



مركز إبداع المعلم  
Teacher Creativity Center



## Protection of the Right to Education in Armed Conflict under International Law:

### The Military Occupation of Palestine as a Case Study

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## Table of Abbreviations

#	Full Name	Abbreviation
1	Universal Declaration of Human Rights	UDHR
2	International Human Rights Law	IHRL
3	International Covenant on Economic, Social and Cultural Rights	ICESCR
4	Convention/Committee on the Rights of the Child	CRC
5	Committee on Economic, Social and Cultural Rights	CESCR
6	International Humanitarian Law	IHL
7	International Criminal Law	ICL
8	West Bank	WB
9	East Jerusalem	EJ
10	Gaza Strip	GS
11	International Armed Conflict	IAC
12	International Law	IL
13	Non-International Armed Conflict	NIAC
14	Geneva Conventions	GCs
15	United Nations	UN
16	Security Council	SC
17	United Nations General Assembly	UNGA
18	Fourth Geneva Convention	GCIV
19	Occupied Palestinian Territory	OPT
20	High Court of Justice	HCJ
21	International Court of Justice	ICJ
22	International Committee of the Red Cross	ICRC
23	International Covenant on Civil and Political Rights	ICCPR
24	UN Human Rights Committee	CCPR
25	International Criminal Court	ICC
26	Palestinian Liberation Organisation	PLO
27	Palestinian National Authority	PNA
28	Office of The Prosecutor	OTP
29	Additional Protocol I to Geneva Conventions	API
30	Additional Protocol II to Geneva Conventions	APII
31	Civil Society Organisations	CSOs
32	Human Rights Council	HRC
33	Universal Periodic Review	UPR
34	Ministry of Education	MoE
35	Palestinian National Authority	PNA
36	Non-Governmental Organisations	NGOs

## **Foreword**

Palestine is considered a unique case of the fulfilment of the right to education under armed conflict. While this issue is discussed in order to emphasise the protection of the right to education, at least theoretically, Palestine is witnessing flagrant violations in everything pertaining to the suspension of the right by the Israeli occupation forces.

The occupation forces utilise unprecedented measures in attacking the curriculum, preventing the construction of schools in Area “C” and Jerusalem and targeting schools during assaults on Gaza. In doing so the occupation forces have proved that they do not miss any chances to suspend this right. These measures include house arrests of children, detainment of teachers and students and prevention of teachers in Jerusalem from reaching schools during the times of closure that coincide with the Jewish holidays.

The occupation forces have ignored and neglected the provisions of the Geneva Conventions, the UN Charter, the Convention on the Rights of the Child and the Universal Declaration of Human Rights to name a few. After all, how can anyone expect an occupation to act morally and preserve rights when it violates the most basic of them, including the right to life and freedom from torture. As such, the demand to protect the right to education in Palestine is primarily an ethical issue before being a political one.

This study focuses on the right to education and takes Palestine as a case study. Perhaps what sets this research study apart is its connection of the violation to international conventions, revealing that the occupation forces do not take into consideration any legal constraints or references. Additionally, the study assesses the effectiveness of these avenues, which constitutes the basis for the international community and human rights organisations to uphold their responsibilities.

The researcher reinforced the theoretical and legal content of the study through the utilisation of facts, evidence and data, thus increasing the importance of the study. Perhaps the inclusion of accurate data on the lost educational classes, violations suffered by children and attempts to disfigure the curriculum would prompt every reader to look deeper into this abhorrent scene.

In short, before us is a unique effort that serves as an important milestone in exposing the violations of the occupation against education in Palestine. It is an effort that certainly deserves praise, and we should benefit from this study in defending the right of Palestinian children to education before all international forums.

Raeda Shuaibi

Chairperson of the Board of Directors

# Protection of the Right to Education in Armed Conflict under International Law: The Military Occupation of Palestine as a Case Study

## **1. Introduction**

The right to education is one of the major social rights enshrined in and guaranteed by international laws and instruments. Within the wider framework of human rights, the right to education falls into the category of economic, social and cultural rights alongside, *inter alia*, the right to work; right to form and join trade unions; right to social security; right to protection of the family, mothers and children; the right to an adequate standard of living; and the right to the highest attainable standard of mental health.<sup>1</sup>

The right to education was first recognised in Article 26 of the Universal Declaration of Human Rights (UDHR),<sup>2</sup> which is widely considered the foundation of international human rights law (IHRL),<sup>3</sup> and later in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>4</sup> and Article 28 of the United Nations Convention on the Rights of the Child (CRC),<sup>5</sup> as well as other international treaties and instruments.

The ICESCR recognises three levels of education: primary, secondary and higher, and emphasises the importance of fundamental and technical/vocational education.<sup>6</sup> The importance of the right to education cannot be overstated. Notwithstanding that the provision of quality education is expensive and requires States to allocate significant resources to this end, it does not seem that any meaningful personal and national development, at the economic, social and cultural levels can be achieved without it. This was recognised by the United States Supreme Court in *Brown v Board of Education of Topeka*, clearly stating that education is perhaps the most important function of state and local governments.<sup>7</sup> Additionally, the importance of education is underscored in its inclusion in the sustainable development agenda 2016-2030, in the form of sustainable development goal four. Moreover, its importance is further emphasised in international

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<sup>1</sup> Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 366.

<sup>2</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

<sup>3</sup> Bantekas and Oette (n 1) 11.

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>5</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) (CRC).

<sup>6</sup> *Ibid* Article 13.

<sup>7</sup> *Brown v. Board of Education of Topeka* 347 US 483, 493 (1954).

discussions on the interdependence of the other sixteen development goals on education, including ending poverty, hunger, health, gender equality and reduction of inequalities.

Furthermore, the right to education is indivisible from numerous civil and political rights. The realisation of many such rights depend on the understanding of individuals of their human rights. These include but are not limited to the right to life, right to political participation, freedom of expression, assembly and democratic governance.<sup>8</sup> Within the wider framework, education is highly necessary for the empowerment of women and other economically and socially marginalised groups; protection of children from exploitative and hazardous labour and sexual exploitation; promotion of human rights and democracy; and protection of the environment.<sup>9</sup> Furthermore, in recognition of the indispensability of the right to education, many states have recognised its importance through the enactment of national legislation with the view of ensuring its respect, protection and fulfilment.

Vice versa, the meaningful realisation of the right to education depends on a number of other internationally recognised human rights, including the right to non-discrimination; right to liberty and security of person; and right to liberty of movement.

The Committee on Economic, Social and Cultural Rights (CESCR), the body monitoring the fulfilment of state parties of their obligations under the ICESCR, determines their commitment through an assessment of the steps taken by the state to respect, protect and fulfil the rights herein the Covenant. The CESCR has conceptualised through its general comments specific economic, social and cultural rights and elaborated the presence of some necessary features for their true fulfilment. For example, it does so for the right to education in general comment 13 through the '4-A scheme' that specifies the presence of a set of required features at all levels of education: availability, accessibility, acceptability and adaptability.<sup>10</sup> As such, the CESCR assesses the commitment of states parties vis-à-vis the right to education against the aforementioned criteria.

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<sup>8</sup> Bantekas and Oette (n 1) 397.

<sup>9</sup> CESCR 'General Comment 13' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1999) UN Doc E/C.12/1999/10 paragraph 1.

<sup>10</sup> Ibid paragraph 6.

The right to education is one of the most important rights severely impacted by armed conflict. According to the Education Cannot Wait Fund, the first global movement and fund dedicated to education in emergencies and protracted crises, more than 75 million children and young people, aged three to eighteen are in urgent need for educational support in 35 crisis-affected countries. Furthermore, children in conflict-affected countries are less likely to complete primary school.<sup>11</sup> The study seeks to explore the available protections of the right to education in armed conflict within the frameworks of IHRL, International Humanitarian Law (IHL), including custom, and International Criminal Law (ICL), assessing their relative strengths and weaknesses.

The study will take the form of a case study of the military occupation of Palestine since 1967 onwards with a particular focus on current events. Research on the impact of the military occupation of Palestine on the right to education is abundant and takes comparative, descriptive and other forms. This study does not intend to describe this impact; instead, it seeks to analyse available remedies and redress mechanisms. As such, it will consist of four main sections. Following the introduction of section one, section two will commence by clarifying the concept of ‘armed conflict’; establishing that the military occupation of the West Bank (WB), including East Jerusalem (EJ), and Gaza Strip (GS) amounts to an international armed conflict (IAC). Section two will also highlight the impact of the military occupation and its associated system of oppression and domination on the right to education. Section three will assess the strengths and weaknesses of IHRL, IHL, including custom, and finally ICL in protecting the right to education, drawing on factual data and evidence from the Palestinian case. Finally, the last section will provide an overview of the current efforts to protect the right to education and present recommendations that capitalise on the advantages of the aforementioned branches of law and challenge and address their shortcomings in protecting the right to education in Palestine.

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<sup>11</sup> Education cannot wait, ‘Education in Emergencies: A Neglected Priority’ (*Education Cannot Wait*) <<http://www.educationcannotwait.org/the-situation/>> accessed 22 November 2017.

## **2. The Right to Education in the State of Palestine and Armed Conflict**

### **2.1 Israeli Occupation as Armed Conflict**

Different branches of international law (IL) apply to different types of situations. IHL is concerned with situations of IACs and non-international armed conflicts (NIACs). Hence, the qualification that military occupation amount to an IAC is imperative to explore the extent of IHL contribution to the protection of the right to education in Palestine. IHL recognises two types of armed conflict: IACs and NIACs. In accordance with common Article 2 of the Geneva Conventions (GCs),<sup>12</sup> IACs arise when one high contracting party - state- resorts to armed force against another state, irrespective of the reasons or intensity of the conflict. Common Article 2(2) extends the scope of the application of the GCs to include the military occupation of the territory of a high contracting party. Moreover, Additional Protocol I of the GCs<sup>13</sup> extends the definition of IAC to include wars of national liberation, whereby peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination.<sup>14</sup>

The definition of occupation is provided in the Convention Concerning the Laws and Customs of War at Land with Annex of Regulations as follows: "Territory is considered occupied when it is actually placed under the authority of the hostile army..."<sup>15</sup> Article 43 of the Hague Regulations specifies that the occupying power must "take all the measures in its power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."<sup>16</sup> Since military occupation leads to the dissolution of sovereign powers, which are thereafter assumed by the occupier, this means that the occupier essentially becomes the government responsible for the occupied territory; as such, IL imposes strict obligations on the occupier with the view of respecting the rights of the occupied civilian population.<sup>17</sup>

The Rhodes Armistice Line (the Armistice Agreement) of 1949, signed between Israel and the Arab States that took part in the 1948 war, placed the WB, including EJ, under

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<sup>12</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287 art 2.

