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AN ENVIRONMENTAL APPROACH

The Protection of Natural Resources in the Occupied Palestinian Territory

BRIEFING PAPER

2017

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Photo: The Israeli Annexation Wall in Qalandia © Al-Haq

Design: AbdelRahman Hijawi

Publisher: Al-Haq - © 2017, All Rights Reserved

This document has been produced with the financial assistance of the Heinrich-Böll- Stiftung. The views expressed herein are those of the authors and therefore do not necessarily reflect the opinion of the Heinrich-Böll-Stiftung.

HEINRICH BÖLL STIFTUNG
PALESTINE & JORDAN

ACKNOWLEDGMENTS

The author would like to thank Marya Farah, Tanya Lee Roberts-Davis, Susan Power, Muhamad Raee, Tareq Al Haj, Fares Fuqha, Valentina Azarov, Vito De Lucia, Jennifer Gleason, Wesam Ahmad, Lillian Zananiri, Samer Khalifa, and Lina Mustaklem for their valuable assistance, support, and guidance throughout the research process.

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INTRODUCTION

ENHANCING PROTECTION

Since occupying the Palestinian Territory (OPT) in 1967, Israel has appropriated and exploited Palestinian resources including fertile land, Dead Sea Minerals, water, stone, natural gas, and oil, thereby depriving the Palestinian population of their natural wealth. While the economic impacts of such exploitation are apparent and may be quantified, the environmental impacts may be less visible but immediate.

The United Nations Environment Programme (UNEP) recognizes that natural resource exploitation and the resultant environmental degradation is an increasingly contributing factor to major conflicts between nations, resulting in environmental inequalities and a host of human rights abuses.

According to the UNEP, over the last 60 years, at least 40 per cent of all internal conflicts have been linked to the exploitation of natural resources, such as land, water, oil and high-value resources such as gold, oil and diamonds. Such conflicts have a heightened impact on indigenous communities, which often rely on natural resources to sustain their livelihoods.[1]

The exploitation of natural resources by armed groups and parties of the conflict disrupts local communities' benefits from and access to natural resources, and may lead to poverty, structural inequality and marginalization among communities. In view of this, natural resource exploitation has also been recognized "to prolong and alter the dynamics of conflict, transforming war into an economic rather than purely political activity."[2]

The United Nations Security Council has also addressed the connection between international peace and the protection of the environment and

1 Natural resources are often described as the "wealth of the poor." United Nations Environment Programme. 'Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law' (2009) <http://postconflict.unep.ch/publications/int_law.pdf>, 9.

2 *Ibid,* 8.

natural resources in a number of resolutions,[3] noting "the exploitation, trafficking, and illicit trade of natural resources have played a role in areas where they have contributed to the outbreak, escalation or continuation of armed conflict."[4]

In this regard, the Security Council encouraged a "transparent and lawful management of natural resources, including the clarification of the responsibility of the management of natural resources" to prevent their illegal exploitation.[5]

Alongside contributing to the exploitation of resources, armed conflicts may irreparably damage natural resources and the environment. The use of environmentally harmful materials, such as weapons, explosives, and toxic gases, impact human health and often lead to the destruction of natural habitats and areas of significant biodiversity.[6] Such impacts may have transboundary effects.

In certain cases, local communities cannot cope with this environmental degradation causing them to transfer to less affected areas. Palestine is undoubtedly affected by these issues, with herding and Bedouin communities among the most vulnerable.

3 A number of resolutions have been adopted with regard to the Democratic Republic of the Congo, Liberia, Libya, Sierra Leone and Somalia which emphasize the linkage between to natural resources and armed conflict. ***See*** UN General Assembly, 'Report of the International Law Commission on Protection of the Environment in relation to Armed Conflicts', (12 August 2011), para 79.

4 United Nations Security Council, Statement by the President of the UNSC (25 June 2007), UN Doc. S/PRST/2007/22.

5 *Ibid.* In determining the link between resources exploitation and conflicts, it is necessary to understand which resources are "decisive", "too trivial to fight over", and "might be seen as economically essential", ***See*** N. Gleditsch, 'Armed Conflict and the Environment: A Critique of the Literature'. (1998) Journal of Peace Research vol. 35, no.3, pp. 381-400, 385.

6 Israel's 2014 military offensive on the Gaza Strip heightened the vulnerability and instability of the environmental situation in the Strip. An environmental assessment report of the Israeli assault provided that it "must have caused serious damages to the environment" and "exacerbated the already painful conditions of the people of the Gaza Strip." The study identified Eastern Gaza City (Al-Shujaea), Beit Hanoun, Khuza'a and Eastern Khan Yunis as key areas most hit by the offense and that may have sustained the majority of environmental impacts. The study provided that the Israeli operation may have also resulted in extensive soil damage, and a deterioration in water and air quality. **See** Palestinian Environmental NGOs Network et el., '2014 war on Gaza Strip: Participatory Environmental Impact Assessment' (October 2015) <http://www.maan-ctr.org/files/server/Publications/FactSheets/WareAsse2014.pdf>, 8.

This paper addresses Israel's exploitation of Palestinian natural resources under international law and presents the issue of resource exploitation from an environmental justice standpoint by exploring the protection afforded to natural resources under international environmental law with a focus on State responsibility.

