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The American University in Cairo

School of Global Affairs and Public Policy

**EDUCATION IN THE SYRIAN GOLAN HEIGHTS UNDER
INTERNATIONAL HUMAN RIGHTS LAW
AND INTERNATIONAL HUMANITARIAN LAW**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By

Michelle Strucke

June 2012

The American University in Cairo
School of Global Affairs and Public Policy

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in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law
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DEDICATION

To my husband Zaki Barzinji, without whom I may not have found my voice, and to my mother Laurie Strucke, without whom I would not have learned how to use it.

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In completing this work, I benefited from the advice and encouragement of countless people. Notably, Professor Hani Sayed and Professor Elna Sondergaard, whose encouragement and lucid advice helped me reach further depths in this topic. I received valuable advice from Sital Kalantry of Cornell Law School about the right to education, and from the students in the Cornell Research Colloquium, whose insightful comments assisted me greatly while editing. I received support from the faculty and students of the Department of Law at the American University in Cairo, who provided a stimulating environment for creative legal thinking, and gave me the support to present this research at an international conference in Austria. I would like to especially thank Professors Tanya Monforte, Alejandro Lorite Escorihuela, Thomas Skouteris, and Diana Van Bogaert, for all of their encouragement and insight – they have truly changed the way I think about law and the world. I benefitted deeply from the perspectives of Dr. Martin Isleem and Dr. Munir Fakhereldin and am indebted to them for offering me their expertise regarding the Druze in Israel and the residents of the Syrian Golan. I am deeply grateful to the staff of Al-Marsad including Nizar Ayoub, Naief Fakhereldeem, and Salman Fakhereldin, for their hospitality and support over the summer of 2008, and for making me feel at home among the people of the Syrian Golan, especially from the village of Majdal Shams. And I have been deeply touched and inspired by their warmth, friendship, hospitality, and inspirational responses, especially their artistic responses, to a difficult political situation. In particular, I wanted to thank Jad Mari, Eyad Abu Saleh, and all others who generously offered me their friendship. I wanted to thank Daanish Faruqi, Kerry, Khulood, Gissella Montenegro, Allison Silver, Lindsey Humphreys, and everyone else who spent countless hours offering their counsel and advice throughout the process of research and writing, and for their friendship across oceans. I am thankful to Dr. Peyi Soyinka-Airewele of Ithaca College for first stimulating my interest in education and conflict and in the state's role in attempting to shape citizens' identities. I wanted to thank my family for supporting me throughout the course of this project, especially Ann, Krista, Bill, and my parents Laurie and Bill, and to Afeefa Syeed, Najeeba Syeed, Esa Syeed, and Nafeesa Syeed, for valuable discussions around educational curricula within conflict zones and for peacebuilding, and on writing around conflict. I wish to thank Dr. Sayyid Syeed, Rafia Syeed, Suhaib Barzinji, and Afeefa Syeed for their hospitality, inspiration, and encouragement. I am deeply grateful to Dina Mansour for her advice, encouragement every step of the way, friendship, and for going out of her way to ensure my thesis was delivered, even when I was halfway around the world. Finally, I want to thank Zaki Barzinji for reading countless versions of my drafts, for his encouragement from beginning to end, and for his endless love, patience, tranquility, and curiosity. I could not have done this without him. All errors are my own.

The American University in Cairo
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EDUCATION IN THE SYRIAN GOLAN HEIGHTS UNDER INTERNATIONAL
HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

Michelle Strucke

Supervised by Professor Hani Sayed

ABSTRACT

Compulsory education, in particular history and religious education, is often used by states as a critical tool of nation building, as states attempt to socialize and shape the attitudes and beliefs of citizens in line with their strategic aims. As a state that defines itself as "Jewish and democratic" and that has instituted special compulsory education curricula for students on the basis of ethnicity and religion, the state of Israel is no exception. The Syrian Golan despite being under occupation by Israel for the last forty-five years has been written about only sparingly compared to the overwhelming amount of research that has been performed on the Occupied Palestinian Territories. The Druze residents of the Occupied Syrian Golan are subject to a separate compulsory education curriculum designed and implemented by the state of Israel that attempts to shape their identity in religious terms that reflect Israel's strategic aims at the expense of accurately depicting the history and heritage of the Syrian Golan and its residents. It attempts to obscure their identity as Syrian Arabs entirely, focusing instead on a narrative of historical similarity and alliance of Druze and Jews and their common persecution by Muslims. And most importantly, it is the same curriculum that Israel has created for its own citizens, highlighting a fundamental problem in Israel's denial that it occupies the Syrian Golan. The problem in the Syrian Golan is not simply that the residents receive a separate education on the basis of religious and ethnic difference. It is not simply that the residents are left without the option of choosing an alternative education for their children that respects their origins. It is that the abuse of the principle of non-annexation has fundamental consequences for the human dignity of the affected residents, and negative implications on the international legal system upon which the principle is based. This study undertakes to analyze the problem of education in the occupied Golan in relation to norms of IHRL and IHL and to propose reconciliation between these conflicting norms to the extent that it is possible. It will focus primarily on Israel's obligations under the ICESCR, CRC, CADE, and key international humanitarian agreements including the Fourth Geneva Convention and the Hague Regulations in the context of belligerent occupation. And finally, it will briefly analyze the problematic legal consequences of Israel's conduct in relation to the residents of the Syrian Golan, and the international legal system.

LIST OF ABBREVIATIONS

CADE	Convention on the Elimination of Discrimination in Education (UNESCO)
CESCR	Committee on Economic, Social and Cultural Rights
CDCE	Committee for Druze Culture and Education
CRC	Convention on the Rights of the Child
DMZ	Demilitarized Zone
ECOSOC	United Nations Economic and Social Council
GAA	General Armistice Agreement
GC	Geneva Conventions
GHL	Golan Heights Law [1981]
HR	Hague Regulations
HCJ	High Court of Justice (Israel)
HRC	Human Rights Committee
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights [1966]
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights [1966]
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ILC	International Law Commission
IDF	Israel Defense Forces
ISMAC	Israel-Syria Mixed Armistice Commission
IHL	International Humanitarian Law
IHRL	International Human Rights Law
JAG	Judge Advocate General (US)
LOAC	Law of Armed Conflict(s)
LMD	<i>Lejnat al-Mubadarah al-Durziya</i> (Druze Initiative Committee)
OHCHR	Office of the High Commissioner for Human Rights (UN)
OPT	Occupied Palestinian Territories
OSG	Occupied Syrian Golan
API	Protocol I Additional to the Geneva Conventions
SC	Security Council
UDHR	Universal Declaration on Human Rights [1948]
UNICEF	United Nations Children's Fund
UN	United Nations
UNDOF	United Nations Disengagement Observer Force
UNESCO	United Nations Education, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
US	United States of America
WWI	World War I
WWII	World War II

PREFACE

Throughout this manuscript, identity will be discussed often, and as such it is appropriate to define how these identity-related terms are used and why they were chosen.

Druze

The origins of the name Druze are disputed. Many historians claim that it originated from a figure known as the first Druze apostate, al-Darazi who was an early convert who outsiders perceived to be the founder of the new religious movement. His so-called followers therefore became Druzes (Duruz), although today the word “Darazi” is still used as a modern epithet, implying that the person is a heretic.¹ The term is said to have gained prominence because of its use by those who attempted to defame the community, although its usage has become acceptable over time to describe adherents to the religion. Authentic Druze manuscripts however do not use the term “Druze” or “Druzes” and such terms are still rejected by some members of the community. The Druze prefer to refer to themselves as “Unitarians,” or *Muwwahhidun* in Arabic, and sometimes as People of Tawhid or *Ahl al-Tawhid*.

Due to the term’s prominence and common usage among the Druze with which the author is acquainted, the term Druze will be used throughout this article, and is not intended to mean any disrespect to the adherents of the faith.

¹ SAMY SWAYD, HISTORICAL DICTIONARY OF THE DRUZES xxii (2006).

*“We don’t need no education.
We don’t need no thought control.
No dark sarcasm in the classroom.
Teacher, leave those kids alone.
Hey, teachers! Leave those kids alone.”*
-Pink Floyd

*“Careful the tale you tell...
That is the spell.
Children will listen.”*
-Stephen Sondheim

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Introduction

Compulsory education, in particular history and religious education, is often used by states as a critical tool of nation building, as states attempt to socialize and shape the attitudes and beliefs of citizens in line with their strategic aims. As a state that defines itself as "Jewish and democratic"² and that has instituted special compulsory education curricula for students on the basis of ethnicity and religion, the state of Israel is no exception. As will be shown, the Syrian residents of the Occupied Syrian Golan³ who have lived under Israeli occupation since 1967 and annexation since 1981 are subject to a separate compulsory education curriculum designed and implemented by the state of Israel that attempts to shape their identity in religious terms that reflect Israel's strategic aims.⁴ This has raised concerns that it does so at the expense of accurately depicting the history and heritage of the Syrian Golan and its residents, who define themselves almost without exception as Syrian, Arab and Druze.⁵ The curriculum, in contrast with the

² The Declaration declares the establishment of a "Jewish state in the land of Eretz-Israel [Land of Israel in Hebrew] to be known as the State of Israel" and does not explicitly mention democratic governance. See Declaration of Establishment of the State of Israel, 5708-1948, 1 LSI 3-5 (1948) (Isr.), available [in English, Hebrew and Arabic] at www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm (also known as "The Declaration of Independence"). The democratic character of the state was legislated in A Basic Law provides that anyone negating "the existence of the State of Israel as a Jewish and democratic state" will not have the right to take part in elections to the Knesset. Basic Law: The Knesset (Amendment No. 35), 2002, S.H. 158 (Isr.). See generally Nathan Lerner, *Religious Liberty in the State of Israel*, 21 EMORY INT'L L. R. 239-276 (2007) (discussing the meaning of Israel being a Jewish and democratic state). See also Orit Ichilov, Gavriel Salomon & Dan Inbar, *Citizenship Education in Israel – a Jewish-Democratic State*, in ISRAELI INSTITUTIONS AT THE CROSSROADS 29, 29 (Raphael Cohen-Almagor ed., 2005) (discussing the Jewish, democratic character of the state in relation to civic education).

³ Occupied Syrian Golan, Syrian Golan, and Syrian Golan Heights will be used interchangeably hereinafter.

⁴ See generally Kais M. Firro, *Reshaping Druze Particularism in Israel*, 30 J. PALESTINE STUD. 40-53 (2001).

⁵ Based upon fieldwork conducted by the author throughout the summer of 2008. Some residents described themselves as Israeli and had accepted Israeli citizenship, but the overwhelming majority described themselves as Syrian, Arab and Druze. One Christian family lived in the occupied village of Majdal Shams, but all others defined themselves as members of the Druze religious sect. See also Tayseer Mara'i and Usama R. Halabi, *Life Under Occupation in the Golan Heights*, 22 J. PALESTINE STUD. 78-93 (1992). It should also be noted that some Druze commentators in Israel, particularly prominent Israeli Druze (not from the Golan), have debated the notion that the Druze are Arab. See SALMAN FALAH, *THE DRUZE IN THE MIDDLE EAST* 1 (1992) ("It is interesting to note that the question of origin did not trouble the Druzes in the past; but with the spread of Arab nationalism, claims were made that the Druzes were of pure Arabic descent, a view opposed by many Druzes in Israel today, including public figures, who maintain that the Druzes are not Arabs. The Israeli authorities recognize them as a separate people, and their identity cards list them as belonging to the Druze nationality.").

Palestinian Arab⁶ curriculum in Israel, which has been charged with simultaneously racializing and demonizing Arabs,⁷ has raised concerns that it attempts to obscure their identity as Syrian Arabs, focusing instead on a narrative of historical similarity and alliance of Druze and Jews, and their common historical persecution by Muslims.

Separate education on the basis of religious and ethnic difference is a complex subject educationally speaking, and raises questions about its compatibility with Israel's human rights obligations including the right to non-discrimination and the right to education as defined under the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination in Education, and other relevant treaties to which Israel is party. In particular, educational curricula that is factually inaccurate and said to marginalize the identity and history of the residents it describes seems to rise to the level of a violation of the ICESCR, the CRC, and the CADE, among other international human rights treaties to which Israel is party. Israel is also bound by the laws of belligerent occupation, since the Syrian Golan enjoys protected status under IHL, sometimes referred to as the International Law of Armed Conflict. Educational institutions are protected places under the law of belligerent occupation, and IHL regards protecting children and maintaining continuity with the heritage, religion, language, and national identity of their parents with special concern. The curriculum and educational institutions in the Syrian Golan will therefore be analyzed against the backdrop of Israel's humanitarian obligations as an Occupant, and against state practice in this area.

⁶ The term "Palestinian Arab" has been chosen based upon the preferences of the Palestinian Arabs interviewed by Human Rights Watch researcher Zama Coursen-Neff in her 2004 study on discrimination against Palestinian Arab children in Israeli schools. Official government sources in Israel usually refer to Palestinian Arabs as "Israeli Arabs," however this term has become highly politicized and was rejected by most of those interviewed. For explanation see Zama Coursen-Neff, *Discrimination against Palestinian Arab children in the Israeli Educational System*, 36 INT'L. L. AND POL. 749 (2004).

⁷ See generally Ismael Abu-Saad, *Present Absentees: The Arab School Curriculum in Israel as a Tool for De-educating Indigenous Palestinians*, 7.1 HLS (2008) [hereinafter Present Absentees]; see also Ismael Abu-Saad, *Separate and Unequal: the Role of the State Educational System in Maintaining the Subordination of Israel's Palestinian Arab Citizens*, 10 SOC IDENTITIES 1 (2004) [hereinafter Separate and Unequal]; see also ISRAEL: DISCRIMINATION AGAINST PALESTINIAN ARAB CHILDREN IN ISRAEL'S SCHOOLS (Human Rights Watch, Children's Rights Division) (2002) [hereinafter HRW Report on Discrimination in Israel's Schools]; see also Janan Abdu, *Official School Curricula: Tool in Israel's Hand to Obliterate Palestinian Identity in the 1948 Areas*, available (in English) [hereinafter: Official School Curricula] at http://www.jai-pal.org/pie/education%20in%20areas%20of%2048%20_English_.pdf (original in Arabic).

The Syrian Golan, despite being under occupation by Israel for the last forty-five years, has been written about only sparingly compared to the overwhelming amount of research that has been performed on the Occupied Palestinian Territories. This paper aims to contribute to the increasing body of international legal analyses of disputed territories and to raise visibility for neglected issues within the Syrian Golan by outlining the violation of these important legal standards through the use of preliminary field work from the Syrian Golan, including the analysis of supplementary educational tools designed by the residents themselves. It also raises questions about the limitations of the IHRL and IHL approaches to evaluating education systems in occupied territories, especially in relation to balancing the quality of educational content with the specific exigencies of a minority population under prolonged belligerent occupation.

Special attention will be paid to Israel's concerns related to security, since these are at the heart of any discussion of its actions in relation to the territories it occupies, and in relation to the Arab minority in the state and the territories under Israel's control. Identity is a highly politicized topic in Israel, and one that carries significance in relation to its international and domestic security. Of note will also be the limitations and problems with the security approach to maintaining and creating identity spaces within education, particularly as they concern an occupied population and Israel's obligations under IHL and IHRL.

It should be noted that the education system in the Occupied Syrian Golan is but one component of the larger picture of what one resident of Majdal Shams, a professor of post-colonial Middle East history, terms "ethnic engineering" that Israel has propagated in the Occupied Syrian Golan, separating Jew from Druze, re-imagining the Golan community and land through a complex web of social and economic policies, and creating a new reality that has fundamentally altered the geographic, social and economic landscape of the territory.⁸ This research note will show that these actions, specifically in the educational system, are contrary to international human rights law and have had lasting negative effects on the Syrian residents subject to Israel's effective control and occupation.

⁸ Interview with Dr. Munir Fakhereldin, in Majdal Shams (Aug. 2008).

The paper is organized as follows: first, a brief history of the Druze in Israel and the history of the Occupied Syrian Golan since its occupation by Israel in 1967 and Israel's annexation of the territory in 1981, followed by an exploration of the competing interactions of state aims vis a vis employing education as a tool of nation-building within the modern nation state with an occupant's obligations related to education under the laws of war. It then provides an overview of the educational curricula in the Occupied Syrian Golan, taking note of the significance of nationalist rhetoric in the curriculum and what is known about Israel's objectives in its creation and implementation. Finally, it briefly analyzes the curriculum with respect to Israel's obligations under International Humanitarian and International Human Rights Law, related specifically to the right to education as outlined by the treaties to which Israel is party and the relevant authoritative interpretations of those treaties. It analyzes the right to education under these two legal contexts and analyzes Israel's obligations, taking into account both Israel's position on the applicability of the two bodies of law and the changing international legal norms of occupation. It concludes that some of the curricular content and the administration of the schools is inappropriate and harmful to the children subject to the curriculum in the Occupied Syrian Golan, thus violating Israel's obligations under International Human Rights Law and International Humanitarian Law.

History of the Syrian Golan

Several characteristics of the Occupied Syrian Golan should be noted prior to discussing the education system. Chief among them is the physical makeup of the area, a characteristic that has played a large role in both Israel and Syria's claims to sovereignty over the territory. The villages of the Occupied Syrian Golan are cramped into the top corner of the fertile, volcanic plateau, which rises up to 2,224 meters above sea level.⁹ The OSG boasts rich soil situated at varying altitudes, rendering it capable of growing a

⁹ The highest point of the Occupied Syrian Golan is Mount Hermon (*Jabal Al-Shaykh*). See DR. RAY MURPHY & DECLAN GANNON, CHANGING THE LANDSCAPE: ISRAEL'S GROSS VIOLATIONS OF INTERNATIONAL LAW IN THE OCCUPIED SYRIAN GOLAN (Al-Marsad Arab Centre for Human Rights in the Occupied Golan) (2008). For an extensive discussion of the topography of the Golan, see ELISHA EFRAT, THE GOLAN HEIGHTS: OCCUPATION, ANNEXATION, NEGOTIATION 16-28 (Shoshana Michael-Zucker trans., ABC Publisher) (2009).

diverse array of crops including mangoes, bananas, avocados, grapes, cherries, and the apples for which the Syrian Golan is recently famous. Further, it contains water from the headwaters of the Jordan River and at its border lies Lake Tiberias, which currently provides up to one third of Israel's total fresh water.¹⁰ Since the displacement of the Syrian residents that had previously lived throughout the Syrian Golan and the destruction of their villages and farms, the five remaining villages in the Syrian Golan are in relative isolation from other developed areas with the exception of several Israeli settlements, built in contravention of international law, including the closest settlement to Majdal Shams, Neve Ativ. Public transportation is scarce,¹¹ and the closest town in Israel proper to the Syrian Golan villages, Kiryat Shemona, is about thirty minutes away by car. Access to Syria and Lebanon are prohibited,¹² and the area around the Druze villages is replete with landmines, fenced off only by barbed wire and danger signs. Roads in the area reportedly primarily serve security and military functions, and the function of serving the Israeli settlements.¹³

Prior to its capture by Israel, the region that is now the Syrian Golan had a long history of settlement by a diverse array of peoples from the Middle East region including Jews, Muslim Arabs, Byzantine Christians, Bedouin, Circassians, Turkmen, and others. The region is mentioned in the Bible as Golan, named after the town Golan, by Greeks and Romans as "Gaulanitis," and by Arabs as "Jaulan" meaning 'wandering' or 'migration' due to its agricultural history.¹⁴ In modern times, Israeli archeologists have researched the history of Jewish settlement of what is in present day the Syrian Golan, dating back more than three thousand years, and have mapped out sites of synagogues and even reconstructed one in the illegal Israeli settlement of Katzrin.¹⁵ Non-Druze Arab

¹⁰ Murphy, *supra* note 9, at 15. Water is also cited as a priority for both Israel and Syria in claiming sovereignty over the territory.

¹¹ This is in stark contrast with the variety of public transport options accessible from the largest illegal settlement in the Golan, Katzrin (alternately spelled Qazrin).

¹² There are a few exceptions to this rule. The exceptions are governed by special agreements between Israel and Syria, mediated by the UN Peacekeeping Forces [hereinafter: UNDOF], in which authorized individuals or crops can travel across the border under special circumstances.

¹³ Efrat, *supra* note 9, at 38.

¹⁴ Efrat, *supra* note 9 at 28-32. These claims are often pointed out by those wishing to establish an historical, Biblical connection of Israel with the Syrian Golan. Those who are pro-Syrian who wish to establish a firmer connection to the Syrian Golan often refer to the residents of the Syrian Golan as the "native inhabitants" or "indigenous residents."

¹⁵ Efrat, *supra* note 9 at 29-31.

settlement began in the early seventh century C.E., and from the 13th to 16th centuries was part of the Damascus district. During Ottoman rule in the 19th and early 20th centuries, the inhabitants of the Syrian Golan were primarily nomadic Bedouin.¹⁶ Afterward, Muslim Circassians banished from the Ottoman empire, Turkmen, and Arab farmers who had migrated from parts of the present-day Palestinian territories in the West Bank settled the land.¹⁷ Settlement of the Syrian Golan by Druze Arabs was said to have begun in the late 17th century when fighting between Muslim and Druze Arabs forced the Druze Arabs to emigrate from the Galilee to the area that is now the Syrian Golan. They were later joined by Druze Arabs from present-day Lebanon and the Galilee, who joined their settlements around what is now the village of Majdal Shams.¹⁸

Control over the Syrian Golan in modern times has largely been subject to the will of colonial powers. Zionist interest in the area and other parts of Syria were asserted early as the late 19th century when land southeast of the Syrian Golan was purchased and temporarily settled by Jewish families.¹⁹ The only official border agreement that explicitly mentions the Syrian Golan territory during World War I was the Sykes-Picot agreement regarding what was to become of the Ottoman Empire's land, concluded between France, England, Italy and Russia. The 1916 agreement divided the territory that is now Israel and the Syrian Golan into four parts, with the Syrian Golan making up part of the northernmost part, to be controlled by France.²⁰ Although the Sykes-Picot agreement fell through after Russia and Italy pulled out, Britain retained control of all of the territory and decided to respect France's claims to the territory and ceded control of Syria to France.²¹ Britain and France took twelve years to demarcate the actual borders of the Syrian Golan and the decision on the borders was ultimately up to them.²² As noted however,

...prior to the demarcation of new national borders and the establishment of British and French mandates over Syria, Lebanon, Palestine, Trans-Jordan, and Iraq, the

¹⁶ Efrat, *supra* note 9 at 30.

¹⁷ *Id.* at 32.

¹⁸ *Id.* at 33.

¹⁹ *Id.* at 39-40.

²⁰ *Id.* at 40.

²¹ *Id.*

²² *Id.* at 45.

Golan was part of the area that Zionists hoped to colonize and control²³... In 1919, the Zionist leader Chaim Weizmann rejected the Sykes-Picot agreement, the British-French arrangement to divide the Arab east among them, on the grounds that the Golan Heights came under French control as part of their mandate over Syria.²⁴

In 1920, the Zionists ultimately withdrew their demand for the Syrian Golan in exchange for gaining territory in the Galilee.²⁵ This later became the basis for some Israelis' claim that the Syrian Golan was "ripped away from the Land of Israel."²⁶ The French controlled Syria, including the Syrian Golan, until Syria gained its independence in 1946 – in part due to the anti-colonial, resistance efforts of many in the Syrian Golan villages in which many inhabitants of the territory lost their lives and entire Syrian Golan villages were wiped out.²⁷ Between 1949 and 1967, the border between Israel and Syria was governed under an armistice regime according to ceasefire agreement signed in July 1949, although both Israel and Syria violated the agreement throughout its tenure, escalating tensions that led up to the 1967 war.²⁸ As part of this agreement, the UN created a Demilitarized Zone (DMZ) in parts of the territory that did not correspond to the international boundary between what the agreement calls Syria and Palestine, which would be negotiated pending territorial settlement between the parties, but importantly,

²³ S. FAKHR EL-DIN, TWENTY YEARS OF ISRAELI OCCUPATION OF THE SYRIAN GOLAN HEIGHTS (1993), *as cited in* Efrat, *supra* note 9 at 42.

²⁴ Efrat, *supra* note 9 at 43.

²⁵ *Id.* at 44-45.

²⁶ *Id.* at 45. ("[V]ery few of the claims raised during the discussions were based on reasons rooted in the past. In fact, only the representatives of the Zionist movement made historically-based claims but these were not the official reasons. The Golan's Jewish history was not presented during the negotiations and it was not claimed that the Golan was part of the patriarchal inheritance. Although, the British and French dealt extensively with historical claims regarding other border sectors, they did not consider historical factors when dealing with the Golan."). *See also* G. BIGER, THE POLITICAL DELIMITATION OF THE GOLAN HEIGHTS DURING THE MANDATE PERIOD 1918-1948 (1993), *as cited in* Efrat, *supra* note 9 at 45, (discussing the officially demarcated lines of the Golan border, "...the final border of the Golan Heights is an artificial line along its entire length; it is not based on conspicuous landscape features... it seems that the territory itself was of no particular importance to the parties and it may be that they were not even familiar with it. It was the lines themselves that were important to the parties, the railroad tracks, the drainage canal, the irrigation channel, etc. and the adjacent land needed to secure them. The need for these lines effectively determined borders in the Golan Heights unlike other areas of the Land of Israel with negotiations focused on demands for territory and not for lines.")

²⁷ Efrat, *supra* note 9 at 47-48.

²⁸ *Id.* at 49.

over which no country was sovereign.²⁹ Nevertheless, in direct violation of the terms of the armistice agreement, Israel maintained that it had sovereign claim to the territory and ceased attending required meetings with the UN body governing the armistice agreement, the Israel-Syria Mixed Armistice Commission (ISMAC).³⁰ Both parties took actions intended to increase their claim over the territories within the demilitarized zone, with Israel amassing control over two thirds of the demilitarized area, and Syria one third.³¹ Over the course of the 17-year armistice agreement, the UN Secretary General remarked that Syria and Israel had submitted no less than 66,000 complaints about one another.³²

A key issue in the disputes over the demilitarized territory was access to water resources.³³ Other disputes centered around development of the demilitarized territories, military and police action within the DMZ, whether the international frontier borders or the armistice lines would be ultimately recognized as the permanent borders between Israel and Syria, efforts to claim sovereignty over parts of the territory, and disputes over the legal authority of ISMAC.³⁴ Although the two states had periods of cooperation and diplomatic pragmatism during this period, their disagreements over the armistice regime devolved into violent escalations and led to a deterioration of relations between the two parties that ultimately led up to the 1967 war.³⁵

Over six days in June 1967, as Jordan and Egypt fought Israel, Syria invaded Israeli territory and used the strategic position of the Syrian Golan Heights as a base from which to attack northern Israeli settlements even after Egypt and Jordan ceased fighting.³⁶ On the fifth day, Israel retaliated against Syria, advancing up the Syrian Golan Heights plateau and seizing the territory from Syria, moving 48 kilometers (30 miles) into Syria.³⁷

²⁹ Efrat, *supra* note 9 at 52. According to the agreement, the armistice line was “not to be interpreted as having any relation whatsoever to ultimate territorial arrangements,” General Armistice Agreement, July 20, 1949, Isr.-Syria, 42 V.N.T.S. 327, Art. 5 [hereinafter Israel-Syria Armistice Agreement].

³⁰ The Chief of Staff of the UN Supervising Organization in Palestine, *Report on the Israel-Syria Armistice Agreement*, ¶ 6, delivered to the Secretary-General, U.N. Doc. S/3353 (Jan. 11, 1955).

³¹ M. Brawer, *Israel’s Boundaries: Past, Present and Future, a Study in Political Geography* (1988) as cited in Efrat, *supra* note 9 at 62. For a summary of Israel and Syria’s positions, see *id.*, at 64.

³² Most of these complaints were disputes over the demilitarized zone. Efrat, *supra* note 9 at 58.

³³ For a detailed discussion of Israel and Syria’s disputes over water resources during the armistice regime, see Efrat, *supra* note 9 at 62.

³⁴ Efrat, *supra* note 9 at 62.

³⁵ *Id.* at 74.

³⁶ *Id.* at 80.

³⁷ *Id.* at 80.

A ceasefire was declared on June 10, 1967 at the request of the Syrians.³⁸ The fallout of the war was summed up well by the following:

In the Six-Day-War, Israel accomplished the expansionist aims that the pre-state diplomatic efforts and previous wars had failed to achieve. The war was a devastating blow for the Arab regimes. With the conquest of the West Bank and the Gaza Strip the remainder of Palestine came under Israeli control, Syria suffered the loss of 1,250 square kilometers (500 square miles) of its Quneitra province, including the provincial capital city Quneitra and the Golan Heights. Israel could not carry out a mass expulsion of the Palestinian population of the West Bank and Gaza Strip in 1967, but it repeated the expulsion tactics it had used against Palestinians in 1948 against inhabitants of the Golan. Israeli Minister of Defense Moshe Dayan ordered his troops to expel the population of the Golan. After the war, all that remained of two cities, 132 villages and 61 farms were six villages: Majdal Shams, Massa'ada, Boq'ata, Ein Qiniya, Rhajar [sic] and S'heita. All of the others had been destroyed.³⁹

While some of the territory including Quneitra was ultimately returned to Syria through the separation of forces agreement in 1974 after the October war (also called the Yom Kippur war) in 1973, the villages that had been in that territory were razed by Israeli forces immediately following the 1967 war.⁴⁰ And “only in a few places does any evidence of their existence remain.”⁴¹

The Druze in Israel and the Syrian Golan

The Druze in Israel comprise about 2% of the total Druze who exist mainly in the Middle East.⁴² They are ethnically Arab members of a secretive religious sect sometimes characterized as heretical that broke off of Ismaili Islam in 1018 A.D. when the Egyptian ruler Halif Hakim pronounced that he was the embodiment of God, and forbid the exercise of all other religions.⁴³ In Israel they reside primarily in the mountains of the Galilee, although a significant population also resides in the Occupied Syrian Golan

³⁸ *Id. at 80.*

³⁹ *Id. at 82.*

⁴⁰ Efrat, *supra* note 9 at 85 (discussing the razing of the villages after their populations were expelled).

⁴¹ Efrat, *supra* note 9 at 85.

⁴² P. HITTI, THE ORIGINS OF THE DRUZE PEOPLE AND RELIGION (1966) as cited in Shmuel Shamai, *Critical Sociology of Education Theory in Practice: the Druze Education in the Golan*, 11:4 BRIT. J. SOC. OF EDUC. 452 (1990).

⁴³ Hitti in Shamai, *supra* note 42.

(OSG) in the foothills of Mt. Hermon (*Jabal Al-Shaykh*).⁴⁴ They have been characterized by scholars as one of the most misunderstood communities in the Middle East,⁴⁵ and history and current affairs are replete with inaccuracies when it comes to information pertaining to the Druze.⁴⁶ One of the primary reasons cited for the confusion surrounding the Druze is their commitment to secrecy:

Druzes have often been misunderstood by outsiders because of their esoteric religious doctrine, the secretive nature that such a doctrine has instilled in them, and the variety of perspectives or divisions prevalent among members of the community. As a result, misconceptions have taken root, multiplied, and flourished with time. Druzes themselves, on the other hand, have not countered misconceptions about their community; rather, they have developed or reinforced attitudes of isolationism, secrecy, and indifference. This is perhaps due to the fact that only a select few among them are initiated into the Druze religious doctrine. More important, these initiated members are often unwilling to comment on the authenticity of the Druze manuscripts and later commentaries simply because most of them are not well versed with such clandestine matters. Those who are knowledgeable, however, feel that true faith resides in the hearts of individual seekers and not in the written word. Thus, spirituality and spiritual readiness comes from within.⁴⁷

While the Druze are frequently characterized as one ethno-religious community, particularly in Israeli official rhetoric and policy which will be addressed in this paper, they are by no means a monolithic community. Distinctions between the adherents of the Druze sect who reside in the Syrian Golan and the Druze in the Israeli Galilee will frequently be drawn in this study, although within those communities as well, all members do not always agree. In general, pro-Syrian Druze in the Syrian Golan preferred to be referred to by their national and ethnic identities as Syrian Arabs, as opposed to the pro-Israeli Druze in the Galilee, who are frequently referred to as Israeli Druze. Although all are of Arab heritage and all are of the Druze religious sect, the various political histories and disparate positions have informed the different communities' preferences for what they should be called.

⁴⁴ According to one account, the Druze began to settle in the foothills of Mount Hermon beginning after the sixteenth century. Hitti *in* Shamai, *supra* note 42. *Contra*. Efrat, *supra* note 9 at 33 (arguing that while the Druze elders speak of their settlement before the 17th century, there is no historical evidence from the period of Fakhr a-Din to prove this claim, or otherwise, and so their settlement began in the late 17th century in the Golan).

⁴⁵ *Supra* note 1 at xi, *see also* Jon Woronoff, *Editor's Note, in id. at ix*.

⁴⁶ *Supra* note 1 at xi.

⁴⁷ *Supra* note 1 at xxxi.

