



AL-HAQ



# ENVIRONMENTAL INJUSTICE IN OCCUPIED PALESTINIAN TERRITORY

PROBLEMS AND PROSPECTS

AL-HAQ  
2015



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PALESTINE & JORDAN

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# CONTENTS

<b>1. INTRODUCTION</b> .....	<b>6</b>
1.1 SUBSTANTIVE ENVIRONMENTAL INJUSTICE .....	7
1.2 PROCEDURAL ENVIRONMENTAL INJUSTICE .....	8
1.3 OVERVIEW .....	11
1.4 CAVEAT: THE QUESTION OF STATEHOOD .....	13
<b>2. THE ENVIRONMENTAL JUSTICE LACUNA</b> .....	<b>17</b>
<b>3. EXTRA-TERRITORIAL ENFORCEMENT OF ENVIRONMENTAL CRIMES</b> .....	<b>22</b>
3.1 TULKARM INDUSTRIAL POLLUTION .....	24
3.2 QALQILYAH 'CLOSED' WASTE DUMP .....	26
3.3 ACTIVE DUMP NEAR JERUSALEM .....	28
3.4 EXTREME LANDSCAPE DEPRIVATION .....	29
3.5 PRACTICAL PROCEDURAL STEPS .....	30
<b>4. EXTRA-TERRITORIAL ENFORCEMENT OF ENVIRONMENTAL TORTS</b> .....	<b>32</b>
4.1 APPLYING THE KUWAIT V IRAQ CASE .....	32
4.2 APPLYING THE SHELL (NIGERIA) NUISANCE CASE .....	34
4.3 ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS .....	36
<b>5. ENVIRONMENTAL RESPONSIBILITIES OF OCCUPYING ADMINISTRATION UNDER INTERNATIONAL LAW</b> .....	<b>37</b>
5.1 ENVIRONMENTAL RESPONSIBILITIES OF AN OCCUPYING POWER DURING A BELLIGERENT OCCUPATION .....	37
5.1.1 Protection of Objects Indispensable to the Survival of Civilian Population .....	39
5.1.2 Protection of the Natural Environment .....	39
5.1.3 'Wide-Spread, Long-Term and Severe' .....	41
5.1.4 Conclusions on law of belligerent occupation .....	42
5.2 ENVIRONMENTAL RESPONSIBILITIES UNDER INTERNATIONAL ENVIRONMENTAL LAW .....	43
5.2.1 Protection of the Environment Under Belligerent Occupation .....	43
5.2.2 No-Harm Rule .....	44
5.2.3 Wrongful Act .....	46
5.2.4 Significant Harm .....	48
5.2.5 Activities Under 'Jurisdiction' or 'Control' .....	49
5.2.6 Liability and Responsibility .....	50
5.2.7 Conclusions .....	50

# CONTENTS

<b>5.3 DUMPING OF HAZARDOUS WASTE</b> .....	<b>51</b>
5.3.1 Overview of Relevant Rules: The Basel Convention .....	51
5.3.1.1 The Meaning of 'Transboundary' and of "Area under National Jurisdiction" in the Context of Occupied Palestinian Territories .....	53
5.3.1.2 Jurisdiction over Persons .....	54
5.3.1.3 Interim Agreement of 1995 (Oslo II) .....	54
5.3.1.4 Domestic Israeli Legislation .....	54
<b>5.4 PROTECTION OF THE MARINE ENVIRONMENT</b> .....	<b>55</b>
5.4.1 The General Legal Framework .....	56
5.4.2 Regulation of the Maritime Zones and Rights to Marine Resources .....	59
<b>6. UN RESPONSIBILITIES FOR THE ENVIRONMENTAL CONDITIONS OF PALESTINIAN REFUGEES</b> .....	<b>64</b>
6.1 CASE EXAMPLE .....	66
6.2 DEMOGRAPHIC CHANGES .....	67
6.3 UN REFUGEES AND ENVIRONMENTAL JUSTICE .....	68
6.4 'GREEN' BUDGETARY ISSUES .....	71
<b>7. CONCLUSIONS</b> .....	<b>77</b>
7.1 PRINCIPAL CONCLUSION .....	78
7.2 WIDER CONCLUSIONS .....	78

# 1 INTRODUCTION

We were invited by Al Haq and Heinrich Böll Foundation to the West Bank to investigate environmental problems affecting Palestinians, which are attributable to Israel's occupation of the territories of the West Bank (including East Jerusalem) and Gaza Strip. 'Environmental Justice' was the rubric within which we were requested to operate and to report.

This is the report based on our visit. It documents a variety of demonstrable obstacles to environmental justice across the widest conceivable spectrum of circumstances. We examine relevant formal law and also, crucially, practical issues of law enforcement. We pay particular attention to remedies for the vindication of rights available within transnational and international fora. The reason for this is the existence of insurmountable barriers to justice within the 'domestic' legal system, from which almost the entirety of the problem of environmental justice stems.

Prior to our visit, we wrote a short briefing paper setting out the core meaning of 'environmental justice' from a legal perspective. We explained that the relevant commentary originates in Europe and North America. This has advantages and disadvantages. It is convenient (and thus advantageous) to be able to research within the parameters of an established paradigm. Yet there is a risk in so doing of overlooking nuances specific to the 'new' setting. Our context is that of the long term, unresolved conflict over sovereignty over the land and its environment, including four decades of belligerent occupation. This is without parallel anywhere else in the world where environmental justice is being considered.

Reference to an established paradigm (in the singular) requires qualification, for there are at least two distinct, but broad, ways of approaching environmental justice in the relevant literature. One is in terms of substantive (or distributive) justice; the other is in terms of procedural justice.<sup>1</sup>

<sup>1</sup> J Ebbesson (ed), *Access to Justice in Environmental Matters in the EU* (Kluwer 2002), 6-8.

## 1.1 SUBSTANTIVE ENVIRONMENTAL INJUSTICE

Regarding *substantive* environmental injustice, this is defined as a situation where environmental 'goods' (e.g. clean land, air, and water) and 'bads' (polluted land etc.) are unfairly distributed along lines of existing social, economic, ethnic, or even national inequality. 'Put in Blacks Back Yard' (the so-called phenomenon of 'PIBBYism') is a classic example, drawn from the US, of how society's toxic waste is dumped in already deprived communities, adding to and deepening existing patterns of inequality.<sup>2</sup> This inspired the formation of a self-styled 'Environmental Justice Movement' in the US, through which the term gained much of the initial energy that has propelled it to fore of environmental law and policy, most lately in our present study.<sup>3</sup>

However, one key nuance in our context is that Palestinians are not a minority ethnic grouping, but a sovereign people. Related to this is the spiritual significance the land assumes for many of both Palestinians and Israelis – something which lends a special, cultural value to the ecology of the area (and thus adds centrality to the importance of environmental justice). We are researching environmental justice in the 'ethical heart of the world'.<sup>4</sup> We cannot satisfactorily focus on the material worth (money, physical human health) of a healthy environment, although these are factors to consider, alongside broader cultural and spiritual ones.

On the other hand, there are obvious parallels with the foundational environmental racism paradigm referred to above. This is evident in the way some Palestinians evoke the concept of 'apartheid' to describe aspects of extreme environmental discrimination in Palestine.<sup>5</sup> Furthermore, the idea of a 'deep' cultural or spiritual engagement with the natural environment is

<sup>2</sup> B Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (Westview Press 1990)

<sup>3</sup> G Walker, *Environmental Justice: Concepts, Evidence and Politics* (2012), vii

<sup>4</sup> E Ray Casto, 'The Economic Geography of Palestine' (1937) *Economic Geography* 235.

<sup>5</sup> E.g. *Water for One People Only: Discriminatory Access and 'Water Apartheid' in OPT* (Al Haq 2013)



by no means exclusive to the Holy Land. On the contrary, here is a growing interest throughout the world in ‘ethically re-connecting’ with nature.<sup>6</sup>

## 1.2 PROCEDURAL ENVIRONMENTAL INJUSTICE

*Procedural* environmental justice is, as the name suggests, about environmental due process or, more broadly, ‘governance’. It is about access to information concerning the environment, opportunities to participate in environmental policy making and administrative decisions, and access to the courts in order to facilitate fair adjudication of disputes. Europe leads the way in this arena, with the 1998 Aarhus Convention on Access to Justice in Environmental Matters obliging nearly fifty states, with much cultural and legal diversity, to adopt minimum standards of participation and access to justice in this area. This is backed by a Europe-wide complaint, compliance, and enforcement procedure, which helps ensure that the standards are implemented on the ground.

Despite the references to claims of environmental ‘apartheid’ above, our partners [Al-Haq and Heinrich-Böll-Stiftung] were not aware of any sustained activist campaign or research of this kind, whether substantive or procedural, except in regard to water (which has received much regional and international attention, well marshalled by the NGO-platform ‘EWASH’ through its ‘Thirsting for Justice’ initiative). Water is important, but we quickly discovered that it is part of a systemic problem of environmental injustice arising from occupation. That is why we were commissioned to report on this topic in a comparatively broad-brush manner - to map the field in a general way - so that specific issues can be understood in their wider context (and priorities for further research and action selected against an understanding of the whole).

That is reflected in the content of our field work. Our partners organized for us a series of site surveys and meetings that embraced an extremely broad

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<sup>6</sup> See e.g. for an historical perspective H Ritvo, *Dawn of Green* (University of Chicago Press 2009). For a legal-philosophical perspective, see Christopher Stone, *The Gnat is Older than Man: Global Environment and Human Agenda* (Princeton University Press 1993) 235-280. For a current constitutional perspective, consider the groundbreaking protection of nature rights under the Ecuadorian Constitution 2008 and the references to rights and duties in respect of the environment under the Constitution of the Kingdom of Bhutan.

and diverse array of localities and topics. We touched on rural and urban problems, and on issues affecting all sectoral divisions of the West Bank (A, B, and C).<sup>7</sup> We also covered various ‘types’ of refugee camps (refugees make up a substantial proportion of the West Bank and Gaza populations), including original UN camps existing ever since the 1948 flight and expulsion of Palestinians from lands conquered by the newly founded state of Israel.

In terms of environmental subject matter, we visited sites of contaminated land and despoiled landscapes; of polluted water, of limited water collection infrastructure, and diverted watercourses, and the ill-effects of uncollected and/or untreated sewage; air pollution from various sources connected with the occupation; West Bank Israeli mineral extraction in the form of quarrying for building materials and manufacture of Dead Sea beauty products; and also renewable energy. And whilst we did not visit the coastal occupied territory (Gaza), we received a presentation on problems here to do with water in particular which we are able to draw on in our report.

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<sup>7</sup> See further below, section 5.3.1.1



### 1.3 OVERVIEW

We begin (in Chapter Two) by elaborating on the domestic environmental justice 'lacuna', which defines the core problem as we see it. In blunt terms Palestinians have no effective means of obtaining environmental justice domestically through independent and impartial judicial hearings. Thus, environmental justice is from a domestic perspective an empty concept. As lawyers, we were particularly struck by the limited jurisdiction that *Palestinian* courts have over Israeli parties, and by the understandable stigma attached by Palestinians to acts of subjection to the Israeli Supreme Court jurisdiction, whether as a claimant or prosecuting party.

That is why we consider (in Chapters Three and Four) the scope for treating the remedying of environmental injustices in Palestine as a shared concern among the judiciaries of the world, as well as (in Chapters Five and Six) international courts or quasi-judicial organizations.

Chapter Three examines the law of universal jurisdiction in respect of crimes against humanity relevant to the Palestinian environment. From our fieldwork we draw four case studies which have the potential to be understood as constituting serious environmental crime. One concerns industrial pollution, two involve waste dumped on land, and one that of aggravated landscape obstruction – the latter being an issue of unique sensitivity given the cultural significance landscapes assume in this region. We briefly set out the practical procedure for prosecuting universal crime in this field.

Chapter Four examines the extra-territorial enforcement of relevant civil wrongs arising in connection with the case studies of the previous chapter. There is no equivalent of universal jurisdiction here, but instead courts, for example the High Court of England and Wales, can, and do, accept jurisdiction in the interests of justice to hear claims that cannot conveniently be resolved in their country of origin. This is illustrated in England by the Bodo People's on-going High Court suit against Shell (Nigeria) Ltd, the implications of which are explored.<sup>8</sup> A distinction is drawn between UK

<sup>8</sup> *Re Bomu-Bonny Oil Pipeline Litigation* [2014] EWHC 958.

and US extra-territorial jurisdiction, the former (we suggest) having the potential to offer more to Palestinian victims of Israeli torts.

Chapter Five concisely tackles the large and complex subject of the enforceability of Israel's international environmental justice obligations. As well as considering Israel's obligations arising under multilateral environmental agreements, the chapter discusses overarching obligations arising from Israel's status as occupying administration. There has already been considerable litigation on this point, notably in connection with the wall and with mineral extraction,<sup>9</sup> but there are further aspects of the occupation that merit attention. We touch on the marine environment (notably the territorial waters of the Gaza Strip, which are occupied in broadly the same way, with similar implications, as the West Bank soil).

Chapter Six examines environmental justice in the context of refugee camps, where displaced Palestinians live in large numbers. International humanitarian law (IHL) provides both for substantive and procedural obligations for the international community to safeguard the environment into which refugees are displaced. We highlight these obligations with reference to the 1948 UN refugee camps. We also address the delicate tension between environmental protection in camps and the 'right to return'.

Chapter Seven draws conclusions and makes recommendations. As obviously deep as environmental injustice is in Palestine, one should not lose sight of the unique prospects arising from occupation which instill hope for the environment being safeguarded justly through law. Palestinians and Israelis are deeply committed to environmental protection by virtue of their cultural attachment to the extraordinary landscapes, which they have inhabited since antiquity.<sup>10</sup>

As will be clear to readers, we have been aware throughout of the great privilege bestowed on us by our partners, in exposing problems on the

<sup>9</sup> E.g. Yesh Din's challenge to the legality of mineral licences granted to Israeli companies in respect of the West Bank (Case HCJ 2164/09), decided in 2012 against the applicants.

<sup>10</sup> Polly Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet* (2010). See further O Das, *Environmental Protection, Security and Armed Conflict* (Edward Elgar 2012), Ch 4. See further the discussion of waste in relation to the law of belligerent occupation in Chapter Five of our report.

ground, and also in having the vision to see that re-focusing peace efforts around environmental protection can – indeed must – work, where other approaches have to date failed. Whilst we cannot adequately capture the full scale of the problem in the space we have available, we do hope to provide a spectrum of the most serious problems so that decisions can be made about action in the future.

## 1.4 CAVEAT: THE QUESTION OF STATEHOOD

While this is not the place to address in depth the question of statehood in relation to Palestine, it is important to emphasize that the premise of this paper is that Palestine is, for the purposes of this report, a state under International Law. Of particular significance is the UN General Assembly (UNGA) resolution of November 29, 2012 on the "Question of Palestine",<sup>11</sup> which accorded to Palestine, with an "overwhelming"<sup>12</sup> majority,<sup>13</sup> the status of non-member observer state. Whether one subscribes to the declaratory or constitutive theory of recognition, an act of collective recognition such as the UNGA resolution is able to have a constitutive effect.<sup>14</sup> Such collective recognition, it has been noted, also follows Palestine's membership of UNESCO, which had to be put to a similar, "constitutive" vote.<sup>15</sup> Membership to the UNESCO, moreover, opens for Palestine to be considered a State under the so-called "Vienna Formula".<sup>16</sup>

Furthermore, Palestine has recently acceded to 15 international treaties

<sup>11</sup> UNGA Res. A/67/L.28

<sup>12</sup> GA/11317, General Assembly Votes Overwhelmingly to Accord Palestine "Non-Member Observer State" Status in United Nations, <http://www.un.org/press/en/2012/ga11317.doc.htm>

<sup>13</sup> 138 UN Members voted in favour, 9 against, with 41 abstentions

<sup>14</sup> As noted by D Akande 'Palestine as a UN Observer State: Does this Make Palestine a State?', EJIL: Talk, Blog December, 3 2012 [www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state/](http://www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state/); for a detailed study see J Vidmar 'Explaining the Legal Effects of Recognition' (2012) 61:2 International and Comparative Law Quarterly

<sup>15</sup> D Akande 'Palestine as a UN Observer State: Does this Make Palestine a State?', EJIL: Talk, Blog December, 3 2012 [www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state/](http://www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state/)

<sup>16</sup> Under the Vienna Formula, an entity is considered a State if it is Member to the UN, one of its specialized Agencies (such as, in this case, UNESCO), or the ICJ

and conventions,<sup>17</sup> and has enjoyed already before the 2012 UNGA vote the individual recognition of 132 UN member states. Lastly, Sweden has very recently recognized Palestine as a State, in addition to non-binding statements of recognition by Belgium, Spain and United Kingdom Parliament.