An environmental approach to protecting natural resources, focuses on safeguarding the environment as a means of protecting human health and promoting the sustainable use of such resources.[7] The environmental approach also seeks to combine environmental and socio-economic rights.[8]

Paragraph 1 of the 1972 Stockholm Declaration recognizes that "both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights."

It has been recognized that environmental degradation affects the enjoyment of all human rights.[9] Particular rights are affected more than others; these include rights to life, health, adequate standards of living, food, water, housing, and property.

Environmental degradation also affects the exercise of collective rights such as the fundamental rights of peoples' to self-determination and permanent sovereignty over natural resources and the right to development.[10] Within

7 On 27 May 2016, the United Nations Environment Assembly of the United Nations Environment Programme adopted a resolution on the protection of the environment in conflict affected areas. The resolution is said to be the most significant resolution on the environment and conflict since 1992. The resolution acknowledged the need to mitigate environmental impacts of the illegal exploitation and trade of natural resources and recognized that "sustainable development and the protection of the environment contribute to human well-being and the enjoyment of human rights." The resolution also called on all Member States to "implement applicable international law related to the protection of the environment in situations of armed conflict." ***See*** United Nations Environment Assembly of the United Nations Environment Programme, Protection of the environment in areas affected by conflict, (4 August 2016), UN Doc. UNEP/EA.2/Res.15, para 4.

8 Dugard et el, 'Let's Work Together: Environment and Socio-Economic Rights in the Courts' (2013), 31. There has been a recognition that environmental violations have potential links to violations of social, economic and cultural rights, especially if the environmental degradation is affecting indigenous communities. ***See***, Schmid, E. *Taking Economic, Social, and Cultural Rights Seriously in International Criminal Law.* (2015), 269.

9 Human Rights Council, Report of the Independent Expert on the Issue of human rights obligations relating to the enjoyment a safe, clean, healthy and sustainable environment, John H. Knox (Preliminary Report) (24 December 2012), UN Doc. A/HRC/22/43, para.19.

10 UN Economic and Social Council, Report submitted by the Special Rapporteur on Toxic Waste on Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (19 January 2001) UN Doc. E/CN.4/2001/55, para. 58.

the OPT, Israel's practices and policies of exploiting Palestinian natural resources, not only continue to perpetuate the occupation on the ground, but also threaten the right of Palestinians to self-determination. The right to self-determination includes the right to freely determine one's political status, and freely pursue economic, social and cultural development.[11] Thus, the current and future exercise of this right is impacted by Israel's exploitation and degradation of resources.

Protection of Natural Resources under International Law

A territory is considered occupied when it falls under the effective control of the Occupying Power.[12] The general legal framework for the responsibility of the Occupying Power as the administrator of the occupied territory is set out in Article 43 of the Hague Regulations.The Article imposes "positive obligations" on the occupier to ensure public health and provisions of food and medical supplies and prohibits the occupier from changing local laws unless absolutely necessary for the restoration of public order and civil life. The International Court of Justice (ICJ) also affirmed that Israel, as the Occupying Power, is bound by international humanitarian law (IHL) and international human rights law (IHRL) in it its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian* Territory.

The following section outlines the protection afforded to natural resources under the provisions of international humanitarian law, international human rights law, and international environmental law.

11 Article 1 of the ICCPR, Article 1 of the ICESCR.

12 The requisite of effective control requires military presence and the substitution of authority. The Hague Convention IV Respecting the Laws and Customs of Wars on Land (1907) Article 42.

International Humanitarian Law

Under international humanitarian law (IHL), the Occupying Power must administer the natural resources of the occupied territory according to the laws of belligerent occupation, derived primarily from the Hague Regulations (1907) and the Fourth Geneva Convention (1949).[13]

The protection of natural resources under the law of occupation arises from (i) the primary principle that the occupant exercises a temporary *de facto* authority and does not acquire sovereignty over the occupied territory, including its natural resources; and, (ii) the general duty of the Occupying Power to ensure the safety and health of the civilian population, including their property and means of subsistence.

The protection afforded to natural resources under belligerent occupation depends on the designation of these resources as publicly or privately-owned property, and whether the resources are movable or immovable property. While private property cannot be confiscated, it may only be requisitioned for "the needs of the army of the occupation."[14]

Natural resources, however, are often considered movable or immovable public property.

Under Article 53 of the Hague Regulations, movable public property- which includes natural resources which have already been extracted or produced- "may be used for military operations."[15]

Immovable public property of the occupied territory- which includes natural resources *in situ*- are protected under Article 55 of the Hague Regulations.

13 Article 46 and Article 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention.

14 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (1907) Article 46 and Article 52.

15 At the international level, there is a general consensus of what public movable property include and does not include, for example oil and gas resources, which are not extracted or refined, are generally considered to be public immovable property under Article 55 of the Hague Regulations. However, crude oil, that is already extracted from the ground, but not refined would be considered moveable property and requisitioned under Article 53 of the Hague Regulations. For additional discussion, *see* Al-Haq, 'Annexing Energy: Exploiting and Preventing the Development of Oil and Gas in the Occupied Palestinian Territory', (August 2015) < http://www.alhaq.org/publications/Annexing.Energy.pdf>

Article 55 of the Hague Regulations outlines the lawful use of public immoveable natural resources in an occupied territory by the Occupying Power:

> **"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."**

In addition to Israel's duty to safeguard the capital of the properties in the occupied territory, the rules of 'usufruct' impose several limitations on Israel's ability to use and administer the natural resources in the occupied territory.

