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Excerpt
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Introduction

1 ISRAEL'S CONTROL OF THE PALESTINIAN TERRITORY AS A LEGAL LABORATORY

1.1 *Subject Matters*

Beginning on June 5 and ending six days later, the 1967 war was brief. During these few days, Israel gained control over the West Bank of the Jordan River, the Gaza Strip, the Sinai Peninsula, and the Golan Heights.¹ Within pre-1967 Israel, East Jerusalem (located in the West Bank) has been subsumed into pre-1967 Jerusalem. Jewish settlements began to be built in the OPT in 1967.² Half a century later, there are more than 586,000 Israelis living in the West Bank, including East Jerusalem.³ Most Palestinians and Israelis know no other reality. Law has played a significant role in the making and maintaining of this reality. This role is the focus of *The ABC of the OPT*.

¹ In 1967, the West Bank, including East Jerusalem, was under Jordanian control; the Gaza Strip and the Sinai Peninsula were under Egyptian control; and the Golan Heights were under Syrian control. The Sinai Peninsula was returned to its Egyptian sovereign pursuant to a peace treaty signed in 1979 (*Treaty of Peace Egypt-Israel*, March 26, 1979, reprinted in (1979) 18 International Legal Materials 362). The Golan Heights were fully annexed, and their residents were given Israeli citizenship (*Golan Heights Law*, 1981). East Jerusalem was annexed as well, although its residents were only given residency status, rather than citizenship (*Basic Law: Jerusalem, Capital of Israel*). The rest of the West Bank, as well as the Gaza Strip, was occupied, and Jewish settlements were established there. In 2005 Israel effected its unilateral disengagement plan, whereby it withdrew its ground forces from the Gaza Strip, evacuated the settlements, and dismantled them.

² The first settlement was Kfar Etzion. The territory on which the settlement had been established was officially seized by the military commander for military purposes, following a governmental decision to resettle the Hebron area; see CivA (Jerusalem) 2581/00 G.A.L Ltd v. *State of Israel* (October 30, 2007) [Hebrew]. On the settlements, see entries J: Jewish Settlements and R: Regularization.

³ See Central Intelligence Agency, The World Factbook – Middle East: The West Bank, <https://www.cia.gov/library/publications/the-world-factbook/geos/we.html>.

The acronym OPT – short for “the Occupied Palestinian Territory” – is widely used in reference to the West Bank and Gaza Strip under Israel’s control. In Israeli Jewish discourse, in contrast, these territories have been designated as “administered” rather than “occupied,” and the West Bank has been commonly referred to by the biblical names of “Judea and Samaria,” claiming a historical link with the Jewish people. From the perspective of international law, however, this form of control has been framed as “belligerent occupation,”⁴ and this normative framework is considered to still apply,⁵ five decades later, to the West Bank, including East Jerusalem and possibly also to the Gaza Strip.⁶

At the same time, Israel’s protracted and highly institutionalized rule over the Palestinian territories, coupled with the mass Jewish settlement project, the de facto incorporation of the West Bank (but not its Palestinian residents) into Israel, and the broader political and legal porosity of the borders between “Israel” and “Palestine,”⁷ may well indicate that the Israeli control regime has far transgressed the normative bounds of occupation. Therefore, while the title of this book invokes the commonly used term “OPT,” it avoids reducing Israel’s rule over the West Bank and Gaza Strip to “occupation” by using the broader term “control” instead. This introduction, and the book in general, oscillates between the concepts “occupation,” “control,” and “rule,” depending on the context under examination and the analytical approach.

Indeed, if viewed through the conceptual prism of “belligerent occupation,” the Israeli control of the OPT is possibly the most legalized such regime in world history. This is mainly evidenced by four interrelated factors. The first is the extensive involvement of government lawyers in designing and carrying out Israel’s rule over the West Bank and Gaza Strip, since its beginning.⁸

⁴ On the normative framework governing the OPT see Section B.2.2 and entry G: Geneva Law.

⁵ On the indeterminacy between occupation and non-occupation and between Occupied and Administered Territories, see entries G: Geneva Law and N: Nomos. See also A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge: Cambridge University Press, 2017), pp. 38–51; G. H. Fox, *Humanitarian Occupation* (Cambridge: Cambridge University Press, 2008).

⁶ On the debate over the status of the Gaza Strip since Israel dismantled the Jewish settlements in that territory and withdrew its ground forces, see entries Z: Zone (specifically Section Z.2.2.1) and X: X Rays (specifically Section X.2.6). The situation in Gaza is also the focus of entry Q: Quality of Life.

⁷ On this porosity, see entry O: Outside/Inside.

⁸ M. Shamgar, “Legal Concepts and Problems of the Israeli Military Government – The Initial Stage,” in M. Shamgar (ed.), *Military Government in the Territories Administered by Israel 1967–1980 – The Legal Aspects* (Jerusalem: Sacher Institute, 1982), pp. 13, 24–25, 27, 50–51; I. Zertal and A. Eldar, *Lords of the Land*, V. Eden (trans.) (New York: Nation Books, 2007), pp. 341, 343–344, 361–371.

The second is the Israeli military legal system, which tries thousands of Palestinians each year, and which has produced thousands of enactments governing Palestinian lives.⁹ A third factor is the unprecedented decision of the Israeli supreme court, operating in its capacity as a high court of justice (HCJ),¹⁰ to open its gates to petitions emanating from the OPT,¹¹ and to determine such petitions in the light of international law¹² as well as Israeli law.¹³ Lastly, the Israeli rule over the Palestinian territories is the longest – and, accordingly, the most entrenched and institutionalized – belligerent occupation in modern history. Taken together, these facts have generated a profusion of law and, concurrently, voluminous legal scholarship.¹⁴

⁹ See entries M: Military Courts, S: Security Prisoners.

¹⁰ Basic Law: The Judiciary, Article 15(c) provides that the supreme court of Israel may also sit as a high court of justice, and “when so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court.”

¹¹ This decision was first made in 1972. See HCJ 337/71 *The Christian Society for the Holy Places v. The Minister of Defence* (1972) 26(1) PD 574 [Hebrew; an English summary is available at (1972) 2 *Israel Yearbook of Human Rights* 354–357]. Note that the decision is unprecedented within the paradigm of belligerent occupations but not within the colonial paradigm. See S. Ben-Nathan, “The Supreme Court and the Territories: The Last Diamond in the King’s Throne,” in I. Menuchin (ed.), *50 Concepts, Testimonies and Representations of Occupation* (Mevaseret Zion: November Books, 2017) [Hebrew].

¹² International humanitarian law (hereinafter: IHL) in general; the law of belligerent occupation in particular; and, to a lesser extent, international human rights law (hereinafter: IHRL). While Israel’s official position has been that IHRL does not apply to the Palestinian territories, since 2002 the HCJ has occasionally applied it as a complementary source to IHL. See HCJ 7957/04 *Mara’abe v. The Prime Minister of Israel* (September 15, 2005) [Hebrew; English translation available at http://elyoni.court.gov.il/files_eng/04/570/079/a14/4079570.a14.pdf]. On the applicable law and its interpretation by the HCJ, see entry C: Geneva Law.

¹³ Israeli administrative law and, to the extent Jewish settlers are involved, constitutional law. In HCJ 1661/05 *Gaza Coast Regional Council v. The Israeli Knesset* (2005) 59(2) PD 481, ¶¶ 78–80, the court decided that the Israeli Basic Laws (which comprise the nascent Constitution of Israel), including the Basic Law: Human Liberty and Dignity, apply *in personam* to Israelis in the occupied territories, leaving open the question of the application of these laws to the Palestinian residents of the same territories.

¹⁴ A search in online data bases supports this assessment. E.g., the term “Israeli Occupation” currently generates some 19,000 results in the Google Scholar interdisciplinary database, <http://scholar.google.co.il/scholar?hl=iw&q=%22israeli+occupation%22&btnG=>, and more than 1,300 in the law journal database “HeinOnline,” http://heinonline.org/HOL/LuceneSearch?specialcollection=&typea=text&termsa=%22israeli+occupation%22&operator=AND&typeb=title&termsb=&operatorb=AND&typec=creator&termsc=&operatorc=AND&typed=text&termsd=&operatord=AND&typee=text&termse=&operator=e=AND&typef=text&termsf=&collection=journals&yearlo=&yearhi=&sorby=relevance&only_vol=&collection_true=&searchtype=field&submit=Search§ions=article§ions=comments§ions=notes§ions=reviews§ions=legislation§ions=case§ions=decisions§ions=misc§ions=index§ions=editorial§ions=external&other_cols=yes.

Yet, it seems that more laws, arming to the teeth trailing troops of lawyers, legal advisors, judges, and scholars, have not operated to limit state violence. Instead, more often than not, law has enabled this violence, cloaking the use of force required to sustain the Israeli regime with a mantle of legitimacy.¹⁵ Judicial review exercised by the HCJ, for example, has rejected the overwhelming majority of the petitions challenging the legality of various decisions and actions of the occupying power.¹⁶ The very few (though highly publicized) rulings in favor of petitioners have had no significant long-run impact on Israel's conduct in the OPT, other than, in some cases, "legalizing" oppressive state practices or propelling Israel to pursue alternative legal justifications.¹⁷ Scholarly work, in the main, has followed the footsteps of the judiciary and other state agents, engaging in an assessment of the legality of specific decisions and institutional practices rather than analyzing, in their light, the role of law in structuring and sustaining the regime. Such an analysis is at the heart of this study.

1.2 The Aims of the Study

This study is designed to accomplish several objectives. First, it sets out to offer a detailed account of the ways in which international and domestic law has been implicated in the multitude of measures taken by the Israeli authorities to establish and maintain their control over the OPT. The first

¹⁵ See, e.g., Judge A. Kozinski: "In the end, we do not believe that more law makes for better law," in *Hart v. Massanari* 266 F 3d 1155, 1180 (9th Cir 2001). This notion can be traced to Cicero's dictum "The more law, the less justice" (Cicero, *De officiis* I (44 BC; Oxford: Oxford University Press, 1994), pp. 10, 33). On the unbridgeable gap between law and justice see Section 3.

¹⁶ R. Shamir, "Landmark Cases' and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice" (1990) 24 *Law & Society Review* 781, 783, provides data on judgments rendered by the HCJ between the years 1967–1986, indicating that 99 percent of Palestinian petitions were rejected. Y. Dotan, "Judicial Rhetoric, Government Lawyers, and Human Rights The Case of the Israeli High Court of Justice during the Intifada" (1999) 33 *Law & Society Review* 319, 334, provides data according to which in the years 1986–1995, 98.5 percent of Palestinian petitions were wholly rejected, and some additional 3 percent were partly accepted. He further notes that during the first Oslo Accord negotiations (1991–1993), the Israeli military attorney general's office tended to treat Palestinians differently according to their factional affiliation: those affiliated with factions supporting the negotiations were treated relatively leniently, while those affiliated with factions actively trying to undermine the negotiations were handled as harshly as possible. Throughout the 1990s, the Israeli military continued arresting and prosecuting Palestinians for actions committed during the Intifada. L. Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (London: UC Press, 2005), pp. 124–126. Our own data up to 2014 indicates that some 99 percent of Palestinian petitions were rejected.

¹⁷ Shamir, "Landmark Cases," p. 797.

decades of the twenty-first century have witnessed a resurrection of the concept of “belligerent occupation,” with the 2003 military occupation of Iraq by the US-led coalition forces, the Ugandan occupation of parts of the Congo, Ethiopia’s 2006 occupation of parts of Somalia, Nicaragua’s occupation of Isla Calero in 2010, and Russia’s occupation of certain areas of Georgia in 2008 and Crimea in 2014. There have also been similar regimes, even if labeled with ostensibly less disturbing names, such as “transformative/humanitarian occupations” or “post-bellum regimes.”¹⁸ Against the backdrop of these developments, a careful scrutiny of the experiments carried out in Israel’s legal laboratory may well generate lessons that are relevant to other situations, and indeed to the course of the development of international law itself.

Second, the study seeks to highlight the nexus between the normative legal text and the narrative context within which it is written and that endows it with meaning. While decisions on the legality of a specific measure affecting the occupied population often accept the normative relevance of international law, they are neither made *in abstracto* nor by abstracted decision-makers. The legal text is written in a national context by domestic decision-makers (judges, legal advisors, and legislators) and, in most cases, its argumentation is directed primarily at the national constituency.¹⁹ The interaction between an international legal norm and a national narrative is among the key factors determining the *nomos* of the regime. Insofar as “[n]o set of legal institutions exists apart from the narratives that locate it and give it meaning,”²⁰ it is necessary to elucidate this nomos in order to understand the role international law has played in instituting and maintaining Israel’s rule over the West Bank and Gaza Strip.²¹

¹⁸ On the allegedly changing faces of foreign control/occupation reflected, *inter alia*, in their different names, see e.g., Gross, *The Writing on the Wall*, pp. 38–51; Fox, *Humanitarian Occupation*; S. Ratner, “Foreign Occupation and International Territorial Administration: The Challenges of Convergence” (2005) 16 *European Journal of International Law* 695; R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2008).

¹⁹ As a general rule, judgments of the HCJ are written and published in Hebrew. Some landmark decisions – notably those that are based on a sophisticated application of international law coupled with an evocative narrative about the subjection of the executive to legal restraints even in the face of terrorism – are published in English as well as Hebrew. It is interesting to note that while Arabic, not English, is both an official language in Israel and the petitioners’ language, the judgments are not translated into Arabic.

²⁰ R. M. Cover, “The Supreme Court 1982 term – Foreword: Nomos and Narrative” (1983) 97 *Harvard Law Review* 4.

²¹ See entry N: Nomos.

Third, by analyzing specific cases, measures, institutions, and legal concepts, this study aims to provide insights into the immensely convoluted legal architecture of the Israeli control regime. The book thus offers not merely a comprehensive but also a detailed study of law's role in constructing and maintaining this regime, tracing the Ariadne's thread woven by legal *dentelières* into the fabric of the regime.

Finally, the study delves into the relationship between the rule, the norm, and the exception, as well as the ways in which this relationship informs and is affected by Israel's control of the West Bank and Gaza Strip. This issue, the relevance of which exceeds well beyond the Israel/Palestine context, is discussed in detail in Section 2. This jurisprudential discussion includes an exposé of the main methodologies used in the various entries comprising this volume to explore the law–rule–exception relationship. Section 3 focuses on the structure of this book and explains the methodological choice to opt for the format of a lexicon for the study of law's role in the making and shaping of Israel's rule over the Palestinian territories conquered in 1967.

2 THE LAW–RULE–EXCEPTION RELATIONSHIP

2.1 General Overview

The law–rule–exception triad has been at the core of a rich jurisprudential literature. Carl Schmitt conceptualized an exceptional situation as one that poses a threat to the existence or survival of the state. Legal norms cannot fully foresee every exceptional situation, nor can such situations, which are never self-evident, be simply grounded in fact. Therefore, according to Schmitt, in order to enable the state to overcome the exception, the sovereign must be entrusted with deciding on the existence of an exception, and, subsequently, with suspending the law previously in force.²² Many have drawn on this formulation of the law–exception relationship (while rejecting Schmitt's authoritarian prescription), to examine various situations that either constitute, or are comparable to, a state of emergency.²³ This section touches upon central themes of the jurisprudential discourse on the exception, including reference to Walter Benjamin and Giorgio Agamben, whose highly influential

²² C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, G. Schwab (trans.) (Chicago: University of Chicago Press, 1988).

²³ However, in Schmitt's own writing, the state of exception (*Ausnahmezustand* in German) is not simply equivalent to a state of emergency. S. Weber, "Taking Exception to Decision: Walter Benjamin and Carl Schmitt" (1992) 22 *Diacritics* 5, 9.

writing on this topic both engages with, and substantially diverges from, Schmitt's thinking.²⁴

In particular, this book sheds light on law's role in shaping or transforming distinctions between the rule and the exception in relation to the occupied territories, as well as on the architecture and effects of specific rules and exceptions deployed by the Israeli authorities. Two overarching lines of critique, via which the book's entries address these themes, will now be described.

The first, which enshrines concepts such as “the rule of law” and “legal normalcy,” largely comports with a mode of thinking and operating that Patricia Ewick and Susan Silbey have labeled “before the law.”²⁵ This approach generally tends to treat legal norms (here, especially international legal norms) as “distinctive, yet authoritative and predictable,” as “a formally ordered, rational, and hierarchical system of known rules and procedures.” In this critique, legality appears, more often than not, “as something relatively fixed,” if not in practice then in principle. In so doing, and in investigating law's operation in light of the premises of the dominant international legal discourse, this critique tells international “law's story of its own awesome grandeur … Objective rather than subjective,” international legal norms are “defined by … [their] impartiality.”²⁶

The second line of critique amalgamates two other modes of thinking and acting. The first, toward which this critique primarily leans, can be termed, following Ewick and Silbey, “critiquing against the law.” It includes what they have described as “exploit[ing] the interstices of conventional social practices to forge moments of respite” – ideationally and concretely – “from the power of law. … [P]art of the resistance inheres in … passing the message that legality can be opposed, if just a little.” The second mode, which on the basis of Ewick and Silbey's terminology can be called “critiquing with the law,” involves “playing” law “as a game … in which pre-existing rules can be deployed and new rules invented to serve the widest range of interests and values.” The concern is less with protecting or respecting (international) “law's

²⁴ On the dialogue (actual and ideational) between Benjamin and Schmitt, see Weber, “Taking Exception to Decision.” Agamben's writing refers to Schmitt and Benjamin extensively, as discussed, e.g., in D. McLoughlin, “The Fiction of Sovereignty and the Real State of Exception: Giorgio Agamben's Critique of Carl Schmitt” (2016) 12 *Law Culture and the Humanities* 509, <http://journals.sagepub.com/doi/pdf/10.1177/1743872112469863>.

²⁵ This use of this phrase clearly differs from its use in F. Kafka “Before the Law,” in *Wedding Preparations in the Country and Other Stories*, W. Muir and E. Muir (trans.) (London: Penguin Books, 1978), p. 127.

²⁶ P. Ewick and S. S. Silbey, “The Social Construction of Legality,” in *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998), p. 47.

power than . . . [with] the power . . . to successfully deploy and engage with the law.”²⁷

By juxtaposing and/or combining these critiques, this study aims to produce a multilayered analysis, richer than would have been possible through a single perspective.

2.2 Critiquing Before the Law

The normative point of departure for this line of critique is the foundational principle of the Westphalian international order: namely, a presumption of sovereign equality between states, each exercising effective control over its territory, and people.²⁸ Under current international law, while said sovereignty is still attached mostly to states, it is increasingly understood as vested in the people, giving expression to their right to self-determination.²⁹ The latter is conceived as the sine qua non for realizing freedom in its negative (freedom from coercion) and positive (freedom of choice) senses.³⁰ From this normative perspective, a situation of belligerent occupation is the exception that suspends the norm: it consists of a foreign military force exercising effective control over a territory, despite having no sovereign title over that territory and without the sovereign’s volition.³¹ In this manner, the link between sovereignty and effective control is severed and the normal order concerning

²⁷ *Ibid.*, pp. 48–49. ²⁸ Article 2(1) of the UN Charter.

²⁹ On the right to self-determination, see generally, e.g., A. Cassese, *Self Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995); S. Oeter, “Self Determination,” in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, Volume 1, 3rd edn. (Oxford: Oxford University Press, 2012), p. 313. In the Palestinian context, see, e.g., M. Halberstam, “Nationalism and the Right to Self-Determination: The Arab-Israeli Conflict” (1993–1994) 26 *NYU Journal of International Law and Politics* 573; R. J. Tyner, “Wars of National Liberation in Africa and Palestine: Self-Determination for Peoples or for Territories” (1978–1979) 5 *Yale Studies in World Public Order* 234; J. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge: Cambridge University Press, 2010).

³⁰ The exposé of the normative framework provided here reproduces, mutatis mutandis, pp. 543–546 of O. Ben-Naftali, “Belligerent Occupation: A Plea for the Establishment of an International Supervisory Mechanism,” in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012). It is noteworthy that the common distinction between so-called “negative” and “positive” rights (or duties), invoked by the present line of critique, is highly problematic. For criticism see, e.g., H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980); J. P. Sterba, “The Welfare Rights of Distant Peoples and Future Generations: Moral Side-Constraints on Social Policy” (1981) 7 *Social Theory and Practice* 99.

