LAW VERSUS JUSTICE

Understanding of security and criminalisation of the right to protest in Israel and Palestine

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Cover pictures: Right-wing activists from the nationalistic group of ‘Im Tirzu’ protest at the entrance to the Tel Aviv University, November 20, 2014. The protest was organised originally as a counter-demonstration against a left-wing vigil that was planed in solidarity with Khir Hamdan, who was killed by Israeli police in Kfar Kanna.

Women’s Day demonstration at Qalandia Checkpoint, Ramallah, March 8, 2014.

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**FOREWORD**

The present report analyses how the Israeli legal system undermines the rights of freedom of expression and peaceful assembly taking into consideration first of all the concept of security of the Jewish state and the different geographical contexts and citizens to whom the law is applied. As in previous reports, NOVACT tries to reveal and analyse discriminatory practices, policies and legal systems that oppress civil society.

In particular, this volume it continues and complements previous researches on Palestine as the study on the peacebuilding strategies of the civil society, the situation of apartheid, the military and arms trade relation between Spain and Israel or the privatisation of security. Furthermore, connects with a growing trend in Europe of criminalisation of the right to protest that NOVACT is working in Spain through a state coalition, called "Defender a quien Defiende" (To defend the one who defends) formed by human rights defenders, journalists, legal experts, university institutes and third sector.

Since its declaration of independence the state of Israel has been under state of emergency and his Emergency Regulations, from the British Mandate in 1945, are the legal framework and basis for this permanent state of emergency that restricts fundamental rights of most of the population, even if the security situation in Israel after more than 60 years of occupation is not exceptional.

Another basic trait of the state is the Jewish character as one basic pillar on which the government relies on. It is one of the main values to be protected and not supporting the idea of Israel as a Jewish state is perceived as a threat to national security.

In this research, Ana Sánchez tries to draw the picture of the different Israeli legal systems and how they are applied differently depending on, not only through a geographical jurisdiction, but also on the people to whom is applied.

A demonstrative example is how the military law (and military courts) applies only to Palestinians citizens in the occupied West Bank, while to Israeli settlers living at the same are under the Israeli civil law. Also Palestinians in East Jerusalem and within the state of Israel suffer legal discrimination.

“Law versus justice” pretends to advocate International governments and civil society on the criminalization of the right to protest in Israel and Palestine and reminds that defending and promoting Human rights is nor only a moral obligation but a State responsibility and that peace without justice, as well as being amoral, is barely possible to achieve.
"Young man, let me remind you that this is a court of law and not a court of justice."
Justice Holmes Jr. U.S. Supreme Court

This is what Oliver Wendell Holmes Jr., one of the great justices of the U.S. Supreme Court, answered after he listened to the argument of a young lawyer who mentioned at several points in his argument that his client sought justice before the court.

Are courts a place of justice? Or are they a place to uphold the law? These and other similar questions have been raised several times. The aim of this paper is not much to reflect on this theory but rather to explore tensions between law and justice and how in the specific context of Israel and Palestine, law is being used to repress justified actions and legitimate rights. We will explore the relations and role of the concept of security, and how it affects the conception and development of policies at the executive, legislative and judicial level in relation to the rights of freedom of expression and peaceful assembly.

In order to do so, we will first analyse the global and growing process of securitisation and how this process is alarmingly jeopardising the principles of democracy and human rights. Then, we will explore the different understandings and approaches to security and based on that, we will try to define and identify Israel’s position on this regard. Having reviewed the theoretical framework we will move to the application and translation of these theories into practice and analyse the impact of Israel’s conceptualisation of security into the protection and promotion of fundamental human rights, specifically in relation to the protection of the right of freedom of expression and peaceful assembly.
Security is a key central point in Israeli policies, both domestic and foreign. It is mainstreamed at every level: legal, political and even at the psychosocial one. Security policies are deeply rooted in their society and security reasons are frequently used to justify fundamental rights and freedoms cutbacks, whether these measures are based on actual threats, on a hidden politically-motivated agenda or both. This security centred approach is not unique to Israel, although their understanding of security and values to protect and methods used involve other kind of threats and has special characteristics, as we will see later on.

Over the last few years, international civil society movements and academics such as Boaventura da Souza have been warning about a global crisis, not only financial but rather one of moral and principles. We are seeing a significant global upraising of individuals of conscience all over the world concerned about the current state of affairs and demanding a global change based on the need for creating alternatives to the predominant neoliberal paradigm, alternatives that promote a safer and more just world for everyone. Movements like Occupy Wall Street in the US or the 15th of May in Spain have seen people taking to the streets as a fora for political participation. They are exercising their right to freedom of expression and peaceful assembly in the squares and the streets to tell their political representatives that civil society wants a change based on equal rights and social justice, broader participation of civil society in the design of public policies and a real democracy.

The overwhelming response that those movements have faced by most of their governments and political representatives has been an increased repression: either through the use of violence when dispersing peaceful protests, or through arrests or the imposition of high fines or even legal repression. The tightening of the legal framework, as was the case in Spain with the so-called “Citizenship Law”¹ (also known as the “gag law”) has triggered many international human rights protection mechanisms due to their undermining the protection provided by the right of freedom of expression, one of the main pillars of Rule of Law, good governance and democratic states. Governments have branded these groups as anti systemic groups, radicals or even terrorist groups. By branding them as a threat to the state, government’s repression and coercive measures were justified. The concept of securitisation illustrates very well this growing process.

The concept of securitisation was introduced by the School of Copenhagen and is defined as a discourse construction of what could be considered as a threat. It has been widely used in the context of the “war against terror”. The aim of this discourse construction was to move certain legitimate political discussion away from the field of politics to the field of security, thus changing the actors involved in such a debate². With security as part of political discussion, the involved actors were the product of democracy: parliamentarians, politicians, civil society representatives, and so on. In the second scenario, the issue has moved to the security sphere and has been treated as such by the security forces: police, army or criminal courts. The aim of this movement is to legitimise certain

¹ Sponenberg, H. 3, Jul, 2015, Spain’s “gag” law comes into force, Consulted on September 28th 2015 at https://euobserver.com/beyond-brussels/129459
coercive measures adopted for the sake of security that otherwise would not be accepted within the standard terms of Rule of Law. This discourse construction needs to be done by an individual or party with sufficient lobby capacity to influence public opinion and align it with its own objectives.

The Paris School of Security differs on the definition, arguing that securitisation goes beyond a discourse narrative and involves other acts that result from daily practices. Within these daily practices we can find what Jef Huysman has defined as "little security nothings", such as data collection, surveillance or identification, among others.

Whichever definition of securitisation we choose, when looking at the specific case of Israel and Palestine, we can clearly see how this process of securitisation has deeply permeated its socio-political reality: politics of fear, hate-speech and all the imaginable examples of Huysman’s “little security nothings” (checkpoints, biometrical control, surveillance mechanisms...)

Through this chapter we will examine the different security paradigms and their impact on human rights restrictions and/or violations. We will analyse Israel’s understanding of security: what does the Israeli government understand by security, what are their values and which measures is the Israeli government taking to protect them, and how this could come into conflict with the definition of Israel as a democratic state.

1.1. WHAT DO WE UNDERSTAND BY SECURITY?

The Oxford dictionary defines security as “The state of being free from danger or threat”.

However, security is a broad, subjective and interpretable concept. It is full of connotations that might vary depending on the socio-political moment, culture or personal circumstances. Defining the concept is an arduous task: this definition will set the framework of protection and which societal values are to be protected.