The strict limitations prohibit the Occupying Power from using the property and natural resources in the occupied territory for the benefit of its own economy. However, Israel has been exploiting natural resources in the OPT for the benefit of its settlement[16] and national economy. The illegal exploitation of natural resources by individuals for "personal or private use" in the context of an armed conflict may constitute the war crime of pillage.

Under Articles 28 and 47 of the Hague Regulations and Article 33(2) of the Fourth Geneva Convention the pillage of private and public property is prohibited.

Further, the unjustified destruction of natural resources can be deemed a violation of Article 53 of the Fourth Geneva Convention which prohibits the destruction of personal, collective and State-owned property, unless absolutely necessary for military purposes.

16 The presence of Israeli settlements and settlers in the OPT is illegal under Article 49(6) of the Fourth Geneva Convention and constitutes a war crime under the Rome Statute of the International Criminal Court.

The "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is prohibited under Article 147 of the Fourth Geneva Convention. Such destruction and appropriation is considered a grave breach of the Convention and a war crime under the Rome Statute of the International Criminal Court. There are also provisions that protect the 'natural environment' in the occupied territory under Articles 35(3) and 55 of Additional Protocol I. Under these provisions, the Occupying Power is prohibited from employing methods or means of war "which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."

In accordance with commentary on Article 55, the natural environment must be understood here in the widest sense as "the biological environment in which a population is living."[17] This reasonably includes the natural resources in the occupied territory.

17 Article 35(3) of Additional Protocol I to the Geneva Conventions granted the first protection for the environment in an armed conflict context. The Article stipulates that "it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" and protects the environment against both intentional damage as well as expected collateral damage that might result from hostilities. Article 55 of the same Protocol is entirely dedicated to the protection of the natural environment within the context of the protection granted to civilian objects.

International Human Rights Law

Permanent sovereignty over natural resources is considered a pillar of the principle of self-determination, which is a peremptory norm of international law.[18]

The right of the Palestinian people to self-determination, including permanent sovereignty over natural resources, is underscored in numerous United Nations General Assembly Resolutions, which affirm the "right of the Palestinian people to permanent sovereignty over their natural wealth and resources must be used in the interest of their national development, the well-being of the Palestinian people and as part of the realization of their right to self-determination."[19]

In situations of occupation, IHRL remains applicable to protected persons and complements IHL.[20]

Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) affirms that *all peoples* should be able to freely dispose of their natural wealth and resources, and prohibits activities that "deprive a people of its own means of subsistence."

Palestinian natural resources should be used to support the development of the Palestinian economy, and more broadly in the interest of the Palestinian population. Israel's administration of these natural resources must be in line with the rules of international humanitarian law, outlined above.

However, Israel's extensive exploitation and control over natural resources in the OPT has limited Palestinian access to their natural resources and on the other hand, *de facto* dispossessed them of their means of survival.

18 UNHRC, General Comment 12: The Right to Self-Determination of Peoples (Art 1), (13 March 1984).

19 UN General Assembly, Right of the Palestinian People to Self-Determination, (24 March 2014) UN Doc. A/HRC/25/L.36.

20 Both the Human Rights Committee and the ICJ have affirmed that Israel's international human rights obligations extend to the OPT. See also, Human Rights Committee, 'Concluding observations, Israel' (3 September 2010) UN Doc. CCPR/C/ISR/CO/3, paragraph 5; Advisory Opinion on the Wall (n 6), paragraphs 106-113.

Further, the exploitation of natural resources and the resulting environmental degradation may also violate other human rights, *inter alia*, the rights to life, health, means of subsistence, water, housing, property, education, healthy environment, and development.

These rights are inevitably impacted by illegal Israeli settlements and the Annexation Wall, which cause: deterioration of water quality, the depletion of natural resources, land degradation, air and noise pollution, deterioration of nature and biodiversity, soil erosion, and land and aesthetic distortions.[21] Israeli settlements, often positioned on hilltops, harm the environment through the illegal disposal and transfer of liquid, solid and hazardous waste into the OPT.

While discharged wastewater from Israeli settlements regularly cause the pollution of aquifers and other water resources in Palestinian communities, particularly those classified as the most environmentally vulnerable.

In addition to environmental degradation, the World Health Organization asserted that settlement activity also "deprives the Palestinians of the capacity to manage environmental protection projects" and as a result only 13 per cent of wastewater is properly treated, while only 30 per cent of solid waste is disposed of in a sanitary manner.[22]

Avenues for Using IHRL for Protecting Natural Resources in the OPT

One of the ways that international human rights law has been used to protect the environment and natural resources during armed conflict is through protecting world heritage sites.

The Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), adopted by the United Nations

21 Palestinian Environmental Quality Authority, 'The Impact of Annexation and Expansion Wall on the Palestinian Environment' (2010) <http://www.lacs.ps/documentsShow.aspx?ATT_ID=6057>, 11-12.

22 World Health Organization, 'Health Condition in the Occupied Palestinian Territory, including East Jerusalem and the Occupied Syrian Golan', (20 May 2016), 69/INF./6, para 123.