<sup>13</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977) 1125 UNTS 3

<sup>14</sup> Ibid art 1(4).

<sup>15</sup> Convention Concerning the Laws and Customs of War at Land (Hague, IV) with Annex of Regulations (signed 18 October 1907) art 42.

<sup>16</sup> Ibid art 43.

<sup>17</sup> Bantekas and Oette (n 1) 579.

Jordanian control, and the GS under Egyptian rule.<sup>18</sup> Israel's admission to the United Nations (UN), via Security Council (SC) Resolution 69 on 4 March 1949,<sup>19</sup> and General Assembly (GA) Resolution 273 on 11 May 1949, was based on the borders demarcated in the Armistice agreement.<sup>20</sup>

One of the results of the 1967 war, between Israel on one side and Egypt and Syria on another, was Israel's seizure of control of the WB, including the annexation of EJ, and GS from Jordan and Egypt respectively. Almost immediately after the occupation of the remainder of the land of historical Palestine, the Knesset adopted, on 22 June 1967, amendments to the "Laws and Administration Ordinance"<sup>21</sup> providing that the "law, jurisdiction and administration of Israel should apply to any area of Eretz Yisrael designated by the government by order,"<sup>22</sup> including Jerusalem, constituting the initial step in "legalising" the annexation of the eastern part of the city. The *de facto* annexation of EJ was completed on 28 June 1967 when the Knesset amended the 1950 Basic Law on Jerusalem<sup>23</sup> to reflect the newly defined municipal boundaries and extend Israeli law officially to the eastern part of the city.<sup>24</sup> Immediately after, the Israeli government issued orders that united both parts of the city under the jurisdiction of the existing Jerusalem Municipality.<sup>25</sup> This annexation was thereafter judicially authorised by the Supreme Court, which held that both parts of Jerusalem had become an integral part of Israel.<sup>26</sup> Within the aforementioned framework, the control of the WB, including EJ, and the GS amounts to a military occupation.

Meanwhile, Israel unilaterally disengaged from Gaza in August and September 2005; since then it has maintained that Gaza is no longer occupied as it has completely withdrawn its military presence from the territory.<sup>27</sup> A three pronged test, as set in the 1948 Hostages Case,<sup>28</sup> and 1983 Tsemel Case,<sup>29</sup> will be used to determine whether Gaza

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<sup>18</sup> Palestinian Academic Society for the Study of International Affairs, 'Fragmenting Palestine: Formulas for Partition since the British Mandate' (May 2013) <[http://www.passia.org/publications/bulletins/Partition/Partition\\_Plan1792013.pdf](http://www.passia.org/publications/bulletins/Partition/Partition_Plan1792013.pdf)> 7.

<sup>19</sup> United Nations Security Council Resolution 69 (4 March 1949).

<sup>20</sup> United Nations General Assembly Resolution 273 (11 May 1949).

<sup>21</sup> Laws and Administration Ordinance 1948.

<sup>22</sup> Ibid Amendment 11 Section 11B.

<sup>23</sup> Basic Law: Jerusalem 1950.

<sup>24</sup> PASSIA, *100 Years of Palestinian History: A 20<sup>th</sup> Century Chronology* (PASSIA 2011) 121.

<sup>25</sup> Ibid.

<sup>26</sup> Hanazalis v Court of Greek Orthodox Patriarchate [1968] HCJ, 171/68(HCJ) 269.

<sup>27</sup> PASSIA, 'Gaza' (June 2008) <<http://www.passia.org/publications/bulletins/gaza/GAZA.pdf>>5.

<sup>28</sup> The United States of America v. Wilhelm List, et al. [1948] Subsequent Nuremberg Trials, 7/12.

<sup>29</sup> H.C.J. 102/82 Tsemel v. Minister of Defence, 37(3) P.D. 365

is still under occupation; actual presence of hostile forces in the territory; their potential to exercise effective powers of government in the area; and the inability of the legitimate government of the area to exercise its sovereign authority over the territory.<sup>30</sup> While the hostile forces, including both army forces and settlers, have withdrawn and were evacuated respectively from the GS, the Israeli army continues to control the air space, maritime zones and most border entry points into Gaza. Thus, the Israeli army has the ability to exercise effective control over Gaza. Furthermore, the redeployment of the Israeli army on the periphery of the Gaza Strip, coupled with its military capabilities, enables it to invade Gaza. Lastly, Israel has also imposed a land, sea and air blockade on Gaza since 2007, with dire affects on the civilian population.

According to the UN Office of Coordination of Humanitarian Affairs, 1.3 million out of the 1.9 million Palestinian in Gaza need humanitarian assistance, while 47% of the households suffer from moderate/severe food insecurity. Furthermore, 55% of Gaza's energy needs are unmet, and only 5% of the water is potable piped water. Comparatively, in 2000, an average of 26,000 Palestinians left Gaza every day, while in 2015, only an average of 501 persons were able to leave daily.<sup>31</sup> This suggests that the non-physical presence of the hostile army in the GS and the development of advanced technologies for surveillance and control does not negate that effective control can be and is being exercised by the Israeli army over GS.<sup>32</sup> This, coupled with the assertion by the Conference of High Contracting Parties to the GCIV Declaration on the applicability of the GCIV,<sup>33</sup> presents a solid argument that Gaza remains occupied territory.

## **2.2 The Impact of Israeli Occupation on the Right to Education**

Since 1967, Israeli policies and measures have severely affected the enjoyment by Palestinians of their human rights, including their right to education. These policies impact the right to education in all of the '4 -A' features required for its true fulfilment in varying degrees: availability, accessibility, acceptability and adaptability. 'Availability' refers to the availability of institutions and programmes in sufficient quantities;

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<sup>30</sup> Yuval Shany, 'Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement' (2005) 8 Yearbook of International Humanitarian Law 369 370.

<sup>31</sup> OCHA, 'The Gaza Strip: The Humanitarian Impact of the Blockade' (November 2016) [https://www.ochaopt.org/sites/default/files/ocha\\_opt\\_gaza\\_blockade\\_factsheet\\_14nov2016\\_mak.pdf](https://www.ochaopt.org/sites/default/files/ocha_opt_gaza_blockade_factsheet_14nov2016_mak.pdf) 2.

<sup>32</sup> Yuval Shany (n 30) 384.

<sup>33</sup> Matthias Lanz, Emilie Max and Oliver Hoehne, 'The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the Duty to Ensure Respect for International Humanitarian Law' (2015) 96 International Review of the Red Cross 2014 1115, 11267.

'accessibility' refers to the accessibility of educational institutions and programmes to everyone without discrimination; 'acceptability' refers to the acceptability of the form and substance of education (including curricula and teaching methods) to students and, in appropriate cases, parents; and 'adaptability' refers to the flexibility of the educational system to adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.<sup>34</sup>

This section will describe Israeli policies and measures affecting the realisation and enjoyment of the rights to education through the employment of the lens of the '4-A' scheme. These include but are not limited to hindrance of maintenance and development of educational infrastructure; attacks and destruction of schools; imposition of restrictions on movement and access to educational institutions; lack of prevention of violent attacks on students and teachers; and detention of students. As can be seen, hindrance to enjoyment of the right to education result from policies that affect various actors and components of the educational and teaching process: schools, teachers and students.

### **Availability:**

In terms of the 'availability' criterion, there is difficulty in obtaining building permits from the Israeli Civil Administration for the construction, expansion or rehabilitation of schools in Area 'C', which is under full Israeli administrative and security control. This results in sub-standard school infrastructure and chronic shortage of classrooms.<sup>35</sup> It follows that 24 schools in Area 'C'<sup>36</sup> and a total of fifty schools in the WB, including EJ, are under risk of demolition,<sup>37</sup> such that three schools were demolished in 2019.<sup>38</sup> Furthermore, according to the Independent Commission for Human Rights, 210 schools in the WB were attacked at least once between 1 January- 31 December 2016; 135 of these attacks have led to the partial suspension of classes in 28 schools, leading to a loss

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<sup>34</sup> CESCR (n 9) paragraph 6.

<sup>35</sup> International Displacement Monitoring Centre, *Report by the Internal Displacement Monitoring Centre to the Committee on Economic, Social and Cultural Rights* (IDMC, 2011) 10.

<sup>36</sup> Ibid 11.

<sup>37</sup> Lawyers for Palestinian Human Rights, *2019 Year in Review Child Rights Bulletin* (LPHR 2020) <<https://lphr.org.uk/latest-news/lphr-2019-year-in-review-child-rights-bulletin/>> 13.

<sup>38</sup> Education Cluster, *Education Under Attack 2019* (Education Cluster, 2020)

of 1,211 lessons, in addition to the complete suspension of classes in nineteen schools of the equivalent of twenty learning days, leading to the further loss of 1,370 lessons.<sup>39</sup>

The situation in EJ is even more severe, with the Israeli Municipality and Ministry of Education effectively exercising full control over the educational process in the city. There are 83,066 Palestinian students in the city distributed over 181 schools (47% in the schools of the Israeli Municipality and Ministry of Education; 29% in private schools; 6% in commissioned schools; 3% in UNRWA schools; and 15% in Islamic Waqf schools).<sup>40</sup> In this context, there is a shortage of 1,500 classrooms,<sup>41</sup> thus severely compromising the availability of infrastructure to provide access to quality education.

### **Accessibility:**

On the other hand, in terms of the ‘accessibility’ criterion, 76,908 Palestinian students and 2,391 teachers were assaulted during the same period (1 January- 31 December 2016) through methods ranging from killing, injury, arrest, detainment, house arrests, delays on checkpoints and deprivation of safe access to schools. Specifically, 26 students, teachers and administrators were killed; and 1,037 students and 52 teachers and administrators were injured. Furthermore, 149 students were arrested, five were placed under house arrest and four were kidnapped by settlers, while seventeen teachers were arrested.<sup>42</sup> In EJ, 12,017 students and 823 teachers have to cross checkpoints on a daily basis in their commute to schools, leading them to arrive late, and in some cases depriving of reaching their schools –and accessing education consequently- all together.<sup>43</sup>

### **Acceptability:**

The compromising of the criterion of ‘acceptability’ is most easily observed in EJ. Israeli authorities, namely the Jerusalem Municipality and Ministry of Education, introduced changes to the Palestinian curriculum in EJ that effectively compromise on Palestinian national identity and attachment to their homeland by the erasure of the 1948

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<sup>39</sup> Independent Commission for Human Rights, *Status of Human Rights in Palestine: Twenty-Second Annual Report 1 January-31 December 2016* (ICHR, 2017) 34.