### ICJ and Palestine

Considering then, for the purposes of this report, Palestine as a state, the question may be fruitfully posed as to whether and under which conditions Palestine may open a dispute proceeding before the International Court of Justice (ICJ). The ICJ's own Statute sets out in Article 35 that non-members to the UN may be parties to a dispute on condition of a) fulfilling the conditions laid down by the Security Council and b) contributing to the expenses. As for point a), the Security Council established that the ICJ "shall be open" to non-parties to its statute and non-members of the UN if any be general or particular,<sup>18</sup> and with which it accepts the jurisdiction of the ICJ and "undertakes to comply in good faith" with its decisions.<sup>19</sup>

A different question is whether Palestine could bring a case under the ICJ against Israel. As the ICJ lacks compulsory jurisdiction,<sup>20</sup> there would need to be an agreement between Palestine and Israel to submit a dispute to the ICJ and to be subject to its ICJ jurisdiction; or a treaty-based provision which assigns compulsory jurisdiction to the ICJ for the resolution of disputes arising

<sup>17</sup> The Fourth Geneva Convention of 12 August 1949 and the First Additional Protocol; the International Convention on the Suppression and Punishment of the Crime of Apartheid; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child (on the involvement of children in armed conflict); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Prevention and Punishment of the Crime of Genocide; the UN Convention against Corruption; the Vienna Convention on Diplomatic Relations; the Vienna Convention on Consular Relations; the Convention on the Elimination of All Forms of Discrimination against Women; the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land; the Convention on the Rights of Persons with Disabilities; the Vienna Convention on the Law of Treaties; and the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>18</sup> A general declaration accepts the jurisdiction of the ICJ in relation to all disputes or a class of dispute; a particular declaration accepts the jurisdiction in relation to a dispute already arisen.

<sup>19</sup> Security Council Resolution 9 (1946), 15 October 1946.

<sup>20</sup> Unless a Party to the UN or to ICJ Statute has produced a declaration in which it generally accepts the ICJ's jurisdiction

in relation to the treaty provisions. In the latter case, both Palestine and Israel would need to be part of one such treaty. Considering the scope of this report, it is easy to verify that Palestine, for the time being, is not a member of any multilateral environmental agreements. For the future, Palestine could ratify one treaty to which Israel is a party, and which provides for the compulsory jurisdiction of the ICJ. Exploring what multilateral environmental agreements could fulfil such criteria exceeds however the scope of this report, and would in any case have effects only from the date of entry into force of that particular treaty for Palestine and Israel.

Finally, it is important to stress the fact that if the breach of substantive norms is not justiciable, this doesn't diminish the breach of such norms, and leaves the theoretical (albeit realistically highly improbable) possibility that Israel may still accept jurisdiction of the ICJ in matters relating to the environment as a show of good faith. We do return to this briefly, in Chapter Five, but it should be stressed that acceptance of ICJ jurisdiction would entail Israel's recognition of Palestine as a state, which is not likely under current political realities.



### ICC and Palestine

At the time of finalising our report for publication (April 2015), Palestine had just acceded to the Rome Statute, which established *inter alia* the International Criminal Court. President Mahmoud Abbas had submitted the application to the court in January 2015 and on April 1<sup>st</sup> Palestine became an official member. At the accession ceremony Kuniko Ozaki (Vice-President of the ICC) stated:

Accession to a treaty is, of course, just the first step. As the Rome Statute today enters into force for the *State* of Palestine, Palestine acquires all the rights as well as responsibilities that come with being a *State Party* to the Statute. These are substantive commitments, which cannot be taken lightly.<sup>21</sup>

This is of course significant in evidencing statehood, but more than this, it has specific environmental justice implications. These are addressed in Chapter Three.

<sup>21</sup> Emphasis added. See ICC Press Release ([http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1103.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1103.aspx) )



## 2

## THE 'ENVIRONMENTAL JUSTICE LAGUNA'

This chapter focuses on the domestic legal system applicable to environmental justice in Palestinian territories. The substantive law is not central at this stage – the focus lies on institutional issues (concerning the 'local' administration of justice).

Our institutional starting point is the British Mandate of Palestine (1922-1948), during which English common law was applied alongside of (and ultimately with precedence over) the law inherited from the defunct Ottoman Empire. Under Jordanian rule between 1948 and 1967, there was a set up, if not a home-grown judicial system, and a Palestinian local criminal and civil court infrastructure, with jurisdiction over criminal and civil matters relating to the environment. Many of the judges remained those appointed

under the British Mandate, although few, if any, survive today.

This arrangement has withstood to some extent the occupation following the 'Six-Day War' in June 1967. In keeping with the law of belligerent occupation (at least nominally), the Israeli Civil Administration (the governing body within which occupation is administered, part of the Coordinator of Government Activities in the Territories, COGAT) has preserved the Jordan-Palestine court system and domestic law, and thus there is in principle scope for environmental justice remedies to be sought through Palestinian local courts, applying Palestinian law.

However, in practice there are major difficulties for enforcing legal responsibility for civil environmental wrongs in Palestine. This is clear from a reading of self-government arrangements negotiated in the early 1990s, particularly Annex 4 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ("Oslo Accords"). Article 3 provides that the Palestinian courts and judicial authorities shall have jurisdiction in all civil matters over 'an ongoing Israeli business situated in the Territory'. 'All' here has a narrow meaning, for it is subject to a number of significant qualifications written into the agreement.

One of the most important qualifications is that in many cases, if not indeed all, the Israeli party cannot be compelled to be subject to the jurisdiction of the court; jurisdiction in respect of an Israeli party is conditional on consent notified to the court in writing (see Art 2 (c) and (d)). Another qualification is that enforcement of a Palestinian court judgment against an Israeli party is to be effected by Israel – the Palestinian court cannot compel execution of its own ruling in these circumstances.

Further, there are gaps in the subject matter of the civil actions that are expressly covered. Only 'real property' (Art 2(b)), 'contract' (Art 2 (d)), and 'commercial disputes' (Art 4) are mentioned as falling expressly within the agreement. Environmental civil claims that cannot be fitted into these categories (tort law is a pertinent example) require a separate agreement by the sides.

Civil matters of a *public law* character fall comprehensively outside of the Palestinian court jurisdiction altogether. Israeli government departments cannot be sued in a Palestinian court under any circumstances, even when acting in what, under the Israeli/English common law, is a 'private law' capacity, such as contract or tort.

This series of lacunae is critical to our study. As Jonas Ebbesson's review of justice in Europe (but with wider application) points out:

'It is quite clear that environmental and social justice, by whatever standard, presupposes effective access to the administrative and legal system, so that rights can be vindicated and existing laws on public health and the environment can be invoked'.<sup>22</sup>

That condition is not satisfied by the justice arrangements in Palestine.

However, these formal limitations concerning civil justice are not the end of the matter, for even if the above obstacles to access to justice were to be remedied, there would remain the fundamental cultural problem that the Palestinian courts – whether in criminal or civil matters (this point does not apply so much to Sharia courts) – have not earned, and do not command, respect of the people (at least outside of the sphere of Sharia law). The courts are under-staffed and under-resourced, and are, we learned, tainted by allegations of corruption. Furthermore, the court system remains very much a legacy of colonialism – Palestinians do not typically see their nation as having a truly 'national court' that is 'indigenous'.<sup>23</sup>

For these reasons, it is out of necessity rather than choosing that Palestinians have sought remedies before the national court system of the occupying power. Israel's legal system too is a reflection of its colonial past.

<sup>22</sup> Above n 1, 8.

<sup>23</sup> M Karayanni 'Access to Justice Ascends to International Civil Litigation: The Case of Palestinian Plaintiffs before Israeli Courts' (2014) 33 Civil Justice Quarterly 41, 52. See further Kelly, Tobias (2004) *Access to justice: the Palestinian legal system and the fragmentation of coercive power*. Crisis States Research Centre working papers series 1, 41. Crisis States Research Centre, London School of Economics and Political Science, London, UK.

It works within the inherited common law tradition, applied during the British Mandate. The Israeli Supreme Court structure bears many of the hallmarks of the English heritage, including an ethos of professionalism and a commitment to core liberal tenets of judicial independence, impartiality, and rule of law. In broad substantive law terms, much of the English common law is retained, including private and public nuisance – the ‘green torts’ that are our focus in Chapter Four.

In practice, however, Palestinian recourse to the Israeli High Court of Justice and appeal courts beyond that is no less fraught with difficulty than recourse to local courts. Without impugning individual Israeli judges (who command a degree of cross-party respect), Palestinians we met with perceive there to be what can best be described as an *institutional bias* where parties from Palestine are concerned. This is borne of a number of high profile defeats, including many relevant to the environment which are discussed later in the report.

Deepest of all is the ethical difficulty Palestinians have in litigating before the High Court of Justice. It is perceived as involving a degree of legitimation of the occupying power. As David Kretzmer puts it in the particular context of administrative law (but again his point has wider application), litigation before the Israeli courts is seen as ‘legal laundering’, by clothing Israeli occupation ‘in a cloak of legality’.<sup>24</sup>

This, then, is the ‘environmental justice lacuna’, and it has profound implications. It is characterized by a tantalizing array of relevant laws but no effective local procedure for bringing them to bear – no means of domestic enforcement. That explains why there is an appetite among Palestinians for vindicating their rights outside of the domestic status quo, through ‘extra-territorial’ procedures and remedies.

<sup>24</sup> D Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002), 2.

## ANNEX 4, OSLO AGREEMENT 1993

2. In cases where an Israeli is a party: the Palestinian courts and judicial authorities have jurisdiction over civil actions in the following cases:

a. the subject matter of the action is an ongoing Israeli business situated in the Territory (the registration of an Israeli company as a foreign company in the Territory being evidence of the fact that it has an ongoing business situated in the Territory);

b. the subject matter of the action is real property located in the Territory;

c. the Israeli party is a defendant in an action and has consented to such jurisdiction by notice in writing to the Palestinian court or judicial authority,

d. the Israeli party is a defendant in an action, the subject matter of the action is a written agreement, and the Israeli party has consented to such jurisdiction by a specific provision in that agreement;

e. the Israeli party is a plaintiff who has filed an action in a Palestinian court. If the defendant in the action is an Israeli, his consent to such jurisdiction in accordance with subparagraphs c. or d. above shall be required, or

f. actions concerning other matters as agreed between the sides.

3. The jurisdiction of the Palestinian courts and judicial authorities does not cover actions against the State of Israel including its statutory entities, organs and agents.

4. Israelis, including registered companies of Israelis, conducting commercial activity in the Territory are subject to the prevailing civil law in the Territory relating to that activity. Enforcement of judicial and administrative judgments and orders issued against Israelis and their property shall be effected by Israel, within a reasonable time, in coordination and cooperation with the Council.



# 3 EXTRA-TERRITORIAL ENFORCEMENT OF ENVIRONMENTAL CRIMES

When exploring opportunities for remedying environmental injustice of a *criminal* character in Palestine in courts elsewhere in the world, a logical starting point is the principle of universal jurisdiction. This enables courts to try persons for crimes committed outside a nation's territory that are not linked to the state by:

the nationality of the defendant or the victim; harm to the state's own national interests.

Almost all states recognize the principle of universal jurisdiction to a greater or lesser extent.<sup>25</sup>

Under Article 5 of the Rome Statute 1998,<sup>26</sup> to which Palestine has now acceded,<sup>27</sup> there are four international crimes in respect of which universal jurisdiction is quite widely recognized trans-nationally:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

In the lead up to the Rome Statute, during the 1980s, there had been talk of a specific environmental crime, called 'ecocide', being a fifth international

<sup>25</sup> Universal Jurisdiction: A Preliminary Survey of International Legislation Throughout the World 2012 (Amnesty International 2013).

<sup>26</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on 17 July 1998.

<sup>27</sup> ICC Press Release ' ICC welcomes Palestine as a new State Party', 1 April 2015 (ICC-CPI-20150401-PR1103). Palestine submitted its accession documentation in January 2015.

crime. That was provided for in the 1985 draft *Code of Crimes Against the Peace and Security of Mankind*, but it was vetoed by a small handful of states.<sup>28</sup> Since 1991, the UN Interregional Crime and Justice Research Institute has renewed investigation of this subject. In 2012, it agreed an action plan for tackling the challenge of serious environmental crime.<sup>29</sup> One key point of action is that of redefining current international criminal law to ensure more explicit coverage of environmental crime.

Nonetheless, even as things stand, it is arguable that serious environmental harm falls within the offences covered by the Rome statute above. Among those who have advanced that argument is the Israeli criminologist Dr. Danny Gymshi, who has suggested (with reference to the occupied territories) that serious, long term pollution of the environment that makes a locality substantially uninhabitable should be considered a crime against humanity.<sup>30</sup> He gives as a generic example a toxic waste dump near groundwater from which communities draw their water supply, resulting in their poisoning. That is indeed a pertinent example, as explained below.

'Crimes against humanity' for our purposes (of potentially implicit environmental crime) are defined under Article 7 as including:

'Deportation or forcible transfer of population' (Art 7(1)(d));  
 'Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court' (Art 7 (1)(h));  
 'Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' (Art 7(1)(k)).

<sup>28</sup> Polly Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet* (2010).

<sup>29</sup> Action Plan on Combating Environmental Crime (UNICRI 2012).

<sup>30</sup> *Green Criminology: Combating Crime Against the Environment* (2010).

Our field visits contained what we consider at least four prima facie environmental injustices of proportions arguably sufficient to engage this Article (if, of course, substantiated in court).



### 3.1 TULKARM INDUSTRIAL POLLUTION

The first case example deals with air pollution from factories within a privately owned industrial zone situated just over the West Bank side of the wall in Tulkarm (Area C) in the occupied Palestinian territory (oPt). Foremost in that respect is a large chemical works - the Geshuri works – which has been the subject of international media attention. Indeed, immediately prior to our visit we became aware of a recent report in the *Lancet* which highlighted the potential serious health implications of this site of occupation for the many residents neighbouring the factories:

‘Most prominent of these is Geshuri, a privately owned Israeli agrochemicals company operating in Tulkarm, West Bank, oPt. Results of several empirical studies suggest that as a result of proximity to industrial zones that house Geshuri and other factories that cause pollution, residents of Tulkarm have among the highest rates of cancer, asthma, and eye and respiratory health anomalies compared with residents in other districts.’<sup>31</sup>

<sup>31</sup> Qato and Nagra, ‘Environmental and public health effects of polluting industries in Tulkarm, West Bank, occupied Palestinian territory: an ethnographic study’ (2013) *Lancet*, vol 382, 5 December 2013, S29

The authors implicated polyaromatic hydrocarbons/dioxins in the factory’s emissions, as inhaled by exclusively Palestinian neighbours.

Our local host fieldworker had prepared numerous affidavits which corroborate that report. But we were also able to see for ourselves the rows of near derelict residential apartments neighbouring the conurbation, and scorched vegetation, which bear witness to the fact that the locality had become uninhabitable as a result of the factory pollution. As well as health issues, this arguably engages the crime against humanity of indirect forcible transfer, which is an international crime under Arts 7 and 8(2)(b) (viii) of the Rome Statute.<sup>32</sup>

To put the Tulkarm case in a perspective appropriate to the issue of universal crime, some further background is necessary: The factories had originally been located within the Israeli side of the green line. They were relocated into occupied territory once Israeli residents refused to tolerate their pollution and took legal action under the English common law of nuisance, which (to reiterate) is in force in Israel as a legacy of the British Mandate. By the terms of the Israeli court injunction, the relocated enterprises were not allowed to operate at times when the wind blew in the Israeli direction of the green line. Here then is a case of the Israeli Occupying Forces (IOF),<sup>33</sup> with the help (if unwitting) of the Israeli judiciary, actively contributing to local Palestinians suffering a toxic tort that Israelis found intolerable (further discussed in chapter 5).

