Status of Building in Judea and Samaria’ (2012).

<sup>122</sup> CNCD 11.11.11. (n 2) 12. For a complete assessment of how the Report is being adopted *de facto*, see Ziv Stahl, ‘From Occupation to Annexation: the Silent Adoption of the Levy Report on Retroactive Authorization of Illegal Construction in the West Bank’ Yesh Din (2016).

<sup>123</sup> Michael Sfard (n 9).

<sup>124</sup> *ibid.*

<sup>125</sup> Jonathan Lis, ‘In Israel, Even Eggs Are Cause for Conflict: New Poultry Law Slammed as ‘Creeping Annexation’ *Haaretz* (Tel Aviv, 12 June 2018) <[www.haaretz.com/israel-news/.premium-new-law-passed-for-west-bank-farmers-slammed-as-creeping-annexation-1.6173080](http://www.haaretz.com/israel-news/.premium-new-law-passed-for-west-bank-farmers-slammed-as-creeping-annexation-1.6173080)> accessed 11 July 2019.

Knesset legislates directly on the occupied territories; and those that seek to normalize and blur the Green Line. Only the first category amounts to *de jure* annexation, and will therefore be addressed in Section III. In this section, we will refer briefly to the remaining three, analyzing the most prominent proposals and assessing how and why they amount to *de facto* annexation.

Under the laws of occupation, the oPt are subject to the governance of the military commander, who is supposed to administer according to the pre-existing laws and the military orders it issues based on its temporary legislative power.<sup>126</sup> When the Knesset, which has not been elected by Palestinians living in the West Bank and therefore does not represent them, tries to assume this power and directly legislates over the territories, it is *de facto* extending its sovereignty.<sup>127</sup>

Some people argue that this is a much-needed measure, since the contrary would mean that settlers in the West Bank would be discriminated against on the basis of where they live.<sup>128</sup> However, settlers are already subjected to Israeli civil laws *in personam*.<sup>129</sup> and, in any case, settlements are illegal, which means that any measure devoted to strengthening them is affected by such illegality.<sup>130</sup>

In this sense, there are, among others, four main laws that raise concerns and that we will analyze briefly: the Settlement Regulations Law, the Norms Law, the Nation-State Basic Law, and the amendment to the Higher Education Law. However, in this context of occup'annexation, there are many other recent developments that must be seen with concern. We are referring here to the Amendment to the Administrative Affairs Court Law, which transfers the jurisdiction of the HCJ over West Bank cases to the

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<sup>126</sup> Yesh Din Database (n 8).

<sup>127</sup> *ibid.*

<sup>128</sup> See the declarations of Naftali Bennet at Jonathan Lis, 'Under Right-wing Pressure, Israeli Army Okays Extending Two Agricultural Laws to West Bank' *Haaretz* (Tel Aviv, 9 October 2018) <[www.haaretz.com/israel-news/.premium-under-pressure-idf-okays-extending-two-agricultural-laws-to-w-bank-1.6544925](http://www.haaretz.com/israel-news/.premium-under-pressure-idf-okays-extending-two-agricultural-laws-to-w-bank-1.6544925)> accessed 11 July 2019.

<sup>129</sup> John Reynolds, *Legitimizing the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory* (Al Haq, 2010) 17.

<sup>130</sup> As implied by the ICJ in the Wall AO (n 8) para 122. This reasoning is nonetheless explicit in Judge Buergenthal's Declaration on the Wall Advisory Opinion. "I agree that this provision (Article 49, Paragraph 6) applies to the Israeli settlements in the West Bank (...) It follows that the segments of the wall being built by Israel to protect the settlements are ipso facto in violation of international humanitarian law." ICJ Wall AO, Declaration of Judge Buergenthal, 244 <[www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-05-EN.pdf](http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-05-EN.pdf)> accessed 11 July 2019. David Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law' (2005) 99 (1) *The American Journal of International Law* 88, 93.

Jerusalem District Court<sup>131</sup>; the Ministerial Committee for Legislation decision, which states that any bill endorsed by the government must specify how it will apply to settlers living in the oPt<sup>132</sup>; the Museums Law, which states that specific Israeli law will also apply to museums in the West Bank...<sup>133</sup>

All these measures share, with the ones we will be discussing now, the element of extension of Israeli law to territories outside of its jurisdiction. They could be considered as a halfway point between *de facto* and *de jure* annexation: being enacted in law, and, most importantly, extending Israeli law, they go beyond the measures we have tackled before. However, since they do not explicitly or implicitly extend sovereignty, they do not reach the threshold of formal annexation. We will take a closer look at this latter aspect in Section III.

### 2.3.1. The Settlement Regulations Law

The Law for the Regulation of Settlement in Judea and Samaria (hereinafter Regulation Law)<sup>134</sup> seeks to regulate the settlements built “in good faith” or “with the consent of the state” and to “allow its continued establishment and development.” In practice, it serves to retroactively authorize illegal outposts built on Palestinian private land and thus expropriate them mediating compensation. Despite the clear violation of the right to property<sup>135</sup>, enshrined in the Hague Regulations in what regards protected persons, this law poses the problem of the extraterritorial application of the law. Indeed, this is one of the reasons why it is pending before the HCJ, a case in which the General Attorney has refused to defend the state due to the unconstitutionality of the projected law.<sup>136</sup>

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<sup>131</sup> Ori Nir and Debra Shushan (n 57). This amendment, approved in 2018, aims at blurring the Green Line, and thus the difference between Israel proper and the oPt. See the Administrative Affairs Courts Law (Amendment – a Decision of an Authority in the Area) Bill 5768 – 2018 at Yesh Din, ‘Annexation Legislation Database’ (n 8).

<sup>132</sup> Ori Nir, *ibid.*

<sup>133</sup> 11.11.11. CNCD (n 2) 12.

<sup>134</sup> Also known as the “Validation Law” or the “Regularization Law”.

<sup>135</sup> Yuval Shany and Yaël Ronen, ‘Israel’s Settlement Regulation Bill Violates International Law’ (*Just Security*, 20 December 2016) <[www.justsecurity.org/35743/israels-settlement-regulation-bill-violates-international-law/](http://www.justsecurity.org/35743/israels-settlement-regulation-bill-violates-international-law/)> accessed 2 July 2019.

<sup>136</sup> *ibid.*

The UN Special Envoy to the Middle East Peace Process stated, right after its passing, that the law “opens the potential for the full annexation of the West Bank.”<sup>137</sup> However, is that so? Before the Court, the government argued that the application of Israeli law outside the state “does not necessarily make that place part of Israel” and that “the Knesset can legislate in Judea and Samaria.”<sup>138</sup>

Robbie Sabel and Michael Sfard argue that the usual interpretation is that the extension of the law constitutes annexation.<sup>139</sup> What is relevant here is the criteria on which the law is being applied to the West Bank: it is no longer a personal application of Israeli law to settlers, but rather a territorial application.<sup>140</sup> It is the first time the Knesset passes a law that applies directly to the Palestinian land and its inhabitants.<sup>141</sup> Applying Judge Buergenthal’s assessment regarding the Separation Wall, since the law seeks to regularize settlements, which are illegal under international law, the law is in itself illegal.<sup>142</sup>

Finally, the Special Rapporteur’s definition of *de facto* annexation should serve to ease any doubts. It refers to those “legislative (...) facts to establish a future claim of sovereignty.” If the law is not struck down by the HCJ, 55 illegal posts, located deeply in the West Bank, with their 3.921 housing units, will be legalized, while further 3.043 Palestinian housing units will be open for expropriation.<sup>143</sup> The Regulations Law would result in a new configuration of the territory, taking ownership from private Palestinian hands and giving it to Israeli settlers. It denies Israel’s claim that settlements are temporary and means that the Knesset – and not the Civil Administration – is declaring itself as legislator over the West Bank, thus constituting another measure of *de facto*

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<sup>137</sup> Tovah Lazaroff, ‘UN: Israeli ‘Settlements Law’ Crosses Red Line, Opens Door for Annexation’ *The Jerusalem Post* (Jerusalem, 7 February 2017) <[www.jpost.com/Israel-News/Politics-And-Diplomacy/UN-Israeli-Settlements-Law-crosses-red-line-opens-door-for-annexation-480845](http://www.jpost.com/Israel-News/Politics-And-Diplomacy/UN-Israeli-Settlements-Law-crosses-red-line-opens-door-for-annexation-480845)> accessed 4 July 2019.

<sup>138</sup> Tovah Lazaroff, ‘Israeli Gov’t: Knesset Purview over West Bank not Akin to Annexation’ *The Jerusalem Post* (Jerusalem, 7 August 2018) <[www.jpost.com/Israel-News/Israeli-Govt-Knesset-purview-over-West-Bank-not-akin-to-annexation-564331](http://www.jpost.com/Israel-News/Israeli-Govt-Knesset-purview-over-West-Bank-not-akin-to-annexation-564331)> accessed 2 July 2019. See also ‘Responses of Israeli government and attorney general in Settlements Regularization Law Case (January 2018)’ (*Adalah*, 2018) <[www.adalah.org/en/content/view/9371](http://www.adalah.org/en/content/view/9371)> accessed 2 July 2019.

<sup>139</sup> Interview with Michael Sfard. Interview with Robbie Sabel. Former Ambassador Legal Adviser to the Israel Ministry of Foreign Affairs and Legal Advisor during the Madrid Conference Talks, and current Visiting Professor of International Law at the Hebrew University of Jerusalem. Carried out at the Legal Network Conference at the Inbal Hotel in Jerusalem, on 19 June 2019 at 10:45h.

<sup>140</sup> Michael Sfard (n 9).

<sup>141</sup> Ori Nir and Debra Shushan (n 57) 6.

<sup>142</sup> Judge Buergenthal (n 132) 224. This is also a ramification of the international law principle of *ex injuria ius non oritur*, “unjust acts cannot create law”.

<sup>143</sup> Peace Now Settlement Watch, ‘The Grand Land Robbery: Another Step Toward Annexation’ (2016) 1.



annexation.<sup>144</sup> In any case, the declaration of the Minister of Education is very clear in this aspect: “Let there be no doubt, the Regulation Bill is what will spearhead the extension of [Israeli] sovereignty.”<sup>145</sup>

### 2.3.2. The Nation-State Basic Law

The Nation-State Law (hereinafter NSBL) defines Israel as the Nation-State of the Jewish people. Its wording is not as openly annexationist as the Settlement Regulations Law, although one of its consequences, together with the projected Override Clause<sup>146</sup>, would precisely be to preserve legislation that, like the Regulations Law, denies rights to Palestinians.<sup>147</sup>

After its enactment in July 2018, four Special Rapporteurs sent the Prime Minister a joint letter in which they expressed their concerns regarding the potential discriminatory character of the law and asked for some clarifications.<sup>148</sup> One of them referred to article 7, which recognizes the development of Jewish settlements as a national value to be encouraged. This wording, taken into consideration with the one of article 1, “the **Land of Israel** is the historical homeland of the Jewish people”, led the Special Rapporteurs to wonder if it constitutes an endorsement of Jewish settlements in the occupied Palestinian territory.<sup>149</sup>

Basic Laws in Israel have constitutional status. Yuval Shany understands that laws create a narrative and that the NSBL will function as Israel’s “constitutional identity card”, which means leaving a share of the populations out of the country’s identity.<sup>150</sup>

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<sup>144</sup> ‘Regulation of Settlement in Judea and Samaria Bill 5776-2016’ Yesh Din Annexation Legislation Database (n 8).

<sup>145</sup> Toi Staff (n 5).

<sup>146</sup> The Override Clause would allow the Knesset to re-sanction bills that the Supreme Court has characterized as unconstitutional. For further information, see Yuval Shany, ‘The Return of the Override Clause? A dangerous and Unnecessary Step’ *The Times of Israel* (Jerusalem, 24 April 2019) <<https://blogs.timesofisrael.com/the-return-of-the-override-clause-a-dangerous-and-unnecessary-step/>> accessed 25 June 2019.

<sup>147</sup> Aeyal Gross, ‘Basic Law – Nation and Occupation in Israel: Part 2’ (*IACL-AIDC Blog*, 2019) <<https://blog-iacl-aidc.org/2019-posts/2019/3/30/basic-law-nation-and-occupation-in-israel-part-2>> accessed 25 June 2019.

<sup>148</sup> ‘UN Special Rapporteurs give Israel 60 days to respond to ‘deep concerns’ regarding Jewish Nation-State Law’ (*Adalah*, 2018) <[www.adalah.org/en/content/view/9626](http://www.adalah.org/en/content/view/9626)> accessed 25 June 2019.

<sup>149</sup> (Emphasis added). An English translation of the NSBL is available at the webpage of the Knesset at <<https://knesset.gov.il/laws/special/eng/BasicLawNationState.pdf>> accessed 25 June 2019.

<sup>150</sup> Yuval Shany, ‘No Way to Build a Constitution’ *The Times of Israel* (Jerusalem, 13 September 2018) <<https://blogs.timesofisrael.com/no-way-to-build-a-constitution/>> accessed 26 June 2019.

Likewise, Professor Robbie Sabel deplors the absence of equality and democracy in the text, stating that it offsets the balance between “Jewish and Democratic”.<sup>151</sup>

Some other authors fear that the lack of distinction made in article 1 between areas inside and outside the Green Line is a legal prelude of annexation.<sup>152</sup> Although when referring to the right to self-determination – “unique” to the Jewish people alone – it refers only to the “**State of Israel**”, we have already pointed out that Israel has not defined its boundaries and has a vocation to all of the “*Eretz Israel*” territory. Most importantly, some experts foresee a latent objective to the law. What is the need of legalizing the supremacy of the majoritarian group, if not out of fear that the group may lose its majority status? The NSBL, considered in this context of pro-annexation measures, would allow to fight the “demographic imbalance” that would be a result of annexation and the addition of an estimated 2.55 million of Palestinians to the Israeli census.<sup>153</sup> In Aeyal Gross’ words, “the law could legitimize a different civic status from that of Israeli citizens for the inhabitants of the annexed area”.<sup>154</sup> Former Supreme Court Justice Eliyahu Matza goes even further, characterizing the law as pointing towards apartheid. “There is only one intent: abandonment of the idea of two states and annexation”.<sup>155</sup>

### 2.3.3. The Amendment of the Higher Education Council Act

Annexation can take the form of something so little apparent as education. The Amendment of the Higher Education Council Act, approved in February 2018, includes the University of Ariel, located in a settlement deep in the West Bank, under the jurisdiction of Israel’s Council for Higher Education.<sup>156</sup> Universities in the settlements were previously subject to a separate council, one that had jurisdiction over areas beyond the Green Line.<sup>157</sup> This amendment does without the said council.<sup>158</sup>

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<sup>151</sup> Interview with Robbie Sabel (n 141).

<sup>152</sup> Ron Skolnik, ‘Israel’s Nationality Law Lays Ground for West Bank Annexation’ *Al-Monitor*, (Washington D.C., 9 August 2018) <[www.al-monitor.com/pulse/originals/2018/08/israel-nationality-law-netanyahu-annexation-west-bank.html](http://www.al-monitor.com/pulse/originals/2018/08/israel-nationality-law-netanyahu-annexation-west-bank.html)> accessed 26 June 2019. This fear is also subtly present in Hassan Jabareen and Suhad Bishara, ‘The Jewish Nation-State Law’ (2019) 48 (2) *Journal of Palestine Studies* 43, 52.

<sup>153</sup> Ron Skolnik, *ibid.*

<sup>154</sup> Aeyal Gross (n 149).

<sup>155</sup> Tzvi Lev, ‘Former Supreme Court Justice: Nationality Law Causing ‘Apartheid’’ *Arutz Sheva*, (Beit El, 30 July 2018) <[www.israelnationalnews.com/News/News.aspx/249742](http://www.israelnationalnews.com/News/News.aspx/249742)> accessed 25 June 2019.