<sup>40</sup> Independent Commission for Human Rights, *Status of Human Rights in Palestine: Twenty-First Annual Report 1 January-31 December 2015* (ICHR, 2016), 320-321.

<sup>41</sup> Independent Commission for Human Rights, *Status of Human Rights in Palestine: Twentieth Annual Report 1 January-31 December 2014* (ICHR, 2015), 39.

<sup>42</sup> ICHR (n 39).

<sup>43</sup> ICHR (n 41).

Palestinian catastrophe, destruction of towns and villages and everything pertaining to Palestinian martyrs and political prisoners, the hazards of colonisation and the apartheid Wall and the crimes committed against the Palestinian people. This altered curriculum was distributed at 52 schools, where 21,000 students enrol. The prevention of the inclusion of the Palestinian curriculum in EJ is a prelude to its replacement with the Israeli one.<sup>44</sup>

### **Adaptability:**

The impact of the Israeli occupation on the 'adaptability' feature is the most difficult to assess as it is intangible and hardly quantifiable. Notwithstanding this difficulty, a necessary prerequisite to ensure the evolution of the curriculum, accompanied by advancement in teaching methods, is the ability of relevant Palestinian authorities to oversee and steer the development of the curriculum. In the absence of Palestinian self-determination and consequently viable state institutions that enjoy full sovereignty, nor a viable national economy enabling these institutions and actors to formulate and enact educational and social policy, coupled with the relative reliance of the Palestinian Ministry of Education on international aid, Palestinians have little control over the content of their curriculum.

We cannot speak about the right to education without highlighting the situation of education in Jerusalem. In addition to the aforementioned violations, and in accordance with the declaration of the ex-Mayor of Jerusalem Nir Barakat, which state that Israeli authorities are "seeking a revolution in education in Jerusalem that integrates Arabs in the Israeli society", the Israeli Plan 2018-2022 seeks, among other issues, to Israelise education in Jerusalem by 90% by emptying the Old City of its schools and taking over its historical buildings, closing schools in Jerusalem and opening new schools that teach the Israeli curriculum, opening new divisions in existing schools and teaching the Israeli curriculum, closing private schools in Jerusalem that refuse to teach the Israeli curriculum and closing private kindergartens and opening new kindergartens that are affiliated with the occupation's Municipality.<sup>45</sup> All of these measures directly infringe on the acceptability of the educational system imposed on Jerusalem. Furthermore, Israeli

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<sup>44</sup> Al-Haq, *Parallel Report to the Committee on Economic, Social and Cultural Rights on the Occasion of the Consideration of the Third Periodic Report of Israel* (Al-Haq, 2011) 32.

<sup>45</sup> Independent Commission for Human Rights, *Status of Human Rights in Palestine: Twenty-Second Annual Report 1 January-31 December 2018* (ICHR, 2019) 26.

occupation authorities follow a policy of house arrests to deprive children of their right to education, among other serious negative repercussions. This policy comes within the framework that Israeli civil law, in force since the illegal annexation of the city, prohibits the imprisonment of children below the age of fourteen. Hence, children are kept under house arrest until they reach the age of fourteen and then are imprisoned. It is important to note that the time spent under house arrest is not counted into the actual sentence. According to the Commission of Detainees and Ex-Detainees Affairs, the number of Jerusalemite children who were put under house arrest was 120 in 2019, ninety in 2018, 95 in 2017, 78 in 2016 and sixty in 2015,<sup>46</sup> directly infringing on accessibility to education.

Access to and enjoyment of the right to education in Gaza is very different from that of the WB, due to the imposition of the siege. The 2014 war on Gaza, extending from 8 July-26 August 2014, has rendered 75 students from governmental schools disabled (22 physical disability cases, 25 cases of hearing impairment and 28 cases of visual impairment). Furthermore, the war has damaged 318 schools (178 public, 91 UNRWA and 49 private schools) that led to the deprivation of 52,000 students of their seats. Additionally, those schools that were not damaged during the war became shelters for persons who were internally displaced due to the lack of an alternative. This severely affected education with the start of the academic year in September 2014.<sup>47</sup> Furthermore, in terms of availability 24 schools sustained minor damages due to Israeli airstrikes on Gaza in 2019; additionally, all schools in GS lost a total of six school days affecting 580,000 students.<sup>48</sup>

For a deeper understanding of the impact of the Israeli occupation on the right to education, it is instructive to employ an intersectional analysis of the challenges and barriers to education faced by different social groups, as well as how these challenges and barriers differ for persons belonging to marginalised and vulnerable groups. Barriers to education are faced disproportionately by several social groups, further leading to their marginalisation, exclusion and lack of enjoyment of rights. Generally, these systems and identities include but are not limited to race, gender, class, sexuality,

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<sup>46</sup> MIFTAH, *House Arrest Policy Factsheet* (MIFTAH, 2020) <<http://www.miftah.org/arabic/Display.cfm?DocId=15415&CategoryId=19>>

<sup>47</sup> ICHR (n 41) 35-36.

<sup>48</sup> Education Cluster (n 38)

ability, age, country of origin and citizenship status.<sup>49</sup> Systems of power and identities specifically affecting the respect, protection and fulfilment of the right to education in armed conflict include race, gender, ability/disability, place of residency (rural/urban area) and ethnic background. For example, in the case of house arrests women are affected disproportionately, such that working mothers are forced to leave their work or take an extensive number of days off, in addition to literacy becoming the jailer of her own son, which has severe repercussions on the mother, child and family as a whole. Additionally, in conflict-affected areas, girls are almost two and a half times more likely to be out of primary school and nearly 90% more likely to be out of secondary school than their counterparts in countries not affected by conflict are.<sup>50</sup>

According to the Special Rapporteur on the Right to Education, social groups who suffer from disproportionate impact in terms of enjoyment of the right to education in times of armed conflict include refugees and returnees; internally displaced persons; women and girls; child soldiers and combatants; and persons with disabilities.<sup>51</sup> For example, the difficulty of obtaining building and expansion permits of schools in Area 'C' forces students to commute to nearby villages to access education; this, coupled with the prevalence of checkpoints and settler attacks on students, alongside societal patriarchy, leads to a disproportionate deprivation of education for girls, whereby families fear the safety of their female children more in comparison with their male children. The same applies to the intersection of age, whereby younger children are more severely impacted than older children are. The same applies to other intersecting identities, such as the intersection of gender and refugee status, age and disability and so on.

### **2.3 Applicability of Different Branches of International Law to Palestine**

The aforementioned section sheds light on and demonstrates the severe impact of the Israeli occupation on the right to education of Palestinians, violating in the process different branches of IL, including the principle of distinction between civilians and combatants and between civilian and military objects under IHL and ICL and the right to education as a human right within the framework of IHRL. To explore possibilities of

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<sup>49</sup> Patricia Hill Collins, 'Social Inequality, Power and Politics: Intersectionality and the American Pragmatism in Dialogue' (2012) 26 *Journal of Speculative Philosophy* 455.

<sup>50</sup> Education cannot wait (n 11).

<sup>51</sup> United Nations Human Rights Council 'Right to Education in Emergency Situations: Report of the Special Rapporteur on the Right to Education, Vernor Munoz' (2008) UN Doc A/HRC/8/10.

remedy and redress within the frameworks of the aforementioned branches of IL, this section will examine and qualify the applicability of IHL, IHRL and ICL to the military occupation of the State of Palestine.

### International Humanitarian Law

Despite the inclusion of military occupation in common Article 2(2) of the GCs, Israel disputes its applicability, including the Fourth Geneva Convention (GCIV) to the WB, including EJ and GS. This is primarily based on their argument that the previous status of the territory is different from that envisaged by the convention.<sup>52</sup> Israeli Foreign Minister Moshe Dayan reiterated the position of the government before the United Nations General Assembly (UNGA) in 1977, arguing that as neither the WB nor the GS were the territory of a “High Contracting Party” when occupied by Israel in 1967<sup>53</sup> that leaves the Occupied Palestinian Territory (OPT) outside the scope of application of GCIV.<sup>54</sup> Israel’s interpretation of Article 2 of GCIV argues the concept of the “missing sovereign,” whereby the ousting of a sovereign power is a precondition for the applicability of the Convention.<sup>55</sup> As such, Israeli officials and spokespersons have elaborated that since both the WB and GS were previously under Jordanian and Egyptian occupation respectively, the automatic applicability of the convention would accord rights to Jordan and Egypt that they are not entitled to.<sup>56</sup>

Contentiously, Israeli courts have issued contradicting rulings on the matter. The High Court of Justice (HCJ) referred to the Military Justice Law<sup>57</sup> in the case of *Basil Abu Aita et. al. v the Regional Commander of Judea and Samaria*. The law states that customary IL is automatically incorporated into Israeli law but not conventional IL, including GCs, which need to be incorporated through statutory enactment or subsidiary legislation.<sup>58</sup>

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<sup>52</sup> Adam Roberts, ‘Decline of Illusions: The Status of the Israeli Occupied Territories Over 21 Years’ (1988) 64 *International Affairs* 345, 348.

<sup>53</sup> David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002) 33-34.

<sup>54</sup> Harvard Program on Humanitarian Policy and Conflict Research, *Review of the Applicability of International Humanitarian Law to the OPT* (International Humanitarian Law Research Initiative, 2004) 3.

<sup>55</sup> Yehuda Z. Blum, ‘The Missing Reversioner: Reflections on the Status of Judea and Samaria’ (1968) 3 *Israel Law Review* 279 293.

<sup>56</sup> Meir Shamgar, *Military Government in the Territories Administered by Israel 1967- 1980: The Legal Aspects* (Alpha Press, 1982) 37.

<sup>57</sup> Military Justice Law 1955.

<sup>58</sup> *Basil Abu Aita v Military Commander of Judea and Samaria* [1983] HCJ, 37(2)(HCJ) 43-44.