<sup>32</sup> See more generally Grazia Careccia and John Reynolds, *Al Nu’Man Village: A Case Study of Indirect Forcible Transfer* (Al Haq 2010)

<sup>33</sup> The IOF has been involved in the process of dispossession of land, destruction of Palestinian greenhouses, and establishment of chemical factories in Tulkarm, more specifically on the land of the Farmer Fayeze Taneeb. Following links explain in deep this involvement: A, Wright, “A good piece of land”. 2006. *Palestine Journals* by Ann Wright [http://palestinejournals.co.uk/?page\\_id=15](http://palestinejournals.co.uk/?page_id=15); C, Smith. “Tulkarem: A city under dust”, Alternative Information Center (AIC), 17 October 2013 <http://alternativenews.org/archive/index.php/politics/palestinian-society/7197-tulkarem-a-city-under-dust>



The second case example is waste dump 'closed' by the IOF near Qalqilyah, which is located on top of an aquifer that supplies a local Palestinian population of many thousands with drinking water. We were accompanied by an official from the Palestinian Environmental Quality Authority (EQA) who, in his private capacity, owned an olive grove surrounding the dump. We were informed that the olives from the grove had been recently designated as unmarketable, because of an unspecified risk of contamination. No one appears to have investigated and acted upon the risk of groundwater pollution arising from contaminants from the dump leaching through the soil. The quality of the water pumped from the local well, which we visited, was not monitored for the presence of carcinogenic dioxins or any similar pollutants associated with landfills; monitoring only takes place for lead and bacteria.

There were many reasons for our visit to this site given our remit. One is that there is no fencing or other notification of the site's dangers. This is

despite the evidence that children are drawn to it and play there, and that there are reports of children experiencing ill health (rashes, sickness) as a consequence. Another is the fact that the dump spontaneously combusts periodically, which is a hazard in its own right. A third is that it is believed that dumping still occurs at the site without permits. Fourthly, local inhabitants do not have access to any records of the kind of waste dumped at the site. Most important, however, is the disproportionately high incidence of cancer among the population served by the deep aquifer only 100 meters from the dump. The EQA official mentioned a figure hundreds of times higher than the average for the West Bank.

This example encapsulates the full range of environmental justice issues with which we are concerned. There are procedural issues, in that there is no system for the collection of information about the effect of the dump on groundwater quality and, in consequence, human health. Thus, the Palestinian public have no means of being informed of the risks to which they are exposed, so that they could take whatever action is available to them. Substantively, if the dump is indeed the cause of cancer on epidemic proportions as feared by our local field host, then this potentially is universally criminal.





### 3.3 ACTIVE DUMP NEAR JERUSALEM

The third case example concerns an active waste dump on the outskirts of Jerusalem near Abu Dis which neighbouring Palestinian residents suspect of containing military waste. The immediate residents are refugees. Unlike the above example, there is no nearby aquifer. Rather, the concern is that residents are exposed to dust from the tip feared to be toxic. There are potential parallels here with the contaminated soil dust public nuisance action in Corby Group Litigation in England.<sup>34</sup>

We were informed that community leaders were in contact with medical professionals, who were concerned about the high incidence of localised illness. If attributable to the dump, this could engage the Rome Statute, for similar reasons to the Qalqilyah scenario above. The illnesses alleged to be attributable to the contaminated dust are serious, including cancer, but there is also the significant matter of the palpably discriminatory

<sup>34</sup> [2009] EWHC 2109 (The local authority responsible for developing an industrial site with waste dumps was liable for personal injury (birth defects) by members of the public exposed to toxic dust from the site).

circumstances in which the exposure takes place. The tip services a settlement quite a distance away, yet it is the Palestinians who are required to live in immediate proximity to it.



### 3.4 EXTREME LANDSCAPE DEPRIVATION

It may strike an ‘outsider’ as curious that natural landscapes could possibly be mentioned in connection with the most serious crimes under the Rome Statute. This is not in the least because of the disparaging terms in which local landscapes have been described in some well-known ‘western’ travel diaries. For example, Raja Shehadeh quotes Thackeray’s description of typical Arab villages as ‘dismal huts piled together on the plain’.<sup>35</sup> The plain itself ‘is unspeakably ghastly and desolate,’ consisting of ‘parched mountains’ and ‘savage ravines.’<sup>36</sup>

But Palestinians deeply value their landscapes, which are considered beautiful in their own right, as well as imbued with biblical and wider

<sup>35</sup> R. Shehadeh, *Palestinian Walks: Notes on a Vanishing Landscape* (2<sup>nd</sup> ed, 2008), xv. The reference is to Thackeray’s *Notes on a Journey from Cornhill to Grand Cairo*.

<sup>36</sup> Ibid, xiii. The Radical British MP John Bright had a more favourable impression: see G M Trevelyan, *The Life of John Bright* (Greenwood Press 1971)

spiritual significance.<sup>37</sup> Our fourth environmental crime case study is about landscape deprivation, affecting a family in Beit Ijza, outside Jerusalem (again). In the early 1970s, the family inherited the land and built a hill top home with exquisite panoramic views (Jerusalem to the east, the Mediterranean to the west). From time to time during the 1980s and 1990s portions of their land were confiscated and subsequently developed into an Israeli settlement that almost entirely encircled the home.

To some extent the settlement summarily ‘confiscated’ the prospect of the family, placing great emotional strain on the family members. It is relevant that the Rome Statute Art, 7(1)(k), refers to inhumane acts ‘intentionally causing great suffering, or serious injury to mental (and potentially) physical health’. If the enclosure of the prospect is not in itself capable of satisfying this, then it is possible that other aspects of the family’s confinement do. In particular, the property can now be entered and exited only via an electronic gated corridor constructed by the IOF, the opening and closing of which is controlled by the IOF remotely from Jerusalem. For almost forty years the family has never left the property together, for fear that the gate would not be re-opened on their return. It was in these extreme circumstances that the head of the family passed away (but the son and his family remain).

### 3.5 PRACTICAL PROCEDURAL STEPS

Though most states recognise universal criminal jurisdiction to a greater or lesser extent, the procedures for prosecuting offences differ from state to state. For example, Britain’s procedure is governed by the Geneva Convention Act 1957, the International Criminal Court Act 2001, and the Police Reform and Social Responsibility Act 2011 (s 153).

The sum of these provisions is that it is open to any individual to initiate criminal proceedings by applying to a magistrate for a summons and an arrest warrant in respect of a crime against humanity (and related serious crimes covered by the Rome Statute). Since 2011 the court has had power to issue a warrant on the condition of the consent of the Director of Public

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<sup>37</sup> Ibid, xiv.

Prosecutions – the aim of this restriction is to prevent an arrest on ‘flimsy’ evidence the ulterior motive of which is political.

Once prosecution is commenced, the accused is triable in any place in the UK as if the crime were committed in the UK.

One of the most recent exercises of the right of private prosecution, which indeed precipitated the 2011 reform, was the arrest warrant issued in respect of Israeli ex-foreign minister Tzipi Livni. The prosecution was initiated by a relative of a Palestinian killed in an Israeli bombing in Gaza in December 2008, authorised by Livni. The warrant remains in force.

We are not aware of environmental crimes having featured in the universal crime arrest warrants to date, but there is no reason in principle why that should remain the case. Were a prosecution *backed by prima facie compelling evidence* to be made in respect of any of the case studies above, the English and Welsh Director of Public Prosecutions would be under real pressure to consent to a warrant being issued.

As explained above, during the writing up of the present report Palestine has successfully applied for accession to the Rome Statute. This opens the door to proceedings being brought against Israel before the ICC. It does not necessarily matter that Israel is not a party to the ICC, nor that Israel does not consent to the exercise of jurisdiction of the ICC. In fact, pursuant to article 12(2)(a) of the Rome Statute, the ICC may exercise jurisdiction if “[t]he State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft” is a party to the Rome Statute.<sup>38</sup>

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<sup>38</sup> ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 90, article 12(2)(a)

# 4

## EXTRA-TERRITORIAL ENFORCEMENT OF ENVIRONMENTAL TORTS

Whether or not they constitute serious criminal offences for purposes of universal criminal jurisdiction, the four West Bank case studies considered in the previous chapter are certainly *prima facie* torts under both Palestinian and Israeli law. We are particularly interested here in the specific tort of nuisance law – which the Israeli/English common law divides into two torts of private and public nuisance. The attraction of nuisance law is that it remedies *on-going* pollution through injunctions that put an end to an unlawfully polluting state of affairs. That is to say, it typically deals not with an isolated accidental event; instead, it remedies a systemic problem.<sup>39</sup>

### 4.1 APPLYING THE KUWAIT V IRAQ CASE

According to the general principle of *lex loci delicti*, nuisance actions (and other civil wrongs) are to be adjudicated in the country where they arise under that country's law.<sup>40</sup> But to proceed straight to the pertinent point under discussion in this chapter, extraordinary situations invite extraordinary jurisdictional approaches. This is well illustrated by the English tort case (the tort of conversion – of aircraft – not nuisance) of *Kuwait Aircraft Corporation v Iraq Aircraft Company*.<sup>41</sup> Here, the High Court accepted jurisdiction over a complaint of tort committed in a Middle East territory, whose parties had no connection with the UK. The dispute was resolved within the framework of English tort law.

Although this case has little to do with the natural environment, it nonetheless has obvious common ground with the context of our subject

<sup>39</sup> See *Hunter v Canary Wharf Ltd* [1997] AC 655 (per Lord Goff).

<sup>40</sup> See *Dicey, Morris and Collins on Conflict of Laws* (Sweet and Maxwell 1993) 257

<sup>41</sup> [1999] CLC 31.

matter, namely, trans-national civil litigation in times of conflict, when that conflict imposes insurmountable barriers to access to justice.

By way of elaboration, Mance J. interpreted the law as set out accurately in the following extract from *Dicey and Morris on the Conflict of Laws* (12<sup>th</sup> ed), r 203:

'(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both:

- (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and
- (b) actionable according to the law of the foreign country where it was done.

(2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.'<sup>42</sup>

The state-owned defendants argued that under Iraqi law the airline may not have committed an actionable tort (by virtue of public authority immunity). If so, that would defeat r. 203(1) and potentially nullify any chance of High Court jurisdiction. Alternatively, it was submitted that English law was 'ousted' by 203(2) by virtue of its not having a significant enough relationship with the site of the tort and the parties. Mance J. agreed with the claimants that the circumstances were exceptional (they had much to do with Iraq's invasion of Kuwait and the difficulties for national civil justice procedures arising from that). Thus the claim was justiciable on the basis of English common law, notwithstanding that the parties had no connection with England and that the tort was committed on foreign soil.

To reiterate, the *Kuwait* case has nothing specifically to do with environmental justice, and the tort at issue was not that of nuisance, which is central to the case studies introduced in Chapter Three. This is important, for any Israeli party sued in nuisance in England under this authority will

<sup>42</sup> *Ibid* 36.



strenuously seek to distinguish it. One possible argument open to an Israeli defendant is that there is insufficient common ground in the definition of nuisance across the triumvirate of Palestine, Israel, and England for r 203 to apply, but that is difficult to argue.

It is indeed true that Palestinian lawyers we spoke with were of the opinion that British Mandate common law has been entirely superseded in Palestine by the Jordanian rule (we are not aware of this having been tested before the courts). Nonetheless, Jordanian law is in substance (if not form, for it is codified) arguably similar. And this issue simply does not arise in relation to the Israeli side, for the law of nuisance in Israel and England are for practical purposes identical.

## 4.2 APPLYING THE SHELL (NIGERIA) NUISANCE CASE

Moving more specifically towards extra-territorial litigation of nuisance law, a Palestinian claimant could draw encouragement from a current example of English common law nuisance litigation of an extra-territorial character, namely, *Re Bomu-Bonny Oil Pipeline Litigation*.<sup>43</sup> Here many thousands of Nigerian claimants sued the Shell Petroleum Development Company of Nigeria Ltd. The defendant was a wholly owned foreign subsidiary of a foreign parent company, being held to account in England in respect of wrongs on foreign soil effecting foreign victims. What is particularly significant is that the claimant did not ultimately argue in the case for jurisdiction to be based on the defendant having a significant presence in the UK.

The case is thus in principle distinguishable from other litigation of 'oil nuisance' affecting Shell. For example, it is different from the ruling of a Dutch court in 2013 in respect of Shell Nigeria's liability for oil pollution in Nigeria affecting a farmer, where some significance was attached to the fact that the company was a wholly owned subsidiary of a Dutch parent company. It is more similar to the *Kuwait* case regarding conversion of aircraft - there is nothing except a loosely common tortious framework 'uniting' the court and the parties, and of course, crucially, a cross national commitment to rule of law (by ensuring that domestic barriers to justice are overcome).

<sup>43</sup> [2014] EWHC 958.

*Re Bomu-Bonny* can also be contrasted with the US Supreme Court decision in *Kiobel v Royal Dutch Petroleum Company*, where the Supreme Court Justices (by majority) refused to accept that allegations of Shell's overseas torts were actionable in the US on the basis of the Alien Torts Statute.<sup>44</sup> Crucially, the court applied a presumption against extraterritoriality that does not exist, or at least not to the same extent, under English law.

Nevertheless, we urge caution. It is suggested that the English courts will take care to ensure that the English common law and the supporting court infrastructure is not a forum in which claimants can easily 'shop' for a favourable litigation host. It is almost inconceivable that the Israeli party would submit to the jurisdiction of the English High Court, and there are plenty of opportunities for distinguishing *Kuwait* and *Re Bomu-Bonny* above from any of those in Palestine.<sup>45</sup> And in cases involving disputes over land (applicable to private nuisance) it is noteworthy that local jurisdiction is strongly deemed the natural forum.<sup>46</sup>

What is essential is that the English court is presented with a private claim in nuisance, the motive for which is a *private* remedy, in the face of insurmountable local obstacles. The High Court can be expected to have considerable sympathy for a genuine private claim (all case studies in Chapter Three can, we believe, sustain one) that would otherwise have been litigated according to *lex loci delicti* in Palestine or Israel but for the exceptional inconvenience of the local fora. (This may or may not be tantamount to a *forum necessitatis* argument accepted in some European legal systems.) It will *not* be sympathetic to a private claim the principal motivation for which is political (e.g. naming and shaming the Israeli occupation). Of course, the distinction is quite subtle, but the English courts will be alive to it and much will turn on this issue of fidelity to *private* concerns.

<sup>44</sup> 133 S.Ct. 1659 (2013) (Decided April 17 2013.)

<sup>45</sup> Although Shell's presence in the UK, through a subsidiary, was not ultimately decisive, we understand from counsel that it was used to negotiate behind the scenes a voluntary subjection of the foreign subsidiary to UK jurisdiction.

<sup>46</sup> Indeed, the presumption is strongest in disputes over land, where the 'foreign land' rule will apply. Private nuisance is normally defined as a tort to land (although that does not apply to public nuisance). The significant is that land does not travel for purposes of conflict of law - *lex loci delicti* is a strong, and perhaps even irrebuttable, presumption in this context (see *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1979] AC 508, 537 (per Lord Wilberforce)).

### 4.3 ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Another possible way of invoking English High Court jurisdiction is through the UK Human Rights Act 1998, which gives effect to the right to a fair hearing under Article 6 of the European Convention on Human Rights (ECHR). In the toxic tort (asbestos related) case of *Lubbe v. Cape Plc*,<sup>47</sup> the possibility of a foreign claimant having access to justice in this way was raised, albeit not decided. Since then the ECHR Strasbourg Court has itself suggested that Article 6 might apply to extraterritorial cases. Specifically, in *Markovic v. Italy*,<sup>48</sup> the Strasbourg Court reviewed the refusal of Italian courts to assume jurisdiction over the claims of victims of NATO bombings in Yugoslavia that Italy owed them damages. The Court stated that if the law of the place where the harm occurred offers a right to bring a claim, then Article 6 applies.

It is unclear that *Markovic* will be of simple application in relation to Israel's wrongs under consideration here. The difficulty is not that the claimant must show that the legal system where the harm took place hampers their access to justice, for example through complicated procedural requirements, high costs, or the unavailability of representation; that is not the problem in the context of Palestine and Israel. Rather, the difficulty is that one could distinguish *Markovic* on the basis that Yugoslavia and Italy are parties to the European Convention, whereas Israel and Palestine are not.

That is why the common law of conflict of laws and access to justice would appear more promising, because it has inherent flexibility lacking on a positive (written) human rights document. Even so, the common law and statute can be pleaded alongside one another (as in *Lubbe v Cape Plc*), and thus each have pertinence for purposes of our study.

<sup>47</sup> [2000] UKHL 41

<sup>48</sup> [2006] Case 1398/03, ECHR.

## 5

### ENVIRONMENTAL RESPONSIBILITIES OF THE OCCUPYING POWER UNDER INTERNATIONAL LAW

This Chapter will focus on the environmental responsibilities of occupying powers under international law. In particular, the opening section will discuss relevant norms under the law of belligerent occupation, while section 5.2 will discuss relevant norms of international environmental law. Sections 5.3 and 5.4 deal with the specific issues of waste and the marine environment (respectively).

