The Obligation to Provide, and the Right to Receive, Development assistance in Occupied Territories, including in Situations of Prolonged Occupation

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I. Introduction

A number of reports published, among others, by the United Nations over the last few years have shown that the socio-economic situation in the Gaza Strip, in East-Jerusalem and in the so-called Area C, which makes up 62% of the West Bank (with exclusive control of the occupying power and an estimated 300,000 Palestinians as well as 341,000 illegal Israeli settlers residing\(^1\)) not only has suffered from the long-lasting conflict, notably the overarching situation of a prolonged occupation, but has deteriorated. This is, *inter alia*, due to Israeli military operations in the Gaza Strip and the long-lasting economic blockade thereof; in East Jerusalem this is the consequence of physical fragmentation between different Palestinian “bantustans”\(^2\) and the increasing detachment of East Jerusalem’s economy from the rest of the Occupied Palestinian Territory (OPT) and its gradual redirection towards Israeli (labour and other) markets\(^3\); in Area C, and across the West Bank, the deteriorating situation is due to a lack of coherent infrastructure for the Palestinians, including the water network, as well as a lack of appropriate planning and zoning laws applicable to the area\(^4\). It may be argued that the situation not only is difficult and shows dim prospects for improvement but, if conditions persist, will deteriorate further, and render impossible a viable Palestinian state based on the 1967 borders.

This scenario necessitates addressing the legal framework applicable to development action (including the obligation to provide, and the right to receive, assistance) in the OPT in light of a situation of prolonged occupation. While pertinent legal rules on development action

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\(^3\) *Ibid.*, at 33.

already appear not to have provided development actors with sufficient clarity in peacetime situations, even more uncertainty exists with regard to territories under occupation. The object and purpose of this expert opinion is first to provide an overview of the legal framework governing development action in general, focusing on peacetime law (II.), and then turn to the question to what extent these rules are modified by international humanitarian law (IHL) and other provisions applicable to occupied territories (III.). Part III is complicated by the fact that in situations of armed conflict, including occupied territories, humanitarian assistance to some extent overlaps with development assistance and the applicable treaty law only refers to “relief”, without specifically mentioning humanitarian or development assistance. Given the broadness and softness of large parts of the applicable legal framework, a further section of this opinion (IV.) singles out several particularly difficult issue areas. These range from access to freshwater resources, to movement of goods and persons to and within occupied territories, like the Gaza Strip, as well as the zoning and planning regimes currently operating in the West Bank. This section seeks to identify and apply pertinent rules of international law in so far as they are applicable.

In conclusion, the expert opinion will summarize the applicable legal frameworks and related findings and point out directions for further development-related advocacy with regard to the OPT (V.).

II. The (peacetime) legal framework governing development action – an overview

The (peacetime) legal framework for development action not only is heterogeneous but spans a broad range of public international law’s many branches.

Apart from rules applicable to access to, and use of, natural resources (sometimes framed as [permanent] sovereignty over such resources), development action often is linked to the right to self-determination and includes a number of provisions firmly rooted in international human rights law (focusing primarily, but not exclusively, on economic, social and cultural rights, which, in turn, are connected to civil and political rights). Parts of the implementation of development action today are governed, among others, by global administrative law as framed by international financial institutions, in particular the World Bank. In addition, a broad body of rules have been developed under the label of “sustainable development”. While many of the latter rules are treaty-based and treaty-specific, primarily those emerging from
multilateral environmental agreements, there also is a growing body of norms, often rightly characterized as soft law, vested in “declarations of principles”, such as the Millennium Development Goals (MDGs) and the recently adopted Sustainable Development Goals (SDGs), which are directly relevant to international law (e.g., SDG 16 on Access to Justice).

These various elements of the legal framework governing development action will be addressed one by one below, after considering the emerging right to development itself.

1. The emerging right to development

While the origins of the right to development can be traced back to the 1940s, it only has become a prominent concept in international law since the 1970s. In the early days, development was perceived as a group right, sometimes asserted by developing States as an expression of collective national interests rather than an interest of individuals or groups who should have been its beneficiaries. Bearing in mind debates in the UN General Assembly, today the right to development mainly is understood as a bundle of rights assigned to the individual as an entitlement
to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

It has been argued that the right to development therefore includes, but goes beyond, the neo-classical model of economic growth measured by increases in gross domestic product (‘GDP’) or per capita income. In addition, there seems to be an entitlement that


6 Marong, supra note 5, para.5.

7 Marong, supra note 5, para.1.


9 Art.1 Declaration of the Right to Development, 4 December 1986 (UN Doc. GA/Res.41/128); see also Marong, supra note 5, para.1.

10 Marong, supra note 5, para.2.
the process of delivering the objectives of the right to development requires conducive national and international environments, and thus mutual responsibility of both the international community and States.\(^{11}\)

This latter element points to the broader concept of good governance as it was first developed by economists and political scientists but that has since found its way into public international law,\(^{12}\) in particular in the context of development cooperation.\(^{13}\)

Apart from the 1986 UN General Assembly Declaration of the Right to Development\(^{14}\) there still are very few international instruments explicitly referring to or defining such a right. Moreover, most of these instruments are legally non-binding, the 1981 African Charter on Human and Peoples’ Rights\(^{15}\) being an exception. Instruments that bear mentioning and that should be taken into account include the 1992 Rio Declaration,\(^{16}\) the 1993 Vienna Declaration,\(^{17}\) the 1995 Copenhagen Summit on Social Development and the resulting Declaration,\(^{18}\) the 2000 Millennium Declaration,\(^{19}\) the 2002 Johannesburg Declaration,\(^{20}\) and the SDGs adopted in 2015.\(^{21}\) These Declarations, as well as similar instruments, largely lack the legal specificity and clarity to render the right to development operational.

\(^{11}\) Marong, supra note 5, para.2, citing Arts. 3.1, 4.1. and 10 Declaration of the Right to Development, supra note 9.


\(^{13}\) There is a growing understanding of shared responsibility of States under the ICESCR in the context of development cooperation; see in particular, Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1, Human Rights Council, 1 September 2008 (UN Doc. A/HRC/9/26), para. 61.

\(^{14}\) See above supra note 9.

\(^{15}\) African Charter on Human and Peoples’ Rights, 27 June 1981 (OAU Doc. CAB/LEG/67/3 rev. 5). Art. 22 thereof stipulates: “(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”


\(^{18}\) Copenhagen Declaration on Social Development, 19 April 1995 (UN Doc. A/CONF.166/9).

\(^{19}\) United Nations Millennium Declaration, 8 September 2000 (UN Doc. GA Res.55/2).


\(^{21}\) Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015 (UN Doc. GA Res.70/1).
Thus, it often is helpful to refer to other rules (and or concepts), including the notion of good governance, human rights law and a number of implementing agreements (most of the latter category, however, not applicable to the Gaza Strip and West Bank, including East Jerusalem). In a broader context, reference may be made first and foremost to (i) the Lomé / Cotonou Conventions (and their respective successor instruments), entered into by the EU and African, Caribbean and Pacific nation states; (ii) trade preferences granted individually or agreed upon within the international trading system (pertinent WTO law); and (iii) various frameworks developed by international financial institutions. A fully detailed analysis of each of the foregoing may be very helpful in the long run, but would exceed the scope of the present expert opinion.

While the right to development as such does not appear to fit into the categories of legally binding versus legally non-binding, its normative character can hardly be disputed in light of the fact that a broad network of bi- and multilateral development agreements has emerged over the years. As has been convincingly argued, these instruments are a response to the claim for the realization of a right to development. While that claim remains formally non-binding, it is nonetheless significantly normative in the sense of shaping State behaviour.

It is against this background that we will now first address international human rights law.

2. International human rights law

22 International trade law is among the most important branches to be taken into account in this context; see, among others, Ahmed Mahiou, ‘Development, International Law of’, in Rüdiger Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law (2013), <opil.ouplaw.com/home/EPIL> (last visited 15 April 2016); see also Markus Krajewski, Handel und Entwicklung, in: Dann / Kadelbach / Kaltenborn, supra note 5, pp. 247-286.


24 International Covenant on Economic, Social and Cultural Rights, 16 December 1966 (UN Doc. GA Res. 2200A (XXI)).

25 Marong, supra note 5, para.15.


27 Krajewski, supra note 22, pp. 247-286.


29 Marong, supra note 5, para.23.
One of the approaches to make the right to development work is international human rights law (“a rights-based approach to development”\textsuperscript{30}).