Occupation and Annexation of the Syrian Golan

The OSG has been under Israeli control since its capture in the war of 1967,⁴⁸ after which it was annexed by Israel in 1981 in contravention of the UN Charter through the passage of the Ramat Hagolan⁴⁹ Law or the “Golan Heights Law” which declared that Israel henceforth had full administrative and legal control over the Syrian Golan.⁵⁰ This law also replaced Israeli military administration over the territory with civil administration. Under unusual political circumstances, the legislation was passed by the Knesset (or Israeli Parliament) within a matter of hours of its introduction, and caused an immediate reprimand from the United Nations’ Security Council, the Arab League, and the United States in addition to other nations and international organizations.⁵¹ In contrast with the usual legislative practice, the law took effect on the same day it was passed.⁵² As will be discussed in more detail later, because International Humanitarian Law prohibits the acquisition of territory by force, the move was interpreted as an effective annexation (which is referred to as a *de facto* annexation since it is a legal fact despite Israel’s refusal to term it an annexation) and is illegal under international law⁵³ and as such has been condemned by the United Nations and most nations of the world.⁵⁴

⁴⁸ Immediately after its capture in 1967, Israel took measures interpreted as expressing its intention to keep the Golan, including immediately canceling the Syrian educational curriculum and instituting immediate military rule as opposed to administering the territories with a series of military orders as they did in the Occupied Palestinian Territories. Further, after only one month, they established their first settlement in the Occupied Syrian Golan, Mershom Golan. See Bashar Tarabieh, *The Untold Story of Suffering and Endurance: The Syrian Community on the Golan Heights*, 33:2 THE LINK 3-4 (Apr. - May 2000).

⁴⁹ Ramat Hagolan is the Hebrew name for the Golan Heights.

⁵⁰ Ramat Hagolan Law, 5742-1981, 36 L.S.I. 7 (1981) (Isr.). [hereinafter: The Golan Heights Law] at 6.

⁵¹ The circumstances are reported in numerous historical accounts of the 1981 events. See, e.g., Leon Sheleff, *Application of Israeli Law to the Golan Heights is Not Annexation*, 20 BROOK. J. INT’L. L. 334 (1993-1993) (“The three readings took place on December 14, 1981, with the opening session at 5:22 P.M. and the vote on the third reading taking place less than six hours later at 11:15 P.M. The following day, the law was formally promulgated. The law was passed in this manner at the behest of the then-Prime Minister Menachem Begin at a time when he could take the opposition by surprise. Begin had just left the hospital after a brief stay, and the leading opposition figures, Shimon Peres and Yitzehak Rabin, were out of the country.”).

⁵² Efrat, *supra* note 9, at 113.

⁵³ The unilateral annexation of a territory is illegal according to customary law derived from the principle in International Humanitarian Law that occupation should be temporary, see A. Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT’L. L. 580 (2006), as cited in Murphy, *supra* note 9, at 35.

⁵⁴ Numerous United Nations resolutions have documented the illegality of the Israeli occupation of the Syrian Golan, e.g., S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg. at 8, U.N. Doc. S/ INF/22/Rev.2 (1967) (calling for the withdrawal of Israeli armed forces from the territories occupied in the 1967 war,

No country formally recognized the annexation when it occurred.⁵⁵ However, many Israelis, as well as the Israeli government, consider the “Golan Heights”⁵⁶ part of Israel.⁵⁷

The Druze are the only Syrians remaining in the OSG because the only six villages in the Syrian Golan that were almost entirely comprised of Druze were spared in the 1967 war⁵⁸ when the over 100,000 other residents (about 95% of the total Syrian Golan population) residing in 163 villages and 108 farms⁵⁹ were forcibly expelled,⁶⁰

including the Syrian Golan). The United Nations Security Council, General Assembly and Economic and Social Council have all declared Israel’s decision to impose its laws, jurisdiction and administration on the occupied territories without legal effect (null and void) under international law. *See, e.g., id.*, S.C. Res. 338, U.N. SCOR, 28th Sess., 1747th mtg. at 10. U.N. Doc. S/ INF/29 (1973), S/RES/497 (1981); U.N. Doc. A/RES/61/27 (Dec. 1, 2006) and U.N. Doc. A/RES/61/118 (Dec. 14, 2006); ECOSOC 6309 U.N. Doc. E/2007/L.19 (2007) *as cited in* UN Information Service, *Economic and Social Council adopts texts on Palestinian people, Independence for colonial countries, social development* (2007) available at <http://www.un.org/News/Press/docs/2007/ecosoc6309.doc.htm> [hereinafter UN Information Service, Resolutions Condemning Syrian Golan Annexation].

⁵⁵ Efrat, *supra* note 9 at 114.

⁵⁶ “Golan Heights” typically refers to the portion of the Syrian Golan that was occupied beginning in 1967, *see* Murphy, *supra* note 9, at 9.

⁵⁷ *See* Website of the Israel Ministry of Foreign Affairs *available at* www.mfa.gov.il/MFA/History/Early%20History%20-%20Archaeology/Katzrin%20-%20A%20Village%20in%20the%20Golan (arguing that the Golan contains some of the state of Israel’s premier archeological and natural sites, including the “ancient Jewish village of Katzrin”, containing the remains of an ancient synagogue that existed in a [Syrian] Golan village). More accurately, Katzrin is an illegal settlement town, constructed by Israel in modern times around the remains of the synagogue wall that was found *after* the occupation of the Syrian Golan. *See also* Israel Nature and National Parks Protection Authority Website for information on the Gamla Nature Reserve in the [Occupied Syrian] Golan which also contains the remains (excavated after the occupation of the Syrian Golan) *available at* www.parks.org.il/ParksENG/company_card.php3?CNumber=508481. No mention is made in these official sources of the Syrian Golan as being anything other than a part of Israel.

⁵⁸ These villages included Majdal Shams (the largest by far), Buqa’ayta, Masadda, ‘Ayn Qinea, S’hita, and Ghajar (also written sometimes as Rajar). The villages with the exception of Ghajar (which overlapped with the Lebanese border) existed within a few kilometers of each other near the ceasefire lines. All were almost entirely Druze except for Ghajar, which was mainly Alowite. *See* Mara’i, *supra* note 5, at 79. Many historians allege that the Druze were spared at least in part based upon what turned out to be the mistaken assumption by Zionist forces that the Druze of the Syrian Golan, like their brethren in the Galilee, would ally themselves with the state of Israel. *Id.* at 80. Another explanation is that the elders who remembered when members of their village fled during the fighting of the Great Syrian Revolt in 1925-27 who returned to find their village of Majdal Shams destroyed took great pains up to and including physical intervention to ensure that villagers did not leave during the fighting in 1967. *Id.* *See also* Shay Fogelman, *The Disinherited: What Happened to the 130,000 Syrian Citizens Living in the Golan Heights in June 1967?*, Haaretz, July 30, 2010 (describing recently declassified documents that demonstrate that the Druze were spared as a matter of IDF policy. Elad Peled, formerly Commander of the IDF’s 36th division during the 1967 war, spoke about the policy in a recently declassified report: “Peled recalls there was a clear policy determined by the IDF high command - “and it must have come down from the political echelon” - not to harm the Druze and Circassian villages. “For numerous reasons, the state had an interest in keeping them there,” he says, although he does not remember what the policy was in regard to other inhabitants”).

⁵⁹ Sakr Abu Fakhr, *Voices from the Golan*, 29:4 J. Palestine Stud. 5-36 (Autumn 2000).

⁶⁰ Fogelman, *supra* note 58 (pointing out that many prominent Israeli officials disputed the claim that the Syrians were forcibly expelled, stating that they fled, and this account of the history of the Syrian Golan has appeared in Israeli textbooks, official documents, and reports by Israeli officials to the United Nations

fleeing mainly to Syria.⁶¹ At the time of the foundation of the state of Israel in 1948, the Syrian Golan was a recognized part of Syria, under Syrian sovereignty,⁶² and the only Israeli Druze were those of the Galilee and other parts of Israel (mainly in the north). The Galilee Druze resided in villages of a primarily traditional nature, led by Druze elders in a strict politico-religious hierarchy. During the 1948 War, which many Israelis refer to as the War of Independence, Druze elders allied themselves politically with the Zionist forces,⁶³ leading to the establishment of such close ties with Israel that the Galilee Druze are the only non-Jewish minority to be compulsorily conscripted into the Israeli Defense Forces.⁶⁴ The relationship between the Galilee Druze and the Zionists was viewed through a lens of historical friendship and religious parallels,⁶⁵ as both Jews and

when confronted with claims that the population was forcibly expelled, and demonstrating that in personal accounts, Golan residents and soldiers who were present at the time contested this narrative, providing evidence that not only were the residents expelled, but many of those who attempted to return to their homes were arrested and then forcibly expelled before their villages were razed.).

⁶¹ *Supra* note 59. The other villages were comprised of Syrians of a diverse array of ethnic and religious descents, including Circassians, Alowite, Christians and Muslims who had coexisted together peacefully for ages including with Jews who had lived beside them in ancient times before the formation of the state of Israel. The concentrations were as follows: 13,500 Circassians were concentrated mainly in Qunaytra and the villages of al-Mansura, al-Adnaniyya, al-Qahtaniyya, ‘Ayn Ziwan, al-Ghassaniyya, al-Juwwayza, Bir ‘Ajam, al-Burayqa, al-Khushniyya, al-Faham, Fazara, Ruwayhina, and al-Faraj; Turkomans consisted of 4 percent of the population and were concentrated in the villages of Hafar, Kafr Nafakha, al-Sindiyyana, al-Razzaniyya, al-Ghadiriyya, al-Husayniyya, al-‘Ulayqa, al-Mughir, al-Dabiya, N’aran, Dayr al-Rahib, al-Ahmadiyya, ‘Ayn al-Simsim, ‘Ayn ‘Aysha, al-Juwwayza, and al-Mumsiyya; Kurds and Armenians in Qunaytra; Maghribis in the villages of ‘Abdin and M’arraba, and 10,000 Palestinian refugees particularly in the Butayha region. *Id.*

⁶² Michelle Strucke, Field Observations in village of Majdal Shams, Syrian Golan Heights (Summer 2008) [hereinafter Fieldwork]. Many Syrian nationalist vestiges remain in the Occupied Syrian Golan, including statues of Syrian nationalist figures from the Syrian Revolution in 1921. *Id.*

⁶³ *Supra* note 4. See also Mara’i, *supra* note 5 (discussing consequences of the “Palestinian Druze” (or Galilee Druze)-Alliance with Zionist authorities on Palestinian-Golan Druze-relations).

⁶⁴ *Supra* note 4 (arguing that other members of religious minorities attempted to voluntarily conscript into the Israeli Defense Forces including Sunni Muslims and Christians, but none were granted approval to sign up). See *id.* (discussing the Druze compulsory conscription through the passage of the compulsory conscription act on 3 May 1956). See generally Martin Isleem, *Colloquial Arabic as a Policy Tool: the Case of the Druze Heritage Curriculum in Israel* (2009) (unpublished manuscript, on file with author) (discussing the Palestinian reaction to the Druze conscription into the IDF, for example that Palestinians and Arabs perceived this as a “stabbing in the back”).

⁶⁵ Laila Parsons, *The Druze and the Birth of Israel, in The War for Palestine 60–70* (2007). See Falah, *supra* note 5, (describing the common understanding Jews have with the Druze and their sympathies when it comes to minority issues and the dangers of assimilation, “There is the [Druze] fear of assimilation within the Israeli society and the Arab culture... Feeding these voices [calling for taking educational action], too, is the feeling that an improvement has taken place in the status of the Druzes in Israel because of their good relations with Jews and their contribution to the state. And, indeed, an attentive ear has been found amongst the Jewish public, which as a minority in its Diaspora understands the Druzes’ deep feelings infighting against the trends of inter-ethnic mixing and assimilation.”).

Druze had been persecuted minorities⁶⁶ in “closed” religions that seldom, if ever, accepted new adherents.⁶⁷

Both groups, according to this narrative, could also constitute a “nationality” or an “ethno-religious community,” since both prohibit or discourage intermarriage, leading some to characterize their adherents as members of a distinct ethnic group. In the Druze sect, intermarriage was prohibited, and converts were not accepted into the sect under any circumstances. Over time, this led to the ethnic isolation of the Druze, since they on the whole were not intermixing with members of any other ethnic groups. The Syrians of the OSG prefer to be called Arab in light of their Arab ethnicity, and Syrian due to their nationality. They do not consider being Druze a distinct ethnicity, but as being a member of a religious sect.

The alliance between the Galilee Druze and the Zionists led to a strong nationalistic presence of Israeli (Galilee) Druze in the armed services and in Israel as a whole, gaining them protection as a special minority and the establishment of a special, separate educational sector governed by the Israeli Ministry of Education, Culture and Sport, based upon Druze history as understood by the Zionists at the time of the alliance. It however has been applied to the residents of the Syrian Golan despite stark political differences between the two groups, including the major difference that the residents of the Syrian Golan are living under occupation and have overwhelmingly refused the offer of Israeli citizenship given them (or to many, unsuccessfully forced upon them) by Israel.⁶⁸ Residents of the Syrian Golan, including those who are Druze, do not serve in the Israeli military, nor for the most part are they citizens of Israel.⁶⁹ Rather, their

⁶⁶ The Druze have suffered almost constant persecution since their founding and as a result have declared much of their sacred text secret to only some elite members of their religion. *See generally* Hitti in Shamai, *supra* note 42. *See also supra* note 1 at xxxi (discussing the Druze sect’s strict hierarchy of the initiated and uninitiated into the religion, “Unlike the early sages of Christianity, who were the ones to study the Bible and transmit its meaning to congregations, Druze sages have studied their scriptures and kept the spiritual knowledge to themselves; insights were shared only with one’s spiritual equals. In the eyes of these sages, not all people are prepared to absorb spirituality”). For a more lengthy discussion of the initiated and uninitiated in the Druze community, *see id.* at p. xxxv – xxxvii.

⁶⁷ The degree of “closedness” of the Druze sect is stricter than that of the Jews. The Druze have not accepted any converts since 1056 A.D., while many Jewish denominations accept a very limited number of converts every year. *See generally* Hitti in Shamai, *supra* note 42 (discussing the origins of the Druze religion and the closing of the gates of the religion).

⁶⁸ Mara’i, *supra* note 5, at 83-84.

⁶⁹ Some residents of the Syrian Golan have accepted Israel’s offer of citizenship, although for doing so they have been ostracized and excommunicated by the Syrian Golan community. The decision to

nationality status is “undefined” (the same political status in Israel as the Palestinians in the Occupied Palestinian Territories, although the residents of the Syrian Golan typically enjoy freedom of movement throughout all of Israel⁷⁰) and Israel considers them permanent residents. Most have outwardly resisted the control of their territory and education system by Israel since its occupation in 1967 and its illegal annexation of the territory in 1981.⁷¹ Citizenship and identity have played a major role in the context of this resistance. According to one history of the annexation of the Syrian Golan, the residents of the OSG continue to claim, “Our war with Israeli [sic] is conducted on three primary levels: identity, land and water. Even after all the years of Israeli occupation and annexation, we have remained Syrians.”⁷²

Application of the Israeli Education System

Education is compulsory in Israel from kindergarten up until the twelfth grade, as of 2007 when the Compulsory Education Law of 1949 (that had been last amended in 1978 to extend to students up to tenth grade) was amended again, expanding the requirement from tenth grade to twelfth grade.⁷³ The Israeli public education system is divided into several sectors that critics claim are at worst discriminatory, and proponents claim are at best reflective of the heterogeneity and multiculturalism of the Israeli populace. Israeli public education is divided into three sectors on the basis of religion and ethnicity, one

excommunicate those accepting Israeli citizenship, banning them from weddings, funerals, and all social and religious events and even from dealing with other community members was made at a general meeting called by the Syrian Golan’s Druze elders in March 1981 that was attended by over 6,000 residents. *See* Mara’i, *supra* note 5, at 83. *Cf.* Efrat, *supra* note 9, at 121 (noting the text of the public declaration, “Every person in the occupied Syrian Golan Heights who dares to replace his Syrian citizenship with Israeli citizenship is harming our dignity, national honor, religion and traditions, and he will be ostracized from community life and excommunicated from our religion. All others will be forbidden from having any relations with such a person.”).

⁷⁰ While the residents of the OSG enjoy freedom of movement throughout Israel and for the most part, the OPT (excluding Gaza), they are granted only extremely limited freedom of movement to Syria and denied travel to other Arab states which do not accept travel from anyone carrying Israeli travel documents (this includes nearly all the Arab states except for Egypt and Jordan, which have peace agreements with Israel).

⁷¹ Mara’i, *supra* note 5, at 83-84. This resistance included a general strike that lasted uninterrupted for over five months. During the strike, Israeli forces blockaded the town of Majdal Shams, not even allowing in food or medical supplies from the International Red Cross, as residents resorted to building their own sewage system and to taking other measures to resist Israel’s attempts to force them to accept Israeli citizenship. *Id.* *See also* Efrat, *supra* note 9, at 121 (describing the general strike).

⁷² Efrat, *supra* note 9, at 124.

⁷³ Compulsory Education Law, 5709–1949, 3 LSI 125 (1949) (Isr.), as amended by Compulsory Education Law Amendment No. 7, 2007, and Compulsory Education Law Amendment No. 11, 1978. *See also* Amendment No. 5, 1969, as cited in Falah, *supra* note 5.

Jewish, one Arab, and one Druze. The Jewish sector is divided into a State-secular education system and State-religious education sector.⁷⁴ The Druze sector used to be a part of the Arab sector, but was divided into two during what scholar of Israeli Druze relations Kais Firro calls the attempt to create Druze “particularism” in Israel.⁷⁵ Firro claims that an Israeli policy of “‘divide and sub-divide’ - or ‘divide and rule’ – was... in place and focused primarily on the Druzes.” The policy, according to Firro, aimed at “weaning them away from the larger Palestinian Arab community by fostering ‘Druze particularism, the notion that Druze ethnicity and identity make them distinct from other Arabs.’”⁷⁶

The official aims of education in the Druze sector of Israel are:

[T]o base education on Druze and Arab cultural values, as well as on the values of achievements in science, and the attainment of peace between Israel and its neighbors. The love of the homeland is common to all its citizens, and thus the Druze are loyal to the State of Israel, and cooperate in the building and running of the state. Druze education aims to emphasize the special as well as the common interests of all citizens, the special ties between Jews and Druze; an understanding of Jewish culture; the development of an Israel-Druze entity; the firm establishment of Druze youth in the culture of the community; and the common destiny of all Druze communities in all their lands.⁷⁷

The Israeli authorities achieved success in this policy at least with the Galilee Druze. By legally designating them a separate religio-ethnic group, and replacing the word “Arab” on their national ID cards with “Druze” under “nationality”, in addition to other

⁷⁴ See generally MINISTRY OF EDUCATION, CULTURE AND SPORT, FACTS AND FIGURES: BASIC EDUCATIONAL CURRICULUM OF ISRAEL 2004 (Isr.), Dalia Sprinzak, et. al., (Yedida Segev ed., Sagir International Translations, Inc. trans.) [hereinafter Israel Educational Curriculum] available at <http://planipolis.iiep.unesco.org/upload/Israel/Israel%20Facts%20and%20figures.pdf>

⁷⁵ Firro uses the term particularism to denote the sectarian identity that many ethno-religious communities in the pre-modern era held prior to their adoption of the notion of nationalism. *Supra* note 4.

⁷⁶ *Supra* note 4. See also State papers of the Foreign Ministry /2402/28, Letter from Dr. H. Hirschberg to Palmon, (Oct. 18, 1949) (Isr.) (on file with Israel State Archives, Jerusalem) as cited in Lina Kassem, PhD Dissertation, The Construction of Druze Ethnicity: Druze in Israel between State Policy and Palestinian Arab Nationalism, (2005) (unpublished Ph.D. dissertation, University of Cincinnati) (on file with author) at 120 (discussing Hirschberg’s recommendations on how to best integrate the Arab, non-Jewish population in Israel to an inter-ministerial committee of the Israeli government shortly after the founding of the state of Israel, in which he concluded that the most important task was to ensure that the Arab groups did not form a single Arab minority and suggested the creation of a separate Druze educational curriculum).

⁷⁷ Falah, *supra* note 5, as cited in Randa Abbas, Druze Education in Israel, (Ph.D. Dissertation, Western Galilee College) (Abstract) available at <http://www.wgalil.ac.il/files/AbstracRandaAbbas.pdf>.

official measures,⁷⁸ the Israeli authorities capitalized on their early political alliance and succeeded in creating the image of a distinct and separate ethnic group, if not “nation” aligned strategically and historically with Jews.

By some accounts, particularly by Galilee Druze working actively with the Israeli government, these distinctions were necessary and in fact called for by members of the Druze communities of the Galilee. Salman Falah, formerly the appointed coordinator of the earliest directors-general committee in Israel for Druze affairs in 1975, and later serving as Director of Druze Education in the Ministry of Education and then deputy director general, was one such voice. According to his influential narrative, the Galilee Druze called for educational action and other means of publicly strengthening Druze identity because they were afraid of assimilation within Israeli society and within Arab culture, and yearned for “special ethnic expression that was precluded during the Ottoman and British Mandatory periods”.⁷⁹ By his account, the government of Israel responded to these voices, creating new policies “to cultivate the ethnic and cultural uniqueness of the Druzes.”⁸⁰ For example, on June 1, 1975, in Resolution 702, the government decided to separate Druze matters from the Arab ministries and handle them separately.⁸¹ And Falah was chosen to be coordinator of the implementing committee for Druze affairs.⁸²

According to Falah, the government was responding to the recommendations of two earlier committees it created – one public and one legislative, through the Knesset – to explore the causes of Druze “bitterness and demonstration”⁸³ during that time period, and “to chart new ways of improving relations between the Druzes and the state of Israel.”

⁷⁸ Other measures included a lack of recognition of Eid el-Fitr (a Muslim holiday) among the Druze, the politicization of Druze shrines, and most notably the compulsory conscription of Druze into the Army via the ‘Minorities Unit’. See Israel State Archives, FM 2570/11, Letter from Ya’acov Shim’oni, Official of the Foreign Ministry of Israel, to E. Sasson (Aug. 16, 1948) (Isr.) (on file with Israel State Archives, Jerusalem) as cited in *supra* note 4 at 42 (discussing Shim’oni having “freely admitted that the establishment of the Minorities Unit contributed little or nothing to the Israeli army- its true purpose was to use the Druzes as ‘the sharp blade of a knife to stab in the back of Arab unity.’”).

⁷⁹ Falah, *supra* note 5, at 141.

⁸⁰ Falah, *supra* note 5, at 141.

⁸¹ Falah, *supra* note 5, at 141.

⁸² Falah, *supra* note 5, at 141.

⁸³ The bitterness and demonstration he referred to most likely referenced the protests by Druze, Arab intellectuals at the time, particularly those involved with the Druze Initiative Committee (LMD), which was founded in 1972. The protests organized by this committee were cited as one of the factors that spurred the creation of the two Israeli-government committees to study problems with the Druze minority. Kassem, *supra* note 76, at 121-122.

Both ultimately recommended removing Druze affairs from the stewardship of the Arab departments,⁸⁴ and both emphasized youth issues, particularly education.⁸⁵ The committee headed by Haifa University's Dr. Gabriel Ben-Dor,

saw an urgent need to strengthen Druze consciousness through developing a special curriculum for the Druze schools. It expressed concern that Druze children did not gain familiarity with the history of their people, tradition, or religion. The committee also expressed its belief that with the introduction of a curriculum in these areas, the feelings of frustration stemming from problems of identity would disappear.⁸⁶

In their report, the Committee stated:

The committee believes that the state of Israel has underestimated the necessity of the education for the Israeli-Druze consciousness and that [the state] has done little to educate and inculcate the Druze youth with Israeli-Druze consciousness. This has done damage to the state and its image. When the compulsory conscription's law was applied on the whole Druze community, the state should have realized it needed also to encourage the intellectuals, to develop the foundation of Israeli-Druze consciousness as an ideological- cognitive basis that could provide Druze youth with a logical explanation of and psychological background to his complete identification with the state and his readiness to fight for its cause, and to preserve meanwhile his Druze particularity. The committee believes that the present curriculum in the Druze schools and the way of imparting it to the Druze child and teenager does not contribute to the deepening of Druze-Jewish brotherhood...preparing an independent Druze curriculum with its own texts is of crucial significance, and will serve the continuation of the community's particularist existence.⁸⁷

By other accounts, the recommendations to establish a separate Druze educational curriculum began as far back as 1949, shortly after the foundation of the state of Israel, and originated not in Druze voices, but in Jewish voices from within or closely related to the Israeli government. In 1949, an inter-ministerial committee of the Israeli government requested Dr. H. Hirshberg's recommendations on how to best integrate the Arab, non-Jewish population in Israel into the new state. Hirshberg concluded that the most important task was to ensure that the Arab groups did not form a single Arab minority that would "be Arab in its national identify [sic] and Muslim in its religion." He believed

⁸⁴ Falah, *supra* note 5, at 210.

⁸⁵ *Id.* One committee presented recommendations in December 1974 and the other in May 1975.

⁸⁶ Falah, *supra* note 5, at 142.

⁸⁷ Knesset Report, *quoted in* KAIS M. FIRRO, *THE DRUZES IN THE JEWISH STATE* (1999) 227 *as cited in* Kassem, *supra* note 76, at 123.

that education would be the most effective tool with which to divide the Arab populace, advocating for the creation of separate schools for different Arab minorities, and for the creation of a separate Druze educational curriculum.⁸⁸

Whatever their original origins, the discussions surrounding developing special Druze curricula stopped short of advocating for teaching the Druze religion to Druze pupils in school. It was suggested, since out of all of the religions represented in the Israeli education system, only Druze do not learn their religion as a matter of formal study, but the Druze spiritual leadership rejected it outright. Falah speculated as to their reasons:

The opposition of the spiritual leadership to religious studies emanates from the principle of secrecy of the Druze religion, which principle is a red line not to be crossed. Possibly, too, there was a fear that in time a plutocratic religion might develop; also, that by granting the ministry proposal, the Druze leadership would be inviting a foreign body to intervene in matters of their religion.⁸⁹

According to Falah, however, many of the fears of the spiritual leaders were allayed once the textbooks , were introduced for the “revolutionary innovation,”⁹⁰ the new Druze heritage curriculum.⁹¹ He claimed that they found the textbooks actually preserved heritage and brought youth closer to their religion, drawing on subjects as diverse as Druze religious law, history, folk literature, dance, and music.⁹² Falah dismissed critics of the policy separating Druze from Arab as mainly leftists and nationalists who protested for ideological reasons.⁹³ However, some of those critics, including members of the *Lejnat al-Mubadarah al-Durziya* (Druze Initiative Committee or LMD), which was opposed to the policy of creating a distinct Druze identity, reported not just with sweeping critiques of the texts, but with lists of the specific factual errors in the government’s new Druze textbooks, particularly related to history.⁹⁴ For example, they criticized the new textbooks for including geographical regions in the reverse of their actual order.⁹⁵ And in the Galilee, some teachers refused to teach the Druze heritage

⁸⁸ *Supra* Letter from Dr. Hirschberg, as cited in Kassem, *supra* note 76, at 120.

⁸⁹ Falah, *supra* note 5, at 142.

⁹⁰ Falah, *supra* note 5, at 144.

⁹¹ Falah, *supra* note 5, at 143.

⁹² Falah, *supra* note 5, at 143.

⁹³ Falah, *supra* note 5, at 143.

⁹⁴ Galeb Saif, Druze Initiative Committee, *Al Zytoonah* (Jan. 1992) at 23, (providing specific examples of errors about the history of the Druze people published in several government authors’ textbooks that were utilized in teaching history in Druze schools) as cited in Kassem, *supra* note 76, at 123.

⁹⁵ Saif in Kassem, *id.*

components of the curriculum, and the lessons had to be taught by conscripted and uniformed Druze soldiers for the IDF.⁹⁶

The three educational sectors each contain their own section on heritage and/or culture. However, in line with what critics term Israel's "divide-and-rule" policy, only the Arab and Druze sections are mutually exclusive. Jewish heritage is infused throughout the entire Israeli curriculum, including in civic education, history, and social studies, despite comprising an additional separate section taught only in the two sections of the Jewish sector. This is because a stated aim of the curriculum is to "foster Zionist values and instill cultural heritage."⁹⁷

The "cultural" heritage of the Druze and the Arabs are taught only in their respective sectors. Although Druze are Arab, it was seen as essential by scholar Haim Blanc who was later minister of Arab Affairs, to define the Druze as a separate nation, distinct from Arabs and particularly Muslims.⁹⁸ Blanc, when asked if the Druze were Arab, had the following to say:

As it stands [this question is] unanswerable, since the term "Arabs" is used loosely to cover a multitude of meanings... In a cultural sense, however, the Druzes are not only "Arabs" but, as it were, "Arabs with a vengeance"... The distinctiveness of the Druzes is nevertheless undoubted, and its origins must be sought in their religion. [The community] was born and grew in a hostile environment; it therefore adopted the principle of *taqiyya*, a sort of protective coloring with religious affiliations, to be "Christian with the Christians, and Muslim with Muslims"... The most recent instance of this outward assimilation may be seen in present-day Israel.⁹⁹

Many Israelis mistakenly characterized *taqiyya* as a uniquely Druze characteristic, though it in reality derives from Shi'i Islam,¹⁰⁰ and a preoccupation with the quality is reflected in the Druze curriculum, exemplifying just one of the type of

⁹⁶ Interview with Dr. Martin Isleem (April 12, 2012).

⁹⁷ Israel Educational Curriculum, *supra* note 74.

⁹⁸ Falah, *supra* note 5, at 143 (discussing the opposition to this policy, who were either "spiritual leaders, who feared that it would lead to a disclosure of the secrecy of their religion; and nationalists and leftists, who saw in the study of Druze heritage a separation of the Druzes from the Arabs and a strengthening of the Druze identity," noting that once the curriculum surfaced, however, the spiritual leaders became supporters of the policy.).

⁹⁹ Haim Blanc, *Druze Particularism: Modern Aspects of an Old Problem*, 3 MIDDLE EASTERN AFFAIRS Nov. 1952, 315-21 as cited in *supra* note 4, at 47.

¹⁰⁰ *Taqiyya* translates to "prudence" and "carefulness" and derives from a practice in Shi'i Islam of protecting one's inner faith by allowing oneself to adopt Sunni Muslim practices. It is therefore not unique to the Druze and in fact is the same concept used by 'Alawi and Ismai'li's to protect their faith in the same manner. *Supra* note 4, at 47-48.

mischaracterizations and factual errors with which the curriculum is charged.¹⁰¹ Another was the selective reading of history that ignores the many Galilee Druze who participated in the Arab Revolt of 1936-1939, and focuses instead exclusively on those Druze who were pro-Zionist. Critics interpreted this as an attempt by Israeli authorities to generalize all Druze as naturally exhibiting a love for Jews based on their similar histories of persecution.¹⁰² And the presentation of Druze as a “non-Muslim minority with an endemic animosity toward the Muslim majority”¹⁰³ was another example of potentially harmful errors within the curriculum – one that did not encourage friendly relations between Arab Muslims and Arab Druze.

The Arab sector in Israel has been the subject of much criticism, as it is said to racialize indigenous Palestinian Arabs and present them in an Orientalist light as primitive and backward.¹⁰⁴ It has been the focus of debates beginning before the founding of the state that continue to this day about textbooks, curricula, and Israel’s objectives vis a vis its Arab minority.¹⁰⁵ Further, the unequal distribution of funding relative to the number of students in the Arab sector resulted in underdevelopment of the

¹⁰¹ Falah, *supra* note 5, at 2 (“As long as the Druzes remain a minority in the Middle East, it seems that the question of their origins and identity will remain a subject for disagreement. The various claims made to their Arabism or their separate status are usually for political reasons, or in order to protect their uniqueness and their very existence. This is quite acceptable to the Druzes, since a basic principle of faith, the “Taqiyya,” explicitly commands identification with the people among whom they live in order to protect themselves from persecution. The Druzes, therefore, even today continue to celebrate some of the Moslem festivals (i.e., the al-Adha Feast [Sacrifice]) and perform marriage ceremonies and burial services according to Moslem traditions. By following these customs, the Druzes are able to avoid revealing the basics of their own faith, which are kept secret and are in fact unknown to the majority of Druzes themselves.”).

¹⁰² Lisa Hajjar, *Making Identity Policy: Israel’s Interventions Among the Druze*, 200 MIDDLE EAST REPORT, MINORITIES IN THE MIDDLE EAST: POWER AND THE POLITICS OF DIFFERENCE, Jul.-Sep. 1996, at 3.

¹⁰³ *Id.*

¹⁰⁴ See generally Present Absentees, *supra* note 7; see also Separate and Unequal, *supra* note 7; see also Coursen-Neff, *supra* note 6 at 749; see also HRW Report on Discrimination in Israel’s Schools, *supra* note 7; see also Official School Curricula, *supra* note 7.