<sup>156</sup> UNHCHR, SR report 2018 (n 9) para 51.

<sup>157</sup> Ori Nir and Debra Shushan (n 57).

<sup>158</sup> *ibid.*

Consequently, Israeli law is applied to university institutions placed in the West Bank, which are granted the same status as those located within Israel proper.<sup>159</sup> Remarkably enough, the sponsor of the bill openly declared “there is an element of imposing sovereignty” in the bill of which he is proud.<sup>160</sup>

#### 2.3.4. The Norms law

This law, proposed in 2014 and re-tabled in 2015, remains stalled. Its destiny is unclear since this law was proposed to the 20<sup>th</sup> Knesset, and now the 21<sup>st</sup> Knesset has limited possibilities until new elections are held in September 2019.<sup>161</sup> Whatever happens to it, we believe it is interesting to mention, since it can be placed halfway in the distinction between *de facto* and *de jure* annexation for the reasons we will now explain.

Its main objective is to equalize the laws applicable within Israel proper with those applicable to the settlers in the WB.<sup>162</sup> Thus, any law approved by the Knesset will also be enacted in the oPt, either by virtue of the passed law itself or through an order of the military commander.<sup>163</sup> This would replace the current policy, known as “channeling”, according to which Israeli law may apply to the settlements through an order of the military commander.<sup>164</sup>

It is interesting to mention that the bill itself explains it does not aim at changing “the political status of the territory”.<sup>165</sup> Nonetheless, by replacing the sovereign in the West Bank, it amounts to a measure of annexation, blurring the line between *de facto* and *de jure*. On the one hand, it does not involve a formal declaration claiming sovereignty, which is why some authors have qualified it as *de facto* annexation.<sup>166</sup> On the other hand, it replaces through a legislative measure the sovereignty of the military commander in the

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<sup>159</sup> UNHCHR, SR report 2018 (n 9) para 51.

<sup>160</sup> Jonathan Lis and Yarden Zur, ‘Education Council Supports Application of Israeli Law to West Bank Universities’ *Haaretz* (Tel Aviv, 25 January 2018) <[www.haaretz.com/israel-news/.premium-education-panel-backs-applying-israeli-law-to-west-bank-universities-1.5764957](http://www.haaretz.com/israel-news/.premium-education-panel-backs-applying-israeli-law-to-west-bank-universities-1.5764957)> accessed 24 June 2019.

<sup>161</sup> Interview Ziv Stahl (n 88).

<sup>162</sup> Gilead Sher and Keren Aviram, ‘The Application of Israeli Law to the West Bank: *De facto* Annexation?’ (2014) 638 INSS Insight.

<sup>163</sup> Yonah Jeremy Bob and Lahav Harkov, ‘Ayelet Shaked: Apply Israeli Law to West Bank within 1 year’ *The Jerusalem Post* (Jerusalem, 2 May 2016) <[www.jpost.com/Arab-Israeli-Conflict/Justice-Minister-Shaked-Applies-Israeli-law-to-West-Bank-within-1-year-452847](http://www.jpost.com/Arab-Israeli-Conflict/Justice-Minister-Shaked-Applies-Israeli-law-to-West-Bank-within-1-year-452847)> accessed 27 June 2019.

<sup>164</sup> Diakonia International Humanitarian Law Resource Center ‘Rule of Law: a Hardening of Illegality in Israel and the oPt 2014-2017’ (2017) 24.

<sup>165</sup> Gilead Sher and Keren Aviram (n 163) 3.

<sup>166</sup> *ibid.*

oPt, which gives a little ground for Diakonia to identify it as *de jure* annexation.<sup>167</sup> We seem more inclined towards the first interpretation, although, if we compare it with other measures of *de facto* annexation, we also believe it somehow goes further.

In conclusion, the previous assessment of policies and legislation has led us to share Orna Ben-Naftali's belief that "the occupation/non-occupation indeterminacy is complemented by its twin annexation/non-annexation indeterminacy."<sup>168</sup> According to the latter, Israel acts as a sovereign in the oPt – establishing the settlements and extending its laws to them – without formally being recognized as such – insofar as it has not formally annexed and granted any status to Palestinians –.<sup>169</sup> Hence, the state is allowed to escape the international community's condemnation while being able to colonize "the Land of Israel" without incurring in any demographic imbalance.<sup>170</sup>

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<sup>167</sup> Diakonia, (n 166) 24.

<sup>168</sup> Orna Ben-Naftali (n 62) 162.

<sup>169</sup> *ibid.*

<sup>170</sup> *ibid.*

### 3. The shift towards *de jure* annexation.

Proponents of annexation believe the best way to acquire sovereignty over the West Bank is to do so gradually.<sup>171</sup> The question is no longer whether Israel will annex or not, but rather how much it will annex.<sup>172</sup> Partial annexation of areas where no Palestinians live has both the benefits of maintaining the necessary Jewish majority in Israel and foreseeing little international pressure.

Formal annexation in Israel can be adopted through a ministerial decree or through a specific act of legislation.<sup>173</sup> There are therefore three main different annexation projects, which comprise from smaller to bigger parts of the territory: a) individual settlements or blocs of them; b) the Jordan Valley; c) the entirety of the West Bank.<sup>174</sup> It is interesting to mention that, at the beginning, our intention was to compare the consequences of the first and last options, without including Area C. This was mainly because the Yesh Din Database presents two bills regarding the West Bank, and none referring to Area C. However, during one of our first interviews, Professor Amichai Cohen recommended focusing instead on this last possibility. He explained that the annexation of the West Bank gathers very little political support from the most right-wing parties – that despite being small, are also very vocal – and that the Israeli political system would never go through with it.<sup>175</sup> On the contrary, he argued that the middle way, the annexation of Area C, is the main problem since it has a lot of support in opinion polls and is gathering more among the political elites, including the centrists.<sup>176</sup>

We will thus assess the consequences attached to these two annexationist projects: on the one hand, the settlements, on the other, Area C. However, it is important to mention, as Yaël Ronen opportunely pinpointed, that this distinction is not exactly so.<sup>177</sup>

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<sup>171</sup> Commanders for Israel's Security, 'Ramifications of West Bank Annexation: Security and Beyond' 11.

<sup>172</sup> Ori Nir and Debra Shushan (n 57) 2.

<sup>173</sup> Yuval Shany, 'Israel's New Plan to Annex the West Bank: What Happens Next?' (*Lawfare Blog*, 6 May 2019).

<sup>174</sup> See the Yesh Din Database (n 8).

<sup>175</sup> Interview with Amichai Cohen (n 17).

<sup>176</sup> *ibid.* See *Haaretz's* poll. Dina Kraft, 'Haaretz Poll: 42% of Israelis Back West Bank Annexation, Including Two-State Supporters' *Haaretz* (Tel Aviv, 25 March 2019) <[www.haaretz.com/israel-news/israeli-palestinian-conflict-solutions/.premium-42-of-israelis-back-west-bank-annexation-including-two-state-supporters-1.7047313](http://www.haaretz.com/israel-news/israeli-palestinian-conflict-solutions/.premium-42-of-israelis-back-west-bank-annexation-including-two-state-supporters-1.7047313)> accessed 30 May 2019. According to Amichai Cohen, there is also a poll on the issue at the Israel Democracy Institute, but we have not been able to find a translation.

<sup>177</sup> Interview with Yaël Ronen, Professor of Law at the Academic Center for Science and Law, research fellow at the Minerva Center for Human Rights and academic editor of the *Israel Law Review*. Carried out in her office at the Hebrew University of Jerusalem on 17 June 2019 at 18:00.

The settlements *are* Area C, and distinguishing among them is only another way used to legitimize what is clearly unlawful, as we will see below.

In this Section, we will try to answer our second question: do *de facto* and *de jure* annexation entail different consequences? As has been explained before, the implications are the same in international law: both lack any legal effects. Consequently, we will now address this issue at the Israeli level.

In order to do so, we will separately analyze the consequences of formally annexing particular settlements (3.2.) and of completely annexing Area C (3.3). Each analysis will take into account the implications at the national level, that is, the benefits that Israel would obtain through annexation, and the impact on existing human rights violations, which derive from the current measures of *de facto* annexation. However, before entering to reflect on this, we will examine the precedents of the *de jure* annexation of East Jerusalem and the Golan Heights (3.1) in order to see if the international community considered, at the time, that the “extension of law, jurisdiction and administration” constituted formal annexation.

3.1. “Extension of law, jurisdiction, and administration” Legislative measures concerning East Jerusalem and the Golan Heights and their qualification by the international community.

It is interesting to mention that, from the very beginning, it was our purpose to treat the law proposals to extend law and jurisdiction as “annexationist laws.” Never a doubt crossed our mind as to their true intention. It was during our meeting with Professor Eugene Kontorovich that he suggested rethinking that statement: is extending civil law an act of annexation? Or does Israel have a claim to the West Bank that would exclude this qualification?<sup>178</sup>

Since the second question had already been extensively established by the international community<sup>179</sup>, we nonetheless remained curious about the first one. This is the reason why, having defined the concept of *de jure* annexation, we will now try to

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<sup>178</sup> Interview with Eugene Kontorovich. Professor of Law at Antonin Scalia Law School and researcher at the pro-settlement think-tank Kohelet Policy Forum. Carried out in his office at Kohelet on 2 June 2019 at 15:00h.

<sup>179</sup> n 85.

determine if these law proposals can be identified as such. We will do so by comparing them to the laws that, 50 years ago, constituted the formal annexation of East Jerusalem and the Golan Heights, due to the fact that they share the same wording. It is important to make clear that we will not assess whether EJ and the GH have been annexed (they have), but rather, if the first legislative measures adopted in their regard constituted, from the very first moment, *de jure* annexation.

This assessment will help us ascertain two issues: first, if the wording of the current law proposals amounts to *de jure* annexation; second, if this kind of annexation results in clear condemnations by the community of states, consequently making the *de facto-de jure* distinction useful in international law and thus confirming our third hypothesis.

### 3.1.1. East Jerusalem

The annexation of East Jerusalem (hereinafter EJ) has been consolidated over subsequent steps. In 1967, after gaining control over the territory, the Knesset amended the Law and Administration Ordinance and the Municipalities Ordinance; the first amendment allowed for the extension of the “law, jurisdiction and administration” of Israel, while the second one authorized for the enlargement of the municipal boundaries to the areas where said jurisdiction would be extended.<sup>180</sup> Following legislation would later entrench the international community’s wariness of annexation; however, since the current law proposals reiterate the same wording present in the first Jerusalem amendment, it is useful to examine what the international community made of it at this stage of the proceedings.

Did this measure, in itself, amount to *de jure* annexation? The government denied it, stating that it was a “municipal fusion” destined to equalize the provision of public services among all residents, as well as to protect the Holy Places.<sup>181</sup> It must also be noted that the amendment passed in June, and UN Security Council resolution 242, approved

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<sup>180</sup> Ruth Lapidot, ‘Jerusalem’ (MPEPIL 2019) <<https://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1303>> accessed 27 May 2019.

<sup>181</sup> Eyal Benvenisti (n 34) 203. See also Nir Hasson, ‘Wary Israel Tried to Conceal East Jerusalem’s Annexation in 1967, Documents Reveal’ *Haaretz* (Tel Aviv, 18 April 2017) <[www.haaretz.com/israel-news/wary-israel-tried-to-conceal-east-jerusalem-s-annexation-in-67-1.5460969](http://www.haaretz.com/israel-news/wary-israel-tried-to-conceal-east-jerusalem-s-annexation-in-67-1.5460969)> accessed 28 May 2019.

in November that same year, did not explicitly mention Jerusalem, nor any of the ordinances.<sup>182</sup>

At this point, it would be useful to make reference to the reactions that Israel's claim that the ordinances did not constitute annexation provoked among the international community as a whole. The UN Secretary-General stated that:

“[I]n the numerous conversations (...) with Israeli leaders, (...) it was made clear **beyond any doubt that Israel was taking every step to place under its sovereignty** those parts of the city which were not controlled by Israel before June 1967. (...) The Israeli authorities stated **unequivocally that the process of integration was irreversible** and not negotiable.”<sup>183</sup>

On the other hand, despite the silence in Security Council Resolution 242, the General Assembly, shortly after the passing of the ordinances, addressed the issue in resolutions 2253 (ES-V) and 2254 (ES-V), affirming the invalidity of said measures and calling Israel to rescind any actions and desist from taking any that would alter the status of Jerusalem.<sup>184</sup> Although these resolutions do not make explicit reference to annexation, the term was frequently mentioned at the plenary meetings.<sup>185</sup> In fact, the US explained its abstention in both voting processes by stating that “it (resolution 2254) appears to accept, by its call for rescission of measures, that the administrative measures which were taken constitute annexation of Jerusalem by Israel.”<sup>186</sup>

The ample majority with which these resolutions were approved seems to attest to the international community's understanding that the amendment of both ordinances amounted to acts of annexation. Their non-binding character can be considered as the only reason why these resolutions were adopted at the UNGA and not at the UNSC. Moreover, the UNSC did address the issue of Jerusalem, despite doing so almost a year

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<sup>182</sup> Ruth Lapidot, ‘Jerusalem: Some Legal Issues’ (OUP 2011) The JIIS Studies Series, 415. Para. 27.

<sup>183</sup> (Emphasis added). UNSC ‘Report of the Secretary-General under General Assembly Resolution 2254 (ES-V) Relating to Jerusalem’ (1967) UN Doc S/8146, para. 33. Shmuel Berkowitz, ‘The Status of Jerusalem in International and Israeli Law’ Jerusalem Center for Public Affairs <[http://jcpa.org/the-status-of-jerusalem-in-international-and-israeli-law/#\\_chapter\\_3](http://jcpa.org/the-status-of-jerusalem-in-international-and-israeli-law/#_chapter_3)> accessed 27 May 2019.

<sup>184</sup> UNGA, ‘Measures Taken by Israel to Change the Status of the City of Jerusalem’ (1967) UN Docs A/RES/2254 (ES-V) and A/RES/2253 (ES-V).

<sup>185</sup> See positions of Bulgaria, Hungary, and the Byelorussian Soviet Socialist Republic at UNGA, ‘Official records: Fifth Emergency Special Session’ (1967) UN Docs A/PV.1554.

<sup>186</sup> UNGA, ‘Official records: Fifth Emergency Special Session’ (1967) UN Docs A/PV.1554, para. 102.



later, in its resolution 252<sup>187</sup>. Once again, nor the 1967 ordinances, neither the term annexation were explicitly mentioned in the resolution; however, the references to annexation were unequivocal in the debate prior to the adoption of the resolution.<sup>188</sup>

Notwithstanding all of the above, the Knesset continued adopting legislative measures concerning Jerusalem, and in July 1980 passed the “Basic Law: Jerusalem the Capital of Israel.” The text was ambiguous enough, since it did not set out the boundaries of the city, nor did it state that Israel’s control was exclusive.<sup>189</sup> The term “annexation” was carefully avoided. Despite the fact that “the law was just a declaration of what existed since 1967”,<sup>190</sup> this enactment triggered Security Council resolution 478, whose language, although subtle, implicitly refers to annexation. Why would the Security Council remind the content of article 47 of the IVGC otherwise?<sup>191</sup>

The international community has then acknowledged that the 1967 ordinances and their wording, extending “law, jurisdiction, and administration”, constitute annexation. The clear language employed by intervening states in the plenary meetings where all these resolutions were adopted, together with the promptness and frequency of condemnations<sup>192</sup>, supports the idea that formal annexation makes for easier qualifications. This contrasts with, for example, the characterization of settlements and the wall. Since Israel has declared that they are based on security needs - that can even be justified under the laws of occupation -, and it has not (until now) legislated on the territory nor extended its jurisdiction, the government can rely on this ambiguity to deny any claims of annexation. Nonetheless, the concept of “*de facto*” has allowed third states and the ICJ to take into account their equivalent effect to annexation in order to declare them illegal anyway. On the contrary, faced with such a blatant measure of extension of sovereignty as the EJ ordinances, states have it easier to qualify them as annexation, and

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<sup>187</sup> The Council stated that all “legislative measures” destined at altering the “legal status” of Jerusalem were invalid. UNSC Res 252 (21 May 1968) UN Doc S/RES/252 (1968).

