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A LEGAL DOGMATIC ANALYSIS ON THE STATUS OF ISRAELI SETTLEMENTS IN THE OCCUPIED WEST BANK AND EAST JERUSALEM

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TIIVISTELMÄ

Matias Reinikainen: Lainopillinen analyysi Israelin siirtokuntien statuksesta miehitetyissä Länsirannassa ja Itä-Jerusalemissa
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Israel on rakentanut vuodesta 1967 asti erinäisiä siirtokuntia Palestiinan miehitetyille alueille. Siirtokuntayhteisöissä asuu Israelin siviiliväestöä, jotka ovat muuttaneet Israelin miehittämille alueille. Siirtokuntien oikeudellinen status kansainvälisen lain silmissä on ollut toistuva puheenaihe kansainvälisen yhteisön keskuudessa. Tutkimuksen tarkoituksena on perehtyä siirtokuntien oikeudelliseen luonteeseen analysoimalla kansainvälisiä sopimuksia, joita on mahdollista oikeudellisesti soveltaa Palestiinan miehitetyille alueille. Tutkimus on luonteeltaan lainopillinen, keskittyen tulkitsemaan miehitykseen ja sodan oikeussääntöihin kytkeytyneitä kansainvälisen lain säännöksiä. Lainopillista analyysia tutkimuksessa tukee teleologinen tulkinta, jonka kautta kansainvälistä lakia tulkitaan ihmisoikeusmyönteisestä perspektiivistä. Kansainvälisen lain tulkinnan tueksi tutkimuksessa hyödynnetään relevanttia oikeuskirjallisuutta sekä kansainvälisten elinten antamia lausuntoja.

Tutkimus koostuu kahdesta pääasiallisesta analyysiluvusta, joista ensimmäisessä luodaan oikeudellinen viitekehys kansainvälisen lain soveltamisesta Israelin siirtokuntiin Palestiinassa. Viitekehys muodostuu Wienin valtiosopimusoikeutta koskevasta yleissopimuksesta, Genèven sopimuksesta siviilihenkilöiden suojelemisesta sodan aikana, ja Haagin yleissopimuksesta koskien maasodan lakeja ja tapoja sekä siihen liitetystä maasodan lakeja ja tapoja koskevasta ohjesäännöstä. Kyseisten kansainvälisten sopimusten tapaoikeudellinen luonne sekä soveltuvuus Israelin miehittämiin Palestiinalaisalueisiin voidaan havainnoida hyödyntäen kansainvälistä oikeuskäytäntöä ja Yhdistyneiden kansakuntien elinten aiheesta tuottamia lausuntoja.

Toisessa analyysiluvussa tarkastellaan, mitä kansainvälisoikeudellisia oikeusnormeja tulkitsemalla siirtokuntien oikeudellinen status kansainvälisen lain silmissä voidaan muodostaa. Tutkimus osoittaa, että Israelin valtio rikkoo useita edellä mainituissa sopimuksissa ilmeneviä oikeusnormeja siirtokuntaprojektillaan. Muun muassa miehittävän valtion siviiliväestön siirtäminen miehitetyille alueille, yksityisen ja valtionomaisuuden käyttäminen siirtokuntien laajentamiseen, sekä miehitettyjen alueiden status quon muuttaminen ovat kansainvälisen lain vastaista toimintaa. Pääasiallinen siirtokuntien laittoman luonteen muodostava tekijä on Genèven neljännen yleissopimuksen artiklan 49 rikkominen siirtämällä Israelin siviiliväestöä miehitetyille alueille, muuttaen Palestiinalaisalueiden väestörakennetta merkittävällä tavalla.

Avainsanat: Kansainvälinen oikeus, ihmisoikeudet, Israel, Palestiina, tapaoikeus, sodan oikeussäännöt

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ABBREVIATIONS

ICRC	International Committee of the Red Cross
Israel	State of Israel
Occupied Territories	The Occupied Territories of the West Bank and East Jerusalem
Palestine	State of Palestine
Palestinians	All groups native to the Occupied Territories with no Israeli citizenship

1 Introduction

1.1 Israeli settlements in the occupied Palestinian territories of the West Bank and East Jerusalem

As a result of the Six-Day War of 1967 between Israel and a coalition of Arab states, Israel gained control over the territories of the Gaza Strip, the West Bank of the Jordan River, the Sinai Peninsula and the Golan Heights.[1] Settlement building in the newly occupied territories began almost immediately thereafter, with over 586 000 Israeli citizens residing in the West Bank and East Jerusalem in the current day.[2] There have been disputes as to the legality of Israeli settlement expansion and it is a relevant and often discussed topic in regards to the Israeli-Palestinian conflict. Israel's expansion into the occupied territories has even been in some sources referred to as settler colonialism.[3] Seeing as Israeli settlements are allocated exclusively to those of Jewish ethnicity[4], it can be argued that settlement expansion infringes on the human rights of Palestinians who, with the constant expansion of Jewish settlements, have been excluded from the areas they have previously been freely inhabiting. The borders of Israel and Palestine can be seen as faded and not fully established as the control Israel exerts over the occupied territories goes beyond that of a belligerent occupier.[5] It can be characterized as a sort of fusion regime between the administrations of both States and Israel's military forces. This creates a confusing administrative element to the governance of the Occupied Territories in which settlement expansion by the Israeli State has managed to keep taking form since 1967 and continue in current day Palestine.

The issue on the legality of Israel's settlements in the occupied Palestinian territories stems from international organizations and judicial institutions interpreting international law in a different manner than the Israeli state and Israel's domestic courts.[6] This is where the study of international treaty law and customary international law enters the discussion to hash out the relevant provisions of law and their application to the subject of settlement expansion. Israel interprets its non-signatory status to, for example, the Vienna Convention as not necessarily needing to abide by the norms set in

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[1] Ben-Naftali et al. 2018, p. 1
[2] Ben-Naftali et al. 2018, p. 1
[3] Sfard 2018, p. 200–213.
[4] Ben-Naftali et al. 2018 in general
[5] Ben-Naftali et al. 2018, p. 2
[6] Dinstein 2019, p. 240-247; Galchinsky 2004, p. 119-124

the Convention.[7] This in turn begs the question as to whether or not the Vienna Conventions are of a customary nature, leading to their applicability even to legal entities that have not ratified the treaty's contents. Thus, a framework, on which the relevant entities in the settlement issue engage in, is to be established. This can be done by examining the relevant legal texts and tools, that have been deemed applicable to the issue either by direct treaty law or case law accustomed through international courts' judgements or advisory opinions.

1.2 Research question

The issue of Israeli settlements in the occupied territories has been one of great concern and great confusion. The status of both Israel and the State of Palestine as sovereign entities have been debated since the formation of both nations, with both countries having only limited international recognition within the international community. However, the relevance of Israel and Palestine's status on the international stage is minimal in the study of Israeli settlement expansion, seeing as international law can be applied to territories of both States.[8] Settlement expansion within an occupied territory has to be examined inside the relevant legal framework concerning belligerent occupation and the other laws of international armed conflict, which are mapped out in the Hague and Geneva Conventions as part of international treaty and customary law as well as through case law generated by the International Court of Justice and other United Nations organs. The domestic law of Israel and all law of non-international nature applied to Palestine will be omitted from the scope of the research question as in the case of conflicting domestic norms provisions of international law enjoy a state of supremacy over domestic legislation, therefore rendering provisions of domestic law irrelevant in the analysis of the legal nature of Israeli settlements in the Occupied Territories. The analysis shall similarly only be applied to provisions of international law that are *jus in bello*, laws governing warfare, in order to leave out other provisions of international law that apply to *jus ad bellum,* known as the conditions under which States resort to war. The distinction is to be made as settlement expansion in the Occupied Territories of the West Bank and East Jerusalem only began as the occupation of the areas was already in force.

Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in time of War states that an occupying power shall not deport part of its civilian population into the area it occupies, which calls to question the legality of Israel's expansion of civilian settlements in the occupied Palestinian territories. Therefore, the research question of this study is as follows: "What is the legal status of Israeli settlements on occupied Palestinian territories in the West Bank and East Jerusalem

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[7] Galchinsky 2004, p. 119
[8] Dinstein 2019 in general.

under international law, and of which components is that status composed of?". The reason for the exclusion of the city of Gaza from the scope of this study is simply the fact that no Israeli settlements exist within the currently besieged city after all Israelis were evacuated out of the city following the siege and thus it lacks relevance in this particular course of research. The aim of this study is to map out the relevant sources of law concerning the issue of the settlements in the form of international law and international humanitarian law in order to paint a comprehensive picture on how international law sees the existence of the settlements through both the examination of case law and applied legal dogmatics. As legal dogmatics is by its nature a descriptive science, the application of a legal dogmatic perspective into the study of the juridical aspects of the settlement issue is used to highlight the content of international treaties and customs, and how the issue is to be perceived through a legal perspective.[9]

1.3 Research methodology

The study of law can be embodied as the study of everything related to law, including current legislative rules guiding society, as well as past law and future law.[10] Therefore, the study of law consists of many different schools of thought and methodology used to further understand it. In order to conduct a study of legal sciences, the research method or methods need to be specified and tailored to fit the particular mode of study at hand. The mode or method of study has an effect on how and from which theoretical perspective the research question is argued, in addition to what kinds of juridical arguments and conclusions can be drawn from the research.[11] In this study, the main research method to be applied is that of legal dogmatics as the objective is to define the legal status of Israeli settlements through analysis of interpretations of the applicable international law. However, aspects of other modes of legal research are partly visible and utilized within the study to support the overall coherence of it, namely that of legal history when it comes to the analysis of the evolution of international law.

Legal dogmatics have traditionally been a key method in researching law currently in force.[12] Legal dogmatics, in principle, are composed of a duality of interpretation and systematization which, when paired together, work to examine the content of norms.[13] Legal dogmatics can be viewed as the study of currently enforced law and justice, setting it apart from legal history, which covers law no longer in effect, and so called *Rechtspolitik*, which concerns itself with pondering *de lege ferenda*-related

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[9] Hirvonen 2011, p. 25-26.
[10] Hirvonen, p. 21.
[11] Huovila 2005, p. 47.
[12] Hirvonen 2011, p. 21.
[13] Ibid.

questions.[14] The main research conundrum within the field of legal dogmatics is to establish the content of currently enforced justice in relation to the legal issue at hand.[15] Therefore, legal dogmatics can be characterized as the aspiration to break down the meaning of legislature. The aforementioned systematization as part of legal dogmatics, refers to how the science of legal dogmatics structurizes and organizes collections of legal norms created by legislative authorities to help create a comprehensive and uniform legal framework.[16] The interpretation of norms forms the more practical dimension of legal dogmatics where norms and aspects of law are studied in order to produce an interpretation of their meaning in the context of the specific issue related to them.[17] The case law generated by judgements or other judicial statements such as advisory opinions by international courts can be applied into a perspective of legal dogmatics in interpreting the meaning of international norms in relation to certain occurrences, such as the issue of Israeli settlements in the occupied Palestinian territories, an issue on which several UN organs have given statements and advisory opinions on.[18]

In addition to the application of legal dogmatics in this paper, the concept of teleological interpretation will be applied. Teleology or teleological interpretation in the context of law means interpreting norms in a way that stays true to the original intent of the law.[19] It can be understood as interpreting the law in accordance with what the legislators of said law intended its purpose to be. Teleology, in its legal context, has to do with the consequences initiated by legal interpretation as they will in many instances create further case law in interpretation of the norms related to similar judicial topic areas.[20] In relation to the issue of Israeli settlements in the occupied territories, the teleological approach should be applied in a way highlighting the primacy of human rights as a sizable portion of the applicable norms relating to the issue stem from treaty law and customary law directly created to ensure the respect of human rights.[21]

The legal dogmatic interpretation, together with a teleological approach, is to be issued through the analysis of multilateral conventions where the legal framework that is applicable to the State of Israel and the occupied Palestinian territories of the West Bank and East Jerusalem can be found in. The conventions laying out the law of international armed conflict, belligerent occupation and international humanitarian law as well as the general principles of international law relevant to the

[14] Creifelds et al. 1997, p. 1018.
[15] Husa et al. 2008, p. 20.
[16] Hirvonen 2011, p. 25.
[17] Hirvonen 2011, p. 21-25.
[18] Dinstein 2019.
[19] Huovila 2005, p. 68.
[20] Huovila 2005, p. 68-75.
[21] Such as the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

issue of the Israeli settlements can be found within the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War and its Additional Protocol I, 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, and Vienna Convention on the Law of Treaties. Through a thorough analysis and theoretical application of the relevant legal provisions of the conventions, an objective and comprehensive view of the Israeli settlements' legal nature under international law can put together.

To support the analysis of the aforementioned international conventions, case law generated by the International Court of Justice through its judgements and advisory opinions on the issue and case law created by the International Military Tribunals for Nuremberg and the Far East's judgements will be used to examine as well as demonstrate how case law for the application of different conventions has been accumulated. In addition to case law, I will also be utilizing different types of legal literature by a plethora of authors on the interpretation of international customary and treaty law plus the evolution of the legal norms relating to the settlements issue. The analysis will furthermore be supplemented by the utilization of relevant United Nations General Assembly Resolutions, United Nations Security Council Resolutions and the United Nations Human Rights Council's independent international commission of inquiry's report on the Occupied Palestinian Territory, including East Jerusalem and Israel. The analysis of the settlements will be conducted by first establishing the relevant framework of international law and its application to the Occupied Territories and Israel as their administrator. The framework will be followed by an analysis of the several key legal provisions regarding the rules of warfare and occupation which are to be used to form an interpretation of the legal status of settlements in the Occupied Territories.

2 The framework of international law applicable to Israel and the occupied Palestinian territories

2.1 The status of international law

International law is, in its core, the legal rules and principles that govern the relations of States to one another.[22] The aforementioned, traditional, definition of international law has widened to include various actors as subjects to it. In addition to States, international law recognizes multiple varieties of non-State actors as subjects to international law, such as non-governmental organizations, multinational corporations, international organizations, national liberation movements and individuals.[23] Therefore, even when some sovereign States do not recognize the State of Palestine as a sovereign nation, the applicability of international law and the law of armed conflict can be determined by the existence of the Palestinian people as a community or a national liberation movement subject to international law. International law can be embodied as a set of treaties and policies dictating the rights and obligations laid upon States and other legal entities bound by international law. One of the defining features of what sets international law aside from national law of States is that it has no legislature that enacts international law nor is there an international constitution upon which further internationally binding norms can be built.[24] As such, the burden of applying international law in States falls mainly to the individual States as there isn't a supranational or global entity that could enforce international law.

International law and its position as law guiding all nations can be sourced from the principle of *opinion juris sive necessatis* which refers to the belief that when States follow a certain practice, such as abiding to the principles of international law, they are doing so out of a sense of obligation.[25] International law is to be seen as having supremacy over domestic law, meaning that when a conflict arises between a provision of international law and a domestic norm, the provision of international law supersedes the domestic norm. This principle is embodied in the term *lex superior derogat legi inferiori*. The supremacy of international law is also codified into Article 27 of the 1969 Vienna Convention on the Law of Treaties, which states:

> *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*

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[22] Grant 2010, p. 1.
[23] Grant 2010, p. 35.
[24] Grant 2010, p. 1-2.
[25] Grant 2010, p. 18.