Educational, Scientific and Cultural Organization (UNESCO) Member States in 1972, recognizes that certain places "are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole" and recognizes the duty of States in "ensuring the identification, protection, conservation, presentation and transmission [of such places] to future generations."[23] The Convention recognizes that "the outbreak or the threat of an armed conflict" is sufficient to place a property under the "list of World Heritage in Danger."[24]

In 2011, Palestine gained membership in UNESCO, allowing it to ratify UNESCO's constitution and become a State party to eight UNESCO conventions and related protocols, including the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage and the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two protocols.[25]

In June 2014, the World Heritage Committee approved the inclusion of the landscape terraces of the village of Battir, on the List of World Heritage in Danger. Battir is a farming village of about 5,000 people.

It's hill landscape comprises a series of farmed valleys and agricultural terraces that are supplied by a complex and technical irrigation system that has been sustained for the past 4,000 years.[26] This unique landscape was under threat of being destroyed as a result of Israel's plans to construct part of the Annexation Wall through the middle of Battir.

In 2015, the Israeli High Court froze the Israeli government's plans to build the Annexation Wall, which would have also annexed about 3,000 dunums of Battir's land.[27]

23 Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) preamble and Article 4.

24 *Ibid,* Article 11(4).

25 Following Palestine's accession, the United States cut funding to UNESCO.

26 United Nations Educational, Scientific and Cultural Organization, Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee, Decisions Adopted by the World Heritage Committee at Its 38th Session (Doha, 2014) <http://whc.unesco.org/archive/2014/whc14-38com-16en.pdf>, 154.

27 S Levy, 'Israeli high court freezes plan to build Separation Wall through West Bank village of Battir'

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols protect cultural property in occupied territories. Article 15(1) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, provides that the "extensive destruction or appropriation of [protected] cultural property" or "making [protected] cultural property […] the object of attack" is an offence, as established under the domestic law of the offences for each Party.[28]

MondoWeiss (7 January 2015) <http://mondoweiss.net/2015/01/separation-through-village/> last accessed 3 May 2017.

28 Under Article 15(2) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, States "shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act."

International Environmental Law

International environmental law (IEL) remains a developing, complex and technical body of law, with States still determining how it relates to international humanitarian law and situations of occupation specifically.[29] International environmental law comprises the "substantive, procedural and institutional rules of international law which have as their primary objective the protection on the environment."[30]

Rules concerning the protection of natural resources in IEL developed in two main ways: in recognizing that States have sovereignty over natural resources, while also stressing that States must not cause damage to the environment (principle of prevention), including to areas beyond their jurisdiction.[31] The principle of prevention requires the "prevention of damage to the environment, and otherwise to reduce, limit or control activities which might cause or risk such damage."[32]

The same obligations of prevention, reduction and control of environmental harm apply in cases of extraterritorial jurisdiction, which exists in the case of an occupation.

In addition to the principle of prevention, the precautionary principle imposes a duty of care on States and indirectly on non-state actors to protect the environment.[33]

Article 15 of the Rio Declaration on Environment and Development (Rio Declaration) is the first legal instrument to codify the precautionary principle and provided that the lack of scientific certainty shall not be used to postpone action when there are risks of serious or irreversible damage to the environment.[34]

29 United Nations Environment Programme (n 1) 34.

30 P Sands, *Principles of International Environmental Law* (2nd Edition, Cambridge University Press, 2003), 15.

31 This principle is codified in Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration. ***See*** P Sands (n 27) 235-236.

32 P Sands (n 30) 246.

33 E Hey, 'Global Environmental Law', (2009) Erasmus University Rotterdam (EUR), Erasmus School of Law, 10.

34 The precautionary principle is a general principle of international environmental law, and incorporation of

(i) Rio Declaration on Environment and Development (Rio Declaration)

The first universal legal instrument to emphasize the rights of people under occupation in relation to both the use of natural resources and the protection of the environment is the 1992 Rio Declaration on Environment and Development (Rio Declaration). Under the Declaration, Principle 23 stipulates that:

> **"the environment and natural resources of people under oppression, domination and occupation shall be protected."**

Principle 23 of the Rio Declaration recognizes the principles of "permanent sovereignty over natural resources" and "environmental protection of natural resources."[35]

In this regard, Principle 23 lies at the crossroad of different areas of international law, including international environmental law, international humanitarian law, and international human rights law. This reflects a distinct feature of international environmental law, which recognizes the interrelationship of the international legal order in relation to environmental issues.[36]

Principle 24 of the Rio Declaration urges respect for international environmental law even during times of armed conflict, and affirms a further obligation on States to continue developing the international law framework governing environmental protection during armed conflicts.

There are parallels to the need to protect the environmental rights of oppressed people in other international environmental law materials, but they do not contain language that links resources to 'oppressed' or occupied people.

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the principle is found in many international environmental legal instruments, for example the CBD preamble paragraph, UNFCCC in Article 3(3), Biosafety Protocol in Articles 1, 10, 11, Fish Stock Agreement in Articles 5, 6, and the 1995 U.N. Agreement for the Implementation of the Provision for UNCLOS, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Species in Article 5.

35 M Tignino, 'Principle 23: The Environment of Oppressed Peoples' (2015), in J. Vinuales (ed.), The Rio Declaration on Environment and Development: A Commentary, Oxford University Press, 2015, pp.557-568.

36 *Ibid*.