<sup>188</sup> As can be seen in the declarations of the Union of Soviet Socialist Republics and Jordan. UNSCOR Voting Record (21 May 1968) UN Doc S/PV.1426.

<sup>189</sup> Eyal Benvenisti (n 34) 205.

<sup>190</sup> Interview with Amichai Cohen (n 17).

<sup>191</sup> Article 47: “Protected persons (...) shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention (...) nor by any annexation by the latter of the whole or part of the occupied territory.

<sup>192</sup> Since then, the international community has agreed on many occasions on the nullity of the annexation of EJ. See all Security Council resolutions concerning Jerusalem at ‘UN resolutions on occupied East Jerusalem’ (2017) Aljazeera <[www.aljazeera.com/news/2017/12/resolutions-occupied-east-jerusalem-171206081326131.html](http://www.aljazeera.com/news/2017/12/resolutions-occupied-east-jerusalem-171206081326131.html)> accessed 28 May 2019. Israel has also entrenched the system through subsequent amendments to the Basic Law. See Lapidoth (182) para. 28-30.

Israel cannot disguise them as a legitimate measure taken under IHL. In consequence, this precedent seems to confirm our third hypothesis, according to which the *de facto-de jure* distinction is useful in international practice. At this point, we will briefly address the Golan Heights Law<sup>193</sup> and its reception by the international community of states, to determine whether it also supports our claim.

### 3.1.2. The Golan Heights.

The Golan Heights (hereinafter GH) and East Jerusalem cases differ in two major aspects: first, the extension of the law to EJ was made through a governmental act, while, in the GH, this was achieved through a legislative act.<sup>194</sup> Second, EJ was part of the territory of Palestine, formerly annexed by Transjordan, while the GH were outside the borders of “the Land of Israel” and were thus on the other side of an external and internationally recognized boundary.<sup>195</sup> These facts, however, do not lead to a different characterization of both legislative measures.

The Knesset’s position regarding the Law, as well as the HCJ’s interpretation and the international community’s reaction, have already been analyzed in depth by Asher Maoz.<sup>196</sup> Therefore, and in order to prove our case, we will just reproduce here his most important findings regarding the positions of the community of states as a whole, as reflected in many UN documents.

In this line, as it obviously derives from the fact that, unlike EJ, the GH were previously subject to an undisputed sovereign state, and also from the fact that this measure represented Israel’s second move towards the annexation of the occupied Arab territories, the international community’s condemnation was stronger and clearer. Nevertheless, what is most relevant here is that, after a US-vetoed resolution at the UNSC, the General Assembly adopted resolution ES-9/7, where it explicitly referred to “the continued occupation of the Syrian Golan Heights since 1967 and its **effective**

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<sup>193</sup> Golan Heights Law 5742-1981. Available at <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/golan%20heights%20law.aspx> accessed 29 May 2019.

<sup>194</sup> For a complete analysis of the differences between both cases and their ramifications, see Leon Sheleff, ‘Application of Israeli Law to the Golan Heights is not Annexation’ (1994) 20 Brook J. Int’l L. 333, and its subsequent reply in Asher Maoz, ‘Application of Israeli Law to the Golan Heights is Annexation’ (1994) 20 Brook J. Int’l L. 335.

<sup>195</sup> Leon Sheleff, *ibid*.

<sup>196</sup> Asher Maoz (n 197) 378-389.

**annexation (...) following Israel's decision to apply its laws, jurisdiction, and administration to the territory.”**<sup>197</sup> The resolution was approved by 86 states.<sup>198</sup> Many of those who abstained,<sup>199</sup> and even opposed the draft,<sup>200</sup> did so while still identifying the Law as annexation, which leaves little doubt as to the characterization of the Golan Heights Law in the international community. It also leaves little doubt as to the confirmation of our third hypothesis: even states politically unwilling to go against Israel or the US in voting in favor of the resolution felt obliged to identify the law as annexation, which means that measures of formal annexation leave little room for states to remain in ambiguity. Hence, the *de facto-de jure* dichotomy is useful, since it allows to refer to *de facto* annexation when there is not enough evidence to ascertain a formal declaration of intent to act as sovereign.

Finally, even if there could have been any doubts regarding the annexationist element of these legislative measures at the moment of their adoption, in hindsight, it is not reasonable to claim that they have not constituted the basis for the annexation of EJ and the GH.<sup>201</sup>

Having identified the extension of the law, jurisdiction and administration of the state as annexation, there is only one aspect left to consider. When we compare and contrast these two examples with the Special Rapporteur's definition of formal annexation,<sup>202</sup> we may ask ourselves: does the declaration need to explicitly mention the term "sovereignty" in order to be considered as *formal* annexation? In other words, does *de jure* annexation need to fulfill any formalities in order to be considered as such?

According to Yuval Shany, the only requirement is the formal declaration of the extension of sovereignty over a territory, which can nonetheless be implicit.<sup>203</sup> This

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<sup>197</sup> UNGAOR 'Resolutions and Decisions Adopted by the General Assembly During its Ninth Emergency Special Session 29 January-5' (1982) UN Docs, A/ES-9/7, 3. Available at <<https://digitallibrary.un.org/record/195706?ln=en>> accessed 29 May 2019.

<sup>198</sup> UNGA, 'General Assembly Provisional Verbatim Record of the Twelfth Meeting' (1982) UN Doc, A/ES-9/PV.12  
<<https://unispal.un.org/DPA/DPR/unispal.nsf/0/EBD42C992A6AEBB2852571E7006B3BD2>> accessed 29 May 2019.

<sup>199</sup> See, among others, the declarations of the representatives of Spain, Chile, Colombia and Austria.  
<<https://unispal.un.org/DPA/DPR/unispal.nsf/0/EBD42C992A6AEBB2852571E7006B3BD2>> accessed 29 May 2019.

<sup>200</sup> See the declarations of the representatives of New Zealand, Ireland and Canada. Ibid.

<sup>201</sup> Interview with Michael Sfard (n 30).

<sup>202</sup> n 104.

<sup>203</sup> Interview with Yuval Shany. Chair of the United Nations Rights Committee and Hersch Lauterpacht Chair in International Law at the Hebrew University of Jerusalem. Carried out in his office at the Israel Democracy Institute on 19 June 2019 at 15:30h. "The formalities accompanying annexation are not

statement makes sense if we take into account the fact that, in a post-Charter regime, no State is going to openly declare its intention to annex. On the contrary, it will try to “obfuscate the reality of annexation.”<sup>204</sup> Supporting this view, J. T. Lawrence adds the following:

### 3.2. Law proposals to annex the settlements and their consequences.

Having determined that, indeed, the law proposals would constitute *de jure* annexation, this section will now focus on the consequences that these bills would have at the domestic level. Taking into account that Israel already exercises effective control over Area C, which, as we assessed before, is already subject to *de facto* annexation, what is the need of a formal endorsement of such a situation?

When addressing Israel, Joseph Weiler referred to an “occupation *ad infinitum* coupled with the luxury of not having to integrate the local population into the democratic processes of the occupying nation.”<sup>205</sup> Professor Noam Zamir also believes that Netanyahu benefits most from the current *status quo*, that it is the best solution for Israel.<sup>206</sup> What are then the benefits of these laws that, by accepting to integrate the Palestinians, outweigh Israel’s most basic aspiration towards a Jewish state? What would change, in practice, that would make Israel want to suffer the predictable condemnation of the international community?

Subsequently, we will analyze what would be the impact of these proposed laws on human rights and IHL existing violations. The fact that Israel is trying to project itself as the sovereign in these areas, and thus leave the international claims of occupation behind, makes the international law of human rights a good framework that the state will not refuse to apply (unlike the IVGC).<sup>207</sup> All the while bearing in mind that, from an

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prescribed by International Law” T. J. Lawrence, *The Principles of International Law* (4<sup>th</sup> edn, Boston: D. C. Heath & Co 1925) 147.

<sup>204</sup> Omar Dajani (n 1).

<sup>205</sup> Joseph Weiler, ‘Israel, the territories and International Law: When Doves are Hawkes’ in Alfred E Kellerman, Kurt Siehr and Talia Einhorn (eds) *Israel Among the Nations* (Kluwer Law International 1998) 390.

<sup>206</sup> Interview with Noam Zamir. Associate Professor at Lyon Catholic University and Assistant Professor at the City University of Hong Kong. Carried out at the College of Management Academic Studies of Rishon LeZion, Israel, on 28 May 2019 at 17:00h.

<sup>207</sup> Interview with Omar Dajani, co-director of the McGeorge School of Law's Global Center for Business & Development at the University of the Pacific and former member of the Palestine Liberation Organization’s Negotiations Support Unit. Carried out through WhatsApp call on 27 June 2019 at 10:00h.

international law perspective, the laws of occupation continue to apply in spite of annexation.<sup>208</sup> In any case, IHL, even if applied correctly, allows for certain restrictions and exceptions on security grounds. This is the reason why many experts are trying to fill these gaps with the stronger protection of civil and political rights, equality under the law and non-discrimination.<sup>209</sup>

Many proposals have been presented to the 20<sup>th</sup> Knesset regarding different areas of settlements; the Etzion Bloc, Greater Jerusalem, Ma'ale Adumim, Greater Hebron, Menashe Bloc, Modi'in Bloc, Ariel Bloc, Western Samaria, the heart of Samaria.<sup>210</sup> These laws seek to extend Israeli law, jurisdiction, and administration. Surprisingly, some seem to explicitly mention, in the explanatory remarks of the bills, extending sovereignty.<sup>211</sup>

In this section, we will first assess what factors would change, what are the positive estimated ramifications that incite the Knesset to adopt these laws, only to continue addressing the disregarded negative consequences on IHL and human rights obligations. This last part will tackle the controversies of whether annexing the settlements would violate the right of Palestinians to self-determination and will illustrate the particular case of the Ma'ale Adumim settlement. This assessment will help us in confirming or rejecting our first hypothesis: that the formal annexation of settlements will have practical consequences at the domestic level but will not change the nature of existing human rights violations, only aggravate them.

Before starting our assessment, a final word must be said about the right to self-determination. The disagreements among the doctrine when it comes to settlements and their impact on this right make it necessary to introduce a few remarks on its holders and content. First, the right has been interpreted to apply outside the decolonization context and to non-self-governing territories, and the Palestinians have been largely identified by

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<sup>208</sup> n 45.

<sup>209</sup> Sarah Leah Whitson, 'Chipping Away at 50 Years of Occupation' (Human Rights Watch, 2017) <<https://www.hrw.org/news/2017/06/05/chipping-away-50-years-occupation>> accessed 20 June 2019.

<sup>210</sup> (Emphasis added) "Now is the time to apply [Israeli] **sovereignty** to these areas, (...) including their commercial and industrial areas, archaeological sites, roads, and all state land between the settlements, located in Area C." Excerpt from explanatory remarks to the bill. See them all at Yesh Din Database (n 8).

<sup>211</sup> It seems to be the case of the Gush Etzion Bloc Bill and the Ma'ale Adumim Bill. A version of the Jordan Valley Bill and of the Entire West Bank Bill also mention extending sovereignty explicitly. We have not been able to access a translation of the proposal, and therefore rely on the description made in Yesh Din's Database (n 8).

the ICJ and the UNGA as a people whose right to self-determination is recognized.<sup>212</sup> Most importantly, even the State of Israel has implicitly acknowledged said right.<sup>213</sup> Regarding the scope of the territory where that right is to be exercised, there seems to be an international consensus on the boundaries drawn by the Green Line.<sup>214</sup>

Second, the right to self-determination has been traditionally understood as having both an internal and external dimension. Internally, self-determination is exercised within the confines of an existing state, while the external dimension involves the creation of a new state.<sup>215</sup> Likewise, the former is made up by two aspects that permanently reinforce each other<sup>216</sup>: the political one, which translates in the right of peoples to choose their own political status and form of representative government, and the economic one, which means that all peoples have a right to freely dispose of their natural resources.<sup>217</sup> The international community has largely recognized and promoted the creation of a Palestinian state, thus acknowledging the external dimension of the Palestinian people's right to self-determination.<sup>218</sup>

### 3.2.1. Consequences at the national level. Incentives to annex.

In domestic law, two major things would change: first, the automatic application of the law to settlers; second, the softening of the zoning, planning and building regulations.<sup>219</sup> Currently, Israeli settlers living in the West Bank are personally subject to Israeli law – a layer known as “enclave law” –.<sup>220</sup> On the opposite side, as we explained before, the Knesset does not (or should not) have the ability to legislate over the territory.

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<sup>212</sup> Daniel Thürer and Thomas Burri, ‘Self-Determination’ (MPEPIL, 2008) para 19, 23 and 34.

<sup>213</sup> Interview with Yuval Shany (n 31). See also Antonio Cassese, ‘The Israel-PLO Agreement and Self-Determination’ (1993) 4 EJIL 564, 569. Cassese explains how, without directly or indirectly referring to the right to self-determination, the 1993 Agreement is nonetheless grounded upon it. The ICJ supports this argument. See AO on the Wall (n 9) para 118.

<sup>214</sup> François Dubuisson, in discussion with the author. July 2019.

<sup>215</sup> Be it through “the establishment of a sovereign and independent State, the free association or integration with an independent State, or the emergence into any other political status freely determined by a people” as Principle 5 of the Friendly Relations Declaration sets out. Daniel Thürer and Thomas Burri (n 215) para 23.

<sup>216</sup> Alice Farmer, ‘Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries’ (2007) 39 International Law and Politics 417, 432.

<sup>217</sup> Ebru Demir (n 64) 23-24.

<sup>218</sup> Among others, the latest UNGA resolution on the issue reaffirms “the right to their independent State of Palestine”. UNGA, ‘The Right of the Palestinian People to Self-Determination’ (2019) UN Doc A/RES/73/158 <<https://undocs.org/A/RES/73/158>> accessed 15 June 2019.

<sup>219</sup> Interview with Noam Zamir (n 209). Interview with Amichai Cohen (n 17).

<sup>220</sup> Gilead Sher and Keren Aviram (n 164) 2.

This translates into a policy, according to which the military commander, who is the administrator in the oPt, enacts most Israeli changes in legislation.<sup>221</sup> However, this application is not automatic and is left to the discretion of the military commander. Attempts to reform this having failed, through the above-mentioned Norms Law, this would be another alternative.

On another hand, Professors Cohen and Zamir coincide in that it is very difficult to build in the West Bank.<sup>222</sup> Due to political sensitivity and international pressure, the building of new houses or settlements is highly regulated by the Minister of Defense and by the military commander. Consequently, if the area of the settlements was annexed, these regulations would be less strict and building would therefore be easier.<sup>223</sup> In this line, Yuval Shany also adds that it would be easier to modify the municipalities.<sup>224</sup>

However, Michael Sfard makes a precision that is difficult to ignore: annexing the settlements would be, legally speaking, an enormous problem.<sup>225</sup> The case differs from that of East Jerusalem, where no Israelis were settled at the moment of annexation. According to him, the sudden application of Israeli law to Israelis living in the West Bank would translate in the illegality of every settlement, since they were not built with the permits required under Israeli law. At least a hundred laws would have to be adjusted, and a lot of gradual work would have to be done for that to happen. In this line, “the day after annexation would probably not look much different than the day before” and the Israeli day-to-day control will remain the same for that period of adaptation.<sup>226</sup>

Having said that, it is now important to address the consequences that these annexationist bills would have on IHL and human rights obligations. As has been stated before, the annexation of settlements is more likely to happen because of one main reason: the fact that there are no Palestinians living there. Professor Cohen referred to this as a core idea from the Ben Gurion era: “Maximum territory, minimum Palestinians.” This fact is precisely what distinguishes the very important consequences of these annexationist projects from those of the annexation of Area C. It is also what makes this

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<sup>221</sup> For a better understanding of how the legal system works, see Atty. Limor Yehuda and others, ‘One Rule, Two Legal Systems: Israel’s regime of Laws in the West Bank’ (ACRI 2014) 13-30.