¹⁰⁵ The Israeli Ministry of Education approved a high school civics textbook called “Taking the Civil Road” in 2011, but recently banned it due to what officials termed factual inaccuracies and what critics called its ‘unbalanced’ portrayal of Arab history and politics. The textbook stated that Palestinian Arabs did not just flee from the newly created state of Israel in 1948, but were forcibly expelled, puts much of the blame for poor relations between Arabs and the state on the state itself due to its lack of integration of Arab symbols or identity into the national identity, and calls for a constitution to protect minority rights in Israel. The issue was important enough to merit calling an emergency session of the Education Committee of the Israeli Parliament, the Knesset, to discuss banning the book. See Ben Lynfield, *Israel bans a textbook promoting Arab rights as ‘unbalanced’*, CHRISTIAN SCIENCE MONITOR, April 23, 2012, available at <http://www.csmonitor.com/World/Middle-East/2012/0423/Israel-bans-a-textbook-promoting-Arab-rights-as-unbalanced>

educational system in Arab areas, reinforcing negative stereotypes about Palestinian Arabs. Similar problems plagued the Druze sector upon its creation in 1976, from a shortage of school buildings, classrooms and equipment to a staff of mostly unqualified teachers.¹⁰⁶ In fact, in 1975, “almost no school buildings were erected in the Druze sector.”¹⁰⁷ As will be shown, evidence of these two trends also exists in the education system in the Occupied Syrian Golan. Problems with the Arab sector’s handling of Druze issues in Israel was cited as one of the reasons why the Druze should be separated from the Arab sector.¹⁰⁸

The Druze education sector, established by the Committee for Druze Culture and Education within the five years following the 1975 committee recommendations on Druze education,¹⁰⁹ lagged noticeably behind the two Jewish education sectors, and the Israeli government did not formally commit to raising the level of services in the sector to the level in the Jewish sectors until 1987.¹¹⁰ While the law requiring compulsory education for all students had been in effect since 1949, requiring students to attend school at least until eighth grade, it was implemented only gradually for girls in the Druze sector, leading to the enrollment of 90% of girls by 1979-80 and 97% by 1986-87.¹¹¹

Some such as Falah have characterized the Druze and Arab sectors’ inequality from the Jewish sectors’ as an inevitable result of the differing periods of time for which they have existed. For example, the Jewish system existed several decades before the establishment of the state of Israel, the Arab system for over 60 years, and the Druze system for over 30 years. “This means that the point of departure of the three systems is not equal, and that the gap that had been created over the course of the decades, both in the physical conditions and pedagogic needs, could not be avoided.”¹¹² Immediately after making this claim, however, Falah contradicted himself by noting that the Druze sector in

¹⁰⁶ Falah, *supra* note 5, at 210, 225. (reporting that up to 60% of teachers in the Druze sector in 1976 were unqualified, problems that were also common to the Arab sector).

¹⁰⁷ *Id.*, at 228.

¹⁰⁸ *Id.*, at 210. Some such as the members of one local council (Daliat al-Carmel) even argued for changing the primary instruction for Druze in Israel from Arabic to Hebrew.

¹⁰⁹ *Id.*, at 211.

¹¹⁰ *Id.*, at 214.

¹¹¹ CENTRAL BUREAU OF STATISTICS, STATISTICAL ABSTRACT OF ISRAEL NO. 38 (1987) *as cited in* Falah, *supra* note 5, at 214. This was around the same time that Syria reported to the United Nations that it had increased female enrollment in schools to those or higher levels.

¹¹² Falah, *supra* note 5, at 210.

its first twenty years already was approaching the levels of the Jewish sectors and had already surpassed the level in the “non-Jewish systems”¹¹³ (presumably the Arab sector). This seems to suggest that the Druze sector may have developed more effectively and rapidly than the Arab sector due to factors other than just the inevitable passage of time, such as differential planning or funding by the state of Israel.

The curriculum in the Syrian Golan and the specific exigencies of Syrian Golan relations will be discussed next in order to provide background for the ensuing evaluation of Israel’s implementation of the right to education in the Occupied Syrian Golan.

State of Education in the Syrian Golan

Two major problem areas exist in the educational system in the Occupied Syrian Golan that broadly parallel the problems in the Arab sector.¹¹⁴ The first is related to the allocation of resources and administrative decisions. The second relates to the educational content of the curriculum. After discussing these obstacles to the realization of the right to education in the Occupied Syrian Golan, a discussion of the residents’ efforts to provide supplemental education will ensue.

Allocation of resources and administrative decisions

According to scholarly reports, resources were unequally allocated to the educational institutions in the Occupied Syrian Golan, so much so that residents often had to pay out of pocket to establish programs guaranteed elsewhere. Kindergartens for instance were for the most part (with the exception of a public kindergarten provided in one village) not provided for residents until they took it upon themselves to pay for their establishment, and after doing so the schools were forcibly closed by the Israeli authorities.¹¹⁵

During the period of Syrian rule over the Syrian Golan, educational expenses such as the cost of textbooks, school overhead, and “everything except pens and notebooks” were

¹¹³ Falah, *supra* note 5, at 210.

¹¹⁴ Education in the Arab sector has been found to be discriminatory according to several studies including most notably Coursen-Neff, *supra* note 6.

¹¹⁵ Shamai, *supra* note 42 (noting that after closing the local Syrian kindergartens, the Israeli authorities also closed the public kindergarten).

provided free to residents by the Syrian government.¹¹⁶ However after two years of maintaining this policy, the Israeli authorities began to charge for textbooks as well as for other expenses. In the words of a former teacher and head of a school in the Syrian Golan for nine years, including during the time of the capture and occupation of the Syrian Golan by Israel, students had to pay for books and “the state [of Israel] offered only the building itself and furniture (in many cases by the taxes of the people of the municipality).”¹¹⁷

The new educational system in the Occupied Syrian Golan was run by Israeli authorities, and local residents had little to no input into the design or implementation of educational policies or curricula.¹¹⁸ Like the Arab sector, the Druze sector is one of the educational sectors in Israel most lacking in autonomy, and as a part of the Druze sector in Israel, the educational system in the OSG was no exception. Unlike in the education system under Syria, in the new educational system under Israeli administration, teachers were required to be adherents of the Druze sect. Further, because the Druze teachers were residents of the Syrian Golan and were not citizens of the state of Israel, they were not granted seniority status and were instead governed by one-year contracts. According to personal accounts of residents of the Syrian Golan, this allowed the Israeli authorities to effectively silence teachers whose political views they did not agree with by controlling those teachers’ terms of employment, basing job opportunities on their perceived cooperation with the state of Israel rather than on merit. Despite the relative political stability of the Syrian Golan, teachers through the duration of the occupation and to the present day are routinely dismissed for demonstrating “any level of political awareness.”¹¹⁹

Standards for teachers’ qualifications were much lower than throughout Israel. Often teachers were considered qualified if they simply attended a brief training course in Israel. “The lack of real qualifications of many of these teachers make them compliant with the [Occupying] authorities, since they would have difficulty finding jobs

¹¹⁶ Interview with Ibrahim Nasrallah, Majdal Shams, Occupied Syrian Golan (Aug. 11, 2008). [In Arabic with simultaneous translation into English].

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Mara’i, *supra* note 5, at 81.

elsewhere”.¹²⁰ This in turn contributed to the lack of quality of the overall education received in the Occupied Syrian Golan and to the de-legitimization of authority that has already begun occurring among students as a result of living under what residents perceived to be an illegitimate authority. Many students in the Occupied Syrian Golan continuously feel alienated from the school system, since they perceive it to be an illegitimate organ of a government that does not represent them.¹²¹ Often, students seek out alternative forms of education that they believe are more authentic, learning about their identity and history from their families at home, and from supplementary forms of education such as the highly politicized annual summer camps that will be discussed momentarily.

Content of the Druze Heritage Curriculum

The educational curriculum for Druze that was instituted in the Occupied Syrian Golan was the same curriculum developed for the Galilee Druze in Israel proper. As discussed, and in the words of an OSG resident, it intended “to inculcate a sense of separate ‘Druze identity,’ distinct from the Arab identity-as if members of this eleventh-century offshoot of Islam constituted a nation rather than a religious sect.”¹²² The Committee for Druze Education and Culture directed its efforts primarily at creating textbooks and curricula that emphasized ‘Druze history and heritage’ and were all prepared by Druze educators and administrators who were not from the Syrian Golan.¹²³ “The committee had to start from scratch, as all [previous] curricula were suited to the Arab schools, without any reference to Druze culture.”¹²⁴ By 1982, all Druze schools offering a matriculation examination used the new Druze curricula, and by early 1988, textbooks on Druze history, heritage and civics were published and in circulation.¹²⁵ These new textbooks were for grades 3 to 12, and included *Hikayat min Qurana* (Tales from our Villages), *Min*

¹²⁰ *Id.*

¹²¹ Shamai, *supra* note 42, at 462.

¹²² Mara’i, *supra* note 5, at 81.

¹²³ Falah, *supra* note 5, at 229.

¹²⁴ *Id.*

¹²⁵ *Id.*

adabina waa'datina (Manners and Customs), *Qiyam Wataqalid* (Values), among others.¹²⁶

In Israeli schools, students' studies of history are divided based upon the ethnic and/or religious heritage to which they are assigned at school (Jewish, Druze or Arab). For example, students in Jewish schools study Israeli and general history (50% of their time spent on each). In Arab schools, within the same number of hours, students study general history (40%), Arab history (40%), and Israeli history (20%). Finally, in Druze schools, the students' studies are divided even further, into four categories: general history (30%), Arab history (30%), Israeli history (20%), and Druze history (20%).¹²⁷

Despite the implicit rationale given for Israel's usage of separate education for Druze, which is based on a notion of specificity to the particular group – that is, that the different or unique circumstances of the Druze dictate that a different curriculum would be more appropriate for them – no similarly specific attention is given to the local history of the Occupied Syrian Golan. “No mention is made of the fact that the Golan Heights has always been part of Syria.”¹²⁸ This means that any history dealing with the forced transfer of over 95% of the population of the Syrian Golan, including nearly all of the villagers' neighbors is omitted. Further, it means that the legal status of the Occupied Syrian Golan is presented only in terms of Israel's position and Israel's strategic objectives, ignoring the position held by Syria, the United Nations, nearly all countries of the world, and most notably, the Syrian Golan residents themselves.

The curriculum as a whole, which reflects the state's aims to form loyal citizens to Israel and enthusiastic adherents of Zionism, encourages the Druze to serve as Israeli soldiers who are willing to sacrifice their lives for the state of Israel. When imported wholesale into a territory occupied by Israel, its intentions take on a more sinister

¹²⁶ Hikayat min Qurana [Tales from our Villages] (1982), revised (1995) (for grades 3-4); Min adabina waa'datina [Manners and Customs] (1986) (for 5th grade); Qiyam Wa taqalid [Values] (1978) (for 6th grade); Min al-Salaf al-Salih [Wise Men of the Religion] (1979) (for 7th grade); Min al-Torath al-Sha'abi [Popular Heritage] (1979), revised (1996) (for 8th grade); Min A'alam al-Druze [Druze Personalities] (1980) (for 9th grade); Min U'oyoon Torath Bani Ma'arouf [Druze Heritage for High Schools] two parts, second edition revised (1987); Min Torath al Mowahideen al-Druze (1993); Aayad [Holidays] (1979) (for all grades); Morshid al-Mo'alim [Teachers Guide] (1979); Min Bustan Torathi, (1993) (for 3rd grade) as cited in Falah, *supra* note 5, at 231.

¹²⁷ Committee for Druze Education and Culture, *History Curriculum for Druze Schools* (Ministry of Education and Culture, Proposal, 1982) (final version in print) as cited in *id.*

¹²⁸ Mara'i, *supra* note 5, at 81.

meaning. Some might assume that the Israeli authorities are making a factually incorrect assumption that the Occupied Syrian Golan is a part of Israel. But more likely, others will take the position – held by the majority of residents of the OSG – that the Israeli authorities are aware that the Occupied Syrian Golan is under Syrian sovereignty, that their imposition of a nationalist curriculum to an occupied population may be seen as an attempt to alter the demographic landscape of the territory, perhaps prejudicing a final settlement of the territory with Syria, and as will be discussed, may even violate the residents’ rights under IHL and IHRL. If the latter, many residents of the Syrian Golan use this as evidence that Israel is using its curriculum in the OSG to deliberately mis-educate students in an attempt to satisfy the state’s aims of permanently acquiring territory in contradiction of IHL. It could also suggest the little priority held for the needs of the students and residents of the Occupied Syrian Golan themselves.

The curriculum also intentionally distances Druze Arabs from their Arab ethnicity in order to create a unique Druze identity. One of the functions of separating out the Druze has been said to distance them from sentiments of Arab nationalism, pan-Arabism, or empathy with the Palestinian Arabs in Israel and the Occupied Palestinian Territories. Supporters’ efforts to oppose this separation and instead emphasize ties between Druze and other Arabs led to accusations that they were “radical elements who, out of political-ideological motives, were bent on emphasizing the common bond between Druzes and Arabs.”¹²⁹ These supporters of Arab heritage and opponents of the Druze heritage curriculum insisted that Druze heritage was part of Palestinian-Arab heritage, and that the government was propagating political divisions between non-Druze Arabs and Druze Arabs.¹³⁰ This position is largely the same as the position of many of the residents of the Syrian Golan, who in their strong opposition to becoming part of the state of Israel, aligned themselves culturally, politically and otherwise with their Palestinian Arab brethren.

Many residents of the Syrian Golan go so far as to say the state through its curriculum, in its enthusiasm to instill the values of the national Zionist project in the Syrian population, in essence robs the OSG residents of their own history, legitimizing

¹²⁹ Falah, *supra* note 5, at 230.

¹³⁰ *Id.* at 231.

Israel's occupation of their territory and what they see as the theft of their neighbors' land. However ineffective this strategy has proved in convincing the inhabitants of the Syrian Golan of Israel's position, it suggests a disregard for the rights of the children in question to an accurate portrayal of their history and identity that will be explored in relation to IHRL and IHL.

Content of Arabic-language and Hebrew-language Curricula

In the Arabic language curriculum in Druze schools in Israel, the normal materials taught in the Arab sector in Arabic literature are supplemented by Druze literature without adding additional class time. The Druze literature surveyed spans a period of over 1000 years, from the faith's founding in 1017 all the way through modern works,¹³¹ and was implemented as part of the efforts to establish a unique, Druze curriculum.

The Hebrew language curriculum for Druze schools in Israel also supplements the regular materials used in Arab or Jewish sector schools with special Druze-focused texts; in this case, works written by adherents to the Druze sect, originally either in Hebrew or in Arabic, and translated into Hebrew.¹³² The associated textbook series for Druze sector schools was prepared jointly by the Israeli Ministry of Education and a team from the University of Haifa, and is called "Roots".¹³³ The regular materials include study of Jewish holy texts (the Bible and Talmud), Jewish thought and philosophy, and grammar and literature aimed at giving students "insight into all aspects of Jewish culture."¹³⁴

When implemented in schools in the Syrian Golan, residents again contested the usage of literature that aimed to emphasize their religious identity at the expense of time that could have been spent learning about the rich cultural and literary heritage of the Arabic language. Residents lamented that in Syrian schools, students learned about Arab

¹³¹ Committee for Druze Education and Culture, *Minhaj el-Loghah el-Arabia Lel Madaris el-Dorzia wa al Mukhtalatah* [Arabic Language Curriculum for Druze Schools], Ministry of Education and Culture (Jerusalem, 1980) (Isr.) (revised version in print as of 2002) as cited in Falah, *supra* note 5, at 233.

¹³² Ministry of Education and Culture, and the University of Haifa, *El-Montakhab* (1987) (for 9th grade), final edition (Haifa, 1996); *Mukhtarat min Tarikh el-Adab Wanusoosih* [Selections from the History of Literature] (el-Nahdah, Nazareth) (1984) (for grade 10), revised edition under the name *el-Montakhab* (in print as of 2002) (for junior-high schools); Ministry of Education and Culture and the University of Haifa, *el-Montakhab* (Haifa, 1986) (for 12th grade), (revised version in print as of 2002) as cited in Falah, *supra* note 5, at 233.

¹³³ Ministry of Education and Culture, *The Hebrew Curriculum for Druze Schools*, (Jerusalem, 1987) (Isr.) as cited in Falah, *supra* note 5, at 233.

¹³⁴ *Id.*

culture spanning thousands of years, from pre-Islamic poetry onward, a heritage that was distilled and reduced down to a superficial focus on grammar and syntax in Arabic, and substituted with Jewish literary references translated into Arabic, or sources related in some way to the Druze sect.¹³⁵ The feeling that they were inadequately learning the Arabic language, culture and heritage led many residents of the Syrian Golan to take advantage of the opportunity to go to Damascus for their higher education, to take up traditional artistic or cultural pursuits related to Arabic culture, and to create and pursue the non-state sponsored educational initiatives that will be discussed next.

Non-state-sponsored educational initiatives

In addition to the kindergartens they developed, the Druze residents of the Occupied Syrian Golan took it upon themselves to supplement their Israeli public education via special summer camps beginning in 1986.¹³⁶ Many of the camp organizers were arrested in the early years of the camp by Israeli authorities for what residents described as organizers' pro-Syrian nationalist and pro-Palestinian leanings. In fact, according to reports of camp organizers in 2008, the IDF only stopped attending their camp in the last few years, presumably after having stopped considering it as much of a threat to Israeli security.¹³⁷

According to its organizers, the intent of the pro-Syrian camp (called *Esham*, which in Arabic means "Greater Syria" or simply "Syria")¹³⁸ was to provide the children of the Occupied Syrian Golan with what they considered an accurate portrayal of their history, identity and culture. The ten-day camp, which in 2008 boasted 280 participants, educated students in Arab culture including Arabic music and literature and Syrian and Golani political history, including the names and history of the villages from which their neighbors were expelled in 1967, in addition to supplemental lessons in sex education

¹³⁵ Fieldwork (Summer 2008), *supra* note 62.

¹³⁶ Shamai, *supra* note 42 (describing the competing summer camps that were held, one pro-Syrian nationalist and the other pro-Israeli nationalist. After the arrest of several organizers of the pro-Syrian camp however, it became definitively the more popular of the two).

¹³⁷ Interview with Moatezz Abu Jabal. Majdal Shams, Occupied Syrian Golan (August 2008).

¹³⁸ In 1999, the camp was called "Withdrawal" or "al-Jalaa" in Arabic. See Joel Greenberg, The Druze of Golan Stay Loyal to Syria, *NEW YORK TIMES*, August 9, 1999. Available at <http://www.nytimes.com/1999/08/09/world/the-druze-of-golan-stay-loyal-to-syria.html?pagewanted=all&src=pm>

and sports. The 2008 camp included a special first-time presentation from a resident of Majdal Shams who had been seriously injured by a cluster bomb, who warned children about both the dangers of cluster bombs and the landmines which are spread all around the borders of the Occupied Syrian Golan, even bleeding into the village of Majdal Shams and sometimes causing fatalities. Finally, the camp situated the history of the Syrian Golan in the context of the larger Israeli occupation of the Palestinian territories, and established a connection of solidarity between the two occupied peoples.¹³⁹

According to a 1999 news article about an earlier meeting of the summer camp, one director (Mr. Abu Jabal) explained the camp's objectives as being (as summarized by the reporter) "set up to counter the Israeli-controlled curriculum of schools on the Golan Heights, where Druse children learn Hebrew as well as Arabic and Middle Eastern history devoid of Arab nationalist content."¹⁴⁰ The camp director went on to say: "Israel is trying to turn them into Israelis, and we reject that," Mr. Abu Jabal said. "We want to teach our children that we have a homeland, a nation, a people that we're very proud of."¹⁴¹

However, pride in the residents' Syrian homeland was not all that campers learned, according to the article:

'We learned to love our homeland, defend our nation and hate Zionism,' said Badia Sabra, a 13-year-old boy from the Druse village of Masadeh.

Khaled Abu Shahin, 14, from the neighboring village of Buqata, said that after three summers at the camp, his perspective on Israel had changed. Visiting the ruins of a village destroyed after the 1967 war made him feel that "Israel is unjust," he recalled in the eloquent Hebrew he learned in school." When I saw it, I couldn't believe the Israelis could be so harsh," Khaled said. "I had thought they were good. Now I believe that only our people are good for us. We want to return to Syria and live with our true people, like our grandparents did."¹⁴²

The sentiments expressed by campers demonstrate some of the dangers of backlash when competing political histories are presented to students due to the lack of accurate information at school. Rather than promote tolerance and friendly relations among nations and peoples by teaching two sides of a historical narrative at once, teaching one-

¹³⁹ *Supra* note 137.

¹⁴⁰ *Supra* note 138.

¹⁴¹ *Id.*

¹⁴² *Id.*

sided narratives and excluding any other perspective leaves open the possibility that when confronted with missing information, a student on either side of a conflict will feel betrayed. This also demonstrates why states exercise caution and even at times overcompensate by excluding all potentially controversial information when considering how to teach students about violence or conflict in the past. It also might help explain why an occupant may exercise particular caution about including materials in educational curricula that may incite anger in the occupied population.

In addition to such organized attempts to re-educate the children of the Occupied Syrian Golan in what many residents view as a correct (albeit traumatic) version of their history, culture and identity, residents are also educated about their Syrian identity at home. Within the homes of Majdal Shams are pictures of Syrian President Bashar al-Assad, Arabic instruments such as the *'oud* and *qanun*, and the frequently playing of Arabic-language television from Lebanon and Syria and the music of Fairouz and Om Kalthoum (famous Lebanese and Egyptian singers). Despite the difficulties of doing so due to the closed borders and travel restrictions, families intentionally maintain ties to their families from whom they are separated in Lebanon and Syria in particular, in an attempt to show their children that they are Syrian even if they have never seen (or may never see) Syria.¹⁴³

Competing National Histories as a Security Risk

Israel has at times considered the commemoration of competing historical narratives – particularly those related to the Palestinians and their historical grievances against Israel – as an incitement to violence, and as such, a security risk for the state. Evidence of this can be found in Israel's recent outlawing of "Nakba" commemorations,¹⁴⁴ or the Palestinian commemoration of the historical "catastrophe" that was what Palestinians describe as the expulsion of thousands of their brethren from the Palestinian territories in

¹⁴³ Fieldwork (Summer 2008), *supra* note 62.

¹⁴⁴ Budget Foundations Law (Amendment No. 40) 5771-2011 (22 March 2011) (Isr.), commonly referred to as the "Nakba Law". See *High Court Ruling on 'Nakba Law' reveals its waning power*, January 7, 2012, available at <http://972mag.com/high-court-ruling-on-nakba-bill-reveals-its-waning-power/32271/>. (Statement by Adalah: the Legal Center for Arab Minority Rights in Israel: "this law authorizes the Minister of Finance to financially penalize government-funded bodies that engage in activities that amount to 'rejecting the existence of the State of Israel as a Jewish and democratic state' or 'commemorating Independence Day or the day of the establishment of the state as a day of mourning.'").

order to create the state of Israel in 1948. In the Syrian Golan Heights, commemorative, Syrian historical monuments have been attacked by the Israeli authorities, and the Syrian Golan residents' attempts to commemorate aspects of their history that they feel have been marginalized by the Israeli authorities – particularly those in which they believe they have undergone injustices – have frequently been met with arrests and crackdowns on participants.¹⁴⁵ This focus by the authorities on political histories and public remembrances of key historical events that may challenge the dominant Israeli national narrative are indicative of the fact that competing histories, particularly by dissatisfied minorities, can be viewed by the state as a security risk or an incitement to violence against the state. This is especially true in the context of Israel, in which the competing narratives surrounding the state's origins and legitimacy are cast in ethnic and religious terms.

Special Factors Affecting the Syrian Golan

Status of Peace Negotiations

Another important characteristic of the Syrian Golan relates to political status negotiations. The Occupied Syrian Golan is one of the major obstacles to peace negotiations between Israel and Syria, which despite a relative lack of overt military hostility, have remained in an official state of war since 1967.¹⁴⁶ Syria claims that it will not sign a peace agreement with Israel until Israel returns the Syrian Golan, and Israel desires the Syrian Golan for its natural resources¹⁴⁷ and military geo-strategic value.¹⁴⁸ In November 2010, the Israeli Knesset passed legislation nicknamed the “Golan Referendum Law” which requires a public referendum in order to cede any territory that is under “Israeli sovereignty” as part of peace concessions, referring in particular the

¹⁴⁵ Such intervention in the activities of Syrian Golan residents that related to their Syrian political identity was at its peak during their heightened resistance activities during the 1980's.

¹⁴⁶ After the war in 1973, about 100 km of the Golan was returned to Syria and peace negotiations resumed and then were again ceased. They have continually begun and then stalled again several times.

¹⁴⁷ Israeli agricultural settlements currently produce considerable amounts of high-quality wine, beef, fruit and mineral water for the domestic market and for international export. *See* Murphy, *supra* note 9, at 15.

¹⁴⁸ Ministry of Foreign Affairs Website, (Isr.) last accessed May 16, 2012, *available at* <http://www.mfa.gov.il/MFA/Facts+About+Israel/Israel+in+Maps/Golan+Heights.htm> (“The Golan Heights are strategically important for several reasons: (a) Israeli presence in the Golan Heights provides a defensible border against invasion by land; (b) All of northern Israel is within range of direct artillery fire from the Golan Heights; (c) The Heights control the main water sources of the State of Israel. The Golan Heights have been under Israeli law, jurisdiction, [sic] and administration since 1981.”).

Golan Heights and East Jerusalem.¹⁴⁹ According to its accompanying procedural legislation, in order to override the referendum provision, a special majority of the Knesset of 80 members is required.¹⁵⁰ The legislation is widely viewed as a potential obstacle to future peace negotiations.¹⁵¹ Residents of the Occupied Syrian Golan are “caught between Israel and Syria,”¹⁵² waiting for peace negotiations that are beyond their control to resume and to finish, while they and their future are tossed like pawns between the two parties. The uprisings in Syria against the Syrian government that began in 2011 and have continued into mid-2012 may also affect negotiations.

Comparatively privileged position

Some OSG residents refer to the Israeli occupation of the Syrian Golan as a ‘five star occupation’¹⁵³ due to the relative ease with which residents can move throughout Israel, the positive view many Israelis hold of Syrian Golan residents as a result of their Druze heritage, as a result of the positive view of Druze in Israel generally, and their comparative economic wealth and lack of discrimination in society, at least in relation to the Palestinians in the occupied Palestinian territories. Because Syrian Golan residents benefit from the confusion between them and the Galilee Druze, a unique problem is presented: while advocacy aimed at gaining national and international recognition of the violations of international law to which the Syrian Golan residents are subject may help residents resolve their status in the long-run, it could backfire politically in the short-term. Increased recognition within Israel of the problems facing the residents of the

¹⁴⁹ *Syria rejects Israeli referendum law for ceding annexed land*, CNN, November 23, 2010, available at http://articles.cnn.com/2010-11-23/world/israel.referendum.bill_1_referendum-peace-deal-knesset-members?_s=PM:WORLD (describing the legislation’s procedure, in which, if 60 members of Parliament approve a peace deal that cedes Israeli-annexed land, the proposal will go to public referendum; yet, if 80 members of Parliament (or a two-thirds majority) pass the peace deal, then no public referendum would be required.).

¹⁵⁰ Jonathan Lis, Ministerial panel decides: Territorial concessions only by referendum, Knesset committee to support bill outlining procedural implementation of referendum, making previously approved law viable, HA’ARETZ, October 11, 2010, available at <http://www.haaretz.com/news/national/ministerial-panel-decides-territorial-concessions-only-by-referendum-1.318417>

¹⁵¹ Top minister opposes Golan heights referendum bill: Dan Meridor says a law mandating a referendum on a Golan withdrawal would tie Israel’s hands in peace talks, HA’ARETZ, October 27, 2009, available at <http://www.haaretz.com/news/top-minister-opposes-golan-heights-referendum-bill-1.5289>

¹⁵² Shamai, *supra* note 42, at 462.

¹⁵³ Fieldwork (Summer 2008), *supra* note 62. This phrase has also been used to describe the situation of Palestinians living in Ramallah due to their relative prosperity compared with Palestinians in occupied Palestinian areas of lesser prosperity such as Hebron.

Syrian Golan could attract negative attention to residents and cause negative political or economic repercussions. For this reason, it can be contended at least to some degree that the current obfuscation of the “Golan Druze” with the Galilee Druze is beneficial to the residents of the Syrian Golan. And correlatively, human rights practitioners’ attempts to clarify between the two groups – particularly by highlighting human rights and humanitarian legal violations perpetrated by the state of Israel – could negatively affect the residents.

That being said, the political views of the residents of the Syrian Golan in relation to Israel are not a secret and have been written about extensively by both residents of the Syrian Golan and journalists. And particularly given the current political situation with the conflict in Syria, it is unlikely that the Syrian Golan residents will enjoy such obfuscation for much longer.

Legal Analysis: Violations of Law

This section will discuss the laws applicable to the Occupied Syrian Golan, including International Humanitarian Law and International Human Rights Law. It will discuss the applicability of both sets of laws in times of belligerent occupation according to international sources, and then Israel’s position on the legal status of the Syrian Golan and on the applicability of IHL and IHRL to the Syrian Golan. It will explain the legal reasoning for the determination that the Syrian Golan is occupied as well as Israel’s objections to this position. This discussion will also detail the extraterritorial application of human rights law, and specifically of economic, social and cultural rights (of which the right to education is one), to occupied territories. It will then discuss the issue of education, first under humanitarian law and more specifically, the laws of belligerent occupation, and then under the framework of international human rights law. It will then discuss various frameworks for assessing education rights in order to determine procedures for assessing and reporting violations to this right, and apply them to the Occupied Syrian Golan. It will take into account Israel’s contentions that IHL does not apply to the Occupied Syrian Golan, and consider the protection of the local inhabitants according to both interpretations of the law. And finally, it will compare and assess the

effects of both approaches, with a view to harmonizing conflicting norms between the IHL obligations and IHRL obligations regarding education in occupied territories.

It should be noted that while in discussions of the applicability of international humanitarian law to the territories occupied by Israel, usually Israel's position in regards to the Syrian Golan Heights is afforded little more space than a footnote. In particular, the discussion of whether or not Israel intended to annex the Syrian Golan is typically dismissed as irrelevant, since the Security Council condemned its action as illegal regardless. This paper will devote substantially more attention to Israel's position in reference to the status of the Syrian Golan Heights not because it has a legal effect on the territory's status *per se*, but due to the following assumptions: 1) Israel's intentions and position on the status of the Syrian Golan as well as how they are perceived by the inhabitants of the Syrian Golan have an effect on inhabitants' opinions generally as well as in regards to the issue of education, 2) the inhabitants' consent and cooperation in regards to educational matters is of interest to the Occupier in accordance with international law, and is therefore relevant to this study, 3) while a legal analysis takes into account the letter of the law, where to go after the analysis –or, engaging in problem solving, often involves prioritizing based on factors which could be called political, and 4) no sincere commitment to problem solving can take place without considering the intentions, position and justifications of a state actor who may be the perpetrator of a violation, since these may affect what legal solutions can be eventually be deemed politically expedient or practical. And finally, conflicting educational aims between the Occupier and what is envisioned and required by international law have a fundamental impact on the residents that is relevant to this analysis. This will be discussed in the next section.

Problem of the Conflict of Laws in an Occupied Territory

The Syrian Golan, as an occupied territory under international law, is subject to the simultaneous and sometimes-conflicting laws of war (IHL) and laws of human rights (IHRL). The law of occupation – a subset of IHL – is already complex, and is made more complex by the situation of prolonged occupation in which the inhabitants of the Syrian Golan find themselves. Questions as to which laws are being applied and why,

which laws trump which laws in cases of conflicting provisions between the applicable sets of laws, conflicting theories or underlying principles behind these laws, and to what extent any of this bears on the realities of education within the Syrian Golan will be addressed through this study from a legal point of view. Depending on whose interpretation of law prevails at a political level, the residents of the Syrian Golan could end up in a very different situation than the one they are in now, or remain under the status quo.

Israel's Position on Occupation, Annexation and Laws

Despite the prolonged nature of the Israeli occupation of the Syrian Golan, the international attention and political and diplomatic consequences of its capture and effective annexation, and the international spotlight on Israel as a result of its conduct within the occupied Palestinian territories – little has been written on the exact legal position of Israel vis a vis the Syrian Golan. Much can be inferred through statements by Israeli heads of state and political leaders, rulings of the High Court of Justice, and through comparative study of Israel's reasoning as regards the application of various international legal instruments to the other occupied territories such as the West Bank and East Jerusalem, but the clearest positions have come from the analysis of Israeli submissions to UN bodies. This portion of the present study undertakes to analyze these positions as thoroughly as possible given the scope of this study.

According to Israel, was or is the Syrian Golan occupied by Israel?

Israel recognized Syrian sovereignty over the Syrian Golan Heights most notably in 1949 in the conclusion of an Armistice Agreement with Syria,¹⁵⁴ but has since alluded to Syrian sovereignty numerous times through public statements.¹⁵⁵ When the United Nations adopted Resolution 242 concerning the illegality of the acquisition of territory

¹⁵⁴ Israel-Syria Armistice Agreement, *supra* note 29.

¹⁵⁵ See, e.g., MOSHE MA'UZ, SYRIA AND ISRAEL: FROM WAR TO PEACEMAKING (1995) at 249 (discussing a statement of Shimon Peres, current President of Israel, recipient of the joint-Nobel Peace Prize with Rabin and Arafat in 1994, and then-Foreign Minister to Prime Minister Yitzhak Rabin on July 19, 1994, "We have acknowledged Syrian sovereignty on the Golan Heights, time after time," and also noting that in the same context, Peres "mentioned the Israeli government's resolution of 19 June 1967, offering to withdraw the [Israeli] army to the international boundary with Syria in return for full peace..." and that Peres "later implied in the Knesset that there was a need to change the 1981 Golan Law (which, in fact, meant the annexation of the Golan to Israel) and that he believed that more than half of the Knesset was prepared to make such a change.").

through force, and identified Israel's resulting obligation to return territories it occupied in 1967, Israel agreed to the resolution even while disputing which territories were meant for withdrawal.¹⁵⁶

Israel does not believe that the Syrian Golan is currently occupied.¹⁵⁷ Since extending its civil administration to the Syrian Golan through the Golan Heights Law in 1981, Israel considered its occupation of the OSG ended, and the Syrian Golan part of its sovereign territory.¹⁵⁸ This will be discussed in more detail in relation to a following question relating to the application of IHL to the Syrian Golan.