#### 5.1 ENVIRONMENTAL RESPONSIBILITIES OF AN OCCUPYING POWER DURING A BELLIGERENT OCCUPATION

States have a number of environmental responsibilities under the law of belligerent occupation. This latter expression is understood as a branch of *jus in bello* (also called international humanitarian law or international law of armed conflicts), and is governed by a subset of norms of *jus in bello* regulating specifically the conduct of an occupying power in relation to the territories it occupies, its population, and its environment.<sup>49</sup>

Generally speaking, the concern of the law of belligerent occupation is focused on the safety and health of civilian populations, their property, and means of subsistence. However, specific protection for the natural environment has more recently become an important concern of the international community, and it is now enshrined in a number of treaty provisions, if not already part of customary law.

Of particular importance in the context of this report is the notion of prolonged occupation. Given that the Israeli occupation has been ongoing for over four decades, the naturally transitory nature of occupations is

<sup>49</sup> This distinction is explicitly advocated by Yoram Dinstein, and we will follow it as it provides analytical clarity, see Y Dinstein *The International Law of Belligerent Occupation* (Cambridge University Press 2009)

all but an inadequate starting point for analysis. As recognized by at least some doctrine<sup>50</sup> and as affirmed by the Israeli Supreme Court in a number of occasions,<sup>51</sup> the long duration of an occupation provides for a departure from some of the norms governing occupations under *jus in bello*, and particularly those regarding the prohibition to legislate. This is due to the evolution of social and economic needs in territories occupied over long periods of time, which may require the introduction of novel legislation (still however in harmony with the general obligations imposed on occupying powers as regards resource use, benefits to local population etc.). A state of prolonged occupation on the other hand may also strengthen arguments for a broader interpretation and application of those provisions of the law of belligerent occupation relating to the environment; indeed those provisions may acquire increasing force the longer an occupation is maintained.

In particular, while each individual instance of environmental degradation in and of itself may fail to cross the thresholds of wide-spread, long-term, and severe damage, it might be argued that from the broader perspective of, for example, the ecosystem approach and taking into consideration then notion of cumulative effects,<sup>52</sup> the environmental effects of a prolonged occupation may cross such thresholds.

The main relevant sources are customary law; the 1907 Hague regulations<sup>53</sup> and particularly Section III "Military Authority over the Territory of The Hostile State"; the 1949 Geneva Convention (IV);<sup>54</sup> and its 1977 Additional Protocol I (AP I).<sup>55</sup>

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50 Dinstein, *ibid.*

51 A Roberts 'Prolonged Military Occupation: The Israeli Occupied Territories 1967-1988' in E Playfair (ed) *International Law and the Administration of Occupied Territories* (OUP 1992) and Dinstein (n. 46) at 116-131

52 Cumulative effects are changes to ecosystems determined by a combination of past, present, and future actions or events. From this perspective, any action or event interacts with the cumulative context within which it occurs.

53 Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 187 CTS 227 (1907)

54 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UN Treaty Series 287 (1949)

55 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UN Treaty Series 3 (1977)

Israel has not signed Protocol I, so it is not, in principle, bound by it. However, the relevant provisions of Additional Protocol I, namely articles 35 and 55, are increasingly considered to be part of customary law.<sup>56</sup> A brief review of select relevant provisions follows.

### 5.1.1 Protection of Objects Indispensable to the Survival of Civilian Population

Article 54 of the Additional Protocol I states that belligerent states must protect objects indispensable to the survival of the civilian population. This includes ecosystems and their goods and services which are of paramount importance for the subsistence of civilian populations, including "foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works". The prohibition of attacking, destroying, removing, or otherwise rendering useless such things applies regardless of motive, and may reasonably include attacks and acts of destruction perpetrated by private militias or civilians if acting under colour of law.

### 5.1.2 Protection of the Natural Environment

Article 35(3) of the Additional Protocol I provides the "basic rules" and at paragraph 3 states that "it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment". However, it is article 55 which offers the most useful provision as regards the protection of the environment in relation to a state of belligerent occupation. Article 55 is entirely dedicated to the protection of the natural environment against widespread, long-term, and severe damage.

During armed conflict the general principles which must govern the assessment of whether a state is liable under articles 35 and 55 for the environmental destruction consequence of military operations are the

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56 In this sense H Almond 'Strategies for Protecting the Environment: the Process of Coercion' (1992) 23 *University of Toledo Law Review* 295, 340; S Gupta 'Iraq's Environmental Warfare in the Persian Gulf' (1993) 6 *Georgetown International Law Review* 252, 260; S Oeter 'Methods and Means of Combat', in D Fleck (ed) *Oxford Handbook of International Humanitarian Law* (OUP 2008), 133-134. For contrary opinions see e.g. Y Dinstein 'Protection of the Environment in International Armed Conflict' (2001) 5 *Max Planck Yearbook of United Nations Law*, 523, 534-535



principle of necessity<sup>57</sup> and the principle of proportionality.<sup>58</sup> The ICJ in its *Legality of Nuclear Weapons* case found that while international environmental legal obligations cannot be understood as limiting the right of self-defence of a state, they require the consideration of the environment as an important element in the assessment of what is necessary and proportionate.<sup>59</sup>

The concept of natural environment in article 55 should be understood in its widest sense of “the biological environment in which a population is living”.<sup>60</sup>

The protection of the natural environment, under article 55(1) importantly “includes” methods and means of warfare. Through this inclusion implicit reference is arguably made to a broader range of actions and activities (within which methods and means of warfare are included as only one, if primary, part) which “are intended or may be expected to cause” such damages to the environment, particularly as it would prejudice the “health or survival of the population”.<sup>61</sup>

The expression “health” means that the protection of the natural environment under article 55(1) is aimed at a broader set of effects than those that only put at risk the survival of the population, and may relate to e.g. air pollution and pollution of water sources or wells which may lead to chronic or acute illnesses, genetic malformation in fetuses etc.<sup>62</sup>

In times of prolonged belligerent occupation, such as the Israeli occupation

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57 As implicit in Article 52 of Additional Protocol I

58 J Henckaerts and L Doswald-Beck Customary International Humanitarian Law. Volume I: Rules (ICRC and Cambridge University Press 2009), Rule 14; Additional Protocol I, Article 51(5)(b)

59 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, at 242, para 30

60 ICRC Commentary at 661

61 Article 55(1), Additional Protocol I. However Dinstein, citing Verwey, maintains that “it has never been seriously contended that the protection of the natural environment under Article 55 (1) breaks any new ground as compared to Article 35(3)”, Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004) at 182

62 International Committee of the Red Cross *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) (ICRC Commentary) at 661

of the oPt, such acts and activities not directly linked to the use of methods and means of warfare, and perhaps linked to the systematic destruction and/or degradation of the environment in ways which may lead to widespread, long-term, and severe damages, may reasonably acquire a particular relevance.

Article 55(2), finally, establishes a prohibition of reprisals aimed at causing damage to the natural environment.

### 5.1.3 ‘Wide-Spread, Long-Term and Severe’

Some words are needed in relation to the apparently stringent thresholds mentioned in both article 35(3) and 55(1). There is also lack of clarity as to the specific meaning of each term. Does long-term mean a damage whose effects last for weeks, months, years, or decades? The general understanding of long-term that emerges from the drafting discussions seem to be that long-term must at least imply a decade. However, it was recognized that it would be “impossible to say with certainty what period of time might be involved”.<sup>63</sup>

Furthermore, how stringent is the severe threshold? What is the necessary spatial scope of damage for it to be considered widespread?

A recent UNEP report has suggested that an important reference point should be the definition of these terms contained in the 1976 Environmental Modification (ENMOD) Convention.<sup>64</sup> ENMOD defines widespread as “encompassing an area of several hundred square kilometres”; long-term as “lasting for a period of months, or approximately a season”; and severe as “involving serious or significant disruption or harm to human life, natural and economic resources or other assets”.<sup>65</sup>

The principle of cumulative effects can provide some further interpretative

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63 ICRC Commentary, at 417

64 United Nations Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (ENMOD), 10 December 1976, UN Doc. A/Res./31/72

65 ENMOD Convention, Annex, “Understandings regarding the Convention”. It must be noted the Annex explicitly states that this interpretation is intended exclusively for the ENMOD Convention.

assistance in relation to these terms. Cumulative effects are changes to ecosystems determined by a combination of past, present, and future actions or events, so that while each individual instance, seen in isolation, may not pose risk of significant damage, once assessed in a cumulative context it may trigger substantial harm, acting as the proverbial last drop. Moreover, cumulative effects interact with the general obligation of precaution in multiple ways.<sup>66</sup>

#### 5.1.4 Conclusions on law of belligerent occupation

In general the rules and principles protecting the environment under the law of belligerent occupation are not considered very effective, either because they provide too stringent and imprecise thresholds (for example a damage to the environment under article 55 AP I must be at once wide-spread, long-term, and severe), or because they offer only indirect protection to the environment (while protecting directly other goods such as private property of individuals and states and the health of human populations).<sup>67</sup>

It is in this respect that the interaction between the law of belligerent occupation as it relates to the protection of the natural environment and general international environmental law becomes important, in at least two respects. One is interpretative. General international environmental law can provide in fact interpretative assistance in relation to incomplete or insufficiently clear provisions of the law of belligerent occupation.<sup>68</sup> The principle of cumulative effects for example can provide significant interpretative assistance in relation to the formulation “wide-spread, long-term and severe”, as we have seen.

The other, as we shall see in section 5.2, has to do with the fact that general international environmental law continues to be applicable during a belligerent occupation.

<sup>66</sup> For one example of how cumulative effects and the precautionary principle may interact see Bénédicte Sage 'Precautionary Coastal States' Jurisdiction' (2006) 37 *Ocean Development and International Law*, 359, particularly at 370

<sup>67</sup> UNEP *Protecting the Environment during Armed Conflict. An Inventory and Analysis of International Law* (Nairobi: United Nations Environment Programme 2009)

<sup>68</sup> UNEP cit.

## 5.2 ENVIRONMENTAL RESPONSIBILITIES UNDER INTERNATIONAL ENVIRONMENTAL LAW

This section will discuss a number of relevant environmental responsibilities that may be said to attach to Israel under general provisions of international environmental law. Despite the formal state of occupation and periods of open armed conflict, it is generally recognized that the relevant rules applicable in these circumstances can be no longer sought only in the *lex specialis* regime of *jus in bello*.<sup>69</sup> In particular, many rules and principles of international environmental law (whether customary or arising from treaties) continue to be applicable in times of armed conflict and belligerent occupation (to the extent that there is no specific stipulation to the contrary), as recognized by the ICJ,<sup>70</sup> the International Law Commission<sup>71</sup> and the most recent doctrine.<sup>72</sup>

The ICJ in particular has clearly stated that the question is not whether or not international environmental law is applicable in times of war, but rather the extent to which it may constraint the activities of belligerents as regards the environment.<sup>73</sup>

For the purposes of this report three themes will be touched upon: the protection of the environment under belligerent occupation; transboundary environmental harm; and illegal disposal of waste.

### 5.2.1 Protection of the Environment Under Belligerent Occupation

Principle 23 of the Rio Declaration states that “the environment and natural

<sup>69</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136; International Law Commission, *Draft Articles on the Effects of Armed Conflicts on Treaties*, 2011 UN Doc. A/66/10; see also R Rayfuse and Sjøsted B Summary Report of the Workshop On Protection Of The Environment In Relation To Armed Conflict Faculty of Law, Lund University 16 - 17 February 2012

<sup>70</sup> *Legality of Nuclear Weapons*, especially at 241-242

<sup>71</sup> ILC *Draft Articles on Treaties* (n. 20), especially article 3

<sup>72</sup> See e.g. P Birnie, A Boyle and C Redgewell *International Law and the Environment* (3<sup>rd</sup> edition, OUP 2011) at 207; UNEP cit.

<sup>73</sup> *Legality of Nuclear Weapons*, at 242 para 30

resources of people under oppression, domination and occupation shall be protected".<sup>74</sup> The negotiating history of this principle shows that its genesis was informed first and foremost by the situation in the occupied Palestinian territories.<sup>75</sup> What is most interesting is the fact that principle 23 provides a link for the application of general principles of international environmental law (as laid out in the Rio Declaration) during belligerent occupation, hence reinforcing the idea that international environmental law is applicable during armed conflict and, particularly, prolonged belligerent occupation.

### 5.2.2 No-Harm Rule

The principle that states must prevent environmental harm caused to the territory of another state by activities under their jurisdiction or control is one of the foundational principles of international environmental law, finding its roots in the ancient Roman legal principle '*sic utere tuo ut alienum non laedas*'.<sup>76</sup> Indeed it is widely accepted as a customary norm of a binding character.<sup>77</sup>

In the specific context of international environmental law the principle is also known as the "Trail Smelter Principle", as its first formulation in a transboundary environmental context related to a case of industrial pollution caused by a smelter located in Trail, Canada.<sup>78</sup>

<sup>74</sup> Report of the United Nations Conference on Environment And Development (Rio de Janeiro, 3-14 June 1992), Annex I 'Rio Declaration On Environment And Development', UN Doc. A/CONF.151/26 (vol. I) (1992),

<sup>75</sup> It was in fact "promoted by the G-77 and China at the behest of the observer delegation of Palestine", J Kovar 'A Short Guide to the Rio Declaration' (1993) 4 Colorado Journal of International Environmental Law and Policy, 119, at 137

<sup>76</sup> meaning: "Use your own property in such a way that you do not injure other people's."

<sup>77</sup> D Wirth 'The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?' (1995) 29 Georgia Law Review 599, at 620; P Sands *Principles of International Environmental Law* (OUP 2003) at 240; Birnie, Boyle and Redgwell (above) at 138; O McIntyre 'The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources' (2006) 46 Natural Resources Journal, 157 at 169

<sup>78</sup> *Trail Smelter Arbitration* (United States vs Canada) (1938/1941) 3 R.I.A.A. 1905; see RM Bratspies and RA Miller (eds) *Transboundary Harm In International Law: Lessons From The Trail Smelter Arbitration* (New York: Cambridge University Press 2006)

The principle has been reaffirmed by the ICJ in the *Corfu Channel* case, where the Court explicitly recognized "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States";<sup>79</sup> again by the ICJ in the *Legality of Nuclear Weapons* Advisory Opinion, where the principle was recognized as being "part of the corpus of international law relating to the environment";<sup>80</sup> it has been invoked by the arbitral tribunal in the *Lake Lanoux* case;<sup>81</sup> it has been reiterated in a number of binding and non-binding legal instruments central to international environmental law;<sup>82</sup> and it has been codified by the International Law Commission which has adopted in 2001 draft articles on the prevention of transboundary harm from hazardous activities.<sup>83</sup>

The principle, as formulated in the text of the Rio Declaration (principle 2), establishes that:

States have [...] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>84</sup>

This principle must be also read in connection with Rio principle 23, discussed in the previous section. The next sections will discuss in brief some of the elements that must be in place for state responsibility to be triggered and in particular the concepts of wrongful act, of significant harm, and of jurisdiction and control.

<sup>79</sup> *Corfu Channel* case, Judgment of April 9th, 1949 : ICJ Reports 1949, p. 4, especially at 22

<sup>80</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para 29 at 241

<sup>81</sup> *Lake Lanoux Arbitration* (France V. Spain) (1957) 12 R.I.A.A. 281

<sup>82</sup> United Nations Convention on the Law of the Sea, 21 ILM 1261 (1982) (UNCLOS); Convention on Biological Diversity, 31 ILM 818 (1992), article 3; see also United Nations Survey of International Law, UN Doc. A/CN.4/1/Rev.1 (1949) at 34; Stockholm Declaration on the Human Environment, UN Doc. A/Conf.48/14/Rev. 1 (1973), principle 21; Charter of Economic Rights and Duties of States, Adopted by UNGA Resolution 3281 (XXIX) UN Doc. A/RES/29/3281 (1974), article 30; Rio Declaration (n. 10), principle 2;

<sup>83</sup> ILC 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities' in *Report of the International Law Commission*, Fifty-third session, 2001, UN Doc. A/56/10

<sup>84</sup> Rio Declaration principle 2





### 5.2.3 Wrongful Act

Generally speaking, states have the right to carry out any activity within their sovereign territory, based on the principle of sovereignty. However, such principle is limited by the rights of other states not to have injury inflicted upon their territory from activities under the jurisdiction or control of another state. For a state to be held responsible, it must have committed a wrongful act, that is, an act which is a breach of an international obligation binding on the state.