<sup>222</sup> Interviews with Zamir (n 209) and Cohen (n 17).

<sup>223</sup> *ibid.*

<sup>224</sup> Interview with Yuval Shany (n 31).

<sup>225</sup> Interview with Michael Sfard (n 30).

<sup>226</sup> Evan Gottesman, ‘Defining West Bank Annexation’ (*Israel Policy Forum* 2019) <<https://israelpolicyforum.org/2019/04/17/defining-west-bank-annexation/>> accessed 1 June 2019.

option the “lesser evil” when comparing both options. Because, as we will see below, “annexing” Palestinians means either granting them equal rights as Israelis enjoy or embracing openly the rising criticisms of Apartheid.

As can be seen, the *de facto-de jure* shifting has important consequences at the internal level, which act as the incentives to push for annexation. These changes will not be so evident when it comes to IHL and human rights violations, at least in the case of the settlements.

### 3.2.2. Violations of IHL.

The annexation of settlements has, then, other legal ramifications, which derive precisely from the very existence of settlements (in other words, from the *de facto* annexation). The major change brought about by *de jure* annexation would be losing the appearance of temporality, which remains that, an appearance. It would also mean, at the international level, losing the claims of reversibility, and thus signaling a lack of willingness to negotiate and to allow the creation of a Palestinian state, which would result in a stronger condemnation by third states. This also relates to what we have discussed before, on whether the prolonged character of the occupation has turned it illegal under the criteria of IHL.<sup>227</sup>

The present Master thesis does not aim at a deep examination of the impact of settlements on human rights; this issue has been covered extensively and needs not be reproduced here.<sup>228</sup> However, taking into account that the main difference between *de facto* and *de jure* annexation sits on a formal declaration, it is useful to mention some of the main repercussions that settlements have on human rights, in order to assess whether they would change after such a formal declaration.

Regarding Israel’s IHL obligations, settlements in themselves violate article 49 of the IVGC. There are those who argue that this article does not apply – or even, as we

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<sup>227</sup> n 94.

<sup>228</sup> In order to learn about the human rights consequences of the settlement enterprise, see Mercedes Melon, *Settling Area C: The Jordan Valley Exposed* (Al Haq, 2018) 63-67. See also the HRC ‘Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, Including East Jerusalem’ (2013) UN Doc A/HRC/22/63 and Nasser Al-Rayyes, *The Israeli Settlements from the Perspective of International Humanitarian Law* (Al Haq Organisation, 2000) 92-97.



stated before, that the Convention does not apply – since the settlers have not been “transferred” nor “deported” but rather have chosen to live there voluntarily.<sup>229</sup> However, the type of governmental conduct required to fulfill this provision has been interpreted by the ICJ as including the measures taken to “organize or encourage”.<sup>230</sup> Moreover, even if the fact that Israel built and financially promoted the settlements did not amount to a “transfer” full stop under article 49, it can always be seen as an “indirect transfer” under the Rome Statute.<sup>231</sup>

If settling in itself is a violation of IHL and has been considered to be a war crime, what would formally annexing them mean? Once more, in this case, the fact that the consequences do not change at the international level contrasts with the changes at the national level. From the first perspective, Michael Lynk argues that it would change nothing because the world would not recognize the annexation nor its results. It would still consider the annexed area occupied territory.<sup>232</sup> Professor Cohen agrees, thinking that this is possibly a political question. Legally speaking, since the very existence of settlements and of the separation wall are already illegal, a formal declaration of annexation would change nothing. Politically, annexation may be a turning point, although when it comes to settlements he does not think so.<sup>233</sup> From this political point of view, it is interesting to mention that the ICC Office of the Prosecutor opened in 2014 a preliminary examination on the alleged crimes committed in the oPt.<sup>234</sup> Even if the formal annexation of settlements may not have any kind of “added value” on their current illegality, it may nonetheless influence the Prosecutor’s decision to open an investigation, an even indict individuals such as the Prime Minister.<sup>235</sup>

On the contrary, *de jure* annexation would have very important ramifications on IHL at the internal level. The main one being that Israel would stop applying the laws of

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<sup>229</sup> E. E. Levy, Tehiya Shapira, Amb. Alan Baker (n 123). This is the stance of the government of Israel.

<sup>230</sup> ICJ Wall AO (n 9) para 120. In its interpretation, the ICJ has relied on the general consensus derived from state practice, as derived from all UNSC resolutions on settlements. See also Eugene Kontorovich, ‘Unsettled: A Global Study of Settlements in Occupied Territories’ (2017) 9 Journal of Legal Analysis 285, 290.

<sup>231</sup> Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli, (n 78) 581. Article 8, b) (viii) of the Rome Statute affirms the “transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” as a war crime. See ICC (n 56).

<sup>232</sup> Interview with Michael Lynk (n 88).

<sup>233</sup> Interview with Amichai Cohen (n 17).

<sup>234</sup> ‘Palestine’ (International Criminal Court, 2018) <[www.icc-cpi.int/palestine](http://www.icc-cpi.int/palestine)> accessed 2 July 2019.

<sup>235</sup> Pnina Sharvit Baruch, ‘Implications of the Application of Israeli Sovereignty over Judea and Samaria’ (2018) 1007 INSS Insight.

occupation, in the same way as it has done in East Jerusalem.<sup>236</sup> This is self-evident; even if the international community would still see the territories as occupied, Israel would act accordingly to its annexation and thus start applying its own civil law. Resulting from this schizophrenia, we can foresee the following issue: article 43 of the Hague Regulations establishes that the occupant must respect the laws in force in the occupied territory.<sup>237</sup> From an international law perspective, this article still applies to the annexed territories, and thus Israel must comply with this obligation. From a domestic perspective, Israel has annexed precisely to apply its own law in the territories, and will therefore breach article 43. This reasoning would apply to all the tenets of occupation such as, for instance, the obligation to act in the best interest of the protected persons in relation to Israel's measures of exploiting their economic resources for the benefit of settlers.

### 3.2.3. Violations of human rights.

Concerning human rights obligations, it has been argued that settlements in the West Bank violate, **among others**, Palestinians' right to property, to enjoy personal security, to freedom of movement.<sup>238</sup> The first derives from the designation of privately owned land as state land where settlements can be built; the second one, from the violence Palestinians are sometimes subject to from the hands of settlers, and from the lack of effective investigations that ensue.<sup>239</sup> Third, the fact-finding mission has established that the majority of the restrictions on freedom of movement are linked to the protection, expansion and improved connectivity of the settlements.<sup>240</sup> And, as Tahseen Elayyan explains, freedom of movement is linked to the enjoyment of most human rights; to access to education and health, to the ability to work, to family reunification.<sup>241</sup>

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<sup>236</sup> Atty. Limor Yehuda and others (n 224) 5.

<sup>237</sup> See Article 43 of the Hague Regulations.

<sup>238</sup> Nasser Al-Rayyes, (n 231) 97. For a full assessment on the impact of settlements and settler violence on human rights, see the latest report of the UNHCHR, 'Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and in the Occupied Syrian Golan' (2019) UN Doc A/HRC/40/42, 5 – 13.

<sup>239</sup> HRC (n 231) para 50-57 and 62-71.

<sup>240</sup> Ibid, para 72.

<sup>241</sup> Interview with Tahseen Elayyan, researcher at Al Haq Institute. Carried out in his office in Ramallah on 19 June 2019 at 14:00h. See also Atty. Limor Yehuda and others (n 113) 103.

Moreover, the existence of settlements has served to establish what Ronni Pelli labels as “One Rule, Two Legal Systems”.<sup>242</sup> What underlies this regime is the discrimination in the application of the law to two groups of individuals living in the same territory. Palestinians are subject to a complex framework of Ottoman, Mandate and Jordanian rules, together with the orders enacted by the military commander.<sup>243</sup> For their part, Israeli citizens living in the area, as well as Jews to whom the Law of Return applies, are subject to Israeli law on a personal basis and through orders issued by the military commander. These two legislations have resulted, among other issues, in an enormous difference between Palestinian cities and Israeli councils regarding the granting of building permits, budget allocation, infrastructure, and services.<sup>244</sup> From the very beginning, the establishment of settlements was formally justified as an alleged necessary security measure, allowed under the laws of occupation. Ironically, the Israeli government now includes the protection of the settlers and the settlements among the security needs that justify, under IHL, the violation of Palestinian rights. In other words, the settlements, constituting a violation of IHL in themselves, have laid the ground for the separation between the legal systems, and thus the systemic discrimination that Palestinians face in almost all aspects of life.<sup>245</sup>

Finally, one of the main issues that we have encountered when assessing the consequences of annexing the settlements is determining whether they and their *de facto* annexation constitute already a violation of the right to self-determination and whether this would change in case of a formal declaration of annexation. Robbie Sabel argues that settlements in themselves do not constitute *de facto* annexation since theoretically they can be removed. On the contrary, Yuval Shany states that the mainstream position, established in the ICJ jurisprudence in the Wall<sup>246</sup> and Chagos Advisory Opinions<sup>247</sup>, is that settlements are incompatible with the right to self-determination.<sup>248</sup> Furthermore, the report of the Fact-Finding Mission on settlements denoted the enterprise in itself as a

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<sup>242</sup> Interview with Ronni Pelli. Attorney working in the Legal Department of the Association for Civil Rights in Israel (ACRI). Carried out in her office at ACRI in Tel Aviv, on 12 June 2019 at 10:30h.

<sup>243</sup> Moshe Drori, ‘The Legal System in Judea and Samaria: a Review of the Previous Decade with a Glance at the Future’ (1978) 8 Israel Yearbook on Human Rights 144, 147.

<sup>244</sup> Atty. Limor Yehuda and others (n 224) 15 – 19.

<sup>245</sup> *ibid* 138.

<sup>246</sup> ICJ AO Wall (n 9) para 120 and 121.

<sup>247</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <[www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf](https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf)> accessed 6 May 2019, para 151 and 160.

<sup>248</sup> Interview with Yuval Shany (n 31).

means of creeping annexation that undermines the right of the Palestinian people to self-determination, and we are inclined to adhere to this thesis.<sup>249</sup>

Another interesting point to make is whether the existence of settlements violates the Palestinian right to self-determination in its economic aspect. The areas where they have been built, together with the areas to which the jurisdiction of the local and regional councils extends, cover almost 40% of the territory of the West Bank, and 63% of Area C.<sup>250</sup> They exploit the mineral extraction and agricultural lands of Area C, while keeping control of almost 86% of the Jordan Valley and the Dead Sea.<sup>251</sup> This means that Palestinians have virtually no access to their natural resources. If, once again, somebody argued that these are temporary measures that can be removed, he or she could be confronted to former Prime Minister Ariel Sharon's words when asked about the possibility of uprooting the settlements: "is it possible today to concede control of the hill aquifer, which supplies a third of our water? Is it possible to cede the buffer zone in the Jordan Rift Valley? You know, it is not by accident that the settlements are located where they are."<sup>252</sup> This is the reason why the FFM concluded, in its report, that the right to self-determination of the Palestinian people in all its dimensions, including the right to have permanent sovereignty over their natural resources, was clearly being violated by Israel.<sup>253</sup>

These violations of human rights, which are interconnected, would only accrue after a formal declaration of annexation. The existing discrimination in the application of the law would continue, only to be "legitimized" by the fact that, after annexation, the territories where settlers live would effectively be under Israel sovereignty, thus allowing for a difference of treatment between the annexed areas and the remaining parts of the West Bank. From Israel's point of view, the "one territory, two legal systems" regime would no longer be applicable, at least in what regards the annexed settlements (we are assuming here that not all settlements would be annexed at once). This assertion needs nonetheless to be clarified: we are assuming, a bit artificially, that there are no Palestinians living in the settlements that would be affected by the annexation. However, Omar Dajani raises the interesting question of what would happen to the Palestinians that

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<sup>249</sup> HRC (n 231) para 101.

<sup>250</sup> 'Settlements' (*B'Tselem*, 16 January 2019) <[www.btselem.org/settlements](http://www.btselem.org/settlements)> accessed 4 May 2019.

<sup>251</sup> HRC (n 231) para 36.

<sup>252</sup> Omar Dajani (n 1).

<sup>253</sup> HRC (n 231) para 38.

work in the settlements.<sup>254</sup> We can only speculate: Ziv Stahl believes that, with annexation, “anything that Israel benefits from will continue”.<sup>255</sup> Hence, Palestinians would still get permits to work in the settlements, in the same way as they still sometimes get permits to work in Israel proper. However, she thinks they would still be subject to military law, while their Israeli employers would be subject to Israeli law.<sup>256</sup> For his part, the Special Rapporteur agrees in that Israel would still allow inexpensive Palestinian labor in the settlements, although he believes that there would be arguments before the courts to apply Israeli labor law to them if the area was formally annexed.<sup>257</sup>

Particularly, freedom of movement would be highly affected, since Israel would unilaterally delineate new borders, which Palestinians may not be able to cross. Suddenly, a land that used to be theirs would be definitively and, most likely, irreversibly closed, leaving them as “foreigners in their own territory”.<sup>258</sup> It is difficult to foresee what the consequences on the right to personal security would be. On the one hand, the closing of the borders of the annexed settlement would result in a pronounced decrease in settler violence and intimidation; on the other, Palestinians may retaliate against settlers living in other, non-annexed blocs, which would therefore add up to the existing violence.<sup>259</sup> The violations of the right to property would also be entrenched and finally “validated”, without any way, *a priori*, for the dispossessed individuals to recover their lands. Something similar, although at the collective level, would happen regarding the right to self-determination in its economic aspect; if the annexed settlement possessed in its territory any natural resources, they would be definitively lost to the Palestinian people’s use.

When it comes to determining if formal annexation would have any impact on the external dimension of the right to self-determination, the positions are as contradictory as they were with the examination of whether the very existence of settlements violated this right. Amichai Cohen explains that, arguably, the annexation of settlements could violate Palestinians’ right to self-determination. Arguably, because depending on which blocs, annexation may or may not affect contiguity, and thus the survival of the two-state

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<sup>254</sup> Interview with Omar Dajani (n 210).

<sup>255</sup> Interview with Ziv Stahl (n 88).

<sup>256</sup> *ibid.*

<sup>257</sup> Interview with Michael Lynk (n 88).

<sup>258</sup> François Dubuisson, in discussion with the author. July 2019.