The language of Article 27 refers to parties of a treaty, insinuating its binding effect to only work in relation to States that are parties to the Vienna Convention, which Israel isn't. However, as the Vienna Convention has been widely considered as a mere codification of existing international customs, it can be applied as customary despite its technical form as treaty law.[26] Therefore, even though Israel has attempted to escape the obligations of the Vienna Convention by refusing to become a signatory to it, the customary interpretation of the Convention trumps any technicalities that may allow States to try and bypass the Convention's provisions. In reality Israel has still been able to ignore Article 27 as there is no legal body to enforce the Vienna Convention in Israel so as long as the Israeli State maintains its independence from the Vienna Convention, Israel can continue to not abide by its provisions even when theoretically acting in breach of it.

The supremacy of international law is also determined by the principle of *lex specialis derogat legi generali*, meaning that that a law with the status of lex specialis will have primacy over general legal norms. According to the International Committee of the Red Cross, human rights law, which is to be applicable at all times, constitutes the lex generalis whereas international humanitarian law becomes applicable in the case of an armed conflict, thus constituting the lex specialis of armed conflict and international armed conflict.[27] Human rights law and international humanitarian law are usually meant to be interpreted as complimentary to each other but when analyzing the legal aspects of armed conflicts, international humanitarian law assumes a higher position.[28] The majority of international humanitarian law is determined by multilateral treaties[29], of which the most relevant on the issue at hand are the four Geneva Conventions of 1949, especially the fourth Convention.

As established, international law holds a dominant position as opposed to domestic law and in a situation of international armed conflict it creates the relevant framework for observing how States are to act in time of conflict. Ergo, in case of belligerent occupation international law is the predominant source of law to guide the legality of different actors' undertakings. Thus, the relevance of the rules regarding belligerent occupation are to be examined to fully grasp how to view the Israeli settlements as they exist in belligerently occupied territories.

2.2 Belligerent occupation

To understand Israeli settlement policy within the occupied Palestinian territories, an understanding of the framework of belligerent occupation, as it is defined by international law, must be had.

[26] Greenwood 2008.
[27] ICRC 2011.
[28] Ibid.
[29] ICRC 2004.

Belligerent occupation is a form of occupation characteristic of international armed conflict, where one state exercises effective control over another state in a coercive manner.[30] Belligerent occupation receives its judicial classification from international humanitarian law, which maps out its rules and obligations concerning both the belligerent and the occupied population.[31] A territory of a state that is occupied by a belligerent shall remain territory of the occupied state as long as the occupied community exists as a state within the meaning of international law.[32] Palestine can be seen as fulfilling this criterion, considering the fact that the State of Palestine has signed and ratified the Geneva Conventions, of which the fourth Convention is in direct relation to the rules of belligerent occupation. What binds Israel to follow international law in regard to belligerent occupation, is the fact that Israel too has both signed and ratified the Geneva Conventions as well as that the general principles of customary international law bind all states.[33] Both States having ratified the Geneva Convention IV may seem superficial in some aspects, considering that the Convention is often classified as customary international law. However, as not all States agree on what is and isn't considered customary law, the ratification of a treaty, despite its customary nature, is a sign of approval of the treaty's contents. It should however be noted that a territory's or a people's non-existence as a State within the meaning of international law does by no means excuse a belligerent occupant from following the rules of warfare legislated by the Geneva Conventions, which are the primary source of legal norms relating to occupation.[34] Even though Israel is a signatory to both the Hague and Geneva Conventions that form the bulk of the international law centered around belligerent occupation, Israel doesn't recognize the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War as applicable to the Occupied Palestinian Territories.[35] This complicates Israel's role as the belligerent occupier of the Palestinian Territories legally as Israel's administrative and judicial organs are the ones relied on for enforcing law of belligerent occupation in its domestic courts in the absence of a supranational body to enforce international law. The non-recognition by Israel of some of the norms relating to belligerent occupation has made part of theoretically applicable international law non-enforceable in Israel's domestic courts.[36]

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[30] Dinstein 2019, p. 33.
[31] Ben-Naftali 2018, p. 141
[32] Dinstein 2019, p. 2
[33] Dinstein 2019, p. 4
[34] See Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.
[35] Shamgar 1971, p. 262-266.
[36] Kretzmer 2002, p. 22-23.

Belligerent occupation and activities undertaken during such an occupation are laid out in the Hague and Geneva Conventions respectively. A thorough analysis of the applicability of the Conventions to the Occupied Territories and their relativity to the settlements issue are needed to fully grasp the framework in which the settlement project has been taking shape. Through analyzing the Conventions in relation to the Israeli-Palestinian conflict it can be observed how they are to be interpreted in a human rights friendly manner regarding the settlement project.

2.3 The Hague Conventions

Occupation and the rules of it are defined in Articles 42 through 56 in 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 (IV) was created in 1907 and bound all its signatories to adhere by the obligations it created in regard to belligerent occupation. Israel, however, never signed nor ratified the fourth Hague Convention, which would make it nonbinding towards Israel in the sense of traditional treaty law. However, the Hague Conventions have with time reached a more declaratory status, morphing them from treaty law into customary international law. This change in the nature of the Hague Conventions was first addressed in the Nuremberg Trials. In the Nuremberg Judgement of the International Military Tribunal, the court stated:

> *The rules of land warfare expressed in the convention undoubtedly represented an advance over existing International Law at the time of their adoption. The Convention expressly stated that it was an attempt "to revise the general laws and customs of war", which it thus recognized to be then existing, but by 1939 these rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the rules and customs of war which are referred to in Article 6 (b) of the Charter.*

Therefore, it can be seen that the Hague Conventions had, by the time of the Nuremberg Trials, evolved fully from treaty law into customary international law, thus creating an obligation to the international community to be bound by it in a declaratory manner. As a consequence, all states will have to adhere to the Conventions even if they weren't parties to any of the original Hague Conventions.[37] The status of the Hague Conventions existing as part of customary international law has since been reverberated in the judgements of other international courts as well, such as the International Military Tribunal for the Far East' majority judgement in 1948 and the International Court of Justice's Judgement in the *Armed Activities on the Territory of the Congo* case in 2005.[38]

[37] Dinstein 2019, p. 4-6.

[38] International Military Tribunal for the Far East: Judgement of 4th November 1948, p. 38, 44, 58; International Court of Justice: Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) Judgement of 19th December 2005, p. 65, 80.

The aforementioned judgements thus create further international case law in the applicability of the Hague Conventions as customary international law, cementing its position on the world stage.