³¹ E. Benvenisti, *The International Law of Occupation*, 2nd edn. (Princeton: Princeton University Press, 2004), p. 4.

the occupied territory is suspended.³² Once the suspension of the norm loses its temporariness, the exception becomes normalized. The normalization of the exception severely affects the occupied population's fabric of life, the occupying power's legitimacy, and, indeed, the very notion of the rule of law.

As Giorgio Agamben has observed, the space where the temporary suspension of the rule is indistinguishable from the rule has generated the conditions of possibility for the concentration camp,³³ but is not limited to Nazi Lagers. It is paradigmatic of every situation where the political machinery of the modern nation state finds itself in a continuous crisis and decides to take it upon itself to defend the nation's biological life, collapsing human rights into citizens' rights,³⁴ subsuming humanity into citizenry and making the former the "exceptionless exception."³⁵ In such a situation, the enemy, stripped of human rights, is also stripped of her/his humanity. Having been excluded from the body politic, s/he has only her/his own body as a political tool and it is through this political body that s/he interacts with the body politic that has thus reified her/him.³⁶

The reason for the indeterminacy of the state of exception – Agamben has argued, adapting Schmitt – is the absence of any necessary relation between the decision on the state of exception and its factual existence. This allows for an indefinite suspension of the norm, explains how the Nazis produced an

³² This notion of suspension was already recognized in the first attempt to codify the law of belligerent occupation in the Brussels Declaration. See Final Protocol and Project of an International Declaration Concerning the Laws and Customs of War (Brussels, 27.8.1874) reprinted in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflict. A Collection of Conventions, Resolutions and Other Documents* (The Hague: Brill, 1988), p. 25.

³³ G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, D. Heller-Roazen (trans.) (Stanford: Stanford University Press, 1988), pp. 166–168.

³⁴ *Ibid.*, pp. 126–131, 174–176. Agamben, noting the very ambiguity of the title *Declaration des droits de l'Homme et du Citoyen*, refers in this context to Arendt's discussion of the paradox wherein "The Conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human." See H. Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt Brace, 1973), p. 299. Thus, says Agamben, in the nation-state system, human rights that are considered inalienable have become meaningless once they cannot be attached to the citizens of a nation-state. The refugee, the person who was supposed to be the "human rights" person par excellence, has thus become the paradigm of "bare life."

³⁵ A term coined by Gross in his analysis of Schmitt's theory of the exception. See O. Gross, "Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy" (2000) 21 *Cardozo Law Review* 1825.

³⁶ Agamben, *Homo Sacer*, pp. 187–188.

ostensibly “normal” constitutional structure characterized by the legal indeterminacy of the emergency situation, and also explains why the sovereign cannot distinguish between the norm and the exception, thus failing to meet the task Schmitt’s *Political Theology* assigned to it.³⁷ In Schmittian terms, the result may be conceptualized as blurring the line between law and fact: the law continues to operate despite its suspension but no longer signifies “the rule of law”: those subject to the state of exception are stripped of the legal rights that would protect them, yet are still subject to law’s violence: “insofar as law is maintained as pure form in a state of virtual exception, it lets bare life . . . subsist before it.”³⁸ The *Goldstone Report* captured this problem when noting, in one of its concluding observations, that “a line has been crossed, what is fallaciously considered acceptable ‘wartime’ behavior has become the norm.”³⁹

International law has contributed significantly to the blurring of this line. And so has Israel’s use of this law over the years, with regard to a wide range of measures designed to sustain, expand, and deepen Israeli control over the OPT (while simultaneously perpetuating Israel’s self-perception and external image as a law-abiding “defensive democracy” fighting “with one hand tied behind its back”).⁴⁰ Against this backdrop, the central proposition this line of critique advances is that once law becomes implicated in obfuscating the rule–exception relationship, it becomes itself infected and its legitimacy is jeopardized. This proposition rests on several observations this critique seeks to substantiate. First, the application of law to individual cases would typically resort to various sophisticated interpretative techniques and methodologies designed to advance the occupying power’s interests at the occupied people’s expense. More often than not the result would frustrate the original purpose of the rule at hand and would operate as a legitimizing device, encouraging a discourse of various specific violations of human rights carried out in the name of security to be perceived as exceptional, thereby concealing the reality wherein said violations have become the rule, not the exception. Second, such application of the law would contribute to and facilitate the formation of an

³⁷ G. Agamben, *State of Exception*, K. Attell (trans.) (Chicago: University of Chicago Press, 2005), p. 58.

³⁸ Agamben, *Homo Sacer*, p. 55 (and the discussion pp. 50–55).

³⁹ UN Human Right Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, “Human Rights in Palestine and other Arab Occupied Territories,” September 25, 2009, A/HRC/12/48, ¶ 1433.

⁴⁰ This is a recurrent narrative in the judgments of the HCJ pertaining to the OPT. See, e.g., HCJ 7015/02 *Ajuri v. IDF Commander in the West Bank* (2002) 56(6) PD 352 [Hebrew; English translation available at http://elyoni.court.gov.il/Files_ENG/02/150/070/A15/02070150.A15.pdf].

environment, indicative of a state policy of tolerance toward systemic violations of human rights and the institutionalization of a culture of impunity.⁴¹ Third, over time, the resulting chain of specific anomalies would generate the perception among the occupied population that the justice system itself is an instrument not merely of power but of unpredictable violence, of arbitrariness, where the absence of law is carried out under the name of law. Constant exposure to law's violence would engender violence.⁴²

International law seeks to regulate the interruption created by belligerent occupation. Such regulation signifies the need to distinguish both order from chaos and the rule from the exception. In distinguishing between order and chaos, its function is to govern the situation; to prevent anarchy by entrusting the occupying power with governing the occupied territory. In distinguishing between the rule and the exception, its function is to establish the conditions that would enable as swift as possible a return to the normal order of the international society.

This, according to the present line of critique, is the role of the law of belligerent occupation, a body of law that bears strong structural resemblance to the normative framework applicable to an emergency regime. This regime, the roots of which date back to the Roman-Commissarial model, rests on three precepts: exceptionality, limited scope of powers, and temporary duration.⁴³ The assumption on which this model is based is that a situation of emergency is exceptional, hence separated from the ordinary state of affairs. For this reason, its duration must be limited and it must not generate permanent effects. This is also the reason for regarding the norm as superior to the exception: the existing legal order defines the terms under which it is suspended, and the powers granted in such a situation are to be used for the purpose of an expeditious re-establishment of normalcy.⁴⁴ Indeed, as modern studies of emergency situations concerned with the derogation from human rights law thereby occasioned have concluded, “[a]bove and beyond the rules . . . one principle, namely, the principle of provisional status, dominates all others. The right of derogation (of human rights) can be justified solely by the concern to return to normalcy.”⁴⁵

⁴¹ See, e.g., entry W: War Crimes. ⁴² See, e.g., entry V: Violence.

⁴³ See T. E. Mommsen, *The History of Rome* (New York: Meridian Books, 1958), pp. 325–326; For later references to this classical model, see, e.g., N. Machiavelli, *The Discourses*, L. J. Walker (trans.) (London: Penguin Books, 1970), pp. 194, 198; J. J. Rousseau, *The Social Contract and Discourse*, G. D. H. Cole (trans.) (London: Everyman, 1993), pp. 293–296.

⁴⁴ For the essential features of the traditional model of emergency powers, see Gross, “Exception and Emergency Powers,” pp. 1836–1839.

⁴⁵ N. Questiaux, Study of the Implications for Human Rights of Recent Development Concerning Situations Known as State of Siege or Emergency (1982) UN ESCOR 35th

The basic tenets of the normative regime of occupation largely conform to this constitutional model, transporting it to the international arena: the normal order is based on the principle of sovereign equality between states that are, at least to some extent, presumed to be founded on the ideas of self-government and self-determination. The severance of the link between sovereignty and effective control, and life under foreign rule – both features of occupation – constitute an exceptional situation. The law of occupation recognizes it as an exception to be managed so as to ensure expeditious return to normalcy. This is why the occupant has only limited powers in terms of both scope and time, and is not permitted to act in a manner designed to generate permanent results.

As noted earlier, this mode of critique takes as its normative framework the law of belligerent occupation, consisting of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land,⁴⁶ the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War,⁴⁷ and the Additional Protocol I of 1977.⁴⁸ Over the past decades it has been accepted that IHL provides the specific – though not exclusive – law governing occupation (*lex specialis*), and that it is complemented by IHRL.⁴⁹ Three basic tenets, extractable from this body of law, will now be articulated.⁵⁰

Session, Agenda item 10, 69 UN Doc E/CN.4/Sub.2/1982/15, p. 20. Also see O. Gross and F. NiAoláin, “To Know Where We Are Going, We Need To Know Where We Are: Revisiting States of Emergency,” in A. Hegarty and S. Leonard (eds.), *Human Rights: An Agenda for the 21st Century* (London: Cavendish Publishing, 1999), p. 79.

⁴⁶ The Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, October 18, 1907, 205 CTS 277; 36 Stat 2277 [hereinafter: the Hague Regulations].

⁴⁷ Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Geneva, August 12, 1949, 75 UNTS 287 [hereinafter: GC IV].

⁴⁸ Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), Geneva, June 8, 1977, 1125 UNTS 3 [hereinafter: AP I].

⁴⁹ See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226, ¶ 25; Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136, ¶ 106; Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Judgment, 2005 ICJ 168, ¶¶ 216–217. See generally, O. Ben-Naftali (ed.), *International Human Rights and Humanitarian Law* (Oxford: Oxford University Press, 2011). For the position that the application of IHRL together with IHL may not necessarily achieve its purpose and may indeed harm more than ameliorate the human rights of “protected people,” see A. Gross, *The Writing in the Wall*, pp. 338–396.

⁵⁰ For a comprehensive exposé of these basic tenets, see O. Ben-Naftali, A.M. Gross, and K. Michaeli, “Illegal Occupation: The Framing of the Occupied Palestinian Territory” (2005) 23 *Berkeley Journal of International Law* 551.

2.2.1 Occupation Neither Transfers Sovereignty Nor Confers Title

Effective control by foreign military forces suspends, but does not transfer sovereignty. The prohibition on annexing an occupied territory is the normative consequence of this principle.⁵¹ Under current international law, and in view of the principle of self-determination, sovereignty remains vested in the occupied people. This principle is currently undisputed. Its development merits attention primarily because history – that is, change over time – is hardly ever a linear process of progression; regression to imperial domination remains an ever-present possibility. It is thus worthwhile to take account, albeit briefly, of this development.

The roots of the principle of the inalienability of sovereignty date back to the post-Napoleonic wars and the restoration of a European order, designed to protect the ruler's sovereignty from intervention by another state. Given that the political legitimacy of European rulers at the time was based on either dynastic monarchy or popular democracy, the principle was designed to accommodate both systems and minimize disruption by preventing one from overthrowing the other.⁵² In the relationship between the European and the non-European world, conquest remained a legally valid way to acquire sovereignty until the twentieth century.⁵³ The international community's gradual renunciation of the use of force as an acceptable policy, coupled with decolonization processes and the ensuing right to self-determination, have internationalized this hitherto exclusively European order. Accordingly, the prohibition on annexation of territory, differentiating between occupation and sovereignty, coheres with the corpus of general international law core principles of sovereign equality, self-determination, and nonintervention.⁵⁴

Given, however, that such principles have not been inscribed on a tabula rasa, it is little wonder that the very occurrence of an occupation echoes the sorry story of the “civilizing mission,” and that “alien occupation” of whatever type has been grouped together with colonial domination, racist regimes,⁵⁵ and related practices of subjugation, domination, and

⁵¹ S. P. Sharma, *Territorial Acquisition, Disputes and International Law* (Leiden: Kluwer Law International, 1997), p. 148.

⁵² E. Benvenisti, “The Origins of the Concept of Belligerent Occupation” (2008) 26 *Law and History Review* 621. N. Bhuta, “The Antinomies of Transformative Occupation” (2005) 16 *European Journal of International Law* 721.

⁵³ S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Oxford University Press, 1996), p. 9.

⁵⁴ See Articles (2), 2(1), 2(4), 2(7) and 55 of the UN Charter. ⁵⁵ Article 4 of AP I.

exploitation.⁵⁶ This sensibility runs through the divide between sovereignty and foreign occupation, and implies that the very phenomenon of occupation is viewed with suspicion and is likely to generate resentment and resistance. This is a fortiori the case with prolonged occupations and with “transformative occupations” – that is, occupations that purport to replace the sociopolitical system of the occupied territory with a system akin to that of the occupying power. The association between such attempts and imperialism may well explain why the various international interventions of the 1990s shied away from either describing themselves as occupations or indeed from referring to the law of belligerent occupation. From this perspective, former president George W. Bush’s admission that the American and British troops occupying Iraq were “welcomed, but it was not a peaceful welcome” should not have come as a surprise,⁵⁷ nor should the subsequent resurgence. Foreign occupation connotes subjugation, not liberation. Reflecting this understanding are the distinction between sovereignty and occupation (as discussed in Section 2.2.2) and the consequential limits placed on the occupant’s governmental authority (as discussed in Section 2.2.3).

2.2.2 An Occupation Is a Form of Trust Precluding the Introduction of Major Systemic Change

The basic rule regulating the occupant’s governmental authority is articulated in Article 43 of the Hague Regulation. Under this rule, the occupant is vested with the authority “to take all the measures in his power to restore, and ensure, as far as possible, public order and safety/civil life, while respecting, unless absolutely prevented, the laws in force in the country.”⁵⁸ This rule, thus, imposes two categories of obligations on the occupant: (a) to protect the

⁵⁶ See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN General Assembly, October 24, 1970, A/RES/2625(XXV).

⁵⁷ In an interview with Brian Williams, NBC News (December 12, 2005), cited in A. Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights” (2006) 100 *American Journal of International Law* 580, 616.

⁵⁸ The authoritative French version uses the phrase “l’ordre et la vie publiques.” The English translation reads: “public order and safety.” Since the authoritative text of the Hague Regulations is in the French language, the English text has no legal standing. For the discussion of the difference between the French and the English versions of Article 43 of the Hague Regulations, see Y. Dinstein, “Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peace-Building” *Harvard Program on Humanitarian Policy and Conflict Research, Occasional Paper No.1* (2004), pp. 2–4.

inhabitants' life, property, and livelihood; and (b) to respect the existing legal, economic, and sociopolitical institutions in the territory.

The first category reflects humanitarian concerns.⁵⁹ It has evolved over time to incorporate the concept of trusteeship, the beneficiaries of which are the inhabitants of the territory.⁶⁰ Admittedly, this is a *sui generis* form of trust insofar as it carries with it a potential conflict of interests between the occupant's security needs and the inhabitants' welfare. In the nineteenth century, this framework produced two primary rules: the occupant was mainly incumbent with the negative duty of refraining from infringing on the inhabitants' most basic rights, while the latter were incumbent with a duty of obedience to the occupant.⁶¹ Over time, the scale began to tip to the inhabitants' side: the GC IV seems to reject the idea that the occupied population was under any obligation to obey the occupant.⁶² In parallel, it has considerably expanded the protection due to the inhabitants, in respect of both negative and positive duties. This process has culminated in the coapplication of IHL and IHRL to occupied territories. Nevertheless, the GC IV explicitly subjects some of the guarantees afforded to the population to military necessity and conditions⁶³ and empowers the occupant to take various measures against "protected persons."⁶⁴ It is thus clear that situations where the occupation either is met with strong resistance in general (such as the occupation of Iraq), or produces such resistance (the occupation of the Palestinian Territory being the quintessential example), threaten the viability of this precarious balance.

The second category of obligations, which prohibits the occupant from instituting major changes in the occupied territory, has its origins in the above-discussed preservation of the sovereignty (inclusive of the domestic governmental system) of the ousted rulers in Europe. This limitation on the

⁵⁹ Originating in the principle of distinction between civilians and combatants, see Benvenisti, "Origins of the Concept of Belligerent Occupation," pp. 624–627.

⁶⁰ Construction of a Wall, ¶ 88; Separate Opinion of Judge Koroma, ¶ 2, explicitly stated that occupied territories "constitute . . . a sacred trust, which must be administered as a whole in the interests both of the inhabitants and the legitimate sovereign or the duly constituted successor in title"; cf. Separate opinion of Judge Higgins, ¶ 2; Separate opinion of Judge Kooijmans, ¶ 33.

⁶¹ R. R. Baxter, "The Duty of Obedience to the Belligerent Occupant" (1950) 27 *British Yearbook of International Law* 235.

⁶² E.g., the terms "war rebellion" and "war treason" were not incorporated in the Convention. Furthermore, while providing the occupant with the right to take measures against "protected persons" who carry out acts detrimental to the occupant's security (GC IV, Articles 27, 64), it nevertheless preserves most of their rights under the Convention (*ibid.*, Articles 5, 68).

⁶³ E.g., *ibid.*, Articles 27, 49, 51, 53.

⁶⁴ Promulgating penal laws (*ibid.*, Article 64); assigning residence (*ibid.*, Article 78); and internment (*ibid.*, Article 42).

occupant's authority was incorporated and further detailed in the GC IV.⁶⁵ Currently known as the “conservation principle,” it highlights the distinction between temporary occupation and sovereignty.⁶⁶ Given that the latter is attached to the occupied people, the principle protects local self-determination. In this context too, both transformative and prolonged occupations threaten the viability of this principle: the former because the objective of redesigning the existing system stands in direct conflict with its conservation;⁶⁷ the latter because maintaining the status quo may well become a mandate for stagnation and defy the obligation to promote the inhabitants’ welfare.⁶⁸ This point invites a discussion of the third tenet of the law of belligerent occupation.

2.2.3 An Occupation is a Temporary Form of Control

The idea that an occupation is a temporary form of control that may not generate permanent results is undisputed. Indeed, it is implicit in both the principle that occupation does not confer title and in the conservation principle. The notion of limited duration further coheres with the exceptionality of the regime and highlights the need to resume, as quickly as possible, the normal international order of sovereign equality.

⁶⁵ *Ibid.*, Article 64.

⁶⁶ J. L. Cohen, “The Role of International Law in Post-Conflict Constitution-Making: Toward a *Jus Post Bellum* for ‘Interim Occupations’” (2006–2007) 51 *New York Law School Law Review* 496, 498–499.

⁶⁷ Viewed from the perspective of the conservation principle, a “transformative occupation” mocks the law. When measured against the idea that an occupation is distinct from sovereignty and that, therefore, it is necessary to preserve the sovereign’s decision-making capacity in matters pertaining to its sociopolitical and economic profile, that is, its right to self-determination, the very concept of “transformative occupation” is an oxymoron which challenges the basic assumptions of the law of belligerent occupation. See Bhuta, “Antinomies of Transformative Occupation”; N. Bhuta, “New Modes and Orders: The Difficulties of a *Jus Post-Bellum* of Constitutional Transformations” (2010) 60 *University of Toronto Law Journal* 799.

⁶⁸ Viewed from the perspective of human rights, however, “transformative occupations,” designed to substitute a democratic for a despotic form of government, arguably create the conditions of possibility for self-determination. From this perspective, the argument has been made that a law that fails to advance this objective is anachronistic and should be updated. See, e.g., G. H. Fox, “The Occupation of Iraq” (2004–2005) 36 *Georgetown Journal of International Law* 195. A somewhat less radical variation of this view holds that resort to dynamic interpretations, which reads broadly the “unless absolutely prevented” proviso, allows for the reconciliation of transformative objectives with the conservation principle without a legislative reform. See, e.g., Roberts, “Transformative Military Occupation,” pp. 620–622.

The greatest challenge to this principle comes not only from reality, but from law itself: the law of occupation, while providing for the provisional status of the occupation regime, does not set time limits on its duration. In this particular regard, the present critique departs from its overall location “before the law,” as described in Section 2.2. This absence of time limits has been construed to mean that an occupation can continue indefinitely.⁶⁹ This construction obfuscates the crucial distinction between the “temporary” and the “indefinite”: a temporary situation definitely has an end; an indefinite situation may or may not have an end. Indeed, if an occupation could continue indefinitely, the interests it is designed to protect would all become meaningless: (i) the inhabitants’ interest in regaining control over their life and exercising their right to self-determination; (ii) the interest of the international system in resuming the normal order of sovereign equality between states; and (iii) the interest of the international rule of law in maintaining the distinction between the norm (the principle of sovereign equality) and the exception (occupation).⁷⁰

2.3 Critiquing Against/With the Law

Another critical approach, interwoven throughout some of this book’s entries, presents various challenges to dominant legal frameworks, while refraining (unlike the former approach) from committing itself to any totalizing normative agenda.⁷¹ This critique differs from the former one in at least five respects. While these differences raise complex theoretical questions, a succinct overview suffices for the purpose of this introduction.