By now it is generally accepted that international human rights not only have a negative, but also a positive, dimension. This equally applies to civil and political rights\textsuperscript{31} and to economic, social and cultural rights\textsuperscript{32}, which jointly emerged from the 1948 Universal Declaration of Human Rights\textsuperscript{33} and are distinctly guaranteed by the two 1966 UN Covenants.\textsuperscript{34} Both categories of human rights are universal and inalienable, indivisible, interdependent and interrelated.\textsuperscript{35}

The UN Covenant on Economic, Social and Cultural Rights (IESCR) \textit{prima facie} is the most appropriate instrument to provide a legal framework for development action. In terms of substance, Articles 6-15 of the Covenant include specific provisions on the right to work, the right to just and fair working conditions, the right to form and join labour unions, the right to social security, recognition of family, maternal, and children’s rights, the right to an adequate standard of living (including the right to food and to water), and the rights to clothing and housing, the right to health, the right to education, and the right to participate in cultural life and enjoy the benefits of scientific progress including the protection of intellectual property.

\begin{thebibliography}{9}
\bibitem{alessandra} Cf. Alessandra Lundström Sarelin, \textit{Human Rights-Based Approaches to Development Cooperation, HIV/AIDS and Food Security}, Human Rights Quarterly 29 (2007), pp. 460-488. There also is a broad range of policy statements by UN bodies to this end, see e.g. OHCHR, \textit{Frequently Asked Questions on a Human-Rights Based Approach to Development Cooperation}, 2006, available at \url{www.ohchr.org/Documents/Publications/FAQen.pdf} (last visited 15 April 2016).
\bibitem{iccpr} ICCPR General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, May 2004 (CCPR/C/21/Rev.1/Add. 1326), para.6: “The legal obligation under article 2, paragraph 1, is both negative and positive in nature.” (see also para. 8 thereof).
\bibitem{udhr} Universal Declaration of Human Rights, 10 December 1948 (UN Doc. GA Res. 217A (III)).
\bibitem{iccpr2} International Covenant on Economic, Social and Cultural Rights, 16 December 1966 (UN Doc. GA Res. 2200A (XXI)) and International Covenant on Civil and Political Right, 16 December 1966 (UN Doc. GA Res. 2200A (XXI)), both ratified by Israel on 3 October 1991.
\bibitem{vienna} This was, among others, confirmed by the UN Vienna Declaration and Programme of Action, 25 June 1993, (UN Doc. A/CONF.157/23).
\end{thebibliography}
These rights are made operative by a particular set of obligations imposed upon States parties to the Covenant. While States possess a margin of discretion when implementing these rights, Article 2 IESCR is clear in two respects:

- First, paragraph 1 clearly lays down that states parties must “take steps”, and they must do so “by all appropriate means”; this means that if a State party does not take any action at all, it is in violation of its obligations under the Covenant. Furthermore, it has been argued convincingly that the principle of non-retrogression applies, prohibiting “any deliberate step backward that cannot be justified with severe economic difficulties, force majeure, distress or the like.”

- Second, paragraph 2 entails a clear prohibition of discrimination in the implementation of the Covenant; consequently, any discriminatory application of Articles 6-15 ICESCR amounts to a violation of the Covenant.

In essence, paragraph 1 primarily imposes an obligation of conduct upon States parties; they enjoy a degree of flexibility as far as progressive realisation and resource allocation are concerned. Read together, paragraphs 1 and 2 thus establish certain minimum obligations: States parties are under an obligation to take steps (i.e., inaction is impermissible); they have to apply the provisions of the Covenant in a non-discriminatory way, and they are barred from deliberately reducing standards in the application of economic, social and cultural rights – unless this can be justified under Article 4 ICESCR. Based upon a comparative analysis of


37 Article 2 ICESCR reads:

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

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.


39 CESCGR General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the Covenant), OHCHR, 2 July 2009 (UN Doc. E/C.12/GC/20).

40 Art. 4 ICESCR stipulates:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations
the jurisprudence of constitutional courts addressing socio-economic rights along the lines included in the ICESCR, it further may be argued that the notions of progressive realisation and resource allocation are limited by the obligation to ensure equal access to scarce resources.\footnote{41}

Additionally, and of particular importance in the context of development assistance and the thereby linked development cooperation, Article 2 of the Covenant does not envisage that States must implement everything by themselves but that they do so “through international assistance and cooperation.”\footnote{42} The obligation to cooperate is not limited to the ICESCR. Indeed, the fact that human rights are a matter of international cooperation already was recognized explicitly in Articles 1 (3), 55 and 56 of the UN Charter. Notwithstanding the absence of a parallel explicit obligation to cooperate in the ICCPR, its extraterritorial application is made clear thru Article 2 (1) ICCPR,\footnote{43} indicating, and underlining, the in-built obligation to cooperate. The duty of international cooperation also is included in Article 3 (3) of the Declaration on the Right to Development.\footnote{44}

Part and parcel of the human rights-based obligation of States parties to cooperate is the right of individuals (and groups of individuals) to receive development assistance, i.e., the obligation to cooperate and the right to receive development assistance are two sides of the same coin. This right to receive development assistance is a tool to ensure that the variety of

\footnote{41} See, e.g., Constitutional Court of South Africa, Mazibuko v. City of Johannesburg (also known as “the Phiri case”), CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009); Nokotyana and Others v. Ekurhuleni Metropolitan Municipality and Others (CCT 31/09) [2009] ZACC 33; 2010 (4) BCLR 312 (CC) (19 November 2009).

\footnote{42} General Comment No. 3, \textit{supra} note 36, paras. 13-14; see also Diakonia Report ‘Planning to Fail’, \textit{supra} note 4, pp. 29-30.

\footnote{43} This has been confirmed by the ICJ in its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] ICJ Rep 136, paras. 111-112; see Rolf Künne\n
\footnote{44} Declaration on the Right to Development, 4 December 1986 (UN Doc. A/RES/41/128, Annex); the essential part of Art. 3 (3) of the Declaration reads as follows: “States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development.”
obligations imposed upon States in the context of development cooperation does not fall idle. It empowers individuals and communities to ensure the fulfilment of human rights as a shared responsibility of States.

Beyond this, the UN Covenant on Civil and Political Rights (ICCPR) adds significant additional relevance for development action. Apart from the principle of non-discrimination, which also is included in this Covenant, the ICCPR’s contribution to good governance (including freedom of expression, freedom of assembly, due process, etc.) is of major importance. In this sense, the ICCPR not only prohibits arbitrary decision-making, but it also provides a basis for the claim that decisions with respect to development action must be subject to a minimum level of judicial review. Additionally, the triple obligations to respect, protect, and fulfil have become an inherent part of the ICCPR. Rights included in the ICCPR also have a positive dimension.

Emerging from the indivisibility of civil and political as well as economic, social and cultural rights included in the two Covenants, States parties to both Covenants are obliged to ensure a minimum level of administrative infrastructure, both in terms of law and institutions. Human rights may be successfully implemented only on the basis of meaningful administrative law. The absence of relevant administrative law and pertinent implementing organs thus may violate both Covenants.

To conclude this overview of the human rights dimension of the legal framework for development action, both Covenants, in their respective Articles 1, include the right to self-determination, which itself plays a distinct role in the context of development action.

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45 Art. 26 ICCPR states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. (…) .”

46 The right to a remedy is included in Art. 2 (3), Art. 9 (5) and Art. 14 (6) ICCPR. Although the ICESCR does not name the right to a remedy, General Comment No. 3 foresees judicial remedies as appropriate measures to implement the Covenant, CESCR General Comment No. 3, supra note 36, para.5.


3. The right to self-determination

Self-determination is a well-established principle of public international law, arguably of *jus cogens* nature.\(^{50}\) However, it may be argued that its main substance was developed only after World War II. Reference to self-determination is made across various Chapters of the UN Charter,\(^{51}\) and the principle additionally has been spelled out in numerous UN GA Resolutions\(^ {52}\) and other pertinent documents.\(^ {53}\) First, self-determination is considered to be binding on the parties to a territorial or related conflict; second, self-determination is the legal foundation for decolonisation; third, self-determination plays a major role in situations of uncertain sovereignty; and fourth, it includes “the right of a people of an existing State … to pursue their own economic, social, and cultural development.”\(^ {54}\) Self-determination also implicates the notion of sovereignty over natural resources.

In a noteworthy recent specification of the right to self-determination by the International Court of Justice, the Court, in its advisory opinion on the Wall, observed “that the existence of a ‘Palestinian people’ is no longer in issue”\(^ {55}\) and added that the rights of the Palestinian people “include the right to self-determination.”\(^ {56}\) The Court further stated that the right to self-determination was breached by creating the “risk of further alterations to the demographic composition of the Occupied Palestinian Territory”\(^ {57}\) and also because “the

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\(^{51}\) Among others, reference may be made to Articles 1 (2), 55, 73, and 76 (b) UN Charter.


\(^{55}\) Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] ICJ Rep 136, para.118.