<sup>259</sup> For a complete assessment (and bleak picture) of the security ramifications, it is interesting to consult the Commanders for Israel’s Security report (n 173).

solution.<sup>260</sup> However, the right to self-determination is violated in any case when the territorial integrity of the land that belongs to a people is affected, independently from the contiguity or not of the future state.<sup>261</sup> In its Advisory Opinion on the Chagos archipelago, where the island was indeed not adjacent to Mauritius, the ICJ recalled that “the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to **their territory as a whole, the integrity of which must be respected.**”<sup>262</sup>

We are prone to adhere to the thesis that the *de jure* annexation of settlements would be a blow to the Palestinian right to self-determination. Taking Ma’ale Adumim as an example illustrates the case. This settlement, that started off as an outpost, is nowadays perceived by the Israeli public as a suburb of Jerusalem.<sup>263</sup> It has been the object of different annexation proposals, and the two main reasons for that constitute also the reasons why they have been pushed back so far. First, the Eastern border of the settlement is only 13 kilometers away from the Jordan border; taking into account its steep topography, annexing it would sever the route between Bethlehem and Ramallah, partition the West Bank in two and seriously damage any reasonable territorial contiguity of a viable Palestinian state.<sup>264</sup> Even if a road were to be constructed to connect the two separate communities that would make up the Palestinian state, such a road could only allow for transportation, which would be subject to the Israelis blocking or shutting it.<sup>265</sup> Second, between Jerusalem and the settlement, there is an unbuilt, controversial area known as E1, where the Palestinian village of Khan Al Ahmar and other Bedouin camps are located. Building in the E1 would result in East Jerusalem being surrounded on all four sides by Jewish neighborhoods, which would entail the end of the aspirations to

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<sup>260</sup> Interview with Amichai Cohen (n 17). Opposed to this, Robbie Sabel believes that the lack of contiguity does not violate the right to self-determination; it just means that the future Palestinian state would not be continuous. Interview with Robbie Sabel (n 141).

<sup>261</sup> Yuval Shany considers this is more a matter of territorial integrity than of self-determination. Nevertheless, the principle of territorial integrity complements that of self-determination in its external dimension, since the boundaries of the territory define the scope where that right is exercised. Interview with Yuval Shany (n 31).

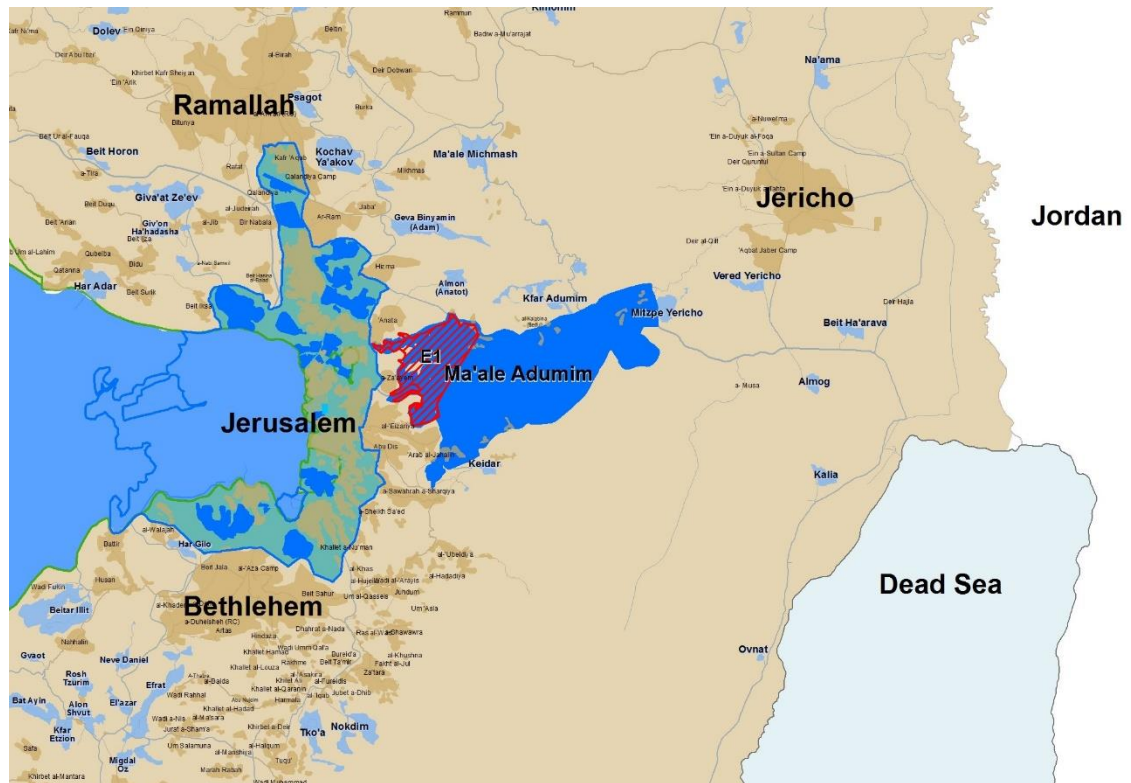
<sup>262</sup> (Emphasis added) ICJ AO on Chagos (n 250) para 160. According to the Secretary-General in the Annex to his report on the Wall, “the *de facto* annexation of land interferes with the territorial sovereignty and consequently with the right of Palestinians to self-determination”. See ICJ AO on the Wall (n 9) 115.

<sup>263</sup> Atif Shamim Syed, ‘Israel’s E1 Plan and Its Implications’ (*The Palestine Chronicle*, 2012) <[www.palestinechronicle.com/israels-e1-plan-and-its-practical-implications/](http://www.palestinechronicle.com/israels-e1-plan-and-its-practical-implications/)> accessed 1 June 2019.

<sup>264</sup> Nir Shalev, ‘The Hidden Agenda: the Establishment and Expansion Plans of Ma’ale Adumim and their Human Rights Implications’ (BIMKOM, B’TSELEM 2009) 54.

<sup>265</sup> Atif Shamim Syed (n 266).

include East Jerusalem as the capital of the future Palestinian state <sup>266</sup> “Judaizing the city demographically and spatially”.<sup>267</sup>



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Apart from these ramifications on the right to self-determination, the formal annexation of this settlement would also have consequences on the enjoyment of other human rights. The final severance from Jerusalem would seriously exacerbate the restrictions that Palestinian already face to access their most sacred holy places, notably the Holy Sepulcher and the Al-Aqsa mosque, apart from impeding their access to medical care, education, family and friends.<sup>269</sup> Furthermore, annexation would result in the forced displacement of the approximately 2,700 Jahalin Bedouins living in the E1 corridor, furthering the expulsion of the ones that were living in the area of Ma’ale Adumim before it was built.<sup>270</sup>

<sup>266</sup> Nir Shalev (n 267) 55.

<sup>267</sup> Zena Agha, ‘Israel’s Annexation Crusade in Jerusalem: the Role of Ma’ale Adumim and the E1 Corridor’ (*Al Shabaka*, 2018) <<https://al-shabaka.org/briefs/israels-annexation-crusade-in-jerusalem-the-role-of-maale-adumim-and-the-e1-corridor/>> accessed 7 June 2019.

<sup>268</sup> The map and a further explanation on the issue can be found at ‘The Ma’Ale Adumim Bill: a Reckless Step Towards Full Annexation’ (*Peace Now*, 11 January 2017) <<https://peacenow.org.il/en/maale-adumim-bill-reckless-step-towards-full-annexation>> accessed 10 June 2019.

<sup>269</sup> *ibid.*

<sup>270</sup> *ibid.* Nir Shalev (n 267) 48.

The annexation of Ma'ale Adumim is probably the most characteristic and controversial case, but it is not the only one. A stronger impact would be that of the Greater Jerusalem Bill, which encompasses and goes beyond Ma'ale Adumim and other blocs of settlements.

The settlement enterprise is the main measure of *de facto* annexation.<sup>271</sup> After having assessed the IHL and human rights violations derived from their establishment and extension, and the potential ramifications that their formal annexation would have, we have come to the conclusion that the consequences differ greatly in what concerns domestic law (direct application of the law and planning and zoning), but not so much regarding the existing violations. In this last case, the breaches remain mostly the same, although they are aggravated by the fact that formal annexation eliminates the temporariness and ambiguity surrounding the settlements, thus entrenching the violations and leaving no way for Palestinians to enforce their rights. Based on the above, this analysis has helped us confirm our first hypothesis.

### 3.3. The annexation of Area C.

In the following section we will repeat the previous assessment, this time regarding Area C, in order to see if our second hypothesis can be validated: formal annexation of Area C will have a great impact on both the internal level and on Israel's human rights violations. We will thus address the consequences of formal annexation at the domestic level (3.3.2.), on human rights violations (3.3.3.) and on the regime of the occupation itself (3.3.4). But first, it is useful to introduce some aspects of Area C and some notions of international law that are necessary to keep in mind while carrying out the following analysis (3.3.1.).

#### 3.3.1. Introduction

Area C covers almost 60% of the West Bank, and includes 165 "islands" classified as part of Areas A and B, which are extremely affected by Israel's policy in Area C.<sup>272</sup> The following map shows the amount of territory in Area C that is available for

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<sup>271</sup> n 57.

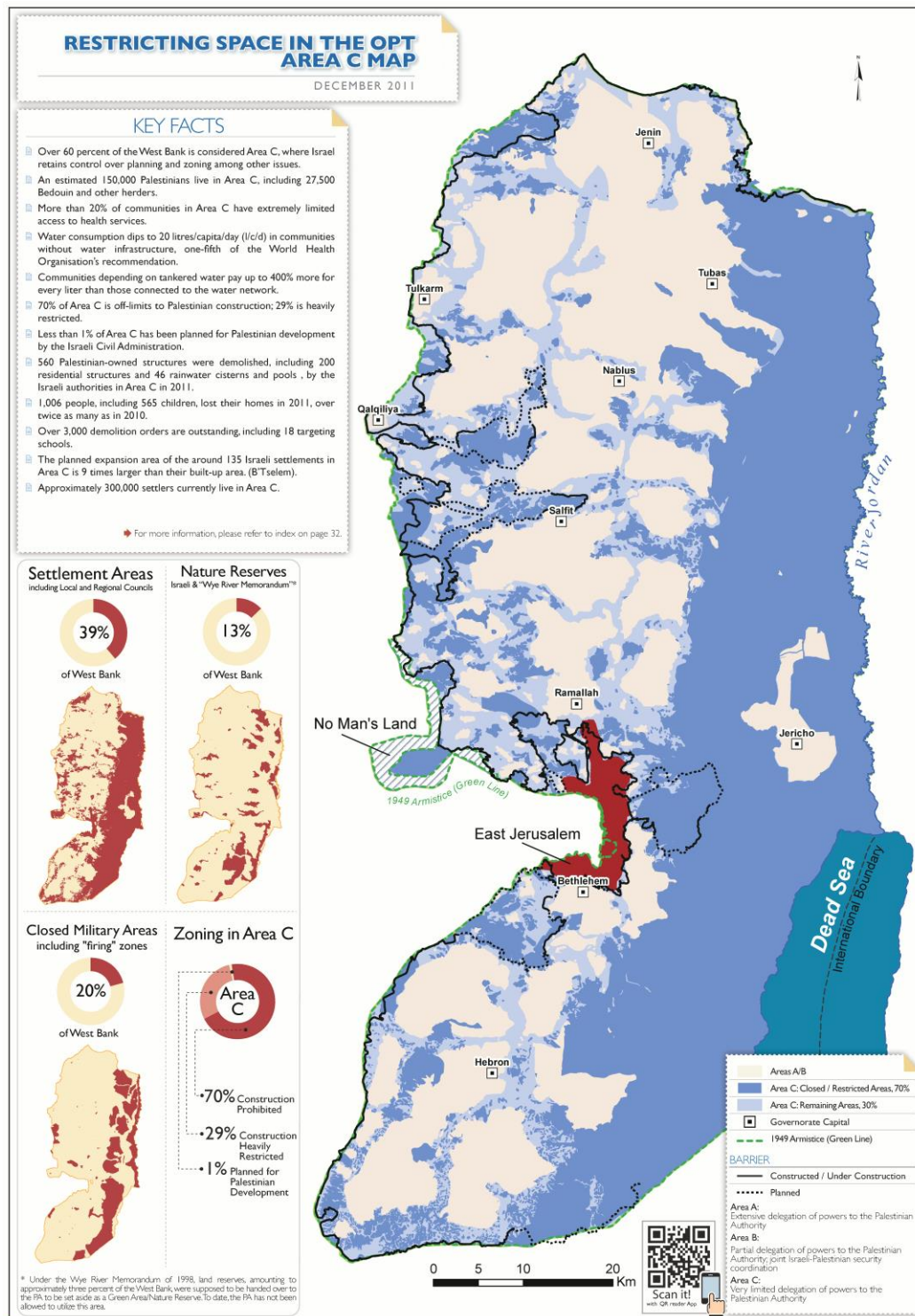
<sup>272</sup> Noga Kadman, *Acting the Landlord: Israel's Policy in Area C, the West Bank* (B'Tselem, 2013) 5.



Palestinian development; that is, that has not been declared state land or closed military zone and where settlements and their local and regional councils have not been established. The result: less than 1%. Most of the arable land and the mineral mining and water resources are located in Area C, making it the basis for any future Palestinian economic development.<sup>273</sup>

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<sup>273</sup> *ibid*, 13.



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As has been mentioned before, settlements in the West Bank are all situated in Area C, which means the distinction we have made when assessing the consequences of

<sup>274</sup> 'Restricting Space in the Occupied Palestinian Territory: Area C Map: Dec 2011' (OCHA, 21 January 2012) <[www.ochaopt.org/content/restricting-space-occupied-palestinian-territory-area-c-map-dec-2011](http://www.ochaopt.org/content/restricting-space-occupied-palestinian-territory-area-c-map-dec-2011)> accessed 27 June 2019.

their annexation is somewhat schizophrenic. Most, if not all, of the ramifications identified above also apply in this case. However, making this distinction was necessary in order to highlight the most important implication of annexing Area C, which derives from the fact that around 180.000 Palestinians live there.<sup>275</sup>

Even in the current state of affairs, the claims that Israel is incurring in the crime of Apartheid are numerous.<sup>276</sup> Others identify this claim as yet another one aimed at delegitimizing the State of Israel, and, sometimes, as an indication of anti-Semitism.<sup>277</sup>

Whether Israeli practices do already amount to an Apartheid regime is not an issue we will address here. There are plenty of studies on the topic.<sup>278</sup> However, this part of the dissertation will focus on how the formal annexation of the whole Area C would irrevocably give weight to these charges, independently of whether Israel grants citizenship or not to Palestinian inhabitants of the area.

Consequently, for the purposes of this subsection, it is useful to introduce first a definition of the crime of apartheid, as contained in the Rome Statute.<sup>279</sup> It refers to “inhumane acts (...) committed in the context of an **institutionalized regime** of systematic oppression and **domination by one racial group** over any other racial group or groups and committed **with the intention of maintaining that regime**.”<sup>280</sup> Many UN resolutions were adopted in the context of the South African apartheid that can be used as an analogy, notably UNSC resolution 417 (1977) and UNGA resolution 37/69 (1982), referring to the Bantustans.<sup>281</sup> Finally, even if Israel has not ratified the International

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<sup>275</sup> Noga Kadman (n 275) 12.

<sup>276</sup> See John Dugard and John Reynolds, ‘Apartheid, International Law and the Occupied Palestinian Territory’ (2013) 24 (3) The European journal of International Law 867.

<sup>277</sup> Robbie Sabel, ‘The Campaign to Delegitimize Israel with the False charge of Apartheid’ (2011) 23 Jewish Political Studies Review 18. See also Pnina Sharvit Baruch and Keren Aviram, ‘Delegitimization of Israel: the Legal Framework’ (2017) Memorandum 169, Institute for National Security Studies.

<sup>278</sup> John Dugard and John Reynolds (n 279). See also Human Sciences Research Council and Middle East Project, ‘Occupation, Colonialism, Apartheid? A Re-assessment of Israel’s Practices in the Occupied Palestinian Territories under International Law’ (2009) <[www.alhaq.org/attachments/article/236/Occupation Colonialism Apartheid-FullStudy.pdf](http://www.alhaq.org/attachments/article/236/Occupation%20Colonialism%20Apartheid-FullStudy.pdf)> accessed 30 June 2019.