⁶⁹ Shamgar, “Legal Concepts and Problems of the Israeli Military Government,” p. 43.

⁷⁰ GC IV, Article 6, is the only provision that tackles directly the issue of the duration of an occupation. It does so, alas, in an implausible manner, providing for the continued applicability of only some of the Convention’s provisions. This may well be construed by occupying powers as limiting their obligations toward the inhabitants precisely in situations where greater protection is needed. Indeed, the text indicates the drafters’ assumption that occupations would normally be of short duration. Once it became clear that this assumption was defied by reality and that it may generate counterproductive results, the provision was abrogated: API, Article 3(b), provides for the application of the law of belligerent occupation until the termination of the occupation. It does not, however, provide for time limits for its duration. See *Construction of a Wall*, Separate Opinion of Judge Elaraby, ¶ 31; Separate Opinion of Judge Koroma, ¶ 2. See entry T: Temporary/Indefinite.

⁷¹ This position is also influenced by the post-structuralist skepticism toward totalizing grand-narratives. See, e.g., J.F. Lyotard, *The Postmodern Condition: A Report on Knowledge*, G. Bennington and B. Massumi (trans.) (Minneapolis: University of Minnesota Press, 1984). On post-structuralism generally see, e.g., I. Buchanan, *A Dictionary of Critical Theory* (Oxford: Oxford University Press, 2010), p. 381.

First, for the present line of critique, concepts such as “legal” and “norm” – and their counters, “illegal” and “exception” (or “fact”) – are not self-evident givens from which conclusions can be deduced, but are complex, elusive, and contestable products of legal discourse and action.⁷² Consequently, the rule–exception distinction is treated as an object of inquiry rather than as a point of departure. The task therefore becomes to carefully scrutinize the construction, deployment, and interplay of the (so-designated) “rule” and “exception,” and the effects thereof.

Second, a conceptual distinction between “the exception” and “the rule” can be maintained while acknowledging, at the very least, that these terms are neither historically nor structurally antithetical. Historically, as Walter Benjamin famously observed, “the tradition of the oppressed teaches us that the state of emergency in which we live is not the exception but the rule.”⁷³ Indeed, for at least a century now, the apparent exception has been anything but exceptional. Across the globe, emergency powers have drastically increased in scope, and the definition of “emergency” has been broadened far beyond military conflicts to justify routine governmental powers serving the interests of socioeconomic elites.⁷⁴ The fact that Israel has been in a declared state of exception since its establishment underscores the point.⁷⁵ Structurally, the state of exception is powerfully tied to the legal rule. For Carl Schmitt (and

⁷² On meaning as the product of use, see, e.g., J. L. Austin, *How to Do Things with Words*, 2nd edition (Cambridge, MA: Harvard University Press, 1975); J. Derrida, *Writing and Difference*, A. Bass (trans.) (Chicago: University of Chicago Press, 1980); L. Wittgenstein, *Philosophical Investigation*, P. M. S. Hacker and J. Schulte (eds.), G. E. M. Anscombe et al. (trans.) (4th edn., Hoboken: Wiley-Blackwell, 2009). On international law as a realm of practices and discourses producing distinctions between, for example, “compliance” with and “violation” of international law, or between “wartime” and “peacetime,” see D. Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006). On law (generally) as revolving around the production of such distinctions, see N. Luhmann, “Operational Closure and Structural Coupling: The Differentiation of the Legal System” (1988) 15 *Journal of Law and Society* 153. Though a relevant source of reference in this regard, Luhman’s writing has important limitations in other regards. For criticism see, e.g., M. Valverde, *Law’s Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003), pp. 6–7. On law as subject to an endless deference of meaning see J. Derrida, “Before the Law,” in J. Derrida and D. Attridge (eds.), *Acts of Literature* (London: Routledge, 1991). See also text and note 91.

⁷³ W. Benjamin, “Theses on the Philosophy of History,” in H. Arendt (ed.), *Illuminations: Essays and Reflections*, H. Zohn (trans.) (Berlin: Schocken, 1969), p. 257.

⁷⁴ See, e.g., M. Neocleus, “The Problem with Normality: Taking Exception to ‘Permanent Exception’” (2006) 31 *Alternatives* 191.

⁷⁵ See HCJ 3091/99 *The Association for Civil Rights in Israel v. The Knesset* (May 8, 2012) [Hebrew]. An international legal manifestation of this constant state of emergency, which will not be discussed in this book, is Israel’s declaration to the UN upon ratifying the International Convention on Civil and Political Rights in 1991. The declaration states that Israel does not see itself bound to Article 9 of the Convention, which forbids arbitrary detention,

later, Giorgio Agamben), the state of exception retains a link to the suspended legal order by establishing the conditions for its reapplication after its suspension, thereby maintaining law's authority.⁷⁶ A critique “against/with the law,” however, construes this link as even stronger, in two interrelated respects: first, far from being a lawless or extralegal space, the state of exception brims with law – with legal texts, procedures, mechanisms, and discourses;⁷⁷ second, to a large extent, many of the oppressive practices and policies associated with the (assumed) exception actually reproduce or originate from practices and policies in the supposedly normal legal order.⁷⁸

A third difference is that the present critique, rather than regarding international law (and law generally) as its normative basis, treats it as inherently violent. Put explicitly, violence is viewed as integral to the so-called “normal” legal order, not as an aberration from this order.⁷⁹ It is in line with this violence, and also due to law’s malleability to diverse (and often competing) interpretations, that law provides a framework not only for engaging with the limits of belligerent control, but also for continuing war and state violence by

in light of Article 4, which reads: “In time of public emergency . . . the States Parties to the present Covenant may take measures derogating from their obligations,” International Convention on Civil and Political Rights, opened for signature December 19, 1966, 999 UNTS 171 (entered into force March 23, 1976). For a discussion of this issue, see J. Quigley, “Israel’s Forty-Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations?” (1994) 15 *Michigan Journal of International Law* 491.

⁷⁶ Schmitt, *Political Theology*, pp. 12–15; Agamben, *State of Exception*, p. 58. It is also a significant element of the inclusive exclusion characteristic of the Israeli occupation. See the aptly titled A. Ophir et al. (eds.), *The Power of Inclusive Exclusion: Anatomy of Israeli Rule in the Occupied Palestinian Territories* (New York: Zone Books, 2009).

⁷⁷ See, e.g., P. Fitzpatrick and R. Joyce, “The Normality of the Exception in Democracy’s Empire” (2007) 34 *Journal of Law and Society* 65; N. Hussain, “Beyond Norm and Exception: Guantánamo” (2007) 33 *Critical Inquiry* 734, 737–750; F. Johns, “Guantánamo Bay and the Annihilation of the Exception” (2005) 16 *European Journal of International Law* 613.

⁷⁸ See entry O: Outside/Inside. For discussion beyond the Israeli–Palestinian context, see, e.g., J. Forman, Jr., “Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible” (2009) 33 *NYU Review of Law and Social Change* 331; E. Hernández-López, “Guantánamo as Outside and Inside the US: Why is a Base a Legal Anomaly?” (2010) 18 *Journal of Gender, Social Policy and Law* 471; J. T. Parry, “Torture Nation, Torture Law” (2009) 97 *Georgetown Law Journal* 1001; W. R. Levi, “Interrogation’s Law” (2009) 118 *Yale Law Journal* 1434; N. T. Saito, “Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism” (2009) 1 *Georgetown Journal of Law and Modern Critical Race Perspectives* 67; A. Anghie, “The Evolution of International Law: Colonial and Postcolonial Realities” (2006) 27(5) *Third World Quarterly*, 739–753; C. Jochnick and R. Normand, “The Legitimation of Violence: A Critical History of the Laws of War” (1994) 35(1) *Harvard International Law Journal* 49–95.

⁷⁹ See especially entries L: Lawfare and V: Violence.

other means. Indeed, states all too often rely on, and resort to, international law to shape and legitimize their violent actions.⁸⁰

Fourth, in this account, the so-called “normal” political order is no less perilous than the “normal” legal order to which it is inextricably tied. Therefore, this critique does not share the previous critique’s lament over the purported suspension of the international order by the prolonged belligerent occupation. Nor does it share the tendency of legalistic approaches to fetishize the principle of state sovereignty,⁸¹ upon which the international order is based. In short, from this critical perspective, neither state-centrism nor a reversion to the dominant international order should be extolled as an ideal solution to the ills of belligerent control.

Lastly, just as legal and political norms are not necessarily praiseworthy, so the exception is not, by definition, deplorable. Moreover, in certain circumstances, the exception can open a space for justice. This insight follows Walter Benjamin’s assertion that in normal situations, the state employs oppressive “law-preserving violence” to protect its monopoly on violence, whereas in the state of exception the bell tolls for the oppressed: “pure violence” erupts, destroying or suspending the law. An example of such “pure violence,” Benjamin claimed, is the proletarian general strike, which – unlike the instrumental violence of partial and political general strikes – demands radical transformation of the state-enforced capitalist labor system.⁸² Giorgio Agamben and Jacques Derrida have each developed this notion in different, but potentially related, directions. Agamben advocated a “real” state of exception, neither statal nor juridical, which would obliterate, or at least undermine, the normalized (and in this regard “fictitious”) state of exception that has been imposed on humanity.⁸³ Derrida, in comparison, defined responsibility as, among other things, “the experience of absolute decisions made outside of . . . given norms, made therefore through the very ordeal of the undecidable.”⁸⁴ “[F]or a decision to be just and responsible,” maintained Derrida, “it must . . . conserve the law and also destroy it or suspend it enough

⁸⁰ See, e.g., Kennedy, *Of Law and War*; Jochnick and Normand, “The Legitimation of Violence.”

⁸¹ For criticism of this tendency, see K. McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transnational Justice” (2007) 34 *Journal of Law & Society* 411, 421–424.

⁸² W. Benjamin, “Critique of Violence,” in P. Demetz (ed.), *Reflections: Essays, Aphorisms and Autobiographical Writings* (Berlin: Schöcken, 1986), pp. 277, 290–292, 300.

⁸³ Agamben, *Homo Sacer*; Agamben, *State of Exception*, p. 59. For discussion of this aspect of Agamben’s writing see McLoughlin, “Fiction of Sovereignty.”

⁸⁴ J. Derrida, *The Gift of Death*, D. Wills (trans.) (Chicago: University of Chicago Press, 1995), p. 5. For discussion of the US detention facility at Guantánamo Bay through the prism of Derrida’s notion of responsibility, see Johns, “Guantánamo Bay,” pp. 615, 633–634.

to have to reinvent it in each case . . . Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.”⁸⁵

This critical approach aims to pursue this perhaps-impossible yet imperative ideal of simultaneously conserving and destroying the law.

2.4 Convergence and Divergence

The question of how these two lines of critique relate to each other is open to interpretation. On the one hand, given the different angles from which they address the Israeli control regime, some may regard them as mutually exclusive, at least in some senses. On the other hand, in many respects, they can be viewed as potentially complementary, and in some cases seemingly contrasting views are merely differences of emphasis. This book leaves room for these different interpretations, with some entries endeavoring to tie these lines of critique together, whereas others lean exclusively toward one or the other. Whichever way one interprets the interrelation of these critiques, their important commonalities are undeniable, including the realization, discussed earlier, that Israel’s rule over the West Bank and Gaza Strip, far from being a space of lawlessness, is in fact filled to the brim with legalism.

Neither of these lines of critique – it is important to stress – is simply “internal” or “external” to law, especially considering the porosity, elasticity, and contestability of law’s (imagined) boundaries.⁸⁶ Instead, these critiques exemplify different types of “legal consciousness” – “before,” “with,” and “against” the law – as defined in Ewick and Silbey’s insightful, if inevitably schematic, writing on the subject. Ewick and Silbey explain:

Legality is not inserted into situations; rather, through repeated invocations of the law and legal concepts and terminology, as well as through imaginative and unusual associations between legality and other social structures, legality is constituted . . . We use the phrase “legal consciousness” to name participation in the process of constructing legality. . . . The production [of legality]

⁸⁵ J. Derrida, “Force of Law: The Mystical Foundations of Authority” (1990) 11 *Cardozo Law Review* 919, 961. For discussion see, e.g., P. Goodrich, “Postmodern Justice,” in A. Sarat, M. Anderson, and C. O. Frank (eds.), *Law and the Humanities: An Introduction* (Cambridge: Cambridge University Press, 2009).

⁸⁶ See, e.g., P. Schlag, “The Dedifferentiation Problem” (2009) 42 *Continental Philosophy Review* 35. Characterizing law’s boundaries as “imagined” does not diminish the “realness” of their consequences. For a similar claim in relation to the category “nationality” see B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York: Verso, 1983).

may include innovations as well as faithful replication. . . . Consciousness is not merely a state of mind. Legal consciousness is produced and revealed in what people *do* as well as what they *say*.⁸⁷

Seeing law and legality as ever-changing products of discourse, imagination, and practice – a view long shared by prominent jurists⁸⁸ – also sheds light on the nature of law in Israel’s control of the West Bank and Gaza Strip. In addition to Israel’s formal legal institutions and texts, there are also, no less importantly, Israeli soldiers on the ground. While not professionally lawyers, they too engage in the sort of activity Ewick and Silbey would characterize as “legal consciousness.” Among other things, soldiers produce various, and at time concurrent, narratives of legality and illegality in the OPT, narratives that largely revolve around the question of the ability, or the authority, to locate and identify the rule and the exception. Thus, in testimonies of Israeli ex-soldiers, the OPT is sometimes described as a space of lawlessness, where “there is no law, only Jewish interests.” According to another narrative, the OPT is in fact replete with law, but since soldiers “only follow orders” they are somewhat distinguishable and remote from that law. In yet another narrative, soldiers not only perform but actually embody the law, a dynamic that finds its ultimate manifestation whenever a soldier asserts: “I am the law.”⁸⁹

Thus, Israel’s control of the West Bank and Gaza Strip, on the one hand, and this study, on the other hand, engage in and produce different legal formations. To reflect the particular legal patchwork of the Israeli control regime, this book is organized in the form of a legal lexicon, as explained in the following section.

3 THE LEXICON FORMAT

The book is structured in a lexical format, comprising 26 alphabetically ordered entries. Each entry, from A: Assigned Residence to Z: Zones, focuses on a legal, administrative, and/or military term/concept that is central to the modus operandi of Israel’s rule over the West Bank and Gaza Strip. Each entry begins descriptively, with a definition, description, or presentation of the legal doctrine relative to the term/concept as a terminus a quo for the ensuing discussion. The latter focuses on the actual use, or role, of the term/concept

⁸⁷ Ewick and Silbey, “Social Construction of Legality,” pp. 43–46.

⁸⁸ See, e.g., Cover, “Nomos and Narrative”; R. M. Cover, “Violence and the Word” (1986) 95 *Yale Law Journal* 1601.

⁸⁹ M. Zagor, “I am the Law! – Perspectives of Legality and Illegality in the Israeli Army” (2010) 43 *Israel Law Review* 551. See entry W: War Crimes.

under examination, and on its impact on life under Israeli rule. This format thus encompasses both the traditional function of a lexicon, as an instrument for the organization of knowledge, and the function of reflecting on this knowledge in a critical manner that challenges and redefines it.

These analytical and deconstructive moves take place at both the level of each separate entry and also, through abundant cross-references, at the level of their interaction. Indeed, to a large degree, the meaning of each term or concept is to be found in its relation to the other terms and concepts discussed in this book. This conception of meaning as relational is inspired in part by Ludwig Wittgenstein's "family resemblance" theory, and in part by Derrida's writing on "différance." According to Wittgenstein, certain words acquire their meaning not by standing for certain objects, but by the relationship between their different uses.⁹⁰ Derrida's argument is more far reaching: that meaning always entails an endless movement/play of differences, in which words are defined by appealing to their (ever unstable) differences from other words that have been, or will be, used.⁹¹

A lexical format has been adopted in, and adapted to, a wide variety of genres, covering the whole gamut from autobiographies⁹² to televised documentaries,⁹³ literary criticism,⁹⁴ journals of political philosophy,⁹⁵ and international human rights law,⁹⁶ to name a few. This format was also used in the 1980s, to provide information on facts, agencies, and institutions affecting life in the West Bank.⁹⁷

⁹⁰ Wittgenstein, *Philosophical Investigation*.

⁹¹ J. Derrida, "Différance," in *Margins of Philosophy*, A. Bass (trans.) (Chicago: University of Chicago Press, 1982); Derrida, *Writing and Difference*. Derrida was not the first to argue that terms acquire meaning through their relation to other terms, but one of the differences between him and, for example, structuralist linguist Ferdinand de Saussure, is his emphasis on the inherent instability of conceptual differences, distinctions, and oppositions. Cf F. de Saussure, *Course in General Linguistics*, W. Baskin (trans.) (New York: Philosophical Library, 1959).

⁹² E.g., C. Milosz, *Milosz's ABC*, M. Levine (trans.) (New York: Farrar, Straus and Giroux, 2002).

⁹³ *L'Abécédaire de Gilles Deleuze, avec Claire Parnet* (1996) (A French documentary television program produced in 1988–1989, consisting of an eight hours series of interviews with Deleuze, organized from Animal to Zigzag).

⁹⁴ R. Barthes, *The Pleasure of the Text*, R. Miller (trans.) (New York: Hill & Wang, 1975) (literary criticism from "Affirmation" to "Voice").

⁹⁵ Mafte'akh – Lexical Review of Political Thought, <http://mafteakh.tau.ac.il/en>.

⁹⁶ S. Marks and A. Clapham, *International Human Rights Lexicon* (Oxford: Oxford University Press, 2005).

⁹⁷ M. Benvenisti et al., *The West Bank Handbook: A Political Lexicon* (Boulder: Westview Press, 1986).

The methodological choice to opt for the format of a lexicon for the study of law's role in the making and shaping of the Israeli control regime rests primarily on the centrality of language to law and, more specifically, on the performative nature of legal language.⁹⁸ Legal language does more than merely describe reality, and even more than enable or limit action: it creates reality, and shapes both experience and consciousness.⁹⁹ The alphabetical order that serves as the organizing principle of this book underscores both the centrality of language to law and the performativity of a (local) dialect of the (international) legal language, in two nuanced ways.

First, the Israeli control regime itself maintains an order that at times may seem arbitrary and at times carefully designed. To an extent, the lexicon reflects and responds to this highly complex order: its alphabetical structure is somewhat arbitrary, but the terms and concepts under examination have been carefully selected and interlinked. At the same time, as Michel Foucault has shown generally,¹⁰⁰ and as this book demonstrates in relation to the Israeli regime, an apparently arbitrary order, if closely inspected, can be highly valuable for revealing the dominant epistemic forces at play.

Second, the lexicon allows for attention to detail: its formality may be analogized to a fisherman's net, which yields definitive shapes from what

⁹⁸ Austin, *How to Do Things with Words*; J. R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969); J. R. Searle, "A Taxonomy of Illocutionary Acts," in K. Gunderson (ed.), *Language, Mind and Knowledge*, volume VII (Minneapolis: University of Minneapolis Press, 1975); P. F. Strawson, "Intention and Convention in Speech Acts" (1964) 73 *Philosophical Review* 439; K. Bach and M. Harnish, *Linguistic Communication and Speech Acts* (Cambridge, MA: MIT Press, 1979). The concept of performative speech has had an enormous impact on social theory; see, e.g., M. Foucault, *The Archaeology of Knowledge*, A. M. Sheridan Smith (trans.) (London: Routledge, 2002); J. Butler, *Excitable Speech: a Politics of the Performative* (London: Routledge, 1997). International legal scholarship has also been thus influenced; see, e.g., W. G. Werner and J. H. de Wilde, "The Endurance of Sovereignty" (2001) 7 *European Journal of International Relations* 28.

⁹⁹ It is little wonder that such discursive practices characterize the world of law: performative speech acts are made, for the most part, by reference to a law or a convention (i.e., in conventionally designated circumstances), by authorized people exercising their authority in conformity with the relevant conventions. See K. Bach, "Speech Acts," in *Concise Routledge Encyclopaedia of Philosophy* (London: Routledge, 1999).