Would an annexation of the Syrian Golan by Israel be legal according to international law?

Israel claimed that the Syrian Golan was captured in self-defense, resulting from Syrian provocations that began the 1967 war and resulted in the capture of the Syrian Golan Heights by Israel – although these facts have been disputed.¹⁵⁹ This formed a part of its

¹⁵⁶ Israel's key argument in regards to withdrawal is that the wording of Resolution 242 does not specify that Israel will withdraw from "all territories occupied..." or "the territories occupied," but merely from "territories occupied." See, e.g., EUGENE V. ROSTOW, PEACE IN THE BALANCE: THE FUTURE OF U.S. FOREIGN POLICY 163-64 (1972); JULIUS STONE, NO PEACE-NO WAR IN THE MIDDLE EAST 39 (1968) as cited in Asher Maoz, *Application of Israeli Law to the Golan Heights is Annexation*, 20 BROOK. J. INT'L L. 356-357 (1993-1995) (arguing that reference should be made to the French text, which uses the word "the" in the French when it states: "des territoires occupés lors du récent conflit" [the territories occupied in the recent conflict]. According to Israel's interpretation of this position –which is bolstered by domestic political and religious pressures in relation to religious, historical and strategic claims to the occupied territories- certain territories are intended to remain part of Israel, and others are intended to be returned. The Golan was originally meant to be returned, but members of the Israeli public and Knesset have increasingly have argued that it should be a part of the permanent borders of the state.)

¹⁵⁷ Murphy, *supra* note 9 at 37-38.

¹⁵⁸ *Id.*

¹⁵⁹ AVI SHLAIM, THE IRON WALL: ISRAEL AND THE ARAB WORLD (2001) at 235-236 (discussing the origins of the 1967 hostilities, arguing that they resulted primarily from the conflict with Syria, which was escalated and provoked through Israel's direct military provocations in order to gain more land from Syria, "Israel's strategy of escalation on the Syrian front was probably the single most important factor in dragging the Middle East to war in June 1967, despite the conventional wisdom on the subject that singles out Syrian aggression as the principal cause of war. It is an article of faith among Israelis that the Golan Heights were captured in the Six-Day War to stop the Syrians from shelling the settlements down below. But many of the firefights were deliberately provoked by Israel. Support for this revisionist view came in 1997 from an unexpected quarter: Moshe Dayan [an IDF Commander]... Dayan confessed that his greatest mistake was that, as minister of defense in June 1967, he did not stick to his original opposition to the storming of the Golan Heights. [Rami] Tal [a reporter who published private conversations with Dayan after Dayan's death] began to demonstrate that the Syrians were sitting on top of the Golan Heights. Dayan interrupted, 'Never mind that. After all, I know how at least 80 percent of the clashes there started. In my opinion, more than 80 percent, but let's talk about 80 percent. It went this way: We would send a tractor to plow someplace where it wasn't possible to do anything, in the demilitarized area, and knew in advance that the Syrians would start to shoot. If they didn't shoot, we would tell the tractor to advance farther, until in the end the Syrians would get annoyed and shoot. And then we would use artillery and later the air force

argument that its occupation and subsequent extension of its law, administration and jurisdiction to the Syrian Golan was legal.

An excellent example of the original reasoning that dictated Israel's contention that the Israeli annexation of the Syrian Golan Heights was legal was articulated by Lauterpacht, who claimed that since international law distinguishes between wars of aggression and wars of self-defense, the prohibition of the acquisition of a territory by force is only relevant to cases of territorial acquisition by force in a war of aggression. When territory is acquired in self-defense, annexation of that territory is not prohibited.¹⁶⁰ This position was articulated in relation to the contention that the war of 1967 had been begun by Syrian aggression. Part of the claim however included the caveat that holding territories in wars of self-defense was only valid as long as it remained within the essential security needs of the victim state to do so, since giving up the territory would pose a significant threat to the state. However, once the territory was deemed to never again pose a threat to the state's security, it could give up the territory.¹⁶¹

A second articulation of Israel's argumentation can be found in the statement of the Israeli Foreign Ministry's legal adviser, Elyakim Rubinstein, at the time of the extension of Israeli administration and law to the Syrian Golan. When asked about the legal justification for annexation, he claimed that the "legal situation has been elevated" and "no private rights [of Arab citizens of the Syrian Golan] have been changed or prejudiced."¹⁶² His contention that the situation was a legal improvement for the inhabitants of the Syrian Golan was based on his assertion that prior to the Israeli capture of the Syrian Golan in 1967, Syrian law applied to the Syrian Golan was but "rarely enforced", causing a "legal vacuum" into which Israel entered, first imposing a military

also, and that's how it was. I did that, and Laskov and Chara [Zvi Tsur, Rabin's predecessor as chief of staff] did that, and Yitzhak did that, but it seems to me that the person who most enjoyed these games was Dado [David Elzar, OC Northern Command, 1964-69].⁷ In retrospect, Dayan could not point to a clearly formulated strategic conception that governed Israel's behavior in the DMZ between 1949 and 1967. All he suggested was that he and some of his fellow officers did not accept the 1949 armistice lines with Syria as final and hoped to change them by means that fell short of war, by "snatching bits of territory and holding on to it until the enemy despairs and gives it to us."

¹⁶⁰ ELIHU LAUTERPACHT, *JERUSALEM AND THE HOLY PLACES*, 51-52, 1968 as cited in *supra* note 156, at 356-357.

¹⁶¹ S.M. Schwebel, *What Weight to Conquest?*, 64 *AM. J. INTL L.* 345-6 (1970) as cited in *supra* note 156, at 356-357.

¹⁶² John Yemma, *Israelis seek to justify annexing Golan Heights*, *CHRISTIAN SCIENCE MONITOR*, 22 December 1981.

government and then with a civil government.¹⁶³ In relation to charges that Israel's unilateral legal move was in violation of international law, Rubinstein said, "International law is subject to reasonable time and conduct... Syria has passed in our view these reasonable conduct and time limits by announcing time and again it will not negotiate with or recognize Israel... even the Law of Occupation cannot be relied upon too long... good faith is necessary."¹⁶⁴

These statements seem to suggest that Israel held the opinion that there was a time limit on the length of time a territory may be held in the temporary state of occupation before the occupant may unilaterally extend its sovereignty over the territory.¹⁶⁵ This perspective is also suggested by historical accounts emphasizing Syrian President Hafez al-Assad's statement during the same time period that he would not accept peaceful relations between the nations.¹⁶⁶ Taken together, Rubinstein's statements emphasizing his idea of a time limit and the emphasis within historical documents on Syria's refusal to negotiate, seem to indicate that Israeli policymakers believed that Assad had relinquished his claim to the Syrian Golan through his rejection of peace agreements on Israel's terms. While problematic for a number of reasons, this perspective is still cited as justification for the extension of Israeli sovereignty over the Syrian Golan.

According to Israel, is the Syrian Golan annexed to Israel?

Historically, Israel officials claimed that they did not "annex" the territory, although this claim is disputed by historians.¹⁶⁷ As noted by Benvenisti, the text of the Golan Heights Law (as in the case of East Jerusalem prior to the formal annexation law passed by Israel) "was vague enough to permit the interpretation that the measure did not effect the formal

¹⁶³ *Id.* For further articulation of the claim that the Golan Heights was a "legal vacuum," see Sheleff, *supra* note 51, at 337 (contending that Syrian jurisdiction, prior to the passage of the Golan Heights Law, had "ceased to be an effective legal instrument.").

¹⁶⁴ *Supra* note 162.

¹⁶⁵ *Contra.* [Untitled Editorial], HA'ARETZ, December 15, 1981, reprinted in Chaim Herzog, *Golan Annexation: Israeli Comment*, 11 J. PALESTINE STUD. (1982) at 174 (criticizing the perspective on a time limit prior to annexation in an op-ed published shortly after the passage of the Golan Heights Law, "It will be difficult for us [Israelis] to justify the imposition of Israeli sovereignty on an area that was outside the sphere of the League of Nations mandate over Eretz Israel by the fact that Syrian/*sic* is not ready to sign a peace treaty with us.").

¹⁶⁶ David Shipler, *The Golan Heights Annexed by Israel in an Abrupt Move: Begin Pushes the Legislation through Parliament – US Criticizes the Action*, NEW YORK TIMES, December 14, 1981, at A1 ("It was Syria's hard-line stance that Mr. Begin cited as an immediate reason for his action. He quoted a report in the Kuwaiti newspaper Al Rai Al Amm on Sunday that President Hafez al-Assad of Syria had expressed the determination to refuse to recognize Israel "even if the Palestinians deign to do so.").

¹⁶⁷ *Supra* note 159.

annexation of the area into Israel.”¹⁶⁸ Others have taken this position, including Leon Sheleff, who argued that because no Basic Law¹⁶⁹ was passed (as was done in the case of East Jerusalem¹⁷⁰) formally annexing (or extending Israeli sovereignty over) the Syrian Golan, it remains a captured, occupied territory according to Israeli law.¹⁷¹ He further argued that the act of recognizing some measure of legal autonomy within a territory or allowing the extension of a certain type of law (such as tribal law) did not automatically serve as a waiver of one’s sovereignty, citing examples of the American recognition of Native American tribal law by the U.S. Supreme Court.¹⁷² This position has been refuted by Moaz Asher, who stated that such examples are not analogous, and that the key characteristic making the extension of the law and jurisdiction of one state over another a “quintessential act of sovereignty” was in that state’s unilateral action, that is, without the consent of the state to whom sovereignty, in reality, belongs.¹⁷³ In the case of the Syrian Golan Heights, Syria did not consent to the extension of Israeli law over the territory, making the Israeli act an illegal extension of its sovereignty over the Syrian Golan.

Rubinstein’s statements above could be viewed as a statement that suggests the Israeli intent to effect formal annexation. The High Court of Justice of Israel, or the Israeli Supreme Court, has made the clearest statements in regards to the view that Israel through the Golan Heights Law extending its administration and jurisdiction over the Syrian Golan amounted to the annexation of the Syrian Golan Heights. Supporters of the

¹⁶⁸ See H CJ 205/82 Kanj Abu Salakh v. Minister of Interior [1983] IsrSC 37(2) 718 [hereinafter: Kanj Abu Salah] (*approving* Justice Cohen’s opinion in H CJ 283/69 Ruweidi v. Military Court in the Hebron District [1969] IsrSC 24(2) 419, 423) *as cited in* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION, Princeton University Press, 2004 (first printing 1993), at 114 [hereinafter: Int’l Law of Occupation] (arguing that *Kanj Abu Salakh* is one example of the High Court’s refusal to adjudicate the issue of whether or not the Israeli government’s reservation regarding the de jure applicability of the law of occupation is applicable to the territories, “*But cf.* Justice Kahan’s opinion in *Ruweidi*, holding the 1967 declaration as affecting annexation,”). See discussion at 110-112 of *id.*

¹⁶⁹ Israel does not have a formal written constitution. Rather, it has a series of 11 Basic Laws that serve as the constitutive laws of the state, serving the same purpose as a constitution.

¹⁷⁰ Basic Law: Jerusalem: The Capital of Israel, 1979-1980 S.H. 186 (Isr.) *translated in* 34 L.S.I. 209 (1979-1980).

¹⁷¹ *Supra* note 51, at 335 (admitting that in a constitutional law textbook on Israel, only one cursory mention was made of the Golan Heights Law, and it stated that the law annexed the territory to Israel, and describing the intentional lack of use of the term annexation during the passage of the law as evidence for the assertion that the Knesset did not want to state the purposes of the law explicitly “for reasons of sensitivity to international public opinion,” citing that an opponent of the law, Member of the Knesset Charlie Biton, unsuccessfully proposed changing its name to “The Law for the Annexation of the Golan Heights.”).

¹⁷² *Id.* at 347.

¹⁷³ *Supra* note 56.

idea that the Golan Heights Law did affect annexation, meaning that it transferred sovereignty over the territory to Israel, draw upon an Israeli High Court decision bearing on the question of the status of the Syrian Golan after the passage of the Golan Heights Law¹⁷⁴ in which the Court was petitioned by residents of the Syrian Golan Heights regarding whether they were required to carry identity cards. The residents' request squarely addressed the question of whether the Golan Heights Law meant that the residents were legally in Israel, and therefore obligated under the Israeli law to carry their identification cards.¹⁷⁵ In response, the Court stated: "Wherever in the law it says Israel or the state of Israel, Ramat HaGolan [the Golan Heights] is included."¹⁷⁶ While the Court clarified that simply extending Israeli administration over a territory outside of the state does not by itself affect annexation of the territory: annexation is determined by a host of other factors including the political conditions and intentions of the legislators at

¹⁷⁴ Some of the confusion here may arise from the differing English renderings of the case title: it is alternately written, Kanj Abu Salakh v. Minister of Interior, *as in* Int'l Law of Occupation, *supra* note 168; Kanagh Abuzalah v. the State of Israel, Abu Salah v. Minister of the Interior, and S. Cang' Abu Zalach et al v. The Minister of the Interior et al *as cited in* Ora Schmalz, *A Survey of a Selection of Judgments Delivered by the Supreme Court of Israel*, 19 ISRAEL L. REV., (1983), and Kang Abou Tzalach v. Minister of the Interior, *as cited in* Sheleff, *supra* note 51, at 345. The author has relied upon others' reports of the text of the case, including both supporters and opponents of annexation who have written in English after translating the Hebrew text themselves, since no English rendering is available on the High Court of Justice website or elsewhere. Most sources consulted however reached similar conclusions regarding the meaning of the Court's holding.

¹⁷⁵ Kanj Abu Salah, *supra* note 168, (*bearing on legislation* contained in the Emergency Regulations (Possession and Presentation of Identity Certificate) (Extension of Validity) Law, 5731- 1971, 1970-1971 S.H. 109, *translated in* 25 L.S.I. 108 (1970-1971)) *as cited in supra*, note 156, at 381; *see also* Schmalz, *supra* note 174, (referring to Kanj Abu Salah, "The argument for the petitioners, contending that the duty to accept and to hold Israeli Identity Cards does not apply to them, was based on the opinion that the Ramat HaGolan Law did not make the area part of the State of Israel, and that therefore a person who is lawfully in the Golan Heights is not lawfully in Israel. Hence he has no duty to accept, to hold, and to produce an Identity Card. The argument for the respondents was that in consequence of the Ramat HaGolan Law, a person lawfully staying in the Golan Heights must be regarded as a person being in Israel lawfully. Barak J. resolved the case by stating that in his view, all legal norms applying to Israel have, by force of the Ramat HaGolan Law, been applied to that area. He stated that the applicants' interpretation leads to absurd consequences. He emphasized that the Laws enacted by the Knesset must be interpreted in order to achieve their aim. The judge stated further that in line with this attitude, there can be no doubt that the legislative aim and the wording of the relevant provision is to equate the Golan Heights, for the purpose of the Law, the Jurisdiction and the Administration, to the State of Israel itself. Each applicant is, therefore, "a resident" for the purpose of the Population Registry Law, and the Law requiring the possession and the presentation of an Identity Card, and therefore the duty to accept, to carry with him, and to produce, an Identity Card applies to him.").

¹⁷⁶ Kanj Abu Salah, *supra* note 168, *as cited in* Rael Jean Isaac & Erich Isaac, *Should None Dare Call It Treason?*, OUTPOST, Dec. 1994, at 4 [hereinafter: Treason].

the time of adopting the legislation,¹⁷⁷ it further stated, “In the matter before us, the language of the law and the legislative purpose will lead to the conclusion that wherever there is reference to 'Israeli law', 'Israel', or another expression that refers to the state, Ramat HaGolan is also meant.”¹⁷⁸

While the decision has been interpreted by many to indicate that the court answered the question of annexation in the affirmative, a careful reading of this phrasing could lead one to come to the conclusion that the Court did not mean that the state had effected formal annexation, and that it simply reiterated the text of the Golan Heights Law using different wording.¹⁷⁹

One argument in support of the idea that Israel intended to annex the Syrian Golan through its passage of the Golan Heights Law, and yet did not want to jeopardize its claim over the territory through a public, international announcement, can be found in an argument published in an op-ed by former Israeli Permanent Representative to the United Nations and Knesset member Chaim Herzog shortly after the passage of the law. Herzog suggested that David Ben Gurion, one of the founders of the state of Israel, advocated a strategy of “ambiguity in what was said on the one hand, and the fact that we were there on the ground on the other” as the “best combination”¹⁸⁰ of tactics in relation to the task of defining Israel’s borders in Israel’s favor.¹⁸¹ Herzog criticized the enactment of the Golan Heights Law as unnecessarily compromising Israel’s best chances of winning the territory, accusing the Knesset of engaging in “unnecessary detail” in legislation, and putting what would be criticized as the illegal annexation of the Syrian Golan permanently on the United Nations agenda.¹⁸² The strategy advocated by Herzog demonstrates clearly what critics of Israel have alleged, namely, that Israel

¹⁷⁷ Kanj Abu Salah, *supra* note 168, (“In a case that dealt with the question of the legal status of the Golan Heights, in light of the Golan Heights Law, Justice A. Barak noted, in line with the comments of Justice H. Cohen, that "application of Israeli norm X on place Y outside the borders of the State does not necessarily make place Y part of Israel. Everything depends on the purpose, language, and implementation of the norm being interpreted") (B’Tselem, trans.) *as cited in* B’Tselem: The Israeli Information Center for Human Rights in the Occupied Territories, *A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem: Comprehensive Report*, May 1995 at 13.

¹⁷⁸ Treason, *supra* note 176, at 4.

¹⁷⁹ This is the conclusion that is reached by Sheleff, *supra* note 51, at 345.

¹⁸⁰ Herzog, *supra* 165, at 174.

¹⁸¹ This tactic has been criticized internationally as Israel’s attempt to use territorial ambiguities and settlement policies to engage in unlawful territorial expansion, or “land grabs.”

¹⁸² Herzog, *supra* 165, at 174.

intentionally employs such strategies of legal ambiguity combined with actions that physically encroach on the territory it occupies in order to expand its borders through creating “facts on the ground.”

The clear acknowledgement of such a strategy also casts doubt over Israel’s assurances that it did not intend the de facto annexation of the Syrian Golan through its passage of the Golan Heights Law.¹⁸³ It is possible that Israel’s statements in regard to its intentions are unreliable, given the possibility that – in line with Ben Gurion’s strategy as articulated previously – Israel intentionally conceals its intentions as a matter of public policy strategy.

While the government of Israel typically avoids use of the term “annexation” in reference to the Syrian Golan, discussions of “maintaining Israeli sovereignty” over the Syrian Golan abound. Such phrases as “retaining Israeli sovereignty over the Golan” are common, as used in the Government of Israel’s Guidelines in 2010, or the High Court of Justice’s consideration of a question in which a petitioner claimed that a local Syrian Golan-based Israeli association was using funds in order to create propaganda aimed at maintaining Israeli sovereignty over the Syrian Golan and preventing any attempts to relinquish control over the territory.¹⁸⁴ Furthermore, the 2010 “Golan Referendum Law” was widely reported by news agencies to require a public vote for any attempts to cede the territories “under Israeli sovereignty,” including the Syrian Golan Heights.¹⁸⁵

The issue of Israeli sovereignty over the Syrian Golan has been such a passionate issue of debate in Israel that it has been claimed by prominent Israelis that any person who is acting under the intention of removing any part of the sovereign territory of Israel is committing treason according to the Israeli penal code – a crime punishable by death or

¹⁸³ *Accord Asher, supra* note 156, at 366 (describing the doublespeak when it came to the interpretation of the initial Israeli extension of its law, administration and jurisdiction to East Jerusalem as effective annexation, which later became apparent through more clear legislation in the form of a Basic Law on Jerusalem, “it was almost natural that while the leaders of the state were making it clear both within and without the Knesset that East Jerusalem had been annexed to Israel, the representatives of the state in international forums fervently denied that this was the result.”).

¹⁸⁴ HCJ 2838/95 Greenberg v. Katzrin Local Council [1997], *available at* http://elyon1.court.gov.il/files_eng/95/380/028/B01/95028380.b01.pdf.

¹⁸⁵ *See e.g.*, Jonathan Lis, *Knesset Pushes Golan Referendum Law*, HA’ARETZ, December 9, 2009, *available at* <http://www.haaretz.com/news/knesset-pushes-golan-heights-referendum-law-1.2474>.

life imprisonment.¹⁸⁶ As recently as 2008, a Member of the Knesset remarked: “There is not a sane nation in the world that gives up the territory of its homeland... Whoever removes land from the State of Israel's sovereign territory is subject to the death penalty... Giving away the Golan Heights to Syria is treason, and the punishment for a person who commits treason under Israeli law is death.”¹⁸⁷

The above discussion should serve as strong evidence to suggest that despite Israel's early claims to the contrary, and its refusal to use the explicit term annexation in relation to the Syrian Golan, Israel takes the position that it has extended its “full sovereignty” over the Syrian Golan, which according to the rules of international law which will be discussed later, constitutes effective annexation. However, as will also be discussed later, regardless of Israel's official position, the 1981 Golan Heights Law is considered an ‘effective annexation’ under international law.

Israeli Reasoning for Continuing to Hold the Syrian Golan

Since 1981, Israel continues to hold the Syrian Golan Heights based on the assertions that, (a) as mentioned previously, the Syrian Golan Heights were legitimately captured as a means of self-defense during unprovoked warfare by Syria, (b) The Syrian Golan Heights is a strategic plateau that is vital to Israel's defense of its borders, which according to Security Council Resolution 242, are guaranteed to be “secure and recognized”. Because of the physical characteristics of the Syrian Golan Heights, which overlooks Israel, and its proximity to unfriendly, warring Arab states, it represents a territory that – if given up – would compromise Israel's security. As an example of the vulnerability to Israel that the Syrian Golan Heights poses, Israel cites its cities being shelled by Syria from positions on the Syrian Golan Heights. Israel interprets the word “secure” in Resolution 242 to mean that its borders be “defensible”.(c) Alternately, some

¹⁸⁶ The revised penal code cited in Treason, *supra* note 176, at 4, was adopted by the Knesset in 1981 and according to the authors, “Chapter 7, entitled “Security of the State, Foreign Relations and Official Secrets,” includes paragraphs covering treason which were incorporated verbatim from earlier revisions of the penal code adopted in 1957. Paragraph 97b reads: “Anyone who does something with the intention of removing territory from the sovereignty of the state or making that territory part of the sovereignty of a foreign state or has performed an act that is likely to bring this about--the penalty is death or life imprisonment.” See also Louis Rene Beres & Zalman Shoval, *On Demilitarizing a Palestinian “Entity” and the Golan Heights: An International Law Perspective*, 28 VAND. J. TRANSNAT’L L., Nov. 1995 at 970; see also HOWARD GRIEF, *THE LEGAL FOUNDATION AND BORDERS OF ISRAEL UNDER INTERNATIONAL LAW*, 2008, at 562-563.

¹⁸⁷ Nissan Ratzlav-Katz, *MK Eldad: Death Penalty for Golan Land Concessions*, ISRAEL NATIONAL NEWS, May 26, 2008, available at <http://www.israelnationalnews.com/News/News.aspx/126304>

prominent Israelis take the position that the Syrian Golan Heights is a part of the historical borders of Eretz Israel or the Biblical “Land of Israel”. This is the position sometimes afforded by Israeli heads of state regarding the West Bank and the Gaza Strip,¹⁸⁸ and is also at times position that officials use to justify the establishment of permanent settlements in the Syrian Golan Heights, the West Bank, and the Gaza Strip.¹⁸⁹ Others however see the Syrian Golan Heights as temporarily under Israeli control, pending a peace agreement with Syria in which the Syrian Golan Heights will be returned to Syria.¹⁹⁰ (d) Still others claim that the Syrian Golan Heights is primarily held due to political battles over access to vital water resources that benefit the state of Israel.¹⁹¹ *According to Israel, does international humanitarian law apply to the Syrian Golan?* Regarding the applicability of international law to the Syrian Golan Heights, and to the occupied territories more broadly, Israel maintains that it upholds international law in its administration of the occupied territories.¹⁹² It disagrees however with the interpretations under which certain standards of international humanitarian law would apply to the territories it occupies. Because the Hague Regulations form part of customary

¹⁸⁸ In an NBC Meet the Press interview of April 25, 1982, Begin was asked about allegations that Israel was “moving unmistakably” to annex the West Bank and the Gaza Strip. He replied, “Well, first of all, I would like to say a word about the term annex, or annexation. You can annex foreign land. You cannot annex your own country. Judea and Samaria are part of the Land of Israel, or in foreign languages, Palestine, in which our nation was born. There our Kings ruled and our prophets brought forth the vision of eternal peace. How can we annex it?” *as cited in* ZVI HARRY HURWITZ, *BEGIN: HIS LIFE, HIS WORDS, HIS DEEDS*, (2004) at 167-168. *See* transcript of full interview *available at* Ministry of Foreign Affairs Website, (Isr.), <http://www.mfa.gov.il/MFA/Foreign%20Relations/Israels%20Foreign%20Relations%20since%201947/1981-1982/118%20Interview%20with%20Prime%20Minister%20Begin%20on%20NBC%20Tel>

¹⁸⁹ In particular, this is the position of the “messianic” movement Gush Emunim that was the first to establish many settlements. Other justifications for settlements include that they are placed for security reasons to use as a “front line warning system,” *see* Dan Simon, *Israel’s Settlement Liability*, LOS ANGELES TIMES, May 25, 2011, *available at* <http://articles.latimes.com/2011/may/25/opinion/la-oe-simon-israel-netanyahu-20110525>

¹⁹⁰ This has been the position of several Israeli administrations that have been willing to negotiate with Syria according to the “land for peace” formula. G.A. Res. 2200A (XXI) at 1, U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), Art. 4.

¹⁹¹ *Supra* note 148 (listing water as one of the reasons for the Golan’s strategic importance to Israel).

¹⁹² This is Israel’s position as described in U.N. documents, *see, e.g., Core Document Forming Part of the Reports of States Parties: Israel, delivered* July 25, 2008, U.N. Doc. HRI/CORE/ISR/2008, November 21, 2008 at 42, ¶103, *available at* <http://www.unhcr.org/refworld/pdfid/4964a6362.pdf> [hereinafter: *Israel Core Human Rights Document*]. For historical position, *see, e.g.,* Prime Minister Begin’s Statement to the Knesset on his visit to the U.S. 27 July 1977, *available at* http://www.archive.org/stream/israelsforeignre00medz/israelsforeignre00medz_djvu.txt (“The State of Israel upholds international law, but if anyone relies upon the Geneva Convention of 1949, which is designed to protect the civilian population in occupied areas, I must say, first of all, that Jewish settlement does not in any way of under any circumstances do harm to the Arabs of Eretz Yisrael. We have not dispossessed, and will not dispossess, any Arab from his land.”).

international law,¹⁹³ and Israel has an internal policy of automatically incorporating customary law into its laws, Israel agrees that it is bound by the Hague Regulations.¹⁹⁴ However, because other conventions concerning international humanitarian law to which it is bound, most notably the Fourth Geneva Convention, it considers partially inapplicable because it has not formally incorporated the legal provisions into its domestic law, which since it is a declaratory treaty, it must do through enacting and passing its own legislation.¹⁹⁵ However, Israel agrees that the “humanitarian provisions” of the Fourth Geneva Convention form a part of customary law, so they agree to respect these provisions in accordance with their interpretation of the Fourth Geneva Convention.

Israel repeatedly argues that it does not consider itself bound by the Fourth Geneva Convention as concerns the West Bank and Gaza, and Gaza, based on its interpretation of Article 2(2) of the Fourth Geneva Convention¹⁹⁶ and its analysis of the historical circumstances that bear upon the question of to whom sovereignty belonged.¹⁹⁷ In this situation, it applies the “humanitarian provisions” of the Fourth Geneva Convention, but not any “political provisions.”¹⁹⁸ It also claims that because it allows the ICRC to operate in the occupied territories, the ICRC effectively ensures compliance with the rest of the Fourth Geneva Convention, which Israel insists it effectively respects since it does not stand in the way of the operation of the ICRC and in fact, complies with most of its requests.¹⁹⁹

With regard to the Syrian Golan, this argument disputing the former sovereignty of the territory is inapplicable. And yet, little has been written on Israel’s legal position concerning the Syrian Golan and the de jure application of the Fourth Geneva Convention. Since Israel contends that its civil law and administration extend to the Syrian Golan, and that the Syrian Golan is part of its sovereign territory, Israel on that

¹⁹³ See, e.g., Mazen Qupty, The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel, available at <http://quptylawfirm.com/wp-content/uploads/2010/10/Application-of-international-law-in-occupied-territories.pdf> at 3.

¹⁹⁴ *Id.*

¹⁹⁵ Israel Core Human Rights Document, *supra* note 192 at 42, ¶103.

¹⁹⁶ *Supra*, note 193 at 11.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ In addition to numerous HCJ cases and other official statements of Israel’s government describing its cooperation with the ICRC, see International Committee of the Red Cross website, *The ICRC in Israel and the Occupied Territories*, January 3, 2012, available at <http://www.icrc.org/eng/where-we-work/middle-east/israel-occupied-territories/overview-israel.htm> (describing work in the occupied territories since 1948).

basis rejects the application of IHL to the Syrian Golan.²⁰⁰ The residents of the Syrian Golan are considered permanent residents of Israel, and Israel rejects the residents' claims to Syrian nationality.²⁰¹ However, it should be noted that Israel allows UN Peacekeepers to operate in the Syrian Golan in the Demilitarized Zone, cooperates with the International Committee of the Red Cross on specific humanitarian issues related to the Syrian Golan's inhabitants, and recognizes the existence of a military conflict between itself and Syria.

According to Israel, does international human rights law apply to the Syrian Golan?

Since Israel's position is that all of the laws of Israel extend to the Syrian Golan, it is understood that Israel believes that human rights law applies to the Syrian Golan to the extent which human rights laws are incorporated into Israeli domestic law. Because Israel does not automatically incorporate legislation from international treaties it ratifies into its domestic law, requiring specific legislation in order to do so,²⁰² only the provisions of human rights treaties it has ratified that have made their way into Israeli domestic law through such legislation, or that are considered customary international law,²⁰³ are considered applicable by Israel to any of what it considers its territory, including the Syrian Golan. Israel contends that, "the Supreme Court has ruled, that both customary and treaty law affect Israeli law, since Israeli law operates under the presumption of compatibility between the domestic law and the international norms Israel has undertaken to uphold."²⁰⁴ Thus, human rights treaties constitute an important tool for

²⁰⁰ Israel does not recognize the *de jure* applicability of the Fourth Geneva Convention or the Hague Regulations to the Syrian Golan. T. Davenport, *A Study of Israel's Occupation of the Golan Heights*, Irish Centre for Human Rights (2008) (unpublished manuscript, National University of Ireland, Galway) (on file with Al-Marsad: the Arab Center for Human Rights in the Occupied Golan), as cited in Murphy, *supra*, note 9, at 36. For an analysis of the Israeli Supreme Court's jurisprudence related to the occupied territories, see D. Kretzmer, *The Occupation of Justice – The Supreme Court of Israel and the Occupied Territories* (2002) State University of New York as cited in Murphy, *supra*, note 9, at 36.

²⁰¹ Murphy, *supra*, note 9, at 38.

²⁰² Israel Core Human Rights Document, *supra* note 192 at 42, ¶103.

²⁰³ Customary law applies as long as it does not contradict any law of the Israeli Knesset (Parliament). See H.C.J. 785/87 Affo et. al. v. Commander of IDF Forces in the West Bank [1988] P.D. 42(2), 4 as cited in Israel Core Human Rights Document, *supra* note 192 at 42, ¶103.

²⁰⁴ H.C.J. 2599/00 Yated - Non-Profit Organization for Parents of Children with Down Syndrome v. The Ministry of Education [2002] P.D. 56(5), 834 as cited in Israel Core Human Rights Document, *supra* note 192 at 42, ¶104.

the interpretation of national legislation, and serve to further enhance and entrench international human rights norms in the domestic sphere.”²⁰⁵

This position leads to the common recommendation by international human rights bodies that Israel incorporate specific, neglected portions of the treaties to which it is State Party into its domestic law, and in regards to the Syrian Golan, respect its international human rights law obligations in full.

Israel’s position on its IHRL obligations in reference to the Syrian Golan differs from its position on the applicability of its IHRL obligations in the West Bank and Gaza because Israel contends that there is no simultaneous applicability of IHL and IHRL. Israel is one of the few remaining states to maintain this position.²⁰⁶

It should be noted that in relation to Israel’s human rights reporting obligations with the United Nations, Israel’s statistics – in line with its position that the Syrian Golan is part of Israel’s sovereign territory – include the Syrian Golan since 1981 as part of its northern district, in the Golan sub-district.²⁰⁷

Relationship between IHL and IHRL

In order to understand Israel’s dual obligations related to the right to education in the territory it occupies, the Syrian Golan, a brief discussion of the relationship between IHL

²⁰⁵ Israel Core Human Rights Document, *supra* note 192 at 42, ¶104.

²⁰⁶ See, e.g., Al Haq, et al., *Joint Parallel Report to the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD) on the occasion of the Consideration of Israel’s 14th, 15th and 16th Periodic Reports on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination*, 80th Sess., Feb. 13 – March 9, 2012 (January 30, 2012) available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AL-HAQ_BADIL_ADDMEER-WCLAC_Israel_CERD80.pdf, at 7, ¶11-12.