<sup>279</sup> A useful definition is provided in the International Convention on the Suppression and Punishment of the Crime of Apartheid; however, Israel is not a party to it. As was mentioned before, it is not a party to the Rome Statute either, but Palestine acceded in 2015, and thus the Statute is applicable in its territory.

<sup>280</sup> (Emphasis added) See article 7.2 (h) of the Rome Statute.

<sup>281</sup> Other relevant resolutions condemning the racist regime of the apartheid in South Africa are the first UNSC resolution on the issue, 134 (1960), and subsequent ones condemning the apartheid (such as 473 (1980)) and establishing sanctions and third state obligations, such as, among others, resolutions 181 (1963), 418 (1977), 591 (1986).

Convention on the Suppression and Punishment of the Crime of Apartheid<sup>282</sup>, its provisions can be used as a means of interpretation of the Rome Statute's provision. Therefore, among the different subdivisions included in article 2 of the Convention<sup>283</sup>, many are relevant to the case. Nonetheless, we will only focus on those related to political rights and nationality and to the creation of ghettos.

### 3.3.2. Consequences at the internal level.

Bearing in mind that settlements are located in Area C, the benefits that we identified above, obtained through their annexation, would evidently also apply in this case; namely, the direct application of the law and the more permissive planning and building regime.<sup>284</sup> However, the annexation of Area C has consequences of its own, which are necessary to address here in order to understand what incentives drive those who put forward these annexation bills.

One of the main motives is the messianic nationalism of the Greater Israel movement, usually – but not only – represented in the ultraorthodox or right-wing parties that believe the State of Israel is meant to grab hold of the whole Land of Israel.<sup>285</sup> Nonetheless, the annexation of Area C has benefits that have nothing to do with religious aspirations and are more related to security and economic aspects. These two dimensions can be clearly seen in the Jordan Valley Annexation Bill, which is why we will use it as an example to illustrate the case.

The Jordan Valley comprises almost 30% of Area C, and over a fifth of the territory of the West Bank.<sup>286</sup> It must be noted that not all of it is designated as Area C, but almost 90% of it is, while the remaining 10% is composed of isolated villages from

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<sup>282</sup> Palestine acceded in 2014. See '7. International Convention on the Suppression and Punishment of the Crime of Apartheid' (*United Nations Treaty Collections*, status as at: 14-07-2019) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-7&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-7&chapter=4&clang=en)> accessed 14 July 2019.

<sup>283</sup> See article 2. UNGA, 'International Convention on the Suppression and Punishment of the Crime of Apartheid' (1973) UN Doc, A/RES/3068(XXVIII) <[www.refworld.org/docid/3ae6b3c00.html](http://www.refworld.org/docid/3ae6b3c00.html)> accessed 5 July 2019.

<sup>284</sup> n 222 and subsequent.

<sup>285</sup> Michael Sfard (n 9). See also Shaul Arieli, 'Why Not, You Can Arrange a 'Luxurious' Annexation' *Haaretz* (Tel Aviv, 16 October 2018) <[www.shaularieli.com/media\\_category/articles-israel-the-territories/](http://www.shaularieli.com/media_category/articles-israel-the-territories/)> accessed 28 June 2019.

<sup>286</sup> Mercedes Melon (n 231) 7.

Areas A and B.<sup>287</sup> Among the area's resources are the land, water, Dead Sea minerals, stone, and oil and gas.<sup>288</sup> Hence, in addition to its abundant groundwater resources, the Dead Sea and the Jordan River, the area has enormous potential for agricultural, industrial and touristic development.<sup>289</sup> These water resources have been exploited for the benefit of settlers and even for citizens in Israel proper, while land cultivation contributes highly to the settlement's sustainability.<sup>290</sup>

On the other hand, the Valley enjoys an extremely important strategic defensive and security position.<sup>291</sup> It is the only defensible border in the Eastern front<sup>292</sup> and, topographically, its hills protect the exposed coastal plains of Israel, where many of its national infrastructures are located.<sup>293</sup>

Consequently, the benefits of annexing this area seem even more important than those of annexing the settlements. In fact, "an undivided Jerusalem" and the annexation of Ma'ale Adumim and the E1 are essential for these security purposes since it would be the only way to secure a road that connects Israel proper to the Jordan Valley in order to mobilize troops.<sup>294</sup> All these advantages can be gained with a complete annexation of Area C.

The magnitude of these positive ramifications for Israel contrasts with the enormous negative impact the annexation would have on human rights. Moreover, the annexation of Area C would imply adding a number of Palestinians to the Israeli census which, despite the discrepancies as to the exact number (and, mostly, its underestimation by Israeli sources), is something that not all Israelis feel comfortable with. These implications, which will be studied in the next section and which would translate in a terrible diplomatic cost, are the reason why these bills have been halted in the Knesset so far.

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<sup>287</sup> 'The Jordan Valley' (*B'Tselem*, 11 November 2017) <[www.btselem.org/jordan\\_valley](http://www.btselem.org/jordan_valley)> accessed 5 July 2019.

<sup>288</sup> 'Facts on the Ground' (Al Haq, 2016) 7.

<sup>289</sup> Mercedes Melon (n 231) 7 and 34.

<sup>290</sup> *ibid*, 33.

<sup>291</sup> *ibid*, 9.

<sup>292</sup> Efraim Inbar, 'The Jordan Valley: Israel's Security Belt' (*Middle East Forum*, 6 January 2014) <[www.meforum.org/3711/jordan-valley-israel-security](http://www.meforum.org/3711/jordan-valley-israel-security)> accessed 1 July 2019.

<sup>293</sup> Maj. Gen. (res.) Uzi Dayan, 'The Jordan Valley is Israel's Only Defensible Eastern Border' (*BESA*, 14 April 2014) <<https://besacenter.org/perspectives-papers/jordan-valley-israels-defensible-eastern-border-2/>> accessed 1 July 2019.

<sup>294</sup> Efraim Inbar (n 295).

### 3.3.3. Ramifications on human rights.

After a complete Area C annexation, there would be two possible scenarios: a) Israel grants citizenship to the Palestinian inhabitants of that Area, or; b) Israel does not grant citizenship, but, instead, grants permanent residence. The dilemma is not without consequence, for the reasons we will address now.

In any permanent solution, people are entitled to nationality, as opposed to permanent residence.<sup>295</sup> One of the main differences among these categories sits on political rights: for instance, Palestinian Jerusalemites have the right to vote in municipal elections, but not in general ones.<sup>296</sup> Annexing the areas where Palestinians live, without granting them the right to vote and be elected in general elections, and thus have a say in the matters that affect them, clearly amounts to apartheid. Something similar occurred in South Africa, where the UNSC demanded the elimination of the policy of apartheid and the granting of equal political rights to all<sup>297</sup> and the UNGA condemned “dispossessing the African majority of its inalienable rights and to deprive it of citizenship.”<sup>298</sup> It would be contrary to what can be found in article 2 c) of the Apartheid Convention, which identifies as a crime of apartheid the “measures calculated to prevent a racial group or groups from **participation in the political, social, economic and cultural life of the country** (...) in particular by denying (...) basic human rights and freedoms, including (...) the **right to a nationality** (...).<sup>299</sup> Even if the practice would not be the same as South Africa’s policy of denationalizing its black citizens and them receiving the nationality of their Homeland once it got independence<sup>300</sup>, the end result would still mean that Palestinians would be left in (yet another kind of) statelessness. In an Area C annexed to Israel, two kinds of peoples would then coexist: Israelis enjoying the full spectrum of human rights, and disenfranchised Palestinians, deprived as well of their right to self-determination. And, in such a case, the claim that difference of treatment – and thus, difference in granting political rights – is justified based on the citizen/non-citizen

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<sup>295</sup> Interview with Robbie Sabel (n 141).

<sup>296</sup> Michael Decker, ‘Israeli Citizenship for Residents of East Jerusalem/Other Permanent Residents’ (Cohen, Decker, Pex & Brosh, 2019) <<https://lawoffice.org.il/en/israeli-citizenship-for-residents-of-east-jerusalem/>> accessed 29 June 2019.

<sup>297</sup> UNSC Res 473 (13 June 1980) UN Docs S/RES/473, para 7.

<sup>298</sup> UNGA ‘Policies of apartheid of the Government of South Africa’ UNGA Res 37/69 (9 December 1982) UN Doc A/RES/37/69.

<sup>299</sup> (Emphasis added). Article 2 c) of the Apartheid Convention.

<sup>300</sup> Human Sciences Research Council and Middle East Project (n 281) 217.



dichotomy, would no longer be applicable, because Israel would have extended its sovereignty over Area C and **all** its inhabitants.<sup>301</sup>

Professor Zamir does not sincerely believe the annexation of Area C is seriously contemplated, but he adds that it would never take place without granting citizenship. He argues that, when East Jerusalem was annexed, its residents were given the chance to nationalize, but decided not to do so as a means of protest.<sup>302</sup> On the contrary, Michael Sfard thinks that Israel may offer permanent residence as a “PR thing”, but it would define it very narrowly.<sup>303</sup> The problem remains that, even if the government decided to grant citizenship to the “annexed” Palestinians of Area C, there would still be legitimate claims of apartheid.

The reason is that, as Amichai Cohen puts it, “there is no such thing as a territory free from Palestinians”.<sup>304</sup> Area C is conceived in such a way that, whatever happens within it also affects Areas A and B. Take freedom of movement as an example, which, as we said before, is linked to most human rights. Suddenly, Palestinians living in these areas would no longer be allowed to go to villages that were Palestinian and are now Israeli, to hospitals or houses that were 200m away from theirs, to cultivate the land that was theirs, affecting their rights to family life, property, education, and health, among others. Several small, isolated areas would be left of the West Bank, under the civilian responsibility of the Palestinian Authority, the result pretty much being like the

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<sup>301</sup> (Emphasis added). It is interesting to mention that this justification may not even be applicable in the current situation. The definition contained in the Apartheid Convention refers to policies carried out in “southern Africa”, as opposed to “South Africa”. The distinction has its significance, since southern Africa also includes the apartheid practices extended to South West Africa (now Namibia). When the Convention was adopted, South Africa had not officially annexed, nor granted citizenship to South West African inhabitants, but the UN still condemned the former for apartheid practices with extraterritorial scope and with regards to non-citizens. Human Sciences Research Council and Middle East Project (n 281) 166.

<sup>302</sup> Interview with Noam Zamir (n 209). Even if “citizenship” and “nationality” are sometimes used as interchangeable concepts, the term “nationalize” as a synonym to “acquire citizenship” may not be the best choice here. In Israel, anybody that fulfills the requirements under the Citizenship law may hold Israeli citizenship. On the contrary, only Jewish individuals are nationals of Israel, and therefore subject to enjoy special privileges. Human Sciences Research Council and Middle East Project (n 281) 216.

<sup>303</sup> Interview with Michael Sfard (n 30). Omar Dajani agrees, arguing that Israel would extend citizenship to show its own public that it remains a democracy (n 210). The “narrow definition” of the number of Palestinians that would have a right to citizenship, see Naftali Bennett’s declaration: “I can decide to execute a freeze according to either 1993 or 2013. (...) otherwise everyone will want to become an Israeli citizen and will move to Area C.” Carolina Landsmann, ‘How Israeli Right-wing Thinkers Envision the Annexation of the West Bank’ *Haaretz* (Tel Aviv, 18 August 2018) <[www.haaretz.com/israel-news/.premium.MAGAZINE-how-israeli-right-wing-thinkers-envision-the-west-bank-s-annexation-1.6387108](http://www.haaretz.com/israel-news/.premium.MAGAZINE-how-israeli-right-wing-thinkers-envision-the-west-bank-s-annexation-1.6387108)> accessed 6 July 2018.

<sup>304</sup> Interview with Amichai Cohen (n 17).

Bantustans of Apartheid South Africa.<sup>305</sup> Both the UNSC<sup>306</sup> and the UNGA<sup>307</sup> condemned such “bantustanization”, demanding that the government of SA abandoned such a policy and, in the context of the whole regime of apartheid, imposing an embargo and sanctions on the regime.

For its part, the Israeli process has been tagged as “luxurious annexation”.<sup>308</sup> This again would be contrary to what is gathered in article 2 d) of the Apartheid Convention, which prohibits the creation of separate reserves and ghettos and the expropriation of land belonging to a member of a racial group.<sup>309</sup> Once more, a claim could be introduced here that the Palestinians living in Areas A and B are not part of Israel’s **population**, and thus the State would have no responsibility for the fact that they are secluded in segregated communities. Even if this argumentation is difficult to accept, since the creation of these ghettos would be a direct result of an illegal act attributable to Israel – that is, annexation–, the same conclusion can be drawn from the South Africa – South West Africa analogy.<sup>310</sup> The justification whereby the black Homelands in SA would later become self-governing and independent and thus end the domination did not absolve the apartheid regime in the eyes of the international community.<sup>311</sup>

Leaving aside the charges of apartheid, and even if political rights were granted to Palestinians, the issue would remain regarding the violation of their right to self-determination. In its external dimension, the international community, supported by the ICJ jurisprudence, has largely recognized that right of the Palestinian people to self-determination needs the creation of an independent Palestinian State in order to be fulfilled.<sup>312</sup>

Robbie Sabel argues that, if Israel granted nationality, Palestinians, as citizens of an existing state, would no longer have a right to self-determination. Israeli Arabs in East

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<sup>305</sup> Interviews with Tahseen Elayyan (n 244), Michael Sfard (n 30) and Omar Dajani (n 210).

<sup>306</sup> UNSC Res 417 (31 October 1977) UN Doc S/RES/417.

<sup>307</sup> UNGA (n 301).

<sup>308</sup> See Shaul Arieli, (n 288).

<sup>309</sup> Article 2 d) of the Apartheid Convention.

<sup>310</sup> n 304.

<sup>311</sup> Human Sciences Research Council and Middle East Project (n 281) 166.

<sup>312</sup> See UNSC resolution 2334 (2016). See also ‘EU Countries ‘Emphasize’ Strong Commitment to Two-State Solution’ *Middle East Monitor* (London, 19 December 2018) <[www.middleeastmonitor.com/20181219-eu-countries-emphasise-strong-commitment-to-two-state-solution/](http://www.middleeastmonitor.com/20181219-eu-countries-emphasise-strong-commitment-to-two-state-solution/)> accessed 1 July 2019, and ‘‘There is no Plan B’ Says Guterres, Reiterating UN’s Commitment to Two-State Solution to Israeli-Palestinian Conflict’ *UN News* (New York, 20 February 2018)



Jerusalem do not have such a right.<sup>313</sup> We do not agree with this statement, and the recent Advisory Opinion delivered by the ICJ on the Chagos archipelago seems to declare otherwise. In said case, the Court established that the cession of territory to the United Kingdom was not based on the “free and genuine expression of the will of the people concerned” and that the issue of consent should be subject to special scrutiny when one of the parties to the agreement is under the authority of the other.<sup>314</sup> By analogy, Israel’s unilateral annexation of Area C can never be interpreted as the expression of the will of the Palestinians, and therefore cannot be deemed as exhaustion of their right.

Nonetheless, even if, for the sake of argument, we accepted that Palestinians living in an annexed Area C would lose their right to self-determination, there would still remain the issue of the very same right of Palestinians living in Areas A and B. The right to self-determination, being a right of peoples, cannot be exhausted when only part of the people has realized said right<sup>315</sup>, and the annexation of Area C would be the definitive death of the two-state solution. The Special Rapporteur referred to this case – in the context of a negotiated arrangement, we must add – as a “one-state-and-a-half solution”.<sup>316</sup>

Moreover, the right does not only cover the existence of a viable, contiguous state. Even if, as the promotional video of one of the annexationist plans states, the Bantustans of Areas A and B would be connected through a system of constructed roads “without seeing a single IDF checkpoint”<sup>317</sup>, relevant issues would remain: first of all, what would happen to territorial integrity? As has been argued before, the Court ruled in the Chagos case that the detachment of the archipelago from the territory of Mauritius constituted a violation of the territorial integrity of the Non-Self-Governing-Territory by the administering power, identifying this principle as a corollary of the right to self-determination.<sup>318</sup> Omar Dajani explains that the right has two twin dimensions: one that is attached to the people, and one that is attached to the territory in question. And the international consensus shows that the scope of this territory goes back to the 1967 lines,

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<sup>313</sup> Interview with Robbie Sabel (n 141).