¹⁰⁰ M. Foucault, "Preface," in *The Order of Things: An Archaeology of the Human Sciences* (New York: Pantheon Books, 1970), p. xvi (using the example of the seemingly arbitrary, fantastic, and fictitious taxonomy of animals depicted by Jorge Luis Borges in his *The Analytical Language of John Wilkins* as a point of departure for discussing the epistemic structures of the human sciences). For a critique of the postmodern mistrust of structural classifications in reference to Foucault's example, see A. Peters and H. Schwenke, "Comparative Law Beyond Post-modernism" (2000) 49 *International and Comparative Law Quarterly* 800, 825–826.

otherwise appears to be an infinite and indefinite river.¹⁰¹ At the same time, the fish and other treasures caught in the net do come from the same river, opening the possibility to learn about the environment in which they were bred and cultivated. The lexicon format does just that: focusing on specific terms and concepts and pointing to their interconnectedness, it offers an opportunity to consider the nomos of the regime – that is, law's interrelation to the vocabularies that constitute and traverse it in the OPT.

¹⁰¹ A metaphor used by Israeli novelist, Dan Tsalka, in the introduction to his alphabetically structured autobiography; see D. Tsalka, *Sefer Ha'Alef-Beit [Book of ABC]* (Tel Aviv: Hargol, 2003) [Hebrew].

B

Border/Barrier

Michael Sfard

B.1 INTRODUCTION: CAN A WALL HAVE ONLY ONE FACET?

A state needs a *border*. From the perspective of positive international law, borders are an existential issue for states. This is what the Montevideo Convention teaches us through its requirement that states have a defined territory as one of the conditions for being endowed with the international legal personality of statehood.¹ State borders must form a geometric shape – that is, they must delineate a territory within a geographic space. Thus, a borderline both defines a country and the area over which it has sovereignty, and, at the same time, affirms and respects the sovereignties that stretch out beyond its outer limits. Borders divide the entire world into “inside” and “outside.”² The Inside is where a country may exercise the powers and liberties of “making or interpreting of Laws, the declaring of Wars, imposing of Taxes, levying or quartering of Soldiers, erecting new Fortifications … or reinforcing the old Garisons.”³ And, in more modern terms: “the capacity to make authoritative decisions with regard to the people and resources within [its] territory.”⁴

¹ Convention on the Rights and Duties of States, Montevideo, December 26, 1933, 165 LNTS 19 (hereinafter: Montevideo Convention).

² This division is, however, subjective. Given that the earth has a finite amount of space, the areas on either side of the border are surrounded by it, and anyone standing on either side could argue that they are the ones surrounded by the border, and therefore, “inside.”

³ Article LXV of the Treaty of Westphalia: Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, Munster, October 24, 1648, printed in: F. L. Israel (ed.), *Major Peace Treaties of Modern History 1648–1967* (New York: Chelsea House Publishers, 1967), vol. I, p. 27.

⁴ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre Publications, 2001), p. 12.

Outside, foreign sovereignties have equal rights and powers with respect to their own territory,⁵ together with political independence that prohibits interference in their affairs.⁶ Inside, the home of the *locals*, subjects of the sovereignty are entitled to status within it; outside, the home of the *foreigners* who will receive their status from the sovereignty that is in power on the other side of the border.⁷ The border is theoretically one-dimensional – that is, it has only length, not width, which guarantees full planar coverage of sovereignty.⁸ In practice, however, borders are often two-dimensional; their width creates a no man's land where there is either no sovereignty at all, or partial and limited multiple sovereignties, but no single full one. Either way, a border or a no man's land has two sides, with a single, distinct sovereignty on each. Borders prevent sovereignties from spilling over into one another, which is why they are a requirement for independent statehood.

A *barrier* is a physical divide installed in a geographic space, which prevents or impedes passage from one side to another. A barrier, like a border, has two sides, and it too splits the geographic space. When a barrier forms a geometric shape – that is, when one end of it, or of a chain of physical barriers, meets the other – that barrier, like a border, divides the world into *inside* and *outside*.

Roughly speaking, a border is a political-legal geographic divide and a barrier is a physical geographic divide.⁹ Physical and legal divides sometimes overlap. For instance, the fence between my lawn and my neighbor's lawn is a physical divide preventing each of us from trespassing on the other's territory.

⁵ Article 4 of the Montevideo Convention; Article 2(1) of the Charter of the United Nations, United Nations, October 24, 1945, 1 UNTS XVI (hereinafter: UN Charter).

⁶ Article 8 of the Montevideo Convention; Article 2(7) of the UN Charter.

⁷ For a discussion of the liquidity of the inside/outside dichotomy, see entry O: Outside/Inside.

⁸ To be precise, the border, stretches to the airspace above land and to the depth underneath the surface, hence the border can be seen as two-dimensional and as creating a spatial rather than planar division. For the recognition of sovereignty over airspace, see Article 1 of the *Convention Relating to the Regulation of Aerial Navigation*, Paris, October 13, 1919, and Article 1 of the *Convention on International Civil Aviation* [*italics above also?*], Chicago, December 7, 1944, both declaring "The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory." Sovereignty over the undersurface was partially recognized by the laws of sovereignty over natural resources: see GA Res 1803 (XVII), 15 / UN Doc A/5217 (December 14, 1962), "Permanent sovereignty over natural resources"; see also Article 1(2) common to the International Covenant on Economic, Social and Cultural Rights (ICESCR), General Assembly, December 16, 1966, 933 UNTS 3 and the International Covenant on Civil and Political Rights (ICCPR), General Assembly, December 19, 1966, 999 UNTS 17 – although sovereignty over natural resources is ascribed to *Peoples and Nations* (in the GA resolution, those terms and "State" are used interchangeably). However, the underlying assumption is that peoples and nations exercise their sovereignty over their wealth and natural resources through the polity of a state.

⁹ On the legal production of space, see entry Z: Zone, Section Z.1.

Introduction: Can a Wall Have Only One Facet?

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Property law, civil law, and even criminal law create a legal divide that occupies the same place as the physical fence between our homes.

Borders and barriers at times maintain a symbiotic and at others a dialectical relationship. Sometimes a physical barrier is installed on a borderline.¹⁰ Sometimes a borderline is determined according to a natural barrier that is already there (a river or a mountain range).¹¹ Physical barriers are used to regulate border crossings, and even in an age of technology that allows the monitoring and control of movement through territories that are not separated by physical obstacles,¹² such obstacles remain popular. Mass migration of asylum seekers from conflict areas¹³ and international terrorism, the major causes of public anxiety in the Western world of the first decades of the twenty-first century, have produced a public demand to tighten border controls. In many places – Israel, Hungary, France, and the United States, to name a few – politicians who have promised to fortify borders with concrete, barbed wire, and observation towers enjoy great popularity.¹⁴

¹⁰ The most obvious example of a physical barrier placed on a border line is the Berlin Wall, erected on the political line that separated West Berlin from East Berlin, between the German Democratic Republic (East Germany) and the Federal Republic of Germany (West Germany). The border between the two Germanies was a border between sovereignties, and since each of these sovereignties had the power to regulate entry and exit from its territory, the border was also a legal barrier. The wall itself was built more than 15 years after the border was created, and it was meant to bolster the legal barrier with a physical one. For a political-historical account of the events leading up to its construction, see D. Heller and D. Heller, *The Berlin Wall* (New York: Walker and Company, 1962). Another example is the Great Wall of China, built to set the boundary of the Chinese empire and foreigners incursions. “The wall is the sign of separation,” wrote the American explorer William Edgar Geil, who is said to have traveled its entire length; see W.E. Geil, *The Great Wall of China* (New York: Sturgis & Wanton, 1909), p. 6.

¹¹ Some examples of a natural barrier that created a political one are parts of the border between Canada and the USA, determined by the course of the Niagara River; the Rhine River that determined the border between Germany and France; the Dead Sea and Jordan River, which form the border between Jordan and Israel; and the Pyrenees, which created the political border between France and Spain.

¹² See entry X: X Rays, Section X.2.5: “Surveillance Technologies 3.0: ‘Smart’ Techno-occupation.”

¹³ Z. Bauman, *Strangers at our Door* (Malden: Polity, 2016).

¹⁴ The clearest and most recent example is Donald Trump’s pledge to build a wall on the US–Mexican border to prevent immigrants from entering. See, for example: “Trump Says Would Raise Visa Fees to Pay for Mexican Border Wall,” *Reuters* (August 16, 2015), www.reuters.com/article/us-usa-election-trump-immigration-idUSKCN0QL0NN20150816. On the French so-called “great wall of Callais” meant to stop influx of illegal immigrants, see G. McAuley and M. Birnbaum, “France and Britain Just Beat Donald Trump to Building a Border Wall,” *The Washington Post* (September 29, 2016), www.washingtonpost.com/world/europe/france-and-britain-just-beat-donald-trump-to-building-a-border-wall/2016/09/28/345e352a-8000-11e6-adoe-ab0d12c779b1_story.html?utm_term=.c40775bf70cf. For the Hungarian

Given these definitions, borders and barriers are concepts that cover the same ground and signify a two-way spatial restriction on those located inside and outside: When one *walls out* others, one is simultaneously *walled in*. That is the *objective* trait of a physical barrier: it excludes on both of its sides. So does a border: bordering is simultaneously an act of defining the *interior* and the *exterior*, claiming sovereignty in the *interior* and acknowledging the *other's* sovereignty over the *exterior*, simultaneously including and excluding local status to residents of each side.

This entry concerns Israel's separation fence project.¹⁵ The separation fence is made up of a physical barrier and a legal barrier. The barrier purportedly separates Palestinians from Israelis. In other words, it has a Palestinian side and an Israeli side. A very small portion of the route chosen for the fence overlaps with the Green Line, which is currently internationally recognized as the eastern limit of Israeli sovereignty.¹⁶ The rest of it penetrates into the West Bank. Unlike the international community, Israel has never recognized the Green Line as an international border and maintains it has claims to the West Bank.

The proposition advanced in this entry is that Israel has enlisted the separation fence to serve its political territorial ambitions.¹⁷ It has done so by creating a barrier whose sides are not merely geographic (east v. west) but also, and more so, national (Israeli v. Palestinian), and by making it a one-way barrier on the national plane. This one-way barrier functions like a one-way mirror. Both deflect (people or light) from only one side. In the case of the separation fence, it is the Palestinian side that gets deflected. For Palestinians, the fence is both a physical barrier and a borderline. For Israelis, the fence is neither. The fact that the barrier has only one side gives Israel an *inside*, without having to recognize that the area on the other side of the fence is an *outside*. While a border establishes distinct sovereignties on either side of it, this one-way fence with sovereignty only on one side creates *moving lines of sovereignty*. The border is a process, a verb rather than a noun.

border fence, see M. Birnbaum, "Refugees Race into Hungary as Border Fence Nears Completion," *The Washington Post* (September 25, 2016), www.washingtonpost.com/world/europe/refugees-race-into-hungary-as-border-fence-nears-completion/2015/08/25/91f6e9c8-4aa0-11e5-9f53-d1e3ddfd0cda_story.html?tid=a_inl&utm_term=.fdc520aa73aa.

¹⁵ For a fuller account of the legal issues surrounding the separation fence, the entry should be read in conjunction with entries P: Proportionality and Z: Zone.

¹⁶ The Green Line was delineated as an armistice line in the armistice agreement signed in 1949 between Israel and Jordan: Jordanian-Israeli General Armistice Agreement, April 3, 1949, 1949 UN Doc S/1302/Rev.

¹⁷ This vision is discussed in entry N: Nomos.

This alteration to how a barrier/border functions is also what allows Israel to both deny the political meaning of the fence, brushing off the accusation that it is engaging in illegal annexation and to effectively impose its own sovereignty in the area that stretches all the way to the fence, without acknowledging a foreign sovereignty beyond it. In accepting the claim that the fence is not a political border, the High Court of Justice (HCJ) misapplied the rationale for the prohibition on the annexation of occupied territory.¹⁸ The issue is not the finality of the border line created, but rather the power to make unilaterally long-term decisions regarding the area and its inhabitants.

To substantiate this proposition, Section B.2 of this entry describes the Israeli separation fence project, focusing on the special legal traits that make it a one-sided border/barrier. Section B.3 discusses and analyzes the HCJ jurisprudence in cases challenging the legality of the separation fence. Section B.4 concludes.

B.2. THE EASTWARD EXPANSION: THE SEPARATION FENCE PROJECT

B.2.1 *The Re-partitioning of Palestine – Eretz Israel*¹⁹

Israel's separation fence project placed a physical barrier in the heart of Mandatory Palestine–Eretz Israel, dividing the area between the Mediterranean and the Jordan River. The Partition Plan, adopted by the UN General Assembly on November 29th, 1947,²⁰ was also set to divide the same territory, but it was never implemented, as Arab countries did not accept it. Instead, Palestine–Eretz Israel was ultimately divided according to the outcome of the 1948 War, with the Green Line marking the armistice on the Israel–Jordan front. The Rhodes Agreements, which established the Green Line, explicitly state that it would have no political meaning and that it was “dictated exclusively by *military considerations*.²¹ The 1967 war reshuffled the cards of this territorial arrangement.

¹⁸ The legality of the separation barrier has been subject to international and Israeli jurisprudence generating substantial scholarly writing. For a comprehensive critical review including references, see A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge: Cambridge University Press 2017), pp. 265–337.

¹⁹ For a more detailed description of the separation fence project and its background, see entry P: Proportionality, Section P.2.1: “Israel’s Separation Fences and Walls Project.”

²⁰ The Partition Plan, GA Res. 181 (II), UN Doc A/RES/181(II) (November 29, 1947).

²¹ Article 2II of the Jordanian-Israeli General Armistice Agreement: “It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations.”

When the West Bank was occupied by Israel in 1967, the territory between the Mediterranean and the Jordan River returned once more to be under one rule, although the regime was divided: a belligerent occupation in the West Bank, and civil rule, with separation of powers and an elected legislature, in Israel. In 2002, pursuant to a wave of suicide terror attacks on Israeli streets, cafes, and buses undertaken in the context of the second Palestinian uprising (Intifada) and to popular public demand to seal entry points from the West Bank into Israel, the Israeli government decided to build a system of fences, walls, patrol roads, and military posts, known collectively as “the separation fence.”²² The route chosen for it was marginally congruent with the Green Line (only about 15 percent²³) and most of it ran within the West Bank, creating what Israel calls “the seam zone” between the fence and the Green Line. Although the plan originally included a vast seam zone (some 16 percent of the territory of the West Bank) international pressure and HCJ judgments²⁴ produced significant changes in the route of the fence, and today the seam zone covers a little more than 8 percent of the West Bank. The entire route of the fence spans 720 kilometers (more than twice the length of the Green Line, which spans 320 km). At the time of this writing, some 500 km of the separation fence have been completed.

B.2.2 *What Is Barred by the Barrier?*

The separation fence is a contiguous physical barrier, but it does have gates and openings²⁵ that allow crossing to the other side. As stated, parts of the separation fence do lie on the Green Line itself. In these sections, the fence

²² The disagreements regarding the project were translated into wars of terminology: for the IDF it is “the security barrier” or “security fence”; for those opposing it, it is known as the “separation wall” and even “the Apartheid wall.” Most Israelis refer to it as the “separation fence.”

²³ UN Office for the Coordination of Humanitarian Affairs, *Barrier Update* (July 2011), p. 3. www.ochaopt.org/sites/default/files/ocha_opt_barrier_update_july_2011_english.pdf.

²⁴ The standard for routing the fence was set primarily in the *Beit Sourik* case, which merited a rerouting of large segments of it: HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* (June 30, 2004), p. 828, http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf (hereinafter: *Beit Sourik*).

²⁵ There are more than 70 gates along the route of the fence. The military refers to 6 of them as “fabric of life” crossings. They are open between 12 to 24 hours a day. The remaining gates are agricultural and seasonal. They open for several hours a day during several days of an agricultural season. In addition to these, there are several gates for use by security forces exclusively. See B’Tselem, *Arrested Development: The Long Term Impact of Israel’s Separation Barrier in the West Bank* (October 2012), p. 28, www.btselem.org/download/201210_arrested_development_eng.pdf.

serves as the physical manifestation of the border. The restrictions on crossing it westward stem from a legal apparatus that prevents unmonitored entry into the state of Israel. The same holds true for all parts of the fence built on the Jerusalem municipal boundary. Israel has annexed East Jerusalem, and therefore, under domestic law, and despite the international community's lack of recognition for the annexation, Israeli law does apply in these areas. The Entry into Israel Law requires non-Israeli citizens to obtain a visa from the Ministry of Interior in order to enter the area bound by the Green Line and East Jerusalem.²⁶ For Palestinian residents of the OPT there is a special arrangement in place, whereby the military commander has the power to grant them entry and stay permits to enter Israel for work, medical treatments, or special humanitarian reasons.²⁷ Basic Law: Human Dignity and Liberty, which is considered the pillar of Israel's constitutional order, sets forth that: "Every Israeli citizen who is abroad is entitled to enter Israel."²⁸ Regarding exiting Israel, the law stipulates: "Every person is free to exit Israel." In plain English, the part of the separation fence that is built on the Green Line and around East Jerusalem forms a barrier to persons who are not Israeli citizens who wish to cross it westward. Israelis can cross it freely.

As noted, the parts of the separation fence that were built inside the West Bank created the seam zone. There is no barrier separating the seam zone from the area beyond the Green Line. The seam zone itself was declared a closed military zone that can be accessed only with a permit,²⁹ and a bureaucracy was put in place to handle applications for permits made by Palestinians. The permits are issued under four categories of interests the applicants may have in entering the seam zone: cultivating farmland, on condition that the applicant has proven proprietary ties to land in the seam zone; conducting business, provided that the applicant has a business or business contacts in the seam zone that require his/her physical presence; and humanitarian purposes such as attending a wedding or funeral or visiting a sick relative and the likes.³⁰ The fourth category is for residents of the seam zone, provided that they can prove they actually reside in it.³¹

²⁶ Article 1(a) of the Entry into Israel Law, 1952.

²⁷ Articles 3b–3c of the Citizenship and Entry into Israel Law (Temporary Order), 2003. This enactment is discussed in entry K: Kinship.

²⁸ Article 6(b) of the Basic Law: Human Dignity and Liberty.

²⁹ Order Regarding Defense Regulations (Judea and Samaria) (No. 378), 1970, Declaration Regarding Closure of Area No s/2/03 (Seam Area).

³⁰ Standing Orders for the Seam Zone, 2017 (Coordinator of Government Activities in the Territories, Civil Administration).

³¹ On the seam zone and its attendant permit regime see entry Z: Zone, Section Z.2.2.4.

These are the rules for Palestinians. For Israelis, the restrictions on accessing and remaining in the seam zone are irrelevant. The proclamation of the seam zone as a closed military zone stated when issued that it does not apply to Israeli citizens and permanent residents.³² It also exempted potential citizens of Israel, under its Law of Return – that is, anyone of Jewish descent,³³ thereby adopting the cornerstone of Israel's immigration policy. A general permit signed the same day as the proclamation itself granted anyone holding a valid Israeli visa (i.e., tourists) a permit to enter and remain in the seam zone. The net result is that Palestinians are the only group of people who need an individual permit to enter and remain in the seam zone.³⁴

Israelis and visa holding-tourists may cross the fence eastward, deeper into the West Bank, by virtue of a general permit granting them entry into the West Bank that has been in place since the occupation began.³⁵

Thus, the separation fence is not a barrier to Israelis and tourists visiting Israel. They can freely enter and leave the seam zone in any direction, while Palestinians (including thousands who live in the seam zone³⁶) must obtain a permit from the military commander to enter the area and remain in it. Palestinians wishing to cross the fence, whether into the seam zone or beyond the Green Line, must prove they have a legitimate need. They need a reason.

In summary, the separation fence – made up of fences and walls, augmented by the attending legal regime which determines who has a right to travel through its openings – has created a barrier for Palestinians, and only for them. They are thereby excluded both from entry into Israel and from free movement across their own land.

³² Article 4(a)(1) Declaration Regarding Closure of Area No 5/2/03 (Seam Area) (see note 29) stipulates that the proclamation is not applicable to any “Israeli.” “Israeli” is defined in Article 1.

³³ *Ibid.*, Article 1, definition of “Israeli.”

³⁴ In May 2004, the Proclamation was amended: the exemption of Israelis was vacated, and a general permit was issued for them instead. That did not change the fact that only Palestinians need to apply for a permit while Israelis, Jews and tourists do not.