As customary international law, the status of the Hague Conventions' applicability through international courts has been established through previous case law laid out by both the Nuremberg Trials and the Tokyo Trials as well as the *Armed Activities on the Territory of the Congo* case. The International Court of Justice has, however, also made direct commentary confirming the Hague Conventions' applicability directly to the Occupied Palestinian Territory in its *Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in which the Court makes direct references on the applicability of the Hague Conventions as well as listing it in the directory of applicable law in relation to the Occupied Palestinian Territory.[39]

2.4 The Geneva Conventions

The Geneva Conventions, similarly to the Hague Conventions, were initially signed and ratified by a number of states as treaty law. By the time of writing, all United Nations Member States have ratified the original four Conventions. Therefore, in international armed conflicts involving two or more States, the Geneva Conventions could be viewed as customary even if they were in essence still treaty law. The Geneva Conventions' evolvement into being customary in nature has however been demonstrated in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* where in its judgement the International Court of Justice deems:

> *The Court however sees no need to take a position on that matter, since in its view the conduct of the United States of America may be judged according to the fundamental general principles of humanitarian law ; in its view, the Geneva Conventions are in some respect a development, and in other respects no more than the expression, of such principles.*[40]

According to Article 154 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, the Convention is supplementary to the Hague Conventions respecting the Laws and Customs of War on Land. Thus, the international law that the Hague and Geneva Conventions create are to be interpreted in relation to one another. The Geneva Conventions build on the Hague Conventions and specify the partly vague phrasing in them but don't in any way supersede the Hague Conventions.[41] An Additional Protocol Relating to the Protection of Victims of

[39] Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, p. 3.
[40] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) 1986, p. 103.
[41] Dinstein 2019, p. 6.

International Armed Conflicts (Protocol I) was added to the Geneva Conventions in 1977.[42] Unlike the four original Geneva Conventions, Additional Protocol I is not universally accepted as international custom and a minority of States, including Israel, have rejected many parts of it.[43] Most provisions of Additional Protocol I are nevertheless considered as customary norms and 174 States are already fully parties to it.[44] As seen in the quote above, it can rightfully be assumed that the International Court of Justice's position on the matter of the Geneva Conventions' customary nature is also clear. Although the Geneva Convention IV's status as customary law is irrelevant in the international community on account of all United Nations Member States having signed and ratified it, the International Court of Justice's judgement in the *Nicaragua v. United States of America* case creates clear precedence for Additional Protocol I's recognition and applicability as customary international law in the eyes of the Court. Creating precedence for Additional Protocol I's customary nature is important when viewing the conflict between Israel and Palestine because if the Additional Protocol I were to be only seen as treaty law, its relevance and applicability to both Israel and Palestine would fall short on account of the 1969 Vienna Conventions. The 1969 Vienna Convention on the Law of Treaties was created to codify the existing principles of customary international law.[45] Article 34 of the Vienna Convention on the Law of Treaties expressly states:

> *A treaty does not create either obligations or rights for a third state without its consent.*

Thus, the customary nature of the Geneva Conventions and Additional Protocol I play a major role in interpreting international law in regard to Israel as when viewed as treaty law instead of customary law, the Additional Protocol I, especially, becomes void of any legal effect on the state of Israel.

Israel has, in the past, contested the applicability of the Geneva Convention IV to the occupation of the Palestinian territories, claiming that the situation in the former British Mandate of Palestine is *sui generis* and therefore doesn't fall under the jurisdiction of the Convention as both Jordan and Egypt were previously belligerent occupants of the territories.[46] There is, however, no requirement for a belligerently occupied territory to have been an independent State at the commencement of the occupation for the Fourth Geneva Convention to be *de jure* applicable to the occupying power and the occupied people. Even if there were inconsistencies or lacking international legislation to be applied to the occupied Palestinian territories at the start of the occupation in 1967, international law

[42] Dinstein 2019, p. 7.
[43] Ibid.
[44] Ben-Naftali 2018, p. 144.
[45] Linderfalk 2007.
[46] Shamgar 1971, p. 262-266.

is clearly applicable from the State of Palestine's declaration of independence in 1988 to present day. The State of Israel has also in the past argued that the Palestinian territories don't fall under the definition of a "High Contracting Party" as depicted in the Geneva Convention IV.[47] The first paragraph of Article 2 of the Convention states:

> *In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*

As can be seen from the first paragraph of Article 2, the territory of a High Contracting Party is not named in the paragraph, insinuating it not being a requirement for the Fourth Convention to apply. The first paragraph does however highlight how the recognition of the state of war is also not a requirement for the application of the Convention, which allows for international law to bypass Israel's non-recognition of the conflict's nature as war.

The second paragraph of Article 2 states:

> *The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if said occupation meets with no armed resistance.*

As can be seen, the general rule of Article 2 is stated in the first paragraph.[48] The second paragraph specifies the application of the Article to cases of occupation where there is no armed resistance by the occupied people. The origin for the second paragraph being included can be traced to occupation of Denmark in the Second World War by the German Reich, where the German occupants were met with no armed resistance by the Danes.[49] The exact applicability of the second paragraph of Article 2 is judicially irrelevant to the Israeli-Palestinian conflict as Palestine has no armed forces and is therefore incapable of armed resistance by the State, even though civil resistance is still possible as can be seen in the Palestinian uprisings, known as Intifadas.

The Israeli State's interpretation of Article 2 based on Palestine, in their view, not fitting the description of a High Contracting Party has been invalidated by the International Court of Justice in its Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, in which the Court stated in relation to the second paragraph of Article 2 that

[47] Dinstein 2019, p. 20-21.
[48] Dinstein 2019, p. 21.
[49] Schindler 1979, p. 132.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

The Israeli interpretation of the second paragraph is therefore, in the eyes of the International Court of Justice, rendered void.

The third and final paragraph of Article 2 states:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

The third paragraph makes the Convention's position on the applicability of the Convention clear in the case of an armed conflict where one party of the conflict isn't party to the Convention itself. This guides Israel to abide by the Convention even when Palestine wasn't party to the Geneva Convention IV, which was the case until Palestine's accession to the Fourth Geneva Convention and its Additional Protocol 1 in 2014.[50] The language of the third paragraph can be seen as being in harmony with the International Court of Justice's aforementioned advisory opinion, in which the Court also reaffirmed the Convention's applicability.

Despite Israel's refusal to apply the fourth Geneva Convention de jure in regard to the occupied West Bank, it has claimed that the Convention's humanitarian provisions would nevertheless be applied on a de facto basis.[51] Such an interpretation of the Convention's applicability is however contested heavily by the International Court of Justice's advisory opinion on the matter.[52] Though it is of note that the International Court of Justice's advisory opinions have no binding judicial power and as such it falls to the State of Israel to decide whether an advisory opinion is of binding force in its case. Even then that doesn't relieve Israel of its obligation to abide by the Geneva Convention IV's provisions as the customary nature of the Convention has been acquired through international case law thus making it applicable to every State at all times.

[50] United Nations General Assembly Resolution 70/88, 2015.
[51] Roberts 2017, p. 45.
[52] Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, p. 32.

3 The status of Israeli settlements and the legal implications that the creation of settlements generates

3.1 The transfer of persons

The transfer of the occupying power's civilian population into the occupied territory is prohibited in Article 49 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War in which paragraph 6 of the Article states:

> *The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.*

It can be observed that the language of Article 49 is clear and concise, it allows for no exceptions or restrictions to transfers of civilians into territory occupied by the occupying power. Israel can be observed to be in breach of this provision of the Geneva Convention IV through its extensive settlement project within the occupied territories of the West Bank and East Jerusalem. The Israeli State has mobilized to help plan, fund and build multiple urban as well as rural settlement communities within the bounds of the occupied territories since the beginning of the occupation in 1967, and as of 2018 120 official settlements existed in the occupied West Bank.[53] As is evident, the settlement project is monumental in size and continuous in its scope, resulting in violations of the fourth Geneva Convention that span over multiple decades since the beginning of the occupation. The Israeli State has been made well aware of the illegality of its actions regarding the settlements by the United Nations Security Council, which has called upon Israel to

> *rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular not to transfer parts of its own civilian population into the occupied Arab territories.*[54]

The UN Security Council has taken the view that the settlement practices, being in violation of Article 49 of the Geneva Convention IV, have no legal validity.[55] Therefore the settlement project is, under international law, prohibited from continuing and should on those grounds be discontinued.