<sup>314</sup> ICJ AO on Chagos (n 250) para 171-174.

<sup>315</sup> Alice Farmer, (n 219) 429.

<sup>316</sup> Speech of the Special Rapporteur at a conference at the Université Saint-Louis in Brussels on 19 March 2019 at 17:30h.

<sup>317</sup> A translated version of the original video is available at Boycott Apartheid ‘The Area C Annexation (Tranquilizing) Plan – Naftali Bennet Explains Supremacy & Demography’ (Youtube Video, 30 October 2012) <[www.youtube.com/watch?v=BeHT9TlrARc](https://www.youtube.com/watch?v=BeHT9TlrARc)> accessed 1 July 2019.

<sup>318</sup> ICJ AO on Chagos (n 250), para 160.

the West Bank and the Gaza Strip.<sup>319</sup> Consequently, the territorial integrity of the Palestinian self-determination unit would be violated. Furthermore, international consensus is also very explicit in what regards the status of Jerusalem as an independent international entity.<sup>320</sup> The annexation of Area C would go contrary to this understanding and would sever the connection between the West Bank and East Jerusalem, leaving only some small territorial contiguity through Bethlehem, thus making it almost impossible for a future Palestinian state to have East Jerusalem as its capital.

A separate assessment must be done in what concerns the economic aspect of the right to self-determination. The economic benefits that in the previous section were identified as advantages for the state of Israel and the losses on the Palestinian side are, evidently, two sides of the same coin. All natural resources in Area C would be definitively lost for residents of Areas A and B, leaving open the question of whether Palestinians in Area C, once nationalized in Israel, would stop being discriminated against and have access to them in the same way as Israeli citizens do. In any case, article 1 of both International Covenants, by stipulating that “all peoples may, **for their own needs**, freely dispose of their natural wealth”<sup>321</sup> indicates that such wealth must benefit the whole people and not some part of it.<sup>322</sup> Furthermore, article 1 has laid down a minimum respect of the economic right to self-determination: “**in no case** may a people be deprived of its own means of subsistence.”<sup>323</sup> Formally annexing resource-rich Area C would mean living residents of Areas A and B practically resource-less<sup>324</sup> and would be a breach of this prohibition, binding on Israel after its ratification of both Covenants.

Finally, the annexation of Area C would have the same impact that the annexation of the settlements would have on other human rights, such as the right to property, freedom of movement and its linked rights. Discrimination would nonetheless gain a more important dimension: both concerning Palestinian residents of Area C and residents

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<sup>319</sup> Interview with Omar Dajani (n 210).

<sup>320</sup> This was first established in the Partition Plan, UNGA resolution 181 (1947) UN Doc A/RES/181 (II) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>> accessed 1 July 2019. It has been subsequently reaffirmed in several UNSC resolutions, such as 252 (1968), 465 (1980) and 476 (1980). See Ziad Abuzayyad, ‘International Conference on the Question of Jerusalem’ (2018) <[www.un.org/unispal/wp-content/uploads/2018/06/P2-Mr.-Ziad-Abuzayyad-E.pdf](http://www.un.org/unispal/wp-content/uploads/2018/06/P2-Mr.-Ziad-Abuzayyad-E.pdf)> accessed 1 July 2019.

<sup>321</sup> (Emphasis added) Common article 1 to the ICCPR and the ICESCR.

<sup>322</sup> Alice Farmer (n 219) 431.

<sup>323</sup> (Emphasis added) Common article 1 to the ICCPR and the ICESCR.

<sup>324</sup> See Orhan Niksic, Nur Nasser Eddin and Massimiliano Cali, ‘Area C and the Future of the Palestinian Economy’ (The World Bank, 2014), where the authors argue that Palestinian economic development cannot be achieved without access to Area C.

of Areas A and B. On the one hand, as was said before, not granting political rights to the former would be a blatant measure of discrimination, hard to uphold against the charges of apartheid. On the other hand, formal annexation would do away (at least from an Israeli perspective) with the “one territory, two legal systems” regime, since comparing the legislation applied in the annexed territory, which Israel regards as its own, and in areas A and B, which are under the civil administration of the PA, would not make any sense. However, we must keep in mind that, despite annexation, the territory would still be regarded as occupied from an international law perspective, and therefore, in the eyes of the international community, the discriminatory regime would only deepen.

Based on the above, the reputational costs of annexing Area C seem extremely high, and the resulting context very bleak. For Israel, it would mean risking the “demographic balance” or, in other words, the Jewish majority it has so long been working for. Even if we took into consideration the potential ramifications of the Nation-State Basic Law that we previously mentioned (that is, guaranteeing the supremacy of the Jewish population), this would only mean entrenching the apartheid regime, a move that may trigger the same processes that took place in South Africa.

This would be an interesting issue. According to the Special Rapporteur, the delivering of an ICJ Advisory Opinion on Namibia had a decisive influence in the attainment of independence, 19 years later.<sup>325</sup> In his opinion, if the ICJ were to deliver an AO on the legality of the Israeli occupation, the process of self-determination would not take that long in our days,<sup>326</sup> which is the reason why he has recommended seeking such an opinion in his 2017 report.<sup>327</sup>

#### 3.3.4. Consequences on the occupation regime

There are some people who argue that, currently, “there is very little military occupation”.<sup>328</sup> There is none in Areas A and B, none in Gaza either.<sup>329</sup> Proponents of this position and supporters of Israel’s official stance, whereby there is no occupation at all, would undoubtedly believe that, after a complete Area C annexation, there would be

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<sup>325</sup> Speech of the Special Rapporteur (n 319)

<sup>326</sup> Interview with Michael Lynk (n 88).

<sup>327</sup> UNHCHR report 2017 (n 43).

<sup>328</sup> Interview with Robbie Sabel (n 141).

<sup>329</sup> *ibid.*

no trace of occupation left (if there ever was) and thus the conflict would be –unilaterally – ended. Consequently, from an internal perspective, annexation would mean completely doing away with the particular administrative status awarded to Area C in the Oslo Accords.<sup>330</sup> The concretization of Israel’s sovereign claim over the territory and its acting as such, would mean that the breaches of IHL identified in the previous subsection regarding the settlements would also apply here.<sup>331</sup>

The previous assessment has allowed us to conclude that, when it comes to Area C, the implications of formal annexation, compared to those of *de facto* annexation, are 1) nothing alike, and 2) very relevant, which has allowed us to confirm our second hypothesis. After verifying two first hypotheses we are now able to answer the first and second of our questions. First, the conceptual differences between *de facto* and *de jure* annexation are limited to a mere formality, that is, to the way in which the intention to claim sovereignty over a territory is shown. In the first case, it will have to be appreciated through the creation of facts on the ground; in the second, it will be formally declared. Second, the shifting from *de facto* to *de jure* annexation does not change anything in international law. On the other hand, it does have different consequences at the domestic level, which are clearer to see in the case of a complete Area C annexation.

Despite the fact that, from a theoretical legal perspective, the territory would still be deemed to be under occupation,<sup>332</sup> the practical consequences of formal annexation at the international level would be determined by politics and not by what the law stipulates. The Israeli-Palestinian conflict is one of the cases where the application of International Law could not be clearer,<sup>333</sup> and still, measures such as the *de jure* annexation of EJ and the GH have gone by without many consequences, apart from periodic UN resolutions reminding their lack of legal effect. The threat of the “diplomatic tsunami” never materialized.<sup>334</sup>

Our greatest fear is that this inaction of the international community would replicate in the case of yet another *de jure* annexation. Which brings us to our next

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<sup>330</sup> n 11.

<sup>331</sup> n 230 and subsequent.

<sup>332</sup> n 45.

<sup>333</sup> Speech of the Special Rapporteur (n 319).

<sup>334</sup> Barak Ravid, ‘Barak: Israel Must Advance Peace or Face a ‘Diplomatic Tsunami’’ *Haaretz* (Tel Aviv, 13 March 2011) <[www.haaretz.com/1.5135859](http://www.haaretz.com/1.5135859)> accessed 2 July 2019.

questions: what would the obligations of third states be in the case of an Israeli formal annexation? In the end, is the *de facto-de jure* distinction pertinent in international law?

### 3.4. Impact on third state obligations. The EU's obligation of nonrecognition.

Having verified our first and second hypotheses, after a lengthy analysis, it is now time to assess the third and last one: do *de facto* and *de jure* annexation entail different legal consequences in what concerns third state obligations? Depending on the answer, and bearing in mind the conclusion we drew from state practice in the precedent of EJ and the GH, we will be in a position to answer our most relevant question: in the end, is this distinction pertinent in international law and practice?

The obligations of third states derived from measures of *de facto* annexation were recalled in the ICJ Advisory Opinion on the Wall. Determining that its construction and its associated regime constitute an unlawful act that violates certain norms that have customary status and create *erga omnes* obligations, the Court emphasized that all states have the obligation not to recognize the illegal situation and not to aid or assist in its maintenance.<sup>335</sup> Third states must also see that any impediment to the Palestinian people's right to self-determination is brought to an end.<sup>336</sup> Furthermore, the Court reminded that, according to common article 1 to the four Geneva Conventions, states undertake to ensure respect of the Conventions.<sup>337</sup>

In addition to these obligations, the ILC Articles on State Responsibility, which provide for the obligations of non-recognition and non-assistance, also establish the obligation to cooperate to bring to an end the unlawful situation and the possibility for states to take lawful measures to ensure cessation or reparation.<sup>338</sup> The ILC, in its 2001 Commentary, particularly addressed the situation of "attempted acquisition of sovereignty of territory through the denial of the right to self-determination of peoples", barring not only formal recognition but also acts that would imply it.<sup>339</sup>

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<sup>335</sup> ICJ AO on the Wall (n 9) para 159.

<sup>336</sup> *ibid*

<sup>337</sup> *ibid*, para 158.

<sup>338</sup> ILC (n 46) Articles 41 and 54.

<sup>339</sup> UNGAOR 'Report of the International Law Commission on the Work of its Fifty-Third Session' (2001) UN Docs A/56/10, 114, para 5, <[http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a\\_56\\_10.pdf&lang=EXP](http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_56_10.pdf&lang=EXP)> accessed 3 July 2018. Interview with Omar Dajani (n 210).

If we take into account that the very existence of settlements and the construction of the wall, identified as measures of *de facto* annexation, already engage the responsibility of third states, one could wonder what would change in the case of a *de jure* annexation. Legally speaking, Professors Lynk, Cohen and Zamir believe that the obligations of third states would remain the same.<sup>340</sup> Perhaps, politically, annexation could be seen as “another layer of illegality”, as some kind of “threshold” that would create a bigger international condemnation.<sup>341</sup>

Omar Dajani, for his part, argues that it is difficult to untangle the legal and political perspectives since states have up until now been playing with words: “*de facto* annexation gives states a lot of wiggle room to claim that this step has not yet been taken.”<sup>342</sup> Once the line has been crossed, and the measures unequivocally translate an intention to act as sovereign, it is difficult for states to avoid condemnation as formal annexation.<sup>343</sup> Consequently, even if the ramifications on third state obligations would remain unchanged when shifting from *de facto* to *de jure* annexation, making this distinction is still useful in state practice. It allows states to go beyond mere formalism and identify as *de facto* annexation measures that would have an equivalent effect, even in cases where the annexing state has not formally declared its intention to annex. On the contrary, it gives states no choice but to qualify the measures as formal annexation when the intention to act as sovereign in the annexed territories has been formally declared, either explicitly (extension of “sovereignty”) or implicitly (extension of “law, jurisdiction, and administration”).

This brings us back to the question of what would states do after condemning an act as formal annexation. Some authors have advanced the growing practice of applying countermeasures against the violations of *erga omnes* obligations of IHL and IHRL.<sup>344</sup>

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<sup>340</sup> (And most of the interviewed people) Dr. Todeschini reaches the same conclusion when assessing the difference in third state obligations between unlawful prolonged occupation and annexation. Vito Todeschini, ‘Between Prolonged Occupation and Annexation: Questions arising from the Legal Characterization of the West Bank as Annexed Territory’, Paper presented at the Conference “The Threshold from Occupation to Annexation”, Birzeit University, Ramallah, 3-4 October 2018 (in file with the author).

<sup>341</sup> Interview with Amichai Cohen (n 17).

<sup>342</sup> Interview with Omar Dajani (n 210).

<sup>343</sup> *ibid.*

<sup>344</sup> Théo Boutruche and Marco Sassòli, ‘Expert Opinion on Third State’s Obligations vis-à-vis IHL Violations under International Law, with a Special Focus on Common Article 1 to the 1949 Geneva Conventions’ (Legal Expert Opinion, 2017) 19 – 26. See also Michael Bothe, ‘Rights and Obligations of the EU and its Member States to Ensure Compliance with IHL and IHRL in Relation to the Situation of the oPt’ (Legal Expert Opinion, 2018) 19. John Dugard stated the same in a conference in Amsterdam, Schechinger Jessica, ‘The responsibility of third states concerning the Israeli occupation of the Palestinian

However, there is no need to look for new tools, since they already exist: “it is not about not having the legal tools to pressure Israel, it is about political will.”<sup>345</sup> Both Noam Zamir and Amichai Cohen seem skeptic towards any international reaction.

The “precedent” of the US and the EU’s response to the annexation of Crimea may reaffirm their position. Contrary to what is happening in Israel, even before the annexation took place, the US and the UK already warned Russia not to intervene in Crimea.<sup>346</sup> Afterward, the West – mainly the opponents of the URSS during the Cold War – took a concerted effort to suspend military cooperation, stop exportation of military goods, and apply economic sanctions, including some with great economic cost for the sanctioning states.<sup>347</sup> It must be stressed that these measures have been taken **against** Russia, and not only in the measure in which they affect the annexed territory (Crimea).<sup>348</sup>

This reaction contrasts with the one shown in the context of the Israeli-Palestinian conflict. Bearing in mind the current political stance of the US towards Israel, some authors have highlighted the role that the European Union can and must play in preserving the two-state solution.<sup>349</sup> Hence, we will only focus here on the EU’s actions and on the impact that annexation would have on them.

Not only has the EU not taken any sanctions against Israel for its policies of *de facto* annexation – which the EU clearly considers to be illegal<sup>350</sup> –, but it has even developed a great number of partnerships that benefit it.<sup>351</sup> This policy is perfectly lawful:

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Territories’ (Shares, 23 July 2013) <http://www.sharesproject.nl/the-responsibility-of-third-states-concerning-the-israeli-occupation-of-the-palestinian-territories/> accessed 30 June 2019.

<sup>345</sup> Interview with Noam Zamir (n 209).

<sup>346</sup> Juergen Bering, ‘The Prohibition on Annexation: Lessons from Crimea’ (2017) 49 New York University Journal of International Law and Politics 747, 784.

<sup>347</sup> For instance, France had to bear a great cost after having to cancel a warship deal of \$ 1.4 billion with Russia. Ibid, 784 – 789.

<sup>348</sup> ‘EU Sanctions against Russia over Ukraine Crisis’ (European Union Newsroom) <[https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis\\_en](https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis_en)> accessed 5 July 2019. See also ‘Timeline - EU Restrictive Measures in Response to the Crisis in Ukraine’ (Council of the European Union, 2019) <<https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/history-ukraine-crisis/>> accessed 5 July 2019.

<sup>349</sup> Michael Bothe (n 347) 5.