A wrongful act may be an action or an omission, or a combination of both. Under international law states have a “due diligence” obligation not to cause foreseeable harm to other states. Breach of a due diligence obligation occurs then when a state knows or ought to know that an activity would cause harm to the environment of another state. In cases of continuous pollution there is a strong presumption that the source state is likely to know.<sup>85</sup>

A state is also considered to commit a wrongful act when it fails to regulate

<sup>85</sup> G Handl 'Liability as an Obligation Established as a Primary Rule' (1985) 16 Netherlands Yearbook of International Law, 49, at 58-59.



or prevent significant transboundary environmental harm in cases where it would protect its own citizens.<sup>86</sup> Considering that Israel has relocated some of its most noxious industries from Israel to the oPt<sup>87</sup> (including the Geshuri industrial facility mentioned in Chapter 3 of this report), it seems *prima facie* evident that the relocation in itself constitutes a wrongful act. Israel, in the particular case of the Geshuri facility, has through its courts in fact protected its own citizens by prohibiting the activity from continuing in its territory (as it was originally located in Kfar Saba in Israel), in light of the harm that was being inflicted to its inhabitants.<sup>88</sup> Yet the same level of prevention, reduction, and control of polluting emissions has not been put in place with regards to the new location of the facility in Area C of the oPt. Moreover, to reiterate, the Geshuri industrial facility *does not* operate when the winds blow in the direction of Israel (for about one month out of 12 months every year). Again, this provides *prima facie* evidence of a type of discrimination relevant for establishing whether Israel has committed, and is committing, a wrongful act which may trigger state responsibility.

<sup>86</sup> Kiss and Shelton cit. at 1131

<sup>87</sup> J Isaac 'The Environmental Impact of the Israeli Occupation' Information Brief N. 27, 14 March 2000, Palestine Center

<sup>88</sup> Isaac *ibid.*

Additionally, the wrongfulness of Israel's conduct in the matter can be also established in relation to its breach of applicable norms of IHL, in particular those relating to the protection of the environment of the occupied territories (see previous section), although that would depend on the latitude of interpretation as regards article 55(1), and specifically whether the type of activity can be subsumed under it, and whether the damage can be considered "wide-spread, long-term and severe". These thresholds are more stringent than "significant", as we shall see in the next section, but not *prima facie* insurmountable.

Finally, this conduct may constitute a wrongful act also in relation to the Interim Agreement of 1995 (Oslo II) and in particular its Protocol Concerning Civil Affairs, article 12(B)(3), at least from the time of entry into force of that agreement. Article 12(B)(3) in fact states that "[b]oth sides will strive to utilize and exploit the natural resources, pursuant to their own environmental and developmental policies, in a manner which shall prevent damage to the environment, and shall take all necessary measures to ensure that activities in their respective areas do not cause damage to the environment of the other side".<sup>89</sup>

It is useful to note how while the Interim Agreements of 1993 and 1995 (Oslo I and Oslo II) were meant to have a validity limited to five years in light of further negotiations meant to lead to a permanent status agreement, to this day they are still, *de facto*, in force.

#### 5.2.4 Significant Harm

According to the International Law Commission, whether harm is significant requires a case-by-case determination. However, harm is generally understood to be significant if it is more than detectable, and over and above what can be reasonably expected as tolerable given technical and social circumstances. "Significant" is on the other hand less than serious or substantial harm. Moreover, there must be "real detrimental effects on human health, industry, property, environment or agriculture".<sup>90</sup> As regards

<sup>89</sup> Protocol Concerning Civil Affairs 36 ILM 603 (1997), art. 12(B)(3)

<sup>90</sup> Report of the International Law Commission, Fifty-third session, 2001, UN Doc. A/56/10/ at 388

the environment, the harm includes "loss or damage by impairment of the environment, the costs of reasonable measures of reinstatement of the environment, including natural resources, and the costs of reasonable response measures".<sup>91</sup> The term "environment", importantly, must be understood to include air, water, soil, fauna and flora and the interaction between the same factors, and the characteristic aspects of the landscape.<sup>92</sup> Moreover, as the ICJ has recognized, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".<sup>93</sup>

#### 5.2.5 Activities Under 'Jurisdiction' or 'Control'

Considering, however, that a number of industrial or other polluting facilities are physically located in the West Bank (whether in Area C or in illegal settlements), the question of jurisdiction and control must be specifically addressed. States in general are responsible for activities under their jurisdiction or control. Territorial sovereignty is "conclusive evidence of jurisdiction".<sup>94</sup> However, the same obligations (of prevention, reduction, and control of environmental harm) apply in cases of *de facto* jurisdiction. *De facto* jurisdiction, premised on effective and factual control, exists in the case of an occupation, as recognized by the International Law Commission<sup>95</sup> and by the ICJ in the *Legal Consequences Advisory Opinion*, where the Court stated that "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of a State liability for acts affecting other States".<sup>96</sup>

Additionally, Israel, according to the Interim Agreement of 1995 (Oslo II),

<sup>91</sup> Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, Report of the International Law Commission, Fifty-eighth session, 2006, UN Doc. A/61/10, Principle 2(1)(iii-v))

<sup>92</sup> *ibid.* (Principle 2(b))

<sup>93</sup> *Legality of Nuclear Weapons* at 241, para 29

<sup>94</sup> I Brownlie *Principles of Public International Law* (7<sup>th</sup> edition, OUP 2008) at 283

<sup>95</sup> *Report cit.* at 383

<sup>96</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ Reports 1971, p.16, at para 118

retained *de jure* jurisdiction over Area C of the West Bank and *in personam* jurisdiction over Israeli citizens resident in the territory (including Area A and Area B).

### 5.2.6 Liability and Responsibility

While State responsibility arises from a wrongful act, international liability is the consequence of harm to the environment of another state arising from activities which, while hazardous, are lawful. This is the case for many energy-intensive activities which are central to the functioning of modern societies, and yet are inherently hazardous insofar as they may cause, as a result of regular operations, injurious consequences to the environment of third states.

The International Law Commission has adopted draft articles on this theme.<sup>97</sup> The principles of international liability in relation to injurious consequences of otherwise lawful activities focus primarily on the operators. However, they impose a number of obligations on states, as regards adoption of domestic laws; of notifications to other states potentially affected by the activity; of adoption of appropriate response measures; and of provisions of transboundary domestic remedies. Where a state fails to comply with its obligations under the norms on liability, there is an automatic shift to state responsibility in light of the breach of obligation which constitutes a wrongful act under the law of state responsibility. Considering that it is the hazardous nature of an activity which determines whether a state is under the obligations just mentioned, it is important to underline that the notion of “hazardous” is quite wide, and includes any activity which involves a risk of causing significant harm.

### 5.2.7 Conclusions

Even if a *prima facie* case can be made, enforcement is problematic (see section 1.4 of the report: Caveat), given the voluntary nature of the jurisdiction of the ICJ, or of alternative international dispute resolution

<sup>97</sup> *Draft Report of the International Law Commission on the Work of its Fifty-Eight Session*, Chapter V: International Liability for Injurious Acts Arising out of Acts not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities), UN Doc. A/7CN.4/L.693/Add. 1, June 9 2006

mechanisms such as arbitral tribunals. This is the attraction of successfully establishing compulsory extraterritorial jurisdiction (Chapters 3 and 4), where possible.

## 5.3 DUMPING OF HAZARDOUS WASTE

Two of our field visits took us to dump sites in which alleged illegal dumping took place (for details see Chapter 3). The relevant international legal framework to address waste dumping is the Basel Convention, to which Israel is a party.

### 5.3.1 Overview of Relevant Rules: The Basel Convention

The Basel Convention regulates the transboundary movement of hazardous waste.<sup>98</sup> Waste is defined as hazardous if it falls under any of the categories specified in Annex I to the Convention (e.g. medical waste, waste from wood preserving chemicals, inks, dyes, pigments, and paints, residues from industrial waste disposal etc.), and if it possesses any one of the characteristics listed in Annex III of the Convention (e.g. explosive, flammable, poisonous etc.).<sup>99</sup> Additionally, waste is considered hazardous if it is so defined by the domestic legislation of the party of export, import, or transit.<sup>100</sup>

As Israel is a party to the Convention, it is bound by its provisions. Moreover, as the Convention obligates state parties to control the transboundary movement of waste also with regards to non-parties, its provisions are relevant in the context of the relations between Israel (a party) and Palestine (a non-party) as article 4(5) establishes that parties “shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party”.<sup>101</sup>

This rule does not apply, however, if the states in questions are parties

<sup>98</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 28 ILM 657 (1989)

<sup>99</sup> Basel Convention, Art. 1(a)

<sup>100</sup> Basel Convention, Art. 1(b)

<sup>101</sup> Basel Convention, Art. 4(5)



to an equivalent bilateral or multilateral agreement which establishes a management framework for transboundary movements of waste that is at least as environmentally sound as the one set out in the Convention (article 11(1)). However, article 4(9)(a) establishes that transboundary movements of hazardous waste shall be allowed *only* if the “State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner”.

The parties to the Convention have also negotiated a Protocol on liability and compensation,<sup>102</sup> and have adopted the so-called “Ban Amendment”<sup>103</sup> intended to ban entirely the movement of hazardous waste from European Union and/or OECD countries to developing countries (neither of which however has entered into force). Israel has not ratified the amendment. However, as a matter of policy, it purports to operate in the spirit of the amendment.<sup>104</sup>

In general then it can be argued that no movement of hazardous waste can be permitted from Israel to the oPt. However, even if such movements were allowed, they would need to follow the strict procedure laid out in the Convention. The Basel Convention regulates in fact thoroughly the conditions under which the movement of hazardous waste can be permitted (article 6). In particular, no movement is to be allowed until the state of export has notified the state of import, and the state of import has in writing consented to the reception of the hazardous waste. Only then the state of export can allow the generator or exporter to initiate the transboundary movement.

Any instance of movement of hazardous waste not complying with these

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<sup>102</sup> Protocol On Liability And Compensation For Damage Resulting from Transboundary Movements Of Hazardous Wastes and Their Disposal, UN Doc. UNEP/CHW.1/WG/1/9/2

<sup>103</sup> Ban Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal Geneva, 22 September 1995, UN Doc. UNEP/CHW.3/35

<sup>104</sup> According to what appears on the website of the Israeli Ministry of Environmental Protection presenting information on the Basel Convention, <[http://www.sviva.gov.il/English/env\\_topics/InternationalCooperation/IntlConventions/Pages/BaselConvention.aspx#GovXParagraphTitle6](http://www.sviva.gov.il/English/env_topics/InternationalCooperation/IntlConventions/Pages/BaselConvention.aspx#GovXParagraphTitle6)> accessed on August, 13, 2014

provisions (and others which will not be necessary to explicitly discuss in this report) is “illegal traffic”, and hence “criminal” (article 4). Potentially the Rome Statute could be engaged here, through an argument that illegal traffic causing serious consequences for Palestinians may be a crime against humanity – a universal crime.

### 5.3.1.1 The Meaning of ‘Transboundary’ and of “Area under National Jurisdiction” in the Context of Occupied Palestinian Territories

Given the particular circumstances applying to the oPt, the expressions “transboundary movement” and “area under national jurisdiction” need to be clarified. Transboundary movement, according to the Basel Convention is “any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State”.<sup>105</sup> Furthermore, “area under the national jurisdiction” of a state means “any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment”.<sup>106</sup>

The Interim Accords (Oslo II) established three different jurisdictional areas for the oPt: Area A, B, and C. Area C, which comprises over 60% of the oPt, is under Israel’s jurisdiction.

A question may arise then with regards to whether or not a *transboundary* movement takes place when waste is transported, e.g., from a settlement (which is fully under the jurisdiction and control of Israel) to a dump site located in Area C, also under the jurisdiction and control of Israel.

However, it would be highly unreasonable *not* to consider such movement and dumping of waste as transboundary, as Area C remains Palestinian territory (even if illegally occupied), albeit under the Interim Agreement of 1995 (II) it has been placed under the temporary jurisdiction of Israel’s civil administration.

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<sup>105</sup> Basel Convention, Art. 2(3)

<sup>106</sup> Basel Convention, Art. 2(9)

It must be further noted how Israel's responsibility arising from their status as occupying power under the rules of belligerent occupation poses, if anything, a more *stringent* set of requirements in relation to the control of such (transboundary) movements of waste (if not immediately in relation to environmental obligations, then in relation to obligations to protect the health and well-being of the dependent population) which, as we shall see, are also regulated in accordance with the Interim Agreement of 1995 (II) and domestic Israeli legislation.

#### 5.3.1.2 Jurisdiction over Persons

Furthermore, Israel has jurisdiction over all Israeli natural and legal persons. In this respect, article 4(7)(a) states that parties shall "prohibit all persons under its national jurisdiction from transporting or disposing of hazardous wastes or other wastes unless such persons are authorized or allowed to perform such types of operations". This provision is then relevant in relation to Israeli Settlements and the Israeli military, both of which have been mentioned as the alleged sources of illegal dumping in the dump sites we visited.

#### 5.3.1.3 Interim Agreement of 1995 (Oslo II)

The Interim Accord (Oslo II) also addresses the topic of waste. Article 12(B) (10) of Annex III of the agreement (besides the question of its continuing relevance despite its originally limited temporal scope) states that "pending the establishment of appropriate alternative sites by the Palestinian side, disposal of chemical and radioactive wastes will be only to the authorized sites in Israel, in compliance with existing procedures in these sites", in recognition of the inability of the Palestinian National Authority (PNA) to ensure sound management of waste due to its objective material, technical, and institutional deficiencies. This provides additional arguments for a strict prohibition of the dumping of Israeli waste (including that produced by illegal settlements) in the oPt.

#### 5.3.1.4 Domestic Israeli Legislation

The Basel Convention binds Israel in terms of responsibility in case of breach of one or more of its provisions. Its provisions are, however, also

domestically justiciable, given Israel's implementation of the Convention by means of the Hazardous Substances Regulations (Import and Export of Hazardous Substances Waste), 5754-1994 (the Regulations). The Regulations prohibit anyone from exporting hazardous substances waste from Israel unless the exporter has obtained a permit, and in accordance with the conditions therein specified.<sup>107</sup> Moreover, the export must be carried out only where the receiving country, through its competent authorities, has consented in writing to receive into its jurisdiction the hazardous waste.<sup>108</sup>

Importantly, article 2(1) restricts the lawful movement of waste in terms of export to countries that are party to a convention involving the transboundary movement of hazardous substances.<sup>109</sup> As Palestine is not party to the Basel Convention, any such movement is altogether prohibited under the Regulations, essentially replicating the substance of article 4(5) of the Basel Convention.

## 5.4 PROTECTION OF THE MARINE ENVIRONMENT

Palestine is situated on the eastern shoreline of the Mediterranean Sea, in a region called the Levant. The sea ecology is pivotal to the fertility of what is among the most ancient cultivated regions in the world (lending to the broader region the name 'Fertile Crescent'). The Mediterranean is at its deepest in this area (at over 5km). Thus, it is not surprising that it is a habitat to some unique deep water flora and fauna.

The Levant is also of major social and cultural importance, and, with the discovery of gas reserves, increasing economic importance as well. It is therefore surprising that it has for long been overshadowed by an emphasis on the soil, notwithstanding that, in theory, a large minority, perhaps even majority, of Palestinian area is under the sea (in the sense of Palestine's entitlement to 'its' continental shelf).

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<sup>107</sup> The Regulations, Art. 2, Amendment 5768-2008

The Regulations, 108 Art. 2(3)

<sup>109</sup> Art. 2(1); cfr. the definition of "a convention" is provided in art. 1

By way of pertinent historical background, under Ottoman rule, the Levant was primarily used as a trading route. In terms of fishing, the Constantinople regime taxed Palestinians highly on proceeds from the sale of their catch (and consequently the fishing industry did not flourish).<sup>110</sup> This position remained fundamentally unaltered during the British Mandate in Palestine, when Palestinians continued to rely heavily on imports of fish products (having all but ‘forgotten’ the art of fishing).<sup>111</sup> This is notwithstanding a coastline of roughly a hundred miles (from Rafah in the south up to and beyond Haifa further north). On the other hand fishing is today a significant source of subsistence food and income, despite – indeed to a large extent because of – the limitations arising from the occupation and the blockade.