\(^{56}\) *Ibid.*

\(^{57}\) *Ibid.*, para.122
route chosen for the wall gives expression in loco to the illegal measures taken by Israel with regard to Jerusalem and the settlements.”\textsuperscript{58} Beyond this, however, the Court did not specify the detailed content of the right to self-determination.\textsuperscript{59} In particular, it remains far from clear precisely what economic self-determination means.\textsuperscript{60}

One paragraph of the advisory opinion that concerns third parties, however, is directly relevant for development action and actors in the OPT:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They also are under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.\textsuperscript{61}

In effect, this means that States are obliged to ensure that their developmental relations with the OPT do not contribute to maintaining the situation created by the construction of the wall.

It is important to note that the right to self-determination includes the notion of economic self-determination. This element of the right to self-determination seemed to have been forgotten after the debate about a New International Economic Order\textsuperscript{62} came to an end. However, economic self-determination has been re-addressed recently. This is particularly pertinent in

\textsuperscript{58} Ibid.
\textsuperscript{59} Thürer / Burri, supra note 54, para.25.
\textsuperscript{60} For further details see the following paragraphs.
\textsuperscript{61} Advisory Opinion on Legal Consequences, supra note 55, para.159.
\textsuperscript{62} In contrast to the predominance of Northern states in the global economy, the New International Economic Order, as endorsed by UNGA Resolution 3201 (1974), aimed at UN member states’ “united determination to work urgently for the Establishment of a New International Economic Order based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations” (preamble). For further details and discussions see Giorgio Sacerdotti, ‘New International Economic Order’, in Rüdiger Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law (2014), <opil.ouplaw.com/home/EPIL> (last visited 15 April 2016).
the context of protecting developing country natural resources against over exploitation by developed countries and actors originating in such countries. A recent analysis underlines that economic self-determination drives human rights advocacy by providing the fundamental theoretical justifications for altering the way in which mineral resources are exploited and the resulting wealth distributed. Economic self-determination calls for people to participate in deciding how to dispose of their natural resources for their own ends.63 Thus understood, “[s]elf-determination lays the foundation for the realization of numerous other human rights; it cannot be allowed to fall to the wayside.”64 Furthermore, applying economic self-determination to current problems of re-source exploitation is in keeping with mainstream movements for economic liberalism and democratization.65 What does this mean for development cooperation in general and for development action in the OPT? This not only means that a people assembled in a territorial entity enjoys the right to independently choose its economic system and the legal framework thereof, but also that the economic relations of such a people and the pertinent territorial entity with other entities (be it states or international organizations) is protected against unjustified interference by other states.66 While this aspect of economic self-determination is not precisely defined, it must, nevertheless, be taken into account in general terms.

4. Sovereignty over natural (and other) resources

In parallel to the specification of the right to self-determination with a view to economic matters, sovereignty over natural resources was developed as a concept in the 1960s, 1970s and 1980s. Even beyond debates about the so-called New International Economic Order,67 it is clear today that sovereignty over natural resources, in particular when valuable

64 Ibid., at 473.
65 Ibid.
66 It is noteworthy that all pertinent resolutions on sovereignty over natural resources also make a reference to external economic relations of developing countries, e.g. the Charter of Economic Rights and Duties, 12 December 1974 (UN Doc. A/RES/29/3281) in its Art. 2 (1) stipulates that “(e)very State has and shall freely exercise full permanent sovereignty … over all its … economic activities”. Art. 1 (2) of the two International Covenants on human rights reads: “The people may, for their own ends, freely dispose of their natural wealth … without prejudice to any obligations arising out of international economic cooperation ….”.
67 Supra note 62.
commodities are concerned, is an important element of development action. Indeed, the International Court of Justice’s December 2005 judgment in the case concerning Armed Activities on the Territory of the Congo affirmed the status of permanent sovereignty over natural resources of developing countries in international law, rooted in the economic development of developing countries and in self-determination of colonized peoples. The concept is designed to provide entities enjoying legal personality under international law “with a legal shield against infringement of their economic sovereignty.” Notwithstanding doubts expressed by Israel about the application of the principle to the OPT, the United Nations General Assembly has reaffirmed its application. Details thereof will be addressed below.

In summary, the International Court of Justice affirmed the legal status of permanent sovereignty over natural resources as customary international law. Irrespective of doctrinal debates over whether the Court provided a convincing restatement of the law, “hardly any contemporary international lawyer would deny the principle of permanent sovereignty legal value.”

5. The legal framework established by international financial institutions, and additional frameworks, including the Millennium Development Goals and the Sustainable Development Goals

International financial institutions, in particular the World Bank, have developed strategies to implement development action. Most important in this regard are the World Bank’s Comprehensive Development Framework together with the United Nations Development

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68 Farmer, supra note 63, at 472-473.


70 Schrijver, supra note 69.

71 Ref. UNGA Resolution 3336 (XXIX), 17 December 1974 (‘Resolution 3336 [XXIX]’) concerning permanent sovereignty over national resources in the occupied Arab territories; Schrijver, supra note 73, para.21.

72 Schrijver, supra note 69, para.23.

73 Ibid.

74 The CDF is an approach by the World Bank to development planning that includes inter alia financial, economic, and fiscal aspects. It was established to coordinate a coherent framework of macroeconomic, structural, and social reforms for poverty reduction. More information available at:
Assistance Framework. Referring additionally to the Poverty Reduction Strategy Papers of the International Monetary Fund, these documents outline a set of principles suggesting that development action is no longer purely discretionary but, once the principled decision to provide such assistance has been taken, implementation of such assistance is rules-based (rights-based). This international financial institution framework thus adds further to strengthening the international rule of law’s applicability to development action; while it does not necessarily include an obligation to provide development assistance per se, this regime ensures that development policy and its operationalization are embedded firmly in the legal framework of international law.

Similarly, the Millennium Development Goals and the Sustainable Development Goals do not establish an explicit legal obligation to provide development assistance. However, similar to the above-mentioned international financial institution strategies, they both contribute to establishing an overall governance framework for development action. Apart from this, it may be argued that third parties are prohibited from interfering with the bilateral relationship between donor and recipient, unless development action interferes, or is in conflict, with superior legal rights or obligations.

6. The protection of development action against interference by third parties

As can be taken from the above discussion of international human rights law and the right to self-determination, international law protects the economic and developmental relationship of developing countries (and their populations) with donor countries against interference by third parties. In the case of developing countries that enjoy full statehood, this argument enjoys additional support from the principle of non-intervention as enshrined in Article 2 (1) UN Charter.

75 UNDAF is the main platform for development collaboration of the UN system at country level. It describes the collective and coherent response of the UN to national development priorities. More information about its programming guidance is available at: <https://undg.org/home/guidance-policies/common-country-programmingundaf> (last visited 15 April 2016).


It is argued here that the OPT, as a situation of prolonged occupation, enjoys similar protection under the law of development cooperation and under general international law. Even assuming that there was no pre-existing (nation-) State on the territory Israel occupied in 1967, and given the empirically much shorter period of nearly all other situations of military occupation, it would put the OPT and its inhabitants at an additional disadvantage if Israel as the occupying power was not obliged to ensure public order and safety but if the Palestinian people did not enjoy protection against interference by Israel with their economic and developmental relations with third parties.

Thus, while all developing countries – on the basis of the principle of non-intervention – enjoy protection of their relations with donor countries against third-party interference, the same applies to the OPT, not necessarily on the basis of the principle of non-intervention, but based upon the right to self-determination and the right to receive development assistance under international human rights law.

7. Intermediate conclusions

In conclusion, international law provides a framework for development action:

- While this framework does not explicitly include a general obligation to provide development assistance, such an obligation may be derived from certain guarantees under international human rights law (apart from minimum guarantees, these primarily are procedural in nature), sometimes also from treaty law, however, only in cases where explicit reference is made to such assistance (in numerous multilateral environmental agreements, for example).

- Based upon the right to self-determination, permanent sovereignty over natural resources and additional legal frameworks, it may be argued that international law forbids third parties, including an occupying power, from interfering with bilateral development assistance relationships between donor and recipient, barring a clear conflict with superior rights and obligations.

- Finally, international law provides a framework for implementation of development action, ensuring that development assistance is not implemented in an arbitrary manner but with due respect to the concept of good governance and the rule of law.
III. The impact of belligerent occupation on the law applicable to development action

Belligerent occupation under international law is governed by a specific legal regime that aims to balance competing interests:

- first, the protection of civilians under belligerent occupation, including their system of political and economic governance;
- second, the interest of the occupying power in ensuring public order and safety;
- third, the obligation for the occupying power not to irreversibly alter the status of the occupied territory and to refrain from exercising sovereign rights over the territory.

In other words, the law of occupation “authorizes the occupant to safeguard its interests while administering the occupied area, but also imposes obligations on the occupant to protect the life and property of the inhabitants and to respect the sovereign interests of the ousted government.”

The details of the law of belligerent occupation can be derived from Articles 42 and 43 of the Hague Regulations, the Fourth Geneva Convention (GC IV) and customary international law.