However, in a later case the court ruling held that the GCIV and 1907 Hague Regulations are part of customary IL and apply to the OPT.<sup>59</sup>

The international community, however, has rejected these elaborate academic, executive and judicial interpretations. The applicability of the GCIV has been affirmed at least 126 times by,<sup>60</sup> to name a few, the GA,<sup>61</sup> SC,<sup>62</sup> Economic and Social Council<sup>63</sup> and Human Rights Commission.<sup>64</sup> This international consensus was further demonstrated by the ruling of the International Court of Justice (ICJ) “Legal Consequences of the Construction of a Wall in the OPT”<sup>65</sup> as well as the continuous emphasis and reiterations by the International Committee of the Red Cross (ICRC) of its applicability, as recently as December 2014.<sup>66</sup>

### International Human Rights Law:

With the confirmation that IHL applies to the WB and GS, there remains the contested issue of the applicability of IHRL, including both the International Covenant on Civil and Political Rights (ICCPR)<sup>67</sup> and ICESCR. Under the *Lex Specialis* principle and the definition of occupation in the Hague Regulations, the more relevant body of law is IHL.<sup>68</sup> Conversely, others scholars argue that IHRL applies simultaneously with IHL, filling in any gaps and increasing protection of civilians, which is the main purpose of IHL. Thus, arguably, the application of IHRL complements that of IHL.<sup>69</sup>

Article 2(1) of the ICCPR defines the scope of application of the Covenant as: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals **within its territory** and **subject to its jurisdiction...**”<sup>70</sup> The primary interpretation of this article specified that the scope of application extends to persons *both* within the

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<sup>59</sup> Beit Sourik Village Council v The Government of Israel [2004] HCJ 2056/04 (HCJ) 23.

<sup>60</sup> Harvard Program (n 54) 13.

<sup>61</sup> United Nations General Assembly Resolution 2252 (4 July 1967).

<sup>62</sup> United Nations Security Council Resolution 446 (22 March 1979).

<sup>63</sup> Economic and Social Council Resolution 1988/25 (26 May 1988).

<sup>64</sup> Human Rights Commission Resolution 1993/2 (19 February 1993).

<sup>65</sup> *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> [140].

<sup>66</sup> Conference of High Contracting Parties to the GCIV Declaration (17 December 2014) paragraph 4.

<sup>67</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

<sup>68</sup> Wall Advisory Opinion (n 65) [178].

<sup>69</sup> Adam J. Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) American Journal of International Law 580, 594.

<sup>70</sup> ICCPR (n 67) art 2(1).

State's territory and subject to its jurisdiction.<sup>71</sup> However, the interpretation has now evolved such that the UN Human Rights Committee (CCPR) asserted in its General Comment 31 that states parties are required "to respect and to ensure the Convention rights...and to all persons subject to their jurisdiction."<sup>72</sup> Furthermore, the ICJ emphasised, in its ruling on the Wall, the applicability of IHRL to the occupied territory, including both the ICCPR and ICESCR,<sup>73</sup> citing the first concluding observations of the CESCR to the State of Israel in 1998 that emphasised the applicability of the covenant to the OPT.<sup>74</sup>

### International Criminal Law:

The applicability of ICL to a certain territory hinges on the accession of the State concerned to the Rome Statute of the International Criminal Court.<sup>75</sup> The first attempt of the Palestinian polity to enter the realms of international criminal justice took place on 22 January 2009, through lodging an Article 12(3) Declaration under the Rome Statute, accepting the jurisdiction of the International Criminal Court (ICC) over its territory.<sup>76</sup> This declaration is believed by many to be for the purposes of holding Israeli officials who took part in the 2008-2009 war on Gaza accountable.<sup>77</sup> The issue was contentious at the time due to the status of the Palestinian Liberation Organisation (PLO) at the UN as a non-member observer entity, such that acceptance of the declaration would, in the very least, incur an indirect confirmation and acknowledgement of Palestinian statehood.

In April 2012, following a thorough consideration of the Declaration made by the Palestinian National Authority (PNA), the Office of the Prosecutor (OTP) of the ICC concluded that the status of the PLO at the UN prevented it from signing and or ratifying the Rome Statute, which in turn prevented the lodging of an Article 12(3) Declaration. As the examination of the OTP was ongoing, the PNA continued its international efforts for recognition and statehood. The UNGA Resolution 67/19 was adopted on 29

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<sup>71</sup> Michael J. Dennis, 'The Application of Human Rights Treaties Extraterritorially in Times of Conflict and Military Occupation' (2005) 99 American Journal of International Law 119, 122.

<sup>72</sup> UN CCPR, 'General Recommendation No 31' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (26 May 2004) UN Doc CCPR/C/21/Rev.1

<sup>73</sup> Wall Advisory Opinion (n 65) [197].

<sup>74</sup> UN CESCR, *Concluding Observations: Israel*, 4 December 1998, E/C.12/1/Add.27, 2.

<sup>75</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

<sup>76</sup> International Criminal Court, *Report on Preliminary Examination Activities* (ICC 2015) 11.

<sup>77</sup> 'ICC Prosecutor Rejects Palestinian Recognition'(BBC News, 2012) <<http://www.bbc.co.uk/news/world-middle-east-17602425>>.

November 2012, where 138 States voted in favour, 9 against and 41 abstained. The resolution effectively upgraded Palestine to the status of non-member Observer State.<sup>78</sup>

This upgraded status enabled the State of Palestine to accede to the Rome Statute.<sup>79</sup> This was realised by lodging an Article 12(3) Declaration on 1 January 2015, accepting the jurisdiction of the Court, and followed by depositing an instrument of accession to the Statute with the UN Secretary General.<sup>80</sup> The Declaration clarified that the State of Palestine grants the court retroactive jurisdiction to 13 June 2014.<sup>81</sup> Consequently, and as a matter of policy,<sup>82</sup> the OTP opened a preliminary examination into the situation in Palestine.<sup>83</sup>

The preliminary examination establishes whether the criteria set in Article 53(1) of the Rome Statute are met to open an investigation,<sup>84</sup> which are 'jurisdiction', 'admissibility' and 'interests of justice'.<sup>85</sup> Recently in December 2019, the OTP concluded that all statutory criteria for opening an investigation have been met. Nonetheless, given the contentious nature of the matter, the OTP asked the pre-trial chamber to determine the territorial jurisdiction of the Court under article 12(2)(a) of the Statute in Palestine.<sup>86</sup> The OTP namely concluded the likely occurrence of war crimes and crimes against humanity as per Article 5 of the statute, which extends subject-matter jurisdiction to also include the crime of genocide and the crime of aggression.<sup>87</sup> Within this context, the ICC has jurisdiction to prosecute officials and perpetrators of war crimes, crimes against humanity, genocide and the crime of aggression in the WB, including EJ, and the GS from 13 June 2014 onwards, if the pre-trial chamber verifies this territorial jurisdiction.

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<sup>78</sup> United Nations General Assembly Resolution 67/19 (29 November 2012).

<sup>79</sup> ICC (n 76) 12.

<sup>80</sup> ICC (n 76).

<sup>81</sup> ICC, 'Palestine Declares Acceptance of ICC Jurisdiction Since 13 June 2014' ICC-CPI-20150105-PR1080 (1 January 2015).

<sup>82</sup> 'Regulations Of The Office Of The Prosecutor- ICC-BD/05-01-09'(International Criminal Court, 2009) <<https://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf>> Regulation 25; 'Policy Paper On Preliminary Examinations' (International Criminal Court, 2013) <[https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf)> Paragraph 76.

<sup>83</sup> ICC (n 76).

<sup>84</sup> 'Preliminary Examination- Palestine' (International Criminal Court) <<https://www.icc-cpi.int/palestine>>.

<sup>85</sup> ICC (n 76) 4-5.

<sup>86</sup> <<https://www.icc-cpi.int/palestine>>

<sup>87</sup> Rome Statute (n 75) art 5.

### **3. International Law and Protection of the Right to Education in Palestine**

#### **3.1 International Humanitarian Law and Customary International Law**

The Statute of the ICJ clarifies that international custom, as evidence of general practice accepted as law, is one of four sources of IL, alongside international conventions, general principles of law and judicial decisions.<sup>88</sup> The definition requires the presence of a general practice and that this practice be accepted as law.<sup>89</sup>

Customary IHL, the branch of IL concerned with international custom in times of armed conflict, emphasises the principle of distinction. Rule 1 of customary IHL on the principle of distinction between civilians and combatants states:

“Rule 1. The parties to the conflict must at all times distinguish between civilian and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”<sup>90</sup>

To further extend protections to civilians in fulfilment of the main purpose of IHL, Rule 7 of customary IHL clarifies the principle of distinction between civilian objects and military objectives as follows:

“Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.”<sup>91</sup>

The principle of distinction is further reinforced in both Additional Protocol I (API) and II (APII) to the Geneva Conventions.<sup>92</sup> The principle of distinction between civilians and combatants is codified into Articles 48 and 51(2), in addition to the principle of distinction between civilian objects and military objectives in Article 52 of API. Article 48 presents the basic rule,<sup>93</sup> while Article 51(2) emphasises the prohibition of the attacking of civilians.<sup>94</sup> Similarly, Article 52 presents the general parameters of the protection of civilian objects, emphasising in Article 52(2) that only the targeting of military objectives is admissible, and adding in Article 52(3) that in cases of doubt

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<sup>88</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: <<http://www.refworld.org/docid/3deb4b9c0.html>> [accessed 24 September 2017] Article 38.

<sup>89</sup> Jan Klabbbers, *International Law* (2013, Cambridge University Press) 26.

<sup>90</sup> International Committee of the Red Cross, *IHL Database: Customary IHL*, available at <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1)> [accessed 4 September 2020] Rule 1.

<sup>91</sup> International Committee of the Red Cross, *IHL Database: Customary IHL*, available at <[https://ihldatabases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7](https://ihldatabases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7)> [accessed 4 September 2020] Rule 7.

<sup>92</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977) 1125 UNTS 609.

<sup>93</sup> Protocol I (n 13) Article 48.

<sup>94</sup> *Ibid* Article 51(2).

objects should be treated as civilian objects.<sup>95</sup> Notwithstanding that these formulations do not directly protect the right to education, schools, as civilian objects (unless used by combatants) are afforded protection under this rule.