There are several approaches and understandings of security spread across various sectors: food security, financial security, social security, digital security... all of them share the essence of the definition ”being free from a danger or threat”. Nevertheless, the focus, the target of protection substantially changes, as well as the strategies taken to protect them. This paper aims to analyse the politically-motivated use of security by the Israeli Government, thus, we will focus on the different paradigms and understandings of security within the juridical -political discourse, focusing on the analysis of the concepts of: 1) legal security/certainty (most commonly used as legal certainty) 2) national security and 3) human security. Before entering into the analysis, we will briefly define each concept in order to build a common understanding.

i. Legal certainty.

The Declaration of Human and Civic Rights, drafter after the French Revolution in 1789, already touched upon this concept of legal security:

Article 5: “The Law has the right to forbid only those actions that are injurious to society. Nothing that is not forbidden by Law may be hindered, and no one may be compelled to do what the Law does not ordain.”

Legal certainty requires all law to be "sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the
consequences which a given action may entail." Meaning that (1) laws and judicial decisions must be made public; (2) laws and decisions must be definite and clear; (3) decisions of courts must be binding; (4) limitations on retroactivity of laws and decisions must be imposed; and (5) legitimate expectations must be protected.

The United Nations regards Legal security as a fundamental principle of Rule of Law. People need to be aware of the consequences of their actions and of the laws and regulations they are subject to. If not, individuals would live in a constant threat and uncertainty for their wellbeing. We would not be able to predict the consequences of our behaviour. Reducing the argument to the absurd, one might get punished for wearing something red or for riding a bicycle because the decision makers have decided so this very same morning... This will lead to a situation of arbitrariness that will put us in a highly vulnerable position in front of those making the decisions, jeopardising our security, freedom or fundamental rights.

ii. National security.

When we talk about security within the political arena, we quickly think about state security, about our governments’ responsibility to protect its territory and population.

This concept of security has a major role in the "realpolitiks" paradigm of international relations. This paradigm prioritises security and power over other considerations: in the absence of an effective world authority, international relations would be characterised by chaos and war, and therefore it would be the responsibility of each state to defend its territory and borders from such threats.

G. Kennan (1948) defines national security as “the continued ability of a country to further develop its internal life without serious interference or threat of interference of foreign powers.” It therefore would aim ultimately to protect national interests.

This concept of national security was developed and studied widely in the years following World War II. Despite being, as we indicated earlier, a concept with many meanings, most of the authors in their definition refer to two ideas: defending territorial borders and protecting its core values.

Gene Sharp pointed out that the fact of using such abstract terms when talking about the protection of values, could lead to situations of internal repression of groups that allegedly violate the country's interests and values: "If you include ‘national interest’ within ‘national security’, the possibility of the suppression of internal groups that allegedly threaten the interests of the country is left open, as well as the military intervention in countries with which you might have different values or economic or political opinions.”

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7 Gene Sharp, “En torno a la definición de seguridad nacional”, en: En busca de la seguridad perdida. Aproximaciones a la seguridad nacional mexicana, op.cit., p. 97
iii. Human security.

"WE COLLECTIVELY PLEDGE to build new foundations of human security, which ensure the security of people through development, not arms; through cooperation, not confrontation; through peace, not war. We believe that no provision in the Charter of the United Nations will ever ensure global security unless people have security in their homes, in their jobs, in their communities and in their environment."  

In the late 1980s and early 1990s a new paradigm of international relations linking insecurity with unmet basic needs of much of the population began to develop. Boutros Ghali, former UN Secretary General, presented in 1992 at the request of the Security Council a document containing proposals about preventive diplomacy, peacekeeping and security. This document stated the need of having a broader approach to security, incorporating other aspects beyond the military ones. Kofi Annan, in 2005\(^9\) indicated the three key elements of human security, namely:

1. Freedom from fear;
2. Freedom from want;
3. Freedom to live in dignity.

This new approach to the concept of security is a holistic concept and focused on the individual, as opposed to the hegemonic approach to national security which remains in effect in most states.

1.2. WHAT DOES ISRAEL UNDERSTAND BY SECURITY? 

Security matters play a key role both in policy and legislative development in Israel, having a significant impact on budget allocation. Israel in 2014 allocated 5.23% of its GDP on defence, comparable to the percentage allocated in countries such as Libya, Eritrea or Saudi Arabia and more than five times higher than Spain (0.91% on the same date). This amount accounts for 12.75% of Israel’s public expenditure, representing a significant amount\(^10\).

According to Shay Shabtai, researcher on security issues in Israel, Israel has failed to consensually define national security objectives since the days of Ben Gurion\(^11\) (Israel’s first Prime Minister) and the discussion around national security strategies lacks engagement with national objectives.

Israel has successfully applied in the past the so-called “security triangle”\(^12\) developed by Ben Gurion, comprised of:

a.- deterrence: designed to encourage foreign decision makers of state entities to avoid military confrontation.

b.- early warning: identify the intentions and preparations of foreign states planning a military attack.

\(^10\) Consulted online on 19th September 2015 at http://www.datosmacro.com/estado/gasto/defensa
\(^12\) idem
c.- decision: The term was coined in the inter-state context: through military force, one state imposes agreement to a preferred policy on another state

However, Shabtai thinks that this approach needs a redefinition. He suggests a number of principles which, in his opinion, Israel should adopt in order to adapt the “security triangle” to the current context and environment:

A) Decision: refers to the imposition by military force of a desired policy on an enemy state or its leaders. Here all military offensives would be included.

B) Resilience: a term that replaces the concept of civil defence. This concept invokes the right of the Israeli people to defend themselves from attacks and threats through all possible means.

C) Deterrence: refers to the use of military capacity to discourage the enemy to launch an attack. This category includes “preventive” detentions and arrests, as referred to in the report.

D) Prevention: refers to the use of measures to prevent the enemy from developing threats. A clear example of this would be the construction of the Wall.

E) Elimination: to damage an enemy’s existing capacities. Attacks targeting enemy military bases fall into this category. Surprisingly, Shabtai includes in this category the attacks on the various “Gaza Freedom” flotillas. The Gaza Freedom flotillas consisted of civilian boats bound for Gaza in order to break the sea blockade imposed by Israel on the Gaza Strip13. In 2010, the Israeli army attacked one such flotilla in international waters, killing nine Turkish nationals.

F) Paralysis: consist of the expansion of the shares of disincentives [increase in violence in most cases] but not going to end in a military attack (decision).

G) Approval: refers to the approval of the international community for Israel’s use of force, through the use of diplomacy. This concept highlights Israel’s understanding of the necessity to have the support of international actors to legitimise their actions and improve Israel’s international image. A clear example is the relationship with the US Government.

H) Security Cooperation: in this case referred to the establishment of alliances against common enemies. An example would be coordinated with the Palestinian Authority in its fight against Hamas.

Shabtai attaches great importance to the field of military interventions or seeking support for them as strategies to ensure safety. He doesn’t address the protection of the rights and interests of people living in the territories that Israel intends to defend, even if it refers to the protection of the values and interests of the state and its borders and territory. This shows a highly militaristic understanding of security, which ignores most of the principles suggested by the human security paradigm. On the contrary, it gives a good insight of a deeply militarised society looks like.

Freilich, former Deputy National Security Adviser in Israel, points out in one of his articles that this predominance of the defence establishment in Israel is a pathology of the system. According to Freilich, there is a large imbalance between military and civilian capacities within the security sector in Israel, and this imbalance influences their policies. Some of the factors that account for these differences are:

- Professional expertise: the IDF is solely responsible for supplying information, analysis and policy
advice to the Prime Minister or the cabinet in areas which go far beyond the commonly accepted spheres of military competence.