#### 5.4.1. The General Legal Framework

The general international legal framework protecting the marine environment is complex and it includes several different and interacting legal regimes such as the law of the sea (both customary law and treaty law); international environmental law; regional agreements; and bilateral agreements. In this section it will only be possible to provide some general coordinates and to highlight some of the issues involved, particularly as regards the protection of the marine environment in the context of armed conflict and belligerent occupation.

A good starting point for this is Principle 7 of the Stockholm Declaration, which sets out the general frame of reference, and provides that “States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea”.

Although the Stockholm Declaration is a soft law document, a central set of norms with regards to the marine environment are contained in the 1982 UN Convention on the Law of the Sea (UNCLOS). And while Israel is not a party to UNCLOS, its provisions are to a large extent a codification of existing customary

110 E Ray Casto, ‘The Economic Geography of Palestine’ (1937) *Economic Geography* 235, 252.

111 Ibid.

law.<sup>112</sup>

With regards to the protection of the marine environment, the relevant norms are contained in articles 192-196 and 207-212 of UNCLOS. Of particular interest are article 192, which sets out a generic obligation of States “to protect and preserve the marine environment” (a significant formulation to which we will return), and article 194, which outlines the “measures to prevent, reduce and control pollution of the marine environment”. Article 194(1) further establishes the duty of states to take “all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source;” article 194(2) reiterates in the marine context the no-harm rule; and article 194(3), provides a non-exhaustive lists of the measures the state shall take to “minimize to the fullest possible extent” the pollution of the marine environment. The responsibility of states (and related obligations), finally, is specified in article 235, and otherwise governed by the general rules of state responsibility.

The applicability of these provisions is however excluded by article 236 in relation to “any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service”.

Moreover, some doctrine considers the entire framework of the law of the sea to be applicable only in peace time. However, the “most tenable position” seems to be that “the maritime rights and duties States enjoy in peacetime continue to exist, with minor exceptions, during armed conflict”.<sup>113</sup> Article 236 in this respect represents an exception, if perhaps not necessarily a minor one.

At any rate, the protection and preservation of the marine environment

112 UNCLOS’ preamble notes in fact that the Convention represents a “codification and progressive development of the law of the sea”. *Sarei v. Rio Tinto* further notes how, considering the number of ratifications, UNCLOS “appears [to represent] the law of nations”, regardless of which provisions may have been codification and which progressive development at the time of signature, *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d 1116, at 1161 (C.D. Cal. 2002)

113 N Klein *Maritime Security and the Law of the Sea* (OUP 2011) at 259



appears to be a norm of customary international humanitarian law. Rule 44 in the International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law, in fact, states that “methods and means of warfare must be employed with due regard to the protection and preservation of the environment”. While the reference is to the environment in general, there is no reason to exclude the marine environment from this. Additionally, with particular respect to a marine context, the San Remo Manual (which regulates naval warfare) uses similar language;<sup>114</sup> and as Karen Hulme underlines, while the manual does not include the expression “preservation” (which denotes a high standard of protection), “it can be read into it”.<sup>115</sup>

Finally, under the general rules of the law of belligerent occupation and of armed conflict, the marine environment enjoys at least the same level of protection afforded to land environments, so we can simply refer to section 5.1.

Besides the general law of the sea, Israel is party to a number of international agreements relevant for the protection of the marine environment, notably the International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978 (MARPOL);<sup>116</sup> the 1976 Barcelona Convention for Protection against Pollution in the Mediterranean Sea, its Protocol on Integrated Coastal Zone Management and, pursuant to it, the latest Revised Strategy for Sustainable Development in the Mediterranean: Focus on the Interface between Environment and Development (of 2014).

An important regime in this regard is the one established by the Convention on Biological Diversity (CBD), whose objectives are the conservation, sustainable use, and equitable sharing of benefits deriving from biodiversity. The CBD establishes at article 4(2) that the provisions of the Convention apply “[i]n the case of processes and activities, regardless of where their

<sup>114</sup> “Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited”, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, para 44

<sup>115</sup> K Hulme ‘Natural Environment’ in W Wilmshurst and S Breau Perspectives on the ICRC Study on Customary International Humanitarian Law (CUP 2007) at 219

<sup>116</sup> Though Israel has not acceded to Annex IV and V

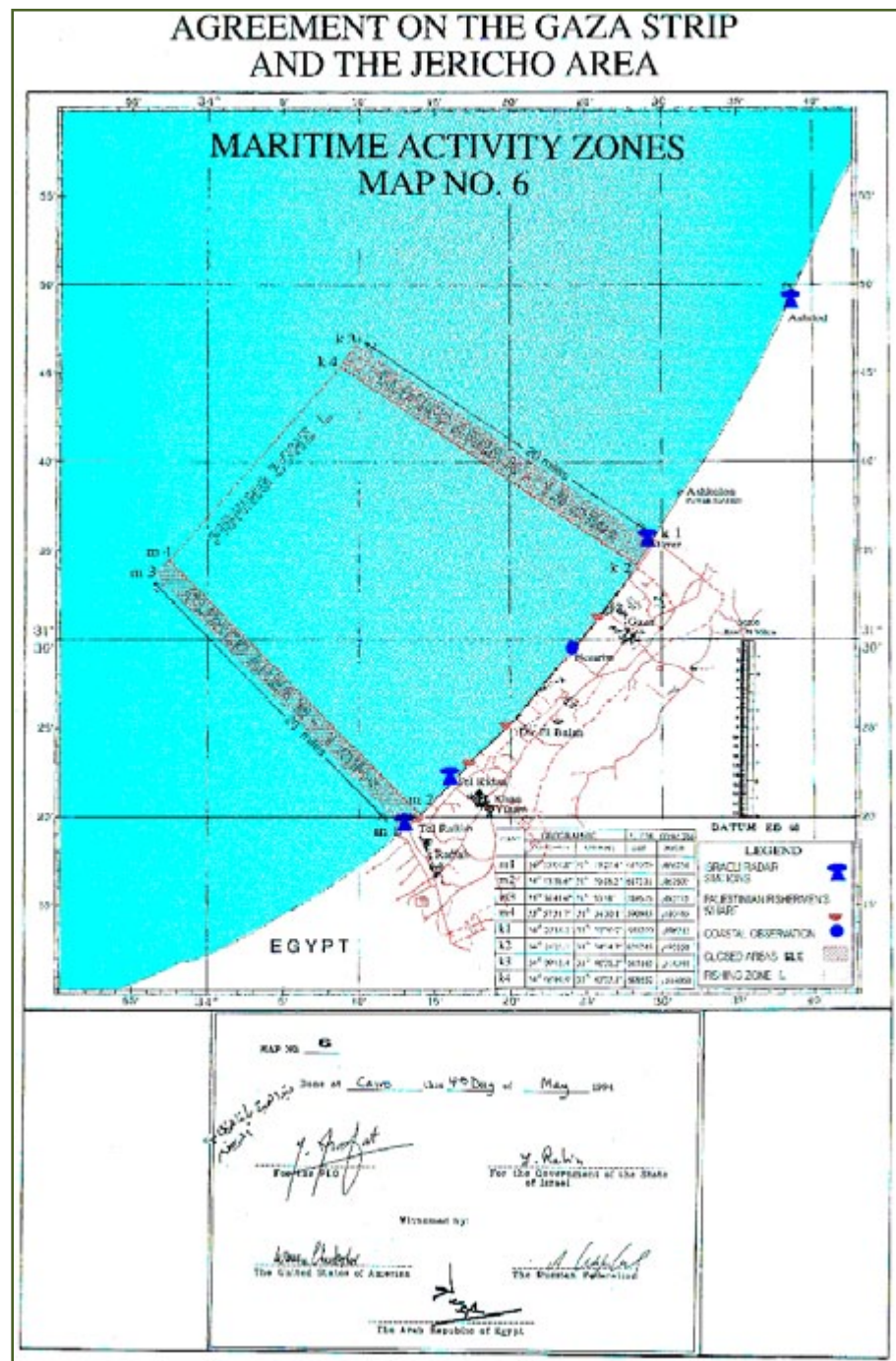
effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction”. The applicability of this provision is also limited in relation to warships and other vessels pursuant to article 236 UNCLOS (hence of limited relevance in relation to the blockade), since article 22(2) of the CBD states that the Convention shall be implemented “consistently with the rights and obligations of States under the law of the sea”. However, as the protection of the environment during armed conflict or belligerent occupation is of increasing importance; and as the applicable framework of rules in the context of armed conflict (and *a fortiori* in a context of prolonged belligerent occupation) can no longer be limited to the special regime of *jus in bello*; there is increasing scope for interpreting the obligations provided for in general international law in a sense which makes them relevant in a context of armed conflict, or even naval warfare. The extent of this relevance, however, remains to be ascertained in the context of more detailed studies.

#### 5.4.2. Regulation of the Maritime Zones and Rights to Marine Resources

UNCLOS provides the basic rules for the regulation of maritime zones. Articles 2 and 3 establish the rules governing the territorial sea, a zone over which a state has full sovereignty. While the status of Palestine as a state has only recently begun to settle, there are a number of bilateral treaties and unilateral acts which have effectively and successively regulated the maritime zones off the coast of Gaza and Palestinians’ access to natural resources, including fishing.

Article XIV of Annex I (Security along Coastline to the Sea of Gaza) of the Interim Agreement of 1995 (II) established so-called maritime activity zones (within which fishing can take place) in the context of a division of the sea of Gaza into three zones: K, L and M. Zone L, extending up to 20 nautical miles (nmi) from the coast of Gaza, is regulated as an area for “fishing, recreation and economic activities”. Zone K and M are a 1.5nmi sliver at the northernmost and southernmost part of the Strip. Zone M and K are closed for all navigation except for the Israeli Navy. Fishing boats are not permitted to leave zone L, but the agreement appears to permit free access for boats within the entire area L. Figure 1 illustrates these maritime zones.<sup>117</sup>

<sup>117</sup> Figure 1 reproduces the map drawn under the negotiation for the Gaza-Jericho Agreement of 1994, subsequently incorporated and otherwise superseded by the Oslo Accords II.



**Figure 1.**

Foreign vessels are in principle allowed to enter zone L but only up to 12 nmi from the coast.<sup>118</sup> The Palestinian Coastal Police is allowed to function in zone L up to 6 nmi, and in special cases up to 12nmi from the coastline. Watson has thus maintained that the Interim Agreement of 1995 (II) effectively “envisio[n]s a 12nm territorial sea”,<sup>119</sup> hence conforming to the provisions of UNCLOS.

Recently, however, the situation has changed significantly. In April 2002, Israel reduced zone L to 12nmi, on security grounds. Israel has however committed as a matter of policy to maintain the fishing zone for Palestinian fishing boats off the Gaza coast to 12nmi.<sup>120</sup>

With the marine blockade instituted in 2006 Israel unilaterally further reduced the fishing zone to 6nmi, effectively cutting off 60% of the fishing grounds. In 2008, Israel then reduced the fishing limit to 3nmi. It was returned to 6nmi in 2012 but periodically this limit is changed to 3 nmi.<sup>121</sup> This process is illustrated in Figure 2 (which is however not current),<sup>122</sup> in that the cease-fire agreement of 2012 re-established the limit to 6nmi.

At any rate, an important consideration in relation to the protection of the marine environment relates to the fact that these maritime zones are effectively under the control and jurisdiction of Israel, which is consequently invested with a general responsibility to prevent maritime pollution and protect the marine environment under the law of the sea, international environmental law, and the law of belligerent occupation. This responsibility applies regardless of the particular exemption of warships and other vessels employed for military purposes to which the environmental rules of UNCLOS and the provisions of the CBD in relation to processes and activities are not, *prima facie*, applicable.

118 The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Annex 1, Article XIV.

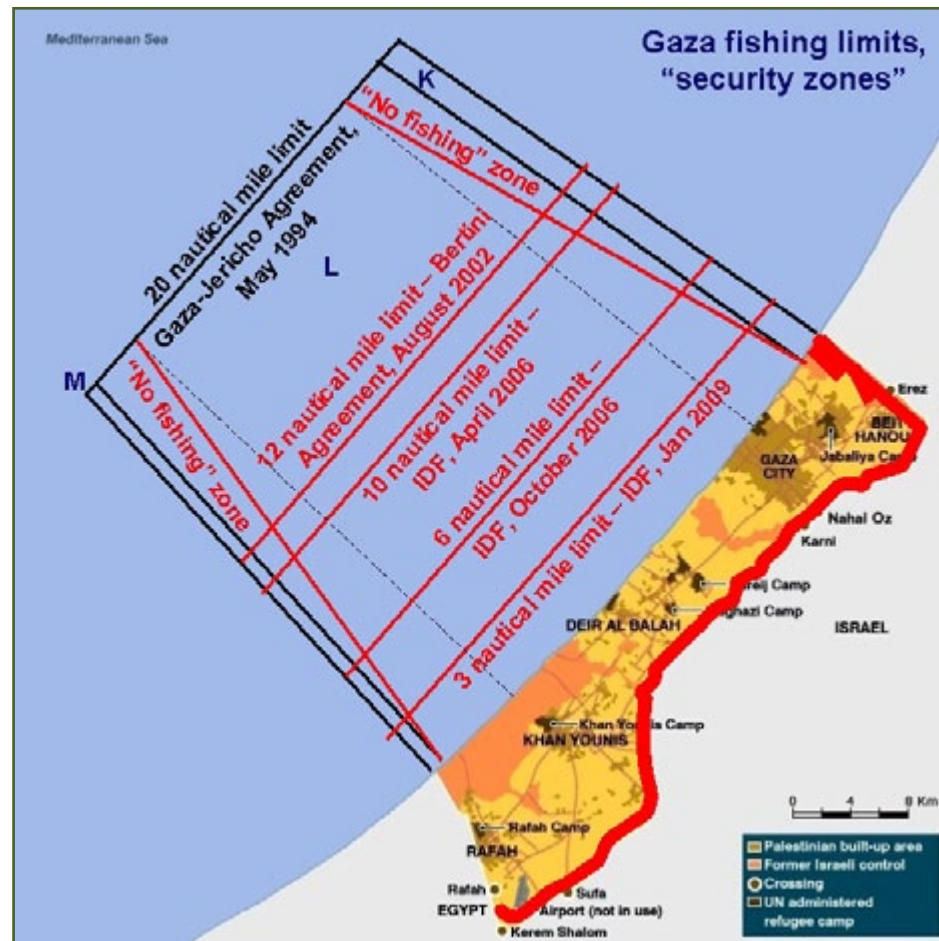
119 Waston, G.R. *The Oslo Accords: International Law and the Israel-Palestinian Peace Agreements*, (OUP 2000) at 152–3.

120 Mission Report of the Personal Humanitarian Envoy of the Secretary-General on the humanitarian conditions and needs of the Palestinian people, Ms. Catherine Bertini, 11 – 19 August 2002

121 Alex Renton, “Fishing under fire off the Gaza coast”, *The Guardian*; <http://www.theguardian.com/theobserver/2013/dec/08/fishing-under-fire-in-gaza> (19 August 2014).

122 For a current map (which unfortunately doesn’t show the historical process) we can point to the map provided by the United Nations Office for the Coordination of Humanitarian Affairs occupied Palestinian territory,

[http://www.ochaopt.org/documents/ocha\\_opt\\_gaza\\_access\\_and\\_closure\\_map\\_december\\_2012.pdf](http://www.ochaopt.org/documents/ocha_opt_gaza_access_and_closure_map_december_2012.pdf)



**Figure 2**

With regards to areas beyond the 12nmi, there are some considerations to be made. Under the principles of the law of the sea, each coastal state may claim an area of up to 200nmi, which would constitute a so-called “exclusive economic zone” (EEZ). In this area the relevant coastal state can exercise sovereign rights, which entail mainly the exploitation of economic utilities and the right to regulate the activities of third parties in relation to security, environmental protection etc. However, these rights are limited vis-à-vis the general rules of freedom of navigation and respect of rights of other States. Finally, an EEZ must be formally claimed. In the case at hand, no EEZ has been claimed, so it is not in any way relevant, today, for an even preliminary assessment of rights and wrongs.

Interestingly, the EEZ refers specifically to the water column; the regime governing the sea floor is different. The sea floor, technically called “continental shelf”, is considered to be, under the rules of the law of the sea, under exclusive sovereign rights of the coastal state,<sup>123</sup> by virtue of it being a *natural* prolongation of the land territory, hence requiring no formal or material claim.<sup>124</sup> As article 76 of UNCLOS states, the continental shelf “comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”.