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[53] Sfard 2018, p. 203-204.

[54] United Nations Security Council Resolution 446 1979.

[55] See Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

It should be noted that while Article 49 explicitly prohibits a State from transferring parts of its civilian population into a territory where said State acts in the role of belligerent occupant, the scope of Article 49 doesn't apply only to literal transfers of civilians. The distinction is an important one to make as Israel isn't conducting literal forced mass transfers of Israeli citizens into the West Bank and East Jerusalem. Instead, Israel provides necessary infrastructure and other incentives for Israelis to willingly move into the occupied territories.[56] Article 49 indeed covers, in addition to forcible transfers and deportations, also any measures by the occupying State to encourage its citizens to migrate to the territory under occupation.[57] In this distinction it is observable that the International Court of Justice has employed a broad interpretation of Article 49 in order to produce wider capabilities for its interpretation. The broad interpretation of paragraph 6 of Article 49 allows for Israeli State support to the settlement project to fall under the meaning of civilian transfer dictated in the Article thus allowing the project to be considered as a violation of the Article. When viewing the legal issue of demographic change and settler expansionism teleologically, a broad interpretation of Article 49 is necessary to produce legal effect for the Article to shield Palestinian human rights relative to the settlement project taking place in the Occupied Territories. Therefore, it isn't acceptable under the jurisdiction of the Geneva Conventions to employ a narrow interpretation of Article 49's provisions as it would be counterintuitive to apply a provision of a collection of legal norms, directed to ensuring the protection of the human rights of protected persons, in a way that works against the interests of the inhabitants of the occupied territory.

The Israeli High Court of Justice, however, hasn't recognized the breach of Article 49 in relation to constructing settlements within the Occupied Territories and has continued to claim that the Geneva Conventions aren't enforceable in Israel's domestic courts.[58] The unenforceability, according to the High Court, stems from the Israeli interpretation of the nature of the Geneva Conventions where Israel doesn't recognize the Conventions as customary law which cannot therefore be applied in Israeli domestic courts, thus making Article 49 unenforceable.[59] This interpretation of the legal nature of the Geneva Conventions has of course been rebuffed by the International Court of Justice on multiple occasions and the customary nature of the Conventions has been strongly established through case law of generated by the International Court of Justice.[60] The primacy of international humanitarian

[56] Sfard 2018, p. 200-217.
[57] Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, p. 39.
[58] Kretzmer 2002, p. 22-23.
[59] Kretzmer 2002, p. 78.
[60] See chapter 2.4 for the customary nature of the Geneva Conventions and their applicability to Israel and Palestine.

law in relation to domestic law is the key legal principle which is to be considered when making arguments for or against the applicability of the Geneva Convention IV and its provisions in a situation of international armed conflict. As the fourth Geneva Convention constitutes the lex specialis of international armed conflict, applying domestic Israeli law over the provisions of the Convention is not possible in the eyes of international law nor is claiming the non-enforceability of lex specialis judicial norms that have been established to be of customary nature and thus applicable to all States. As a consequence, the interpretation of the Israeli High Court of Justice crumbles as international case law supersedes any legal precedence created by the High Court's interpretation of the applicability or nature of the Geneva Conventions. Any interpretation or legal action taken on the assumption of the Geneva Conventions' non-applicability to the Occupied Territories becomes void of any legal effect as such an assumption is legally a clear non sequitur. Due to international law not having a supranational organ or institution to enforce international law's provisions on a national scale however, the burden of enforcement falls unto the Israeli State which has so far been unwilling to apply any international court's decisions over its own domestic law since the beginning of the occupation of the West Bank and East Jerusalem. It is however noteworthy that the Israeli High Court of Justice has ruled that the Hague Conventions are of customary legal nature and therefore any arguments resting on violations of the Hague Conventions are justiciable to be applied within Israeli domestic courts.[61] The other main reason that is cited by the Court in regard to not taking a position on the legality of the settlements is that it sees the political sensitivity of the general arguments relating to the legality of the settlements are not justiciable.[62] This can be seen as a direct link to the Israeli view of treating the legal status of Palestine as *sui generis*, thus supporting the Israeli argument of non-justiciability of any arguments concerning the legality of the settlements.

The construction of permanent housing units and other civilian infrastructure on occupied territory allows for a continuous breach of both the Hague and Geneva Conventions since the population evacuated from the occupied territory should be transferred back to the areas they inhabited previously to the displacement for necessary military reasons, in this case undertaken by the Israeli Defence Forces, as soon as hostilities in said areas have ceased.[63] The construction of settlement communities in these areas act as proof that no hostilities are actively taking place in the areas seized from the Palestinian population, seeing as they would not be safe for settler communities to freely inhabit if they were a part of an active conflict zone. Therefore, it can reasonably be argued that no

[61] Kretzmer 2002, p. 78
[62] Ibid.
[63] Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, p. 41.

threat of imminent danger is looming above the settlements, in which case the ownership of land confiscated from the Palestinian population should be returned to usage by their previous owners as soon as physically and administratively possible. In doing so the State of Israel would be acting according to its obligations dictated by the Geneva and Hague Conventions Articles 49 and 46 respectively.

As no hostilities regarding the conflict are taking place within the bounds of settler communities in the Occupied Territories, the return of private property to their Palestinian owners is to be done as soon as possible in order to comply with Article 49, as its aim is to prevent fundamental demographic change in the occupied territory.[64] The construction of civilian settlements, the purpose of which is to allow for the transfer of Israeli jews into the occupied territory, creates the risk of drastic change in the ethnic demographics of the West Bank and East Jerusalem as the longer a settlement exists, the longer the original inhabitants stay displaced which in turn makes their return more difficult. On that ground, the relocation of settlers and the Palestinians who have previously inhabited the land on which the settlers reside is necessary for the proper realization of Article 49's provisions in the Occupied Territories. Article 49 reflects the principle of right of return for displaced protected persons. In order to comply with the fourth Geneva Convention, Israel needs to allow for the repatriation of any protected persons displaced due to settler expansion. The right of return exists as a general right applying to all persons displaced during a period of armed conflict which has been codified first in the Hague Regulations and incorporated later into the Geneva Conventions and their Additional Protocols.[65] Blocking the right of return of Palestinians thus demonstrates a further breach of international humanitarian law through the settlements. This is demonstrated through interpretation of the Hague Convention IV, Article 43:

> *The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*

The rule of the right of return therefore necessitates that the belligerent occupant of a territory must preserve the social and legal status quo of the occupied territory to the furthest extent possible, meaning that the occupied population's existence must go on with minimal interference from the occupying power.[66] As is apparent from the creation of settlements and the population transfers

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[64] Dinstein 2019, p. 238-240.
[65] Boling 2001, p. 8.
[66] Ibid.

coupled with the seizure of private property[67] as a direct consequence of settlement expansion, the settlements exist in violation of the right of return, thus forcing illegally transferred protected persons to remain displaced.