²⁰⁷ See for example CENTRAL BUREAU OF STATISTICS, STATISTICAL ABSTRACT OF ISRAEL, GEOGRAPHICAL DISTRIBUTION OF THE POPULATION, POPULATION DENSITY PER SQ. KM. OF LAND, BY DISTRICT AND BY SUB-DISTRICT (2005) available at http://www1.cbs.gov.il/shnaton57/st02_04.pdf. This has also been noted in numerous reports carried out by the Organization for Economic Co-operation and Development (OECD), e.g., OECD, *Study on the Geographic Coverage of Israeli Data*, available at <http://www.oecd.org/dataoecd/2/19/48442642.pdf> at 19, ¶53, (“As noted in Para 41, the fundamental description of the land area covered by “Israel “or “the State of Israel” is provided in the generic Explanatory Notes in the Statistical Abstract. That description clearly indicates that Israel’s geographic area, as defined by the Israeli authorities, includes East Jerusalem, since July 1967, and the Golan Sub-District, since December 1981. The Israeli Settlements in the West Bank are not mentioned in the description of the “State of Israel”, though they are mentioned in metadata on specific statistical programs.”) See also *id.* at 22, ¶61 (“Within the [Central Bureau of Statistics] CBS geographic hierarchy, the entire area of the Golan Heights is identified as a distinct Sub-district, entitled the Golan Sub-district. Statistics available at the Sub-district level are also available for the Golan Sub-district.”).

and IHRL is necessary. International Humanitarian Law²⁰⁸ governs the conduct of hostilities under international law and the protection of civilians and other vulnerable populations who are affected by warfare. The breadth of humanitarian law (also called the law of armed conflict) is wide, and it governs all aspects of armed conflict, from the *jus ad bellum* (regulations concerning the justifications for war), *jus in bello* (regulations concerning how war ought to be waged) to the *jus post bellum* (regulations concerning conduct following the cessation of hostilities), in all times and on all types of terrain, from land warfare to warfare conducted at sea or by air. It has been said, however that “the bulk of the rules governing the conduct of hostilities has been created for the basic purpose of protecting certain groups of persons, including peaceful civilians, from the worst of the hardships in a conflict.”²⁰⁹

²⁰⁸ The majority of International Humanitarian Law is contained in the 1907 Fourth Convention Respecting the Laws and Customs of War on Land of 18 October 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter: Hague Regulations] and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287, entered into force on 21 October 1950 [hereinafter: Fourth Geneva Convention]. The other three Geneva conventions are 1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; and 3) Geneva Convention Relative to the Treatment of Prisoners of War; all three are dated August 12, 1949. The text of all four instruments, as well as the full particulars of the committee discussions and plenary sessions of the 1949 conference, are found in the three volumes of the *Final Record* of that meeting, as cited in GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY... A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* (1957) at p. 25-26 [hereinafter: *Occupation of Enemy Territory*]. There are various narratives for what International Humanitarian Law is and why it was created. Most of them attempt to draw a line of historical trajectory connecting various legal and historical events in a neat line that leads to the development in the present. Many of these narratives rely upon an assumption that progress has been made, and connect the building and development of legal institutions and codes (or legal positivism) to this idea that such actions constitute a step in the right direction. They also in varying ways use assumptions that international law is developed as a whole, unified body. According to some of the most commonly cited narratives, IHL has its origins in the St. Petersburg Declaration of 1868, and the Hague peace conferences of 1899 and 1907, and the Lieber Code of 1863, which only extended to American soldiers but was nonetheless used as inspiration for several other military codes which served as the precursor to the 1864 Geneva Convention. See, e.g. Geoffrey Best, *Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After*, 75 INT'L AFF. 619, 625 (1999) as cited in Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: the Politics of Distinction*, 19 MICH. ST. U. COLL. L. J. INT'L L 299 2010-2011, [hereinafter: *Politics of Distinction*] at 306; According to the ICRC's version of the history of IHL, IHL in its codified form began with the Geneva Convention of 1864, but scattered codes and laws regulating the conduct of hostilities existed for millennia beforehand, but not in a binding, internationally-recognized, codified format. These included the *Viqayet*, a code of warfare from 1280, written during the height of Moorish (Arab-Muslim) rule of Spain. See *What are the Origins of International Humanitarian Law?*, INT'L COMM. RED CROSS (Jan 1., 2004) available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/5KZFR8> as cited in *Politics of Distinction*, at 306.

²⁰⁹ Baxter, *Constitutional Forms and Some Legal Problems of International Military Command*, 29 BYIL (1952) at 357-359, as cited in *Occupation of Enemy Territory*, *supra* note 208, at 22-23.

International Human Rights Law has the noble aim of protecting “everyone,” and zeroes in most specifically on the most vulnerable categories of people, including those who are specially protected under international humanitarian law, and others, guaranteeing everything from the rights of the accused to the right of a people to self-determination. Human Rights Law was created in after World War II response to the horrific abuses of unchecked state power on individuals and members of groups in violation of their common humanity. As such, on a fundamental level, Human Rights Law aims to promote the inherent dignity of mankind through the protection individuals from the abuses of the state. It has expanded from a primary focus on the rights of the individual to include the notions of collective rights, rights for members of particularly vulnerable or disadvantaged groups, and into protections of individuals and peoples from abusive actors other than the state.

While intending to protect “everyone,” human rights have been primarily articulated, defined and enforced through the organ of the state and its official representatives. States, not individuals, are signatories to human rights treaties and are charged with the responsibility for ensuring their respect, even though the system focuses on the protection, for the most part, of individuals. And states are also responsible to some degree through their involvement in international legal and judicial organs and United Nations committees for their enforcement.

It may seem contradictory that a system was created in which states – themselves the abusers of human rights whose shocking conduct spurred the creation of the system of international human rights – were charged with guaranteeing that those rights are protected. Based in part on this critique, more individual-based reporting mechanisms of human rights violations have been instituted to allow the individual a voice in reference to its state’s conduct, most relevantly to this study by the Committee on Economic, Social and Cultural Rights.²¹⁰ However, one of the most hallowed principles underlying the international legal system is the notion of state sovereignty, which demarcates limits on the ways in which violations of human rights within a state can be enforced. In effect, the human rights system operates around the ability of states to shame other states

²¹⁰ For more information on complaints procedures, see Office of the High Commissioner for Human Rights, *Human Rights Bodies: Complaints Procedures*, available at <http://www2.ohchr.org/english/bodies/petitions/index.htm> [last accessed May 16, 2012]

through exposing and critiquing other states' human rights violations, and as such, has often been a factor leading to charges that the system of human rights is politicized.²¹¹ This is often a distinction that is drawn in contrast with the historically neutral character of humanitarian law, which is guaranteed by a neutral international body, the International Committee of the Red Cross, as opposed to a Human Rights Committee comprised of representatives of what in comparison appear to be squabbling states.

Traditionally, it was interpreted that human rights law applied in a time of peace, while international humanitarian law applied during a time of war.²¹² However, this opinion no longer prevails in regards to the application of law during a time of armed conflict. Very few countries today adopt the doctrine that the two types of law are mutually exclusive, although of the few that adopt this position, Israel is one.²¹³ While debates rage over the particulars of how the two bodies of law intersect during a time of armed conflict, it is now generally agreed that the two apply concurrently during times of war.²¹⁴ This has been affirmed in multiple resolutions of the UN Security Council²¹⁵ and

²¹¹ Israel repeatedly alleges that the United Nations system is biased, and that the human rights mechanisms in particular unfairly “single out” Israel related to its human rights record. Israel often critiques the United Nations human rights system as being politicized.

²¹² A more traditional viewpoint was that the laws of armed conflict superseded the laws of IHRL during a time of conflict, based on a theory of distinction between the laws of peace and the laws of war. *See, e.g.,* J. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS, (1975), at 15, as cited in YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW, 2009 at 402 [hereinafter: Continuity and Change of IHL] (“... the two legal systems (the law of armed conflicts and human rights) are fundamentally different, for humanitarian law is valid only in the case of an armed conflict while human rights are essentially applicable in peacetime, and contain derogation clauses in case of conflict. Moreover, human rights govern relations between the State and its own nationals, the law of war those between the State and enemy nationals. There are also profound differences in the degree of maturity of the instruments and in the procedure for their implementation... Thus the two systems are complementary.... But they must remain distinct, if only for the sake of expediency.”).

²¹³ Despite adopting this stance, the HCJ has considered specific human rights in several cases related to the OPT, but based on the reasoning that the rights were incorporated into domestic law – so Israel’s state practice is not exactly consonant with its position on the applicability of IHRL treaties. *See, e.g.,* H.C.J. 1890/03, Bethlehem Municipality & 21 others v. The State of Israel – Ministry of Defense, Supreme Court of Israel Sitting as the High Court of Justice (February 3, 2005) (Isr) (discussing competing claims of rights to freedom of religion and freedom of movement). Further, the HCJ has ruled occasionally that IHL and IHRL apply concurrently in the OPT. *See, H.C.J. 769/02, Public Committee against Torture in Israel et al. v. Government of Israel et al., Supreme Court of Israel sitting as the High Court of Justice (December 2006) (Isr.) as cited in Program on Humanitarian Policy and Conflict Research, From Legal Theory to Policy Tools: International Humanitarian Law and International Human Rights Law in the Occupied Palestinian Territory (Policy Brief: May 2007), available at <http://www.hpcrresearch.org/sites/default/files/publications/IHRLbrief.pdf>*

²¹⁴ Some of the earliest articulations of the position that human rights applied during times of occupation and armed conflict were related to Israel and its actions within the territories it occupied. For example, in

General Assembly,²¹⁶ as well as three times by the International Court of Justice in separate advisory opinions.²¹⁷

This position of parallel applicability might seem confusing, since IHRL and IHL have unique and fundamental characteristics that pose some difficulties for the potential for them to govern conduct simultaneously. These include some of the most basic premises behind the bodies of law, and could cause some to see the two bodies as so divergent as to be irreconcilable. For example, the *jus in bellum* regulations mentioned previously govern the ways in which war should be waged. Warfare, by its nature, even in a situation in which it is most optimally regulated and controlled, is an exceptional state that goes outside the norm, by definition causing extreme destruction, loss of life, maiming, and destruction of property. During times of peace, such situations would constitute violations of international human rights law of the most extreme nature.²¹⁸ It seems almost bizarre that human rights could coexist at the same time as war, when a state of war is itself a violation of the human rights of individuals on a grave scale; and yet, to take the opposite approach, one could find it absurd if human rights did not apply during a time of war. Disallowing the application of human rights law could be viewed

1967, the UN Security Council stated, “essential and inalienable human rights should be respected even during the vicissitudes of war,” *in* GA Res. 237, ¶2, preambular ¶2, UN Doc. A237/1967, June 14, 1967. *See also* GA Res. 2252 (ES-V), UN Doc. A2252/ESV, July 4, 1967, which refers to this resolution, *as cited in* Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISRAEL L. REV. 315 (2007) [hereinafter: *Interplay Between IHL and IHRL*]. One year following this resolution, the Tehran International Conference on Human Rights represented the United Nations’ adoption of the phrase “human rights in armed conflict,” which was used in a series of resolutions following the first resolution of the Tehran conference, which was entitled “Respect and Enforcement of Human Rights in the Occupied Territories,” Final Act of the International Conference on Human Rights, UN Doc. A/Conf.32/41 (Apr. 22-May 13, 1968).

²¹⁵ *See, e.g.*, S.C. Res. 1019, UN Doc. S/RES/1019 (Nov. 9, 1995) and S.C. Res. 1034, UN Doc. S/RES/1034 (Dec. 21, 1995)(in regard to Former Yugoslavia); S.C. Res. UN Doc. S/RES/1635 (Oct. 28, 2005) and S.C. Res. 1653, UN Doc. S/RES/1653 (Jan. 27, 2006)(Great Lakes region) *as cited in* *Interplay Between IHL and IHRL*, *supra* note 214, at 316.

²¹⁶ *See, e.g.*, G.A. Res. 50/193, UN Doc. A/RES/50/193 (Dec. 22, 1995)(Former Yugoslavia); G.A. Res. 3525 (XXX), UN Doc. A/3525 (Dec. 15, 1975)(territories occupied by Israel); G.A. Res. 46/135, UN Doc. A/RES/46/135 (Dec. 19, 1991)(Kuwait under Iraqi occupation); G.A. Res. 52/145, UN Doc. A/RES/52/145 (Dec. 12, 1997)(Afghanistan) *as cited in* *Interplay Between IHL and IHRL*, *supra* note 214, at 316.

²¹⁷ Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996 [hereinafter: ICJ *Use of Nuclear Weapons*]; Judgment, *Case Concerning Armed Activities on the Territory of the Congo*, ICJ, 19 December 2005; Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004.

²¹⁸ INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (Henry J. Steiner et al. ed., Oxford University Press 3rd) (2007) [hereinafter: *Law, Politics, Morals*].

as abandoning people when they are the most vulnerable and the most in need of their protection. The balance of these two points of view suggests that, however contradictory the two bodies of law might seem, it makes the most sense to apply human rights law and humanitarian law simultaneously, attempting to guarantee to the best of the law's ability the protection of those most affected by warfare in an extraordinary situation such as conflict.

While now understood that both sets of laws apply simultaneously, questions (especially in light of the above tensions between the two bodies of law) are raised as to the practical application of legal norms from the two bodies of law in specific situations. One approach that has been advocated in relation to dealing with the parallel application of IHL and IHRL focuses on the “complementarity between their norms in most cases and prevailing of the more specific norm when there is contradiction between the two.”²¹⁹ This is the approach that the ICJ has arguably adopted in its advisory opinions that reference the relationship between IHL and IHRL.²²⁰

For example, when legal obligations conflict, questions are raised as to which law supersedes the other. To answer this question, scholars look to the doctrine of *lex specialis*. The full phrase is *lex specialis derogat generali*, meaning that a specific rule should take precedence over a general rule.²²¹ In the ICJ's 1996 Advisory Opinion on the Threat or Use of Nuclear Weapons, the ICJ affirmed the *lex specialis—lex generalis* relationship between the two bodies of law, explaining that the right to life must be interpreted through the rules of humanitarian law such as proportionality, indiscriminate use of force, and precautionary measures as outlined under IHL,²²² so that international humanitarian law is *lex specialis* to international human rights law in relation to the right to life.²²³ Horowitz explains that this means that:

²¹⁹ Interplay Between IHL and IHRL, *supra* note 214, at 312.

²²⁰ Elizabeth Mottershaw, Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law, 12 INT'L. J. HUM. RTS. 457 (2008) [hereinafter: Rights in Armed Conflict].

²²¹ “Comment on Relationships Between International Human Rights and Humanitarian Law,” in Law, Politics, Morals, *supra* note 218, at 395.

²²² Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, para. 25 as cited in Jonathan Horowitz, *Human Rights, Positive Obligations, and Armed Conflict: Implementing the Right to Education in Occupied Territories*, 1 INT'L HUMAN. LEGAL STUD. 306–307 (2010) [hereinafter: Right to Education].

²²³ *Id.*

where obligations that an occupant has to human rights law and occupation law overlap, human rights obligations remain applicable but must be interpreted through international humanitarian law. This is because international humanitarian law is more appropriately tailored for the situation under inspection, namely occupation.²²⁴

In a later opinion, the Court posed three options in relation to how IHL could relate to IHRL more broadly: some rights could be only issues of IHL, some of IHRL, and some both.²²⁵

Some have argued that in its opinion on the *Legality of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ indicated that in the case of certain rights – for example, certain economic, social and cultural rights such as the right to education – human rights law provides for the more specific articulation of a right.²²⁶

Some, such as commentators Doswald-Beck and Vite in the *International Review of the Red Cross*, have argued that:

The major legal difference is that humanitarian law is not formulated as a series of rights, but rather as a series of duties that combatants have to obey. This does have one very definite advantage from the legal theory point of view, in that humanitarian law is not subject to the kind of arguments that continue to plague the implementation of economic and social rights.²²⁷

This theory however is based on a distinction between economic, social and cultural rights and civil and political rights that has been displaced by a newer understanding of the character of the rights. The original theory was that economic, social and cultural rights imposed positive duties on states, whereas civil and political rights primarily imposed negative duties on states. This conceptual understanding has been displaced by wider acceptance of the idea that both sets of rights impose both positive and negative duties on states, and that the types of rights are closer in character

²²⁴ *Id.*, at 236

²²⁵ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004, para. 106.

²²⁶ This is the interpretation of the ICJ decision presented in *Rights in Armed Conflict*, *supra* note 220, at 457. Mottershaw argues, "... the ICJ's formulation in the wall opinion 'might be understood to mean that the human rights law obligations would remain of primary relevance.' In fact, where human rights law provides more detail – and in the case of economic, social and cultural rights it does – this is the only way it can be understood. The rights are clearly a matter of both and it is self-evident that the law that provides most detail will have the most relevance."

²²⁷ Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94–119 (1993) as cited in *Law, Politics, Morals*, *supra* note 218, at 459.

than originally argued.²²⁸ Others have argued that humanitarian law does not simply impose duties or obligations on states, but also implies certain rights.²²⁹

The laws of occupation – a subset of IHL in which one warring army takes territory of its enemy party under its control – also has unique characteristics which complicate its simultaneous function with IHRL. The thrust of the law of occupation is related to the maintenance of the status quo within a territory, during a time in which an enemy power within an armed conflict holds a territory while it continues to wage war against the territory’s sovereign. This status, while as will be explained later has developed and changed in recent years, perhaps in response to the increasing importance of human rights protection, has been seen as in conflict with the transformative notion of a state’s human rights obligations. As mentioned previously, states are obligated under human rights law to take both positive and negative legal measures to ensure the protection of human rights. The primary problem arises in regards to the state’s positive obligations, acts that can often involve legally disruptive and intrusive measures such as the overhaul of legislation or the creation of new institutions in a territory. Occupiers, under international law, are traditionally prohibited from interfering in these more permanent ways with the territory, a principle that has been termed the conservationist principle.²³⁰ And yet, under the guise of fulfilling human rights obligations that allow for the Occupying Power to make sweeping but unnecessary changes to a territory under its control, the Occupier can act for its sole benefit, against the wishes of the population.²³¹

These tensions will be discussed more specifically within the context of the right to education as it relates to the competing obligations states have when both sets of law apply. And the distinctions in the two fields of law – the law of occupation under IHL, and the right to education under IHRL – will be handled in this study through a dual

²²⁸ Rights in Armed Conflict, *supra* note 220, at 455.

²²⁹ One example of this is Article 13 of the Third Geneva Convention, related to the humane treatment of prisoners of war, which Greenwood argues ‘implicitly states a right’, *as cited in* Rights in Armed Conflict, *supra* note 220, at 455-456.

²³⁰ Roberts describes it as follows: “the cautious, even restrictive assumption in the laws of war (also called inter- national humanitarian law or, traditionally, *jus in bello*) that occupying powers should respect the existing laws and economic arrangements within the occupied territory, and should there- fore, by implication, make as few changes as possible. This conservationist principle in the laws of war stands in potential conflict with the transformative goals of certain occupations.” Adam Roberts, Transformative Military Occupation: Applying the Laws of War and Human Rights, 100 Am. J. Int’l L. 580, 2006, at p. 580

²³¹ Right to Education, *supra* note 222, at 307

emphasis on the obligations that both sets of law have in common, namely the positive legal obligations that are imposed on states by the right to education and the duties of states related to education under IHL.

Extraterritorial Application of Human Rights in Occupied Territories

According to Horowitz, the idea that extraterritorial application of human rights applies in occupied territories is based on:

the general notions that 1) a state has obligations under human rights treaties to the people within its jurisdiction, 2) that the territorial jurisdiction is extended to the areas that a state has ‘effective control’ over, and 3) in an occupied territory, as defined in Article 42 of the Hague Regulations, is under the ‘effective control’ of the Occupying Power.²³²

As indicated by the above, the notion of territory under which a state has “effective control” is a *conditio sine qua non* (or requisite condition) of whether a territory is under belligerent occupation. Once it is determined that an area is under the “effective control” of a belligerent power, it can be demonstrated that the threshold has been met that determines whether human rights norms apply in those areas. As such, the notion of “effective control” will be explained in the context of the Syrian Golan in the following section on whether the Syrian Golan is occupied.²³³

While discussions of the extraterritorial application of human rights have primarily revolved around discussions of the application of civil and political rights, the ICJ has stated that the Covenant on Economic, Social and Cultural Rights as well as the Convention on the Rights of the Child must be applied extraterritorially during times of occupation if the state is party to those treaties.²³⁴

²³² *Id.*, at 236. Horowitz also notes in his footnote that an extensive discussion of domestic and Strasbourg case law on the extraterritorial application of human rights *see* Al Skeini v. Secretary of State for Defence [2004] EWHC 2911 (QB), and the Court of Appeal, [2005] EWCA Civ 1609.

²³³ Opposition to this point of view has been expressed by the UK in the Al-Skeini case, in which it advocated the point of view that “effective control” has different meanings within IHL versus IHRL. However, a majority of international lawyers writing on the subject of IHL and IHRL disagree with this approach.

²³⁴ From footnote, “The Court also notes that this view has been advanced by the Committee on Economic, Social and Cultural Rights.” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), Advisory Opinion, 9 July 2004, paras. 112, 113 and 114 *as cited in* Right to Education, *supra* note 222, at 236. This position of the ICJ was not unanimous; In a separate opinion, Judge Rosalyn Higgins stated: “So far as the International Covenant on Economic, Social and Cultural Rights is concerned, the situation is even stranger, given the programmatic requirements for the fulfillment of this category of rights,” *as cited in* Law, Politics, Morals, *supra* note 218, at 469.

Questions have also been raised as to the degree of responsibility an occupant has to the occupied population compared with its own population. The Human Rights Committee in General Comment 31 commented on this matter in relation to the ICCPR, advocating an expansive definition of rights-holders under the terms of the treaty. Under their interpretation, Covenant rights must extend not simply to the citizens of States Parties to the ICCPR, but to “all individuals, regardless of nationality or statelessness,” including those within the effective control of a State Party “acting outside its territory.”²³⁵ Based on this evidence, Horowitz concluded that “generally speaking, it is.”²³⁶

As previously discussed, the right to education is seen as a basic, inalienable human right as evidenced in its inclusion in some of the basic international human rights treaties, as will be demonstrated below. Specifically, it is seen as “binding under all circumstances and to be protected in all situations, including crises and emergencies resulting from civil strife and war.”²³⁷

Some have taken the existence of derogation clauses in human rights treaties as evidence that human rights norms are expected to apply in all situations, with only certain, specified exceptions. For example, in the ICCPR, derogation from certain rights is permitted in times “of public emergency which threatens the life of the nation.”²³⁸ Mottershaw notes that the ICESCR does not have any such derogation provision, which could be more logically taken to mean that economic, social and cultural rights apply at all times including during times of armed conflict, than to read a prohibition into the text where there was none.²³⁹ She also notes that the drafters of the ICESCR found a derogation clause unnecessary, since they believed that Article 2(1) governing the general

²³⁵ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 as cited in *Right to Education*, *supra* note 222, at 237.

²³⁶ *Id.*, at 237.

²³⁷ REPORT ON THE STRATEGIC PARALLEL SESSION ON EDUCATION IN SITUATIONS OF EMERGENCY AND CRISIS (International Committee of the Red Cross) (2000).

²³⁸ ICCPR, *supra* note 331 at Art. 4, as cited in John Cerone, *Human Dignity in the Line of Fire: the Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 VAND. J. TRANSNAT'L L. 1453 (2006).

²³⁹ Rights in Armed Conflict, *supra* note 220, at 457.

applicability of treaty obligations was “sufficiently flexible,”²⁴⁰ and may have seen the nature of economic, social and cultural rights, found “the case for derogation as ‘less compelling’.”²⁴¹

Legal Status of the Syrian Golan

Applicability of IHL and Occupation Law

The Syrian Golan Heights is considered occupied under international law, and as such is subject to the laws of international humanitarian law and a subset of that law, which is the law of belligerent occupation. However, because occupation law is complex and the Syrian Golan Heights’ legal status is contested by Israel, this paper will consider the question of whether the Syrian Golan Heights is considered occupied under international law, and if so, what recent developments in the law of occupation have meant for the topic of education under occupation.

What is an “occupied territory” according to international law?

Occupation is a subset of International Humanitarian Law (also known as the Law of International Armed Conflict or LOIAC) that has a long history in the legal tradition. Throughout history, it has been essentially determined through facts,²⁴² and is defined under the Hague Regulations in Article 42.

Article 42 of the Hague Convention states: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”²⁴³

As explained by Dinstein, the second paragraph indicates two clear conditions for whether a territory is considered occupied:

- (i) “the establishment of authority by the Occupying Power as a matter of fact (‘has been’)
- (ii) the ability of the Occupying Power to exercise that authority (‘can’)²⁴⁴

²⁴⁰ M. C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 27 (1995) *as cited in* Rights in Armed Conflict, *supra* note 220, at 451.

²⁴¹ Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 217 (1987) *as cited in* Rights in Armed Conflict, *supra* note 220, at 451.

²⁴² Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 29.

²⁴³ The Hague Regulations, *supra* note 208, at Art. 42.

It has been noted by commentators that every area within the territory under the control of the invading forces does not need to be physically occupied in order to establish a state of effective occupation.²⁴⁵ For example, an occupation by the only the air force of the occupying state might rise to the definition of effective occupation.²⁴⁶ One such commentator, von Glahn, noted that, “as long as the territory as a whole is in the power and under the *control* of the occupant and as long as the latter has the ability to make his will felt everywhere in the territory within a reasonable time, military occupation exists from a legal point of view.”²⁴⁷

The notion of the degree of the invader’s control over the territory is often encapsulated by the phrase “effective control.” The notion of effective control is tied in with the notion of occupation, since effective control is a prerequisite for defining a territory as being occupied. Determining what constitutes effective control has been a matter discussed by legal commentators:

The test for effective control is not the military strength of the foreign army which is situated outside the borders that surround the foreign area. What matters is the extent of that power's effective control over civilian life within the occupied area; their ability, in the words of Article 43 of the Hague Regulations, to 'restore and ensure public order and civil life.'²⁴⁸

This has been interpreted to mean when:

[territory] is actually placed under the authority of the hostile army... Thus there is assumed an invasion of the enemy state, resisted or unresisted, as a result of which the invader has rendered the enemy government incapable of publicly exercising its authority; the invader has successfully substituted his own authority for that of the legitimate government in the territory invaded. Invasion as such does not ordinarily constitute occupation, although it precedes it and may coincide with it for a limited period of time. In other words, while invasion represents mere penetration of hostile territory, occupation implies the existence of a *definite*

²⁴⁴ YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 42 (2009) [hereinafter: *Belligerent Occupation*].

²⁴⁵ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 28.

²⁴⁶ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 28-29. His idea of an “air force occupation” at the time was a theoretical one, as certain conditions would need to be met in order to establish control over the territory even in this case. See p. 28.

²⁴⁷ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 29.

²⁴⁸ Eyal Benvenisti, *Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements*, 28 *ISR. L. REV.* 297, 308–09 (1994) [hereinafter: *Protection of Human Rights*].

control over the area involved. In the former case, the invading forces have not yet solidified their control to the point that a thoroughly ordered administration can be said to have been established.²⁴⁹

In addition to being misunderstood, the requirements for what constitutes the “effective control” threshold that makes up an essential component that determines whether a territory is under belligerent occupation itself can be complex. As noted by Dinstein, whether the control of an occupier is “effective” as per the requisite standard is highly subjective, since even what constitutes “effective” control as required by IHL could vary based on a number of factors including everything from the terrain of the area to the displaced sovereign’s prior degree of control.²⁵⁰ And while the opinions of authoritative international bodies such as the ICRC, the ICJ, and the UN Security Council can be persuasive, these opinions themselves are not binding, except those issued by the Security Council under Chapter VII of the UN Charter.²⁵¹

Occupation must be maintained “in every respect” by the occupying forces in order for the territory to continue being in a state of belligerent occupation.²⁵² In other words, simply demonstrating that a *de facto* state of occupation has occurred is not sufficient to determining that it continues. The determination, however, is a factual one, and so the factual circumstances and degree of control of the occupant must be continually analyzed in order to determine whether a territory remains under occupation.

Despite the consistency of the legal definition of “Occupation,” as a term the definition has become increasingly complicated, both politically and legally. Its usage in recent years in particular has demonstrated that occupants and alleged occupants themselves dispute the meaning of the term and its applicability to their particular situation.²⁵³ Since the ascendancy of the principle of self-determination in international

²⁴⁹ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota *at* p. 28.

²⁵⁰ Belligerent Occupation, *supra* note 244 *at* 44.

²⁵¹ It is widely accepted that UN Security Council Resolutions based on Chapter VII of the UN Charter are legally binding on all members of the United Nations.

²⁵² Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota *at* p. 29.

²⁵³ For example, in the 2003 US and UK-led invasion of Iraq, despite their declaration that they would “strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq,” did not explicitly refer to themselves as occupants or their conduct in Iraq as rising to the legal level of “occupation.” Letter from the Permanent Representatives of

law, a principle that is enshrined in the founding documents of the United Nations, and the processes of decolonization undertaken by members of the United Nations after its founding, foreign occupation has increasingly been characterized as illegal and equated with colonization.²⁵⁴ The political stigma therefore associated with the term occupation has further clouded the term's meaning in recent years. As has been noted by scholars such as Yoram Dinstein, belligerent occupation itself is not necessarily illegal.²⁵⁵ However, there is evidence to suggest that such a category of occupations – illegal occupations – does exist, as has been noted by statements by Kofi Annan, former UN Secretary General, and the UN Security Council.²⁵⁶

Is the Syrian Golan under Israel's effective control and occupied according to IL?

The Syrian Golan Heights has been declared occupied according to international law by authoritative institutions such as the United Nations Security Council for years. The rationales for declaring it occupied are as follows:

Israel captured the Syrian Golan during the course of the war between Israel and Arab states in 1967. This was territory acquired by force in contravention of the UN Charter.

the United Kingdom of Great Britain and Northern Ireland and the United States of America, to the United Nations, addressed to the President of the Security Council, UN Doc. S/2003/538 (May 8, 2003) as cited in Protection of Human Rights, *supra* note 248 at ix. See also the statement by W. Hays Parks, Special Assistant to the Army Judge Advocate General, who said,

“The term ‘military occupation’ is one of those that’s very, very misunderstood. When you are an infantry company commander, and you’re told to take the hill, you physically occupy it. That’s military occupation with a smaller-lower-case ‘m’ and lower-case ‘o.’ It certainly does not mean that you have taken over it with the intent to run the government in that area. That’s the very clear-cut distinction, that until the—usually, until the fighting has concluded and is very conclusive, do you reach the point where technically there might be Military Occupation – capital ‘M,’ capital ‘O’- and a declaration of occupation is issued. That’s a factual determination; it’s a determination by the combatant commander in coordination with others, as well. Obviously, we occupy a great deal of Iraq at this time. But we are not, in the technical sense of the law of war, a military occupier or occupation force.” United States Department of Defense News Transcript, Briefing on Geneva Convention, EPW’s and War Crimes (Apr. 7, 2003), http://www.au.af.mil/au/awc/awcgate/dod/t04072003_t407genv.html, as cited in Protection of Human Rights, *supra* note 248 at ix

²⁵⁴ Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, 2009 at p. 4. This perspective of equating occupation with colonization can also be found in the academic writings of residents of the Golan.

²⁵⁵ Belligerent Occupation, *supra* note 244 at 2.

²⁵⁶ *Annan asks Israel to end occupation: First use of term “illegal,”* DAWN, Mar. 13, 2002, <http://archives.dawn.com/2002/03/13/int1.htm>; Yael Ronen, *Illegal Occupation and its Consequences* (Aug. 2007) (unpublished manuscript, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=yael_ronen).

The occupation has continued. No legal facts determining that the occupation has ceased have arisen. For example, Syria and Israel continue to be at a state of war; no peace treaty has been convened between the two parties; and Israel's Golan Heights Law extending Israeli civil law and sovereignty over the Syrian Golan has been declared "null and void" according to the U.N. Security Council, and is therefore irrelevant to a determination of legality. This determination that the effective annexation was null and void can be explained by the reasoning that customary international humanitarian law indicates that an occupation must be temporary.²⁵⁷ Derived from this is the idea of a principle of "non-annexation," which is the principle adopted here by the United Nations. The justification for calling the Syrian Golan illegally annexed, as stated previously, relies on the idea that International Humanitarian Law prohibits the acquisition of territory by force. The annexation (which is referred to as a *de facto* annexation since it is a legal fact despite Israel's refusal to term it an annexation) is illegal under international law²⁵⁸ and as such has been condemned by the United Nations and most nations of the world.²⁵⁹ Israel has effective control over the territory, as evidenced by its

²⁵⁷The unilateral annexation of a territory is illegal according to customary law derived from the principle in International Humanitarian Law that occupation should be temporary, see A. Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights* (2006), 100 *American Journal of International Law*, p. 580 at 583 as cited in Dr. Ray Murphy and Declan Gannon, *Changing the Landscape: Israel's Gross Violations of International Law in the Occupied Syrian Golan*. Al-Marsad – Arab Centre for Human Rights in the Occupied Golan, November 2008 at 35. Also discussed in *Protection of Human Rights*, *supra* note 248 at xi, in discussing UN Security Council Resolution 1483 states, 'occupation is a temporary measure for reestablishing order and civil life after the end of active hostilities, benefiting also, if not primarily, the civilian population... occupation does not amount to unlawful alien domination that entitles the local population to struggle against it.'