- The "closed circle": the IDF has a key role at every step of the decision making process and participates in a wide range of circles:
  - Intelligence assessment: military intelligence is responsible for the National Intelligence Assessment.
  - Strategic Planning: the IDF Planning Branch is considered the main strategic planning entity.
  - Diplomacy in Uniform: many of the contacts with other states have been done by the IDF, playing a key role in peace negotiations, such as in Camp David in 1978. In fact, military cooperation is one of Israel’s strategies for fostering cooperation with other states.
  - Military Government: the IDF is responsible for leading the civil administration in the occupied Palestinian territory since 1967. Most of the issues they are handling have nothing to do with the military sphere and are of a purely civilian character.
  - IDF as a pressure group: their institutionalised role and their connections with the elite decision makers make the IDF a very influential group. A disproportionate share of the national labour forces is employed by the military and military related industries, making the IDF a major economic force.

Taking all this into consideration, we could undoubtedly affirm that Israel’s conception of security falls within the national security approach, rather than within the human security one. However, this does not differ so much from other countries. What makes Israel's conception of security peculiar is the focus of their security paradigm, the values to be protected and its extreme securitisation and militarisation of all the spheres of public life.

The priority given to the protection of Israel’s understanding of national security and national values has opposed, and often trumps, its legal and human security.

The construction of the Wall is a clear example of this primacy of national versus human security. This case constitutes a serious violation of IHL and international human rights law. In 2004, the International Court of Justice (ICJ) declared illegal construction of the Wall and therefore its associated regime of occupation. The ICJ issued an advisory opinion denying that the construction of the wall was justified for security reasons, as Israel claimed:

“The construction of the wall and its associated regime can not be justified by military exigencies or for reasons of national security or public order”

It also reminded states parties to the Geneva Convention that they are responsible for ensuring compliance with it, as well as for ensuring the protection of protected persons living under a military occupation, as established by the Convention.

1.3. JEWISH CHARACTER OF THE STATE AS CENTRAL VALUE OF PROTECTION.

In 1999 Israel established the National Security Council (NSC). Its mission is to advise the Prime Minister on issues related to national security and reports directly to him. Most of these matters are classified and secret affairs, as points its website. However, their vision reflects that its aim is to promote safety in the State of Israel in the most professional manner possible, based on the
foundations laid down in the Declaration of Independence of the State of Israel in 1948\textsuperscript{14}. The Declaration of the Establishment of the State of Israel, of May 14, 1948 reads:

“November 29, 1947, the United Nations General Assembly adopted a resolution calling for the establishment of a Jewish State in Eretz-Israel [...] This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable. This right is the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State”\textsuperscript{15}

The Jewish character of Israel is one of the basic pillars on which the government relies on, and one of the main values to be protected. This, as Sharp\textsuperscript{16} noted, has resulted in repression and discrimination of those groups who do not share this value. Not supporting the idea of Israel as a Jewish state is perceived as a threat to national security. Anyone who opposes or does not recognise the Jewish character of the State of Israel is considered an enemy of it. We can look, for instance, at the case of Haneen Zoabi, a Palestinian citizen of Israel and Knesset member. Zoabi was suspended from her parliamentary privileges in 2010 for her participation in the Freedom Flotilla\textsuperscript{17}, which sought to break the land, sea and air blockade of Gaza, imposed by Israel in 2007 after Hamas won the elections in the Strip. Two years after her participation on the Flotilla, in 2012, the electoral committee suggested to incapacitate Zoabi, alleging that she was constantly disqualifying the State of Israel and publicly in-citing against it, its institutions and against its army\textsuperscript{18}. The petition stated that Zoabi denied the existence of Israel as a Jewish and democratic state and based on Article 7 A of the Basic Law of the Knesset, could be disqualified as a member of this body. This article provides that

“A candidate will not participate in the elections to the Knesset and a person can not be a candidate for the Knesset if its objectives or actions list acts of people, express or implied, incur one of the following assumptions:

- Denial of the existence of the State of Israel as a Jewish and democratic state
- Incitement to racism
- Support for armed resistance to a hostile state or terrorist group against the State of Israel.”

Such policy amounts to a legal discrimination in a state where about 25\% of its population is not Jewish\textsuperscript{19} and therefore might not identify themselves with this value.

This article excludes and discriminates against several population groups, such as Palestinian citizens of Israel, both Christians and Muslims, or citizens who do not define themselves as Jews, such as atheist Israelis who do not want their state to be a religious theocracy, but rather a true secular and pluralistic democratic state. Moreover, according to data obtained by the Israel Democracy Institute in a survey conducted in 2014, 40\% of the Jewish population in Israel believes that recognising Israel

\textsuperscript{14} National Security Council, Vision of the NSC. Consulted online 17 October 2015 at http://www.nsc.gov.il/he/About-the-Staff/Pages/default.aspx
\textsuperscript{15} Declaration of the Establishment of the State of Israel, of May 14, 1948
\textsuperscript{16} Gene Sharp, “En torno a la definición de seguridad nacional”, en: En busca de la seguridad perdida. Aproximaciones a la seguridad nacional mexicana, op.cit., p. 97
\textsuperscript{17} Lis, J and Khoury, J. 07/06/2012 Haaretz, Consultado en http://www.haaretz.com/israel-news/knesset-panel-recommends-revoking-arab-mk-s-privileges-1.294669 18/11/2015
as a Jewish state would harm the country’s image\textsuperscript{20}.

This strategy of trying to make Israel a purely Jewish state has been strengthened in recent years under Netanyahu’s government, with the release of the controversial proposal “the Basic Law of Israel as the nation state of the Jewish people”. This topic has been central to many of the discussions of the Israeli public sphere, both in the streets and in the Knesset.

The problems arising from this desire to label Israel as a Jewish state goes beyond the denial of freedom of religion. It creates a situation of inequality, both formal and material, among people living within the borders of the State of Israel. This legal discrimination jeopardises the basic principles of democracy and Rule of Law and can amount to a situation of apartheid, under international law.

\textbf{1.4. STATE OF EMERGENCY: SECURITY OVER FREEDOM.}

Israel has been under a state of emergency ever since its declaration of independence.

The state of emergency is an exceptional situation that may be declared by a state to control or cope with a situation that, as its name suggests, can be considered as an emergency or as an exceptional situation. Israel declared a state of emergency on the day of its establishment and has not repealed it to date. The exception has become the norm in this case and has brought the country to the paradoxical situation of a standardisation of emergency.

Israel’s Emergency Regulations are the legal framework and basis for this permanent state of emergency. These Regulations date back from the British Mandate in 1945 and have been challenged several times for being disproportionately repressive.

Already in 1951, several Members of the Knesset (MK) suggested to revoke these regulations, arguing that they were against the democratic principles of the State of Israel. They were not revoked at the time because they were providing the legal basis for the military code that had been imposed in the Palestinian population living in Israel by that time.

Later on, in 1967, the military code for Palestinians living in Israel had been abolished and a committee was created in order to draft new regulations. The Six Days War, in June of this very same year, froze the committee’s activity and marked the beginning of the longest military occupation in modern history. As a result, the Emergency Regulations remained in place. But following the military occupation of what is now considered the occupied Palestinian territory (oPt), Israel needed to develop a new legal framework to bear the weight of the occupation’s machinery.

Respecting local laws in force is one of the most important principles governing military occupation, as noted at the Geneva Convention. Therefore, Israel decided to keep the Emergency Regulations in place in the newly occupied Palestinian territory, arguing that they were part of the local law. However, this argument is flawed for several reasons:

a) According to the Jordanian Defence Regulations approved in 1935, the Jordanian legal framework would be applicable in any territory where the Jordanian army was present. Jordan ruled the West Bank from the end of the British Mandate in 1948 until the beginning of Israel’s military occupation in 1967. During this time, as stipulated in the Jordanian Defence Regulations, Jordanian law was the applicable legal framework in the West Bank, not the British Emergency Regulations.