For example, Principle 1 of the 1972 Stockholm Declaration affirms that environmental protection is required for a life of dignity and well-being for present and future generations, and that such protection can be undermined as a result of apartheid, colonial, and other forms of oppression, and foreign domination.[37]

(ii) State Responsibility for Internationally Wrongful Acts

The responsibility of States not to cause environmental harm is one of the basic principles of international environmental law and is widely accepted as a customary principle of law,[38] and may provide a legal basis for bringing claims for liability and State responsibility for environmental damage.[39]

State responsibility for internationally wrongful acts includes violations committed by its organs (such as its armed forces), persons or entities exercising governmental authority, or persons or groups acting under its control.[40]

The principle of State responsibility indicates a breach of international law which gives rise to State accountability. Once responsibility of the State for wrongful acts has been established, the State bears liability for its acts.[41] Liability of actors for their illegal acts, or for adverse consequences of their lawful activities is reflected in the Draft Articles on State Responsibility developed by the International Law Commission in 2001.[42]

The State which committed the wrongful act is under an obligation to cease

37 The 1977 Mar del Plata Declaration of the United Nations Water Conference and the 1982 World Charter for Nature contain references to the protection of natural resources during armed conflicts – and in occupied territories specifically.

38 The principle has been widely accepted in different cases and codified by the International Law Commission in its 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.

39 P Sands (n 30) 246.

40 Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) provides that an internationally wrongful act can consist of "an act or omission." And ICRC, *Customary International Humanitarian Law*, (2005) Rule 149

41 Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) Article 28.

42 P Sands (n 30) 869.

the wrongful act and to guarantee its non-repetition.[43]

Additionally, the responsible State is under an obligation to make full reparations for the injury caused be it material or moral.[44] Reparation can take the form of restitution, compensation and/or satisfaction, and may serve different purposes at both domestic and international levels. Reparations can be part of an economic instrument[45] which provide an incentive to encourage compliance with environmental obligations.[46]

They can also be used to impose sanctions for the wrongful conduct or require corrective measures to the damage caused to the environment.[47]

Within the OPT, international environmental law continues to be applicable. The International Court of Justice, in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, confirmed that the provisions and instruments of international environmental law "apply at all times, in war as well as in peace."[48]

The Court defined the environment as "the living space, the quality of life and the very health of human beings, including generations unborn."[49]

Further, the Court asserted that "the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict."[50]

43 Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) Article 30.

44 *Ibid,* Article 31.

45 This includes using financial means to motivate polluters to reduce the health and environmental risks imposed by their facilities, processes or products. For example, some instruments provide monetary and near-monetary rewards for polluting less, and impose costs of various types for polluting more. **See** R Anderson, 'Incentive-Based Policies for Environmental Management in Developing Countries', (August 2001) <http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-IB-02-07.pdf>

46 P Sands (n 30) 869.

47 *Ibid.*

48 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) ICJ Rep 1996, para. 27.

49 *Ibid*, para. 29.

50 *Ibid*, para. 30.

The Potential for Using Multilateral Environmental Agreements in Ensuring the Protection of the Environment and Natural Resources in the OPT

Another approach in ensuring environmental protection during armed conflict is the use of Multilateral Environmental Agreements (MEAs).

MEAs are "binding international instruments to which more than two States are a Party."[51] What is distinct about MEAs is that they give rise to State responsibility if breached, while containing procedural and institutional rules which facilitate compliance mechanisms and decision making among involved actors.[52]

The State of Palestine has acceded to several MEAs since 2014, including: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; the Convention on Biological Diversity and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity; the United Nations Convention on the Law of the Sea; the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses; and, the Paris Agreement on Climate Change.[53]

In light of domestic legal challenges to environmental and natural resources protection in the OPT,[54] these agreements provide avenues for protecting natural resources and potentially seeking effective remedial action for environmental violations.

Two examples are provided below on the potential of using MEAs in protecting the environment, through exploring provisions in the Basel Convention on

51 United Nations Environment Programme (n 1) 35.

52 A. Chayes and A. H. Chayes, 'The new sovereignty: compliance with international regulatory agreements', Cambridge MA, Harvard University Press, 1995.

53 In accordance with Article 77 of the 1999 Palestinian Environmental Law No. 7 (Palestinian Environmental Law), MEAs of which "Palestine is a part [...] shall be considered complementary" to the Palestinian Environmental Law.

54 The Israeli occupation, and the systematic impunity therein, creates serious obstacles for accountability for civil environmental wrongs committed in the OPT, see Al-Haq, 'Environmental Injustice in the OPT: Problems and Prospects' (4 August 2015) <http://alhaq.org/publications/publications-index/item/environmental-injustice-in-occupied-palestinian-territory?category_id=10>

the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Convention on Biological Diversity.

Both treaties have been signed and ratified by Palestine and Israel, and contain the basic principle of the sovereign rights of States to use their natural resources and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond their national jurisdiction.

As such, the treaties could potentially constitute a framework for any bilateral or multilateral environmental agreements between the two countries. However, the law of occupation imposes further "stringent requirements" on Israel, as the Occupying Power, to protect the environment and the well-being of the protected population in the OPT.[55]

(i) The Basel Convention on The Control of Transboundary Movements of Hazardous Wastes and their Disposal

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was developed over fifteen years ago to restrict the cross-border trade and dumping of a range of toxic chemical wastes identified as 'hazardous' as well as household waste and incinerator ash. Signatory states are expected to undertake "environmentally sound waste management" and to prohibit the cross-border trade of toxic chemicals to States where the import of such chemicals is banned.