The codification of the principle of distinction in APII, which is concerned with NIACs, suggests its high importance. However, in downgrading the restrictions imposed on state conduct in NIACs, the principle of distinction is restricted to the protection of civilians, and does not extend to civilian objects. Article 13 sets the parameters from the principle between civilians and combatants in a manner not dissimilar to the formulation in Articles 48 and 51(2) in API.<sup>96</sup>

In addition to the principle of distinction, which enjoys customary status and is codified into the Additional Protocol to the GCs, other provisions in the GCs and their additional protocol provide indirect protection, in varying degrees, to the right to education. Article 24 of the GCIV requires the facilitation of the education of orphaned children under the age of 15, and encourages that this be entrusted to persons of a similar cultural tradition.<sup>97</sup> Furthermore, Article 50 clarifies that the responsibilities of the occupying power include, in cooperation with national and local authorities, facilitating the proper working of all institutions devoted to the care and education of children.<sup>98</sup> The convention went as far as to include formulations that seek to protect the right to education of prisoners; Article 94 states:

“The education of children and young people shall be ensured; they shall be allowed to attend schools either within the placement of interment or outside”.<sup>99</sup>

The protection of the right to education is also enshrined in API. Article 77 provides for the imposition of measures to ensure that children under the age of 15 do not take part in the hostilities; it particularly specifies that all parties to a conflict shall refrain from recruiting these children.<sup>100</sup> Article 4(3)(c) of APII contains a highly similar formulation to the one in Article 77 of API; however, APII extends the protection of the right to

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<sup>95</sup> Ibid Article 52.

<sup>96</sup> Protocol II (n 92) Article 13.

<sup>97</sup> Geneva Convention (n 12) Article 24.

<sup>98</sup> Ibid Article 50.

<sup>99</sup> Ibid Article 94.

<sup>100</sup> Protocol I (n 13) Article 77.

education in Article 4(3)(a) of providing for the education of children, including religious and moral education.<sup>101</sup>

As can be seen in the aforementioned formulations contained in the GCs, API and APII, alongside custom, IHL does not spell-out specific human rights; instead, it focuses on the general provision of protection to civilians in times of armed conflict. In light of the automatic application of IHL in times of armed conflict under the *Lex Specialis* principle,<sup>102</sup> this could give rise to tension in claims of the inapplicability of IHRL. While this may be refuted through the use of a plethora of judicial decisions, assertions of treaty bodies and academic opinions, this could nonetheless serve as a loophole for the occupying power to avoid legal accountability over violations of rights codified into IHRL instruments.

While the principle of distinction affords protections to Palestinians living under military occupation, it does not provide direct protections to their right to education under armed conflict since, as mentioned above, IHL does not spell out specific rights. However, IHL also does not provide sufficient civilian protection in light of the absence of the neutralisation of educational institutions and affording to educational personnel of specific protections during armed conflict, as is the case with hospitals and medical personnel.

Another weakness is the tension that arises when a specific right that enjoys customary status is already governed by a treaty, particularly when a country is not a party to that treaty or convention.<sup>103</sup> In light of the absence of a hierarchy among the sources of IL, and the consideration of consent as a basis of any obligation under IL, this creates a paradoxical situation that is very likely to be addressed in accordance with political and/or economic interests.

On another level, theoretically, the principle of distinction between civilians and combatants should protect children commuting to school from violence, injury, detainment and arrest, coupled with protection afforded to educational institutions by virtue of the principle of distinction between civilian objects and military objectives.

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<sup>101</sup> Protocol II (n 92) Article 4(3).

<sup>102</sup> Silvia Borelli, 'The (Mis)-Use of General Principles of Law: *Lex specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict' in Laura Pineschi (ed), *General Principles of Law: The Role of the Judiciary* (Springer 2015) 273.

<sup>103</sup> *Ibid* 62-63.

Furthermore, the provisions protecting the right to education in varying degrees should ensure a minimum level of access to education, should the occupying power observe these texts. Practically, however, the customary nature of these rules and their codification into the GCIV, which currently enjoys customary status, have not prevented the Israeli military forces and settlers from attacking children, teachers and administrators, on one hand, and educational institutions on the other. This may be attributed to that infringement on customary law and that IHL is usually remedied and addressed through national and international tribunals, or diplomatic efforts through the UNSC.<sup>104</sup> In this context, it may be deduced that the international community lacks the necessary political will to see this through. This, coupled with the protection Israel receives at the UNSC, where the United States of America has used the veto 42 times between 1972-2011 to shield Israel from criticism and censor,<sup>105</sup> makes the prospects of the effectuation of customary IHL seem bleak.

Furthermore, customary IL is inherently indeterminate. Putting aside some well-established prohibitions, such as that of torture, there is a significant lack of consensus on which rights enjoy customary status and which do not.<sup>106</sup> This may be attributed to the process of qualifying custom, which poses a number of methodological challenges, particularly in the field of human rights. This comes within the context of evidence of custom in human rights largely being based on declaratory sources, rather than other forms of state practice. This could thus potentially open a gap between aspirations and reality.<sup>107</sup> As political dynamics, interests and considerations play a major role in the qualification of customary status, they thereby serve as another channel/ platform/ avenue that reflects the domination of global north over global south countries within the international legal order. Coupled with the indeterminacy of customary IL, this gives a large scope of discretion in the effectuation of legal accountability for the violation of the right to education.

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<sup>104</sup> ICRC, 'Customary International Humanitarian Law: Questions and Answers' (ICRC, 15-05-2005) <<https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a8>> accessed 29 Sep 2017.

<sup>105</sup> Donald Neff, *An Updated List of Vetoes Cast by the United States to Shield Israel from Criticism by the U.N. Security Council*, last updated January 10, 2017, available at: <https://www.washingtonreport.me/2005-may-june/an-updated-list-of-vetoes-cast-by-the-united-states-to-shield-israel-from-criticism-by-the-u.n.-security-council.html> [accessed 24 September 2017].

<sup>106</sup> Bantekas and Oette (n 1) 60.

<sup>107</sup> Ibid.

Finally, notwithstanding the importance of the principle of distinction, it can be relatively easily circumvented through the employment of the principle of proportionality, as stipulated in Rule 14 of customary IHL:

“Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited”<sup>108</sup>

While this formulation prohibits disproportionate attacks on civilians and civilian objects, it nonetheless finds them permissible if they are proportionate to the military advantage anticipated. Furthermore, since the formulation does not restrict the discretionary power given to the perpetrator for the qualification of the proportionality of the attack and the anticipated military advantage, the principle of proportionality seems to allow significant leeway in escaping accountability.

### **3.2 International Human Rights Law**

The right to education, a social right, is covered and protected by a wide array of international human rights conventions and treaties. The first time the right to education was recognised as a human right was in 1948, when it was codified into Article 26 of the UDHR, stating:

“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”<sup>109</sup>

Widely considered the foundation of IHRL, the UDHR, however, is not a multilateral treaty that incurs legal obligations on its state parties. Consequently, the international community codified civil and political rights into the ICCPR and economic, social and cultural into the ICESCR. In contrast to the UDHR, the ratification of the ICCPR and ICESCR by state parties entails and gives rise to legal obligations. The right to education was codified and detailed into Articles 13 and 14 of the ICESCR. The ICESCR provides for free and compulsory primary education for all, emphasising its goals and importance. It further elaborates state responsibility towards secondary, higher, fundamental,

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<sup>108</sup> International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, 2005, Volume I: Rules, available at: <http://www.refworld.org/docid/5305e3de4.html> [accessed 24 September 2017] Rule 14.

<sup>109</sup> UDHR (n 2) art 26.

technical and vocational education.<sup>110</sup> In addition, The CESCR further disseminates its vision concerning the right to education in its General Comment 13, elaborating aims and objectives of education, criteria to assessing fulfilment of the human rights to education and the features of different levels of education,<sup>111</sup> among others.

The right to education is further protected and elaborated on in the Convention on the Rights of the Child, the most widely ratified treaty by the international community, which recognises the right in Article 28 emphasising the contents of Article 13 of the ICESCR in terms of state obligations at different levels of education, as follows:

“States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular...”<sup>112</sup>

The CRC also recognises the aims of the right to education in Article 29 to include the development of the child’s personality, talents and abilities to their fullest potential, development of respect for human rights and fundamental freedoms, development of respect for the child’s parents, cultural identity, language and values and for different civilisations, preparation for a responsible life in a free society and development of respect for the natural environment.<sup>113</sup> The CRC’s first general comment elaborates on Article 29 in terms of its significance and functions, as well as focusing on human rights education; and implementation, monitoring and review.<sup>114</sup> Furthermore, one of the CRC’s optional protocols focuses on the involvement of children in armed conflict,<sup>115</sup> and expressly provides for protection of children from involvement in Articles 1 and 2.<sup>116</sup>

The accession to multilateral conventions, including the ICESCR and CRC, gives rise to legal obligations for the states party in observing and taking active steps to ensure the fulfilment of the instruments. Israel ratified and acceded to both the ICESCR and CRC in 1991, as well as to the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict in 2005. However, Israel is not a party to the Optional Protocol to the ICESCR or the Optional Protocol to the CRC on a Communication Procedure. This therefore excludes individual communications and inquiry missions as accountability

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<sup>110</sup> ICESCR (n 4) articles 13 and 14.

<sup>111</sup> CESCR (n 9).

<sup>112</sup> CRC (n 5) art 28.

<sup>113</sup> Ibid art 29.