Regulations, as contended by Israel.

b) On May 12th 1948, the King of England proclaimed the Revocations Order, annulling the British Mandate over Palestine. The Emergency Regulations are part of this legal framework, and thus were annulled as well by the Revocations Order.

However, the problem of the Emergency Regulations goes far beyond this formal question. The underlying problem of the regulations is their excessive and disproportionate cutback of fundamental freedoms for the sake of security. Perhaps the real aim behind these regulations can be answered if one asks: security for whom?

The Emergency Regulations are the legal basis for Administrative Detention, land confiscation and house demolitions, among many other rights violations.

ACRI, the Association for Civil Rights in Israel filled a petition to the High Court of Justice in 1999, challenging the constitutionality of the Emergency Regulations and asking for their revocation21. ACRI argued that the constant renewal of the Emergency Regulations were contrary to Israel’s own domestic legislation, as well as to international law. The security situation in Israel was not an exceptional situation, and therefore the application of a rule such as the Emergency Regulations, which severely restricts fundamental rights of most of the population is not justified. They add that this practice is inconsistent with a liberal conception of the rule of law and separation of powers.

Aaron Barak, Chief Justice at that time, rejected the request based on the situation at the time: the beginning of the second intifada. In 2003 ACRI resubmitted another slightly modified request, demanding that the restrictions in pursuit of safety to be minimal and proportionate.

The government’s response, which now included the Knesset as a defendant, was that suspending the emergency regulations would create a loophole that would cut the powers of the authorities to determine what measures were necessary to ensure national security. They also recognised the need to transform these regulations and adapt them to the context. Israeli authorities stated that, despite the fact that the state of emergency still existed, the state of “legal” emergency should be gradually eliminated.

ACRI responded again in 2006 claiming that Israel’s situation could not be defined as a state of emergency. The Supreme Court decided to give a timeframe for the executive to amend part of the emergency legislation. In 2011 the Court argued that the Government had taken in this direction, had slightly modified parts of the regulations and was still working on it. Based on that, in 2012 and after 12 years of hearings, the Supreme Court ruled that the petition should be dismissed, claiming that Israel is nowadays in a situation of internal and external threat, thus a state of emergency and its regulations are duly justified22.

In the opinion of Judge Rubinstein, Israel’s situation is somehow exceptional. He argued that Israel is a normal and exceptional country at the same time. It is a normal country, according to the magistrate, because it is a democracy in which the fundamental rights of its people are safeguarded,
but at the same time it is not a normal country because of the threats to which it is constantly subjected. According to this, the adoption of certain exceptional measures are needed to protect its population and ensuring national security. This reiterates a common stance on the Israeli Supreme Court, that of the non-interference of the Court in matters relating to state security. The judgment included a dissenting opinion, that of magistrate D. Beinisch, who stated that the state of emergency declared by law in Israel was the result of a political vision, meaning that Israel was using the pretext of security to justify or legitimise a series of actions for political purposes.

Aaron Barak, a former chief justice, said in relation to the use of torture in interrogations that the Court was not in a position to decide how war should be conducted. Barak has argued that the Court should never replace or question the decisions related to the maintenance of security, since the role of the Court is not to be security experts, but to legitimise the decisions of those who do are.

The political use of the concept of security by the Israeli authorities is nothing new. In the same vein, Raja Shehadeh, a Palestinian lawyer, said the activities that the Israeli army carried out in the occupied territory of Palestine under the pretext of security conceal these political objectives:

- Control of Palestinian local residents by the Israeli army
- Preventing hostile action against the State of Israel.
- Preventing the rise of hostile Arab political leadership to Israel.
- Preventing contact with the Organisation for the Liberation of Palestine and control their activities.
- Implementation of the settlement policies of the Israeli government, suppression of any resistance to the Arab Palestinian population against them and protect Jewish settlers.

Pushing the Jewish character of the State of Israel as a core value creates an unbalance between those who identify themselves as Jewish and the ones who don’t. This generates a clear situation of formal discrimination based on personal beliefs and religion, which is contrary to any democratic principles. Whenever certain population groups have privileges over other groups, we cannot talk about equality in front of the law. When having a dissident or critical voice carries the risk of being punished or incarcerated, we cannot talk about Rule of Law. Security, values and protection measures must take into consideration the needs of every population groups, regardless of their race, sex or religion. Human dignity, not religion, should be the core and central value to be protected.

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23 Barak, A. Israeli Supreme Court, Judgements of the Israeli Supreme Court: fighting terrorism within the Law, The Supreme Court and Problem of Terrorism
CRIMINALISATION OF THE RIGHT TO PROTEST

The state of emergency entails a series of restrictions on certain rights, among those, the right to freedom of expression, association and peaceful assembly. It is extremely important for these measures to be proportional to the threat and time-bound, so we can avoid unnecessary extensions of these restrictions. The current standardisation of the emergency in Israel and of the military Israeli law applied to the oPt had led to a situation of criminalisation of the right to protest. Taking a critical position towards Israeli segregation policies is considered as a threat to the State and the Israeli Government puts a lot of efforts on developing an even more restrictive framework in order to counter rest and silence these voices. In this chapter, we will go through some of those laws and regulations, some of them newly approved, such as the NGO Bill or the Anti-boycott law, and others dating from the beginning of the military occupation such as the Military Order 101, which bans the right to protest in the oPt. Despite the fact that the criminalisation of protest happens both in Israel and in the oPt, it is important to highlight that once again, Israelis and Palestinians are not treated equally for the very same actions, even if these actions occur at the same time and place, which might be qualified as a situation of apartheid, thus constituting a crime against humanity.

2.1. LEGAL REPRESSION AND DISCRIMINATORY POLICIES WITHIN ISRAEL.

Israel boasts of being the only democracy in the Middle East. However, over the last few years it is becoming harder and harder for the Israeli Government to defend such a statement. The use and abuse of violence against peaceful demonstrators, the recent restrictions and excessive control and meddling in the work of human rights organisations, together with the ongoing treatment of the Palestinian people as second-class citizens do not exactly represent the best example ever of democratic and good governance practices.

According to Adalah, a Palestinian human rights organisation based in Haifa and working to promote the rights of the Palestinians citizens of Israel, there are more than 30 discriminatory laws still active. As explained above, several Basic Laws stress the importance of recognising the State of Israel as a Jewish and democratic State, this being a sine qua non, for instance, when running for elections, or for an elected parliamentarian or any other kind of public servant. These regulations are obstructing the legitimate right of the Palestinians citizens of Israel to exercise their political rights, as well as their right of freedom of expression and peaceful assembly.

Whenever Palestinians decide to raise their voices to protest against this continuous discrimination, or against the brutal military occupation of the West Bank, or against the brutal and repeated bombings over the illegally blockaded Gaza Strip, they face a brutal police repression.

During the Cast Lead Operation, back in December 2008-January 2009, police and security forces cracked down on peaceful demonstrations, using arrest as deterrent effect. According to Adalah, 832 people were arrested during this time, 34% of which were minors. Out this 832, 80% remained in custody until the end of the proceedings, being 54% minors.

\[\text{Adalah’s discriminatory Laws Data Base. Consulted online on 29 December 2015 http://www.adalah.org/en/law/index}\]

\[\text{According to the PCHR and OCHA reports there were 1,417 victims, 926 of them civilians. 313 of the dead were children and 116 women}\]
CRIMINALISATION OF THE RIGHT TO PROTEST

GAZA STRIP
The Gaza Strip remains under an Israeli military blockade that imposed collective punishment on its inhabitants. The Strip has been blockaded by air, land and water from 2007 to the present. Some of the Israeli Military Orders are also applicable here.