²⁵⁸The unilateral annexation of a territory is illegal according to customary law derived from the principle in International Humanitarian Law that occupation should be temporary, see A. Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights* (2006), 100 *American Journal of International Law*, p. 580 at 583 as cited in Dr. Ray Murphy and Declan Gannon, *Changing the Landscape: Israel's Gross Violations of International Law in the Occupied Syrian Golan*. Al-Marsad – Arab Centre for Human Rights in the Occupied Golan, November 2008 at 35.

²⁵⁹Numerous United Nations resolutions have documented the illegality of the Israeli occupation of the Syrian Golan, including UN Security Council Resolution SRES242 of 22 November 1967 calls for the withdrawal of Israeli armed forces from the territories occupied in the 1967 war, which include the Syrian Golan. The United Nations Security Council, General Assembly and Economic and Social Council have all declared Israel's decision to impose its laws, jurisdiction and administration on the occupied territories without legal effect (null and void) under international law, including U.N.S.C. Resolutions 242 (1967), Resolution 338 (1973), and Resolution 497 (1981); UN GA Resolution 61/27 (1 December 2006) and Resolution 61/118 (14 December 2006); ECOSOC 6309 as cited in UN Information Service, "Economic and Social Council adopts texts on Palestinian people, Independence for colonial countries, social development," 26 July 2007 as cited in Norwegian Refugee Council, International Displacement Monitoring Centre, Syria: forty years on, people displaced from the Golan remain in waiting, 31 October 2007 at 8.

administration of the territory in virtually every aspect of residents' daily lives. From a military standpoint, the IDF also operates from the Syrian Golan and can make its presence felt to the occupied population within a very short period of time, in further support of the notion that Israel has effective control over the Syrian Golan.

Are IHL and IHRL simultaneously applicable to the Occupied Syrian Golan?

The Occupied Syrian Golan, therefore, is governed by both the rules of International Humanitarian Law in addition to International Human Rights Law.²⁶⁰ It has been demonstrated most clearly by the International Court of Justice in its 2004 Advisory Opinion that humanitarian law in addition to human rights law applies in relation to Israel's conduct in the occupied territories. The Court stated, "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights."²⁶¹

Israel, as party to several human rights conventions, is obligated under those conventions to all of its provisions (provided that no reservation was made by Israel at the time of its ratification). Additionally, each state must abide by its treaty obligations in all of its territory in addition to all areas under its effective control. The occupied territories including the Occupied Syrian Golan fall under the definition of territories under Israel's effective control.

Applicability of Fourth Geneva Convention

Israel has disputed the applicability of the Fourth Geneva Convention to the occupied Palestinian territories on the basis of several arguments that mainly have to do with the prior sovereignty of those territories. Israel bases this argument on an interpretation of the wording of a provision of the Fourth Geneva Convention, and on its

²⁶⁰ The international system of states is governed by (and itself creates) international law. The rights of individuals on the international plane are primarily governed by a regime of "interrelated, interdependent" human rights, and the law regulating war as well as that which explicates states' obligations to protect and provide for civilians during conflict is contained in international humanitarian law. These broad categories of international law are derived from several primary sources – notably treaties (such as those enumerating the rights and obligations of international human rights and humanitarian law), customary international law, general principles of law, and the works of jurists (at a supplementary level). The most authoritative illustration of the sources of international law is found in STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, para. 1(a).

²⁶¹ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004

contention that only some of the provisions of the Fourth Geneva Convention have arisen to the status of customary law. However, because the prior sovereignty of the Syrian Golan was not in question, these arguments are not relevant here. The applicability of the Fourth Geneva Convention to the Occupied Syrian Golan has been affirmed by numerous UN resolutions mentioned previously in this paper.

Problem of Education in an Occupied Territory

“Education’s best claim is that it teaches a person to value what deserves to be valued.”

William James

Education holds an important rhetorical place in our globalized world. As an empowerment right, education has been alternately viewed as a stimulator of good and of evil, but both its critics and champions appear to hold the same opinion about its power, believing in education’s ability and potential to create either angels or monsters. Some (such as UN Special Rapporteur on the right to education Katarina Tomasevski) have called education “the message carrier,”²⁶² allowing for both society’s latent and manifest messages to be passed along to its members by means of institutions of education, educational curricula, and what some social scientists call the “hidden curriculum”²⁶³ experienced in what schools promote and fail to promote, in what they emphasize and how they emphasize it, and in what they ignore and conceal. Education has been charged with creating both good and evil citizens, promoting and institutionalizing societal evils such as racial discrimination and promoting societal “good” such as democratization, and being used as a tool for peace and for war and violence, up to and including inciting genocide.

Governments, including colonial powers, and their militaries have long attempted to persuade populations through the control, manipulation, or “reform” of a country’s educational systems. Particularly after World War II, American writers located in education the site of the attitude of hatred that created the conditions leading to the

²⁶² KATARINA TOMASEVSKI, EDUCATION DENIED: COSTS AND REMEDIES 184 (2003) [hereinafter: Education Denied].

²⁶³ For an overview of the origins of the term “hidden curriculum,” see Stephen J. Farenga & Daniel Ness, Encyclopedia Of Education And Human Development 1 (2005) at 16.

horrors of the Holocaust in Europe. They called for “re-education” or what came to be called “re-orientation” of the populations in countries formerly controlled by the Axis powers, leading to sweeping military-led changes in the educational systems in those countries in an effort to “educate away” their intolerant attitudes toward minorities.²⁶⁴ Other examples abound, all tied together by a common experience of promoting intolerance and difference on the basis of race, whether or not the racial groups demonized were present in the classroom or relegated to a separate educational institution.²⁶⁵

Citizenship education, in particular multicultural and democracy-promoting citizenship education, has been the focus of much of recent scholarship on curricular reform and educational reform in the West, particularly in the United States. National education serves multiple objectives within a democratic nation state, most notably the aim of nation building by means of socializing the state’s population (particularly youth) to serve as good citizens. State compulsory educational curricula are designed with these aims in mind, most notably that of inculcating the values and perceptions of the dominant group and cultivating loyalty to the state. The content of education therefore can serve as a map, instructing us in the state’s primary goals for its citizens.

In the state of Israel, for instance, the state’s “Jewish and Democratic” character bled into its goals for citizenship education, generating an approach dedicated to the cultivation of “education for Zionist citizenship”.²⁶⁶ The state attempted to at the same time promote Israeli nationalism and democracy, but remains trapped in a race and religion-centered debate concerning how much emphasis should be placed on “universalistic” or plural values versus “national” or specifically Zionist values.²⁶⁷ This

²⁶⁴ After the Rwandan genocide, in which members of the majority national ethnic group massacred members of the ruling minority ethnic group, many looked for answers in the education system, which systematically and “scientifically” presented historiographic, colonial-inspired racial divisions as inherent, presenting a racial hierarchy of minority over majority that proved to be fatal. And in apartheid-era South Africa, one of the most well-known means of racial segregation was through the education system, which – again inspired by European colonial visions – attempted to divide the nation based on religion and race, and through the “Bantu Education Act”, segregated all black Africans into separate and inferior schools on the basis of their “inherent inferiority” to the “civilized” white, Afrikaaner South African of European descent.

²⁶⁵ Education Denied, *supra* note 262.

²⁶⁶ Orit Ichilov, Gavriel Salomon and Dan Inbar, Citizenship Education in Israel – a Jewish-Democratic State. Israeli Institutions at the Crossroads *at* 31.

²⁶⁷ Orit Ichilov, Gavriel Salomon and Dan Inbar, Citizenship Education in Israel – a Jewish-Democratic State. Israeli Institutions at the Crossroads *at* 31.

is particularly an issue in a society with minorities such as non-Jews (who are primarily Arab) that do not fit into the national ideology and who even dispute to varying degrees the state's foundation.

States, Israel among them, which according to sociologists serve as the “site of on going conflicts among and between various class, gender and racial groups”²⁶⁸ even in the most manifestly democratic societies are run by a dominant group of decision-makers who control schools and decide on educational content. And as in any decision, a decision *for* something contains a latent decision *against* something else.

What schooling systematically does is to valorize...*some* values, perspectives, ways of speaking, showing, and saying as if they really were Value, Validity, Language – and thus to render all other ways of life/thought/feelings/embodiment as invalid in comparison with what is passed off as neutral, natural, universal and obvious. Other ways (in all senses) are diluted, denied, distorted, above all – deformed; that is they are refused recognition as *really* alternative approaches to understanding social identity in relation to specific combinations of space and time.²⁶⁹

As in this conceptualization of education and the quote by William James, one of the founders of modern psychology, education has the potential to simultaneously legitimize and de-legitimize perspectives, and very often legitimizes the majority viewpoint at the expense of minority perspectives. It is this capacity of the dominant group in a nation state to *de-form* contrasting perspectives of minority groups through public education that serves as the impetus for this inquiry.

In a situation of long-term or prolonged occupation, attempts by a nation-state to promote nationalist values linked to the occupying nation are complicated. In other occupations such as the Japanese occupation of Korea, the Ethiopian occupation of Eritrea, the American occupations of Iraq and Afghanistan, or the Chinese occupation of Tibet, similar waves of protest and resistance have occurred by residents under occupation who are resentful of the attempt of the occupying power to assimilate them. This also fits into narratives of postcolonial resistance, where often culture serves as the

²⁶⁸ Henry A. Giroux, *Theories of Reproduction and Resistance in the New Sociology of Education: a Critical Analysis*, 53 HARV. EDUC. REV. 257–293 (1983) as cited in Shmuel Shamai, Critical Sociology of Education Theory in Practice: the Druze Education in the Golan. British Journal of Sociology of Education. Vol. 11, No. 4, 1990 at 450.

²⁶⁹ *Race/ethnicity/gender/culture: embodying differences educationally: an argument*, in BREAKING THE MOSAIC 20–30 as cited in Shmuel Shamai, Critical Sociology of Education Theory in Practice: the Druze Education in the Golan. British Journal of Sociology of Education. Vol. 11, No. 4, 1990 at 450-1.

site of conflict. Since culture is taught in public schools run by the occupying power, and public schools are one of the most pervasive institutions of an occupying power in its attempt to socialize citizens, public schools often become symbolic sites of conflict between those attempting to resist and those attempting to control a population. Motives on both sides can appear malicious to those on the other side, but both can be justified.

One final note should be highlighted in relation to the teaching of historical events. While competing versions of history exist in reality, states typically choose one narrative to teach their students, one specific version of events. Sometimes, states even omit key events, particularly related to their own country's mistakes, suffering from what researcher David Tyack calls the 'pedagogy of patriotism,' "rarely describing abuses committed by one's own government against populations of other countries or the people in one's own country, although history abounds with such examples."²⁷⁰ There are particular challenges facing states when it comes to addressing difficult parts of the state's history, and states often suffer from the blindness that can accompany their sense of victimization, propagating one-sided viewpoints.²⁷¹ States also at times use such negative expressions as xenophobia to attempt to inculcate a sense of patriotism among their population,²⁷² and believe that the history and geography curriculum they teach is objective – a quality that as Tomasevski aptly states, "is as impossible as it is widespread."²⁷³

General Characteristics of Occupation Law

Legal Instruments

Most of occupation law is contained in the Hague Regulations and the Fourth Geneva Convention, although state practice can be found in military manuals and other authoritative documents used to instruct armies on the laws. Occupation law in one of its most essential characteristics aims to protect and preserve the status quo. It allows an

²⁷⁰ SCHOOL: THE STORY OF AMERICAN PUBLIC EDUCATION 5 (S. Mondale & S.B. Patton ed., 2001) as cited Education Denied, *supra* note 262 at 192.

²⁷¹ *Id.*

²⁷² See also D. Coulby, *Education in times of transition: Eastern Europe with particular reference to the Baltic states*, in EDUCATION IN TIMES OF TRANSITION: WORLD YEARBOOK OF EDUCATION 2000 17, (D. Coulby et al. eds., 2000) as cited in Education Denied, *supra* note 262 at 184.

²⁷³ *Id.* at 184.

Occupant to hold a territory and take necessary steps to win its military engagement, with regard for the restrictions upon it under the law and in keeping with the principles of protection of civilians and other protected persons, but it as will be explained below – it discourages the occupant from taking steps to fundamentally change the character of the occupied territory, including through legislative means. This is in tension with a fundamental characteristic of human rights law, which envisages the state as an entity with abilities to transform a territory through the continual improvement of human rights conditions. As the section on recent developments will show, the aims of IHL and IHRL have come closer in recent years, but these fundamental characteristics still remain an obstacle to the harmonization of the two types of law in a situation of prolonged occupation.

Principles of Occupation Law

Since the Golan Heights is governed by the law of occupation, some overriding principles of occupation law will be relevant to the later discussion of education under occupation.

The Law of occupation rests on four basic principles:

1. Sovereignty does not pass from the hands of the occupied state to the hands of the occupying force. This is primarily inferred through scholars' emphasis on the limited powers given to the occupant and on Art. 43 of Hague Regulations which instructs the occupant to respect the laws in the country unless they prevent the occupant from carrying out its duty to restore and ensure 'public order and [civil life]'.²⁷⁴ Numerous authorities have noted this lack of a transfer of sovereignty, for example von Glahn notes that:

“the consensus of opinions of writers on international law is that the legitimate government of the territory retains its sovereignty but that the latter is suspended during the period of belligerent occupation. In other words, the occupant does not in any way acquire sovereign rights in the occupied territory but exercises a

²⁷⁴ Hague Regulations, *supra* note 208, at Art. 43.

temporary right of administration on a trustee basis²⁷⁵ until such time as the final disposition of the occupied territory is determined.”²⁷⁶

2. Occupants are not to interfere in local law, as set out in Art. 43, which states:

the authority of the legitimate power having in fact passed into the hands of the occupant, the latter should take all the measures in his power to restore, and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.²⁷⁷

The ICRC Commentary on the Fourth Geneva Convention (in commenting on Art. 64 of the Fourth Geneva Convention, which is an elaboration of Art. 43 of the Hague Regulations), states that respect for the law in force is a principle that ‘dominates the whole of occupation law’.²⁷⁸

This does not mean that the occupant can never alter the laws. However, the high threshold of necessity that must be met in order to change the laws will be addressed in the context of legislation related to education.

Also in question is to what extent an absent government can legislate for the occupied territory (i.e. changing the “laws in force”). Von Glahn also comments on this idea, noting that up until at least 1944, the U.S. Judge Advocate General’s School “taught that the legitimate sovereign could not legislate for an occupied portion of his territory.”²⁷⁹ However he notes that (at least by 1957) the prevailing opinion was that “the legitimate sovereign may legislate for an occupied portion of his territory, provided that his laws do not conflict with the powers of the occupant as outlined in conventional international law.”²⁸⁰

²⁷⁵ Some commentators such as Dinstein have disagreed with the use of this term to characterize the relationship between an Occupying Power and the inhabitants of the occupied territory, noting that, “A position of a trustee postulates trust. Incontrovertibly, no premise of trust between enemies in wartime is warranted. An occupied territory is not entrusted in the hands of the Occupying Power. The latter wrests control over the land from the displaced sovereign and wields power in it – as a war-related measure – energized by the military capability to do so.” He states that it is not a matter of good will, except what good will is mandated through legal obligation. Belligerent Occupation, *supra* note 244 at 36.

²⁷⁶ Occupation of Enemy Territory, *supra*, note 208.

²⁷⁷ Hague Regulations, *supra* note 208, at Art. 43.

²⁷⁸ *Supra*, note 293.

²⁷⁹ Occupation of Enemy Territory, *supra*, note 208.

²⁸⁰ Occupation of Enemy Territory, *supra*, note 208.

3. The “occupant must not injure the local population, and must provide them with care.”²⁸¹

4. The “occupant may not undertake activities for the sole benefit of its native state. It must direct its actions toward the local population or toward military necessity; any actions outside those two realms are prohibited.”²⁸²

These principles will be relevant in the discussion of the Occupant’s duties and restrictions in relation to education in the Syrian Golan.

Relevant Developments in Occupation Law

Benvenisti, a prominent legal scholar on the issue of occupation law, notes that the development of occupation law has made it more difficult for states to determine what their obligations are – as he puts it, “...recourse to the law of occupation was a complicated undertaking, because it was not simply a task of looking up the relevant articles in the Hague Regulations or the Fourth Geneva Convention.”²⁸³ Therefore it is necessary to take a look at the recent developments in the law of occupation that bear on this discussion.

Occupation law has developed in particular in the interwar period, and has been affected in particular by the postwar processes of decolonization including the pursuit of self-determination and self-rule, such that, according to Eyal Benvenisti, “if the Geneva law focused on the welfare of individuals, the modern law of occupation has to consider also the claims of peoples as distinct subjects of international law.”²⁸⁴ He further notes that the distinct phenomena of the “recalcitrant occupant” and the emergence of “prolonged occupation(s)” such as Israel’s in the OSG and OPT have posed a double challenge to the law of occupation: “a challenge to the principles that underlie the laws of occupation, and a challenge to their enforceability.”²⁸⁵

Many of the recent developments that have occurred in the laws of occupation were reflected in Security Council Resolution 1483 related to the invasion of Iraq. Several already-existing principles of occupation law were importantly affirmed. These included a) an affirmation of the neutral connotation of the doctrine – namely, that

²⁸¹ Occupation of Enemy Territory, *supra*, note 208.

²⁸² Occupation of Enemy Territory, *supra*, note 208.

²⁸³ Protection of Human Rights, *supra* note 248 at x

²⁸⁴ *Id.*, at 107

²⁸⁵ *Id.*

‘occupation is a temporary measure for reestablishing order and civil life after the end of active hostilities, benefiting also, if not primarily, the civilian population... occupation does not amount to unlawful alien domination that entitles the local population to struggle against it;’²⁸⁶ b) an affirmation that “sovereignty inheres in the people and regime collapse does not extinguish sovereignty,”²⁸⁷ and c) the recognition of the continued applicability of IHRL during conflict and occupation, simultaneously with occupation law.²⁸⁸

Others reflected changes or important developments in the law, most notably, that the role of the Occupant has changed from the “disinterested occupant”²⁸⁹ or “inactive custodian”²⁹⁰ envisioned under the Hague Regulations to the “heavily involved regulator”²⁹¹ required in modern times. As Benvenisti notes,

Resolution 1483... calls upon the occupants to pursue an “effective administration” of Iraq... The call to administer the occupied area “effectively” acknowledges the several duties that the occupants must perform to protect the occupied population. It precludes the occupant from hiding behind the limits imposed on its powers as a pretext for inaction.²⁹²

²⁸⁶ *Id.*, discussing UN Security Council Resolution 1483

²⁸⁷ (“thus the Resolution implicitly confirms the demise of the doctrine of *debellatio*, which would have passed sovereign title to the occupant in case of total defeat and disintegration of the governing regime”, see Protection of Human Rights, *supra* note 248 at xi – Also see Michael N. Schmitt, *Debellatio*, MAX PLANCK ENCY. PUB. INT’L L. (2009), which “examines the concept of *debellatio* in international law, including the issue of whether it survives in contemporary law” (according to its abstract).

²⁸⁸ The wording recognizes “in principle [of] the continued applicability of international human rights law in occupied territories in tandem with the law of occupation. Human rights law may thus complement the law of occupation on specific matters.” Protection of Human Rights, *supra* note 248 at xi

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* Benvenisti’s opinion here (of the opinion of the Security Council) seems in consonance with the approach taken by criminal tribunals in establishing culpability or criminal responsibility of states in commenting on states’ tendency to attempt to circumvent their legal obligations by using legalistic pretexts. For example, Cohen cites the Nuremberg Tribunal who, in their discussion of the notion of *debellatio*, says “However, calling occupation by the name of *debellatio* (premature annexation) will not excuse the occupant from international obligations.” (Judgment of the Nuremberg Tribunal, 30 Sept. 1946, Proceedings in the Trial of the Major War Criminals Before the International Military Tribunal, as cited in E. Cohen at p. 30); Protection of Human Rights, *supra* note 248 at 107; it further seems consonant with the approaches taken by other criminal tribunals such as the ICTY (International Criminal Tribunal for Yugoslavia) and the Ethiopian-Eritrean Claims Commission, when they stated the following: in its Tadic case in 1999, the Appeals Chamber of the ICTY focused on “protected persons” in the hands of powers to whom they owe no allegiance,” and described the ‘necessary

These recent changes in occupation law, particularly in the increased emphasis on the Occupant as an active custodian of the occupied population, demonstrate that a new approach to the simultaneous applicability of IHL and IHRL is needed and suggest that a new approach would involve more direct action by the Occupant for the benefit of the local population.

Education under International Humanitarian Law

The justification for the protection of children under the laws of armed conflict is summed up well in Pictet's authoritative official commentary of the Fourth Geneva Convention:

The indescribable tragedy which the Second World War brought into the lives of millions of children forms one of the most distressing chapters in the history of the conflict and one which arouses the greatest pity. Children were the innocent victims of events which afflicted them all the more cruelly because they were young and weak; they suffered hardships in violation of one of the most sacred of human laws—the law that children must be protected, since they represent humanity's future.²⁹³

implications of the evolution of the law from a tool that defined armies' obligations toward each other into 'international humanitarian law' that aimed at securing the well-being of individual civilians"—(Protection of Human Rights, *supra* note 248 at viii) stated "Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterization as such." *Prosecutor v Tadic*, Case No. IT-94-1-T, Judgment, 580 (May 7, 1997) Partial Award, Central Front, Ethiopia's Claim No. 2, April 28, 2004, paras 28, 29 (available at <http://www.pca-cpa.org/ENGLISH/RPC/EECC/ET%20Award.pdf>) as cited in Protection of Human Rights, *supra* note 248 at vii-viii). And the Eritrea-Ethiopia Claims Commission "rejected the link between the disputed status of certain territories and the protection of individuals present in those territories" (Protection of Human Rights, *supra* note 248 at viii) when it said, "The alternative could deny vulnerable persons in disputed areas the important protections provided by international humanitarian law. These protections should not be cast into doubt because the belligerents dispute the status of the territory." *In* Partial Award, Central Front, Ethiopia's Claim No. 2, April 28, 2004, paragraph 28 (<http://www.pca-cpa.org/ENGLISH/RPC/EECC/ET%20Award.pdf>) as cited in Protection of Human Rights, *supra* note 248 at viii at footnote 2.

²⁹³ IV JEAN PICTET, GENEVA CONVENTION 1949, OFFICIAL COMMENTARY (1952).

Children represent humanity's future. Educating children allows one generation to pass its knowledge on to another, and make one of the only impacts it can on humanity's future. Children are specially protected under IHL, and according to the first additional protocol to the Fourth Geneva Convention, "shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason."²⁹⁴ Due to its special protection of children during times of war, educational institutions, as institutions devoted to children, are protected places requiring special attention during warfare generally, as well as by the Occupant in a situation of belligerent occupation.

Educational institutions are generally considered institutions of a civilian character. Distinguishing between civilian and military objects is a requirement that is at the heart of humanitarian law. Known as the principle of distinction, it is one of the most important (and inviolable) principles of IHL. At its most essential it requires warring parties to distinguish between civilian and military targets to minimize harm to civilians during warfare. The First Optional Protocol to the Fourth Geneva Convention states, "Civilian objects are all objects which are *not* military objectives..."²⁹⁵ These, with few exceptions, include educational institutions.

According to the Hague Regulations – which form part of customary law – educational institutions are among those which should be protected and treated as private property during conflict:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.²⁹⁶

It is surprising however that international humanitarian law is rarely invoked when discussing states' obligations to ensure education in conflict generally or in

²⁹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3, entered into force on 7 December 1978.]

²⁹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed conflicts (Protocol I) 8 June 1977, entry into force 7 December 1978. <http://www.icrc.org/ihlnsf/full/470?opendocument>. Article 52(1).

²⁹⁶ The Hague Regulations, *supra* note 208, at Art. 56

situations of occupation.²⁹⁷ This is in spite of the fact that education is protected under specific situations of crisis and armed conflict, in conflicts of both an international and non-international character, as well as under the laws of belligerent occupation. This has been the case since at least 1957, when von Glahn wrote:

The accepted rules of international law are unfortunately silent on [the extent to which an Occupant could interfere legitimately with the educational system of a territory under his control] and while a very few writers on the law of nations have briefly commented on education under belligerent occupation, little has actually been contributed toward the solution of this very real and important problem in our age of ideological conflicts.²⁹⁸

Several aspects of education are protected under International Humanitarian Law. These include the proper functioning of educational institutions, access to education for internees,²⁹⁹ and access to education that respects the moral and religious wishes of parents. As an international armed conflict and a situation of occupation, the most notable provision related to the right to education under International Humanitarian Law – Article 50 of the Fourth Geneva Convention – states:

The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children... Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.³⁰⁰

These protections cannot be derogated from due to a state annexing the territory that was being occupied. According to the Fourth Geneva Convention,

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor

²⁹⁷ Through the 1990's, humanitarian law was barely discussed even in relation to the most basic forms of education. See Sobhi Tawil, *International Humanitarian Law and Basic Education*, 839 INT'L REV. RED CROSS 4 (2000).

²⁹⁸ Von Glahn, see note 28 in Right to Education, *supra* note 222, at 327.

²⁹⁹ "All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside." Geneva Convention IV, Article 94

³⁰⁰ Geneva Convention IV, Article 50

by any annexation by the latter of the whole or part of the occupied territory.³⁰¹

The Fourth Geneva Convention also provides specifically for the education of children under the age of 15 who have been separated from their families:

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.³⁰²

This emphasis on maintaining a child's original identity and heritage, as indicated by the above provision, occurs repeatedly in IHL articles concerning children. Although many of those are not directly applicable to the context in the OSG related to education, they shed further light on IHL's special protection of the identity of children in general and respect for the wishes of their parents related to their cultural, national, religious and moral traditions. For example, during non-international armed conflicts: "Children shall be provided with the care and aid they require, and in particular: (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care."³⁰³

And in cases of necessary evacuation of children, the Fourth Geneva Convention stipulates: "Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity."³⁰⁴

Other articles refer to states' obligations to ensure that children are provided with clear identifying information, including information about their family heritage,

³⁰¹ Geneva Convention IV, Article 47

³⁰² Geneva Convention IV, Article 24

³⁰³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Section II: Humane Treatment, Article 4, paragraph 3(a). These three articles are as cited in the Report on the strategic parallel session on Education in Situations of Emergency and Crisis at the World Education Forum, International Committee of the Red Cross, 2000.

³⁰⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed conflicts (Protocol I) 8 June 1977, entry into force 7 December 1978. <http://www.icrc.org/ihlnsf/full/470?opendocument>. Article 78 (2).

nationality, religion, and language spoken by their family.³⁰⁵ These provisions indicate IHL's emphasis on maintaining the continuity of a population's identity during conflict and suggest the importance in international humanitarian law of respecting children's heritage, religion and culture, and national origins.

Responsibilities to maintain educational institutions

According to Art. 50 of the Fourth Geneva Convention, Occupants have a responsibility to facilitate the proper working of institutions for children. Commentators for the International Committee of the Red Cross have interpreted this broadly to mean that any institution that is devoted to the care and education of children, whatever its status under the country's laws (including whether they are privately run or state-sponsored), must be protected. Institutions of a wide variety are included in Pictet's interpretation, including child welfare centers, orphanages, children's camps, day cares, and social welfare services, among others.³⁰⁶ Pictet notes that these institutions take on roles of increased importance during wartime, since many children are left without their natural protectors and rely on these institutions during critical points in their development.

Occupants have an obligation to ensure, in cooperation of the local and national authorities, the proper working of children's institutions has been interpreted in both a passive and an active sense. According to the ICRC's Commentary, this means that not only must an Occupant avoid interfering with the actions of local or national authorities in respect to children's institutions, but "also to support them actively and even encourage them if the responsible authorities of the country fail in their duty."³⁰⁷ This includes facilitating the access to facilities, food, medical supplies, and anything else they need to carry out their duty, and ensuring that they receive these even when resources are inadequate. Pictet emphasizes the importance of ensuring the proper functioning of children's institutions by saying,

This provision assures continuity in the educational and charitable work of the establishments referred to and is of the first importance, since it takes effect at a

³⁰⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed conflicts (Protocol I) 8 June 1977, entry into force 7 December 1978. <http://www.icrc.org/ihlnsf/full/470?opendocument>. Article 78 (3).

³⁰⁶ Pictet, Geneva Convention 1949, Official Commentary, Vol. IV, at p. 286.

³⁰⁷ Pictet, Geneva Convention 1949, Official Commentary, Vol. IV, at p. 286

point in children's lives when the general disorganization consequent upon war might otherwise do irreparable harm to their physical and mental development.³⁰⁸

While this helps to explain what types of institutions are meant to be properly working, the Commentary does not explain what "properly working" means in the context of educational content or program structure.³⁰⁹ Further, some questions remain in regards to what an Occupant is responsible for doing if the national and local authorities either refuse to or are unable to cooperate.³¹⁰ Can the Occupant take matters into its own hands and act unilaterally? Or can the Occupant excuse itself from its obligations?

These vague areas leave room for other, more specific rules to weigh in where relevant. This will be discussed further in the section related to the convergence of IHL and IHRL on education.

Powers and Restrictions to form separate schools and to interfere with educational content

State practice is one way to determine how states have previously interpreted their obligations in relation to IHL. Occupants in the past have seized upon the potential of educational institutions as a way to radically transform the "enemy's" worldview. While an occupant does have some latitude to interfere with the educational program in a territory it occupies, primarily those areas are limited to matters of military security and necessity. Yet as has been established, state practice demonstrates that Occupants typically wield more influence than they are entitled to under international humanitarian law in relation to interfering with educational content in territories under their control.

According to prominent IHL commentator von Glahn:

[I]f it is true that lawful interference with the educational program and system of an occupied enemy territory exists only over a limited range of activities primarily connected with military security and necessity, then there would appear to exist a distinct conflict between the theoretical and legal rights of an occupant in this field and the far-reaching remolding of education envisaged by those who would re-educate the youth of the enemy.³¹¹

³⁰⁸ Pictet, Geneva Convention 1949, Official Commentary, Vol. IV, at p. 287.

³⁰⁹ Right to Education, *supra* note 222, at 304-328

³¹⁰ *Id.*

³¹¹ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 67.

The actual practice of states as belligerents differs strikingly from what is permitted and prohibited in theory according to the texts of humanitarian law and what von Glahn describes as the “rather tolerant attitude” of commentators on the subject of interference in education. For example:

In almost every single major belligerent occupation in recent history, the occupying power has quickly taken steps far beyond a mere supervision of native schools and institutions of higher learning;³¹² in many instances far-reaching changes have been effected while in others a temporary or lasting elimination of large portions of an educational system was perpetrated by a military occupant³¹³

There are many examples of widespread, detailed interference with educational systems, such as when Germany occupied Belgium during WWI and in addition to devoting resources to prohibiting anti-German instruction in schools, forbade the singing of patriotic Belgian national songs and the conduct of patriotic exercises.³¹⁴ Von Glahn in noting one such example notes the ambiguities of what is allowed in terms of regulating interference with content of education under occupation: “Such detailed regulation of educational institutions exceeds by a wide margin the limitations agreed upon by writers of international law; yet, in the acknowledged absence of a binding set of rules on the subject of education under occupation, interference beyond military necessity appears to be customary rather than exceptional.”³¹⁵

The interference with educational content is at times due to Occupants’ attempts to remove hate-filled content or other content that could potentially politicize or incite violence among the occupied population. However it has also provided a tempting opportunity for an Occupant to wield its influence to attempt to alter the population of the enemy state’s beliefs. During WWII, a large number of American writers advocated for educational reform (of teachers as well as curricula) as the only way to reform the attitudes of the people of aggressor nations to a less “war-minded and intolerant

³¹² EDGAR LOENING, *L’ADMINISTRATION DUE GOUVERNMENT-GENERAL DE L’ALSACE DURANT LA GUERRE DE 1870-1871* 117-119.

³¹³ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 64.

³¹⁴ Willem Bisschop, *German War Legislation in the Occupied Territory of Belgium*, 4 TGS 110, 131–133 (1919).

³¹⁵ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 65.

attitude”.³¹⁶ He claims that the writers called for “the youth of totalitarian countries should be “educated away” from the doctrines of fascism... and that they should be taught in such a way as to stimulate the growth and development of democratic ideas.”³¹⁷

Historical narratives however, as well as ideologies, are often subjective, largely dependent on who has the power to approve the narrative and therefore to determine whether or not actions – particularly actions involving political violence – are hateful or nationalistic. One example of this distinction is highlighted by Noam Chomsky’s discussion of whether to call certain armed groups “freedom fighters” or “terrorists,” depending on whose perspective is privileged in discourses of political violence.³¹⁸ This demonstrates the tension between a nationalistic narrative that might be promoted by an occupant, vs. a totally opposite nationalistic narrative that might be promoted by an occupied population as part of their history.

Some educational content can be prohibited by the Occupant: “There can be little doubt that the occupying power may prevent any and all teaching which serves to provoke hostility toward the occupant’s forces, disrespect to the latter and to their commands, or passive resistance to the lawful orders given to the civilian population.”³¹⁹

Such lawful interference is that which is directed toward purging content that directly targets the occupant and its forces and/or administration, and as such is limited in scope.

If existing international rules and the precepts laid down by writers in international law were to be applied in full, little could be done in the way of re-education beyond a pattern comprising a very general supervision of education

³¹⁶ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 62. Von Glahn cites a number of articles on the topic, including Claude Pepper, *The Liberated Nations and the New Order*, 6 *FREE WORLD* 111 (1943); Gilbert Murray, *The Task of Re-Educating Germany*, *NEW YORK TIMES MAGAZINE*, May. 16, 1943; although he also cites opposing (or “doubtful”) perspectives contained in the following articles: Julian Huxley, *German Education and Re-Education*, 25 *NEW STATESMEN AND NATION* 103–104 (1943) and Stephen Corey, *Should We Take Over Their Schools?*, 58 *SCHOOL AND SOC.* 321–323 (1943) as cited in Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 62 (footnote 71).