³⁵ General Entry Permit (No. 5) (Israeli and Foreign Residents) (Judea and Samaria), 1970. It was preceded by an entry permit from 1967. Incidentally, the general permit grants entry only during the day, and a longer stay requires a permit. This provision has become a dead letter that is not followed. See response of the IDF Spokesperson’s Office to a query from HaMoked: Center for the Defence of the Individual (October 25, 2010), www.hamoked.org.il/Document.aspx?dID=Documents1306 [Hebrew].

³⁶ According to an OCHA estimate. Once the construction of the barrier is completed, about 25,000 Palestinians will find themselves as residents of the seam zone: OCHA, Barrier Update, p. 3.

B.2.3 To Be or not to Be a Border?

The first government of Israel resolution approving the fence states:

The fence . . . is a security measure. The construction of the fence does not express a political or any other border.³⁷

A Security Cabinet resolution approving a segment of the separation fence states:

The barrier that shall be constructed per this resolution, like the other segments thereof in the “seam zone” is a security measure to prevent terrorist attacks and does not express a political or other border.³⁸

These statements, and many similar ones,³⁹ echo the statement contained in the Rhodes Agreement that the Green Line is not a political border and that it was “dictated by military considerations.” They also seem to conform to Israel’s official stance that the future of the West Bank will be determined through negotiations.⁴⁰ Simultaneously, however, they are defied by material reality occasioned by Israel’s actions on the ground in the seam zone.⁴¹

The seam zone, created by the route of the fence, was formed such that it keeps more than 70 settlements, and East Jerusalem,⁴² on the so-called Israeli side of the fence. It is where 425,000 of the half a million Israeli settlers⁴³ in the West Bank live. The number of Palestinians who live in the seam zone is much smaller: about 11,000 in total,⁴⁴ though about 150 Palestinian villages

³⁷ Government Resolution No. 2077 (June 23, 2002).

³⁸ National Security Cabinet Resolution (September 9, 2003) regarding Phase 3 of the Barrier in the Jerusalem Envelope Area (excluding Maale Adumim).

³⁹ On October 20, 2003, then Prime Minister Ariel Sharon declared on the Knesset podium that “the separation fence is not a political border, it is tool to prevent terror attacks” (reported in Israeli news site Nana10: <http://news.nana10.co.il/Article/?ArticleID=84463>). The same position was conveyed to the American national security advisor, Condoleezza Rice, in June 2003. See “Rice: the US Views the Separation Barrier as an Israeli Attempt to set a Political Border,” *Globes* (June 29, 2003), www.globes.co.il/news/article.aspx?did=701242.

⁴⁰ “[T]he West Bank is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations,” Israeli Settlements and International Law, Israeli ministry of foreign affairs website, www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx. For a thorough analysis of Israel’s normative approach to the OPT, see entry N: Nomos.

⁴¹ For a discussion of the gap between Israel’s declared positions on the future of the OPT and its deeds, see entry R: Regularization.

⁴² OCHA, Barrier Update, p. 4.

⁴³ Around 190,000 of the seam zone settlers reside in East Jerusalem. Figures are relevant to 2005 – “The Separation Barrier,” *B’Tselem* (January 1, 2011), www.btselem.org/separation_barrier/map.

⁴⁴ Figures are relevant to 2013 – “The Separation Barrier,” *B’Tselem* (January 1, 2011), www.btselem.org/separation_barrier/map.

have land in it.⁴⁵ The seam zone is also where Israel's larger industrial areas in the West Bank are located and it is connected to Israel's metropolitan areas by major roads.

The municipal jurisdiction of the settlements located in the seam zone cover it almost entirely, a fact that is extremely important given the law applicable in the settlements. Throughout the years, large parts of Israeli law were imported into the West Bank and applied to the jurisdictions of the settlements, turning them into enclaves of Israeli law in the OPT. In fact, this practice has been called “enclave law,”⁴⁶ and it is implemented through a technique called “pipelining”: military orders which constitute primary legislation in the OPT cite laws enacted by the Israeli parliament, mostly administrative law, as applying in the jurisdictions of the Israeli local councils in the West Bank. This gives Israel’s bureaucracy administrative powers in the settlements.⁴⁷ Pipelining Israeli laws is thus what gives the Israeli Ministry of Education the ability to apply statutory powers provided for in Israeli law to the school system in the settlements. It is what gives the bureaucracy of the Ministry of Health regulatory powers over medical facilities there, and so on.

Side by side with the “enclave law,” extraterritorial legislation by the Knesset has applied parts of Israeli law to Israelis in the West Bank on a personal basis. An obvious example of this is Israeli criminal law, which has been applied on a personal basis to Israelis in the West Bank.⁴⁸ This personal application follows Israelis wherever they go in the West Bank, whether inside the seam zone or east of it.

Once the separation fence seals off a section of the seam zone and access to it becomes subject to the permit regime, Palestinians’ presence there depends on their ability to withstand the bureaucratic via dolorosa of obtaining an entry permit. Israeli military authorities practice a policy of issuing agricultural

⁴⁵ OCHA, *The Humanitarian Impact of the Fence* (July 2013), www.ochaopt.org/documents/ocha_opt_barrier_factsheet_july_2013_english.pdf.

⁴⁶ “Enclave law” is a term coined by Prof. Amnon Rubinstein: see A. Rubinstein, “The Changing Status of the Territories – From Trust to Legal Hybrid” (1987) 11:439 *Iyunei Mishpat* 450 [Hebrew].

⁴⁷ Section 2 of the Order regarding Administration of Local Councils (Judea and Samaria) (No. 982), 1981, empowered the military commander to promulgate a bylaw for Israeli local councils in the OPT. Local Council by Law, 1981, promulgated pursuant to this section, has applied hundreds of Israeli laws to the territories of local councils.

⁴⁸ Defense (Emergency) Regulations (Judea and Samaria – Adjudication of Offenses and Legal Assistance), 1967. For more, see Association for Civil Rights in Israel, *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank* (October 2014), www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf.

permits only for the harvests, making the permitted Palestinian presence in the seam zone extremely limited. In addition, the military denies permits to many Palestinians who do have one of the acknowledged legitimate reasons to cross into the seam zone and are theoretically eligible for them because of “security blocks.” These are people denied entry by either the Israeli police or the General Security Service (GSS) into an area where many settlements are located and which provides unhindered access to areas beyond the Green Line. These objections usually rely on some sort of intelligence information alleged to be in the possession of the GSS but which remains undisclosed.⁴⁹

Data collected by Israeli human rights organizations that have been monitoring the implementation of the permit regime ever since its inception show that both the number of seam-zone permits the civil administration issues to Palestinians and their duration plummeted over the years.⁵⁰ Research conducted by the UN revealed that the yield produced by Palestinian-owned olive trees west of the fence is 60 percent lower than that of trees to the east of it because farmers are unable to cultivate the groves freely and fully.⁵¹

The barrier’s traits have turned the entire seam zone into an area that provides all the conditions for flourishing, thriving Israeli civilian life, while at the same time draining and gradually erasing Palestinian presence there. The same hand that unraveled the binds that tied the seam zone to the remainder of the West Bank, physically, economically, socially, and in terms of infrastructure, has been weaving new, increasingly strong bonds that tie it to Israel proper.

The separation fence Israel has declared “does not express a political or any other border” has brought dramatic changes to all aspects of life in the area it has sealed off to Palestinians. Demographically, normatively, economically, and in terms of infrastructure and commerce, the area became Israeli. At the same time, Israel’s denial that the fence constitutes a border has allowed it to avoid recognizing that a *different* sovereignty lies to the east of it and has left Israeli claims to areas east of the fence intact. In practice, the fact that, in terms of the law, the fence is transparent to Israelis has also ensured that its construction would not undermine Israeli presence to the east of the fence. Indeed, Israelis are free to cross the fence eastward, ensconced in the bubble of Israeli law that has been applied to them on a personal basis and continue to

⁴⁹ On the bureaucracy of the permit regime and the role of the GSS in this context see entry Z: Zone Section Z.2.3.

⁵⁰ HaMoked: Center for the Defence of the Individual, *The Permit Regime: Human Rights Violations in West Bank Areas Known as the Seam Zone* (March 2013), pp. 15–19.

⁵¹ OCHA, *The Monthly Humanitarian Monitor* (December 2011), p. 8.

enjoy Israeli administrative law, which is still applied in the jurisdiction of settlements that remained east of the fence.

B.3 DE FACTO WHAT? THE ANNEXATION ARGUMENT AND THE HCJ SEPARATION FENCE JURISPRUDENCE

B.3.1 *The Annexation Argument – It Walks like a Duck*

The situation in the seam zone, described above, has led two UN Special Rapporteurs to conclude that the fence and its attendant legal regime constitute the annexation of the seam zone into Israel. Prof. John Dugard, the UN Special Rapporteur on the OPT, wrote in September 2003:

The word “annexation” is avoided as it is too accurate a description and too unconcerned about the need to obfuscate the truth in the interests of anti-terrorism measures. However, the fact must be faced that what we are presently witnessing in the West Bank is a visible and clear act of territorial annexation under the guise of security. There may have been no official act of annexation of the Palestinian territory in effect transferred to Israel by the construction of the Wall, but it is impossible to avoid the conclusion that we are here faced with annexation of Palestinian territory.⁵²

The Special Rapporteur on the Right to Food, Jean Ziegler, has also addressed that year the construction of the separation fence as an act of de facto annexation:

As the fence/wall does not follow the 1967 border between Israel and the OPT, but cuts through Palestinian lands in the West Bank, it effectively annexes Palestinian land.⁵³

The ICJ, which addressed the issue when asked by the UN General Assembly to provide an advisory opinion on the ramification of the construction of the fence, voiced concern that the fence would create de facto annexation:

The Court considers that the construction of the wall and its associated regime create a “fait accompli” on the ground that could well become

⁵² Commission on Human Rights, The Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967: Report by the Special Rapporteur John Dugard, E/CN.4/2006/29 (January 17, 2006), p. 6.

⁵³ Commission on Human Rights, Addendum – Mission to the Occupied Palestinian Territories: Report by the Special Rapporteur Jean Ziegler, E/CN.4/2004/10/Add.2 (October 31, 2003), p. 16.

permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.⁵⁴

The legal view that the fence is an act of annexation, despite Israel's official position that it is not a political border and the fact that it has not taken any official legal steps toward annexation, such as applying Israeli legislative powers directly to the seam zone, is predicated on a substantive analysis of the issue rather than on a formal one. Such analysis looks at the rationale underlying the absolute prohibition international law places on the annexation of occupied land and examines whether Israel's actions and the reality they produce violate the value protected by the prohibition.

The prohibition on annexation is a customary norm, reflecting the foundational principle of the legal regime of belligerent occupation that an occupation does not confer title and that an acquisition of territory by force amounts to prohibited conquest.⁵⁵ Currently, it reflects the principle of self-determination.⁵⁶ The prohibition on annexation of occupied territory was codified back in the 1930s, in the Montevideo Convention, where the state was the object of protection,⁵⁷ and again after WWII, in the GC IV, where civilians are the object of protection from annexation.⁵⁸ The prohibition can be violated and annexation effected even in the absence of an *official* change

⁵⁴ Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136, ¶ 121.

⁵⁵ On this principle, see Introduction, Section 2.2.1.

⁵⁶ The principle of self-determination has a long history and was enshrined throughout the UN Charter: Articles 1(2) and 55 list promoting self-determination as the goal of the UN; Article 76(b) affirms that the objective of the trusteeship system is to promote the “progressive development” of the inhabitants of the trust territories toward “self-government or independence.” See also: Common Article 1 of the Human Rights Covenants (ICCPR, ICESCR), 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 ICJ 16, ¶ 52; Western Sahara, Advisory Opinion, 1975 ICJ 12, ¶¶ 54–59.

⁵⁷ Article 11 of the Montevideo Convention stipulates that “The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure.”

⁵⁸ Article 47 of the Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Geneva, 12 August 1949, 75 UNTS 287 provides that “Protected persons . . . shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

to the borders of the annexing state that brings the annexed territory within its jurisdiction. Substantive annexation is the *de facto* application of sovereignty by the annexing state over the occupied territory in a manner that exceeds temporary administration and forfeits the trust function required in a regime of occupation.⁵⁹ Substantive annexation is the application of a policy that defies the principles of temporariness and conservation,⁶⁰ entrenches the occupier's long-term hold over the occupied territory, undercuts the occupied people's ability to exercise its right to self-determination, and pushes it farther out of reach.⁶¹

It is difficult to think of a clearer example of substantive, or *de facto*, annexation than the reality Israel has forced on the seam zone. As the UN Special Rapporteurs and the ICJ noted, this is a reality that creates a *fait accompli* whose impact is not temporary.⁶² The principle of conservation is openly and profoundly breached. With the fence and the legal regime applied to it and to the seam zone, Israel has freed itself of the restrictions the laws of occupation place on the administration of occupied land, and, using security as an excuse, created *de facto* sovereignty. In parallel, it has been engaged in engineering the demographics, economy, and law of the seam zone with effects that will reverberate far into the future. To the extent that any human endeavor may be considered permanent, this annexation is. It translates the vision of "Greater Israel" into a political, material, and legal reality. The HCJ, as discussed in the following subsection, has been complicit in the transportation of the Israeli *nomos*, comprising law and the narratives which endow it with meaning, into the West Bank.⁶³

B.3.2 The HCJ Fence Jurisprudence – Form over Substance, Words over Deeds

The *de facto* annexation argument was raised in the two main HCJ cases challenging the legality of constructing the separation fence inside the West

⁵⁹ The foundational principles of the regime of occupation and their interrelations are discussed in the Introduction, Section II.B.

⁶⁰ For more on the conservation principle, see Introduction and entry G: Geneva Law.

⁶¹ O. Ben-Naftali, A. Gross, and K. Michaeli, "Illegal Occupation: The Framing of the Occupied Palestinian Territory" (2005) 23(3) *Berkeley International Law Journal* 551 (hereinafter: *Illegal Occupation*).

⁶² Temporariness as a feature (and principle) of occupation is discussed in both the Introduction and in entry T: Temporary/Indefinite.

⁶³ See R. M. Cover, "The Supreme Court 1982 term – Foreword: Nomos and Narrative" (1983) 97 *Harvard Law Review* 4. For a discussion of the concept and the different nomoi inhabited by Israel and by the international community, see entry N: *Nomos*.

Bank;⁶⁴ the Beit Sourik case⁶⁵ and the Alfei Menashe case.⁶⁶ Israel denied it vehemently. State counsel argued that the fence was built for security purposes only and that its route was dictated solely by the need to protect Israel and Israelis from Palestinian terrorists.

An affidavit signed by General Office Commander (GOC) of the Central Command Maj. Gen. Moshe Kaplinsky and submitted in the Beit Sourik case stated: "This is not a permanent fence, but a temporary one, built for security purposes."⁶⁷ Given that international law decrees that an occupation is temporary but fails to set precise time limits on its duration, that this lacuna has produced the Israeli thesis that equates the temporary with the indefinite;⁶⁸ and the past successes in convincing the HCJ that long-term projects were temporary,⁶⁹ it is little wonder that in this instance too, the principle of temporariness was used to deflect the de facto annexation argument.

And it worked. The court accepted the state's position lock, stock, and barrel. Relying on the text of the resolutions passed by the government and by the national security cabinet,⁷⁰ then chief justice Aharon Barak, who presided in both cases, ruled that the motivation for the construction of the fence was security,⁷¹ that Israel's ultimate final borders did not factor into the determination of its route,⁷² and that it was "inherently temporary."⁷³ When petitioners proved that the future expansion plans for settlements formed the basis for the route at various locations such as Bil'in,⁷⁴ 'Azzun,⁷⁵ and Aflei Menashe,⁷⁶ the justices took it as a regrettable aberration from the security basis for the project rather than as the exposure of its true political character. When Israel's then minister of justice said at a public event, sitting next to the

⁶⁴ Domestic and ICJ Litigation focused on the de facto annexation and proportionality arguments. A third possible argument that no physical barrier even on an international recognized border is legal, was not argued. For an analysis of the "left out argument," see Y. Blank, "Legalizing the Barrier: the Legality and Materiality of the Israel/Palestine Separation Barrier" (2010–2011) 46 *Texas International Law Journal* 309.

⁶⁵ *Beit Sourik*, p. 828.

⁶⁶ HCJ 7957/04 *Mara'abe v. Prime Minister of Israel* (2005) 60(2) IsrSC 477, http://elyoni.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf (hereinafter: Alfei Menashe). The author of this entry served as the attorney for the petitioners.

⁶⁷ Affidavit signed on April 19, 2004, quoted in *Beit Sourik*, p. 830.

⁶⁸ See entry T: Temporary/Indefinite. ⁶⁹ See entry J: Jewish Settlements.

⁷⁰ For the resolutions, see notes 37–38. ⁷¹ *Beit Sourik*, p. 830; Alfei Menashe, ¶ 98.

⁷² *Beit Sourik*, p. 820; Alfei Menashe, ¶ 98. ⁷³ *Alfei Menashe*, ¶ 100.

⁷⁴ HCJ 8414/05 *Bil'in Village Council Chairman v. The Government of Israel* (2007) TakSC 2007(3) 3557.

⁷⁵ HCJ 2732/05 *Head of 'Azzun Village Council v. Government of Israel* (June 15, 2006). English translation available on the website of HaMoked: Center for the Defence of the Individual: www.hamoked.org/files/2015/6654_eng.pdf.

⁷⁶ *Alfei Menashe*, ¶ 113.

then deputy chief justice Mishael Cheshin, that in its rulings on the separation fence, the HCJ was “drawing the country’s borders,” Cheshin chastised her, saying: “That is not what you have contended in court.”⁷⁷ Yet, even this statement did not steer the HCJ away from following Israel’s official statements: the fence is merely a security barrier. It is not a border.

The HCJ preferred form over substance, text over context, purported intentions over expected outcomes. In the courtroom, it was official declarations – words – rather than deeds – ground realities – that dictated the judicial conclusion.

B.4 CONCLUSION: SOVEREIGNTY WITHOUT BORDERS

Israel erected a system of fences and walls that functions as a one-way barrier and restricts Palestinian movement only. As a border, it represents the line of de facto sovereignty Israel has managed to force on the seam zone, but not its final territorial claims on the eastern front. On one side of it, the regime “makes authoritative decisions with regard to the people and resources” without any real restrictions, while on the other side of it, sovereignty is in suspension. Israel’s denial that the route of the fence expresses a political border must be understood in the context of the denial – in the Rhodes Agreements – that the Green Line is a political border. In both cases, the line is proclaimed not to be a border as a way of maintaining claims to sovereignty over areas to the east of it. In both cases, the creation of a legal status of a border, which Israel perceives more as preventing its expansion eastward than cementing its sovereignty west of it, is avoided by the assertion that the route was determined by security considerations and that it is temporary.

The HCJ analysis was based on embracing the virtual reality created by the state’s declarations. In accepting Israel’s official position that there was no annexation, it ignored the substantive questions that attribute decisive weight to the impact the construction of the fence has on the Palestinian right to self-determination. In axiomatically accepting the declaration that the fence is temporary, the justices absolved themselves of the need to face the magnitude of the long-term changes the fence would create in the area it seals off. Finally, the HCJ misinterpreted the undertone of the Israeli government’s declaration that the route of the fence was not a border. The judgments issued by the HCJ consider this statement as deriving from the position that, pending any other

⁷⁷ Y. Yoaz and The Associated Press, “Justice Minister: West Bank Fence Is Israel’s Future Border,” *Haaretz* (December 1, 2005), www.haaretz.com/news/justice-minister-west-bank-fence-is-israel-s-future-border-1.175645.

agreement, the Green Line is the border of sovereign Israel. Yet this assumption overlooked the fact that the fence is effectively a continuation of what is stated in the Rhodes Agreements – i.e., that the Green Line *is not a border* and, as a result, that the eastern limit of Israel's sovereignty is not defined either by the Green Line or by the fence.

The separation fence is a barrier/border mutation, wrought by the fact/norm, temporary/indefinite, annexation/nonannexation indeterminacies of the Israeli control over the Palestinian Territory.⁷⁸ With the legal regime it applied to the fence and the space between it and the Green Line, Israel managed to create a physical and legal line that preserves the empowering characteristics of a barrier and of a border, while casting away its limiting characteristics. This genetic mutation created a uni-national barrier which is also a one-sided border.