Whether or not the law of occupation is applicable depends on preconditions set forth under public international law (IHL norms). If applicable, the question arises as to what impact occupation has on the law applicable to development action. In this regard, it is important to bear in mind that Article 2 common to the four Geneva Conventions equates the situation of military occupation with an international armed conflict.

To clarify the relationship between the law regulating development action and belligerent occupation, it thus is necessary to examine more closely the impact of the existence of an armed conflict on the law applicable to development action. Before addressing the details thereof, it is essential to underline that

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79 In particular, Art. 42 of the Hague Regulations, which consists of two conditions: (i) as a result of hostilities, the ousted government is incapable of publicly exercising its authority in that area, (ii) potential/effective control. The latter condition is disputed and some require that “the foreign army has actually substituted its own authority for that of the ousted government (‘actual control’)”, see Benvenisti, supra note 78, para.5.

80 Article 2 GC IV reads: “In addition to the provisions which shall be implemented in peace-time, 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.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance (…).”
belligerent occupation does not involve or imply the transfer of sovereignty to the occupying power.\textsuperscript{81}  

In contrast to short-term occupation, situations of prolonged occupation deserve particular treatment in light of the fact that many of the traditional rules that have developed for situations of military occupation do not necessarily meet the interest of the occupant and the inhabitants in such a prolonged context. Originally, most of the rules related to military occupation pay tribute to the temporary nature of such occupation and thus most of the provisions regulating belligerent occupation are not adapted to a situation of prolonged occupation. Contrary to what the International Court of Justice assumed, “prolonged” does not imply the imposition of fewer obligations on an occupying power,\textsuperscript{82} rather the opposite is true: An occupying power cannot in any way escape its protective obligations towards the civilian population in the occupied territory. In addition, it is arguable that Article 43 Hague Regulations must be read as not only protecting “the laws in force in the country” (and thereby implicitly barring regime change), but also as allowing for the exercise of political and economic self-determination within the occupied territory so long as the occupying power’s security and safety is not put at risk.  

Thus, an occupying power must provide ample space for political and economic self-determination while upholding the protection of the civilian population under occupation. Indeed, it may be argued that the longer an occupation lasts, the less an occupying power can rely upon specific rights derived from the law of occupation, and the more respect it must accord to the long-term development needs of the civilian population and its self-governance.\textsuperscript{83}  

\textsuperscript{81} Benvenisti, \textit{supra} note 78, para. 1.  


\textsuperscript{83} Advisory Opinion on Legal Consequences, \textit{supra} note 55, paras. 125-131; see ‘Article 6’, Commentary of 1958, Convention (IV), <www.icrc.org> (last visited 15 April 2016); Julia Grignon, The Geneva Conventions and the End of Occupation, in: Andrew Clapham / Paola Gaeta / Marco Sassoli (eds.), The 1949 Geneva Conventions – A Commentary, Oxford 2015, pp. 1577 et seq. Critical Vaios Koutroulis, The application of international humanitarian law and international human rights law in situation of prolonged occupation: only a matter of time?, International Review of the Red Cross, 94 (2012), at 172-3, who (rightly) states that the Hague Regulations do not contain a similar article that ends application. Article 3 (b) AP I (at 173 et seq.) is not applicable with regard to Israel because it is not party to AP I.
Development action can be linked to the law of occupation, but IHL appears to be silent on development activities and does not explicitly refer to development in its legal framework. It is not surprising that the term “development assistance” does not appear in IHL provisions as international law pertinent to development evolved only in the 1960s and 1970s, whereas the main IHL sources were codified between the end of the 19th century and the first half of the 20th century.\footnote{Marong, supra note 5, para.5.}

1. The general applicability of the peacetime legal framework governing development action to situations of belligerent occupation

As has been rightly pointed out the “question of the effect of an armed conflict on treaties was and is one of the most disputed subjects in public international law.”\footnote{Silja Vöneky, ‘Armed Conflict, Effect on Treaties’, in Rüdiger Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law (2011), <opil.ouplaw.com/home/EPIL> (last visited 15 April 2016), para.1; Jonathan Horowitz, Human Rights, Positive Obligations, and Armed Conflict: Implementing the Right to Education in Occupied Territories, International Humanitarian Legal Studies, Vol.1 (2010), at 307.} In light of the trend to dissolve the traditional dichotomy between the international law of war on the one hand and the law of peace on the other hand,\footnote{Robert Kolb, ‘Human Rights and Humanitarian Law’, in Rüdiger Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law (2013), <opil.ouplaw.com/home/EPIL> (last visited 15 April 2016), paras. 26, 44.} practice and academia seem to largely agree that “whether a treaty continues to be in force in war time depends on the type of treaty in question, its object and purpose.”\footnote{Ibid., para.5.}

Indeed, the International Law Commission has made clear that the outbreak of an armed conflict does not in itself terminate the operation of treaties between parties to the conflict, nor between any such party and a third party. There are five categories of treaties where the incidence of an armed conflict does not as such affect their operation:\footnote{Report of the International Law Commission, GA, Sixty-Second Session, 3. May-4 June and 5 July-6 August 2010 (UN Doc. A/65/10) at 289. See also Art.7 and Annex to Art.7, ILC Draft articles on the effects of armed conflicts on treaties, International Law Commission, Sixty-third Session, UN, 2011.} treaties providing for continuance during war; treaties compatible with the maintenance of war; treaties creating an international regime or status; treaties for the protection of human rights, and; treaties relating to the protection of the environment. In addition, it appears clear that \textit{jus cogens} and \textit{erga omnes} rules continue to apply in situations of armed conflict.\footnote{Vöneky, supra note 85, para.5.} Whether some of these
categories also apply to customary international law is subject to debate. However, it seems clear that human rights law and international environmental law continue to apply even where based on customary law. In the Legal Consequences case, the ICJ considered that the protection offered by human rights conventions does not cease in case of armed conflict save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.  

Tensions between human rights law and IHL exist in the realm of positive obligations: Occupation law largely works to restrict Occupying Powers from tampering with the laws and institutions of the occupied territory, whereas significant provisions of human rights law press States to amend or change laws and develop infrastructure to accommodate the welfare of the population under their control.

The conclusion that the law of peace in principle continues to apply in situations of armed conflict, and considerations of belligerent occupation, do not mean that no exceptions or derogations arise. Indeed, situations of armed conflict, including belligerent occupation are subject to a number of exceptions and derogations, not only with regard to international human rights instruments, but also in other circumstances. In addition, even if no exception or derogation applies, there is ongoing debate as to whether Article 2, paragraphs 1 and 4, ICESCR allows for the modification of standards and obligations for protecting these rights, with significant support for the position that socio-economic rights are not suspended automatically in situations of armed conflict nor subject to exception / derogation but, rather, that the specific content of these human rights may be modified. Whether or not justifications recognized in the law of state responsibility (in particular, justification on grounds of self-defence, countermeasures in respect of an internationally wrongful act, and necessity) can be applied to development action in situations of armed conflict is a matter of debate. Furthermore, it also would appear to be important to distinguish situations of actual conduct of hostilities from situations of military occupation, including and perhaps especially prolonged occupation such as exists in the OPT.

In so far as peacetime law remains applicable, Israel – in addition to its other obligations as occupying power – is directly bound by international human rights law vis-à-vis Palestinians.

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91 Horowitz, supra note 85, at 307.
living in the OPT to the extent it exercises effective control.92 Furthermore, Israel likewise is bound by the obligation not to interfere with development action agreed upon between various donors and the Palestinian Authority unless

- exceptions and modifications provided for under peacetime law, in particular, human rights law apply (2.),
- the law of belligerent occupation supersedes such obligations as lex specialis (3.),
- modifications of the law applicable to development action result from the Oslo Agreements and Israel’s “unilateral disengagement” from the Gaza Strip (4.).

The foregoing assertions give rise to several concluding remarks further below.

**2. Exceptions and modifications in the interest of the occupying powers**

Article 4 (1) ICCPR foresees the derogation of certain provisions in times of national emergency:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Israel submitted such information under Article 4 (3) ICCPR to the UN Secretary General in 1991, claiming that:

> Since its establishment, the state of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the

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92 This follows from the applicability of international human rights law, in particular, the two Covenants, and the additional arguments presented above (section II.).
defence of the state and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.\(^{93}\)

Notwithstanding procedural questions, this proclaimed state of emergency has remained in force ever since and has been extended every 12 months.\(^{94}\) Article 4 (2) ICCPR lists non-derogable rights. Furthermore, Israel has not made any declaration beyond Article 9 ICCPR.