WEST BANK
Israelis
- Israeli Basic Law
  - just for Israelis living in settlements
- Palestinians
  - Israeli Military Orders, just for Palestinians with Green ID
Military Courts
Interrogation Centres
Area A
Area B
Area C

ISRAEL

JERUSALEM
The unilateral annexation of East Jerusalem by Israel in 1960 breaches international law and it is not recognized by the international community including the United States. East Jerusalem continues to be an occupied territory. Thus, International Humanitarian Law is applicable. Palestinian residents of Jerusalem despite being subjected to the Israeli legislation suffer from a flagrant discrimination on the application of the law. Israeli policies infringe the rights of the Palestinian population living in East Jerusalem by isolating Jerusalem from the West Bank, revoking residency or social benefits of Palestinians who stay abroad for seven years or are unable to prove that Jerusalem is their center of life and through discriminatory practices in public budget allocation, public infrastructure and services, land expropriation or demolition of houses.
Protests were also joined by Israelis, however, the consequences for them were not as harsh compared to the Palestinian protestors. Looking at the statistics, all the protestors from the Northern District were detained until the end of the proceedings, 94% of them in the Jerusalem District. These two districts have a large Palestinian population. On the other hand, not one of the protestors arrested in the Tel Aviv District, which has a majority of Israeli Jewish residents, was held until the end of the proceedings.

Peaceful demonstrators are detained under the Criminal Procedure (Powers of Enforcement, Detention Law, 1996). They can then be realised with no charges, on bail or they can be prosecuted under the Penal Code. The usual charges are participating in a forbidden assembly (Article 151) rioting (Article 152) or assaulting a police officer (Articles 273 and 274).

Likewise, during the summer of 2014, with the so-called Operation Protective Edge in summer 2014 (which killed 2251 Palestinians from the Gaza Strip, 1462 civilians including 551 children) massive demonstrations were held across Israel and the West Bank. Israeli Jewish and Palestinians took the streets to protest the abuses crimes committed during that period. The response from the police and security forces was clear: repression and violence, particularly against Palestinian citizens. Around 1,500 individuals, nearly all Palestinians were arrested within one month in demonstrations that took place mainly in Palestinian communities. A recent report by Adalah documents the use of violence and arrest aimed at deterrence. In the report, Adalah denounces the fact that not only international legal standards have been violated, but also Israeli domestic regulations, specifically the Israel’s Criminal Procedure Code and the Youth Act. According to the report “The police exhibited a complete disregard for the principles and criteria that apply to its authority for preventing and
dispersing demonstrations, which are stipulated in rulings of the Israeli Supreme Court as well as Guideline 3.1200 issued by the Attorney General regarding the right to protest.” People were unlawfully arrested and deprived of their freedom, minors were interrogated without their parents, and disproportional amounts for bail were imposed. Furthermore, the courts were fully compliant with the state attorneys, ruling for the most severe sentences, delaying detention of protestors unjustifiably and even expressing their sympathy and support for the war.

Cutting back the right to publicly express different opinions in the street and arresting people who participate in peaceful protests or demonstrations is not the only measure that the Israeli Government has taken for restricting the right of freedom of expression. On December 27th 2015, the controversial law “Transparency Bill”, as Justice Minister Ayalet Shaked named it, was voted in the Knesset, passing its first vote. Rather than seeking transparency, it seems that the new bill is an attempt to control and silence the dissent or critical voices through governmental policies. This new bill comes after the freezing of a previous one proposed and dismissed due to a heavy international and internal criticism. This previous bill intended, for instance, to completely forbid local NGOs deemed to be “political organisations” from receiving any kind of foreign government funding. This new one, the Transparency Bill, appears to be a bit softer, yet the European Union has criticised it warning Israel to be “very careful about reining in its prosperous democratic society with laws that are reminiscent of totalitarian regimes.”

The Transparency Bill would be applicable to all local NGOs receiving more than 51% of their funding from foreign governments. These organisations would be obliged to:

“a) To disclose that the majority of their funding is from foreign government entities, including the names of the entities in all publications intended for the public or available to the public, in any visual media that can have written text added, in any written appeal to a public employee or public representative and in any report written and distributed to the public.

b) To note in the minutes, for any meeting that has minutes, that the majority of its funding is from foreign government entities, including the names of the countries, in any public meeting with public representatives.

c) Representatives of organisations to which the law applies shall be considered lobbyists of the foreign entities. Section 68(a) of the Knesset Law shall apply to them, and they will be required to wear a special identification tag noting that they are representatives of organisations that are funded primarily from foreign government entities.”

Not complying with these obligations might lead to fines over 29,000 NILS (around 6,700€) for each violation; for example, not wearing the tag in at the Knesset would imply a fine of over 6,700€, nor properly reporting foreign funding another 6,700€...etc.

Human Rights organisations play a key role as watchdog of Israeli policies and practices. Organisations such as Adalah, B’tselem or ACRI, among many others, have been denouncing and exposing Israeli crimes and rights violations for decades. They receive funding for their work on the

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protection and promotion of human rights, something that normally falls within the responsibility of the State.

These repressive measures taken by the Government of Israel did not silence these critical voices. The myth of the so-called “only democracy in the Middle East” is falling apart and is losing many supporters abroad due to the continuous violations of human rights and abuses of the Palestinian people and for the total lack of respect for Rule of Law and real democracy. Perhaps due to all of these reasons, the Boycott, Divestments and Sanctions campaign, launched by Palestinian civil society in 2005 is becoming increasingly successful. The campaign asks international civil society organisations and people of conscience to impose boycotts and implement divestment actions against Israel, and to maintain these actions until Israel recognises the inalienable rights of the Palestinian people. The demands of the campaign are summarise in three points:

1. Ending Israel’s occupation and colonisation of all Arab lands and dismantling the Wall
2. Recognising the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and
3. Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194.

This nonviolent campaign, inspired by South Africa, already has a long list of achievements. According to the World Investment Report published by the United Nations Conference on Trade and Development agency (UNCTAD) on June 2015, foreign direct investment in Israel plunged from almost $12 billion in 2013 to just $6.4 billion in 2014, the lowest figure in more than a decade. Roni Manos, Israeli economist, attributes this loss to Operation Protection Edge and the boycotts Israel is facing. Earlier in February 2015, 63 members of the European Parliament called on the European Union foreign policy chief Federica Mogherini to suspend the EU-Israel association agreement. An article published by the Financial Times indicated that BDS could cost Israel $4.7 billion a year.

This new method of international pressure did not pass unnoticed by Netanyahu’s government, which on April 15th 2015 approved the Anti-boycott Law. The new regulation was enacted by the Knesset on 2011 with the stated aim of preventing harm to the State of Israel by means of boycott. The law imposes sanctions on any individual or entity that calls for an economic, cultural or academic boycott of Israel’s West Bank settlements or of Israel itself. It allows entities to sue and to win compensation from individuals or organisations that have called for a boycott. It also permits the Finance Minister to impose severe economic sanctions on Israeli individuals, groups, and institutions that receive state support if they call for or participate in a boycott. Several NGOs challenge the constitutionality of the law, arguing that it violates several fundamental rights, such as freedom of political expression. The organisations argued that the law “imposes disproportionate sanction on peaceful activists and groups who work for human rights, freedom of expression and self-determination in the Occupied Territories.”