⁷⁸ Ben-Naftali, Gross and Michaeli, “Illegal Occupation,” pp. 612–613.

F

Future-Oriented Measures

Hedi Viterbo

F.1 INTRODUCTION

Israel's entire control regime over the West Bank and Gaza Strip is future-oriented. It shapes the future and is also, in some cases, concerned with unwanted eventualities. Some of the practices and policies that make up this regime have a preventive, preemptive, or deterrent element, whether formally or effectively. Examples appear throughout this book. The restriction of Palestinian "family unifications,"¹ for instance, has been justified by Israeli authorities as a preemptive security measure. According to critics, however, the aim of this policy is to prevent another perceived danger: a demographic threat to Israel's Jewish majority.² Prosecution,³ incarceration,⁴ house demolitions,⁵ and deportations⁶ are all designed, among other things, to prevent and deter future Palestinian transgressions. Israel's control over planning and building permits in the West Bank⁷ seeks to shape a desirable territorial future. The West Bank barrier,⁸ Israel's surveillance apparatus, and the issuance of entry permits and IDs⁹ are all meant, among other things, to prevent and deter unauthorized movement. Closed military zones¹⁰ are often used in an attempt to prevent future demonstrations.¹¹ Israel presents its (oft-coerced) recruitment of Palestinian

¹ See entry K: Kinship.

² A. Gross, "In Love with the Enemy: Justice, Truth, Integrity and Common Sense Between Israel and Utopia in the Citizenship Law Case" (2009) 13 *Hamishpat* 141, 152–154 [Hebrew].

³ See entries M: Military Courts and Y: Youth.

⁴ See entries S: Security Prisoners and Y: Youth. ⁵ See entry H: House Demolitions.

⁶ See entry D: Deportations. ⁷ See entry Z: Zone. ⁸ See entry B: Barrier.

⁹ See entries P: Proportionality, V: Violence, and X: X-Ray.

¹⁰ See entry Z: Zone, Section Z.2.5.1 ("Military Zoning").

¹¹ Association for Civil Rights in Israel, *The Status of the Right to Demonstrate in the Occupied Territories* (September 2014), p. 37, www.acri.org.il/en/protestright/the-right-to-demonstrate.

informants and collaborators,¹² as well as its use of undercover soldiers,¹³ as means to gather necessary information for preempting proscribed activities. At the same time, by sowing suspicion among Palestinians, another future effect of the use of informants and undercover forces is to undermine Palestinian unity and collective resistance.¹⁴ The recent separation of Palestinian children and adults in Israeli custody is likewise future-oriented: it hinders intergenerational Palestinian influences¹⁵ in the hope of creating more docile future adults.¹⁶

Bringing this future-oriented element center stage, this entry investigates the role and consequences of prevention, preemption, and deterrence in two areas of Israeli policy and practice.¹⁷ The first, examined in Section F.2, is preemptive attacks, with a focus on three issues: (a) purportedly preemptive military strikes, starting with the 1967 war that led to Israel's control over the West Bank and Gaza Strip; (b) extrajudicial assassinations, commonly referred to as “targeted killing” (in English) or “focused preemption” (in Hebrew); and (c) “warning” procedures, such as the “roof knocking” tactic of dropping low-impact munitions prior to bombing residential buildings. A second area, analyzed in Section F.3, is termed here “the penalty of potential threats.”

¹² See entries V: Violence, X: X-Ray, and Y: Youth. On Israel's use of informants in the context of “preventive detention,” see Section F.3.1.

¹³ See entry X: X-Ray.

¹⁴ T. Kelly, “In a Treacherous State: The Fear of Collaboration Among West Bank Palestinians,” in S. Thiranagama and T. Kelly (eds.), *Traitors: Suspicion, Intimacy, and the Ethics of State-Building* (Philadelphia: University of Pennsylvania Press, 2010), p. 169; N. Gordon, *Israel's Occupation* (Berkeley and Los Angeles: University of California Press, 2008), pp. 42–43.

¹⁵ See entry S: Security Prisoners.

¹⁶ See H. Viterbo, “Rights as a Divide-and-Rule Mechanism: Lessons from the Case of Palestinians in Israeli Custody” *Law & Society Inquiry* (forthcoming) [hereinafter: Rights as a Divide-and-Rule Mechanism].

¹⁷ Comparable practices are ubiquitous far beyond Israel/Palestine, and have been extensively studied. For representative examples, see R. V. Ericson and K. D. Haggerty, *Policing the Risk Society* (Oxford: Clarendon Press, 1997); B. E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2006); B. Anderson, “Preemption, Precaution, Preparedness: Anticipatory Action and Future Geographies” (2010) 34 *Progress in Human Geography* 777; C. Heath-Kelly, “Counter-Terrorism and the Counterfactual: Producing the ‘Radicalisation’ Discourse and the UK Prevent Strategy” (2013) 15 *British Journal of Politics & International Relations* 394; D. Kellner, “Preemptive Strikes and the War on Iraq: A Critique of Bush Administration Unilateralism and Militarism” (2004) 26 *New Political Science* 417; J. McCulloch and S. Pickering, “Pre-crime and Counter-terrorism” (2009) 49 *British Journal of Criminology* 628; G. Mythen and S. Walklate, “Terrorism, Risk and International Security: The Perils of Asking ‘What If?’” (2008) 39 *Security Dialogue* 221. On the politics and culture of risk management, see, e.g., U. Beck, *Risk Society: Towards a New Modernity* (London: SAGE publications, 1992); A. Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford: Stanford University Press, 1991).

Three components of this penalty will be examined: (a) “administrative detention” (also known as “preventive detention”): imprisonment without trial or charge on the basis of secret evidence; (b) the preemptive arrest of “potential offenders” for whom there is no evidence of an actual intent to break Israeli law; and (c) “mappings”: house incursions to gather information about Palestinians who are considered innocent. The entry will analyze the stated objectives, the surrounding discourses, and the actual effects of each of these practices.

These two areas of future-oriented activity – preemptive attacks and the penalty of potential threats – align themselves differently with the different modes of control Israel exercises over the Gaza Strip and West Bank.¹⁸ Following its unilateral pullout from the Gaza Strip in 2005, Israel has mostly been controlling this territory externally, including through closure and airstrikes.¹⁹ Rather than being a permanent military presence on the ground, the Israeli military has conducted intermittent incursions. As a result, it is primarily toward the Gaza Strip that Israel has deployed its preemptive airstrikes and “warning” tactics in recent years, as is evident in Section F.2. In comparison, as described in Section F.3, the Israeli penalty of potential threats is now in use mainly (in the case of “administrative detentions”) or almost exclusively (in the case of preemptive arrests and house “mappings”) in the West Bank. It is primarily within this territory, which is also populated by hundreds of thousands of Jewish settlers, that Israeli security forces, legal institutions, and administrative authorities operate on a regular and extensive basis. Accordingly, the vast majority of Palestinians in Israeli custody are from the West Bank, whereas only a relatively small proportion are from the Gaza Strip.²⁰

Social theorist Brian Massumi has put forward an insightful conceptualization of the three future-oriented modes of operation examined in this entry – prevention, deterrence, and preemption. As he articulates it, in prevention, the potential threat precedes the intervention. A successful prevention means that the threat never materializes. When prevention fails, the threat starts eventuating, and deterrence may take over. In order to maintain an immediate

¹⁸ For further discussion of the different modes and scales of Israeli control over the Gaza Strip and West Bank, see L. Allen, “The Scales of Occupation: ‘Operation Cast Lead’ and the Targeting of the Gaza Strip” (2012) 32 *Critique of Anthropology* 261; A. Cohen, “Israel’s Control of the Territories – An Emerging Legal Paradigm” (2016) 21 *Palestine-Israel Journal* 102; D. Li, “The Gaza Strip as Laboratory: Notes in the Wake of Disengagement” (2006) 35 *Journal of Palestine Studies* 38.

¹⁹ See also entries Q: Quality of Life, V: Violence, and Z: Zone.

²⁰ See entry S: Security Prisoners, Section S.1 (“Introduction: Terminology, Figures, and Context”).

response capability to this unfolding threat, deterrence translates (or converts) it into a present danger. In other words, rather than preventing the threat altogether, deterrence contributes to its development. This creates a self-propelling process of advancing into the perilous future, even at the risk of self-annihilation. Alongside this difference, prevention and deterrence share a fundamental assumption: namely, that threats are empirically assessable, causes are identifiable, and there is a predictable causal link between them. In this logic, uncertainty about the nature of the threat is seen as simply the result of insufficient data. Preemption, in contrast, presumes that such uncertainty can never be overcome, because new and unpredictable threats are always bound to emerge, with potential terrorists or offenders whose identity and location are often unspecifiable. This requires state authorities to operate proactively – to make the first move – and in so doing contribute to the emergence and even proliferation of threats. The state's aim is to make these heretofore-unspecified threats emerge and proliferate on its own terms, so that now they can finally be managed. Like deterrence, preemption thus becomes a self-propelling process, but in a different manner: by bringing nonexistent threats into being (and, once these threats are materialized, invoking them to retroactively justify itself).²¹

While Massumi contrasts the three future-oriented modes of operation rather starkly and rigidly, in reality they overlap inextricably and defy clear-cut definitions. Yet, his analysis and others' earlier works²² shed light on two key dimensions of Israel's future-oriented measures, both of which are illustrated throughout this entry. First, these measures are not only preclusive but also, no less importantly, productive in nature. In the process of supposedly thwarting eventualities that are deemed undesirable, they engender new and often greater threats and harms, intentionally or not, including the loss of civilian lives, mass suffering, and Palestinian animosity toward Israel. Second, as explained in this entry, Israel's future-oriented practices often evince a self-propelling or circular logic, according to which they are eternally necessary, regardless of the extent of actual threats and evidence.

²¹ B. Massumi, "Potential Politics and the Primacy of Preemption" (2007) 10:2 *Theory & Event*, 115–24.

²² See, e.g., S. Crook, "Ordering Risks," in D. Lupton (ed.), *Risk and Sociocultural Theory: New Directions and Perspectives* (Cambridge: Cambridge University Press, 1999), pp. 160, 171 ("In an organised regime the activities of scientific and technical experts, inspectorates and enforcement agencies, legislators and concerned citizens do not simply process risks that appear 'externally' over the horizon of the regimes in an ad hoc way. The apparatuses of surveillance and discipline ... routinely produce the risks they assess and manage. The important corollary of this point is that only those risks are produced which are in principle 'manageable'"). See also the sources cited in note 17.

In addition to exploring the productive dimension and circular logic of the practices and policies under examination, this entry advances three other arguments. First, that some of these policies and practices potentially serve objectives that are entirely different from, or at least additional to, their stated ones. More specifically, they fulfill a function that is not directly concerned with prevention, deterrence, or preemption, or they target a different potential threat from their professed one. Second, this entry puts a spotlight on the sanitized terminology used to conceal and legitimize the harm and threats created by Israel's future-oriented measures. Finally, contrary to legalistic²³ criticisms of these measures as disregarding the law, the entry demonstrates their eager use of legal mechanisms, classifications, and arguments. The concluding section summarizes the key findings in relation to each of these aspects, and further delves into the close relationship between seemingly exceptional future-oriented practices and “normal” law.

F.2 PREEMPTIVE MILITARY ATTACKS

One of Israel's recurrent justifications for its violence toward Palestinians in the West Bank and Gaza Strip has been the management of future risks. Three key practices, in particular, have been presented as serving this objective: preemptive military strikes, extrajudicial assassinations, and “warning” procedures.

F.2.1 Preemptive Strikes

The 1967 war – the inception of Israel's rule in the West Bank and Gaza Strip – was presented by Israeli officials as preemptive self-defense against Arab aggression.²⁴ The Israeli government's official decision to wage this preemptive war proclaimed: “[T]he armies of Egypt, Syria, and Jordan are deployed for a multifront attack that *threatens Israel's existence*. It is therefore decided to *launch a military strike* aimed at liberating Israel from encirclement and *preventing assault by the United Arab Command*.²⁵

²³ For a useful discussion the meaning(s) of “legalism,” see K. McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transnational Justice” (2007) 34 *Journal of Law & Society* 411, 414–424. On the legalistic nature of the Israeli regime, see entries L: Lawfare and V: Violence.

²⁴ For an analysis challenging Israel's depiction of the war, see E. N. Kurtulus, “The Notion of a ‘Pre-emptive War’: the Six Day War Revisited” (2007) 61 *Middle East Journal* 220.

²⁵ Quoted in M. B. Oren, *Six Days of War: June 1967 and the Making of the Modern Middle East* (London: Penguin Books, 2002), p. 158 (emphases added).

While depicted as meant to preempt future harms (“assault by the United Arab Command”), this war also brought about a different political and legal future, brimming with new harm and danger.

Since then, Israel has continued launching purportedly preventive or pre-emptive military strikes. As a case in point, in 2014, the Palestinian organization Hamas (which governs Gaza) signed a reconciliation agreement setting out plans to form a unity government with its rival, Fatah (which controls the Palestinian Authority in the West Bank). Minutes after the announcement, the Israeli air force fired two missiles into the Gaza Strip, injuring seven Palestinians. The Israeli authorities did not portray this as retaliation for firing from this territory. Instead, they described it as a “preventive attack … designed to thwart terrorism,” while admitting that the stated targets – rocket launchers – had not actually been hit. Shortly after the airstrike, two rockets were fired from the Gaza Strip into Israel (causing no Israeli casualties or damage to property).²⁶ The Israeli airstrike might have thus ended up triggering, or at least potentially legitimizing, the harm it supposedly sought to prevent – the firing of rockets from Gaza.

Further, aside from preventing such firing from the Gaza Strip, the Israeli attack may have been at least partly aimed at another perceived threat: Palestinian political unity. This is not entirely inconceivable given Israel’s extensive attempts at politically fragmenting Palestinian society, as discussed elsewhere in this book.²⁷ Indeed, the Israeli government vocally censured and refused negotiation with the Palestinian unity government.²⁸ According to one Israeli commentator, Israel’s prime minister, Benjamin Netanyahu, “viewed the reconciliation as a threat rather than an opportunity” because it “robbed him of the claim that in the absence of effective rule over Gaza, there is no point in striking a deal with [the Palestinian Authority].”²⁹ Like the pre-emptive war of 1967, then, this airstrike might have been concerned with governing the region’s political future.

²⁶ G. Cohen, J. Khoury, and S. Seidler, “IDF Attacks in Gaza Minutes After the Announcement of the Unity Agreement,” *Haaretz* (April 23, 2014) [Hebrew], www.haaretz.co.il/news/politics/1.2303190.

²⁷ See entry S: Security Prisoners, Section S.2, “Sociopolitical fragmentation.” See also, e.g., Gisha, *The Separation Policy: List of References Prepared by Gisha* (2014), http://gisha.org/UserFiles/File/publications/separation_policy_2014.pdf; A. Korn, “The Ghettoization of the Palestinians,” in R. Lentini (ed.), *Thinking Palestine* (London and New York: Zed Books, 2008), pp. 116–130; Viterbo, “Rights as a Divide-and-Rule Mechanism.”

²⁸ B. Sobelman, “Israel Suspends Peace Talks with Palestinians,” *Los Angeles Times* (April 24, 2014), www.latimes.com/world/middleeast/la-fg-israel-talks-20140425-story.html.

²⁹ A. Sharon, “Failure in Gaza,” *New York Review of Books* (September 25, 2014), www.nybooks.com/articles/2014/09/25/failure-gaza/.

F.2.2 Extrajudicial Assassinations

Unlike the English term “targeted killing,” its Hebrew equivalent *sikul memukad* (meaning “focused preemption/foiling/thwarting”), does not acknowledge the lethal nature of extrajudicial assassination.³⁰ Instead of the “killing” this practice entails, the Hebrew term emphasizes its future-orientedness – the alleged ability to preempt a future threat. It is thus not the precise outcome of this measure (killing) that is center stage but its temporal horizon.

Israeli authorities and officials have repeatedly emphasized this future-oriented dimension. In 2005, Moshe Ya’alon, the chief of staff at the time (and later the minister of defense), asserted that Israel’s “targeted killings . . . were intended to preempt . . . terrorist attacks.”³¹ The state’s response to a 2002 petition against Israel’s so-called “focused preemption” policy characterized it as a “means of warfare used to preempt murderous attacks.”³² The supreme court’s decision on the matter, in 2006, unanimously upheld the lawfulness of this policy (as analyzed in depth in another entry),³³ and reiterated the future-oriented language. The opinion of emeritus chief justice Aharon Barak described this as a “preventive strikes policy,”³⁴ and chief justice Beinisch concurred: “the function of ‘focused preemption’ is to prevent [Israeli] casualties as part of the state’s duty to protect its soldiers and citizens.”³⁵

The judgment also touched on the potential uncertainty of the dreaded security threat. The state’s response to the petition admitted the “uncertainty inherent to any belligerent act.”³⁶ Chief justice Beinisch suggested managing this uncertainty as follows: “[I]n some circumstances, information about the terrorist’s past activity can be used to assess the threat he poses. . . . [T]his assessment should take into account the likelihood of the life-threatening

³⁰ “Extrajudicial assassination” and related phrases appear, *inter alia*, in Article 8 of the Rome Statute of the International Criminal Court, UN General Assembly, July 17, 1998, ISBN No 92-9227-227-6 (prohibiting “the carrying out of executions without previous judgement pronounced by a regularly constituted court”); Article 1 of the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, May 24, 1989, UN Doc E/RES/1989/65 (“Governments shall prohibit by law all extra-legal, arbitrary and summary executions”).

³¹ Quoted in A. Craig, *International Legitimacy and the Politics of Security* (Plymouth: Lexington Books, 2013), p. 141 [hereinafter: International Legitimacy]. The author adds that the military’s international law department “constructed their advice to meet the Israeli understanding of . . . [targeted killing] operations as ‘anticipatory self-defence.’” *Ibid.*, p. 146. On the international law department, see entry L: Lawfare.

³² HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel* (December 13, 2006), ¶ 9 of Barak’s opinion, http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

³³ See entry C: Combatants. ³⁴ HCJ 769/02, opening paragraph of Barak’s opinion.

³⁵ *Ibid.*, Beinisch’s concurring opinion. ³⁶ *Ibid.*, ¶ 13 of Barak’s opinion.

terrorist activity. . . . [S]ubstantial likelihood . . . is required.”³⁷ This contingency, the court ruled, should be weighed against another: the potential “military benefit” of the assassination. Only if the former is proportionate to the latter would the liquidation be regarded as lawful.³⁸ In the face of uncertainty, then, preemption rests on a calculation of probabilities.

What the Hebrew and English euphemisms “focused preemption” and “targeted killing” mask is that extrajudicial assassination is often neither focused nor targeted.³⁹ A relatively well-known example of this imprecision is Israel’s assassination of Hamas military leader Salah Shehadeh in 2002, which killed not only Shehadeh himself and his guard, but also 14 other Palestinians, as well as injuring more than 80 others, and destroying 4 residential buildings.⁴⁰ In the name of thwarting one future harm or threat, such liquidations can thus end up creating other harms and threats: the loss of civilian lives, mass suffering, Palestinian animosity toward Israel, and, as a result, potentially, additional future threats. According to the supreme court, “there [must] be a proper proportionate relationship between the [Israeli] military objective and the [Palestinian] civilian damage”⁴¹ – requiring the military, in this regard as well, to weigh uncertain contingencies against one another.

The alternative terms “extrajudicial assassinations” and “extrajudicial executions” convey the spatial and temporal deviation of this practice from the process of judicial review. Spatially, this procedure occurs outside the courtroom. Temporally, instead of subjecting evidence to judicial scrutiny before deciding how to handle the alleged terrorist, the order is reversed. The death of a Palestinian target is politically utilized as evidence of the existence and operation of terrorists. Rather than diminishing the threat of terrorism, extrajudicial assassinations and the harm they cause thus serve as evidence for the never-ending stream of future threats.⁴²

³⁷ *Ibid.*, Beinisch’s concurring opinion.

³⁸ *Ibid.*, ¶¶ 45–46, 58, 60 of Barak’s opinion, ¶ 5 of deputy chief justice Rivlin’s concurring opinion, Beinisch’s concurring opinion.