Furthermore, the scope of application of the ICCPR - and ICESCR – may be argued to be limited. Israel favours a restrictive interpretation of Article 2 (1) ICCPR, limiting its application to the State’s own territory and baring its applicability to the Palestinian territories. Israel relies upon the wording of Article 2 (1) ICCPR (“…to all individuals within its territory and subject to its jurisdiction…”). This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to its jurisdiction. The ICJ rejected such arguments by Israel and clarified that

\(\ldots\) while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.\(^{95}\)

The ICJ also observed that the OPT has been subject to Israel’s territorial jurisdiction.\(^{96}\) In general, when States act extraterritorially, the international and regional human rights treaties are applicable if States exercise jurisdiction.\(^{97}\) Treaty obligations can be binding upon the occupier based on its own treaty ratifications, or those of the occupied State.\(^{98}\) The rights in

\(^{93}\) See <www.geneva-academy.ch/RULAC/international_treaties.php?id_state=113> (last visited 15 April 2016).


\(^{95}\) Advisory Opinion on Legal Consequences, supra note 55, para.109.

\(^{96}\) Advisory Opinion on Legal Consequences, supra note 55, paras.111 et seq.


the ICESCR thus apply at all times and represent the existential minimum, including in times or armed conflict.\footnote{Eibe Riedel, Economic, Social, and cultural rights in armed conflict, Andrew Clapham / Paola Gaeta (eds.), The Oxford Handbook of International Law in Armed Conflict, Oxford 2015, at 464.}

\section*{3. Debate about the applicability of the law of belligerent occupation to the Palestinian territories}

\subsection*{a) General applicability of the Fourth Geneva Convention relative to the Protection of Civilians in Times of War}

The application of GC IV has for a long time been denied by Israel, which asserts that a unique status applies to the West Bank and Gaza Strip.\footnote{See Eyal Benvenisti, The International Law of Occupation, 2nd Edition, Oxford 2012, at 206.} Israel argues that because the territory lacked sovereign recognition prior to its annexation by Jordan and Egypt it is “not a territory of a High Contracting Party as required by the Convention.”\footnote{Advisory Opinion on Legal Consequences, \textit{supra} note 55, para.90. GA Res. 67/19 (2012) further states “the right of the Palestinian people to self-determination and to independence in their State on the Palestinian territory occupied since 1967.”} Thus, Israel argues that Article 2 (2) GC IV (“The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party (…)”) cannot apply to Palestinian territory because “Palestine” was not a sovereign State/High Contracting Party at the time of the occupation. These assertions notwithstanding, some judgments by the Israeli High Court of Justice have referred to GC IV.\footnote{Ajuri v. IDF Commander, Judgment, Israeli High Court of Justice (HCJ 7015/02), para.17, <http://www.hamoked.org/files/2010/110_eng.pdf> (last visited 15 April 2016).} The Court even approved invoking Article 53 GC IV as a source of authority to set up the wall:

Regarding the central question raised before us, our opinion is that the military commander is authorized – by the international law applicable to an area under belligerent occupation – to take possession of land, if this is necessary for the needs of the army. \textit{See} articles 23(g) and 52 of the Hague Convention; article 53 of the Fourth Geneva Convention.

Israel therefore diluted its own argument and now partly applies GC IV to the OPT, although arguing that the Convention as such is not \textit{de jure} applicable. With regard to the interpretation of Article 2 GC IV, the ICJ in its 2004 advisory opinion stated:
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 it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable. This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power.\footnote{Advisory Opinion on Legal Consequences, \textit{supra} note 55, para.95. See Marco Sassoli, 
The Concept and the Beginning of Occupation, in: 
Clapham / Gaeta / Sassoli (eds.), \textit{supra} note 98, p.1405.}

The ICJ further noted that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1995. They issued a statement in which they ‘reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem’.\footnote{Advisory Opinion on Legal Consequences, \textit{supra} note 55, para. 96. See Shane Darcy / John Reynolds, 
An Enduring Occupation: The Status of Gaza Strip from the Perspective of International Humanitarian Law, 
Journal of Conflict & Security Law 15 (2010), at 223-4; also International Commission of Jurists, Israel’s Separation Barrier, 

The Security Council also has affirmed that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem.\footnote{UNSC Res. 465, 1 March 1980 (UN Doc. SC/RES 465); also UNSC Res. 476, 30 June 1980 (UN Doc. SC/RES/476).}

\textit{b) To what extent is the law of occupation lex specialis?}

In principle, the law of occupation can only be applied as \textit{lex specialis}, superseding peacetime obligations, to the extent that the occupying power itself can and does rely upon such an argument in the interest of its security or where the law of occupation provides for a higher standard of protection for the civilian population than peacetime law. Otherwise, peacetime law, including (among others) general human rights law and international economic law, continues to apply.
Starting from the premise that the West Bank and Gaza Strip are occupied territories, in principle, GC IV and similar regimes apply. The longer occupation lasts, the more peacetime international human rights law will have to be respected in addition to the law of occupation. The occupying power remains the addressee for these human rights obligations, irrespective of its disengagement, based upon extraterritorial application of international human rights law. It may be that to the extent that the occupying power transfers sovereign rights to an administrative entity, its human rights obligations transform from negative rights into positive rights (along the lines of the ECtHR ruling in the case of Ilascu and others v. Russia and Moldova).106

c) The obligation to provide or permit “relief” under the law of occupation

An occupying power is obliged to care for the wellbeing of the population of the occupied territory. Specific duties are mentioned in Article 50 (education), Article 56 (health services) and Article 55 (provision of food and medical supplies) of GC IV, while customary law enshrines a duty to provide for the wellbeing of the population. In accordance with this principle, international humanitarian law establishes a duty to accept and facilitate relief operations for the benefit of the population. The primary responsibility for providing such relief needs falls on the occupying power (Article 55 GC IV), but if basic needs are not met the occupying power must allow and facilitate aid by third parties (Article 59 GC IV).

While such third party operations are subject to the agreement of the occupying power, consent may not be withheld for arbitrary reasons. Withholding consent would violate norms of human rights law and IHL. The occupying power also must coordinate conflicting interests in a reasonable, effective, and non-discriminatory way, in accord with the principle of good faith.

Article 43 Hague Regulations states that an occupying power must restore and maintain public order and civil life, including public welfare, in an occupied territory.107 The occupying power must respect “les lois en vigueur” (the laws in force) in an occupied territory, unless there is an “empêchement absolu”, meaning that the occupying power has to maintain the

106 Ilascu and others v. Russia and Moldova, European Court of Human Rights, Judgment, 8 July 2004.
107 See Koutroulis, supra note 83, at 179.
laws in force and not modify, suspend, or replace them with its own legislation.\textsuperscript{108} The occupying power can only exercise control rights for military and security purposes.\textsuperscript{109} The duty to ensure the wellbeing of the population amounts to a duty of good governance. The elements of the duty of good governance include that the occupying power must conduct its administration of the occupied territory according to what is expected of the modern state, which is welfare of the population within that state with a broad range of regulatory responsibilities.\textsuperscript{110}

As mentioned above, it is further spelled out in Article 59 GC IV that the occupying power “shall agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal.” This constitutes a secondary obligation: either the occupying power fulfills its own primary duty to provide for the wellbeing of the occupied population under Article 43 Hague Regulations and provides the requisite so-called basic needs under article 55 of the IV Geneva Convention, or it allows for “relief” by all means possible. The occupation authorities therefore must cooperate wholeheartedly with the rapid and scrupulous execution of relief schemes.\textsuperscript{111}

Article 60 GC IV adds:

Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.

“Relief” is a rather neutral term and is not constrained to a particular nature.\textsuperscript{112} While construed primarily as being of “humanitarian character”\textsuperscript{113}, relief actions could contain mid-

\textsuperscript{108} Kuhn, \textit{supra} note 78, para.13.

\textsuperscript{109} “(…) However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”, Art. 27 GC IV.

\textsuperscript{110} Michael Bothe, The Administration of Occupied Territory, in: Clapham / Gaeta / Sassoli (eds.), \textit{supra} note 98, p. 1467.

\textsuperscript{111} Article 59, The Commentary of 1958, at 320.

\textsuperscript{112} Article 59, The Commentary of 1958, GC IV, at 321, states for example: “The Convention does not lay down any rule in regard to the donors; the immensity of the needs will make it desirable to accept the co-operation of any person, organization or institution which can lend assistance, provided that such assistance is not used for purposes of political propaganda.”

\textsuperscript{113} Article 60, The Commentary of 1958, GC IV, at 323.
term and long-term development assistance, including “early recovery” and “recovery” connected to relief due to the broad possibility of action that could constitute “relief” and the open wording.