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30 Reed, J (8 Jun 2015) Peace deal could deliver $120bn to Israeli economy, says study, Financial Times. Consulted online on 10 Feb 2016 http://www.ft.com/intl/cms/s/0/578dea3c-0cf6-11e5-a83a-00144fabeabc0.html#axzz3zlFhoG
civil and administrative sanctions that are contrary to accepted legal principles, because of political statements. [The law] aims at silencing expressions of protest against the government’s policy in areas under its control and thus it restricts, unconstitutionally, the democratic means available to a minority to express its opposition to government policy.”

Boycott actions are legitimate nonviolent measures that individuals are entitled to take in order to express their political opinions. Economic boycotts political motivated must be protected by the right to freedom of expression. The US Supreme Court ruled in favor of economic boycott for political reasons in 1982, in the case of the National Association for the Advanced of Colored People (NAACP) versus Claiborne Hardware Co. The US Supreme Courted ruled in that case that economic damages caused by a political boycott are not sufficient grounds for compensation in a civil suit, as long as they are not caused by violent behaviour; “holding that a political consumer boycott is free speech under the First Amendment and protected against common law tort liability for business interference”.

Canadian Ontario Court of Justice upheld a similar position concluding that “boycott and picketing activities were lawful in a democratic society which places a high value on free speech”.

2.2. JERUSALEM: INVISIBLE WALLS.

Despite being East Jerusalem an occupied territory, the applicable law is the Israeli one (rather than the martial law, as in the West Bank). Thus, regulations related to freedom of expression and peaceful assembly are not linked to a martial code, as opposed to the situation in the occupied territory in the West Bank.

In general, assemblies, vigils, and demonstrations do not require a permit or a license in advance, unless they entail all of the following three elements: they are held outdoors, there are 50 or more participants, and they include a march and/or a political speech. Whenever the activity does not include all the 3 elements, a permit is not required.

However, the UN Special Rapporteur on Freedom of Expression and Peaceful Assembly clearly states that organisers of protests or demonstrations should not face fines or imprisonment for failing to notify authorities: 34

Protests might be disperse by Police forces under the following circumstances: 35:
- When the demonstration was not issued a permit even though it requires one
- When the demonstrators violated the conditions of the permit issued by the police, if such a permit was required
- When the demonstration constitutes a threat to public safety
- When, during the demonstration, violence of any kind erupts on the part of the demonstrators
- When the participants are disrupting public order

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31 Adalah, Uri Avnery et al. v. Knesset et al "Concerning the constitutionality of the Law Preventing Harm to the State of Israel by Means of Boycott” Summary of the Decision. 2015.
Within the recent escalation of tensions, on September 25th 2015, the Israeli cabinet approved to harshen regulations on use of live ammunition against demonstrators. From now on police and soldiers will be able to fire 22 calibre live rounds from Ruger rifles when they judge that not only their own lives are in danger but also those of civilians\(^\text{36}\).

This broaden the rules of engagement, leaving a broad margin of interpretation that can lead to an excessive use of force against peaceful demonstrators and to unnecessary use of lethal methods.

According to the Palestinian Center for Human Rights, 33 Palestinians have been killed between October 3rd 2015 and 31st December of the same year, including 5 minors. The oldest one was only 37 years old. Some of them were left bleeding to death\(^\text{37}\).

These regulations come together with a package of new discriminatory bills that rather to contempt and prevent violence will create further separation, segregation and discrimination, which will lead to more frustration and violence. Among those measures are the revocation of citizenship on the grounds of “breach of trust”, closure of Palestinian neighbourhoods and establishment of minimum sentences for Palestinian stone-throwers.

The right to a citizenship is recognised by Article 15 of the Universal Declaration of Human Rights and revoking this right on the grounds of breach of loyalty constitutes a flagrant violation of this fundamental rights. Besides, Palestinians residents of East Jerusalem are considered under IHL as protected persons. Both IHL and IHRL prohibit the deportation of protected residents on the grounds of breach of loyalty, and prohibit the occupier from requiring them to swear allegiance to the occupying power\(^\text{38}\).

In the same direction, the closure of certain neighbourhoods of East Jerusalem, such as Issawiah or Jabal al-Mukabir, constitutes a collective punishment. Adalah, the human rights organisation argued that this policy was illegal even under domestic Israeli law, based on a ruling by the Supreme Court that prohibited indiscriminate and disproportionate measures such as imposing barriers, “The police’s actions are sweeping and arbitrary, and are affecting thousands of residents without any distinction. The police can achieve their security objectives by other means that cause far less of a violation against residents’ rights.” \(^{39}\)

On November 2015 the Knesset approved an amendment to the country’s civil law establishing a minimum prison sentence of three years for people who throw rocks at Israeli troops, civilians or vehicles. The law proposes custodial sentences for children as young as 12, convicted on “national-motivated offences”. Israel’s current criminal law prohibits custodial sentences against children under 14 in favor of rehabilitation and reintegration. The law should apply for both, Palestinians and Israelis, but in practice is only addressing Palestinians of Jerusalem and Palestinians citizens of


\(^{37}\) PCHR Palestinian victims killed by Israeli forces since 02 October 2015. Consulted online on 2 January 2016 http://pchrgaza.org/en/?p=7492


\(^{39}\) Adalah, Adalah to Israeli authorities: Closure of Palestinian neighborhoods in Jerusalem, permission to use live fire against stone-throwers are illegal Consulted online 2 January 2016 http://www.adalah.org/en/content/view/8643
Israel. The law also enables Israel to cancel national health insurance and other social programmes for the parents of an imprisoned minor. This law not only flagrantly violates IHL and IHRL, it also contributes to the strengthening of a structural violence that jeopardise human security of the Palestinian residents and dispels any hopes of a just and lasting peace.

2.3. THE MILITARY COURT SYSTEM: LEGAL REPRESSION TO NONVIOLENT MOVEMENTS AND POPULAR RESISTANCE IN THE WEST BANK.

2.3.1. HOW DOES THE MILITARY COURT SYSTEM WORK?

The Israeli Military Code applicable in the West Bank is only applied to the Palestinian residents, not to the Israeli citizens living in the illegal settlements. This constitutes a serious legal discrimination that might imply a crime of apartheid, defined by the Rome Statute in 2002 "as inhumane acts of a character similar to other crimes against humanity ‘committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime’."

Looking the situation and the daily life of the Palestinian civilian population, it is increasingly difficult not to talk about apartheid in Palestine. Richard Falk (2014), former Special Rapporteur on the Situation of Human Rights in the occupied Palestinian territory since 1967, recalls in his latest report submitted to the Human Rights Council of the United Nations the urgent need to reconsider the question of apartheid and racial segregation policies that Israel carries out in Palestine. Falk calls upon the International Criminal Court to issue an advisory opinion in this regard evaluating the situation of prolonged occupation, since it contains clear elements of colonialism, apartheid and ethnic cleansing.

The Military Courts are the living spit of an institutionalised regime of systematic oppression. They have legitimated abusive practices such as the administrative detention for over 48 years. These Courts were established for the purpose of the Emergency Regulations from 1945 and nowadays prevail in the West Bank. In Gaza prevailed until 2005 (being revoked after the disengagement plan) and in Jerusalem Palestinians are subjected to Israeli Civil Law, due to Israel’s de facto unlawful annexation.

The military courts judge every year thousands of Palestinian civilians on the basis of the following criminal categories

A. The Hostile Terrorist Activity category includes involvement in what Israel terms "terror attacks", military training, weapons offences and weapon trading, but also offences related to membership in "illegal associations" – associations deemed illegal by the Israeli military commander.