³⁹ This is true even according to Israeli authorities’ (debatable) standards: two out of every five Palestinian casualties of Israel’s so-called “targeted killings” between September 29, 2000, and December 26, 2008, were not the formal object of the assassination. See B’Tselem, “Fatalities Before Operation ‘Cast Lead’” (n.d.), www.btselem.org/statistics/fatalities/before-cast-lead/by-date-of-event.

⁴⁰ O. Ben-Naftali and K. Michaeli, “We Must not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings” (2002–2003) 36 *Cornell Journal of International Law* 233, 280.

⁴¹ HCJ 769/02, ¶ 44 of Barak’s opinion.

⁴² S. Krasmann, “Targeted Killing and Its Law: On a Mutually Constitutive Relationship” (2012) 25 *Leiden Journal of International Law* 665, 681.

While upholding the lawfulness of Israel's "focused preemption" policy, the supreme court has ruled that "if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed . . . Trial is preferable to use of [lethal] force."⁴³ Yet, classified documents leaked in 2008 suggest that the military has assassinated Palestinians who could have been arrested. The attorney general, however, refused to investigate this potential violation of the court's ruling. The only people prosecuted (and convicted) were the leaker and the Israeli journalist who published this information.⁴⁴ At the same time, the alternative this ruling proposes – arrest, interrogation, and trial – is far from perfect. As shown elsewhere in this book, trial in an Israeli court offers near-certain conviction.⁴⁵ And, as discussed in Section F.3.1, arrest often leads to "administrative detention": incarceration without trial on the basis of secret evidence.

F.2.3 "Warning" Procedures

Civil casualties, especially if documented and broadcast globally, can greatly erode the legitimacy of military attacks. Indeed, during its 2006 war against Hezbollah in Lebanon, Israel made frequent use of warnings to clear the battlefield of civilians: leaflets dropped from aircraft, radio broadcasts in Arabic, and telephone calls to local civic leaders. The military's international law department (examined in another entry)⁴⁶ was heavily involved in this endeavor. Yet, the warnings proved to be ineffective, as Israel's assumption that no civilians remained in the area turned out to be false.⁴⁷

Drawing on its lessons from Lebanon, the Israeli military, advised by its international law department, refined this procedure in its assaults on the Gaza Strip from 2008 onward. For the military offensive of 2008–2009, the general staff issued an order with a legal annex stipulating that "as far as possible in the circumstances, the civilian population in the area of a legitimate target is to be warned," so long as such warning does not endanger Israeli forces or the military action. In addition to flyers and radio broadcasts, Israel began sending recorded warnings specifying evacuation locations to mobile phones of Palestinians in designated areas. The Israeli military also introduced the controversial "roof knocking" tactic, which has also been

⁴³ HCJ 769/02, ¶ 40 of Barak's opinion.

⁴⁴ See entry V: Violence, Section V.3 ("Invisible violence").

⁴⁵ See entry M: Military Courts. ⁴⁶ See entry L: Lawfare.

⁴⁷ Craig, International Legitimacy, pp. 165, 171, 185, 197.

employed in later offensives on the Gaza Strip: dropping low- or nonimpact explosives on residential buildings that allegedly house combatants or military infrastructure prior to bombing them with larger missiles.⁴⁸ In an address to the UN General Assembly, Israeli prime minister Netanyahu boasted: “Israel was doing everything to minimize Palestinian civilian casualties. . . . No other country and no other army in history have gone to greater lengths to avoid casualties among the civilian population of their enemies.”⁴⁹

However, the Israeli procedures have exposed to harm many of the Palestinians they purport to warn, in at least two ways. First, despite the soft tone of the name “roof knocking,” the so-called “warning” munitions are hazardous and intimidating. They can damage or shake the targeted building, cause physical harm to the residents, induce great fear, and have even directly hit and killed civilians. In this sense, not only do they signal an impending attack, they are themselves a preliminary attack. Even Gazans who wished to evacuate were often unable to do so for various reasons: insufficient time; lack of clarity on which house was being targeted (due to simultaneous attacks nearby); uncertainty whether a bombing was a preliminary warning; the lack of nearby shelters; physical and health reasons; and a sense that there was no safe alternative given Israel’s strikes throughout the Gaza Strip.⁵⁰ Some Palestinians did leave their buildings, but returned “too soon” (as the Israeli military later put it): though the Israeli pilot could see them running back to the house, the missile was already under way, resulting in their death.⁵¹ Others were not in targeted houses themselves, but were injured as a result of bombings of nearby buildings. On other occasions, Israel’s warning flyers designated

⁴⁸ Y. Feldman and U. Blau, “Consent and Advise,” *Haaretz* (January 9, 2009), www.haaretz.com/consent-and-advise-1.269127. See also Craig, *International Legitimacy*, pp. 185, 187, 196–219; E. Weizman, “Legislative Attack” (2010) 27 *Theory, Culture & Society* 11, 21–22; E. Weizman, “Gaza Attacks: Lethal Warnings,” *Al Jazeera* (July 14, 2014), www.aljazeera.com/indepth/opinion/2014/07/gaza-attacks-lethal-warnings-2014713162312604305.html. On the “roof knocking” tactic, see also entry X: X-Ray. On the subsequent adoption of this tactic by the US-led coalition forces in Iraq in 2016, see entry E: Export of Knowledge, Section E.2.

⁴⁹ Haaretz, “Transcript of Benjamin Netanyahu’s Address to the 2014 UN General Assembly,” *Haaretz* (September 29, 2014), www.haaretz.com/israel-news/1.618308.

⁵⁰ B’Tselem, *Black Flag: The Legal and Moral Implications of the Policy of Attacking Residential Buildings in the Gaza Strip*, Summer 2014 (2015), pp. 54–57 [hereinafter: Black Flag], www.btsel.org/download/201501_black_flag_eng.pdf; Physicians for Human Rights – Israel et al., *Gaza, 2014: Findings of an Independent Medical Fact-Finding Mission* (2015), pp. 40–44, https://gazahhealthattack.files.wordpress.com/2015/01/gazareport_eng.pdf; A. Iraqi, “The Humanitarian Myths of Israel’s ‘Roof-Knocking’ Policy in Gaza,” *World Post* (September 9, 2014), www.huffingtonpost.com/amjad-iraqi/the-humanitarian-myths-of_b_77364.html.

⁵¹ G. Cohen, “Israeli Army Says the Killing of 8 Gazan Family Members Was in Error,” *Haaretz* (July 10, 2014), www.haaretz.com/israel-news/1.604128.

certain neighborhoods as safe, but Palestinians who fled there ended up perishing in an Israeli attack.⁵²

Second, these measures have been utilized as a preemptive legal defense against potential accusations that Israel indiscriminately attacks populated areas in Gaza.⁵³ Under the international law of armed conflict, civilians, unlike combatants, are not considered legitimate military targets (as explained elsewhere in this book).⁵⁴ In a controversial application of this legal distinction, some Israeli officials have argued that warned civilians who remain in targeted buildings willingly become “human shields”⁵⁵ and thus relinquish their civilian status.

One senior military lawyer articulated this position as follows, in 2009:

The people who go into a house despite a warning do not have to be taken into account in terms of injury to civilians, because they are voluntary human shields. From the legal point of view, I do not have to show consideration for them. In the case of people who return to their home in order to protect it, they are taking part in the fighting.⁵⁶

Similarly, according to Israeli philosopher Asa Kasher, the author of the military’s ethical code,

there is no army in the world that will endanger its soldiers to avoid hitting the [already] well-warned neighbors of an enemy or terrorist. . . . Israel should favor the lives of its own soldiers over the lives of the well-warned neighbors of a terrorist when it is operating in a territory that it does not effectively control [referring to the Gaza Strip],⁵⁷ because in such territories it does not bear moral responsibility for properly separating between dangerous individuals and harmless ones, beyond warning them in an effective way.⁵⁸

⁵² B’Tselem, *Black Flag*, pp. 54–55.

⁵³ The description of these techniques as a “preemptive legal defense” is borrowed from: N. Gordon, “Using Human Shields as a Pretext to Kill Civilians,” *Al Jazeera* (August 30, 2016), www.aljazeera.com/indepth/opinion/2016/08/human-shields-pretext-kill-civilians-160830102718866.html.

⁵⁴ See entry C: Combatants.

⁵⁵ For a critical analysis of Israel’s use of the term “human shields,” see N. Gordon and N. Perugini, “The Politics of Human Shielding: On the Resignification of Space and the Constitution of Civilians as Shields in Liberal Wars” (2016) 34 *Environment and Planning D: Society and Space* 168.

⁵⁶ Feldman and Blau, “Consent and Advise.” This point is also touched upon in entry X: X-Ray, Section X.2.6.

⁵⁷ On the question of whether Israel has retained effective control after its 2005 unilateral from the Gaza Strip, see entries Z: Zone (specifically Section Z.2.2.1) and X: X Rays (specifically Section X.2.6).

⁵⁸ A. Kasher, “Analysis: A Moral Evaluation of the Gaza War,” *Jerusalem Post* (February 7, 2010), www.jpost.com/Israel/Analysis/A-moral-evaluation-of-the-Gaza-War. For further analysis of Kasher’s assertions on “roof knocking,” see entry E: Export of Knowledge.

Initially justified as means to minimize collateral damage, these so-called “warning” measures can thus pave the way for destruction, suffering, and civilian casualties. They are therefore both a form of military offense in and of themselves and a preemptive legal defense, claiming to shift Palestinians who do not or cannot heed them from one legal category (legally protected civilians) to another (legitimate military targets).⁵⁹ The high proportion of Palestinian civilian casualties – between 73 and 77 percent in the 2014 Israeli military operation, according to some estimates⁶⁰ – demonstrates the broader context within which these supposedly cautionary measures potentially authorize killing civilians.

F.3 THE PENALTY OF POTENTIAL THREATS

In addition to military attacks, another context in which prevention, deterrence, and preemption occupy a central place is law enforcement. As explained in Section F.1, this context mostly pertains to the West Bank, whereas the preemptive military attacks analyzed in Section F.2 largely concern the Gaza Strip. The following discussion will focus on three specific practices: “administrative detentions,” preemptive arrests, and “mappings.” In different ways, the primary concern common to these future-focused practices is not past crimes but potential threats, specific or unspecifiable.

In general, criminal law has some future-oriented elements: sentencing, for example, incorporates deterrence considerations.⁶¹ And yet, in certain key respects, criminal law usually insists on presenting itself as relying on the past – both as matter of principle (in drawing on precedent) and as a matter of fact (in inspecting evidence of defendants’ past actions). “Administrative detention,” preemptive arrest, and “mapping” make up a form of penalty that openly defies this mythical or ideal mode of criminal law: a penalty of potential threats, in which past-based decisions, though still in operation, become secondary and instrumental to the management of future and potential transgressions. Since the alleged threat is yet to materialize and is sometimes completely unknown, speculative evidence is produced, the basis of

⁵⁹ Weizman, “Legislative Attack,” pp. 21–22.

⁶⁰ See, respectively, UN Office for the Coordination of Humanitarian Affairs, *Occupied Palestinian Territory: Gaza Emergency – Humanitarian Snapshot* (2014), [www.ochaopt.org/c
ontent/gaza-emergency-humanitarian-snapshot-20-july-2014](http://www.ochaopt.org/content/gaza-emergency-humanitarian-snapshot-20-july-2014); Human Rights Watch, “Israel/
Palestine: Unlawful Israeli Airstrikes Kill Civilians” (July 15, 2014), www.hrw.org/news/2014/07/15/israel/palestine-unlawful-israeli-airstrikes-kill-civilians.

⁶¹ J. McCulloch and D. Wilson, “Before Pre-Crime: A History of the Future,” in *Pre-Crime, Pre-Emption, Precaution and the Future* (London: Routledge, 2016), p. 17 [hereinafter: *Pre-Crime, Pre-Emption, Precaution*].

which is not past facts but a probability calculus.⁶² After exploring this penalty in this section, the entry will critically consider (in the concluding section) the extent to which it actually deviates from “normal” criminal law.

F.3.1 “Administrative Detention”

As discussed elsewhere in this book, Israel has placed thousands of Palestinians in so-called “administrative detention”⁶³ – imprisonment without charge or trial. This measure is also commonly referred to as “preventive detention,”⁶⁴ as its objective, officially at least, is to prevent potential risks rather than punish past actions. In the absence of specific charges, Palestinians are thus deprived of their liberty not due to actual offenses, but on grounds of allegedly posing a threat.

Usually, since such incarceration is based on secret evidence, neither the detainee nor the defense attorney are properly informed of the allegations, and therefore cannot effectively refute them. The incarceration can be extended every six months with no set limit, subject to military court review. This review, however, is not only based on secret evidence, but is also unbound by the regular rules of evidence and is held behind closed doors.⁶⁵ While

⁶² For a somewhat similar analysis, see L. Amoore, “Risk before Justice: When the Law Contests Its Own Suspension” (2008) 21 *Leiden Journal of International Law* 847, 850–851, 854–857 [hereinafter: “Risk before Justice”]. On speculative threats in the context of the legal principle of proportionality, see entry P: Proportionality, Section P.3 (“Values: Constants and Variables”).

⁶³ For further figures and analysis, see entry S: Security Prisoners, Section S.1.

⁶⁴ See, e.g., H. Ludsin, *Preventive Detention and the Democratic State* (Cambridge: Cambridge University Press, 2016); C. V. Reicin, “Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories” (1987) 8 *Cardozo Law Review* 515; T. Stahlberg and H. Lahmann, “A Paradigm of Prevention: Humpty Dumpty, the War on Terror, and the Power of Preventive Detention in the United States, Israel, and Europe” (2011) 59 *The American Journal of Comparative Law* 1051; D. Webber, *Preventive Detention of Terror Suspects: A New Legal Framework* (London: Routledge, 2016).

⁶⁵ Articles 290–291 of Order No. 1651 Concerning Security Provisions (Integrated Version) (Judea and Samaria), 2009, www.law.idf.il/Templates/GetFile/GetFile.aspx?FileName=XC_F5b3NoLWRvY3NcdGFmcmloX2hh2lryVxiaXRhaGquXyZfcGxpbgIcb2dkYW5faGFraWthLnBkZg==&InfoCenterItem=true. For further discussion, see B’Tselem and Hamoked, *Without Trial: Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants Law* (October 2009) [hereinafter: *Without Trial*], www.btselem.org/download/200910_without_trial_eng.pdf; T. Pelleg-Sryck, “The Mysteries of Administrative Detention,” in A. Baker and A. Matar (eds.), *Threat: Palestinian Political Prisoners in Israel* (London: Pluto Press, 2011), pp. 123–135. See also Amoore, “Risk before Justice,” p. 855 (“Because the system … [deploys a risk] calculation that can never itself be made visible, people can never meaningfully access, challenge, or correct their risk category.”).

review decisions of military courts can be appealed to the supreme court, none of the hundreds of appeals in the period 2000–2010 resulted in a release order or a rejection of the secret evidence.⁶⁶ Hence, the risk this mode of imprisonment professes to prevent remains uncontested throughout the review and appeal.

Often, the secret evidence is based on information provided by Palestinian informants, usually as a result of coercion (and sometimes payment) by the Israeli security authorities.⁶⁷ Rather than openly acknowledging the potential unreliability of such information, Israeli authorities invoke the need to protect informants' anonymity as a reason for not revealing the alleged evidence.⁶⁸ Military judges who review this evidence do not independently verify it. One former military judge, when asked in an interview whether he used to summon the informants to testify in such cases, replied: "Not the sources [i.e., the informants] themselves, but the [written] testimonies they provide," as presented by the Israeli security agencies. The interviewer sought clarification: "So what do you actually see?," to which the former judge answered "Documents, the source's code-name, I ask the GSS [General Security Service] agent to explain [these documents] ... and whether the source is reliable. Of course I have to take as a given that all my information comes through the GSS agents. ... [A]s a rule, I didn't doubt what they [i.e., the Israeli agents] said."⁶⁹

⁶⁶ S. Krebs, "Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court" (2012) 45 *Vanderbilt Journal Transnational Law* 639, 643 [hereinafter: "Lifting the Veil of Secrecy"]. The author adds that even if such an appeal were to succeed, the military court's unjustified extension of the "administrative detention" would unlikely be acknowledged, since the detention made it impossible for the presumed threat to materialize. *Ibid.*, pp. 648–649. On the near-certain outcome of such appeals and the way it fits into Israel's broader apparatus of "(un)certainty governance," see entry M: Military Courts.

⁶⁷ H. Cohen and R. Dudai, "Human Rights Dilemmas in Using Informers to Combat Terrorism: The Israeli-Palestinian Case" (2005) 17 *Terrorism and Political Violence* 229–243, 233–236. On Israel's use of Palestinian patients from Gaza as informants as a prerequisite for considering their applications for exiting Gaza for medical reasons, see entry V: Violence, Section V.3 ("Invisible Violence"). On the informants issue, see entries V: Violence, X: X-Ray, and Y: Youth.

⁶⁸ B'Tselem and Hamoked, *Without Trial*, pp. 27, 40. A former military judge voiced this rationale in the 2011 Israeli documentary *The Law in These Parts* (2013; Director: Ra'anan Alexandrowicz. American Documentary/POV): "The ['administrative'] detainee ... isn't shown the material regarding what he allegedly did. That way we don't give away our sources." Some suggest that "administrative detention" is also sometimes used to recruit the detainees themselves as informants. Pelleg-Sryck, "The Mysteries of Administrative Detention," pp. 130–133.

⁶⁹ Former military judge Oded Pessenson's interview in *The Law in These Parts*. On this documentary, see entry M: Military Courts.

With the rise of social media, “administrative detentions” have also been increasingly targeted at Palestinians who write, share, or “like” allegedly suspicious posts on Facebook, blogs, and similar websites. This is part of the Israeli security agencies’ growing use of “big data” – enormous sets of information analyzed by algorithms to reveal patterns of behavior.⁷⁰ A common way to trace these presumed patterns is to inspect the use of key words and phrases online. For example, reports suggest that Palestinians have been arrested after using the word *shahid* (Arabic for “martyr”) online. In Israeli Jewish society, this term is usually understood as an expression of incitement, although for most Palestinians its meaning is different, showing respect for those who die in a political struggle.⁷¹ One military officer has boasted that “if you get to their house a week before the attack, the [Palestinian] kid [who posted online] doesn’t [even] know that he is a terrorist yet.”⁷² Put simply, this expresses a belief that Israeli authorities, equipped with advanced cyber technology, can predict unlawful actions that are unknown even to the would-be terrorists themselves.

⁷⁰ Addameer, “Daring to Post: Arrests of Palestinians for Alleged Incitement” (August 24, 2016) [hereinafter: “Daring to Post”], www.addameer.org/publications/daring-post-arrests-palestinians-alleged-incitement; O. Hirschauge and H. Shezaf, “Revealed // How Israel Jails Palestinians Because They Fit the ‘Terrorist Profile’,” *Haaretz* (May 31, 2017) [hereinafter: “Revealed // How Israel Jails Palestinians”], www.haaretz.com/israel-news/.premium-1.792206; H. Shezaf, “The IDF is Putting Palestinians on Trial for Facebook Posts,” *+972 Magazine* (March 17, 2016), <http://972mag.com/the-idf-is-putting-palestinians-on-trial-for-facebook-posts/117910/>; A. Harel, “Israel Arrested 400 Palestinians Suspected of Planning Attacks After Monitoring Social Networks,” *Haaretz* (April 18, 2017) [hereinafter: “Israel Arrested 400 Palestinians”], www.haaretz.com/israel-news/1.783672; A. Gibor, “The Country Most Dangerous to Us in the Middle East is Facebook,” *Makor Rishon* (January 29, 2016) [Hebrew], www.nrg.co.il/online/1/ART2/751/369.html; A. Kane, “Post, Share, Arrest: Israel Targeting Palestinian Protesters on Facebook,” *Intercept* (July 7, 2016), <https://theintercept.com/2016/07/07/israel-targeting-palestinian-protesters-on-facebook/>; Defence for Children International – Palestine, “Facebook Posts land Palestinian Teens in Administrative Detention” (October 17, 2016), www.dci-palestine.org/facebook_posts_land_palestinian_teens_in_administrative_detention; J. Brown, “Minority Report’: On What Grounds Does Israel Arrest Hundreds of Palestinians for Uncommitted Crimes?”, *Haaretz* (April 19, 2017) [Hebrew] [hereinafter: “Minority Report”], www.haaretz.co.il/blogs/johnbrown/1.403521. In some cases, the social media posts culminate not in “administrative detention” but in trials on charge of incitement. Addameer, “Daring to Post”; Hirschauge and Shezaf, “Revealed // How Israel Jails Palestinians”; Shezaf, “The IDF is Putting Palestinians on Trial for Facebook Posts.”