Under the human rights legal framework, Article 2 (1) ICESCR sets forth that “international assistance and co-operation” is to be sought as a subsidiary measure. First, the ICESCR implies a positive duty to take (own) measures. Article 2 (1) ICESCR thus obligates Israel, as a State Party, to take progressive measures for the realization of the Covenant. It cannot simply refrain from interference, but is bound to comply with core obligations. The State is in breach of its obligation unless it can demonstrate that it has made every effort to use all resources at its disposal – including international assistance. Given that human rights law establishes a positive duty to take measures, and given the duty under the law of occupation to ensure the wellbeing of the population, the occupying power cannot hinder any “relief” action arbitrarily. On the contrary, it must facilitate short-term and long-term relief actions, no matter whether they are labelled “humanitarian assistance” or “development assistance”, and often the line is blurred between relief and development. Reference to the distinction between “humanitarian” and “development assistance” is neither made by the ICESCR nor by the Hague Regulations or GC IV. Quite the opposite, it follows from Article 43 Hague Regulations, Article 27 GC IV and Article 2 (1) ICESCR that the occupying power is under the duty to provide for or facilitate the wellbeing of the population by whatever means. While humanitarian assistance thus provides a minimum level of protection, development action is subject to its own regime, but normally builds on that minimum level of protection.

4. Modifications of the law applicable to development action resulting from the Oslo Agreements, and the “disengagement” of the Gaza Strip

The boundaries between Israel and the OPT date back to the armistice agreements concluded between Israel and its Arab neighbours in 1949, following the Israeli-Arab war. A “Green Line” was drawn between Israel and Jordan by the agreement of 3 April 1949. This line constitutes the boundary between Israel and the West Bank, notwithstanding that Israel

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114 The primary duty under the ICESCR is to respect and protect, as well as fulfil, economic, social and cultural rights. Subsidiary in nature, the State shall seek humanitarian and development assistance.

115 Rebecca Barber, Facilitating humanitarian assistance in international humanitarian and human rights law, International Review of the Red Cross, Vol. 91 (2009), at 393.
unilaterally annexed East Jerusalem *de facto* in 1967. The *de facto* boundary between Israel and the Gaza Strip derives from the agreement of 24 February 1949 between Israel and Egypt.

During the Six-Day War in 1967, Israel captured the West Bank, including East Jerusalem and the Gaza Strip. The West Bank and Gaza Strip remained under Israeli military control even after peace agreements were concluded with Egypt and Jordan. The “territories occupied in the recent conflict” were, at that point in time, treated as a single territorial unit.116 Israel thus asserted effective control over territory it occupied beyond the “Green Line” in 1967.117

Under a series of agreement between 1993 and 1999 Israel then partially transferred policing authorities and civil administration to the Palestinian Authority (PA) over a small part of the OPT. It is important to note the fragmentation introduced by the 1995 Oslo II Accord, dividing the West Bank into three administrative divisions: Areas A, B and C.118 However, Article XI (1) of the Oslo II Accord clarifies that “[t]he two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period.” In Area C of the West Bank, most powers of the occupying power have not been transferred to the Palestinian Authority (PA) up until today. Area C clearly remains occupied territory.119 Likewise, Areas A and B remain occupied territory.

East Jerusalem was excluded from the Oslo agreements. Israel *de facto* annexed East Jerusalem in 1967. It was incorporated into the existing Israeli municipality of (West) Jerusalem, rendering 70sq. km of the OPT and its occupants part of a single administrative and municipal Jerusalem area under unilaterally imposed Israeli legal jurisdiction.120 In this regard, the UN Security Council emphasized that “legislative and administrative actions taken

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118 Interim Agreement on the West Bank and the Gaza Strip, 28. September 1995. Article XI (3) reads:
   'Area A’ means the populated areas delineated by a red line and shaded in brown on attached map No. 1;
   ‘Area B’ means the populated areas delineated by a red line and shaded in yellow on attached map No. 1, and the built-up area of the hamlets listed in Appendix 6 to Annex I; and
   ‘Area C’ means areas of the West Bank outside Areas A and B, which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction in accordance with this Agreement.
119 While Israel conferred greater powers to the Palestinians over West Bank Areas B, and especially Areas A in the 1990s, and despite Israeli claims to have withdrawn from the Gaza Strip, because Israel continues to exercise effective control over the OPT, virtually all States, and most legal scholars, agree that Israel remains the occupying power of the entirety of the OPT.
120 Benvenisti, *supra* note 117, p.204.
by Israel to change the status of the city of Jerusalem, (…), are totally invalid and cannot change that status.”121 In 1980, the Knesset enacted the “Basic law: Jerusalem the Capital of Israel”, stating that “Jerusalem, complete and united, is the capital of Israel.”122 These later attempts to change the status of Jerusalem de jure again were criticized and the UN Security Council referred to the 1980 Basic Law as a “violation of international law” and “null and void.”123 The UN General Assembly also viewed East Jerusalem as a part of the OPT.124 In its advisory opinion, the ICJ came to the conclusion that “[a]ll these territories (including East Jerusalem) remain occupied territory and Israel has continued to have the status of occupying Power.”125

Although Israel treats East Jerusalem as part of its territory, its legal status as an occupied territory has not changed under international law. East Jerusalem remains de jure part of the OPT. In any case, according to Article 47 GC IV, the law of occupation continues to apply even where East Jerusalem effectively has been annexed by Israel.

In the Gaza Strip the situation is more complex. Israel unilaterally “disengaged” from the Gaza Strip in 2005 and ended the Israeli administration. The Agreement on Movement and Access between Israel and the PA was concluded to transfer security-related and civil administrative functions to the PA.126 However, until today Israel controls the Gaza Strip boundaries, access by sea, as well as the airspace over the territory. Political leadership in the Gaza Strip vacillated between 2005 to 2007. After 2006 elections and clashes between Fatah and Hamas, the latter assumed control over governmental institutions in the Gaza Strip. Since 2007, two administrations exist on parallel tracks in the OPT amid apparent attempts to form a unity government: Hamas administration in the Gaza Strip and the Fatah-dominated Palestinian Authority based in Area A of the West Bank. Several major armed interventions by Israel in the Gaza Strip have taken place since its unilateral disengagement, as well as regular Israeli incursions and aerial bombardments. From a legal point of view, the question is whether Israel’s “disengagement” led to a change in the status of the territory and the conflict.

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124 UNGA Res. 67/19, Status of Palestine in the United Nations, 4 December 2012 (UN Doc. A/Res.67/19).
125 Advisory Opinion on Legal Consequences, supra note 55, para.78.
between the parties involved. Israel claims that it no longer is an occupying power with regard to the Gaza Strip.\(^\text{127}\) The Israeli Supreme Court upheld that the occupation of the Gaza Strip had ended:

Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law.\(^\text{128}\)

Yet, the findings of the 2009 Goldstone report point in the opposite direction:

Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip. The Mission is of the view that the circumstances of this control establish that the Gaza Strip remains occupied by Israel. The provisions of the Fourth Geneva Convention therefore apply at all relevant times with regard to the obligations of Israel towards the population of the Gaza Strip.\(^\text{129}\)

In a similar manner, the Office of the Prosecutor of the International Criminal Court concluded that

[while Israel maintains that it is no longer occupying Gaza, the prevalent view within the international community is that Israel remains an occupying power under international law, based on the scope and degree of control that it has retained over the territory of Gaza following the 2005 disengagement. In accordance with the reasoning underlying this perspective, the Office has proceeded on the basis that the situation in Gaza can be considered within the framework of an international armed conflict in view of the continuing military occupation by Israel.\(^\text{130}\)]


\(^\text{130}\) Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53 (1) Report, Office of the Prosecutor, International Criminal Court, 6 November 2014, para.16.
UNSC Resolution 1860, moreover, stressed that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state.\textsuperscript{131}

Article 42 of the 1907 Hague Convention (IV) states that:

 Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

In the absence of clear-cut criteria for when such occupation begins and comes to an end, a careful examination of the interpretation of this provision is required.\textsuperscript{132}

The “effective control” test is the standard used in determining whether a State is the occupying power of a territory. The three key elements, deriving from the mentioned Article 42 of the 1907 Hague Convention (IV), are: (i) foreign military presence, (ii) the ability of the foreign forces to exert authority in the concerned territory in lieu of the local government, and (iii) its non-consensual nature.\textsuperscript{133} Continuous presence of soldiers is thereby only one criterion under the effective control test.\textsuperscript{134} The ICTY held in \textit{Naletelic} that the law of occupation applies to territories where a state possesses the “capacity to send troops within a reasonable time to make its power felt.”\textsuperscript{135}

In addition to controlling the borders, coastline and airspace, Israel controls the Gaza Strip’s telecommunications, water, electricity and sewage networks, as well as people going into and out of the territory and its population registration requirements and process.\textsuperscript{136} The Security Council stressed, again in 2009, that the Gaza Strip and West Bank constitute one occupied territory: “…the Gaza Strip constitutes an integral part of the territory occupied in 1967 and

\textsuperscript{131} UNSC Res. 1860, 8 January 2009(UN Doc. SC/RES/1860).

\textsuperscript{132} Philip Spoerri, The Law of Occupation, in: Clapham / Gaeta, supra note 99, p.188.

\textsuperscript{133} \textit{Ibid}.