B. Disturbance of public order includes offences such as stone throwing and incitement to violence.

C. The “classic” criminal offences category includes crimes such as theft, robbery and trading in stolen goods.

D. Illegal presence in Israel includes the offence of “leaving the Area without permission,” with which Palestinians who enter Israel without permits, usually in search of work, are charged.

E. Traffic offences committed in the oPt.
According to B’tselem, these are the indictments against Palestinians between 2008 and 2013, depending on the type of violation:40

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40 Baumgarten-Sharon, N., Stein, Y. Presumed Guilty: Remand in Custody by Military Courts in the West Bank, 2015

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2.3.2. MILITARY COURT SYSTEM AND COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW

The existence of the military courts itself is seen as a legitimate practice of customary international law, standardised by the Fourth Geneva Convention and the Hague Regulations, applicable legal framework in the case of a belligerent occupation.

Art. 43 of the Hague Regulations provides that the occupying power must ensure public order and maintain the preoccupation legal system in order to prevent the occupying power to act as a sovereign legislator “unless absolutely prevented” (e.g. maintaining law and order). For ensuring this compliance with the new regulations and restoring and ensuring public order and civil life Article 66 of the Geneva Convention stipulates that military tribunals may be established under these three conditions:

1. It must be properly constituted (according to the Constitution or the law)
2. Having a non-political purpose
3. Be located in the occupied territories

Israel only fulfils one out of the 3 requirements: being properly constituted. Military courts were established under the terms of the Order regarding Security Provisions, 5730-1970 (Military Order No. 378.)

As for the location requirement, the military court system includes several courts of different instances:

1. - In the West Bank:

   a) Courts of first instance:

      1) The Judea Court is located in the Ofer military base, within the occupied Palestinian territory.
      2) The Samaria Court is located at the Salem military base, within the occupied Palestinian territory.

   b) The Military Court of Appeals, the Military Court for Administrative Detention and the Military Court of Appeals regarding Administrative Detention, located in Ofer, within the occupied Palestinian territory.

   c) The Military Juvenile Court, operating in Ofer since 2009

Both military courts, Ofer and Sale located inside Israeli military bases, thus, Palestinian civilians tried in these courts are being judged inside a military base.

2. - Inside Israel: adjacent to interrogation centres of the Israel Security Agency (ISA, formerly known as the General Security Service or by Shabak the Hebrew acronym) there are four more branches of the military court. This, once again, constitutes a violating the principle of being located within the occupied territory.

Still, one the most worrying and concerning problems of these military courts is the political use given to them and their systematic violation of International Humanitarian Law and International Human Rights Law.

2.3.3. REPRESSFOR DEFENDERS AND IMPUNITY FOR OFFENDERS: UNLAWFUL USE OF THE
JUDICIARY IN THE WEST BANK

"Palestine’s youth are saying: we want all our rights and will accept nothing less”42

The main function of the Israeli military court system is to prosecute Palestinians who are
arrested by the Israeli military and charged with “security violations”.43 The legal system is developed
to preserve the security values and interests bound and determined by the Israeli Government:
the values of Israel as a Jewish and Democratic State. This bumps into the legitimate rights of the
Palestinian people to selfdetermination, right to freedom of association and freedom of expression
and peaceful assembly, among many others.

Security-based reasons are used as justification to punish any critical voice to the Israeli
occupation of Palestine. Criminalisation of the protest in the West Bank has come to a situation in
which people who exercise their rights get punished while those violating them don’t.

Amnesty International denounces on its report Trigger Happy44 that “The frequency and persistence
of the arbitrary and abusive use of force against peaceful demonstrators in the West Bank by Israeli
soldiers and police- and the impunity enjoyed by perpetrators-indicate that is a policy.” In the report,
Amnesty documents the killing of at least 14 people, Palestinian civilians in the context of nonviolent
protests in 2013.

Following the most recent Palestinian popular upraising the repression of the Israeli Army against
protesters have reached alarming levels of brutality and violence. According to the Palestinian Center
for Human Rights (PCHR) since October 3rd, Israeli forces have killed 75 Palestinians in the occupied
West Bank either in protests, after stabbings were carried out or the Israeli authorities allege stabbing
attacks were intended. 57 of the, were less than 25 years old and 18 were underage. Amnesty
International denounced that Israel has “carried out a series of unlawful killings of Palestinians using
intentional lethal force without justification”45. The human rights organisation has documented in
dept at least 4 cases of what could be considered as extrajudicial killings. In some cases, the person
shot was left bleeding to death on the ground and was not given prompt medical assistance. This, as
denounced by AI, is a violation of the prohibition of torture and other ill-treatment.

Unfortunately, the disproportionate use of violence is not the only strategy of repression that the
Government of Israel uses against the popular nonviolent resistance movement: the arrests have
proven to be a very effective measure and to have a strong deterrent effect among the population.
Israel carries out a policy of arbitrary arrests and detentions that far from being an isolated practice
but a policy of the military authorities of the Government of Israel. According to Addameer, a
Palestinian organisation focused on prisoners support and human rights, in December 2015, there
were approximately 6800 total Palestinian political prisoners held in Israeli detention and prison

42 Eid, H. (9 Nov 2015) Palestine de-Osloized, Consulted online 13 Dec 2015
https://electronicintifada.net/content/palestine-de-osloized/14977
43 Lisa Hajjar (2005), Courting Conflict: The Israeli Military Court System in the West Bank and Gaza, London, The University of California
Press, p. 3.
45 Amnesty International, (27 October 2015) Israeli forces in Occupied Palestinian Territories must end pattern of unlawful killings, Consulted
bank/
centres, compared to about 5900 at the end of September 2015, before the recent escalation. Between 1 October and 31 December 2015, Israeli forces arrested more than 2663 Palestinians including 480 children46.

Many of the arrests carried out are made under the Military Order 101: Prohibition of Incitement and Hostile Propaganda, promulgated in 1967. This military order prohibit Palestinians participation in any assembly or protest. It is considered to be participating in an assembly or a protest when a group of ten or more people gathered in a group whose purpose is to reflect political or jointly on policy. Given that Palestinian families are usually quite numerous, a family drinking tea after dinner and talking about politics may be breaking the law and facing up to 10 years in prison.

Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, following his visit to Israel and the occupied Palestinian Territories in December 2011, said the Military Order Israeli 101 is used by the military Israel to “restrict the right of Palestinians to freedom of expression and assembly”. As reported by La Rue, the command “criminalises expression and political activity, including the organisation and participation in protests, attending assemblies or vigils; tenure, agitation or display political flags or other symbols, and printing and distribution of any Material “having a political significance.” La Rue criticised the “vague and change prohibition of freedom expression for political purposes” and “considerable scope for discretion” leaving the order as to use force application to ensure compliance with the order, potentially facilitates situations of abuse of force by the Israeli army47.

The European Union adopted in 2004 the Guidelines on Human Right Defenders48. According to the guidelines, “Human rights defenders (HRD) are those individuals, groups and organs of society that promote and protect universally recognised human rights and fundamental freedoms. Human rights defenders seek the promotion and protection of civil and political rights as well as the promotion, protection and realisation of economic, social and cultural rights. Human rights defenders also promote and protect the rights of members of groups such as indigenous communities.” Following this definition, Palestinian who participate in nonviolent demonstrations against the Wall, the Israeli military occupation or the settlements could be define as HRD, therefore, they should be treated and protected as such.