⁷¹ Hirschauge and Shezaf, “Revealed // How Israel Jails Palestinians”; Shezaf, “The IDF is Putting Palestinians on Trial for Facebook Posts.” See also Addameer, “Daring to Post”; Brown, “Minority Report”; G. Levy and A. Levac, “In 2016 Israel, a Palestinian Writer Is in Custody for Her Poetry,” *Haaretz* (May 21, 2016), www.haaretz.com/israel-news/.premium-1.720418.

⁷² Hirschauge and Shezaf, “Revealed // How Israel Jails Palestinians.”

Some critics suggest that by apprehending alleged “future criminals” before any crime actually occurs, “administrative detention,” like other preventive measures, risks creating the very harm it formally seeks to thwart. As one Israeli human rights attorney observed in the late 1970s,

the concept of preventive detention logically precludes a possibility of eventually charging the detainees with any offense. . . . [Such Palestinian] detainees have been arrested by virtue of being “potential offenders” which means that they have committed no offence to which their arrest could be connected. No wonder, then, that . . . [these] detainees can only reach one conclusion from their ordeal: “If I am busted and beaten when I have done nothing, then the next time I had better do something.”⁷³

At the same time, in some cases, the appeal of “administrative detention” for Israeli authorities may stem not from its preventive or predictive potential, but from its procedural laxity – the ability to rely on undisclosed secret evidence without having to undergo trial hearings. Possibly due to this reason, the military prosecution has been reported to resort to “administrative detention” after failing to get the detainee convicted in a military court trial.⁷⁴ Security agents have likewise occasionally justified using “administrative detention” as a way to avoid revealing classified evidence to the detainee.⁷⁵ Somewhat similarly, as discussed in one of this book’s other entries, some Palestinian prisoners, having served their full sentences, have been placed in “administrative detention” immediately after their scheduled release.⁷⁶ In these and other respects, “administrative detention” can serve as a form of punishment without trial.

F.3.2 Preemptive Arrest

“Administrative detention” formally depends on evidence. This evidence is secret, potentially unreliable, and impossible to effectively contest – and yet, its existence allows Israeli authorities to claim reasonable suspicion. This, along with the judicial review in use, helps maintain a semblance of the rule of law.

⁷³ L. Tzemel, “Detention of Palestinian Youths in East Jerusalem” (1977) 6 *Journal of Palestine Studies* 206, 207.

⁷⁴ Shezaf, “The IDF is Putting Palestinians on Trial for Facebook Posts.” See also Defence for Children International – Palestine, Facebook Posts Land Palestinian Teens in Administrative Detention.

⁷⁵ Krebs, “Lifting the Veil of Secrecy,” p. 645, note 15.

⁷⁶ See entry S: Security Prisoners, Section S.1 (“Introduction: Terminology, Figures, and Context”). For a similar report, see Brown, “Minority Report.”

In contrast, the Israeli military has also arrested numerous noncitizen Palestinians despite the absence of any evidence whatsoever of their intention to violate the law. Israeli authorities consider these Palestinians to be potential offenders who might end up breaking Israeli law in one way or another at some point in the future. Some of these Palestinians have a prior conviction. Others have no criminal record, and are reportedly targeted not due to their personal behavior but, rather, their age⁷⁷ and gender – typically, they are young men. On occasion, such arrests, instead of “administrative detention,” have been the response of Israeli authorities to potentially inciteful social media posts.⁷⁸ Somewhat similarly to “administrative detention,” but even more so, these speculative arrests seem to assess future risks as predetermined by past record and statistical factors.

In 2015, the military commander in charge of Israel’s forces in the West Bank reportedly said: “We are looking for potential terrorists.” His deputy concurred: “a . . . terrorist can be traced and stopped before he makes the ultimate decision to stab or run over with a car.” An Israeli reporter described this, sympathetically, as “a new, creative, and almost revolutionary approach” involving attempts “to deter . . . and even persuade [potential offenders] . . . during interrogation. Experience shows such persuasion, before the potential terrorist executes his plot, to be very effective.”⁷⁹

Preemptive arrest thus rests on a circular logic: its alleged “effectiveness” stems from non-offending by the arrested Palestinians after their release, although there was no evidence of their intent to offend to begin with. In fact, such evidence seems to be regarded as redundant, because it is precisely the lack of evidence – and, accordingly, the lack of offending – that supposedly serves as a sort of evidence of the success of preemptive arrests. Taking this logic to its ultimate conclusion, Israel’s preemptive security measures can be nothing but necessary: if, after release, the Palestinian complies with Israeli law, then the preemptive arrest is deemed successful; if, on the other hand, s/he ends up breaking the law, this reinforces the call for ever-evolving preemptive tactics. In a sense, then, preemptive arrest bears resemblance to extrajudicial execution, which, as explained in Section F.2.2,

⁷⁷ For a critical analysis of age-based Israeli measures, see entry Y: Youth, and entry S: Security Prisoners (Sections S.1.2 and S.4).

⁷⁸ R. Ben Yishai, “Door Pounding, Ski Mask: Report from a Palestinian House – This is How the IDF is Trying to Stop the Next Terrorist,” *Ynet News* (December 7, 2015) [Hebrew], www.ynet.co.il/articles/0,7340,L-4734559,00.html.

⁷⁹ *Ibid.* For similar reports, see A. Harel, Israel Arrested 400 Palestinians; Hirschauge and Shezaf, Revealed // How Israel Jails Palestinians.

functions as evidence of the need for constant prevention in the face of a supposedly never-ending security threat.⁸⁰

F.3.3 “Mapping”

The Israeli authorities have gone beyond allegedly proactive detentions and arrests. Another measure, apparently aimed to act as a deterrent (among other things), is so-called “mappings”: military incursions into homes to take the details of Palestinians who are not suspected of any wrongdoing, actual or even potential. Soldiers usually raid houses in the West Bank at night, wake up the inhabitants, inspect their IDs, write down their details, sometimes photograph or videotape them, and on some occasions make a record of the layout of the house.⁸¹ In East Jerusalem (which Israel controversially claims to have annexed), a similar practice has been repeatedly employed by the police⁸² (exemplifying the commonality between Israel’s conduct in East Jerusalem and the rest of the West Bank, despite the formal legal disparity between these regions).⁸³ The invisibility of Israeli state violence – an issue examined in another entry⁸⁴ – is vividly evidenced here by the masks the soldiers or police often wear.⁸⁵ At the same time, the hypervisibility of this

⁸⁰ See supra note 44 and its accompanying text.

⁸¹ See, e.g., ACRI, “Searches in Residents’ Homes (‘mappings’) – An Illegal Pattern in the Territories” (February 25, 2008) [Hebrew], www.acri.org.il/he/?p=1759; Breaking the Silence, “Mappings” (October 23, 2012), www.breakingthesilence.org.il/testimonies/videos/27830; B’Tselem, “In answer to B’Tselem, Israeli Military Confirms: Soldiers’ Actions in Entering Palestinian Homes by Night for ‘Mapping’ Follow Procedures” (August 10, 2015) [hereinafter: “Israeli Military Confirms”], www.btselem.org/harrasment/20150809_night_in_crusions_in_qsarrah; B’Tselem, “Soldiers Enter 20 Palestinian Homes Near Nablus Late at Night, Unjustifiably Intimidating the Families and Disrupting their Lives” (June 24, 2015) [hereinafter: “Soldiers Enter 20 Palestinian Homes Near Nablus”], www.btselem.org/harassment/20150624_night_incursions_in_nablus_area.

⁸² See, e.g., N. Hasson, “Rights Group: Police Collecting Intel by ‘Visiting’ E. J’lem Homes at 3 A.M.,” *Haaretz* (May 23, 2016) [hereinafter: “Rights Group”], www.haaretz.com/israel-news/.premium-1.720994; N. Hasson, “Police Raid East Jerusalem Houses Every Night,” *Haaretz* (February 3, 2017) [Hebrew], www.haaretz.co.il/news/local/.premium-1.3626076.

⁸³ On further manifestation of this commonality, see entry Y: Youth, Section Y.3 (“The Rule of Exception beyond Israeli Military Law”). On continuities, connections, and parallels between Israel’s formally disparate military and civil legal systems, see entry O: Outside/Inside, Section O.3 (“Israeli Law Does Not Stop at the Border”).

⁸⁴ See entry V: Violence, Section V.3 (“Invisible Violence”).

⁸⁵ See, e.g., B’Tselem, “Masked Soldiers Enter Palestinian Homes in Dead of Night, Order Residents to Wake their Children, and Photograph the Children” (March 24, 2015), www.btselem.org/hebron/20150324_night_search_in_hebron; B’Tselem, “Soldiers enter 20 Palestinian homes near Nablus; Hasson, Rights Group; Hasson, Police Raid East Jerusalem Houses Every Night.”

violence⁸⁶ manifests itself in the photographs and videos the Israeli forces take, as well as their desire to see up-close the inside of Palestinian homes.

Typically, “mappings” are conducted in houses or areas on which the military has little or no prior intelligence. The goal seems to be to proactively gather as much information as possible, in case it proves to be legally or operationally useful at some point in the future. As one former soldier who was frequently involved in “mappings” has described it, this practice

wasn’t focused on a specific place where there was intelligence about a fugitive hiding or about a terrorist. . . . When you set out to these mappings you are told in advance that they are . . . deliberately directed toward . . . people that are known to be innocent of any wrongdoing, known to have nothing to do with terrorists, and with the only objective of having information about everyone. And we, trained artillerymen . . . [who had no] high combat training in urban warfare, . . . knew right from the start that there’s no way we were being sent to a dangerous house. . . . My commanders and the GSS believed that . . . everyone is a potential future terrorist, and that’s why we have to know everything about them all.⁸⁷

At the same time, other reports suggest that this practice serves another purpose: showing presence. An ex-soldier who was asked to take pictures of Palestinian inhabitants during “mappings” argues “The mappings were designed to make the Palestinians feel that we were there all the time. . . . I had the pictures [I had taken] for around a month. . . . [N]o commander asked about them, no intelligence officer took them. . . . At one point I deleted the pictures, I realized it was all a joke.”⁸⁸

Another former soldier similarly recalled, on a different occasion: “I don’t think any mapping information ever went any higher [i.e., to the intelligence agencies]. I don’t remember ever sending any photographs from the camera.”⁸⁹ A possible interpretation of these accounts is that they illustrate Israel’s “effective ineffectiveness,” a mode of operation analyzed in another part of this book.⁹⁰ Alternatively, these testimonies may suggest that rather

⁸⁶ On the hypervisibility of state violence, see, e.g., H. Viterbo, “Seeing Torture Anew: A Transnational Reconceptualization of State Torture and Visual Evidence” (2014) 50:2 *Stanford Journal of International Law* 281, 291–292, 295–297; N. Whitty, “Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa” (2010) 10(4) *Human Rights Law Review* 689, 698–708.

⁸⁷ Breaking the Silence, “Mappings.”

⁸⁸ Breaking the Silence, “Pictures at 3 AM,” www.breakingthesilence.org.il/testimonies/videos/70540.

⁸⁹ Breaking the Silence, “An element of overachievement” (May 6, 2011), www.breakingthesilence.org.il/testimonies/videos/14959.

⁹⁰ See entry M: Military Courts, Section M.3 (“Un/certainty governance”).

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than being ineffective in collecting intelligence, “mappings” effectively fulfill a different function altogether: deterring Palestinian misdeeds through displays of constant and ubiquitous military presence.⁹¹ Either way, whether for the purpose of preemptive information gathering or performative deterrence,⁹² this future-oriented tactic humiliates, harasses, intimidates, and infringes on the privacy of blameless Palestinians.

“Mapping,” preemptive arrest, and “administrative detention” are interrelated and mutually complementary. An Israeli colonel explains how they all fit into the military’s preemptive strategy:

We started . . . constructing a profile of [the potential terrorist] based on past attacks. Where does he live? How old is he? What is his motivation? We started [targeting] . . . those who met this profile. We . . . mapped risk groups of 15- to 25-year-olds . . . and started inspecting their Facebook pages. . . . Those we could [arrest], we arrested. Those we had no reason to arrest, we warned. For others, we mapped their home – arriving every night and searching it. We also exerted pressure on their families. . . . And the statistics started showing a decline [in terrorist attacks].⁹³

This future-oriented strategy can provoke, and in some cases even initiate, the threats it purports to minimize, as explained thus far.

F.4 CONCLUSION

Prevention, deterrence, preemption, and the preoccupation with possible eventualities and risks have been central to Israel’s control over the West Bank and Gaza Strip. This entry has shed critical light on two specific areas of such future-oriented policy and practice. The first – preemptive attacks – includes purportedly preemptive military strikes, extrajudicial assassinations, and “warning” tactics. The second – a penalty of potential threats – comprises “administrative detentions,” preemptive arrests, and house “mappings.”

⁹¹ On the military’s policy of deterrence through displays of presence, see also *Breaking the Silence, Occupation of the Territories: Israeli Soldier Testimonies 2000–2010* (2011), pp. 29, 36–38, www.breakingthesilence.org.il/wp-content/uploads/2011/02/Occupation_of_the_Territories_Eng.pdf; M. Zagor, “I am the Law! – Perspectives of Legality and Illegality in the Israeli Army” (2010) 43 *Israel Law Review* 551, 573–574.

⁹² In a reply to a letter from the Israeli NGO B’Tselem, the military’s spokesperson defined the objective of “mappings,” vaguely, as serving “an operational need.” See B’Tselem, Israeli Military Confirms.

⁹³ Y. Yehoshua, “Suddenly, A Regiment Commander Questions the Lack of IDF Backing for the Shooting Soldier. Once I Present the Facts, He Understands,” *Yediot Aharonot* (April 28, 2016) [Hebrew], www.yediot.co.il/articles/o,7340,L-4796895,oo.html.

In the process of tackling perceived threats, these measures have brought about additional and often greater harms and threats, wittingly or not. Israel's preemptive war in 1967 thus ultimately created decades of violence and suffering in Israel/Palestine. Extrajudicial assassinations and "warning" tactics have caused civilian casualties and injuries in the name of protecting civilians. "Administrative detention," preemptive arrests, and house "mappings" each, in different ways, deprive Palestinians of their liberty, or intimidate them, on the basis of either undisclosed evidence or no concrete evidence at all, and might therefore foster Palestinian animosity toward Israel. Israel's prevention, preemption, and deterrence practices, then, are no less productive than preclusive, consistently engendering new perilous futures.

Some of these practices also evince a circular logic, deeming them eternally necessary regardless of the extent of actual threats and evidence. In particular, in preemptive arrests, non-offending by the arrested Palestinians after their release is regarded as proof of the effectiveness of this measure, even though there was no evidence of their intent to offend to begin with. If, after release, the Palestinian ends up breaking Israeli law, this reinforces the call for ever-evolving preemption. Somewhat similarly, extrajudicial executions function as evidence of a supposedly never-ending security threat, which in turn is seen as requiring constant prevention. Prevention and preemption can thus become self-affirming and self-propelling.

Further, as this entry has demonstrated, some of Israel's future-oriented practices potentially serve objectives that are entirely different from, or additional to, their stated ones. Israeli military attacks on the Gaza Strip may seek to politically fragment Palestinian society. The Israeli military's "warning" tactics allegedly provide a legal defense against possible accusations of indiscriminate military attacks on populated areas. The procedural laxity of "administrative detention" makes it possible for Israeli security authorities to avoid the hassle of trial hearings. And "mappings" are a way for Israel to display a constant and ubiquitous military presence. In this regard, these practices achieve one of two things: either they fulfill a function that is not directly about prevention, deterrence, or preemption, or they target a different threat from their purported one.

Also apparent throughout this entry has been the sanitized terminology that conceals the future harm and threats brought about by these measures. The phrase "targeted killing" and its Hebrew equivalent "focused preemption" mask the often nontargeted and nonfocused nature of these political and extrajudicial assassinations. Similarly, behind the pleasant-sounding term "roof knocking" are dangerous bombings used to thwart accusations of civilian casualties. Though "detention" implies a temporary suspension of liberty due

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to a known suspicion, “administrative detention” actually refers to potentially indefinite imprisonment without charge or trial. “Mapping” likewise denotes the intimidation of innocent citizens. It is through this sanitized language, among other things, that the future-oriented practices to which Israeli authorities subject Palestinians in the West Bank and Gaza Strip claim legitimacy.

As touched upon in this entry, some critics lament what they describe as the illegality of Israel’s future-oriented measures. Contrary to this legalistic criticism, and in line with the discussion of law’s violence elsewhere in this book,⁹⁴ this entry has demonstrated that these measures eagerly utilize legal mechanisms, categories, and arguments. The invocation of Israel’s “warning” tactics to retroactively justify indiscriminate military attacks (through a controversial application of the legal distinction between civilians and combatants) is one example. Other practices, such as so-called “targeted killing” and “administrative detention,” have received the Israeli supreme court’s stamp of approval.⁹⁵ As for Israel’s penalty of potential threats, while bypassing trial hearings, it conveniently remains under the auspices of law enforcement. In addition, rather than investigating alleged violations of the court’s ruling on extrajudicial executions, the Israeli legal system has prosecuted and convicted those who revealed the potentially incriminating information.⁹⁶ Indeed, as the political geographer Louise Amoore has observed, “[i]t is not the case that ‘law recedes’ as risk advances, but rather that law itself authorizes a specific and particular mode of risk management.”⁹⁷ This complicity of law in Israel’s future-oriented practices warrants skepticism toward calls by some critics for a “return to law.”

Moreover, prevention, preemption, and deterrence practices such as those deployed by Israeli authorities in the West Bank and Gaza Strip do not represent the abandonment of “normal” law. Rather, they resonate with, extend, and perfect longstanding legal mechanisms. With regard to the penalty of potential threats in particular, criminal statutes since the very beginning of the nineteenth century have authorized indefinite preventive detention.⁹⁸ Numerous laws have also long attached criminal liability to status

⁹⁴ See especially entry V: Violence, as well as entry L: Lawfare and Section 2.3. (“Critiquing Against/With the Law”) in the Introduction.

⁹⁵ In addition, “administrative detention” is legally enshrined in Article 78 of Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Geneva, August 12, 1949, 75 UNTS 287. For further discussion, see entry A: Assigned Residence, Section A.1. (“The Legal Parameters of ‘Assigned Residence’”).

⁹⁶ See also Section V.3 (“Invisible Violence”) of the entry V: Violence.

⁹⁷ Amoore, “Risk before Justice,” p. 850.

⁹⁸ M. Finnane and S. Donkin, “Fighting Terror with Law? Some other Genealogies of Pre-emption” (2013) 2 *International Journal of Crime and Justice* 3, 5–7, 10–11.

or associations rather than specific individual actions. Further, the law of inchoate offenses criminalizes actions that are considered to have been undertaken toward a future offense.⁹⁹ Expert psychiatric opinion in criminal proceedings, as the social theorist Michel Foucault characterized it, “show[s] how the individual resembles his crime before he has committed it . . . [by] revealing what could be called a paropathological series [of past acts that are improper, albeit not unlawful].”¹⁰⁰ What practices such as those examined in this entry therefore do is not reverse or undermine “normal” law, but lay bare its myth. At the same time, the wide scope, frequency, and impact of these mechanisms in the West Bank and Gaza Strip, and Israel’s ever-growing emphasis on nonspecific potential threats, are remarkable. The relation between Israel’s future-oriented measures and supposedly “normal” law is thus best understood not as a dichotomy between exception and rule but, rather, as a continuity with a consequential difference in scope and depth.¹⁰¹

⁹⁹ McCulloch and Wilson, *Pre-Crime, Pre-Emption, Precaution*.

¹⁰⁰ M. Foucault, *Abnormal: Lectures at the Collège de France, 1974–1975*, V. Marchetti and A. Salomoni (eds.), A. I. Davidson (trans.) (London and New York: Verso, 2003), pp. 19–20.

¹⁰¹ A similar observation is made in McCulloch and Wilson, *Pre-Crime, Pre-Emption, Precaution*, p. 18 (arguing that contemporary “pre-crime laws replicate and [at the same time] depart from” some “forward-looking aspects of traditional criminal law”).