In the case of exporting wastes across international borders, the authorities of the State of export must notify the authorities of the prospective States of import and transit, providing them with detailed information on the intended movement. The transport may only proceed if and when all States concerned have given their written consent. In cases where such "prior and informed consent" has not been granted by the concerned State authorities, and

55 Al-Haq, 'Environmental Injustice in the OPT: Problems and Prospects' (4 August 2015) <http://alhaq.org/publications/publications-index/item/environmental-injustice-in-occupied-palestinian-territory?category_id=10>, 54.

wastes are transferred illegally, the Convention imposes the duty on the State responsible for the transfer to ensure safe disposal of the waste, typically by re-import into the State of generation.

Parties to the Convention can bring any cases or alleged cases of illegal transport to the attention of the Convention Secretariat for appropriate action, with outcomes including but not limited to a resolution negotiated between the States concerned.

As Palestine acceded to the Basel Convention in 2015 and Israel is also party[56] to the Convention, Palestinian authorities are able to avail of the notification system it provides in order to report incidents of unauthorized transfers of hazardous wastes[57] from Israel and Israeli settlements to the OPT. This use of international law provides a significant avenue for Palestine to bring environmental crimes perpetrated by Israel to the attention of international fora and to seek effective remedies.

This would be in line with domestic standards as well. For example, the Palestinian Environmental Law prohibits the import of hazardous substance and waste unless a special permit is obtained from specialized agencies.[58]

In addition, according to the Oslo Accords, hazardous waste in the OPT must be transported for appropriate disposal to an Israeli landfill because the respective Palestinian authorities have been restricted from developing an appropriate location for environmentally sound disposal of toxic wastes.[59]

In June 2016, the Palestinian Environment Quality Authority (EQA) filed a

56 Israel ratified the Basel Convention in 1995.

57 Under the Basel Convention, illegal traffic (constituting a criminal act under international law) is defined as a transboundary movement of hazardous wastes specified in Article 9 of the Convention.

58 The 1991 Palestinian Environmental Law No. 7, Article 13.

59 The Interim Agreement on the West Bank and the Gaza Strip (Oslo II) (1995) Article 12(5) on Environmental Protection of Annex III. According to this article: "*Both sides shall respectively adopt, apply and ensure compliance with internationally recognized standards concerning the following: levels of pollutants discharged through emissions and effluents; acceptable levels of treatment of solid and liquid wastes, and agreed ways and means for disposal of such wastes; the use, handling and transportation (in accordance with the provisions of Article 38 (Transportation)) and storage of hazardous substances and wastes (including pesticides, insecticides and herbicides); and standards for the prevention and abatement of noise, odor, pests and other nuisances, which may affect the other side.*"

notification[60] with the Basel Convention Secretariat about an incident of two illegal truckloads of hazardous wastes sourced from Israel's Nitzane Shalom (Geshuri) settlement industrial zone[61] that were stopped en route in April 2016 heading to the Zahrit Al-Finjan landfill (near Jenin). A 2011 Israeli State comptroller report provided that the industrial settlement (referred to as Mesila) is unauthorized and is constructed without building permits through the takeover of Palestinian lands.[62]

In response to Palestine's notification, Israel claimed that the waste belonged to the industrial settlement and not to the State.

According to the Basel Convention, a "transboundary movement" of waste entails the movement of waste from "an area under the national jurisdiction of one State" to another.[63]

Areas of national jurisdiction include "any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment."[64] Because Israeli settlements are under full Israeli control and Israeli civil law applies therein,[65] Israel's claim was dismissed by the Secretariat.

Following the mediated negotiation process provided by the Basel Convention Secretariat, Palestine succeeded in attaining an agreement with Israel for the waste to be transferred back across the Green Line and to be appropriately

60 Palestinian Environment Quality Authority, 'Palestinian Environment Quality Authority files a notification to the Basel Convention against Israeli for illegally transferring hazardous waste to Palestine' (8 June 2016) <http://environment.pna.ps/ar/index.php?p=newsdetails&id=197>

61 The Nitzane Shalom industrial settlement (referred to as the Geshuri factories by Palestinians) is a gated industrial settlement in the northern of the West Bank, which remains in proximity to Israeli cities across the Green Line. There are 11 factories with dubious environmental records operating in the industrial settlement, two of which are inactive and one is in a liquidation process under Israeli court supervision.

62 Israeli State Comptroller Report, 'Industrial Zones in Judean and Samaria' (2011) <https://whoprofits.org/sites/default/files/industrial_zones_in_judea_and_samaria_and_the_rural_sector.pdf>

63 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) Article 2(3).

64 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) Article 2(9).

65 This arrangement means that the Israeli Ministry of Environmental Protection has the jurisdictional power to control industrial pollution in settlements.

disposed of in Israel. This is a significant victory for Palestine, demonstrating one possible way to use international environmental law to hold Israel accountable for violating the environmental and human rights of Palestinians.