<sup>114</sup> CRC ‘General Comment 1’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2001) UN Doc CRC/GC/2001/1

<sup>115</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) (OPI-CRC)

<sup>116</sup> Ibid Articles 1+2

mechanisms relevant to the violation of the right to education by Israeli authorities. Accordingly, Israel's legal obligations are limited to submission of periodic reports to the CESCR and CRC on the steps taken at the legislative, as well as other levels, to ensure respect and fulfilment of the rights enshrined in the ICESCR and CRC. Following consideration of the State report and shadow reports submitted by civil society organisations (CSOs) the committee would issue concluding observations, commending the state's performance in certain areas and emphasising areas that raise concern and/or require improvement. The violation of the right to education was one of the remarks made by the CESCR in its 2011 concluding observations to Israel, stating:

"The Committee is concerned that Palestinian children living in the Occupied Palestinian Territory are not able to enjoy their right to education, as a consequence of restrictions on their movement, regular harassment by settlers of children and teachers on their way to and from school, attacks on educational facilities, and sub-standard school infrastructure. The Committee also notes with concern that there are as many as 10,000 unregistered children in East Jerusalem, out of which around 5,500 are of school age but do not attend school due to their lack of registration."<sup>117</sup>

Similar, yet more elaborated concerns were expressed by the CRC in their latest observations to Israel, focusing comprehensively on the status of education in the WB, including EJ and GS. The committee cited in the case of the WB attacks on schools by settlers and soldiers and their usage as military outposts or detention centres, as well as the harassment of children during their commute to/ from schools, and the refusal of Israeli authorities to grant relevant building permits, and consequent school demolitions. For EJ, the focus was on the severe shortage of 1,000 classrooms and deteriorating infrastructure in schools. Furthermore, in the case of GS, the committee highlighted the severe damage sustained on 300 schools during the 2012 offensive on Gaza and the inability of the United Nations Work and Relief Agency to meet the enrolment needs of 40,000 school age children due to the blockade.<sup>118</sup>

In addition to its codification into the UN treaty system, the right to education is further protected through the UN charter system. The special procedures to the Human Rights Council (HRC) include the Special Rapporteur on the Right to Education, whose post was established by the Human Rights Commission through resolution 1998/33,<sup>119</sup> and

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<sup>117</sup> CESCR, "Concluding Observations: Israel," 16 December 2011, E/C.12/ISR/CO/3, 8.

<sup>118</sup> CRC, "Concluding Observations: Israel," 4 July 2013, CRC/C/ISR/CO/2-4, 16.

<sup>119</sup> Commission on Human Rights Resolution 1998/33 (April 1998)

endorsed and extended by the HRC in resolution 8/4.<sup>120</sup> The mandate of the Special Rapporteur is to focus on the right to education and includes –but is not limited to– reporting on the progressive realisation of the right to education; promotion of assistance to governments to develop and adopt plans of action to secure progressive implementation of the right to education; and take into account gender considerations, particularly the situation and needs of the girl child.<sup>121</sup> With the view of fulfilling his/ her mandate, the Special Rapporteur is empowered to undertake country visits, respond to individuals complaints and information received on allegations concerning violations of the right to education in specific countries, engage in constructive dialogue with governments, civil society and other actors to identify solutions for the implementation of the rights and submit annual reports to the HRC and GA covering the activities relating to the mandate.<sup>122</sup>

Another protection mechanism includes the Universal Periodic Review (UPR), a platform organised by the HRC that gives States the chance to review practices of other States and recommend measures and steps to ensure upholding of human rights. The review is held periodically, with three cycles completed so far. Israel’s latest UPR took place in 2018, with a number of States flagging the violation of the right to education of Palestinians. Tunisia and Mexico’s recommendations in the 2013 UPR focused on discriminatory laws and practices and their impact on the right to education, while Australia’s recommendation focused on the interdependency of the meaningful realisation of the right to education on freedom of movement. Malaysia’s recommendation encompassed the fulfilment of a wide array of rights, including the right to education, alongside right to life, to live in dignity, adequate food, housing, health and freedom of movement.<sup>123</sup>

The main strength of IHRL in terms of the protection of the right to education include the plethora of international instruments that may be utilised to expose and highlight the violations of the military occupation apparatus. Notwithstanding their abundance, these legal mechanisms are essentially recommendatory instead of enforceable, as they do not contain any implementation mechanisms to ensure respect for human rights. However,

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<sup>120</sup> Human Rights Council Resolution 8/4 (12 June 2008)

<sup>121</sup> Commission on Human Rights (n 119) paragraph 6(a).

<sup>122</sup> Office of the High Commissioner for Human Rights, ‘Special Rapporteur on the Right to Education’ (OHCHR) <<http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/SREducationIndex.aspx>> accessed 29 Sep 2017

<sup>123</sup> Human Rights Committee, “Report of the Working Group on the Universal Periodic Review: Israel,” (19 December 2013), A/HRC/25/15, 25–26

both Palestinian and Israeli CSOs have diligently made use of the limited options at their disposal and have submitted shadow reports for consideration by the committees at every reporting cycle. Despite the bleak prospects of enforcement, this legal advocacy work has a dual advantage in that it keeps the question of Palestine on the table of the international community, particularly after its regression in terms of priority after the regional turmoil of the Arab Spring. The second advantage is that a continuous exposure of human rights violations in a manner that enables actors to draw patterns and observe systematic action could strategically contribute to altering international public opinion on issues of legal accountability.

A major weakness, on the other hand, is the permissibility of the restriction of and derogation from that is provided for by the major instruments of IHRL. This disadvantage is further compounded since, unlike Article 4(1) of the ICCPR that restricts derogations to times of “public emergency which threatens the life of the nation”<sup>124</sup> and nonetheless excludes the rights in Articles 6, 7, 8, 11, 15, 16 and 18,<sup>125</sup> Article 4 of the ICESCR presents a broader clause on limitations of rights that accommodates a large degree of discretionary power in interpretation, as follows:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”<sup>126</sup>

Thus, legal advocacy on the violation and/ or restriction of the right to education could face the hurdle that it is legally permissible and proportionate to the circumstances. While this could be overcome, it nonetheless could raise issues of admissibility and grounds for legal accountability in the first place.

On a different level, the adoption of two separate covenants in 1966 by the UNGA; one stipulating civil and political rights and another on economic, social and cultural rights, instead of a single covenant on all civil, political, economic, social and cultural rights that human beings are entitled to, reflected the socialism/ communism vs. liberalism/ capitalism polarisation that dominated the international community during the era of

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<sup>124</sup> ICCPR (n 67) article 4(1)

<sup>125</sup> Ibid art 4(2).

<sup>126</sup> ICESCR (n 4) art 4.

the cold war. Whereas the socialist bloc considered the provision of a comprehensive social welfare system that ensures the realisation of all economic, social and cultural rights a natural extension of its political ideology, the majority of the liberal democracies conditioned the fulfilment of such rights on the dynamics and forces of free market economics.<sup>127</sup>

Furthermore, a close look at both covenants reveals the depth of this polarisation that rendered economic, social and cultural rights initially non-justiciable rights whose realisation was to take place progressively. Justiciability in this sense refers to the capacity of a certain claim to receive judicial scrutiny or determination under mandatory rather than discretionary rules.<sup>128</sup> The extent of State obligations in terms of the realisation of economic, social and cultural rights is encompassed in Article 2(1) of the ICESCR, which states:

“Each State Party to the present Covenant undertakes to take steps, individually and through assistance and co-operation, especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”<sup>129</sup>

This formulation of State obligations significantly contrasts with that in the ICCPR, which reads:

“Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...”<sup>130</sup>

Comparing and contrasting both formulations reveals the downgrading of economic, social and cultural rights; this is evident in the use of non-imperative language, the statement of progressive realisation and the reference to the availability of resources. This downgrading in terms of the realisation and consequent non-justiciability of economic, social and cultural rights should not by any means be understood to mean that they are the poor counterpart of civil and political rights, as many of the latter are rendered meaningless in the absence of a true realisation of the former. For example,

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<sup>127</sup> Bantekas and Oette (n 1) 368.

<sup>128</sup> M. J. Dennis and D. P. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?', *American Journal of International Law* 98 (2004), 462, 474–5.

<sup>129</sup> ICESCR (n 4) Article 2(1)

<sup>130</sup> ICCPR (n 67) Article 2(1).

for the enjoyment of the civil right to life to be meaningful, an enjoyment of adequate food, water, decent housing and healthcare, all of which are social rights, is a prerequisite.<sup>131</sup>

Furthermore, with the knowledge that many State parties could utilise the progressive realisation formulation of economic, social and cultural rights as a loophole from fulfilling their State obligations, the CESCR determines commitment of states parties to their obligations through an assessment of the steps taken by the state to respect, protect and fulfil the right in concern. This however does not negate that the international legal order affords civil and political rights higher importance and protection and political will to take their violations seriously, in comparison with economic, social and cultural rights.

### **3.3 International Criminal Law**

The jurisdictional subject matter of ICL concerned with crimes committed in times of war is that of “war crimes,” specified under Article 8 of the Rome Statute of the ICC. The Rome Statute classifies war crimes by the type of conflict (IAC/ NIAC) and type of violation (grave breach of GC/ serious violation of applicable laws and customs). It is worth noting that not all violations of IHL are criminalised; in fact, only the violation of a small portion of IHL rules and laws gives rise to individual criminal responsibility.

However, as described in the previous section, the principle of distinction between civilians and combatants and between civilian objects and military objectives enjoys customary status. In this context, attacks on civilians, including students, teachers and administrators, and on civilian objects including schools and educational institutions are criminalised under a number of war crimes, as follows:

- Articles 8(2)(b)(i)+ 8(2)(e)(i): War crime of “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.”
- Article 8(2)(b)(ii): War crime of “intentionally directing attacks against civilian objects, that is, objects which are not military objectives.”

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<sup>131</sup> Bantekas and Oette (n 1) 367.

- Article 8(2)(b)(v): War crime of “attacking or bombarding, by whatever means, town, villages, dwellings or buildings, which are undefended and which are not military objectives.”
- Articles 8(2)(b)(ix)+ 8(2)(e)(v): War crime of “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided that they are not military objectives.”

Notwithstanding that the aforementioned violations do not directly protect the right to education of Palestinians, they largely apply to many of the violations of this right. On a purely legal level, ICL reflects the hierarchy that prioritises civil and political rights over economic, social and cultural rights in IHRL. The main argument against the inclusion of violations of economic, social and cultural rights in ICL is based on doubt around whether existing law would allow for such a nexus.<sup>132</sup> However, since the perpetration of such acts entails individual criminal responsibility, ICL remains one channel to see through legal accountability. Despite the importance of the codification of such acts, several obstacles impede access to justice within the framework of ICL. These obstacles come at two main levels: the opening of an investigation and the trying of defendants.