<sup>350</sup> Many EU policy reports reaffirm the illegality of settlements. Directorate-General for External Policies ‘Occupation/Annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy’ European Parliament (2015) 27-39. See also Valentina Azarova (n 105).

<sup>351</sup> Such as the EU-Israel Association Agreement, according to which Israeli products benefit from preferential tariffs and customs conditions, the Open Skies Agreement, or the fact that Israel was the first non-European country to be part of the EU Research and Technological Development Framework Programmes. ‘Israel and the EU’ (European External Action Service, 12 May 2016) <[https://eeas.europa.eu/delegations/israel\\_en/1337/Israel%20and%20the%20EU](https://eeas.europa.eu/delegations/israel_en/1337/Israel%20and%20the%20EU)> accessed 3 July 2019.

International Law obliges for non-recognition and non-assistance in the EU's relationships with the annexing power that would imply any recognition of its authority over the annexed territory.<sup>352</sup> However, the contrast with the immediate sanctions imposed on Russia is remarkable. Leaving aside political considerations (and the evident fact that the annexation of Crimea touched the EU's borders), this may be due in part to what has been discussed before, that qualifying an act as formal annexation leaves little margin of appreciation for states, and thus makes it easier for them to condemn the annexation and take measures against it.

Up until now, the EU's policy has been to declare the settlement enterprise illegal<sup>353</sup>, but not the whole occupation regime. Consequently, it has been adapting the concrete realization of its obligation of non-recognition by, for instance, refusing the preferential tariff treatment to goods originating in the settlements<sup>354</sup>, preventing settlements from accessing EU funds,<sup>355</sup> or by making it compulsory to indicate in their labeling which products have originated there.<sup>356</sup> It is arguable whether these measures suffice to exhaust the EU's obligations, since the obligation of non-recognition and non-assistance should also imply making sure that the settlements do not benefit in any way from the EU's trading relations.<sup>357</sup>

Nevertheless, a recent appeal questioning the legality of the labeling differentiation policy has led the French *Conseil d'État* to request a preliminary ruling

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<sup>352</sup> In the Namibia case, the ICJ ruled out those dealings that "may imply a recognition that South Africa's presence in Namibia is legal" and those where SA acts on behalf of Namibia, or that may entrench SA's authority over the territory. ICJ AO on Namibia (n 61) para 121-126.

<sup>353</sup> 'Statement by the Spokesperson on the Latest Settlements' Announcements by the Israeli Authorities' (*European External Action Service*, 11 April 2019) <[https://eeas.europa.eu/headquarters/headquarters-homepage/60945/statement-spokesperson-latest-settlements%E2%80%9999-announcements-israeli-authorities\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/60945/statement-spokesperson-latest-settlements%E2%80%9999-announcements-israeli-authorities_en)> accessed 4 July 2019.

<sup>354</sup> As set out by different EU notices to importers in 2003, 2005 and 2012. European Commission Notice to Importers (EC) on Imports from Israel into the EU [2012] OJ C232/5. The ECJ has also ruled accordingly in the *Brita* case. See Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-1289 and reaffirmed its jurisprudence in the Case C-104/16 P *Council of the European Union v Front populaire pour la libération de la sahra-el-hamra et du rio de oro (Front Polisario)* [2016]. François Dubuisson and Ghislain Poissonnier, 'La Politique de Différentiation de l'Union Européenne à l'Égard des Produits Originaires des Colonies Israéliennes : Quels Fondements en Droit Européen et International ?' (2018) 1 *Revue Belge de Droit International* 11, 13.

<sup>355</sup> European Commission Guidelines (EC) on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards [2013] OJ C205/9. Ibid, François Dubuisson and Ghislain Poissonnier (357) 12. Hugh Lovatt, 'EU Differentiation and the Push for Peace in Israel-Palestine' (2016) *European Council on Foreign Relations*, 5.

<sup>356</sup> European Commission 'Interpretative Notice on Indication of Origin of Goods from the Territories Occupied by Israel Since June 1967' (2015).

<sup>357</sup> François Dubuisson, 'The International Obligations of the European Union and its Member States with Regard to Economic Relations with Israeli Settlements' (CNCD 11.11.11. and FIDH, 2014) 31 – 38.



from the ECJ.<sup>358</sup> While the Court has not yet delivered, the Advocate General has issued an opinion in which he deems the Israeli occupation to be illegal.<sup>359</sup> Even though the Court is not obliged in any way to follow the AG's opinions, this may be a turning point in the EU's foreign policy, whereby it may start to qualify the occupation – and not only the settlements – as illegal.

It seems unlikely that the EU, or any state by that matter, would declare the occupation to be illegal without an international consensus on the issue, be it in the form of a UN resolution or an ICJ AO. And there is a need to qualify a situation before assessing what obligations derive from it. As we have seen before, UNSC resolutions on South Africa and on Israel, the AO on Namibia and the AO on the Wall have helped in determining the existing third state obligations, thus facilitating the task for states to comply with them. In this context, an AO affirming the illegality of the occupation would have the same political effect as a formal declaration of annexation: it would eliminate the margin of appreciation for third states, both in the qualification of the situation and in the determination of third state obligations. This is even more relevant in the context of the internal crisis of the EU, with Eastern states supporting Israel, makes it harder to reach a consensus.<sup>360</sup>

We have argued that, since the settlements already raise the above-mentioned obligations on third states, the latter would not change after a formal annexation, apart from making it easier for states to identify it as an unlawful situation. Nonetheless, even if these obligations would not change in substance, it is undeniable that the scope of the territory where they would have to be applied would increase in the context of a complete Area C annexation.<sup>361</sup> The consequences would then mostly affect Palestinians since Israeli entities in the West Bank are already subjected to them.

What would happen to the EU's differentiation policy? Up until now, Israel has very reluctantly accepted these measures, because they targeted areas that were not under its sovereignty. However, it seems unlikely that it would accept such a treatment regarding an annexed Area C that it regards as its own.<sup>362</sup> Still, the EU's obligation of

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<sup>358</sup> François Dubuisson and Ghislain Poissonnier (n 357) 13.

<sup>359</sup> (Provisional text) Opinion of Advocate General Hogan, Case C-363/18 *Organisation juive européenne Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* [2019] para 53.

<sup>360</sup> Hugh Lovatt, (n 358) 6.

<sup>361</sup> François Dubuisson, in discussion with the author. July 2019.

<sup>362</sup> Ibid.

non-recognition imposes, at a minimum, such a differentiation treatment: it has not only been imposed by the recent Security Council resolution 2234<sup>363</sup>, but it has also been ruled by the ECJ<sup>364</sup> (even if the Commission has managed to circumvent this obligation in the new Morocco-EU fisheries agreement.<sup>365</sup>)

Therefore, if the EU was able to uphold its differentiation policy, and even if Israel argued that the products all originate in its sovereign territory, the obligation to indicate whether they come from the settlements would remain, probably then not affecting Palestinian trade. On the other hand, the refusal of preferential tariff treatment would not touch Palestinian trade, since it never benefitted from it under the Interim Association Agreement on Trade and Cooperation concluded between the EU and the PLO.<sup>366</sup> According to Hugh Lovatt, the EU would, in any case, hold fast to the Green Line and still consider the area to fall under the scope of the agreements signed with the PLO.<sup>367</sup> However, if the EU decided that formal annexation indeed crosses a red line, and happened to adopt the same restrictions as were taken in Crimea (import ban on products originated in Crimea, restrictions on trade and investment, export ban for certain goods)<sup>368</sup> then Palestinian trade may suffer the negative consequences of Israel's violation of the prohibition of annexation. "If anything, *de jure* annexation might encourage the EU to do more to enforce its non-recognition obligations."<sup>369</sup>

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<sup>363</sup> UNSC Res 2334 (2016).

<sup>364</sup> ECJ, *Brita* case (n 357).

<sup>365</sup> 'MEPs: Seek European Court's Opinion on EU-Morocco Fisheries Agreement's Compatibility with International Law' (*Human Rights Watch*, 11 February 2019) <[www.hrw.org/news/2019/02/11/meps-seek-european-courts-opinion-eu-morocco-fisheries-agreements-compatibility](http://www.hrw.org/news/2019/02/11/meps-seek-european-courts-opinion-eu-morocco-fisheries-agreements-compatibility)> accessed 15 July 2019.

<sup>366</sup> Commission (EC), 'Euro-Mediterranean Interim Association Agreement' (Trade Agreement with the PLO) [1997] OJ L187/3.

<sup>367</sup> Email from Hugh Lovatt, policy fellow with the Middle East and North Africa programme at the European Council on Foreign Relations, to author (13 July 2019).

<sup>368</sup> Katya Kruk, 'The Crimean Factor: How the European Union Reacted to Russia's Annexation of Crimea' (*Warsaw Institute*, 7 May 2019).

<sup>369</sup> Hugh Lovatt (n 370).

#### 4. Conclusions.

After a deep analysis of the current practices and public declarations, it seems that, among Israeli political leaders, the shift towards *de jure* annexation is effectively taking place. Whether this shift will be consummated in a finally approved law to extend sovereignty is a matter of politics, and thus difficult to predict. When we started drafting this thesis, it seemed almost inevitable, at least in what concerns certain settlements. However, at the moment of writing these lines, the failure to form a coalition after the April 2019 elections may have changed the scenario completely.

Nonetheless, *de facto* and *de jure* practices of annexation coexist, and the previous assessment has shown that their impact on international law obligations is not always that different, while the consequences at the national level do vary. This is especially true in the case of settlement annexation, where the positive changes at the domestic level – direct application of the law to settlers and easier regimes of planning and building – contrast with the negative impact on Israel's already existing human rights violations. Our first hypothesis, whereby formal annexation would accrue but would not particularly change existing violations, would thus be confirmed.

On the contrary, going from a *de facto* to a formal annexation has huge implications in Area C, which also verifies our second hypothesis. While the ramifications at the domestic level remain practically unchanged, since Israel already enjoys the economic and security benefits that its control of Area C entails, the impact on human rights violations would be extremely higher. Claims of apartheid would be difficult to deny even if Palestinians living in Area C were granted citizenship, and the definitive blow to the two-state solution and to the people's right to self-determination would come with a great reputational cost for the state of Israel.

Finally, from an international law perspective, the substance of third state obligations remains unchanged after a formal annexation. The *de facto* annexation (through the construction of settlements and of the Separation Wall) has already engaged, among others, the obligations not to recognize them as lawful and not to aid or assist in their maintenance. In the context of a formal annexation of settlements this would remain the same; in an Area C annexation, the territorial scope where these obligations must be applied would increase and Palestinians living there would be affected by Israel's commission of an unlawful act. However, from a political point of view, formal

annexation may imply crossing some kind of “threshold” that could push third states to impose sanctions on Israel. This lack of difference in legal consequences combined with the political relevance seems to confirm our third hypothesis as well.

The distinction between *de facto* and *de jure* annexation is, in the end, mostly doctrinal and, despite its definitions and practical consequences being relatively similar, has enormous political importance. Its purpose is, on the one hand, to go beyond mere formalism and make it easier to qualify a situation as annexation despite the lack of formal declaration. On the other hand, it also gives states a bigger wiggle room, while allowing both Israel and third states to play with words and time. As long as Israel does not cross the red line of formally extending sovereignty, everyone – except the Palestinians – will benefit from this vagueness: Israel will keep establishing facts on the ground, and the international community will continue with its formal condemnation and subsequent inaction. Nonetheless, once that line is crossed, state practice shows, like in the recent annexation of Crimea, that consequences for the violating state will be harsher.

The Israeli government has been shielding itself behind the claim that all measures are temporary and subject to negotiations. The experience of East Jerusalem and the Golan Heights, as well as the amount of money and efforts that has been spent on the settlements and the wall suggests otherwise. In Orna Ben-Naftali’s words,

“The blurring of the boundaries between the temporary and the indefinite and, indeed, between the rule and the exception, has donned a mantle of legitimacy on this occupation, and has made possible the continuous interplay of occupation/non-occupation; annexation/non-annexation.”<sup>370</sup>

Consequently, a formal annexation of either the settlements or Area C would eliminate the pretense of reversibility on which all the of the international community’s references to peace are based, making it clear that Israel no longer supports a two-state solution.

In this sense, international law should make sure that the absolute prohibition of annexation is extended to those measures that can already be identified as constituting *de facto* annexation, instead of waiting for a formal declaration that may never materialize.

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<sup>370</sup> Orna Ben-Naftali (n 62) 162.

Otherwise, it will continue subordinating the respect of Palestinians rights to a mere formality, which, once carried out, will be almost impossible to reverse.

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## 6. Annexes

### 6.1. Annex 1 – List of interviewed people in chronological order.

1. Amichai Cohen. Dean of the Faculty of Law at the Ono Academic College and Director of the Center for Security and Democracy at the Israel Democracy Institute. Carried out in his office at the IDI in Jerusalem on 26 May 2019 at 12:00h.
2. Noam Zamir. Associate Professor at Lyon Catholic University and Assistant Professor at the City University of Hong Kong. Carried out at the College of Management Academic Studies of Rishon LeZion, Israel, on 28 May 2019 at 17:00h.
3. Eugene Kontorovich. Professor of Law at Antonin Scalia Law School and researcher at the pro-settlement think-tank Kohelet Policy Forum. Carried out in his office at Kohelet on 2 June 2019 at 15:00h.
4. Michael Sfard. Activist and Human Rights Lawyer, through telephone, on 10 June 2019 at 12:00h.
5. Roni Pelli. Attorney working in the Legal Department of the Association for Civil Rights in Israel (ACRI). Carried out in her office at ACRI in Tel Aviv, on 12 June 2019 at 10:30h.
6. Gideon Levy. Critical journalist and writer of weekly columns for Haaretz focusing on the occupation. Author of “The Punishment of Gaza”. Carried out in his office at Haaretz in Tel Aviv on 12 June 2019 at 13:30h.
7. Najah Dukmak. Professor of International Humanitarian Law and International Human Rights Law at Alquds University in Jerusalem. Carried out in her office at Alquds University on 17 June 2019 at 13:00h.
8. Yaël Ronen. Professor of Law at the Academic Center for Science and Law, research fellow at the Minerva Center for Human Rights and academic editor of the Israel Law Review. Carried out in her office at the Hebrew University of Jerusalem on 17 June 2019 at 18:00.
9. Tahseen Elayyan. Teseacher at Al Haq Institute. Carried out in his office in Ramallah on 19 June 2019 at 14:00h.

10. Robbie Sabel. Former Ambassador Legal Adviser to the Israel Ministry of Foreign Affairs and Legal Advisor during the Madrid Conference Talks, and current Visiting Professor of International Law at the Hebrew University of Jerusalem. Carried out at the Legal Network Conference at the Inbal Hotel in Jerusalem, on 19 June 2019 at 10:45h.
11. Yuval Shany. Chair of the United Nations Rights Committee and Hersch Lauterpacht Chair in International Law at the Hebrew University of Jerusalem. Carried out in his office at the Israel Democracy Institute on 19 June 2019 at 15:30h.
12. Omar Dajani. So-director of the McGeorge School of Law's Global Center for Business & Development at the University of the Pacific and former member of the Palestine Liberation Organization's Negotiations Support Unit. Carried out through WhatsApp call on 27 June 2019 at 10:00h.
13. Ziv Stahl. Director of the research department at Yesh Din. Carried out through Skype on 1 July 2019 at 14:00h.
14. Michael Lynk. Special Rapporteur on the situation of human rights in the Palestinian occupied territories since 1967 and Associate Professor of Law at Western University in Ontario. Carried out through Skype on 2 July 2019 at 14:30h.
- \*15. Hugh Lovatt. Policy fellow with the Middle East and North Africa programme at the European Council on Foreign Relations – Communication through e-mail., to author (13 July 2019).