However, in accepting the consequences of its criminal actions, Israel has demanded that the case not be published on the Basel Convention website. Despite the lack of public disclosure about the case to date, it remains an important first step in seeking effective remedial action for environmental crimes committed by Israel against Palestinian communities. In February 2017, the EQA filed another notification to the Basel Convention on two other truckloads of 8000 liters of hazardous mineral oils that were stopped en route by Palestinian police in two separate incidents in Bethlehem and Nablus trying to dump the waste there.[66]

(ii) The Convention on Biological Diversity

The Convention on Biological Diversity (CBD) was developed for the "conservation of biological diversity, the sustainable use of its components and equitable sharing of the benefits arising out of the utilization of genetic resources […] taking into account all rights over those resources."[67] The Convention provides that biological resources include "genetic resource, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity."[68]

The CBD is considered to be the first legally binding global instrument for the protection of biodiversity. The Convention's preamble stresses the "importance of, and the need to promote international, regional and global cooperation among States and intergovernmental organizations and the non-governmental sector for the conservation of biological diversity and the sustainable use of its component."

In promoting such cooperation, the Convention recognizes the traditional

66 Wafa, 'Environment Quality Authority files a notification to the Basel Convention against Israel for the illegal transfer of hazardous waste', (22 February 2017) <http://www.wafa.ps/ar_page.aspx?id=p7jFhWa734604842532ap7jFhW>

67 Convention on Biological Diversity (1992) Article 1.

68 *Ibid*, Article 2.

dependence of many indigenous and local communities on biological resources and the benefits of using their traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

The Convention also recognizes the vital role women play in the conservation and sustainable use of biological diversity and affirms the need for full participation of women at all levels of policy-making and implementation for biological diversity conservation.[69]

In its tenth meeting in October 2010, the Conference of the Parties of the CBD adopted the Strategic Plan for Biodiversity for the period 2011-2020 and the Aichi Biodiversity Targets, which is meant to represent a useful flexible framework for the development of national biodiversity strategies and action plans and their implementation, aimed at improving the state of biodiversity and protecting ecosystems.[70]

Due to its geographical location and unique topography, Palestine is home to significant biodiversity hotspots. It contains five bio-geographical zones (ecosystems), all with their special climate and distinct biodiversity, which are the Central Highlands, Semi-Coastal Region, Eastern Slopes, Jordan Rift Valley and Gaza Strip.[71]

According to the 2015 *State of Palestine Fifth National Report to the Convention on Biological Diversity*, there are more than 50 sites which have been identified as key biodiversity areas.

The report provides that there is a national list of threatened species available for Palestinian flora, but that a national list of Palestinian threatened fauna is not available due to a lack of comprehensive data. In 2015, the State of

69 Convention on Biological Diversity (1992).

70 United Nations Environmental Programme, Convention on Biological Diversity, 'Decision Adopted by The Conference Of The Parties to the Convention on Biological Diversity at Its Tenth Meeting', (29 October 2010) UN Doc. UNEP/CBD/COP/DEC/X/2 <https://www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.pdf>

71 There are about 51,000 living species in the State of Palestine, constituting approximately 3% of the global biodiversity. There are more than 30, 850 animal species, consisting of an estimated 30,000 invertebrates, 373 birds, 297 fish, 92 mammals, 81 reptiles and 5 amphibians. The State of Palestine also hosts over than 2,000 species of plants including 54 endemic plants that do not exist in any other part of the world. ***See*** The State of Palestine Fifth National Report to the Convention on Biological Diversity (2015) <https://www.cbd.int/doc/world/ps/ps-nr-05-en.pdf>

Palestine acceded to the CBD. In compliance with the provisions of the Convention, the EQA needs to update its national biodiversity strategy and action plan, and to prepare a list of endangered species.[72]

The report also provides that in 2005, Israel declared 48 nature reserves in the West Bank, including East Jerusalem covering an area of 69,939 hectares (12.35 percent of the area of the West Bank).[73] The declaration of these nature reserves is part of Israel's unlawful land appropriation policy, and limits Palestinian land use and access to natural resources.[74]

The report recognizes that the practices of the Israeli occupation have destroyed Palestinian ecosystems. For example, the overexploitation of water resources and the heavy diversions of the flow of the Jordan River have resulted in the rapid decline in the water level and deterioration in the water quality of the Dead Sea, resulting in polluting the environment and the unique ecosystems reliant on it.[75]

In case the activities of a State cause imminent or grave danger or damage "to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction", the State must immediately "notify the affected State of such danger and damage, as well as initiate action to prevent or minimize such danger or damage".[76] Further, the Conference of the Parties to the CBD, shall examine "the issue of liability and redress, including restoration and compensation for damage to biological diversity".[77]

72 To-date (June 2017), the list of endangered species has not been published by the EQA.

73 The State of Palestine Fifth National Report to the Convention on Biological Diversity (2015) <https://www.cbd.int/doc/world/ps/ps-nr-05-en.pdf>, 3.