Moreover, the sovereignty over said continental shelf exceeds and is independent of, the sovereignty or sovereign rights asserted or recognized over the superjacent sea areas,<sup>125</sup> and it relates in particular to the economic exploitation of “mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species”.<sup>126</sup>

<sup>123</sup> UNCLOS, Article 77(2)

<sup>124</sup> Article 77(3) of UNCLOS states explicitly that “The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation”

<sup>125</sup> UNCLOS, Article 78(1)

<sup>126</sup> UNCLOS, Article 77(4)



# 6

## UN RESPONSIBILITIES FOR THE ENVIRONMENTAL CONDITIONS OF PALESTINIAN REFUGEES

The Palestinian Central Bureau of Statistics (PCBS) estimates the population of the oPt at mid 2014 at around 4.55 million, with an estimated West Bank population of 2.79 million and 1.76 million in the Gaza Strip. The overall population density is 756 persons per km<sup>2</sup>, with a high density in Gaza of 4,822 persons per km<sup>2</sup> compared to a much lower one in the West Bank with 493 persons per km<sup>2</sup>.<sup>127</sup> 52% of the total Palestinian population, or approximately 2.3 million persons, are considered in need of humanitarian aid.<sup>128</sup>

The number of registered refugees in Palestinian territory is approximately 2.2 million, constituting around a 33% of the total population in the West Bank and 76% in Gaza. More than 900,000 persons living in the West Bank and ca. 1,3 million living in Gaza are refugees. 24% of the West Bank's refugee population live in nineteen refugee camps while 42% of the refugees in Gaza live in 8 refugee camps.<sup>129</sup>

Refugee camps that were created as a result of the war of 1948 are governed by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), to some extent in parallel to the Palestinian Authority. These camps in effect constitute a series of quasi-autonomous administrative centres that are located across the Oslo division (Areas A, B, and C). They apply to a refugee population that originally numbered an

127 Press release of the Palestinian Central Bureau of Statistics on the Eve of the International Population Day (11/07/2014). <http://www.pcbs.gov.ps/site/512/default.aspx?tabID=512&lang=en&ItemID=1165&mid=3172&wversion=Staging>

128 2014 OCHA Strategic Plan for the Occupied Palestinian Territory. November 2013, at 1. [https://docs.unocha.org/sites/dms/CAP/SRP\\_2014\\_oPt.pdf](https://docs.unocha.org/sites/dms/CAP/SRP_2014_oPt.pdf)

129 UNRWA 2014, Emergency Appeal for the Occupied Palestinian Territory, 3. [http://www.unrwa.org/sites/default/files/unrwa\\_ea\\_2014\\_final\\_design\\_jan\\_21.pdf](http://www.unrwa.org/sites/default/files/unrwa_ea_2014_final_design_jan_21.pdf)

estimated 700,000 in 1948<sup>130</sup>, but which has now doubled to more than 1.5 million, for those registered in camps, and reaching almost 5 million considering the total number of registered Refugees.<sup>131</sup>

The largest camps in the West Bank have populations of around 20,000. Examples are the camps in Jenin (16,000), Tulkarm (18,000), and Balata (in Nablus, 24,000). Three of the camps in Gaza, collectively, are a temporary home to almost a third of a million refugees (Al-Shati Beach Camp (84,000), Rafah (104,000), and Jabalia (110,000)).

We visited the Al-Am'ari camp on the outskirts of Ramallah, set up originally by the Red Cross in 1949 to accommodate refugees from the coastal town of Yafa (Jaffa) and nearby areas. The camp is located on public land leased from Jordan and comprises 93 dunums<sup>132</sup> (less than a tenth of a square kilometer). The latest UN figures indicate that the original population of the camp (circa 3,500) has almost tripled to 10,500 (as of 2007).<sup>133</sup> The look of the camp has also changed as the original Red Cross cotton tents were replaced by concrete housing structures in the 1950s, which are often separated by only one or two meters of walkway.

The housing infrastructure leads to a nearly complete deprivation of privacy, and the population density raises immense challenges with regards to sanitation. At the same time, ecological services are difficult to implement for a population living under such dense conditions in a valley location.

The UN General Assembly Resolution 302 (IV) of 8 December 1948 provides the UNRWA with the mandate to oversee works necessary to prevent conditions of starvation and distress. The physical manifestation of this mandate is the development of the original tent dwellings into concrete housing and the provision of some waste water services, power services,

130 According to Benny Morris 2004, The Birth of the Palestinian Refugee Problem Revisited.

131 UNRWA. UNRWA in Figures as of 1 January 2013 (2013). <http://www.unrwa.org/sites/default/files/2013042435340.pdf>

132 One dunum equals 1,000 square meters.

133 Amari Refugee Camp Profile 2007 (2008) [http://www.ochaopt.org/documents/opt\\_campprof\\_unrwa\\_amari\\_oct\\_2008.pdf](http://www.ochaopt.org/documents/opt_campprof_unrwa_amari_oct_2008.pdf)



and educational infrastructure. However, from our viewpoint through an environmental justice lens it is significant that the mandate appears flexible enough to encompass an environmental dimension.

Palestinian refugees who are not registered under UNRWA are entitled to assistance under the auspices of UN High Commissioner for Refugees (UNHCR), including the rights and wider provisions set out in the UN Refugee Convention of 1951.

However, there are grey areas, consisting of farming families who have been removed from large portions of their land and who cannot adequately live on the remainder of it. As elsewhere in the world, farm sizes and family numbers are traditionally based on the potential of the ecosystem within the farm boundaries, including the fertility of the soil, water resources, and farm-specific waste water treatment facilities.

## 6.1 CASE EXAMPLE

A good illustration of this dilemma is provided by a farming family we visited on the outskirts of Qalqilyah. In this case, we saw that the wall bisected a moderately sized farm. The water and drainage facilities (as well as much of the arable land) were located on the Israeli side of the wall. What remained of the farm could no longer be adequately drained, and as a result, the land and the farmstead are periodically flooded by sewage from the nearby town which 'backed up' against the wall. This is often exacerbated by the closure of a sluice gate in the wall by the IOF. The Palestinian farmers had no control over the sluice gate and thus were at the mercy of the IOF with regards to its opening and closing (and powerless to alleviate the adverse consequences that this decision has for the family).<sup>134</sup>

The numbers of Palestinians in this invidious position does not appear to have been systematically recorded, and perhaps it is difficult to do so. Nonetheless, one recent UNRWA study drew attention to nearly two hundred rural communities whose land has been cut off by the wall and thus

<sup>134</sup> See more generally Brophy and Isaac, 2009, at 18.

was considerably devalued (ecologically and financially).<sup>135</sup> This is hugely significant because viable, small-scale farms contribute substantially to sustainable livelihoods and their loss is a serious threat from a sustainability perspective.

## 6.2 DEMOGRAPHIC CHANGES

Refugees have contributed to a changing demographic profile of the region. Since 1950, there has been an evident movement from rural to urban areas. The United Nations trace the rise in the share of the Palestinian population living in urban areas from 37.3% in 1950 to 75% in 2014 with further urbanization ongoing and intensifying.<sup>136</sup> By 2050 it is estimated that the overall population of Palestine will be at 9.727.000, with 1.663.000 (17.1%) living in rural areas and 8.063.000 (82.9%) in cities.<sup>137</sup>

This is a real challenge, considering, for example, the situation in Gaza where the projected population density in 2020 is at 5,835 people per km<sup>2</sup>, putting severe pressure on an already overcrowded and heavily urbanized area.<sup>138</sup>

The pace of urbanization continues to be accelerated by settlement construction. As of the end of 2008, Israel confiscated or (de facto) annexed<sup>139</sup> approximately 70% (4102 km<sup>2</sup>) of the land in the West Bank.<sup>140</sup> Confiscation of land, house demolitions, uprooting of trees, and re-directing

<sup>135</sup> UNRWA, *Barrier Impacts on the Environment and rural Livelihoods* (UN, 2012)

<sup>136</sup> UN World Urbanization Prospects, 2014 Revision

<sup>137</sup> Data from UN, Department of Economic and Social Affairs: Population Division, Population Estimates and Projections Sections. On-line Data: Urban and Rural Population. [http://esa.un.org/unup/unup/index\\_panel1.html](http://esa.un.org/unup/unup/index_panel1.html)

<sup>138</sup> United Nations Country Team in the occupied Palestinian territory "Gaza in 2020 A liveable place?". August 2012, at 7. <http://www.unrwa.org/userfiles/file/publications/gaza/Gaza%20in%202020.pdf>

<sup>139</sup> "The Court considers that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to a de facto annexation", Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I C J Reports 2004, p. 136, at 184

<sup>140</sup> *BADIL Resource Centre* for Palestinian Residency and Refugee Rights. "Confiscation and Discriminatory Distribution of Land" Article, June 2010. <http://www.badil.org/es/monitoreo-continuo-de-los-desplazamientos/item/1369-land-confiscation>

of watercourses serve to isolate and segregate Palestinian communities. Thus, even for Palestinians not classified as refugees, land is no longer as valuable in the broadest sense (for community living) as it once was.

### 6.3 UN REFUGEES AND ENVIRONMENTAL JUSTICE

With the emergence of sustainable development as an overarching policy of the UN in the late 1980s, the UN agencies with refugee responsibilities began to consider environmental issues in their work. UNHCR started to place some emphasis on the importance of environmental conservation and has since taken environmental considerations into account when planning, designing, and implementing assistance programmes for refugees, while at the same time considering that measures may need to be taken to compensate or reduce the negative impact of refugee fluxes on the environment of host societies.<sup>141</sup> One example for this is the “Environment Trust Fund” created in 1993, the main aim of which was to apply the principles underlying UNHCR’s environmental policies and guidelines in activities in the field,<sup>142</sup> but also to prevent adverse ecological consequences of mass flight.<sup>143</sup>

The idea of refugees as source of environmental problems is analyzed by Gain Kibreab (1997), on the basis of a study of human displacement in eastern Sudan that has parallels with our present concern. The author challenged the assumption that refugees are “exceptional resource degraders” and that this causes instability (potentially leading to war). It is argued that “environmental change and population displacement are the consequences of war and insecurity rather than their causes. War and insecurity force people and their animals to congregate in safer areas. Over time, the safer areas get over-exploited while the unsafe areas remain un-

141 G Kibreab, “Environmental causes and impact of refugee movements: a critique of the current debate”, (1997) *Disasters* 21(1):20–38, at 23.

142 UNHCR Global Appeal 1999 - The Environment Trust Fund. <http://unhcr.org/3eaff43e21.html>

143 T Affi and K Warner “The impact of environmental degradation on migration flows across countries”, (2008), Working Paper No.5/2008, UNU-EHS Working Paper Series, United Nations University, Institute for Environment and Human Security, Bonn, at 5

or under-used”.<sup>144</sup> Of course, as Onita Das points out, there is a ‘vicious circularity’ here – war breeds environmental harm, which breeds conflict.<sup>145</sup>

The UNHCR has developed guidelines aimed at mitigating the environmental impact of refugee and internally displaced persons (IDP) populations, and to promote adaptation to environments under strain.<sup>146</sup> One example is the publication “*Refugee Operations and Environmental Management: Key Principles of Decision-Making*”,<sup>147</sup> another one is the “*Handbook of Selected Lessons Learned from the Field: Refugee Operations and Environmental Management*”.<sup>148</sup> These publications have been fleshed out into the UNHCR Environmental Guidelines of 1996 and 2005. Emphasis is placed on participation, on procedural environmental justice. UNHCR advises to identify refugees with skills and experience in environment-related activities, provide systematic information, facilitate training activities and interaction between refugees and the local population, or assist in the mobilization of refugee labour in environmental projects where refugees can be employed.<sup>149</sup>

In terms of refugees as victims of environmental problems, the necessary actions are circumscribed within the mandate of the *UNRWA and UNHCR to protect, assist, and seek durable solutions for refugees as well as for other people in need of international protection*. The UNRWA defines “Palestine Refugees”, as

‘persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict’.

144 Kibreab, (1997), at 33

145 O Das, *Environmental Protection, Security and Armed Conflict* (Ashgate 2012).

146 UNHCR, *Climate change, natural disasters and human displacement: a UNHCR perspective*. UNHCR, (2008) Geneva, at 13

147 UNHCR, *Refugee Operations and Environmental Management: Key Principles of Decision-Making*. (1998) UNHCR, Geneva.

148 UNHCR, *Handbook of Selected Lessons Learned from the Field: Refugee Operations and Environmental Management*. (2002) UNHCR, Geneva.

149 UNHCR, *UNHCR Environmental Guidelines*, UNHCR, Geneva, at 43; UNHCR (2005), *UNHCR Environmental Guidelines*, (1996) UNHCR, Geneva, at 33

UNRWA also recognizes the descendants of the originally displaced Palestinians as refugees, limited, however, to those who are living in one of UNRWA's refugee camps and who receive Agency services.<sup>150</sup>

Over time, UNRWA has adapted and renewed its mandate in order to meet the changing needs and circumstances of the refugees, providing services to all registered refugees present in its area of operations, whether they live in camps or not.<sup>151</sup> Thus, UNRWA is the main provider of basic services to the Palestinian population working locally and regionally in fields like education, health, relief, and social services, while also cooperating with local authorities to provide water, wastewater, and solid waste services to refugees.<sup>152</sup> Most solid waste collection and transport in the camps is carried out by UNRWA, using its own equipment and management procedures.<sup>153</sup>

However, the involvement of UNRWA in the built environment of the camps has shown little consistent evidence of environmental planning and awareness.<sup>154</sup> Indeed, the site we visited (Al-Am'ari Camp) showed very little evidence of UNRWA having an environmental protection mandate whatsoever. One striking feature was the lack of vegetation – even at the height of spring. The scene was one of dust and concrete. By contrast, neighbouring valleys enjoyed the benefits of terraces with olive trees which were attractive to look at, and valuable in the more physical or material senses of regulating the local climate (providing shade) and being a source of food and fuel.

There is some evidence that UNHCR and UNRWA are aiming to work closely

<sup>150</sup> UNRWA-UNHCR, *The United Nations and Palestinian Refugees* (2007), at 5

<sup>151</sup> UNRWA-UNHCR (2007), at 6

<sup>152</sup> UN Environment Programme (UNEP), *Desk Study on the Environment in the Occupied Palestinian Territories*, January 2003, Geneva: UNEP. Pag.43 <http://postconflict.unep.ch/publications/INF-31-WebOPT.pdf>

<sup>153</sup> UNEP (2003), at 59

<sup>154</sup> B Muna., "Dynamics of space, temporariness, development and rights in Palestine refugees' camps" (2014), in Hanafi, S., Hilal, L., and Takkenberg, L (eds), *UNRWA and Palestinian Refugees. From relief and works to human development*. Routledge, London-New York, at 195

to tackle common environmental issues affecting refugees.<sup>155</sup> A holistic approach would look in an integrated fashion at the social, economic, and environmental pillars of sustainable development. Of particular note in that respect are UNRWA's "Sustainable Development Goals",<sup>156</sup> which were heralded by a group of academics as "a new, holistic, integrated, developmental and participatory approach on urban planning to improve the built environment in Palestinian refugee camps".<sup>157</sup> Implementing ambitious policies of this kind takes time, and it does not seem to be tackled with a sense of urgency.