As noted earlier, as a matter of policy the OTP opened a preliminary examination following the acceptance by the State of Palestine of the jurisdiction of the ICC over its territory. Despite the conclusion of the OTP that war crimes are likely to have been committed in the case of the State of Palestine, for the purposes of legal analysis we will present the obstacles that could face the opening of an investigation. The preliminary examination establishes whether the criteria set in Article 53(1) of the Rome Statute are met to open an investigation,<sup>133</sup> which are ‘jurisdiction’, ‘admissibility’ and ‘interests of justice’.<sup>134</sup>

The qualification of the jurisdictional requirements of the aforementioned war crimes is not necessarily an obstacle within the Palestinian context. This would require the verification that military occupation amounts to an IAC (the contextual element of war crimes), as well as the individual elements of crime relevant to each of the

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<sup>132</sup> Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press, 2015) 22.

<sup>133</sup> Preliminary Examination- Palestine (n 84).

<sup>134</sup> ICC (n 76) 4-5.

aforementioned crimes, which can be carried out with relative ease due to the comprehensive and expansive monitoring and documentation, by human rights organisations, of the violations perpetrated by occupation forces.

The obstacles to shifting the examination into an investigation come at the level of admissibility and interests of justice. Article 17 of the Rome Statute specifies the admissibility requirements as complementarity and gravity. Complementarity refers to a case that is being investigated or prosecuted by a state that has jurisdiction over it, unless the state is genuinely unwilling or unable to carry out the investigation or prosecution.<sup>135</sup> Consequently, if the State has the willingness and the ability to investigate and (possibly) prosecute those who have committed the most serious crimes of international concern, in conformity with Article 17(2) and 17(3) on willingness and ability criteria, then the complementarity requirement of admissibility would pose an obstacle to opening an investigation.

The second admissibility requirement of gravity is a contentious one, as the Statute gives large discretionary power to the OTP in its estimation and qualification. This was the main premise against which the case of the Mavi Marmara flotilla, which was headed towards the besieged Gaza Strip and was attacked by Israeli occupation forces, was found inadmissible by the OTP. This was concluded through the employment of a comparative disadvantage test to the case. The OTP was grappling with cases in the continent of Africa that included hundreds of thousands of victims, as compared to nine victims on the vessel, despite the presence of strong evidence of the occurrence of war crimes committed by Israel.<sup>136</sup> Within the temporal jurisdiction of the court to Palestine extending from 13 June 2014 onwards, a quantitative comparison with the cases witnessed in African countries, such as Côte d'Ivoire<sup>137</sup> could prove to be the main challenge to opening an investigation.

However, quantitative assessment is not the only approach to determine gravity; instead, a qualitative assessment could and should be employed. In this sense, the fact that the aforementioned measures continuously occur where perpetrators (settlers and soldiers alike) are very rarely indicted and tried by the Israeli judiciary, coupled with

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<sup>135</sup> Rome Statute (n 75) art 17.

<sup>136</sup> Office of the Prosecutor, Situation On Registered Vessels Of Comoros, Greece And Cambodia (ICC 2014) <[https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article\\_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf)> 3.

<sup>137</sup> *Situation in the Republic of Côte d'Ivoire*, ICC-02/11 (ICC) <<https://www.icc-cpi.int/cdi>>.

the discriminatory facets of the measures and the number of persons at risk in light of the current legal and political frameworks are all factors that could be used to overcome the complementarity obstacle and qualify the gravity of the situation.

Furthermore, an even more contentious issue is that of interests of justice. The Rome Statute and Elements of Crime do not provide a definition or at least the constituents of interests of justice, leaving a large discretionary power at the helm of the OTP.<sup>138</sup> As this criterion has never been employed previously by the OTP, its potential to preclude an investigation is difficult to determine.

The second set of obstacles concern trying the defendants. The first obstacle in this category is the identification of defendants. The temporal jurisdiction of the ICC to Palestine extends only from 13 June 2014 onwards. Accordingly, this restricts accountability to those who committed and/ or ordered, solicited, induced, aided, abetted or assisted the commission<sup>139</sup> of the crime(s) in question within this timeframe. Furthermore, in light of the limited resources of the ICC and vast amount of horrendous crimes taking place around the world, it is not feasible for the court to prosecute every single person who was involved in committing and/ or commissioning crimes within the jurisdiction of the court.<sup>140</sup> This is in line with the practice of *ad hoc* tribunals, including the ones of the former Yugoslavia and Rwanda, who prosecuted those who bore greatest responsibility for committing and commissioning war crimes and crimes against humanity. This translates in the Palestine context to the prosecution of the most senior officials who were responsible for the execution of such crimes, and would very possibly exclude all minor perpetrators and participants, including, within the wider context, settlers, foot soldiers...etc. This gives rise to questions regarding whether this is the form of justice that the Palestinian people seek and would be satisfied by.

The second obstacle is the qualification of the *mens rea*, the requirement of committing the aforementioned crimes with a culpable mental state. The threshold for the qualification of the *mens rea* require that the perpetrator commit the acts with both intent and knowledge. 'Intent' in relation to conduct requires that the person means to

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<sup>138</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010) 661.

<sup>139</sup> Rome Statute (n 75) Article 25.

<sup>140</sup> *Ibid* Article 30.

engage in the conduct, while 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.<sup>141</sup>

Even in the case of the qualification of the *mens rea* of the defendants and the issuance of an arrest warrant by the ICC, the court does not try criminals *in absentia*. Hence, the extradition of defendants would pose another significant obstacle to access to justice. This will largely depend on the cooperation of states parties to the Rome Statute and their political will. The extradition of Omar Al-Bashir, ex-President of Sudan, to the ICC in June 2015 when he was in South Africa, demonstrates that the Court does not essentially have the necessary political power to see through the effectuation of access to justice.<sup>142</sup>

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<sup>141</sup> Douglas Guilfoyle, *International Criminal Law* (Oxford University Press, 2016) 315.

<sup>142</sup> Mehari Taddele Maru 'Why South Africa Let Bashir Get Away' (Aljazeera, 2015) <<http://www.aljazeera.com/indepth/opinion/2015/06/south-africa-bashir-150615102211840.html>>

#### **4. Current Strategies and Ways Forward**

Section two of this study demonstrates the violation of the right to education at the hands of Israeli military authorities. Different international and national actors, including both official institutions and CSOs are addressing this issue through the utilisation of different procedures and strategies.

At the national level, the paradox of the designation of responsibility for education in the OPT between the Ministry of Education (MoE) of the State of Palestine and military authorities, did not prevent the Palestinian President from issuing a Presidential Decree, in accordance with Article 43 of the 2003 Amended Basic Law,<sup>143</sup> ratifying Educational Law (8) of 2017,<sup>144</sup> which provides for free education throughout all educational levels and compulsory education until 10<sup>th</sup> grade.<sup>145</sup> The law further states that its provisions apply to the educational stages included in its text (primary and secondary) and on all educational institutions in Palestine.<sup>146</sup> One of the stated priorities of the MoE in 2017 (then the Ministry of Education and Higher Education) is to further develop the legal framework regulating education to maximise effective protection and advanced realisation of the right to education; for example, in 2016, the MoE's expenditure on the development of the education, creativity and excellence laws reached USD 85,459;<sup>147</sup> an additional USD 461,738 were allocated in 2018 to develop the legal environment regulating Palestinian education.<sup>148</sup>

At the policy level, education is one of ten national priorities that have been planned and elaborated on in the National Policy Agenda 2017-2022.<sup>149</sup> With the view of the realisation of the provision of good and comprehensive education for all (national priority eight), the agenda specifies four key national policies, including the improvement and maintenance of enrolment in education. Policy interventions towards this end include the retention of high enrolment rates in primary education,

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<sup>143</sup> Palestinian Amended Basic Law 2003.

<sup>144</sup> Education Law (8) of 2017.

<sup>145</sup> Ibid Article 5.

<sup>146</sup> Ibid Article 2.

<sup>147</sup> Ministry of Education and Higher Education & Palestinian Initiative for the Promotion of Global Dialogue and Democracy 'MIFTAH', *Citizen Budget 2017* (MoEHE, 2017) <<http://miftah.org/Publications/Books/CitizenBudget2017BEn.PDF>>, 3.

<sup>148</sup> Ministry of Education and Higher Education & Palestinian Initiative for the Promotion of Global Dialogue and Democracy 'MIFTAH', *Citizen Budget 2018* (MoEHE, 2018) <[http://miftah.org/Publications/Books/Citizens\\_Budget\\_2018\\_MoEHE\\_EN.PDF](http://miftah.org/Publications/Books/Citizens_Budget_2018_MoEHE_EN.PDF)>, 2

<sup>149</sup> National Policy Agenda 2017-2022 <[https://palaestina.org/uploads/media/NPA\\_Arabic\\_Final\\_Approved\\_20\\_2\\_2017\\_Printed.pdf](https://palaestina.org/uploads/media/NPA_Arabic_Final_Approved_20_2_2017_Printed.pdf)>.

improvement of enrolment in secondary education and provision of support and protection to education in Jerusalem and Area 'C'.<sup>150</sup>

The fact that education is a key national priority is demonstrated through the allocation of 21% of the national budget to the MoE,<sup>151</sup> amounting to USD 894,915,530 in 2017,<sup>152</sup> and 22% of the public budget in 2018, amounting to USD 1,041,890,000.<sup>153</sup> Furthermore, the developmental budget of the MoE is one of the largest developmental budgets of the State of Palestine Ministries, reaching a whopping USD 165,189,889; amounting to 18.46% of the total budget of the MoE.<sup>154</sup> This enabled the MoE to dedicate USD 30,152,412 in 2017 to support schools in Jerusalem, Area 'C' and marginalised areas, including through providing transportation to students who have to cross checkpoints and the Wall to reach their schools.<sup>155</sup> Furthermore, there is in the MoE a special unit for education in emergencies that is entrusted with the development and execution of emergency plans when the right to education is compromised in certain areas.<sup>156</sup>

Another national policy adopted to facilitate the realisation of the national priority of education is to improve the quality of school education.<sup>157</sup> The majority of the key policy interventions towards this end are dedicated financial allocations in the budget of the MoE. For example, USD 5,133,171 were dedicated to the reform and development of educational curricula in 2017; USD 1,500,000 to the digitisation of education; and USD 8,146,500 to the implementation of afterschool activities.<sup>158</sup> Additionally, the capacity-building and continuous training of teachers is allocated USD 2,938,912 from the developmental budget of the MoE.<sup>159</sup>

Before the establishment of the PNA, the status and quality standards of education in Palestine in terms of access, infrastructure and quality was abysmal and in continuous deterioration. Since the establishment of the PNA in 1994, the legal paradox of the

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<sup>150</sup> Ibid 41

<sup>151</sup> Interview with Mo'ayad Afaneh, Expert Analyst of National Budgets and Standards of International Transparency, Al-Quds Open University (Ramallah, Palestine, 6 October 2017).