74 *See for example*: Settlement expansion around an Israeli-declared "nature reserve," OCHA, 31 October 2014, <https://www.ochaopt.org/content/settlement-expansion-around-israeli-declared-nature-reserve>

75 In addition, Israel exploits the special minerals and the mud of the Dead Sea through Ahava, a settlement business located in the settlement of Mitzphe Shalem. While the Dead Sea coastline is shared by Israel, Jordan, and Palestine, since 1967, Israel has unlawfully appropriated vast areas of Palestinian land in the occupied Dead Sea area making the area largely off-limits for Palestinian development. The Palestinian economy could gain $918 million annually from Dead Sea minerals and $290 million from tourism in the area. See Al-Haq, 'Pillage of the Dead Sea: Israel's Unlawful Exploitation of Natural Resources in the Occupied Palestinian Territory' (2012) <http://www.alhaq.org/publications/publications-index/item/pillage-of-the-dead-sea-israel-s-unlawful-exploitation-of-natural-resources-in-the-occupied-palestinian-territory?category_id=10>

76 Convention on Biological Diversity (1992) Article 14(1)(d).

77 Convention on Biological Diversity (1992) Article 14(2).

Conclusion: Why an Environmental Justice Approach Matters?

Israel continues to exploit and destroy the natural resources in the OPT with no regard to the impact it leaves on the occupied territory and the environment, and in violation of its obligations under international law. It is further important to stress the personal impact such exploitation has on Palestinians individually and collectively.

The methods of dispossessing and appropriating Palestinian natural resources,[78] create a coercive environment which results in the unlawful forcible transfer of Palestinians, especially in Area C of the West Bank. For example, Israeli restrictions, including those stemming from a discriminatory planning system, obstruct Palestinian access to water and create harsh living conditions that may result in transfer. Forcible transfer is a grave breach of the Fourth Geneva Convention, and a war crime under the Rome Statute of the International Criminal Court.

The protection of natural resources during an occupation is established in various provisions of international law. However, effective enforcement of these provisions, as well as avenues for accountability, are often insufficient. As such, international practices, including the taking of substantive action by third states in line with their obligations under international law, must be strengthened and depoliticized in order to ensure the protection of vulnerable groups in occupied territories that are dependent on natural resources.

In turn, the implementation of environmental standards could benefit from increased engagement with affected communities, including for knowledge-sharing on their environment and resources and the recognition of the significance of indigenous environmental knowledge.

78 The International Criminal Tribunal for the former Yugoslavia (ICTY) held that the creation of severe living conditions aimed at making it practically impossible for those targeted to remain, constitutes forced transfer. In its *Krajisnik* judgment, the ICTY concluded that by creating conditions through house searches, arrests and physical harassment, as well as cutting off water, electricity and telephone services, the Serb authorities succeeded in causing many Muslims and Croats to abandon their homes.

Such an approach is at the heart of the concept of "environmental justice" which recognizes the existence of "socio-economic inequalities" within communities, in which disadvantaged groups, low income communities and/or minorities are denied equal opportunities to access natural resources.

While also often bearing the least responsibility in causing environmental damage, such groups disproportionately suffer the most from the environmental impacts and many risk losing their lives and livelihoods.[79]

The environmental justice framework has been shaped as a mechanism for struggling communities to mobilize and demand accountability for the protection, prevention and punishment of "wrongs related to disproportionate impacts of growth on the poor and vulnerable in society from rising pollution and degradation of ecosystem services, and from inequitable access to and benefits from the use of natural assets and extractive resources."[80] The environmental justice framework has increasingly developed around the "anthropogenic placing of people and communities at the center of the frame, particularly those who are marginalized economically and politically as well as environmentally."[81]

There remains a need for an emerging Palestinian environmental justice movement, which recognizes the environmental and social justice issues affecting Palestinian communities in the OPT and that are attributable to different actors, including the Israeli occupation. This movement must foster more collaborative, transparent and open communications between affected communities, local government, civil society organizations and environmental scientists and experts.

Bearing in mind that the prolonged nature of the Israeli occupation poses challenges to the adequacy of occupation law given the usual transitory nature of an occupation, the protection of natural resources under such a prolonged

79 R Ako, 'Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific' (2013), 2-4 and B Hill, 'Environmental Justice Legal Theory and Practice' (2014).

80 United Nations Development Programme, 'Environmental Justice: Comparative Experiences in Legal Empowerment' (June 2014), 5.

81 G Walker, 'Globalizing Environmental Justice: The Geography and Politics of Frame Contextualization and Evolution' (2009), 358.

occupation is similarly inevitably insufficient. Further, the degradation of the environment may be linked to weapons use, and even more so to the systematic policies of appropriating and depriving the Palestinian population of their natural wealth.

As such, international environmental law can provide further avenues which guarantee the protection of natural resources and the environment in the occupied territory. Understanding the spirit of environmental law can also play an integral part in articulating and developing a more nuanced perspective on environmental justice issues in the OPT.[82]

82 M Adebowale, 'Using the Law: Access to Environmental Justice- Barriers and Opportunities' (2004), 15.

NOTES

NOTES

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ABOUT AL-HAQ

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

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

Al-Haq is also committed to facilitating the transfer and exchange of knowledge and experience in IHL and human rights on the local, regional and intenational levels through its Al-Haq Center for Applied International Law. The Center conducts training courses, workshops, seminars and conferences on international humanitarian law and human rights for students, lawyers, journalists and NGO staff. The Center also hosts regional and international researchers to conduct field research and analysis of aspects of human rights and IHL as they apply in the OPT. The Center focuses on building sustainable, professional relationships with local, regional and international institutions associated with internationalchumanitarian law and human rights law in order to exchange experiences and develop mutual capacity.

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

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