³¹⁷ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 62.

³¹⁸ The question has been posed in various incarnations throughout history, but gained traction with GERALD SEYMOUR, *HARY’S GAME* (1975), and has ignited the comparison in discussions on how to define terrorism by Noam Chomsky and others.

³¹⁹ T. LAWRENCE, *PRINCIPLES OF INTERNATIONAL LAW* (D.C. Heath & Co. 7th) (1923) as cited in Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 63 (footnote 72).

and the elimination of definite methods and ideas aimed specifically against the occupant and his administrative authorities.³²⁰

Short of the two types of interference that are stated, namely removing speech that would lead to incitement against the occupant and/or its administration, and the suspension of discussions of political matters, according to von Glahn, “the occupant does not appear to possess any additional rights to interfere with educational matters in occupied enemy territory.”³²¹ He supports his argument by citing Garner, commenting on actions of Germany during WWI to turn the University of Ghent into a Flemish institution, who stated:

Its courses of instruction, the language in which they were given, and the selection of its professors were matters of no legitimate concern to the military occupant so long as the conduct of the university and the character of its teaching were not such as to endanger the military interests of the occupant or threaten the public order.³²²

According to von Glahn, some governments in their official instructions allowed for the suspension of discussions of political matters in schools while under occupation, although “no binding definition of the extent of such prohibition or suspension is known to the writer.”³²³ He notes that the American instructions (at least by 1957), which he calls “semi-official”, since they were teachings from the Ann Arbor School operated by the Judge Advocate General’s Department during WWII were the most detailed in this regard, stating:

...schools must be permitted to continue their ordinary activity, provide that the teachers refrain from references to politics and submit to inspection and control by the authorities appointed. Schools may be closed temporarily if military necessity requires, especially during the operational phase of the war. Further,

³²⁰ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 67. He notes that this could be subverted in theory through the occupant employing “puppet” members of the native population to institute educational reforms and curricular changes, but states that this would not relieve them from their responsibilities not to unlawfully interfere with education under international law or protect them from any charges resulting from unlawful conduct.

³²¹ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 63.

³²² II JAMES GARNER, *INTERNATIONAL LAW AND THE WORLD WAR 77-78 (1920) as cited in* Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 63.

³²³ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota at p. 63.

schools may be closed, if the teachers engage in politics or refuse to submit to inspection.³²⁴

Also, Art. 19 of the Bellot Rules³²⁵ discussed the prohibition on discussions of a political nature, proposing that any teacher who violated this prohibition could be removed from his/her position and replaced with a teacher of the same nationality as him/her.³²⁶

Commentators have stated that the occupant does not have a right to “introduce his own language as the official language of instruction”³²⁷ nor does he have the right to replace teachers with teachers of the occupant’s nationality.³²⁸

All told, these interpretations indicate that an Occupant has limited latitude to interfere with the content of educational programming in territories it occupies, and can restrict content due to military necessity with respect to political or other matters that might incite a population against the Occupant. However, the Occupant’s powers stop short of allowing it to impose its own ideology, culture or language upon the local population.

Other areas in which the Occupant might wish to interfere with educational content are more ambiguous in the letter of the law of IHL, but are supported (as will be discussed later) in IHRL in its requirement that education “promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”³²⁹ State practice in IHL however supports Occupants’ attempting to purge what it sees as problematic ideologies and to reeducate a population. Although, when it comes to purging educational materials of hate-filled rhetoric or hateful ideologies, there is a risk that Occupants’ may move beyond the latitude they are given and attempt to remove

³²⁴ JUDGE ADVOCATE GENERAL’S SCHOOL, LAW OF BELLIGERENT OCCUPATION 66-67 (1946) *as cited in* Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota *at p.* 63.

³²⁵ A. Wilson, *The laws of war in occupied territory: a commentary on the Bellot Rules*, 18 TRANS. GROTIUS SOCIETY 17–39 (1933)

³²⁶ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota *at p.* 64.

³²⁷ S.V. Heyland, *Occupatio Bellica*, II WORTERBUCH 163 (1925)

³²⁸ Gerhard von Glahn, *The Occupation of Enemy Territory... A Commentary on the Law and Practice of Belligerent Occupation*, 1957, University of Minnesota *at p.* 64.

³²⁹ G.A. Res. 2200, U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200A(XXI) (1966)

ideologies that threaten its worldview, or educate a population according to its ideology beyond the necessity required by security and public order, in a manner solely benefitting the Occupant. And as discussed previously, this could contravene a basic principle of occupation law. This is an area that will be explored in more detail in the case of the OSG.

Education under International Human Rights Law

Legal Instruments respecting the Right to Education

Israel has ratified many of the core multilateral human rights treaties:

- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),³³⁰ ratified by Israel 2 February 1979.
- The International Covenant on Civil and Political Rights (ICCPR),³³¹ ratified by Israel 3 January 1992.
- The International Covenant on Economic, Social and Cultural Rights (ICESCR),³³² ratified by Israel 3 January 1992.
- The Convention on the Elimination of Discrimination against Women (CEDAW), ratified by Israel 2 November 1991.
- The Convention on the Rights of the Child (CRC),³³³ ratified by Israel 2 November 1991.
- The Convention Against Discrimination in Education (CADE),³³⁴ ratified by Israel 22 September 1961.

Many of these agreements contain provisions respecting the right to education.

Under the Covenant on Economic, Social and Cultural Rights, one of the foundational human rights treaties, education is an essential human right and “an indispensable means of realizing other human rights.”³³⁵ As such, it is guaranteed in two articles in the Covenant on Economic, Social and Cultural Rights, Articles 13 and 14, and the right to

³³⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (1969).

³³¹ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1976) [hereinafter: ICCPR].

³³² International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3 (1976) [hereinafter: ICESCR].

³³³ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (1989) [hereinafter: CRC].

³³⁴ Convention Against Discrimination in Education, 429 U.N.T.S. 93, entered into force May 22, 1962.

³³⁵ U.N. Doc. E/C.12/1999/10 on the right to education (art. 13), General Comment no. 13, *at* paragraph 1.

education is most comprehensively outlined in this treaty. Education for children is further stipulated in the Convention on the Rights of the Child in Articles 28 and 29 and provisions relating to aspects of the right to education exist in other international legal agreements including all those listed above including the International Covenant on Civil and Political Rights (1966), Article 18(4),³³⁶ and the UNESCO Convention Against Discrimination in Education (1960), Article 5.³³⁷ Despite the importance of the right to education and its prominence in such an array of authoritative international legal agreements, its meaning and scope are not always clear. What is meant precisely by education? The covenants do not provide an explicit definition of education,³³⁸ nor do their commentaries. Some, such as UNESCO in its Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms of 1974, have conceptualized education in a wide scope, stating that implied in education is “the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge.”³³⁹

However, education in the context of both international and regional UN legal instruments guaranteeing the right to education adopts the narrower approach, relating to

³³⁶ ICCPR, *supra* note 331. It should be noted that this provision does not guarantee a right to education generally as outlined in the other treaties, but instead guarantees the right of parents to ensure the moral education of their children in accordance with their wishes.

³³⁷ *Supra* note 334, Art. 5. The right to education is also contained in the European Convention on Human Rights, Protocol I (1954), Article 13; the African Charter on Human and Peoples’ Rights (1981), Article 17; the African Charter on the Rights and Welfare of the Child, Article 17(3); and the American Declaration of the Rights and Duties of Man, Article 12; among other non-binding declarations such as the Universal Declaration of Human Rights (1948), Article 26; the Declaration on the Rights of the Child (1959), Principle 7; and the Declaration on Social Progress and Development (1969), Article 10.

³³⁸ The CADE provides the following explanation of education, but it falls far short of being a comprehensive definition: “For the purposes of this Convention, the term “education” refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.” Recognizing the need for a further definition of at least basic education, UNESCO produced the following definition of basic education (original in French) in 2007: UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANIZATION, EXPERT CONSULTATION ON THE OPERATIONAL DEFINITION OF BASIC EDUCATION: CONCLUSIONS 4(2009).

³³⁹ UNESCO, Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms of 1974, Article 1(a) *as cited in* Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: including a systematic analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights*, 82 INT’L. STUD. IN HUM. RTS. 18–19 (2006) [hereinafter: Cultural Rights].

the institutional transmission of knowledge.³⁴⁰ This narrower definition refers to “instruction imparted within a national, provincial or local education system, whether public or private,”³⁴¹ and is primarily related to instruction within educational institutions. This distinction between narrower and wider conceptions of education was also noted by the European Court of Human Rights when it stated: “[Education in a wider sense refers to] the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction [education in a narrower sense] refers in particular to the transmission of knowledge and to intellectual development.”³⁴²

In 2007, recognizing the need for a more comprehensive definition of basic education, UNESCO sponsored a meeting of experts to produce a definition. In their conclusions, the experts produced the following definition:

For the purposes of this definition, basic education covers notions such as fundamental, elementary and primary/secondary education. It is guaranteed to everyone without any discrimination or exclusion based notably on gender, ethnicity, nationality or origin, social, economic or physical condition, language, religion, political or other opinion, or belonging to a minority.

Beyond pre-school education, the duration of which can be fixed by the State, basic education consists of at least 9 years and progressively extends to 12 years. Basic education is free and compulsory without any discrimination or exclusion.

Equivalent basic education is offered for youth and adults who did not have the opportunity or possibility to receive and complete basic education at the appropriate age.

Basic education prepares the learner for further education, for an active life and citizenship. It meets basic learning needs including learning to learn, the acquisition of numeracy, literacies, and scientific and technological knowledge as applied to daily life.

Basic education is directed to the full development of the human personality. It develops the capability for comprehension and critical thinking, and it inculcates the respect for human rights and values, notably, human dignity, solidarity, tolerance, democratic citizenship and a sense of justice and equity.

³⁴⁰ M’Bow, A., “Introduction” in: Mialaret, 1979, p. 11 *as cited in* Cultural Rights, *supra* note 339 at 19.

³⁴¹ Cultural Rights, *supra* note 339 at 18-19.

³⁴² *Campbell and Cosans v. United Kingdom*, Judgement of 25 February 1982, Publications of the European Court of Human Rights, Series A, Vol. 48, para. 33 *as cited in* Cultural Rights, *supra* note 339 at 19.

The State guarantees the right to basic education of good quality based on minimum standards, applicable to all forms of education, and provided by qualified teachers, as well as effective management along with a system of implementation and assessment.

Basic education is provided in the mother tongue, at least in its initial stages, while respecting the requirements/needs of multilingualism.

In those States where basic education is also provided by private schools, the State ensures that such schools respect fully the objectives and content as mentioned in the present definition.³⁴³

This definition, while instructive, is not binding as it is based on a combination of authoritative treaties binding on state signatories, and domestic definitions of education. For example, the section stipulating the length of education is not based on any treaty law.³⁴⁴ Therefore, while more comprehensive than what is contained in the balance of multilateral treaties respecting the right to education, it cannot be completely relied upon when determining states' obligations. However, it does provide an overview of what's commonly recognized by practitioners as what is required of states in achieving basic education.

While not explicitly defining education, other UN bodies and commentators have provided characterizations of the right to education. Some describe it as a social and cultural right, and others as a civil right. Some, such as former UN Special Rapporteur on the right to education Katarina Tomasevski describe the right to education as an empowerment right. This interpretation of education as an empowerment right, or a right upon which other rights are contingent, aligns with the Supreme Court's explanation in landmark court case *Brown v Board of Education of Topeka* in which the Court stated: "In these days, it is doubtful that any child may reasonably be expected to succeed in life

³⁴³ UNESCO, The Right to Education, Expert Consultation on the Operational Definition of Basic Education: Conclusions, 17-18 December 2007, Original: French, Published in 2009 by the United Nations Educational, Scientific and Cultural Organization (UNESCO), Education Sector, Division for the Promotion of Basic Education, Section for the Promotion of Rights and Values in Education, 7 place de Fontenoy, 75352 Paris 07 SP, France (ED-2009/WS/19) - CLD 746.9, at 4.

³⁴⁴ UNESCO, The Right to Education, Expert Consultation on the Operational Definition of Basic Education: Conclusions, 17-18 December 2007, Original: French, Published in 2009 by the United Nations Educational, Scientific and Cultural Organization (UNESCO), Education Sector, Division for the Promotion of Basic Education, Section for the Promotion of Rights and Values in Education, 7 place de Fontenoy, 75352 Paris 07 SP, France (ED-2009/WS/19) - CLD 746.9, at 8.

if he is denied the opportunity of an education.”³⁴⁵ While many characterizations are debated by scholars, the right to education is typically viewed in relation to states’ obligations under the ICESCR, and consider it an economic, social and cultural right.

A related question is who is the subject of the right to education. The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights describe the right as applicable to “everyone.” As Article 13, paragraph 1 of the Covenant on Economic, Social and Cultural Rights states, “the States Parties to the present Covenant recognize the right of everyone to education.”³⁴⁶

Although education is guaranteed to everyone, in practice the right is primarily dealt with as it concerns children of a specific age group. As noted by Tomasevski, while it is stated that education must be in the best interests of children according to international legal instruments, in reality, children do not have a say in the creation of those treaties or their interpretation, nor (usually) in any facets of the education they receive. Rather, the best interests of the child, and accordingly, the content and quality of the education they receive, are determined by the state, parents, and the community.³⁴⁷ The role played by parents and community members in determining what is best for their children vis a vis their education is an important component of the right to education and will be revisited in more detail shortly.

The right to education broadly guarantees access to quality educational institutions and calls for respect in education for human rights and friendly relations among nations. Article 13, paragraph 1 of the Covenant on Economic, Social and Cultural Rights states:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.³⁴⁸

³⁴⁵ *Brown vs Board of Education of Topeka*, 347 U.S. 483 (1954) at 493 as cited in Cultural Rights, *supra* note 339 at p. 18.

³⁴⁶ Covenant on Economic, Social and Cultural Rights, Article 13, paragraph 1.

³⁴⁷ Tomasevski, 1999a, para. 79 (UN Doc. E/CN.4/1999/49) as cited in Cultural Rights, *supra* note 339 at 20, footnote 8.

³⁴⁸ Covenant on Economic, Social and Cultural Rights, Article 13, paragraph 1.

Article 13, paragraph 2 (e) of the same Covenant states: “The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established and the material conditions of teaching staff shall be continuously improved.”³⁴⁹

However, other than these broad guarantees of respect, understanding, tolerance, and friendship, it has little to say regarding the content of education. According to former UN Special Rapporteur on the right to education Katarina Tomasevski, there are some limits, for example, “International human rights law obliges individual states to ensure that each child has access to education, but it also prohibits them from monopolizing education, let alone transforming it into institutionalized indoctrination”.³⁵⁰ She goes on to admit that “what happens in schools, public or private, is seldom examined through the human rights lens.”³⁵¹ The content of education is primarily dealt with in the CRC and will be examined later in this section.

Traditionally, the task of educating children fell under the purview of parents, but according to international legal agreements, the entity that is primarily responsible for guaranteeing the right to education is the state. However, it is “increasingly recognized” internationally that other entities also have responsibilities in the sphere of education.³⁵² Parents do have some say in the education of their children, particularly related to religious and moral values and to the choice of which schools their children attend.

Article 13(3) of the ICESCR states:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.³⁵³

³⁴⁹ Covenant on Economic, Social and Cultural Rights, Article 13, paragraph 2 (e).

³⁵⁰ Education Denied, *supra* note 262 at 15.

³⁵¹ *Id.*

³⁵² “It is, moreover, increasingly recognised that non-governmental and other sectors bear some form of responsibility in the sphere of education. Article 7 of the World Declaration on Education for All, adopted by the World Conference on Education for All, held at Jomtien, Thailand from 5 to 9 March 1990, states that “[n]ew and revitalised partnerships at all levels [are] necessary . . . [including] . . . partnerships between government and non-governmental organisations, the private sector, local communities, religious groups, and families”, *as cited in* Cultural Rights, *supra* note 339 at p. 21.

³⁵³ ICESCR, Art. 13 (3)

And the ICCPR also contains a similar provision respecting parents' choices regarding education: "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."³⁵⁴

Parental choice in schools is also discussed in the CADE in the context of educating children according to parents' wishes using separate schools. For example, under certain circumstances,³⁵⁵ forming separate schools or educational systems "offering an education which is in keeping with the wishes of the pupil's parents or legal guardians," does not constitute discrimination.³⁵⁶ This allowance for entire separate educational systems as a means to respect the wishes of parents demonstrates the critical importance that human rights law places on parents' choices when it comes to the moral and religious schooling of their children, and in maintaining continuity with children's linguistic heritage. It should be noted that this provision does not speak of ethnic segregation or segregation on the sole basis of nationality.

The CADE also pays special attention to parental choice in education for national minorities, in particular in allowing them to "carry on their own educational activities."

In Article 5(1), States Parties agree that:

(b) It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction;

(c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:

³⁵⁴ ICCPR, *supra* note 331 at Art. 18 (4)

³⁵⁵ The separate schools or educational systems must be established "for religious or linguistic reasons... in keeping with the wishes of the pupil's parents or legal guardians" and does not constitute discrimination "if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;" CADE, Art. 2 (b)

³⁵⁶ CADE, Art. 2 (b)

- (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
- (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
- (iii) That attendance at such schools is optional.³⁵⁷

This article again emphasizes the importance in IHRL of allowing parents to choose the religious and moral education of their children, as long as the education is optional so as to ensure that no one is forced to receive education against his or her convictions. It also emphasizes that any alternative education should conform with educational standards so as to be at a similar quality as the education the student would otherwise receive. And finally, it stresses that alternative education for national minorities should not exclude the students from society or its activities, and should not prejudice national sovereignty.³⁵⁸ All of these aspects suggest the importance in IHRL of respecting the moral and religious convictions of individuals and the wishes of their parents in education, in a manner that is specific to the individual.

Education is most often characterized as an economic, social and cultural right due to its placement in the ICESCR. Like other economic, social and cultural rights, it must be progressively realized, according to Article 2, with two exceptions that will be discussed momentarily.

Progressive realization of rights refers to Article 2 of the ICESCR, which states: “Each State Party to the present Covenant undertakes to take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”³⁵⁹

³⁵⁷ CADE, Art. 5 (1) (b) (c)

³⁵⁸ According to a UNESCO-published Commentary on the CADE, “This may mean, in particular, that the rights granted to minorities must not be interpreted as allowing minorities to isolate themselves from the community as a whole.” YVES DAUDET & PIERRE MICHEL EISEMANN, COMMENTARY ON THE CONVENTION AGAINST DISCRIMINATION IN EDUCATION, ADOPTED ON 14 DECEMBER 1960 BY THE GENERAL CONFERENCE OF UNESCO 31(2005).

³⁵⁹ ICESCR, Art. 2

This provision has often led to the charge that the economic, social and cultural rights contained in the ICESCR take a back seat to the civil and political rights enshrined in the ICCPR, whose full realization must be achieved immediately.

Two areas must be achieved immediately. The non-discrimination provision must be achieved immediately, as affirmed by the General Comment related to the right to education.³⁶⁰ The second is states' obligations to provide the most basic forms of education immediately.³⁶¹

In order to achieve non-discrimination in education, which is a non-derogable provision even in cases of national emergency, states must understand what constitutes discrimination. This is explained in further detail by the CADE:

For the purpose of this Convention, the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

- (a) Of depriving any person or group of persons of access to education of any type or at any level;
- (b) Of limiting any person or group of persons to education of an inferior standard;
- (c) Subject to the provisions of article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
- (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.³⁶²

Establishing separate educational systems does not constitute discrimination under the treaty, as discussed previously, in specific cases related to the wishes of parents regarding their children's moral, religious and linguistic education. The other exceptions are for gender-separated schools provided that the education provided is of the same quality, with the same quality staff and similar or the same educational content,³⁶³ and for private schools, provided that the education provided conforms with state standards, and "if the object of the institutions is not to secure the exclusion of any group but to provide

³⁶⁰ U.N. Doc. E/C.12/1999/10 on the right to education (art. 13), General Comment no. 13, *at* paragraph 31.

³⁶¹ In cases in which the state is unable to implement free education for all immediately, the state must work out a detailed plan that will take place over a reasonable number of years to provide free compulsory education for all in territories under its jurisdiction. Article 14, ICESCR.

³⁶² CADE, Art. 1 (1).

³⁶³ CADE, Art. 1 (a)

educational facilities in addition to those provided by the public authorities”³⁶⁴ and “if the institutions are conducted in accordance with that object.”³⁶⁵

In order to comply with non-discrimination obligations according to the CADE, States Parties are obligated to ensure that no differences of treatment are occurring between nationals “except on the basis of merit or need,”³⁶⁶ and no restrictions or preference “based solely on the ground that pupils belong to a particular group.”³⁶⁷ And States Parties have an obligation “to give foreign nationals resident within their territory the same access to education as that given to their own nationals.”³⁶⁸ It is important to note that the obligation here refers to access to education, not to providing identical curricula to non-nationals.

The Committee on Economic, Social and Cultural Rights (CESCR) has stated that enforcement of the right to education has been challenging.³⁶⁹ This led the CESCR in a General Comment to articulate “minimum core obligations” for each right including the right to education that states are obliged to achieve lest they commit a violation of the right in question.³⁷⁰ Of these there are “minimum essential levels” of each right which must be achieved immediately in order to avoid depriving the Convention of its *raison d’etre*, and notes that states cannot use the progressive realization clause or cite a lack of resources to excuse itself from not fulfilling them.³⁷¹ For the right to education, this

³⁶⁴ CADE, Art. 1 (c)

³⁶⁵ CADE, Art. 1 (c)

³⁶⁶ CADE, Art. 3 (c)

³⁶⁷ CADE, Art. 3 (d)

³⁶⁸ CADE, Art. 3 (e)

³⁶⁹ The Nature of States Parties Obligations, General Comment 3, adopted 13-14 Dec. 1990, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 5th Sess., at 86, ¶ 9, U.N. Doc. E/1991/23, annex III (1990) *as cited in* Sital Kalantry et al., *Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*, 32 HUM. RTS. Q. 271 (2010) [hereinafter: *Enhancing Enforcement*].

³⁷⁰ *Id.*

³⁷¹ General Comment 13: The Right to Education, U.N. Doc. E/C.12/1999/10/(1999), para. 9-10, Committee on Economic, Social and Cultural Rights *as cited in* Right to Education, *supra* note 222, at 314. The Committee does admit in paragraph 10 that there might be cases in which a State Party does not have the resources to fulfill its minimum core obligations, it has the burden of demonstrating this: “In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”

includes providing the most basic forms of education immediately.³⁷² While some questions remain about whether these standards are fixed minimums applicable to all countries regardless of resource limitations, or whether they are flexible standards,³⁷³ they are still a useful and widely adopted measure of what is minimally required in order to achieve compliance with the right to education under the ICESCR.

With respect to the right to education, the Committee stipulated the following five minimum core obligations (as summed up by researchers Kalantry et al.):

1. to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis;
2. to ensure education conforms to the objectives set out in article 13(1) [of the Covenant];
3. to provide [free and compulsory] primary education for all;
4. to adopt and implement a national education strategy which includes provision for secondary, higher and fundamental education; and
5. to ensure free choice of education without interference from the State or third parties, subject to with “minimum educational standards” (arts. 13(3) and (4)).³⁷⁴

Based on these minimum standards, Tomasevski developed a 4-A’s scheme, the “4-A Right to Education Framework” that has been adopted by the CESCR³⁷⁵ and has been widely adopted as a standard worldwide. The four core contents of the right to education according to this scheme are: Availability, Accessibility, Acceptability, and Adaptability.³⁷⁶

³⁷² In cases in which the state is unable to implement free education for all immediately, the state must work out a detailed plan that will take place over a reasonable number of years to provide free compulsory education for all in territories under its jurisdiction. Article 14, ICESCR.

³⁷³ Enhancing Enforcement, *supra* note 369 at 272.

³⁷⁴ The Nature of States Parties Obligations, General Comment 3, adopted 13-14 Dec. 1990, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 5th Sess., at 86, ¶ 9, U.N. Doc. E/1991/23, annex III (1990) *as cited in* Enhancing Enforcement, *supra* note 369 at 272. Kalantry points out that some scholars called for additional minimum core obligations, such as the right to be educated in one’s native language and others. She lists for example suggestions by Fons Coomans, who suggested that “the minimum core obligation should also include: (1) the provision of special facilities for persons with educational deficits such as girls in rural areas or working children; (2) the quality of education; and (3) the right to receive an education in one’s native language.” FONS COOMANS, IN SEARCH OF THE CORE CONTENT OF THE RIGHT TO EDUCATION, IN CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 217, 229-30 (2002) *as cited in* Enhancing Enforcement, *supra* note 369 at 272-273.

³⁷⁵ The Right to Education, General Comment No. 13, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 21st Sess., ¶ 45, U.N. Doc. E/C.12/1999/10 (1999) [hereinafter General Comment No. 13] *as cited in* Enhancing Enforcement, *supra* note 369 at 274.

³⁷⁶ These were first proposed in Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski, U.N. ESCOR, Comm’n on Hum. Rts., 55th Sess., ¶¶ 50–74, U.N. Doc. E/CN.4/1999/49 (1999).

Availability refers to the government's obligations to allow the establishment of schools (as outlined under the ICCPR) and to ensure that free and compulsory education is available to all children of an appropriate age for school (as outlined in the ICESCR).³⁷⁷

Accessibility refers to the government's obligations to provide access to education for all children who meet the age requirements for compulsory education.³⁷⁸ For higher levels of education that are not compulsory, and for which tuition and fees are often required, accessibility is assessed by whether it is affordable.³⁷⁹

Acceptability refers to the quality of education, which can include health and safety standards, requirements for teachers' professional training, and other factors such as the language of instruction.³⁸⁰

Adaptability refers to the schools' ability to adapt to the best interests of the child (according to the standards set out by the CRC).³⁸¹ As Tomasevski points out, "This change reversed the heritage of forcing children to adapt to whatever schools may have been made available to them."³⁸²

The Convention on the Rights of the Child contains even more expansive treatment of the right to education in relation to the aims of education. In addition to containing a provision respecting access to education, contained in Article 28, the CRC describes the aims of education in Article 29. Art. 29, paragraph 1 of the Convention on the Rights of the Child states:

1. States parties agree that the education of the child shall be directed to:
 - a. the development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - b. the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - c. the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

³⁷⁷ Education Denied, *supra* note 262 at 51.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*, at 52.

³⁸² *Id.*

- d. the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- e. the development of respect for the natural environment.³⁸³

The enjoyment of these rights, like the enjoyment of all fundamental human rights, is linked to the dignity of the person.³⁸⁴ The provisions of this article demonstrate clearly that the right to education as outlined in the CRC is not simply limited to providing access to education, but is qualitative, linked to the content of the education.³⁸⁵

While also not explicitly defining education or calling for specific curricula, the Committee on the Rights of the Child has often called upon states to make curricula more relevant to children, and has set out the way forward in doing so: states should encourage more active participation by children in schooling.³⁸⁶

The CRC requires States Parties to direct their actions toward the best interests of the child. “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”³⁸⁷ This includes through ensuring that educational institutions are suitably staffed and take care to protect the children who attend in terms of their physical safety and health, among other factors. The same Article goes on to require States Parties to “ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”³⁸⁸

³⁸³ The Convention on the Rights of the Child, Article 29, paragraph 1.

³⁸⁴ U.N. Doc. CRC/GC/2001/1 on the Aims of Education, 17/04/2001, General Comment No. 1 of the Committee on the Rights of the Child, 2001 *at* 1.

³⁸⁵ U.N. Doc. CRC/GC/2001/1 on the Aims of Education, 17/04/2001, General Comment No. 1 of the Committee on the Rights of the Child, 2001 *at* 3.

³⁸⁶ E.g. CRC Committee, Concluding Observations: Costa Rica (UN Doc. UN Doc. CRC/C/94, 2000), para. 233 and Italy (UN Doc. CRC/C/15/Add.41, 1995), para. 21, and E.g. CRC Committee, Concluding Observations: Cameroon (UN Doc. CRC/C/111, 2001) para. 380; Saudi-Arabia (UN Doc. CRC/C/103, 2001) para. 414 and the Netherlands Antilles (UN Doc. CRC/C/118, 2002), para. 576, *as cited in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 27* (Mieke Verheyde et al. ed.,) (2006).

³⁸⁷ CRC, Article 3 (1).

³⁸⁸ CRC, Article 3 (3).

The CRC also calls for respect for children’s heritage and national origins, and parents’ or legal guardians’ choices. In its preamble (a non-legally binding statement at the beginning of the Convention that draws attention to the Convention’s overall object and purpose, priorities and its influences), the Convention takes account of “the importance of the traditions and cultural values of each people for the protection and harmonious development of the child.”³⁸⁹ In Article 3, the Convention calls on States Parties to respect the rights of children’s parents, requiring that they:

undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.³⁹⁰

While not specifically mentioning education, the Convention’s wording in these Articles appear to extend to all aspects of a child’s life in the state. Children also have the right to acquire a nationality, and the right to “preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”³⁹¹ In cases where children are rendered stateless due to being illegally deprived of their identity (or parts of their identity), States Parties are required to “provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”³⁹²

Together, these provisions indicate that the CRC, like the ICESCR, places a strong emphasis on maintaining children’s cultural and national identity, whether through education or in other closely related aspects of life, such as family life and cultural heritage.

School separation and educational content

Regarding the provision of non-discrimination, questions have been raised as to whether separate schooling for religious or linguistic minorities constitutes discrimination under these legal instruments. This is particularly in light of the fact that the history of the notion of human rights is often told as a means of curbing state abuses of their populations that was brought to the world’s attention following the abuses of

³⁸⁹ CRC, preambulatory clause.

³⁹⁰ CRC, Article 3 (2).

³⁹¹ CRC, Art. 7(1)

³⁹² CRC, Art 8(1)

governments of the Axis Powers (such as Nazi Germany) during World War II. Much of the horror of World War II, according to many of these narratives, began through the governments' abuse of educational institutions to indoctrinate their citizens with racially supremacist ideas that dehumanized members of religious minorities. Other states have struggled with divisions in education on the basis of ethnicity, color, or nationality.

As discussed previously, the UNESCO Convention against Discrimination in Education permits the separate schooling of religious minorities (and does not consider it discriminatory treatment), if it is optional, and in accordance with the wishes of their parents. The wording of the article is:

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article I of this Convention:

... b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.³⁹³

In 1978, UNESCO established the concept of a "right to be different." Tomasevski described this right as indicating that "all individuals and groups have the right to be different, to consider themselves as different and to be regarded as such."³⁹⁴ Indeed, many see the preservation of minorities' heritage as a key component of their human rights more broadly, including their rights to freedom of expression, freedom of thought, conscience, and religion, and human dignity more generally. In fact, the ICCPR guarantees minority protection in Article 27, which states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."³⁹⁵ And yet, there is a fine line between heritage preservation and celebration

³⁹³ United Nations Educational, Scientific and Cultural Organization, Convention against Discrimination in Education, Adopted by the General Conference at its eleventh session, Paris, 14 December, 1960, entered into force 22 May 1962 at Article 2(b)

³⁹⁴ Education Denied, *supra* note 262 at 143.

³⁹⁵ ICCPR, Art. 27

or practice of culture, and segregation of the group itself – and according to human rights law, whether the distinction is based on religion, language, or other factors.

Historically, differences have been accommodated through segregation. The boundaries have followed internationally prohibited grounds of discrimination. . . . Communities are educating their children within the boundaries of belonging defined by religion, ethnicity, or language. The model of all-encompassing public education aims to overcome such boundaries and the underlying division of children into ours and theirs. Although that model is embodied in the spirit and wording of international human rights law, it does not guide education strategies.³⁹⁶

These boundaries of permissible segregation that do not constitute discrimination are inclusive of religion, but not race. Religious schools have had a long history. “Different from race, religion has always constituted a boundary of belonging, throughout the history of education. Religious schools are older than secular schools. It is likely that more children attend religious than secular schools today.”³⁹⁷

Further, as mentioned previously, what constitutes acceptable segregation in schooling is bounded by important requirements, including that parents have a choice as to whether their children will attend a segregated school, the quality of education does not suffer, and that students are not excluded from the linguistic and cultural life of the society in which they live.

When allowing for separate educational institutions for religious education, there is no distinction made in human rights law for whether these institutions need be public or private.

According to former UN Special Rapporteur on the right to education Katarina Tomasevski, “Questions about what children are taught are asked much too rarely, and abuses of education are detected retrospectively, if at all. . . . The assumption that any education is better than none is as unfounded as it is prevalent.”³⁹⁸

Many countries have struggled with internal debates over the content of educational curricula, particularly as it relates to sensitive issues such as the relations between minorities and varying versions of history, especially in relation to conflict. For example, in Bosnia-Herzegovina, separate schools with separate curricula were instituted on the

³⁹⁶ Education Denied, *supra* note 262 at 143.