In light of the prohibition on population transfers into the occupied territory it should be noted that such a ban refers to transfers of civilian population and as such the transfer of military and civil servant personnel into the occupied territory for the purpose of public administration is allowed.[68] The partial administration of an occupied territory and upholding of the law of international armed conflict as well as other international law falls to the Occupying Power and the necessary personnel required for those purposes in the occupied territory are permitted to reside there as needed. There shall however be a distinction between residing in the occupied territory temporarily for purposes dictated by international law and the settling of an occupied territory for the purposes of demographic change or *de facto* annexation of such territory. Article 49 does not rule out personnel transfers for necessary purposes by the belligerent occupant, as they don't fulfil the definition of "transfer" in the meaning that Article 49 aims to convey and how it is meant to be interpreted.[69]

It is important to note that while acting in breach of Article 49, the State of Israel isn't presenting its actions as those of a State willingly violating international law by which it is bound to abide. The Israeli High Court of Justice has managed to create a legal loophole which allows for the settlement project to thrive on with full steam by refraining from administering rulings that would call into question the legal basis upon which the settlement project rests on. As it is clear from paragraph six of Article 49 that Israel is acting in violation of the Geneva Convention IV, the High Court of Justice never ruled on the principles on which the establishment of civilian settlements in the Occupied Territories could be judicially based on.[70] This allows for the Israeli State to go on with the settlement activities under the assumption of legality as the High Court of Justice hasn't created any juridical basis for the illegality of civilian settlements on the basis of international law, especially Article 49.[71] On account of the High Court of Justice deliberately making efforts to not take a position on the legal nature of the settlements, it would be straightforward for the State of Israel to ignore the provisions of the Geneva Convention IV relating to population transfers if it weren't for the United Nations

[67] See chapter 3.2.2 for the seizure of private property in the Occupied Territories.
[68] Dinstein 2019, p. 240.
[69] As is evident from Dinstein 2019, p. 240, paragraph 576.
[70] Kretzmer 2002, p. 99.
[71] Ibid.

Security Council and the International Court of Justice who have strongly condemned the project due to international law being incompatible with the Israeli interpretation of the project's legal nature.

3.2 The permanence of civilian settlements and the usage of both private and public property for settler activity resulting in such perceived permanence

3.2.1 The question of settlement permanence

The construction of buildings for use by the occupying power's population, that are not fundamental to necessary military activities of the occupying power, is in principle banned in a situation of belligerent occupation, seeing as belligerent occupation is by definition a temporary measure. The permanence of buildings, in this case civilian infrastructure such as housing units, amounts to *de facto* annexation by the belligerent occupant even when Israel doesn't recognize it *de jure*. The Israeli State hasn't contested the existence of the settlements, further suggesting the State's willingness to act in breach of Article 49 of the Geneva Convention IV. Israel has however on multiple occasions defined the seizure of private land for use in building settlements as temporary seizure as opposed to "confiscation" which transfers ownership of property, which is prohibited in the Hague Convention IV as illegal activity.[72] This exhibits the Israeli State's attempts to bypass provisions of international law in order to portray the settlement project as abiding by international law even when it is encountered by lex specialis legal norms directly in conflict with the nature of the project.

The planned permanence of the Jewish settlements is visible from state support for infrastructure necessary to continued civilian inhabitancy as well as the transfer of families with young children to the settlements.[73] The Israeli State's support to the settlement project has observed the confiscation of road, water and sewage networks from Palestinian usage and their allocation into usage by the Israeli settler population in the settled areas.[74] The connection of established settlements into the electrical grid also suggests that the settlements are meant to have a permanent place in the occupied territories.[75] The planned permanence of infrastructure built within the Occupied Territory can be observed from how such infrastructure functions in relation to Israeli and Palestinian society. Civilian infrastructure for use by settlers and arguably unnecessary military infrastructure serve a purpose as tools for Israeli control and evidently at least temporary demographic change within the bounds of

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[72] See Hague Conventions (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Article 46 for the prohibition on confiscation of property and Sfard 2018, p. 208, regarding temporary seizure of property.
[73] Sfard 2018, p. 205-215.
[74] Sfard 2018, p. 204.
[75] Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel 2022, p. 10.

the Occupied Territory.[76] Even though Israel has made promises to the temporariness of such infrastructure both directly and indirectly, the reality remains that such infrastructure poses the risk of becoming permanent by its nature and usage. The International Court of Justice has described the regime that expansion of Israeli infrastructure within the Occupied Territories create as *fait accompli* as it by its nature may become permanent.[77] Hence the damage to the Palestinian communities and the dissolution of the borders between Palestine and Israel have been caused, having the chance of becoming permanent as the State of Israel has been advancing with the settlement project despite condemnation by the international community and the International Court of Justice.

Civilian infrastructure in and of itself doesn't automatically create the likeliness of attaining a permanent position as settlements in the Occupied Territory, thus creating a permanent breach of Article 49 of the Geneva Convention IV and the Hague Regulations Article 46, but the way in which such settlements are populated with families including small children implies that the children of settlers are assumed to grow up in the settlements and engrain themselves within that milieu. The integration of settlers of Israeli origin into the Occupied Territory materializes as a clear violation of Article 49 of the fourth Geneva Convention as it inevitably results in demographic change within the territories in which Israeli settlements are located. The permanence of the violation can be observed from how the Israeli State and its citizens residing in the settlements ground themselves within the communities as if they were normal Israeli towns subject to Israeli administration and law which in turn isn't possible from the perspective of international law due to their mere existence violating several provisions of international customary law. As a consequence, the *fait accompli* created by Israel proves harder to reverse as time goes on and the communities integrate deeper into Israeli society, indicating a form of annexation of the territories on which the settlements lay.

3.2.2 Usage of private land for settlement expansion

As Israel's characterization of land seizure is presented as a temporary measure that doesn't amount to confiscation of land which would transfer ownership from the Palestinians to the Israelis, the settlements built on seized land are and will be of a temporary nature when following the logic laid out by the Israeli interpretation of land seizure. Assuming that the Israeli State is committed to upholding the temporary nature of the settlements, the question of the settlements' existence in their

[76] Such as *The Wall*, referenced in the Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

[77] Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, p. 90.

current state is of a confusing nature. The prohibition of land confiscation stems from Article 46 of the Hague Convention IV in which is stated:

> *Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.*
>
> *Private property cannot be confiscated.*

Israel has managed to bypass the ban on confiscation of property by rebranding it as "seizure" as can be seen in the first paragraph of chapter 3.2.1 However, it can't be reasonably argued that forcible seizure of private land from the Palestinian population in the occupied territories doesn't act in breach of the demand for the respect of private property dictated by the first paragraph of Article 46. Palestinians have on multiple occasions petitioned the High Court of Justice of Israel, claiming that seizing private land for settlement expansion is against the requirements set under international humanitarian law, which have always been waived by the High Court on the grounds of settlements performing important military and defense functions.[78]

Seizing land, on which Palestinians have previously lived on, and allocating it to new inhabitants of a different ethnic group and nationality for the purpose of expansion of a State currently belligerently occupying the territory on which the private land is located in is in its essence a breach of the respect for private property that Article 46 clearly and concisely demands from States engaged in an active armed conflict. It can therefore be deducted from the wording of Article 46 and Israel's activity in settlement creation that the right to have private property respected is being breached through the seizure of private land, and further breaches of international law are being created by continuously building civilian infrastructure on said land with little regard to its previous owners' right to the land in question. The Israeli authorities have however deemed that the seizure of land for settlement construction doesn't breach international humanitarian law and is necessary for security reasons.[79] In a quote from the case of Ayub et al. v. Minister of Defence et al., featured in *Land Grab: Israel's Settlement Policy in the West Bank*, Justice Vitkon of the High Court of Justice has stated that:

> *In terms of purely security-based consideration, there can be no questioning that the presence in the administered territory of settlements – even "civilian" – of the citizens of the administering power makes a significant contribution to the security situation in that territory, and facilitates the army's performance of its function. One need not be an expert in military and defense matters to appreciate that terrorist elements operate more easily in territory occupied exclusively by a*

[78] Lein et al. 2002, p. 48.
[79] Lein et al. 2002, p. 48-49.

population that is indifferent or sympathetic to the enemy than in a territory in which there are also persons liable to monitor them and inform the authorities of any suspicious movement. With such people the terrorists will find no shelter, assistance and equipment. These are simple matters and there is no need to elaborate.[80]

It is therefore apparent that Israel's judicial system considers the transfer of civilians into the Occupied Territories as a military necessity. This interpretation exists in direct contradiction of Article 49 of the Geneva Convention IV which requires for no demographic change to happen within an occupied territory caused by actions of the belligerent occupant. It can also be observed that a contradiction exists between the Israeli High Court of Justice's view of the civilian settlements being a necessary part of assuming militaristic security in the Occupied Territories and the international community's view on the settlement project needing to be discontinued on the grounds of breaches of international law. By nature, civilian settlements of the occupying power existing in an active conflict zone on occupied territory would endanger the safety of the occupying power's civilian population to the terrorism mentioned by Justice Vitkon and therefore necessary security needs of the occupying power's armed forces wouldn't be complimented but rather compromised by the presence of civilian citizens of the occupant.