\textsuperscript{135} Prosecutor v. Naletilic and Martinovic, ICTY, IT-98-34-T, Judgment of 31 March 20013, para.217. See also Spoerri, supra note 132, p.189 (“(…) capable of sending troops within a reasonable time in order to make its authority felt in the concerned area.”).

will be a part of the Palestinian state.”\textsuperscript{137} The prevailing international view is that the Gaza Strip and West Bank constitute a geographical unity. It also is easier to conclude that although occupying power troops may not be present on all of the territory at all times, the situation of occupation remains unchanged because Israel maintains its capacity to exercise authority throughout that territory\textsuperscript{138} and, indeed, clearly does so as and when it chooses. Taking into account that Israel imposes a blockade, re-enters the Gaza Strip whenever it chooses, renders large parts of its territory impassable and otherwise controls significant territorial rights (water and airspace), Israel’s occupation of the Gaza Strip has not ceased.

Thus, and despite that Israel continues to occupy the entirety of the OPT, Israel treats all three areas differently: East Jerusalem is regarded as sovereign Israeli territory (annexed \textit{de jure} under Israeli law), while for the remainder of the West Bank (some) IHL provisions apply, and the Gaza Strip is officially declared to no longer be subject to the former military occupation.

Despite Israel’s divergent treatment of these areas, Israel remains occupying power with regard to the entire OPT, consisting of the unity of the West Bank, including East Jerusalem and the Gaza Strip.

\textbf{6. The relationship between development action and humanitarian assistance}

The idea to provide and receive humanitarian assistance stands at the core of the law of armed conflict and several norms have been interpreted to address the question (Articles 43, 46 and 52 of the 1907 Hague Convention IV; Articles 59, 60 GC IV; Article 69 AP I). International law thus provides a solid basis for humanitarian assistance.

Relief actions are specifically mentioned under Article 59 GC IV. Relief action is a secondary obligation that does not free an occupying power from its primary obligations to safeguard the wellbeing of the protected population (Article 60 GC IV). In particular, an occupying power is obliged to ensure food and medical supplies (Article 55 GC IV) and the functioning of the health care system (Article 56 GC IV). Care and education are mentioned under Article 50

\textsuperscript{137} UNSC Res. 1860 (2009), 8 January 2009 (UN Doc. S/RES/1860).

\textsuperscript{138} Grignon, \textit{supra} note 83, p.1594.
GC IV. Moreover, articles 47, 49, 52 and 53 GC IV entail specific obligations for the occupying power towards the protected population. For example, Article 52 GC IV states:

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

Reading all of these provisions together, an obligation to prevent de-development and to ensure the status quo wellbeing of the population can be deduced from GC IV and from peacetime law. In particular, the term “relief” allows for a broad understanding of humanitarian and development actions going hand-in-hand. Moreover, humanitarian relief action and development action are inextricably linked to one another, particularly in a prolonged occupation context, according to the UN General Assembly:

9. There is a clear relationship between emergency, rehabilitation and development. In order to ensure a smooth transition from relief to rehabilitation and development, emergency assistance should be provided in ways that will be supportive of recovery and long-term development. Thus, emergency measures should be seen as a step towards long-term development.

10. Economic growth and sustainable development are essential for prevention of and preparedness against natural disasters and other emergencies. Many emergencies reflect the underlying crisis in development facing developing countries. Humanitarian assistance should therefore be accompanied by a renewal of commitment to economic growth and sustainable development of developing countries. In this context, adequate resources must be made available to address their development problems.

11. Contributions for humanitarian assistance should be provided in a way which is not to the detriment of resources made available for international cooperation for development. (…)

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139 See above at III., 3.c).  
140 UNGA Res.46/182, 19 December 1991 (UN Doc. A/RES/46/182); also UNGA Res.55/163, 7 February 2001 (UN Doc. A/RES/55/163), para.6: “(…) as well as international cooperation in response to emergencies, from relief to rehabilitation, reconstruction and development (…)”; UNGA Res.57/152, 3 March 2003 (UN Doc. A/RES/57/152), para.18: “Invites the United Nations system to explore further the concept of transitional recovery teams for providing assistance for bridging relief assistance and development cooperation.” (emphasis added); UNGA Res. 58/114, 5 February 2004 (UN Doc. A/RES/58/114), para.6: “(…) consider the issue of the transition from relief to development in an integrated manner, through a possible joint meeting of the humanitarian and operational segments, during its substantive session in the near future, in view of the importance of getting humanitarian and development organizations, including international and regional financial institutions and non-governmental organizations, to discuss and review more fully the implications of
7. Intermediate conclusions

- Peacetime law on development action, in principle, remains applicable in situations of belligerent occupation. The occupying power must respect peacetime law on development action, including human rights in general, and economic and social rights in particular, based upon the effective control test. However, the scope of these obligations may have to be adapted to the specific circumstances, in particular in light of Article 2 (1) ICESCR.
- Only to the limited and case-specific extent that treaty-based or customary international law on belligerent occupation can be considered lex specialis, it will enjoy precedence over peacetime law with regard to development action.
- Even to the extent that the law of occupation may prevail, the occupying power is obligated to prevent de-development and not to interfere with development aid provided by third States, and the occupying power must ensure at least the status quo of the wellbeing of the civilian population in occupied territories.
- IHL-based humanitarian assistance, recovery and development action often overlap. However, in situations of prolonged occupation, which has just entered its fiftieth year in the OPT, development action should gradually replace humanitarian assistance unless doing so will be to the disadvantage of the civilian population.

IV. Selected issues

1. Access to freshwater

Access to freshwater is part of the human right to water protected by Article 6 ICCPR and Article 11 ICESCR.\textsuperscript{141} States are obliged to respect, protect and ensure the right of access to water. This basically also applies to Israel in the OPT, subject to some factual differentiation between East Jerusalem, West Bank Area C and the Gaza Strip.

\textsuperscript{141}CESCR General Comment No.15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003 (UN Doc. E/C.12/2002/11), para.3
Water resources are *de facto* controlled by Israel. Ground water distribution was addressed by Article 40 of the Oslo II Accords, and, among others, an Israeli-Palestinian Joint Water Committee has been established.\(^{142}\) There is no regular water supply in the Northeast of Jerusalem.\(^{143}\) The neighbourhoods have been isolated through the separation barrier.\(^{144}\) Notwithstanding that East Jerusalem was *de facto* annexed by Israel and agreement on its ultimate disposition postponed by the Oslo II,\(^{145}\) the irregularity of water supply violates Article 11 (1) ICESCR.

In the West Bank, Israel uses more water than it is allowed to use under the Oslo II.\(^{146}\) Water shortages for Palestinians persist and 10% of the population lacks network services.\(^{147}\) The water distribution and usage by Israel clearly violates Oslo II. Moreover, taking into account the law of state responsibility, Israel is obliged to end and not repeat the overuse of water resources and it must provide full reparation for its violations of Oslo II.

In the Gaza Strip, severe damage to the water infrastructure was caused during the 2008-2009 Gaza conflict.\(^{148}\) The remaining water supply is of such poor quality that only 5-10% quality reaches drinking water standards. Although Israel claims it has “disengaged” from the Gaza Strip, it continues to control ground water distribution.\(^{149}\) Israel is obliged to accept and facilitate relief action for the amelioration of water infrastructure in the Gaza Strip. This flows from Articles 2 (1) and 11 (1) ICESCR and its obligation not to hinder international assistance and cooperation. If Israel does not comply with its positive duty to take action under the ICESCR, alternatively it must facilitate relief action by third States.

### 2. Movement of development-related goods into occupied territories

\(^{142}\) Art. 40:11 Appendix I of Annex III Israeli-Palestinian Interim Agreement of 28 September 1995 “the two sides will establish, upon the signing of this Agreement, a permanent Joint Water Committee (…)”.


\(^{144}\) On the illegality of the Separation Barrier, see Advisory Opinion on Legal Consequences, *supra* note 55.

\(^{145}\) Article XXXI:5 Israeli-Palestinian Interim Agreement of 28 September 1995.


With regard to development-related goods, Israel is generally obliged to facilitate the delivery of development aid. As highlighted above, Israel is under an obligation to respect peacetime law on development action, to prevent de-development and to ensure at least the status quo wellbeing of the civilian population. In East Jerusalem and the West Bank, checkpoints impose constraints on the movement of such goods. For instance, there is no access for relatively cheap products from the West Bank in East Jerusalem. Israel thereby violates several provisions, namely Articles 59, 60, 55 and 56 of GC IV. Moreover, the OPT’s territorial unity, set forth and agreed in the Oslo II Accords, is not respected. Last but not least, such measures infringe upon the right to economic self-determination.