## 6.4 'GREEN' BUDGETARY ISSUES

UNRWA's initial pitch for funding to integrate environmental considerations into refugee welfare practices was a section on "Protecting the Environment" in its Interim Programme Strategy, as recently as 2008-2009.<sup>158</sup> The Programme Budget Report for 2008-2009 of UNRWA's Commissioner General to the UN General Assembly identified, in Chapter VI, the need for a programme for the improvement of infrastructure and camps, with objectives oriented to "improve the quality of life for camp residents living in substandard habitat by means of integrated social and physical action which promotes environmentally and socially sustainable neighbourhoods in accordance with strategic camp development plans" and to "improve environmental health conditions in refugee camps by ensuring safe-water supply (and) solid waste management".<sup>159</sup>

<sup>155</sup> UNRWA-UNHCR (2007), at 3

<sup>156</sup> T de Jong, and M Aced, M, "UNRWA's "traditional" programmes as a catalyst for human development" (2014), in S Hanafi, L Hilal, and L Takkenberg (eds), *UNRWA and Palestinian Refugees. From relief and works to human development*. Routledge, London-New York, at 60

<sup>157</sup> S Hanafi, L Hilal, and L Takkenberg, "Introduction" (2014), in S Hanafi, L Hilal, and L Takkenberg (eds), *UNRWA and Palestinian Refugees. From relief and works to human development*. Routledge, London-New York, at 10

<sup>158</sup> UNRWA, What protection means for UNRWA: consultant's report dated 31 March 2008, (2008) at 8. <http://www.unrwa.org/userfiles/20100118155412.pdf>

<sup>159</sup> UNRWA, Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East: Programme Budget 2008-2009. (2007) UNGA, 62 Session, Supplement No.13A (a/62/13/Add.1)

UNRWA's Medium Term Strategy (MTS) is the blueprint for programmes and field operations from 2010 through 2015. It has identified 15 Agency-wide strategic objectives that derive from its four established human development goals, namely, (1) a long and healthy life, (2) acquired knowledge and skills, (3) a decent standard of living, and (4) human rights enjoyed to the fullest extent possible. Among these 15 strategic objectives are those oriented to reduce poverty (vii), improve employability (x), or improve the urban environment through sustainable camp development and upgrading of sub-standard infrastructure and accommodation (xi), among other interlinked aims.<sup>160</sup>

UNRWA is thus gradually putting its Environmental Management Framework (EMF) in place, which aims to minimize the negative environmental impacts caused by the Agency and develop opportunities to create environmental benefits. The framework considers the refugees as partners, promotes the participation of communities, and analyses how UNRWA facilities should reduce its consumption of energy, water, and materials within an overall context of greenhouse gas reduction.<sup>161</sup>

### ***In Situ Environmental Protection and the 'Right of Return'***

One possible explanation for the slow pace of 'greening' the refugee policy is the perceived tension between this goal and the "right of return". Critical opinions among Palestinian refugees and the broader Palestinian society are underpinned by anxiety that rehabilitation of camps and their environment could go against the "right of return" as it might imply a normalization of the status quo and could be read as recognition of the permanent character of the camps.

UNRWA addressed this issue by distinguishing between the "right of return" and the "right to live in appropriate living conditions" in its path towards a more 'developmental approach'.<sup>162</sup> The Agency is adapting its mandate

<sup>160</sup> UNRWA, UNRWA Medium Term Strategy 2010 – 2015, (2010) at 16-17 <http://www.unrwa.org/userfiles/201003317746.pdf>

<sup>161</sup> Ibid., at 24

<sup>162</sup> Misselwitz and Hanafi (2010), at 361

to take into consideration that while it has "historically understood its role as a temporary relief provider to a temporary group of victims, carefully avoiding taking on a wider governing role", it has, at the same time, assumed a role beyond its mandate in the eyes of the refugees, which makes the organization responsible for the problems in the camps.<sup>163</sup>

The issue is deeply complex, as highlighted by Misselwitz and Hanafi<sup>164</sup>. The authors explain that "while camps are considered to be a laboratory of the Palestinian nation-building process and an expression of the evolution of the right of return, in daily life these camps are exposed to a process of double marginalization" through the exclusion of refugee camps from urban planning programs, but also by disconnecting them "from the social and urban networks of their neighbouring areas". Thus they lose "their temporary nature and become low-class residential neighborhoods" without a proper integration into their urban environment; they are being perceived "as urban slums and specific political spaces".

An attempt at reconciling this tension was expressed in the 2004 Geneva Conference entitled "Meeting the Humanitarian Needs of the Palestine Refugees in the Near East: Building Partnerships in Support of UNRWA", where a new policy framework was launched based on a developmental approach. An agreement was reached among the participants that "Palestinian refugees' right to live in improved living conditions within the camps would not jeopardize their right of return".<sup>165</sup>

The research of Nell Gabiam<sup>166</sup> in the Neirab Camp in Syria before the Syrian civil war brought forth some interesting arguments that justify the improvement and development of the camps without hurting the "right of

<sup>163</sup> Ibid., at 362

<sup>164</sup> Ibid., at 363

<sup>165</sup> Ibid., at 367

<sup>166</sup> N Gabiam, "Implementing the Neirab Rehabilitation Project: The Political Implications of 'Sustainable Development' (2010), IFI/UNRWA conference: "From Relief and Works to Human Development: UNRWA after 60 years," Oct 9, 2010.

[http://www.aub.edu.lb/ifi/public\\_policy/pa\\_camps/pc\\_events/Documents/20101008ifi\\_unrwa60\\_conference/conference\\_papers/day2/ifi\\_unrwa\\_conf\\_day2panel1\\_paper3\\_gabiam.pdf](http://www.aub.edu.lb/ifi/public_policy/pa_camps/pc_events/Documents/20101008ifi_unrwa60_conference/conference_papers/day2/ifi_unrwa_conf_day2panel1_paper3_gabiam.pdf)



return". Some Palestinian refugees argued that "development was actually a useful tool for achieving return" as it would help refugees to "overcome material hardship", allowing them to "more effectively focus on their political goals, including the goal of return".<sup>167</sup> On the other hand, the author acknowledges distrust of some Palestinian refugees towards the agenda of "sustainability" or "self-reliance" of their camps, the fear being that this could mean a progressive retirement of UNRWA from their lives and consequently a loss of their status as refugees, or that it might undermine their refugee identity and weaken the political advocacy for return.<sup>168</sup>

Finally, Misselwitz and Hanafi discuss the potential of the Infrastructure and Camp Improvement Programme (ICIP) and the expanding role of UNRWA as a major agent delivering main services to camp cities in the absence of a durable solution. The authors mention the case of Kenya as "radical and perhaps unrealistic" in its application to Palestine, but also remarkable and challenging, since the case of the African country represents the search of interim solutions that would allow refugees to freely participate in the economic and communal life of the host region, including the implementation of environmental protection measures. This would, importantly, not abolish their status as refugees since the "participation in the civil life of a host country is considered an essential human right, which should not compromise the political right to return or to receive compensation".<sup>169</sup>

### Procedures for Review of UNRWA Policy

A review of UNRWA's capacity to address problems for environmental justice - within the scope of its mandate and considering some of the environmental challenges identified in their camps in Palestine - can be approached from different angles. In this last section we are looking at some aspects that should be considered in order to enhance the capacity and accountability of the organization.

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<sup>167</sup> Gabiam (2010), at 5

<sup>168</sup> Ibid., at 8

<sup>169</sup> Misselwitz and Hanafi (2010), at 385

UNRWA is a 'subsidiary' of the UN that has its mandate reviewed by the General Assembly every three years.<sup>170</sup> Should there be any doubts with regards to its performance related to the environment in Palestine, the General Assembly would be the body before which to raise this question. In December 2013, the General Assembly, through Resolution 68/76 dedicated to the "Assistance to Palestine Refugees", decided to extend the mandate of the Agency until 30 June 2017.<sup>171</sup>

Considering the "grave concern" expressed in the Resolution with respect to the "especially difficult situation of the Palestine refugees under occupation, including with regard to their safety, well-being and socioeconomic living conditions", this renewed mandate might lead to further action on environmental justice within the scope of UNRWA's mandate and, if not, to increased pressure by the General Assembly.

Equally, and as part of the need for a new approach within UNRWA which recognizes the challenges for the Palestinian refugee population and camps with respect to environmental justice, the new drafting of the UNRWA's Medium-Term Strategy for 2016 to 2021<sup>172</sup> should be studied and analysed from a perspective capable to address these challenges, and used to reframe part of the Agency's scope in this field.

Finally, UNRWA's environmental policies and environmental justice approach should be improved through its participation in several fora aiming to "support efforts to achieve sustainability through stronger legal responses to environmental pressures".<sup>173</sup> In particular, pressure may be brought to bear through the Rio+20 Declaration on Environmental Justice,

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<sup>170</sup> Sands and Keliin, *Bowett's Law of International Institutions*, 6<sup>th</sup> ed (Sweet and Maxwell 2009),66

<sup>171</sup> General Assembly resolution 68/76, *Assistance to Palestine refugees*, A/RES/68/76 (16 December 2013), available from [undocs.org/A/RES/68/76](http://undocs.org/A/RES/68/76).

<sup>172</sup> UNRWA Medium Term Strategy 2016-2021 "Zero draft" July 2014, available from [http://www.unrwa.org/sites/default/files/draft\\_-\\_medium\\_term\\_strategy\\_2016-2021.pdf](http://www.unrwa.org/sites/default/files/draft_-_medium_term_strategy_2016-2021.pdf)

<sup>173</sup> As it was expressed during the World Congress on Justice, Governance and Law for Environmental Sustainability in December 2012. Available from <http://www.unep.org/newscentre/Default.aspx?DocumentID=2700&ArticleID=9350>

Governance, and Law.<sup>174</sup> This Declaration urges closer cooperation and the establishment of links with the United Nations Environment Programme’s (UNEP) International Advisory Council for the Advancement of Justice, Governance, and Law for Enforcement Sustainability.<sup>175</sup>



## 7 CONCLUSIONS

As explained in the introductory chapter, our topic “Environmental Injustice in Palestine” is as broad as it is vitally important. In so-called “black letter law terms” (or formal law), our topic engages private law, public law, criminal law, and “super” criminal law (crimes against humanity). Moreover, the sources of the law are domestic, international, and trans-national and, crucially, they comprise a substantial unwritten, or customary (including common law) element. The topic is full of variety, and in turn, complexity.

We have approached our task from a law scholar’s perspective. At no point

<sup>174</sup> Rio +20 Declaration on Justice, Governance and Law for Environmental Sustainability, available at [http://www.unep.org/rio20/Portals/24180/Rio20\\_Declaration\\_on\\_Justice\\_Gov\\_n\\_Law\\_4\\_Env\\_Sustainability.pdf](http://www.unep.org/rio20/Portals/24180/Rio20_Declaration_on_Justice_Gov_n_Law_4_Env_Sustainability.pdf)

<sup>175</sup> Information about the International Advisory Council for the Advancement of Justice, Governance and Law for Enforcement Sustainability, available from <http://www.unep.org/delc/worldcongress/TheInternationalAdvisoryCouncil/tabid/105851/Default.aspx>

do we attempt to advise with precision on the merits of potential claims or potential prosecutions. That would require a more factually detailed and procedurally deeper type of research, and it would involve enlisting the services of practicing lawyers. Instead, we have attempted to map the field in a preliminary way, to help frame an agenda for future research, and, if wished, future legal action.

## 7.1 PRINCIPAL CONCLUSION

Our principal conclusion is that Palestinian people are victims of a serious and systematic environmental injustice arising from a lacuna built into the Oslo Accords. No Palestinian with a *prima facie* claim in respect of environmental injustice arising from the occupation can have confidence in a realistic prospect of justice domestically. The interim self-government structure does not provide satisfactorily for access to justice, nor is it satisfactory for victims of injustice to be reliant on the procedures of the belligerent occupying force.

All subsequent problems covered in our study stem from this. But this core problem does have potential solutions, which lie in the legal remedies that are in principle enforceable within trans-national (including extra-territorial) and/or international fora. The remainder of the conclusions focus on these fora.

## 7.2 WIDER CONCLUSIONS

In trans-national or extra-territorial terms, we discussed the application of universal criminal jurisdiction, in which context we identified the Rome Statute as of particular significance. We have highlighted four instances where the high threshold of universal criminality is potentially met in relation to environmental injustice (two concerning waste, one concerning air pollution, and one concerning landscape).

If there is interest in proceeding with this line, we recommend preliminary medico-scientific investigation (of, say, a toxicological character, aimed at linking - or refuting a link - between waste dumps and Israeli private factories with Palestinian ill-health). Not all of the problems here are

to do with physical health. The destruction of landscapes or access to their beauty involves psychological issues, concerning the centrality of landscapes to the emotional well-being of Palestinians. Evidence should be tailored accordingly.

There is less of an accepted sense of a “universal tort” to compare with crime, but there is nonetheless real scope for fruitful engagement of extra-territorial nuisance litigation (Chapter Four) in which ‘local’ torts can be litigated in a foreign jurisdiction on grounds of convenience (broadly defined). There is real scope for exploiting the fact that Israeli civil law in respect of the environment is largely identical to that of England and Wales, particularly in regards to the “green tort” of nuisance law. Whilst Palestinian law is no longer that of the common law of England and Wales (as it was under the British Mandate), the Jordanian law that superseded the common law does nevertheless recognize environmental nuisance as a tort in much the same way as Israel, England, and Wales. Because of this commonality – if not quite universality - of nuisance law, the High Court of England and Wales could possibly be persuaded to accept exceptional jurisdiction to hear a nuisance claim.

The extra-territorial pursuit of criminal sanctions and civil remedies involves different procedures. The former would be addressed in England (by way of example) through the Magistrates Courts. The latter would be addressed through the High Court. In each case proceedings would be adversarial, although the burden of proof differs between criminal and civil wrongs.

Moving away from extra-territorial litigation, it is argued that there is potentially some scope for the International Court of Justice adjudicating one of a number of strongly arguable claims of Israel’s violations of international environmental law (Chapter Five). In particular, the IOF’s waste management practices raise legal issues that engage international humanitarian law relating to the obligations of the belligerent occupying state; multilateral environmental treaties of which Israel is a signatory; and indeed customary international law. However, the problem is that ICJ jurisdiction is not compulsory.

In terms of resolving that problem, one can almost rule out that Israel would consent to ICJ jurisdiction. It is true that Israel presents itself as an environmentally responsible state, such that it could be embarrassed by an allegation of breach or violation of environmental laws. Thus a strictly environmental complaint might be more difficult to reject – to not consent to – than one ‘complicated’ by reference to the state of belligerent occupation (humanitarian law). However, for reasons set out towards the close of Chapter One, we would not expect the ICJ to remedy the problems we address.

The Palestinian marine environment is a very important facet of environmental justice. That is why we touch on this in Chapter Five, albeit concisely. A significant portion – even majority – of the Palestinian territory comprises the Mediterranean Sea, and the marine harvest is potentially very important, as are issues of transit and maritime landscape. We have suggested that the law here is complex – and further complicated by the periodic making and breaking of bilateral agreements in this area. But there should in principle be a way forward, using the law, in which Palestine as a coastal state has appropriate use and care for its rich and fortunate marine territory.

Refugees also raise complex issues which we have attempted to address in Chapter Six. It is in Palestine where UN refugee competence was in effect ‘born’ (in the late 1940s). However, the refugee population has grown over time, not diminished, despite UN mandate. Indeed, there is a real tension between UN efforts to protect the environment of refugees and the refugees’ wish to return to their own farms and dwellings. Despite the difficulties, we recommend a closer look at whether UNRWA has the resources and the priorities necessary to effectively manage the environment-refugee nexus. We believe that the environmental dimension has been slow to be recognized, and equally slow to be acted on. There is scope for holding the UN to account here through the General Assembly, albeit that it is unusual to do so.

Looking broadly to the future, we see much value in considering – and to some extent redefining – the peace process as an *ethico-environmental challenge*. The dispute has become so entrenched, and indeed normalized,

that a fundamentally new perspective is arguably required. The environment may provide that, for there is surely a latent common ground in the spiritual and ethical value placed on the land and the landscapes in our ‘area of the Levant’, around which a fruitful dialogue and recognition of reciprocity could be built.

Consider in this respect former International Court of Justice Judge Christopher Weeramantry’s comment that:

It is surely paradoxical that in the midst of 150 millennia of existence, we ignore the quintessential wisdom of those 150 millennia as enshrined in the common core teachings of the world’s great religions.<sup>176</sup>

The salient words here are ‘core’ and ‘great religions’. Applied to Palestine, it means different peoples finding a spiritual, as well as secular, reason for occupying a very special place in the world, in a caring, co-operative, and kind way.

<sup>176</sup> C Weeramantry, *Tread Lightly on the Earth: Religion, the Environment and the Human Future* (Stamford Lake publishing 2009).



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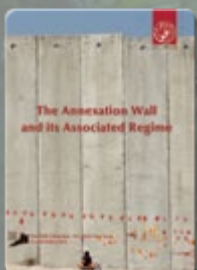
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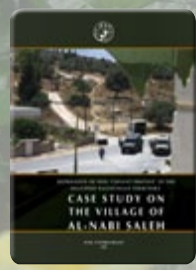
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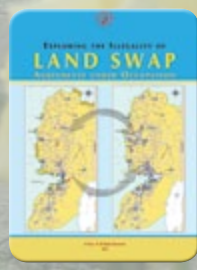
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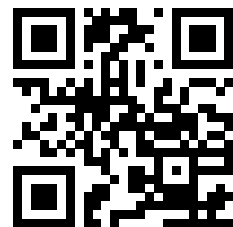


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AL - HAQ

### About AL-HAQ

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory (OPT), the organisation has special consultative status with the UN Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, regardless of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. The organisation conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. The organisation has a specialised international law library for the use of its staff and the local community.

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Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), and the Palestinian NGO Network (PNGO).