However, Palestinians participating in nonviolent demonstrations in the West Bank will be accused of violating Military Order 101 and will be found guilty of committing a “security offence”. They will be sentenced to a term of imprisonment or to the payment of significant fines. Trials at the Military Courts do not respect the right to a due process and most of activists are convicted despite the lack of evidences or independent witnesses. The president of the military court in the occupied territory, Netanel Benishu admitted in 2011 that these courts systematically denied the right of Palestinians to a fair trial49. According to B’Tselem, of 835 Palestinian minors who were arrested and tried in

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47 A/HRC/20/17/Add.2 at paras. 77 and 78
military courts between 2005 and 2010 on charges of throwing stones, only one was acquitted. With a conviction rate of 99.9%, legal certainty is definitely left out of the room for the sake of Israel’s security.

51 Baumgarten-Sharon, N., Stein, Y. Presumed Guilty: Remand in Custody by Military Courts in the West Bank, 2015
3/ CONCLUSIONS

Looking back to the questions raised in the introduction about the relations between law and justice in Israel and a Palestine, one of the conclusions that we can draw is that when it comes to freedom of expression peaceful assembly of the Palestinian people, relations between law and justice rarely exist. Neither within Israel, nor in East Jerusalem nor in the West Bank can we talk about the existence of an enabling environment for freedom of expression and peaceful assembly.

The prevailing approach of nations security, plus the securitisation of all spheres of public policies are smashing those nonviolent popular resistance groups and people who are exercising their legitimate right to express their opinions, whether they are aligned or not to the mainstream or the governmental ones. In an environment in where Palestinians have a non-existent or a very restricted access to political participation and thus, a very limited influence in the development of public policies, one of the few ways they have for expressing their views and opinions is by taking the streets. The government of Israel has transformed the right of freedom of expression into a threat to national security by criminalising the right to protest for the sake of the protection of the values of Israel as a Jewish and democratic state.

This extreme securitisation primarily affects the Palestinian people and implies a racial-based legal discrimination that could incur on serious breaches on IHL, such as the crime of apartheid, as have been pointed out by several legal experts in the past few years52.

The international community needs to take urgent and effective measures in order to protect and promote the fundamental human rights of the Palestinian people. Defending and promoting Human Rights is not only a moral obligation, but also a State responsibility, as stipulated in the Outcome Document of the 2005 United Nations World Summit [A/RES/60/1, para. 138-140] and formulated in the Secretary-General’s 2009 Report [A/63/677] on Implementing the Responsibility to Protect53:

1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

In that sense, it is important to monitor governmental complicities and collaborations in arm-trade and remember that export authorisations of items shall not be granted if the export would contravene any of the criteria outlined in Article 6 of the Arms Trade Treaty54.

A transfer of items should be denied if:

a) It would violate the State Party’s obligations under measures adopted by the UN Security
Council acting under Chapter VII of the Charter, in particular arms embargoes;
b) It would violate a State Party’s relevant international obligations under international
agreements;
c) A State Party has knowledge at the time of authorisation that the arms or items would be
used in the commission of:
- Genocide;
- Crime against humanity;
- Grave breaches of the Geneva Conventions of 1949;
- Attacks directed against civilian objects or civilians protected as such;
- Other war crimes as defined by international agreements to which it is a Party.

Israeli receives $3,000 millions per year from the US government, the 6th part of the US foreign
funding and 2% of Israel’s GDP. 75% of this funding, an average of $500 per citizen, would be for
military aid purposes55.

The lack of accountability for war crimes and human rights violations, as well as the normalisation
of the institutional relations towards a country with deeply rooted discriminatory policies jeopardise
the dream of a just and lasting peace in Palestine. The continuous and systematic repression of
the Israeli government of fundamental rights, specially of the rights to freedom of expression and
peaceful assembly needs a continuous and systematic answer from the international community: no
normal relations with abnormal countries until they fulfil their legal responsibilities.

55 Paça, A. (Dir) Simarro, C., Sabate, O., Defensa, Seguridad y Ocupación como negocio. Relaciones militares, arma-mentísticas y de seguri-
dad entre España e Israel, 2014.
“If the injustice is part of the necessary friction of the machine of government, let it go, let it go: perchance it will wear smooth—certainly the machine will wear out... but if it is of such a nature that it requires you to be the agent of injustice to another, then I say, break the law. Let your life be a counter-friction to stop the machine. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn.”

David Thoreau,
Civil Disobedience and Other Essays
MAPPING FREEDOM OF EXPRESSION

DO YOU DISAGREE WITH THE OCCUPATION AND DISCRIMINATORY POLICIES OF THE CURRENT ISRAELI GOVERNMENT?

Yes

Would you like to do something about it?

Yes  No

what would you like to do?

Exercise my right of protests, freedom of expression and peaceful assembly and join a Human Rights NGO

Exercise my right of freedom of expression and peaceful assembly and join the Boycott, Divestment and Sanctions campaign

Remember: Solence is complicity [Responsibility to Protect]

In Israel, if the “transparency law” is approved you might be required to wear a special identification tag noting that you are a representative of an organisation that is funded primarily from foreign government entities, otherwise, you can be fined up to 29,000 NISL (6,700 EUR)

According to the anti-boycott law imposes sanctions on individuals calling for academic, cultural or economic boycott, allowing entities to sue and win compensations from individuals who have called for the boycott
Understanding the security and criminalisation of the right to protest in Israel and Palestine.

In East Jerusalem:
- If you are Palestinian, your citizenship might be revoked based on the concept of "Breach of trust." 

In Israel:
- If you are Palestinian, you have great chances of being jailed until the end of the proceedings.
- If you are an Israeli activist, you can be arrested and tried in an Israeli civil court.
- Demonstrations are forbidden in Palestine by military order 101, if you are Palestinian you will be tried in a military court and you’d face up to 9 years of imprisonment.

In the West Bank:
- If you are an Israeli activist, you can be arrested and tried in an Israeli civil court.
- Conviction of an Israeli who commits an ideological crime is only 1.9 percent.
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About NOVACT—International Institute for Nonviolent Action

NOVACT—International Institute for Nonviolent Action promotes international peace-building actions in conflict situations. The Institute has been created through the collective effort of those active in international civil society to contribute to a peaceful, just and dignified world.

Understanding nonviolence as a transformation strategy, NOVACT strives to achieve a society based on human security and real democracy, free of armed conflicts and violence in all of its dimensions.

In cooperation with its international advisory committee and its network—composed of experts, human rights defenders and civil society organizations in the Middle East, North Africa, Europe and America—NOVACT supports non-violent movements which are working for social change and developing civilian peace intervention mechanisms to protect vulnerable groups in conflict situations.

As a committed, political, independent agency, NOVACT promotes peace initiatives, training programs and action-oriented research to advocate for national and international public policies and regulations that guarantee human security and the effective protection of human rights and fundamental freedoms.

With its headquarters in the Mediterranean city of Barcelona, NOVACT is an initiative of Nova-Social Innovation, which is registered as a non-governmental organization and is recognized by the United Nations. The Institute raises funds from committed citizens and public institutions.

www.novact.org

About Servei Civi Internacional

Servei Civil Internacional (SCI) is an international grassroot movement that works for a culture of peace, global justice and social transformation.

Born in 1982 SCI Catalunya represents one of more than 45 branches, which together form the international network of SCI International.

These international dimensions allowed us to establish connections with other organizations from all over the world. Still our special emphasis lies on the Mediterranean area, where we work in solidarity with the social challenges that are shared by their citizens.

www.sci-cat.org
LAW VERSUS JUSTICE: UNDERSTANDING OF SECURITY AND CRIMINALISATION OF THE RIGHT TO PROTEST IN ISRAEL AND PALESTINE