In the Gaza Strip, Israel controls the airspace and borders. Furthermore, it controls the supply of essential goods (for example, electricity, fuel, telecommunication, water, etc.). Blockades of land, air and sea transportation, as well as other restrictions on the movement of goods seriously impact development in the Gaza Strip. The Oslo II Accords in fact foresee the control of Gaza’s airspace and territorial waters by Israel. However, Israel was supposed to facilitate the building of a seaport and airport for the Gaza Strip. Import and export of goods must be evaluated in light of socio-economic rights. If Israel unnecessarily interferes with the movement of goods into or out of the Gaza Strip, it violates the ICESCR and ICCPR. Consent cannot be withheld arbitrarily. The duty to accept and facilitate development action, such as the movement of development-related goods, flows from Articles 2 (1), 11 (1), 12 and 13 ICESCR.

3. Movement of development-related workers into occupied territories, in particular access and protection of development workers

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150 See III., 7.
153 Buffer zones have been established and the coastline is controlled by Israeli forces; see Annex I, Art. XIV Israeli-Palestinian Interim Agreement of 28 September 1995.
156 Michael Bothe, Legal Expert Opinion on the Right to Provide and Receive Humanitarian Assistance in Occupied Territories, 15 July 2015, p. 2 (copy on file with the authors).
Free movement of development workers is of particular importance for effective development aid and for individuals subjected to restrictions. Customary law includes an obligation to respect and protect aid personnel. Article 71 (2) Additional Protocol I, applicable to armed conflict situations, reads: “Such personnel shall be respected and protected.”

While Israel is not a party to AP I, the customary law analogue of this provision is binding on Israel.\textsuperscript{157} Admittedly, the movement of relief / development workers can be subject to certain restrictions,\textsuperscript{158} yet movement cannot be denied on arbitrary grounds and visa requests, for example, must be handled swiftly and controls at entry checkpoints may not be abused. Arbitrary arrests violate Articles 9 and 10 ICCPR. Derogations in accordance with Article 4 ICCPR remain possible and there may also be security reasons for restrictions. These qualifications notwithstanding, development personnel shall be respected and protected to the fullest extent practicable.\textsuperscript{159} The Convention on Privileges and Immunities of Specialised Agencies also gives special protection to International Development Aid Workers included in its Article 1 (for example the ILO, FAO, and others).\textsuperscript{160}


\textsuperscript{158} Cf. Article 71 (1) and (3) AP I:

(1) Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties. (…)

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.


\textsuperscript{160} Convention on the privileges and Immunities of the Specialised Agencies, Article I - Definitions and scope, Section 1:

In this Convention: (…) (ii) The words “specialized agencies” mean:

(a) The International Labour Organization;
(b) The Food and Agriculture Organization of the United Nations;
(c) The United Nations Educational, Scientific and Cultural Organization;
(d) The International Civil Aviation Organization;
(e) The International Monetary Fund;
(f) The International Bank for Reconstruction and Development;
(g) The World Health Organization;
(h) The Universal Postal Union;
(i) The International Telecommunication Union; and
4. Infrastructure, in particular planning and zoning

In the West Bank (Area C) and East Jerusalem, Israel de facto annexed OPT territory. Israel claims that East Jerusalem is part of Israel, and it constructed a barrier that does not abide by the West Bank’s boundaries,\(^{161}\) and thus violates Oslo II. Through its Military Order No. 418 (1971) Israel unlawfully introduced a transition from Jordanian Planning Law.\(^{162}\) Israel’s occupation administration denies planning permits for Palestinian construction and demolishes Palestinian structures.\(^{163}\) Potential violations with regard to planning and zoning include the right to self-determination, Articles 43, 46 and 52 of the Hague Regulations, and Article 27 of GC IV and others.\(^{164}\) The confiscation of private property, for example, is specifically forbidden by Article 46 (2) of the Hague Regulations. Article 53 GC IV further prohibits the destruction of personal property unless the exception of military necessity applies:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Moreover, Israeli settlements and extensive supporting infrastructure constructed within the territory of West Bank violate Article 49 (6) GC IV.\(^{165}\)

With regard to the Gaza Strip, a duty to facilitate the re-building of infrastructure again flows from the duty under Articles 2 (1) and 11 (1) ICESCR for international assistance and co-operation. Israel must accept and facilitate development actions.

5. Limitations imposed on the use of natural resources in occupied territories

\(^{(j)}\) Any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter.”

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\(^{161}\) Advisory Opinion on Legal Consequences, supra note 55, para.119.

\(^{162}\) Diakonia Report ‘Planning to Fail’, supra note 4, pp.14 et seq.


\(^{164}\) Michael Bothe, supra note 156.

\(^{165}\) Article 49 (6) GC IV states: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” See also Advisory Opinion on Legal Consequences, supra note 55, para.117.
Certain limitations are imposed upon an occupying power with regard to the use of natural resources in occupied territories. In the West Bank, including East Jerusalem, the following non-exhaustive list of examples of potential violations may be noted: (i) Up-rooting of vast numbers of fruit-bearing trees; (ii) destruction of farms and greenhouses; (iii) rights given to Israeli companies to extract valuable deposits from the Dead Sea while no new permits were issued to Palestinian firms; (iv) issuance by the occupying power of permits to operate cement and stone quarries by Israeli entities and individuals; etc.

An occupying power is forbidden from exploiting natural resources as it so wishes; it must take the interests of the local population into account. Otherwise, Articles 43, 46, 52 and 55 of the Hague Regulations are violated. The Hague Regulations are meant to safeguard the local population from activities of de-development.

Article 43 of the Hague Regulations obliges an occupying power to “… restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force of the country”. Article 55 of the Hague Regulations more specifically reads:

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.

Yet the use under article 55 is limited in so far as “a territory held in belligerent occupation is not an open field for economic or other kinds of exploitation” and the interest of the local population must be taken into consideration. Moreover, the obligation to restore and ensure public order and civil life is broader than guaranteeing security; it encompasses “a variety of aspects of civil life, such as economy, society, education, welfare, health, transport, and all other aspects of life in a modern society.” Thus, the benefit of measures taken by an occupying power primarily should be for the population of the occupied territory. Private property cannot be confiscated (Article 46 Hague Regulations), and an occupying power acts as the “administrator” of property. In addition, if Israeli individuals or entities extract and

166 Yesh Din v. IDF Commander in the West Bank (Quarries case), Judgment, Israeli High Court of Justice (HCJ 2164/09).

167 Théo Boutrouche, Expert Opinion on International Humanitarian Law Requiring of the Occupying Power to Transfer Back Planning Authority to Protected Persons Regarding Area C of the West Bank, pp.8-9, note 30 (copy on file with the authors).
exports natural resources, Palestinian rights over natural resources are violated, very much in line with the above-described considerations regarding the right to self-determination.

It is worth noting again here that the OPT is to be treated as a single territorial unit under Oslo II. Israel’s separation policy stands in stark contrast with the goals envisaged by Oslo II. With regard to the Gaza Strip, other glaring examples regarding restriction and interference with natural resources to be further explored are the curtailment of the fishing zone and known natural gas field exploitation. Oslo II foresaw a 20 nautical mile offshore fishing zone as an interim measure. Israel’s repeated unilateral reduction and interference with activities even in that limited zone, contradicts both the bilateral Oslo agreements and the most fundamental law of the sea precepts. The de facto control of proven Palestinian gas reserves by Israel also violates the status of Palestinian waters under international law.

V. Summary and conclusion

In summary, there are two main conclusions to be drawn from the arguments presented in this expert opinion on development assistance provided in occupied territories, including in situations of prolonged occupation:

First, the international law of development co-operation provides a basic legal framework for development action in occupied territories. Based upon international human rights law and the right to self-determination, an occupying power normally is not entitled to interfere with developmental relations of the occupied territories and its inhabitants with third parties, unless the occupying power claims, and substantiates, legitimate security concerns. Third parties – in light of the human rights obligation to cooperate with regard to the implementation of human rights – are entitled to provide development assistance to an occupied territory and its inhabitants, and the latter are entitled to receive such assistance.

169 See above at III, 4.
Second, development action in an occupied territory does not replace humanitarian assistance. Given the broadness of the law of development cooperation and the contrasting specificity of international humanitarian law, this not only would run counter to the protected interests of the inhabitants of an occupied territory, but it could even be counterproductive for the ratio legis of the legal rules protecting the civilian population. Thus, even in situations of prolonged occupation, an occupying power cannot escape its obligation to ensure and allow relief in support of the inhabitants of the occupied territories. The occupying power’s obligations for the benefit of the civilian population persist. Moreover, the longer an occupation persists, the more the occupying power will become subject to additional obligations in light of human rights law and the right to (economic and political) self-determination of the inhabitants of the occupied territory. Development action thus does not replace the obligations to provide humanitarian assistance but will serve as an add-on for the benefit of the inhabitants of occupied territories and, as such, is protected both under peacetime international law and under the law of occupation.

This expert opinion has elucidated the basic cornerstones of the applicable law; the space in between these cornerstones needs to be fleshed out further. It goes without saying that there are many detailed and specific rules, which will have to be applied within this broader legal framework to the many different situations arising in practice, some of which have been sketched briefly in the last section of the expert opinion.

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