It should also be noted that the displacement of civilians in the Occupied Territories and the seizure of properties owned by them as well as settlement construction being a tool for demographic change are clearly against the meaning of Article 46 of the Hague Convention IV and Article 49 of the Geneva Convention IV, both of which the Supreme Court of Israel has deemed to be applicable in the city of Rafah in the Gaza Strip.[81] The International Court of Justice has further remarked that in light of the foregoing, the Geneva Convention IV is applicable in all Palestinian territories.[82] In that regard the International Court of Justice's case law should be applied by Israel and directly overrides any Israeli policy aiming to seize private property for the purposes of settlement expansion.

3.2.3 Usage of public land for settlement expansion

In addition to private land seized from Palestinians, Israel has also employed the usage of public Palestinian land for settlement expansion. The Drobless Plan[83], adopted by the Israeli government in 1981 as part of its settlement policy within the Occupied Territories, details the plan to seize land for

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[80] Originally from H.C. 606/78, quote translated into English by Vardi, S. & Shulman Z. and featured in Lein et al. 2002, p. 48-49.
[81] Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, p. 34.
[82] Ibid.
[83] Officially called *Settlement in Judea and Samaria – Strategy, policy and plans*.

the purpose of suppressing the Arab population through settlement expansion.[84] Such seizure of public land by the occupying power is prohibited under Hague Convention IV, Article 55 which states:

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Article 55 thus embodies the occupying power's right to administrate and make use of public property of the occupied territory but doesn't grant it any rights to annexation or to transfer its civilian population into the property. Article 55 legitimizes the occupying power's control over occupied state lands but at the same time also creates limitations to how such lands may be used.[85] It can therefore be deduced that Article 55 creates the legal ground allowing for the occupying power to exercise administrative power to a degree that is imperative for effective governance within the occupied territory. The administration of an occupied territory doesn't however include settling the territories with the occupant's civilian population because of the prohibition on demographic change, as interpreted from the Geneva Convention IV Article 49.[86]

The Drobless Plan, one of the major blueprints for the Israeli State's settlement policy, features the reasoning and geopolitical intention behind the acquisition of public as well as uncultivated Palestinian land as follows:

> It is therefore significant to stress today, mainly by means of actions, that the autonomy does not and will not apply to the territories but only to the Arab population thereof. This should mainly find expression by establishing facts on the ground. Therefore, the state-owned lands and the uncultivated barren lands in Judea and Samaria[87] ought to be seized right away, with the purpose of settling the areas between and around the centers occupied by the minorities so as to reduce to the minimum the danger of an additional Arab state being established in these territories. Being cut off by Jewish settlements the minority population will find it difficult to form a territorial and political continuity.[88]

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[84] United Nations 1981.
[85] Kretzmer 2002, p. 93-94.
[86] See chapter 3.1.
[87] "Judea and Samaria" is the name used by the State of Israel to refer to the administrative district encompassing the entire West Bank with the exception of East Jerusalem. Definition sourced from Galnoor & Blander 2018, p. 184.
[88] United Nations 1981.

The Drobless Plan's vision of all public land areas of the West Bank being at the disposal of the Israeli State to use for advancing and expanding their own State is inherently incompatible to Article 55 of the Hague Convention IV, which even Israeli courts themselves have deemed as applicable to the areas and enforceable in their courts. The fundamental meaning of Article 55 is for the occupying State to act as a trustee to administer the occupied territory in a way that benefits the public of the occupied country and not that of the occupier itself.[89] Israel is not only neglecting its responsibilities as a usufructuary to the Occupied Palestinian Territories but also purposefully breaking its legal obligations produced by Article 55 by erecting settlements on public Palestinian land in breach of the Hague Convention IV. Following the policy of settling state-owned and uncultivated land, proposed by the Drobless Plan, also manifests in an organized form of demographic change inside Palestine directly in violation of Article 49 of the fourth Geneva Convention. The existence of a predetermined policy action plan demonstrates beyond doubt the organized and state-executed manner in which the settlement project has been thrusting forward for decades despite the Israeli State being aware of its illegal nature. Israel cannot thus mask the violation of Article 49 of the Geneva Convention IV nor Article 55 of the Hague Convention IV behind a curtain of unintentional or wilful ignorance as documentation of the premeditated nature of the breaches exists in the form of the Drobless Plan.

[89] Kretzmer 2017, p. 42-43.

4 Conclusions

4.1 On the framework of international law applicable to the Occupied Territories of the West Bank and East Jerusalem

International law's binding effect as the supreme law of nations stemming from the principle of *opinion juris sive necessatis* becomes further emphasized through the principle of lex superior that establishes the primacy of international law over domestic legal norms.[90] In the case of an international armed conflict, such as the Israeli-Palestinian conflict, the lex specialis legal norms of international humanitarian law claim a superior position on other international and domestic provisions, thus forming the basis for the laws of belligerent occupation to be applied into the Occupied Palestinian Territories and Israel as the occupying power.[91]

As the guiding principles of international humanitarian law to be applied into the analysis of Israeli settlements in the Occupied Territories are sourced from the Hague Convention (IV) respecting the Laws and Customs of War on land and its annex, Regulations concerning the Laws and Custom of war on Land and the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, the applicability of these conventions are of great importance to the analysis of the settlements' legal nature under international law. The primacy of international law guarantees that no domestic norms of either Palestine or Israel need to be taken into consideration when establishing the applicability of different provisions of international humanitarian law. The applicability of the fourth Hague Convention to Israel is formed by its customary nature, designated through case law from judgements made by international courts, as Israel isn't a signatory to the Convention itself.[92] Similar case law regarding the fourth Geneva Convention's applicability has been accumulated by the International Court of Justice as well.[93] The customary nature of Conventions that devise the laws of belligerent occupation is of great importance as it allows for the appliance of provisions of international law in cases where a State refuses to recognize international humanitarian law as applicable due to non-signatory status to a convention.

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[90] See the Vienna Convention on the Law of Treaties, Article 27.

[91] ICRC 2011.

[92] The Nuremberg Judgement of the International Military Tribunal of 1st of October 1946, p. 83; International Military Tribunal for the Far East: Judgement of 4th November 1948, p. 38, 44, 58; International Court of Justice: Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) Judgement of 19th December 2005, p. 65, 80.

[93] See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) 1986, p. 103.