<sup>152</sup> MoEHE (n 147) 2.

<sup>153</sup> MoEHE (n 148) 2

<sup>154</sup> MoEHE (n 147) 2.

<sup>155</sup> Ibid.

<sup>156</sup> Interview with Mo'ayad Afaneh (n 151).

<sup>157</sup> National Policy Agenda (n 149) 41.

<sup>158</sup> MoEHE (n 147) 3.

<sup>159</sup> Ibid 2.

assignment of responsibility for education –and other social services- has been used as a loophole by the Israeli government to evade their responsibility. Naturally, this has come at the expense of the Palestinian people. Over the past 25 years, the MoE has significantly improved the status of education in Palestine, despite limited resources and major difficulties. It is in this sense that the continuation of the prioritisation of the right to education by the government and the dedication of sufficient allocations to the MoE is of utmost importance.

At another level, a number of Palestinian CSOs work in the field of human rights, monitoring and documenting human rights violations perpetrated by Israeli military forces and settlers, including those against the right to education and other rights that impact the right to education. Such national organisations include but are not limited to Defence for Children International- Palestine, Right to Education Campaign of Birzeit University, Independent Commission for Human Rights, Al-Haq, Addameer Prisoner Support and Human Rights Association and Mandela Organisation for Human Rights. International and UN organisations undertake similar work, including Human Rights Watch, Amnesty International and the Norwegian Refugee Council, the UN Office for the Coordination of Humanitarian Affairs and the UN Office of the High Commissioner for Human Rights. These documentations are brought up before international bodies, such as the HRC and relevant UN committees monitoring adherence of states parties to their treaty obligations, including but not limited to the CCPR, CESCRC and CRC. The continuation and accumulation of these documentations is highly important, since it increases prospects for legal accountability in the future and facilitates drawing a pattern that reflects the Israeli State's policy of violence, and impunity of perpetrators.

However, several strategies should be employed to maximise benefit from these efforts and work. These organisations should prioritise monitoring and documentation of violations of economic, social and cultural rights. This comes within the context that the vast majority of them prioritise documenting the violations of civil and political rights due to their blatancy and highly pronounced short-term impact. This approach further feeds into the perception of the hierarchy of human rights, with civil and political rights considered as first class rights and economic, social and cultural rights as second-class rights.

Furthermore, funding to Palestinian CSOs, as well as international non-governmental organisations (NGOs) and UN agencies in Palestine has decreased since the beginning of the “Arab Spring” in light of shifting donor priorities to a more regional scope. The approach of prioritising civil and political rights over economic, social and cultural rights, coupled with limited financial resources, hinders the prioritisation of addressing the violation of the right to education. It is thus crucial that Palestinian CSOs diversify their sources of funding to expand beyond institutional donors to include individual donations, proceedings from income-generating projects and activation of corporate social responsibility, so as to enable them to secure the funds necessary to prioritise, and to put the documentation of economic, social and cultural rights on equal footing with civil and political rights.

With the availability of significant and sufficient data and information, organisations as has been discussed should continue to target the CESCR and CRC to expose Israeli violations, but should also seek to capitalise on the availability of charter-based mechanisms, including lobbying member states of the HRC to give higher priority to economic, social and cultural rights, particularly the right to education, in Israel’s next UPR. Similarly, Palestinian CSOs and international NGOs should consolidate efforts and lobby the Special Rapporteur on Education to request a country visit to Israel and the State of Palestine. The outcome of such requests has positive implications irrespective of whether Israel accepts or refuses them. A visit by the Special Rapporteur would provide for ample data and information on the multiple facets of the violation of the right to education. On the other hand, the natural conclusion if Israel refuses the request of the Special Rapporteur would be that it did so due to its deteriorating and abysmal human rights record. This would reflect poorly on Israel’s human rights record and would highlight the culture of impunity it attempts to foster.

These comprehensive strategies are highly important but yet do not address root causes that downgrade and serve as an obstacle to efforts that seek to address human rights violations in general and those of economic, social and cultural rights in particular, taking into consideration the disproportionate impact of intersectional discrimination, and particularly on the grounds of gender, age, place of residency and disability. The main obstacles that impede the effectuation of human rights are the alleged premise of state sovereignty, the normative framework of IL and the structural framework of IL.

The alleged premise of state sovereignty essentially deprives customary international law, IHL and IHRL of enforcement mechanisms. Furthermore, the activation of the economic dimension of IL enforcement is contingent on the political will of the international community. Effectively, human rights enforcement mechanisms are activated only when it is in the economic interests, which in turn affect the geopolitical interests of a few select States and then state sovereignty is of no value whatsoever. These same states enjoy unlimited powers and are able to nullify the decisions and opinions of the entirety of the international community.

On another hand, while ICL has relatively “more teeth” than IHL and IHRL, there remains nonetheless surmountable obstacles to access to justice within this avenue, the vast majority of which relate to the political will of the international community and the hegemony of the global north over the global south in a classic example of how the normative framework of IL serves as yet another obstacle. This normative framework, additionally, fails to address the disproportionate impact of intersectional discrimination of gender, age, refugee status, social class, place of residency and disability to name a few in terms of access to rights and access to justice.

The structural framework of IL refers to the division between civil and political rights on one hand and economic, social and cultural rights on another hand. The development of IHRL came in the midst of the cold war, when the capitalist liberal camp adopted civil and political rights and the socialist communist camp adopted economic, social and cultural rights. This in its turn served the human rights order a highly severe blow, as neither category is truly meaningful without the other. However, this division downgraded economic, social and cultural rights by making them non-justiciable for a highly protracted period and linking their fulfilment through progressive realisation to the dynamics of free market economics and without the requirement of setting clear timeframes and action plans.

This thus essentially turned education, healthcare, housing and social security into a privilege rather than a human right. Additionally, the rise of neoliberalism in the 1970s and 1980s coincided with the weakening of the Soviet Union and it only strengthened after its fall, consequently further exacerbating the decline of investment in social services and entrenching the status of economic, social and cultural rights as a privilege. This became very clear in the latest Covid-19 pandemic crisis, which exposed the

fragility of health systems worldwide and particularly in global north countries, including in Italy, Spain and the USA.

A similar pattern is observed with respect to education and particularly in conflict-affected countries. For example, more than 75 million children and young people are in urgent need to educational support, and children in conflict-affected countries are 30% less likely to complete primary school and 50% less likely to complete lower-secondary school. With respect to refugees, only 50% of refugee children have access to primary education, compared with a global level of more than 90%, and only 1% attend university compared to the global rate of 34%.<sup>160</sup>

The structural, normative and law enforcement obstacles that face the realisation of the right to education and other economic, social and cultural rights gives rise to question whether law is the optimal medium to effectuate equal access to quality education for all or is better suited to supplement other efforts and endeavours? The example from Palestine in section four, in addition to numerous other models, reveals that the prioritisation of education as a national policy could serve as an entry point, but that nonetheless it requires commitment and continuity.

This requires the rejuvenation of social movements that adopt a human rights discourse, challenging in the process the profit-based approach to social service delivery, most importantly education. The social movements should push for a highly important rearrangement of priorities that designates education and other social services as national priorities, which should be translated into policies through a redistribution of wealth, namely the reform of the taxation system to increase revenue and advance social justice. This would take the form of a just progressive taxation system that correlates with people's income and naturally increases the burden on large and monopolistic corporations. The importance of this is the increase of revenue for States from national resources, which would enable the free identification of priorities, including the free development of the appropriate educational system. This would be imperative to addressing societal racism, xenophobia and discrimination by reforming the educational system to foster tolerance, diversity and humility and question inequalities, discrimination and hegemony not only on the local level but also on the

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<sup>160</sup> Education cannot wait (n 11).

global level. Human rights-based advocacy work should also be evidence based; to this end, it is imperative to monitor and document allocations to education as a percent of the public budget or gross domestic product.

These models should be nationally owned and strengthened before scaling them up to the regional and international levels. This requires concerted long-term efforts that ought to be based on the strengthening of networking and consolidation of efforts among the various stakeholders. Once national models and experiences are strengthened and solidified, consolidation of efforts could extend to a regional scope and finally to the global level. Again, here it remains crucial for advocacy work to be evidence-based and for allocations to education be continuously monitored. This, hopefully, would enable the reform of the global order to put education and other economic and social rights on an equal footing with civil and political rights, and of equal importance recognise that all human rights are void of meaning in the absence of self-determination, the continuation of occupation and the persistence of “global north” hegemony over the “global south”.

## **5. Conclusion**

One of the many rights violated by the Israeli military occupation of Palestine is the right to education. Israel's policies and procedures render the violation at all '4-A' levels of 'availability', 'accessibility', 'acceptability' and 'adaptability'. Intersectional factors that have a disproportionate impact on some social groups over others include gender, class, disability, age, place of residency and refugee status.

Each of the branches of IL has strengths and weaknesses in terms of the protection of the right to education. While IHRL enjoys a plethora of conventions and instruments in the form of treaties, as well as charter-based mechanisms that guarantee the right to education, its enforceability (or lack thereof) severely restricts its effectiveness. The same applies to IHL. In contrast, the enforcement of ICL is slightly more advanced. However, this enforcement depends on the political will of the international community and more fundamentally on the recognition of economic, social and cultural rights, on an equal footing with civil and political rights.

Palestinian CSOs and international NGOs and UN agencies working in Palestine that seek to improve the Palestinian human rights situation should continue to capitalise on the availability of a significant number of instruments and mechanisms within the framework of IHRL, with the aim of informing and impacting the political will of the international community to hold Israel accountable for its violation of the right to education and other Palestinian human rights. However, given the structural, normative and law enforcement obstacles it is clear that IL is not the optimal medium to protect the right to education and particularly during times of armed conflict, but should be nonetheless considered a supporting channel. The protection of the right to education requires a rearrangement of priorities that is translated into policies that receive necessary budget allocations through a redistribution of wealth. This model could extend thereafter to regional and international levels. Ultimately, the protection of the right to education universally largely depends on the reform of the international legal order to perceive and put economic, social and cultural rights on an equal footing with civil and political rights, alongside the enhancement of the political will to end conflicts and occupations and consequently put an end to gross and blatant human rights violations.

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