³⁹⁷ *Id.*

³⁹⁸ Education Denied, *supra* note 262 at 15

basis of religious and other identities for students, a move which was criticized since it arguably avoided the difficult task of educating students democratically. One such critic alleged that:

Education is often misused by providing students with different interpretations of the same facts. For example, curricula and textbooks may present the start of the war as aggression and occupation, or a fight for liberation and national emancipation. Was it genocide and ethnic cleansing of some parts of the territory, or it was it self-defense?³⁹⁹

Another example of the manipulation of educational content to promote particular political ideologies related to identity is accomplished by excluding key parts of minorities' history from the curriculum. For example, in Bosnia-Herzegovina, "In municipalities where the Bosniak population is the majority, school leaders exclude attributes of the Croat nation and Croat culture from the school curriculum. Some Croat teachers and students refuse to attend schools with the Bosniak majority, and would rather conduct class under tents, using curricula from neighboring Croatia."⁴⁰⁰

Although exclusions of content, and the suggestion of the resulting impression that a minority group is not important, or has not contributed to the nation, is not the only method states have used historically to manipulate identity politics in schools. The "over-emphasis" of a particular group's ethnic or cultural background can itself be a problem. "By over-emphasizing someone's ethnic, linguistic or religious preferences, one often forgets other characteristics of an individual, such as gender, social, generational, professional, intellectual, and many others. Educational practice fenced in by a nationalistic-political frame can not only cripple all other dimensions of a personality but also its developmental potential."⁴⁰¹

This is the same problem that is often identified as a critique of cultural relativism, in that it places an emphasis on culture above all other factors and variables. A group may be described as so culturally unique that it is reduced to stereotypical depictions, or

³⁹⁹ Adila Pasalic-Kreso, Education in Bosnia and Herzegovina: Minority Inclusion and Majority Rules The system of education in BiH as a paradigm of political violence on education, 2 CURRENT ISSUES IN COMPARATIVE EDUCATION 7 (2002). Pasalic-Kreso also states, "Furthermore, this presents political abuse of education at the national level that skillfully avoids each attempt toward sincere democratization and respect for cultural differences in the education system" at 6.

⁴⁰⁰ *Id.*, at 7.

⁴⁰¹ *Id.*, at 12.

depictions that overly focus on the “traditional,” overshadowing the group’s modern, integrated context.

Education must, through its provision institutionally and through its content, meet the standards set out in the ICESCR and other human rights instruments, and for example as stated in the ICESCR, “promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups,” but no specific syllabi or educational programs are required. In fact, a corollary that may be assumed is that educational content will differ between different societies.⁴⁰²

There are certain key places in a curriculum in which “abuses” or attempts at state indoctrination have occurred in the past, such as within history or civics curricula, mostly in the contexts of situations of armed conflict. It is important to note that not all of these problematic educational content areas can occur in subjects such as history or social studies where they might be expected. Some of these attempts occur in surprising places, such as mathematics curricula. For example, “In Hitler’s Germany, a mathematics textbook nudged learners to calculate the financial savings that would ensue from eliminating mentally ill people. ‘The construction of a lunatic asylum costs 6 million DM. How many houses at 15,000 DM each could have been built for that amount?’”⁴⁰³

And in the United States, mathematics were also used to achieve political propaganda objectives: “One maths book printed in the US during the USSR’s Afghanistan war for use amongst Afghani refugees offered the following mathematical problem: ‘If you have two dead Communists, and kill three more, how many dead Communists do you have?’”⁴⁰⁴

Education has also played a role in the encouragement of war and the incitement of violence. As Tomasevski noted, “Throughout history, education has been particularly effective in the militarization of boys. Participation in warfare has been part of traditional initiation rituals through which boys become men. Glorification of war

⁴⁰² J. Lonbay, *Implementing the right to education in England*, in *Economic, Social and Cultural Rights: Progress and Achievements* 163–183 (1992).

⁴⁰³ T. McGirk, *Afghan warrior joins the Great Game*, *Independent*, Sep. 30, 1993, as cited in *Education Denied*, *supra* note 262 at 17.

⁴⁰⁴ *Id.*

continues by means of history textbooks which are dotted with wars and war heroes.”⁴⁰⁵ For example, it was reported that education (at the urging of the state) played a role in the conditioning of the population to commit genocide in Rwanda, through the propagation of so-called “scientific” theories about ethnic difference.⁴⁰⁶

While extreme, these examples demonstrate the importance of holistically examining educational content across a curriculum, and of the importance of paying particular attention to portrayals of national minorities, and perceived social ills. They also highlight how important educational curricula during a conflict can be, particularly as it relates to ethnic minorities, and underscore why authorities in situations of conflict may be suspicious of content which appears to be related to potentially sensitive subjects that may bear on national security such as political content, or content which is nationalistic, related to identity, religion, or minority relations, or foreign affairs.

The abuses of state power to determine educational content produced curricular content that undermined human dignity and ran counter to the provisions of IHRL related to education. They are instructive in demonstrating some of what would constitute a violation of the right to education. They also violate other articles of human rights treaties such as the ICCPR, which while not specifically dealing with education, prohibit the advocacy of “national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence”⁴⁰⁷ or promotion of propaganda for war.⁴⁰⁸ And as a whole, they undermine the cause of human dignity with which human rights law is concerned.

Protection of Education by IHL vs. IHRL

⁴⁰⁵ “The schools took it upon themselves to develop actual theories of ethnic difference based on a number of allegedly scientific data which were essentially morphological and historiographical. In the first case, the two main groups can be differentiated by appearance, as the Tutsi are ‘long’ whereas the Hutu are ‘ugly’, genuine ‘Negroes.’” From Commission on Human Rights, Report on the Situation of Human Rights in Rwanda, submitted by Mr. Rene Degni-Segui, Special Rapporteur, UN Doc. E/CN.4/1997/61 of 20 January 1997, para. 25 *as cited in* Education Denied, *supra* note 262 at 19-20.

⁴⁰⁶ “The schools took it upon themselves to develop actual theories of ethnic difference based on a number of allegedly scientific data which were essentially morphological and historiographical. In the first case, the two main groups can be differentiated by appearance, as the Tutsi are ‘long’ whereas the Hutu are ‘ugly’, genuine ‘Negroes.’” From Commission on Human Rights, Report on the Situation of Human Rights in Rwanda, submitted by Mr. Rene Degni-Segui, Special Rapporteur, UN Doc. E/CN.4/1997/61 of 20 January 1997, para. 25 *as cited in* Education Denied, *supra* note 262 at 19-20.

⁴⁰⁷ ICCPR, *supra* note 331 at Art. 20 (2)

⁴⁰⁸ *Id.*, at Art. 20 (1)

In 2008, the International Committee of the Red Cross undertook a study in which they explored the mutual compatibility of IHL and IHRL. In line with this approach, Jonathan Horowitz outlined an approach to the right to education compatible with both IHL and IHRL in a time of occupation. The author will adopt the approach advocated by Jonathan Horowitz in relation to the conflicting norms and potential reconciliation of norms of the right to education under IHL and IHRL simultaneously. Namely, it will be demonstrated that the positive obligations required by the state under IHRL can fit into the vague requirements of the Occupying Power. And through applying, based on an assessment of the appropriate context, either a *lex specialis* or *lex posterior* approach as the primary lens through which the norms can be viewed or limited, either occupation law or human rights law can be harmonized into a more definitive set of obligations agreed upon between the two bodies of law.

Horowitz first raises a number of questions regarding which provisions of IHL or IHRL might supersede the other. For example, as previously discussed, the right to education is an economic, social and cultural right and as such should be achieved progressively, including through changes to legislation. However, in occupation law, the Fourth Geneva Convention calls for only “essential” changes to the law, and the Hague Regulations state that a state should respect local laws “unless absolutely prevented.” Which of these provisions is strongest in relation to changing the education system in an occupied territory?

He then examines four positive obligations of the right to education under IHRL and their potential compatibility with the Occupant’s requirements for education under occupation law. These four will be explained briefly.

1. *Make Primary Education Compulsory and Free for All* – this provision, contained in Article 13 of the ICESCR, is not similarly enshrined in occupation law. While the Fourth Geneva Convention stipulates that Occupants must provide education for children orphaned or separated from their parents, its only other obligation is to “facilitate the proper working of institutions devoted to the care and education of children.” Legislating for free and compulsory education for all children in a

context in which that did not exist therefore seems to go beyond what is required of the Occupant.⁴⁰⁹ In this sense, there appears to be a conflict between the laws.

2. *Ensure the Physical Operation of Institutions Devoted to Primary Education* – the requirement to ensure that educational institutions are properly functioning in occupation law, especially as elaborated in the Commentary to the Fourth Geneva Convention stating that Occupants must ensure this even when local or national authorities’ resources are inadequate, seems compatible with the broad obligations under the right to education regarding what it means for an educational institution to be working properly.⁴¹⁰ Human rights law however does provide stronger, specific obligations than occupation law in terms of what is required to ensure that educational institutions are properly functioning. State practice generally shows that while Occupants have provided for educational institutions, they have done so more “based on whim, generosity, and self-interest of the Occupying Power.”⁴¹¹
3. *Remove Discriminatory Laws that Limit Children’s Access to Primary Education* – this is a key, immediately required provision of the ICESCR enshrined in Article 2(2),⁴¹² and has a corollary in occupation law. The Fourth Geneva Convention in Article 27 prevents the Occupant from making detrimental distinctions against those under their control based on factors such as “race, religion, or political opinion.”⁴¹³ While this has been respected in state practice, Horowitz raised some further questions. For example, while the Commentary to the Fourth Geneva Convention indicates that an Occupant should abrogate any discriminatory laws it finds that “might place difficulties in the way of the application of the Convention,”⁴¹⁴ he questioned what powers the Occupant would have in a situation in which a discriminatory law existed preventing girls from attending school. While changing the law would seem to be compatible with the non-discriminatory spirit of the Fourth Geneva Convention, it could be

⁴⁰⁹ Right to Education, *supra* note 222, at 314-5.

⁴¹⁰ *Id.*, at 315-6.

⁴¹¹ *Id.*

⁴¹² ICESCR, Art. 2(2) *as cited in* Right to Education, *supra* note 222, at 315-6.

⁴¹³ Geneva Convention IV, Art. 27 *as cited in id.*, at 317.

⁴¹⁴ Pictet, Commentary, Geneva Convention IV, at 207 *as cited in id.*, at 317.

impermissible on the basis of the principle that occupation law requires the Occupant to preserve institutions' working the way they worked prior to occupation.⁴¹⁵

4. *Remove Hateful Materials from Education* – the ICESCR requires States Parties to provide an education that promotes “understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups,”⁴¹⁶ implying that hateful materials should be removed from school curricula. State practice indicates that Occupants have done so, and commentator Von Glahn advocated this approach as far as it is required by military necessity or satisfies the Occupant's requirement to ensure public order.⁴¹⁷ However, removing hateful materials might not always be in the interest of public order or required by military necessity. For example, if the hateful materials are not directed toward the Occupant, but toward some third group, it seems that removing them would cross a line in occupation law.⁴¹⁸ This represents a conflict with IHRL, which would have the State Party remove any such materials that promote hatred.

Additionally, some provisions of occupation law can be fit into the spirit of human rights obligations related to education. These include:

1. *Occupant Should Act to Benefit the Welfare of the Local Population* – Because human rights law is primarily concerned with protecting citizens from state abuses, this approach – condoned by occupation law – is consonant with international human rights law in general.
2. *Occupant Should Support Educational Institutions in Cooperation with National and Local Authorities* – working with local and national authorities is a key provision of the laws of occupation on education, and respects the many provisions within human rights law on the right to education which specify that children, or children's parents acting on their behalf, should have a choice in their educational options. This choice is tantamount to their having a say in their

⁴¹⁵ Right to Education, *supra* note 222, at 318.

⁴¹⁶ ICESCR, Art.13(1).

⁴¹⁷ Right to Education, *supra* note 222, at 318.

⁴¹⁸ *Id.*

education, and so the occupation law provision fits well into the spirit of these human rights law provisions.

3. *Occupant Should Respect Local Norms Including Religious and Cultural Needs* - both IHRL and occupation law contain provisions related to providing for the needs of the local population in a manner that is specific to their religious, cultural, and ethnic backgrounds. This demonstrates a respect in both sets of law for the dignity of individuals and for their family life. In occupation law, an Occupant is required to find teachers, if it must assign them, who closely match the student in terms of his or her religion, ethnicity, national and cultural background.

The increasing fragmentation of international law, which has been much discussed, requires that competing principles be harmonized into a single set of principles. The Court in ICJ decision simply mentioned that the state is responsible for both sets of obligations, IHL and IHRL. It relied on doctrine of *lex specialis* heavily to determine through which lens the laws should be seen (as a matter of which comes first). However, many scholars have found this approach – largely imported from domestic legal systems which have much clearer formal hierarchies than the international legal system – to be problematic and at times, unclear.⁴¹⁹ Other interpretations have been posited and international legal bodies such as the ILC have noted that which approach is taken should be determined based upon context.⁴²⁰

Horowitz pointed out two main underlying assumptions that in his opinion should be taken into consideration when deciding on the relationship between occupation law norms related to education and IHRL norms. One is the assumptions underlying occupation – namely, that occupation is short and temporary and the Occupant does not have the “prerogative” to change laws, which in contrast with a State’s wide authority to decide what education it provides its population, should be respected as a general principle over IHRL. So in this case, he finds the *lex specialis* approach, which would favor occupation law in this case, relevant.⁴²¹ The second is that since occupation law was written, international standards on the right to education are far more comprehensive

⁴¹⁹ Right to Education, *supra* note 222, at 320.

⁴²⁰ ILC, see note 20 in Horowitz, at 409 *as cited in* Right to Education, *supra* note 222, at 321.

⁴²¹ *Id.*, at 322.

and up to date than anything in occupation law. It is for this reason that Horowitz advocates flipping the *lex specialis* relationship, allowing IHRL to be in the lead, and he does so by invoking the principle of law *lex posterior derogat legi priori*, meaning that when two provisions deal with the same content, the more recent law takes precedence.⁴²² He cautioned against using this principle however to suggest that all of IHRL should supersede IHL because IHRL is more recent, since this position has and would have virtually no support in court decisions or literature and goes against the notion that both bodies of law co-exist during conflict.⁴²³

One final point is that without the *lex specialis* framework to reign in the human rights standards, Occupants might use human rights obligations to manipulate laws in their favor.⁴²⁴ Some of the several occupation law restrictions that might reign in a human rights approach to amending legislation are the necessity of cooperating with local and national authorities to ensure the proper working of educational facilities.⁴²⁵ Another is that interference in education is only permitted in cases of necessity, i.e. if not interfering would result in a violation of the right to education.⁴²⁶

Allowing more up-to-date international human rights standards to guide the Occupant in its interpretation of IHL is not in conflict with what the drafters and interpreters of the Fourth Geneva Convention appeared to have wanted based on Horowitz's reading of the drafting history and commentary. For example, Greece specifically suggested updating a provision on education in Protocol I Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I) to reflect "present-day requirements," referring specifically to the right to education in the ICESCR.⁴²⁷ And the commentary on Article 77 AP I specifically mentions that the article develops the Fourth Geneva Convention as well as other rules of international law, naming specifically the ICCPR and the CRC.⁴²⁸

In regards to the question of at what point a human rights approach for a specific provision should take precedence over an occupation law approach, some have answered

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.* at 323.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.*, at 324.

that the change could occur when the territory during its daily life represents peace more than war.⁴²⁹ However, in the case of education, stronger controls are still needed in order to be able to monitor the Occupant's intentions and actions and in order to more accurately gauge the needs and wants of the local population.

One other approach that could be possible would be for the Occupant to give effect to treaties that were in force by the prior sovereign's ratification, but that had not been implemented.⁴³⁰ This would allow the Occupant to amend laws without coming up against the restrictions of occupation law. However, it would only allow for a limited range of changes and would go against the spirit of occupation law, which is not to make sweeping changes to the existing legislative structure.

The author advocates for the use of Horowitz's approach, in which *lex specialis* or *lex posterior* is applied in order to selectively determine which body of law is the more appropriate lens through which to view an Occupant's primary obligations. After determining which is the more appropriate, IHL or IHRL, the other norms can be filled in or injected into the more vague requirements of the other. While imperfect, this approach nevertheless seems to bring practitioners one step closer to an agreed-upon approach for assessing education under occupation in relation to IHL and IHRL.

Israel's Conduct in Relation to IHL and IHRL Obligations

Now that Israel's obligations related to education under IHL and IHRL have been established, Israel's violations of International Humanitarian Law and International Human Rights Law will be presented, taking into account the complementarity of Israel's obligations based on the *lex specialis/lex posterior* framework that was discussed previously. The violations of the various legal instruments and articles already discussed will be explored according to four general themes related to education, within which IHL and IHRL norms complement one another.

Legal Problems Arising from Israel's Position

⁴²⁹ Droege, *see* Right to Education, *supra* note 222, at 538, and M. Sassoli & L.M. Olson, *The Relationship between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts*, 90 IRRC 599 (2008) as cited in Right to Education, *supra* note 222, at 324.

⁴³⁰ *Id.*, at 326.

Israel's position that the Syrian Golan Heights is part of the sovereign territory of the state of Israel, while simultaneously recognizing that this status is not intended to prejudice a peace settlement with Syria, in which all or part of the Syrian Golan may be returned in exchange for peace, at first glance presents some legal contradictions. Israel appears to be recognizing the continuing state of war between Syria and itself, and even politically conceptualizing its control over the Syrian Golan as a temporary state, and yet is not willing to take the step of formally admitting that the Syrian Golan is an occupied territory. Doing so would force the state to accept the legal ramifications of its conduct (such as its violations of law, including the transfer of parts of its civilian population into the Syrian Golan through its civilian settlements there – arguably a war crime according to the Rome Statute of the International Criminal Court) and accept the legal obligations that it ignores or evades in relation to its conduct with the native population.

However, one scholar offers an explanation that reconciles this apparent contradiction in Israel's position which provides even further support for the contention that Israel intended to annex the Syrian Golan. Simply, annexing a territory does not in any way prevent a sovereign from agreeing to transfer its territory to its neighbor.⁴³¹ This was pointed out explicitly by Prime Minister Begin during two of the three readings of the Golan Heights Law,⁴³² and statements indicating the same idea were expressed in relation to the Basic Law which annexed Jerusalem to Israel.⁴³³

In addition to these problems, a primary reason why Israel's position is problematic as regards international law is not simply a matter of its practice being in violation of the letter of legal norms, or the factual reality of its civil administration of the Syrian Golan, nor is it solely a matter of semantics in regards to whether or not the territory is called "annexed." The problem is something much more fundamental, having implications for the international legal system as a whole.

⁴³¹ Maoz in *Application of Israeli Law to the Golan Heights is Annexation*; Maoz, Asher, Vol. 20 Brook. J. Int'l L. (1993-1995) at 367.

⁴³² During one reading on the Golan Heights Law, the Prime Minister stated: "Politically speaking I declare before all of the members of government seated here, that the moment the President of Syria states that he is prepared to engage in negotiations with Israel for a peace treaty, at that moment the negotiations for a peace treaty with Israel shall begin, and nothing shall stand in our way." 93 D.K. 1694 (1982), as cited in Maoz in *Application of Israeli Law to the Golan Heights is Annexation*; Maoz, Asher, Vol. 20 Brook. J. Int'l L. (1993-1995) at 367.

⁴³³ Maoz in *Application of Israeli Law to the Golan Heights is Annexation*; Maoz, Asher, Vol. 20 Brook. J. Int'l L. (1993-1995) at 367.

Whether the Israeli administration of the Syrian Golan is civil or military is not the main problem. The primary problem is in the application of the same laws of one's own population to an occupied population: Israel's extension of its own law to the Syrian Golan fails to take into account the differing realities, state aims and legal obligations regarding the treatment of an occupied population. This problem is essentially the crux of this paper. The state has legitimate aims in regards to educating its own population. Yet these aims are at times fundamentally in conflict with the aims of education as relates to an occupied population, especially when a state is attempting to inculcate a sense of national identity in the people. Some of the most obvious manifestations of this problem are in terms of educational content and curricula that address national history, but the problem goes much deeper, for example into the democratic processes of decision-making that the Syrian Golan residents are not able to take part in due to their status as non-citizens. And as long as Israel continues to hold that the inhabitants are simply rejecting Israel's benevolence or generosity by not accepting its offer of citizenship, the fundamental attitude of Israel as regards the population and the resulting power relations will remain distinctly unbalanced.

Israel in many ways, by attending to its human rights obligations exclusively in the Syrian Golan, could theoretically develop educational institutions positively in accordance with its obligations under international law. This often is the narrative put forth by the state in relation to its conduct in the Syrian Golan. For example, the state of Israel focuses on its achievements in education in the Syrian Golan, such as the increased enrollment of girls in schools, improved attendance and graduation rates among both genders, and its development of schools by utilizing increasingly advanced technology. However, by ignoring its obligations under international humanitarian law and focusing exclusively on the promotion of human rights and its objectives as a state, no matter how well it achieves these ends, Israel will still face problems due to the conflicting aims of the two bodies of law in relation to the residents. The aims of a legitimate state sovereign over its population and the aims of an occupying power over the enemy inhabitants of the territory it occupies differ substantially, as has been discussed previously in this study. And as long as the population sees itself as occupied, and Israel ignores this status and

the resulting consequences of this viewpoint, the human dignity of the residents will not be respected and human rights obligations will therefore be violated in the process.

Put another way, if what is good for an Israeli citizen must necessarily be good for a Syrian citizen, or a citizen of any other state, that would undermine some of the most important principles that underlie the international system of states. These include the principles of state sovereignty and of the self-determination of peoples, which are bedrocks of the international legal system and protected by the UN Charter, in addition to numerous other instruments guaranteeing these rights. States by definition differ in their determinations of what benefits their citizens, and it is their right and privilege to do so, since as sovereign nations, no legal body has authority over them. While there is happily more overlap between the valuations of states in what constitutes “good”- for example resulting in the abundance of multilateral international legal instruments guaranteeing agreed-upon rights and interstate cooperation - each state as a sovereign has the right to disagree with other states, except in regards to commission of the most heinous of crimes (such as violations of *jus cogens* norms).

While Israel could begin to comply with its obligations under IHL and IHRL in relation to education as suggested by this analysis, it is unlikely that the residents of the Syrian Golan would enjoy their rights fully until they are no longer living under belligerent occupation. However, without an end in sight to their prolonged occupation, Israel’s increased compliance with its international legal obligations could vastly improve the Syrian Golan residents’ enjoyment of the right to education.

Changes to the Legal Structure and Proper Functioning of Schools

As discussed previously, Israel’s acquisition of the Syrian Golan by force was in contravention of the UN Charter. Israel’s subsequent military occupation was illegal according to IHL, and its application of its laws to the OSG, or annexing the territory, constituted a further violation of IHL that was condemned immediately by the United Nations Security Council, General Assembly, and was not recognized by nearly all nations of the world. And as just discussed, Israel’s prolonged occupation of the territory continuously subjects the population to an increased risk that their human rights will be violated.

As discussed, an occupant has to balance its obligations to maintain the status quo in the territory it occupies, and to take positive steps to ensure that the population is enjoying its human rights obligations. The tension between these two competing principles is apparent when it comes to the issue of Israel extending its educational curricula to the residents of the Syrian Golan and administering its schools.

In a review of the history, immediately after its capture of the Syrian Golan in 1967, Israel's military administration allowed the Syrian Golan residents to continue attending educational institutions following the Syrian curriculum and educational structure. However, the curriculum was soon replaced by an Israeli curriculum. Israel claims that because of war with Syria, it had to use its own textbooks for education of the Syrian Golan residents since it had no access to Syrian curricula. Local authorities within the Syrian Golan, due to their stance of resisting Israeli authority, refused to cooperate with Israeli military authorities. Consequently, it is difficult to determine whether the Israeli authorities conducted themselves appropriately by replacing the curriculum. In regards to whether Israel's changes to educational institutions without the consent of the local population amounted to a violation of IHL, this area of occupation law is gray.

As mentioned previously, Art. 50 of the Fourth Geneva Convention requiring an occupant to maintain educational institutions does not state what an occupant should do if local and national authorities refuse to cooperate in maintaining the proper working of educational institutions. Israel chose to act unilaterally by implementing its education system, but without the cooperation of local authorities, and given a lack of teachers, textbooks, and legal authorities, it is difficult to say whether the Israeli authorities could have acted differently without violating their obligation under Article 50. Under IHRL, in particular Article 13(2) of the ICESCR, States Parties have an obligation to ensure that schools are developed and that teaching conditions are continuously improved. By taking an active role in the development of schools, Israel appears to have been complying with this provision. Teacher training was a more questionable area, but since the right to education is meant to be progressively realized, a more in depth study of Israel's conduct would be necessary in order to determine whether or not this article has been violated.

Art. 50 further requires that the occupant to ensure that children in the occupied territory who are orphaned or separated from their parents are provided with an education

if the local authorities are inadequate for doing so. And this obligation also requires an occupant, when making these arrangements, to provide education given by instructors of the same nationality, language, and religion of the children, if possible. And many other obligations in IHL demonstrate a respect for education of children that is consistent with their parents' nationality, religion, language, and moral values. The Israeli authorities, by requiring that students were taught in Arabic in Arab sector schools, by Druze teachers, may have believed that this constituted their compliance with the spirit of these IHL protections, even though most of the children were probably not orphaned. In regards to nationality, because Israel began to define the Druze as a nation, a creative, rather than a strict, interpretation of "nationality" could have allowed them to make the argument that they were complying with the emphasis on nationality.

Due to these ambiguities and considerations, it is not clear whether Israel's original choice to impose its curricula on the residents of the Syrian Golan was in contravention of IHL. This is particularly true since in the first few years of occupation, the authorities may not have had time (or enough information or cooperation from residents) to understand the nuances of their situation vis a vis their identity, religion, and educational preferences. Israel's obligations related to nationality should have been more clear from the beginning, and will be discussed further in a later section.

Similarly, Israel's extension of its laws related to compulsory education over the Syrian Golan, at face value appears to contradict its obligation under Art. 53 of the Hague Regulations to keep local laws in force unless "absolutely prevented." Yet, without access to Syrian lawyers, law books, or the authorities governing the provision of education, again, it could be argued that it was necessary for Israel to do so in order to ensure that the residents were guaranteed access to education under the law. However, the wording "absolutely prevented" suggests a very high standard of compliance, casting doubt on whether it was truly necessary for Israel to impose its school system on residents and cease respecting Syrian educational laws. Therefore, it is again difficult to say whether Israel committed a violation early on by applying its own laws to the Syrian Golan.

Later on, in particular when more of the local population began to cooperate with Israeli authorities, and when Syrian residents began publicly voicing their opinions on the

imposition of the Israeli educational system on residents, Israeli authorities have more to prove as to why they did not respond to the residents' wishes. This will be discussed further in relation to educational content.

Access to Education

In order to comply with its obligations under the right to education in IHRL, education must be available, accessible, acceptable, and adaptable. The first two will be discussed in relation to access to education. In the Syrian Golan, Israel took steps to ensure that all students of the appropriate ages were provided with some form of compulsory education. However, the education was not always free, since residents had to pay for educational costs out of pocket in many cases. This raises questions about whether education was truly "accessible" to all residents.

Israel claimed its actions benefitted the local population. Indeed, Israel presents statistics demonstrating that reading levels, girls' participation in education, and other indicators have risen positively as a result of Israel's actions related to education in the Syrian Golan. These improvements support the notion that Israel complied with its requirements for access to education under the IHRL right to education.

Choice of Schools

On the whole, at least at primary and secondary levels, Israel appears to have provided access to education. However, whether or not this access was provided on a non-discriminatory basis is in question. As will be discussed in more detail, students only had access to some schools – for example, a non-Jewish, Arab student could not attend a Jewish school even if the education provided there was of a higher quality or in keeping with the wishes of the student's parents. This could indicate that the access was discriminatory on prohibited grounds, and would call into question Israel's compliance with access to education under the ICESCR and other IHRL instruments to which it is party.

Choice of schools is an important component of the right to education that is not discriminatory, as outlined in the CADE, Art. 5(1) and numerous other instruments to which Israel is party, including the ICCPR and ICESCR. Parents have a right to choose the educational institutions for their children, or to create new schools if the available choices are not acceptable (subject to limitations such as quality and local law).

However, in the Syrian Golan, students did not have these choices even when they or their parents objected to the educational institutions' quality or content. And according to the right to education in the ICESCR, non-discrimination must be achieved immediately, and is non-derogable.

School choice is particularly important when it comes to the rights that minorities' have to ensure their religious, linguistic, and moral traditions are respected and maintained. For example, according to the CADE, Art. 2(b) and Art. 5(1), creating separate schools for minorities for linguistic or religious reasons does not constitute discriminatory treatment by a state party, but only if the institutions are optional and of a quality similar to or the same as other schools in the state. In the case of the residents of the Syrian Golan, not only did many of the parents object to the educational institutions, they were not allowed other educational options, and met great resistance from Israeli authorities when they attempted to create alternative educational arrangements. Further, the way that Hebrew is taught in comparison with Arabic, indicates a strong aversion by authorities to exploring the rich heritage of the Arabic language. This may result in the erosion of Arabic language abilities and knowledge among an Arab population, and would defeat some of the objectives of creating separate, Arabic-language schools for the Arab minority as a means to respect the maintenance of their linguistic traditions.

In sum, these circumstances suggest that the non-discrimination requirement, and thus Israel's obligations under the CADE and ICESCR mentioned above, were violated. Respect for parents' wishes and the best interests of the child fall under the "adaptability" criteria, and in the above case, as well as in terms of content, this criteria appears not to have been respected.

Educational Content/Curricula

Because teachers were often poorly trained, the threshold for "acceptable" education may not have been met.

Another aspect in which parents' wishes are important is in terms of the content of education, which fall under both the "acceptability" and "adaptability" criteria for assessing the core components of the right to education in IHRL. Respect for parents' wishes related to their moral or religious convictions in particular is guaranteed in Art. 18(4) of the ICCPR, ICESCR Art. 13(3), and the two CADE articles already discussed.

Additionally, IHL – particularly the Geneva Conventions and their optional protocols– places a strong emphasis on the respect for children’s nationality, language, and religion.

In the Syrian Golan, many residents strongly disagree with the Druze heritage curriculum to which they have been subject. While Druze schools teach essentially secular tenets, they take great care to portray the Druze religious sect as an ethnic group or nation, and to emphasize aspects of the history of members of the religious sect that are calculated to serve Israel’s aims of nation-building among its citizens. Coupled with a lack of school choice, what many students and parents feel is objectionable content is forced upon residents against their religious and moral convictions. This is in clear contravention of Israel’s obligations under the abovementioned articles.

Also in regards to content, the state is under an obligation to avoid inciting religious hatred, and to provide an education that is consistent with the United Nations’ aims of tolerance and friendship among peoples and nations. This is an essential component of the right to education, as outlined in the CRC, ICESCR, and other instruments. To this end, it is questionable how the portions of the Druze heritage curriculum that are intended to distance students from their Arab heritage, and emphasize elements of history that serve to distance students from Muslim Arabs, are intended to promote “friendly relations” among the residents of the Syrian Golan with Arab populations and nations.

However, Israel in this case is balancing a situation in which authorities may fear that– if afforded an accurate portrayal of their political and religious history – the curriculum might incite religious hatred against the Jewish population in Israel, or incite violence directed at the occupant’s forces. And yet, it is critical for the state to be able to balance their permissible interference with educational content of this nature, with their obligations to provide an education that is consistent with residents’ convictions (or to allow them to create their own educational institutions). While restrictions on “political” content are arguably permissible according to IHL, at least if judging by some of the foundational rules of IHL, if not by the letter of the law, an overly broad definition of what is political can infringe on residents’ rights as described above – in particular, as they relate to what Israel considers sensitive information related to identity, such as religion and ethnic heritage – can easily surpass what is permitted by IHL.

For example, applying an educational system that – if what critics allege is true – deliberately attempts to separate Syrian Arab Druze from their ethnic Arab identity, due to fears that Arabs will coalesce under the umbrella of Arab nationalism and harm the state’s security, is so broad as to constitute a violation. Re-shaping the identity of an occupied population in order to serve nation-building interests in the occupant’s state, particularly at the expense of respecting the national origins of the population, goes beyond the occupant’s authorities in relation to interfering with educational content.

Consent and Welfare of Population

Above all other things, the principle of distinction is an essential principle of humanitarian law. Residents of the Syrian Golan should under no circumstances be used to achieve military objectives by Israel, and actions should not be for the “sole benefit” of the occupant. And according to the CRC, the best interests of the child should be respected. These include a child’s right to education that respects his or her family heritage, language, and nationality.

Israel’s attempts to inculcate Israeli nationalism in the occupied population – in pursuit of the state’s aims to achieve sovereignty over the Syrian Golan – appear to come for the sole benefit of the occupant, at the expense of the rights of the children subject to the education system. This is a clear violation of the CRC, and of a basic principle of occupation law.

Conclusion

While it may not live up to the expectations of either adherents or critics of the power of education to create either good or evil human beings, education does have an impact on a child’s development and worldview, one that is even more pronounced in a situation of conflict, in which two parties are at war. And many of the rights and protections afforded children under both IHL and IHRL are directed toward preserving and upholding the human dignity that all people possess. The residents of the Syrian Golan have been caught in the middle of a conflict that, in the absence of military action, has been waged in terms of their identity, and their loyalty. And the overall conclusion of this study points to the fact that by violating residents’ rights under these two bodies of law, Israel in some of its actions threatens their dignity.

From a human rights and humanitarian perspective, it is critical to ensure that the story of a people is told in a way that does not infringe on others' rights. But it is also critical that a people be allowed to define itself, and to pass on its own story to its children. It is critical that children are never taught that their own identity is a threat.