Even though the International Court of Justice deems the Hague Convention IV and the Geneva Convention IV as applicable to the Occupied Palestinian Territories, Israel views the fourth Geneva Convention as non-applicable due to the Palestinian Territories being *sui generis* in nature.[94] Israel's refusal to recognize the applicability of the Geneva Convention IV leads to its unenforceability in Israel's domestic courts and thus the Convention remains judicially unenforced as, aside from Israeli courts, there are no judicial organs to apply the provisions of the Convention in a court of law. The fact that Israel doesn't view the fourth Geneva Convention as binding is confusing when considering that the Hague Convention IV is enforceable in Israeli courts, seeing as the Geneva Convention IV merely expands upon the provisions already dictated in the Hague Conventions.[95] Israel's non-recognition of the Convention's applicability doesn't relieve it from abiding by its provisions due to the Convention's customary nature in the eyes of the International Court of Justice, therefore making any activities in breach of the Convention illegal under international law.

4.2 Violations of international humanitarian law manifested through the existence of the Israeli settlements

Israel's extensive settlement project within the Occupied Territories has gone on since 1967, expanding in scope year by year.[96] This period has seen settlement expansion continue despite of violations of the laws of international armed conflict coming into existence through the creation of settlements in the Occupied Territories. The seizure of private Palestinian land as well as State-owned lands of the Occupied Territories for the purpose of settlement construction has seen the violation of the fourth Hague Convention through a premeditated project to oust Palestinians from certain areas of the Occupied Territories in order to use the land for settling Israeli civilians into those territories.[97]

The illegal nature of the establishment of Israeli settlements manifests from a plethora of breaches of international law. The key legal provision composing the illegality of the settlements is Article 49 of the Geneva Convention IV which prohibits the main element of Israel's settlement project: population transfers into the occupied territory. The Israeli State has provided support in the form of planning, funding, and construction in order to advance the settlement project within the Occupied Territories.[98] It is imperative that a broad interpretation of Article 49 is employed in respect to the Israeli State's role in the project so that the interpretation of the Article can claim any kind of State support to the

[94] Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, p. 3; Shamgar 1971, p. 262-266.
[95] Dinstein 2019, p.6; Kretzmer 2002, p. 78.
[96] Ben-Naftali et al. 2018, p. 1.
[97] Kretzmer 2002, p. 75 & Lein et al. 2002, in general.
[98] Sfard 2018, p. 203–204.

project as contributing to population transfers in order to produce the maximum human rights effect for Article 49. The underlying purpose of Article 49 is also to prevent fundamental demographic change in an occupied territory through mass transfers of the Occupying Power's civilian population into the occupied areas.[99] The violation of Article 49 in the Occupied Territories is construed from the fact that the Israeli settlements have facilitated a way for over half a million Israeli civilians to have settled into the West Bank and East Jerusalem, and to have formed communities consisting solely of Israelis.[100] Such a large-scale change in the ethnic demographics of the Occupied Territories is a clear breach of the purpose of Article 49. A necessary provision of international humanitarian law to pair with Article 49 in regard to the settlements is Article 43 of the Hague Convention IV. Article 43 under a teleological interpretation necessitates the maintenance of a status quo within an occupied territory, thus creating a link between the protected persons displaced due to settlement expansion and the settlements Israeli settlers reside in, changing the status quo through change in ethnic demographics and the displacement of Palestinians.

The transfer of Israelis into the Occupied Territories or the construction of temporary infrastructure for fulfilment of duties related to necessary military and public administration needs isn't prohibited.[101] The seizure of Palestinian private property is allowed when necessary military reasons so dictate in an area that is at the time under hostilities but the seized property is to be returned as soon as hostilities in that area come to an end.[102] The legal paradox created by the settlements' existence is generated by the fact that no military hostilities can realistically be taking place in settler communities or they wouldn't be safe for Israeli settlers to inhabit and expand, ergo the property seizures' legal justification is unable to fully rest on the assumption of military necessities.

The confiscation of private property, prohibited under Article 46 of the fourth Hague Convention, is not allowed to happen during a period of belligerent occupation. Israel has however seized Palestinian property by rebranding confiscation as temporary seizure in order to use Palestinian private land for constructing settlements.[103] Seizure, as conceptualized by Israel, should therefore be of temporary nature for it to not amount to a violation of Article 46. It can nevertheless be observed that Israeli civilian settlements have been connected to Israel's electrical grid, many settlers have brought children to grow up in the settlements, public buildings have constructed in civilian settlements and

[99] Dinstein 2019, p. 238–240.
[100] Sfard 2018, p. 200–204.
[101] Dinstein 2019, p. 240.
[102] Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, p. 41
[103] Sfard 2018, p. 208.

local councils have been established.[104] Such integration of the settlements into Israeli society demonstrates the violation of Article 46 through the permanent nature of the settlements even when claims to the contrary are being made by the Israeli State. The usage of public land in the Occupied Territories for settlement construction in turn violates Article 55 of the fourth Hague Convention as it dictates Israel's role as the Occupying Power to remain that of an usufructuary and administrator, a role that settlement expansion clearly breaches. Article 55 requires the Occupying Power to administrate the Occupied Territory in a manner that benefits the occupied population,[105] which can be seen as not happening in Palestine due to the settlements being settled exclusively by Israelis.

As is evident, the main violation of international humanitarian law through settlement construction and expansion is demonstrated by the transfer of Israeli civilians in a large-scale project into the Occupied Territories for the purpose of settlement expansion, thus violating Article 49 of the Geneva Convention IV. Further violations necessarily linked directly to the mere existence of the Israeli settlements are witnessed through the confiscation of public and private lands in order to erect Israeli settlements. The confiscation of land is to be observed as illegal through the perceived permanence of the Israeli settlements and their administration by Israel.

4.3 The Palestinian state of existence morphed by settlement expansion

It is clear from the provisions of international humanitarian law that the settlement project originally, and the constant expansion of civilian settlements in the current day Occupied Territories, presents a situation in which the illegality of establishing Israeli settlements in the Occupied Territories of the West Bank and East Jerusalem is concisely clear. Thus, it can be deducted that Israeli political goals of expanding the area and sphere of influence of the State of Israel into the territories occupied since 1967 through settlement expansion forms a clash with international law that can only materialize as total violation of the legal principles and provisions in the legal framework of belligerent occupation that apply to the Occupied Territories.

The international law of belligerent occupation requires that the status quo of the occupied territories must be maintained so that political negotiation may take place in order to resolve the fate of the territories in question.[106] It is evident that the construction of civilian settlements in the Occupied Territories threatens the maintenance of such a status quo in the Occupied Palestinian Territories, therefore manifesting in Israel failing to respect the international rules of warfare in this regard by

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[104] Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel 2022, p. 10; Sfard 2018, p. 208.
[105] Kretzmer 2017, p. 42-43.
[106] Kretzmer 2002, p. 75.

forcing a demographic change in the Occupied Territories which sees the restriction of Palestinian inhabitancy within Palestine to only areas allowed by the State of Israel. This allows for Israel to force a change into the ethnic demographics of Palestine by instituting a presence of Israelis by State-supported settlement projects which are in clear violation of Article 49 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War which prohibits the transfer of the Occupying Power's civilian population into territory it occupies. When a broad interpretation of Article 49 is employed, it becomes clear that any activity by the belligerent occupant to support the transfer of its civilian populace into the occupied territory is strictly prohibited even if the State isn't directly transferring civilians itself.

The resources and security tasks that Israeli settlements as well as other Israeli infrastructure in the Occupied Territories provide to Israeli society make it increasingly unlikely that a full withdrawal from the settled areas would happen in order to comply with international law, further lengthening the span of time in which the settlements continue to exist in violation of international law.[107] It can be observed that through illegal settlement expansion, the Israeli State has broken the Palestinian pre-occupation status quo by forcing a major change in the ethnic demographics of the Occupied Territories of the West Bank and East Jerusalem.

[107] Dajani 2017, p. 54-55.