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What 'Security', whose 'Rights' and which 'Law'? The Israeli High Court of Justice and the Israeli Settlements in the Occupied West Bank

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RÉSUMÉ

Cette thèse examine l'interprétation et l'application, par l'Haute Cour d'Israël (HCJ), de principes du droit international de l'occupation et du droit international des droits de la personne dans le traitement de requêtes judiciaires formulées par des justiciables palestiniens. Elle s'intéresse plus particulièrement aux jugements rendus depuis le déclenchement de la deuxième *Intifada* (2000) suite à des requêtes mettant en cause la légalité des mesures adoptées par les autorités israéliennes au nom d'un besoin prétendu d'accroitre la sécurité des colonies et des colons israéliens dans le territoire occupé de la Cisjordanie.

La première question sous étude concerne la mesure dans laquelle la Cour offre un recours effectif aux demandeurs palestiniens face aux violations alléguées de leurs droits internationaux par l'occupant. La recherche fait sienne la position de la HJC selon laquelle le droit de l'occupation est guidé par une logique interne tenant compte de la balance des intérêts en cause, en l'occurrence le besoin de sécurité de l'occupant, d'une part, et les droits fondamentaux de l'occupé, d'autre part. Elle considère, en outre, que cette logique se voit reflétée dans les principes normatifs constituant la base de ce corpus juridique, soit que l'occupation est par sa nature temporaire, que de l'occupation découle un rapport de fiduciaire et, finalement, que l'occupant n'acquiert point de souveraineté sur le territoire. Ainsi, la deuxième question qui est posée est de savoir si l'interprétation du droit par la Cour (HCJ) a eu pour effet de promouvoir ces principes normatifs ou, au contraire, de leur porter préjudice.

La réunion de plusieurs facteurs, à savoir la durée prolongée de l'occupation de la Cisjordanie par Israël, la menace accrue à la sécurité depuis 2000 ainsi qu'une politique de colonisation israélienne active, soutenue par l'État, présentent un cas de figure unique pour vérifier l'hypothèse selon laquelle les tribunaux nationaux des États démocratiques, généralement, et ceux jouant le rôle de la plus haute instance judiciaire d'une puissance occupante, spécifiquement, parviennent à assurer la protection des droits et libertés fondamentaux et de la primauté du droit au niveau international.

Le premier chapitre présente une étude, à la lumière du premier principe normatif énoncé ci-haut, des jugements rendus par la HCJ dans les dossiers contestant la légalité de la construction du mur à l'intérieur de la Cisjordanie et de la zone dite fermée (Seam Zone), ainsi

que des zones de sécurité spéciales entourant les colonies. Le deuxième chapitre analyse, cette fois à la lumière du deuxième principe normatif, des jugements dans les dossiers mettant en cause des restrictions sur les déplacements imposées aux Palestiniens dans le but allégué de protéger la sécurité des colonies et/ou des colons. Le troisième chapitre jette un regard sur les jugements rendus dans les dossiers mettant en cause la légalité du tracé du mur à l'intérieur et sur le pourtour du territoire annexé de Jérusalem-Est. Les conclusions découlant de cette recherche se fondent sur des données tirées d'entrevues menées auprès d'avocats israéliens qui s'adressent régulièrement à la HCJ pour le compte de justiciables palestiniens.

Mots-clés : recours effectif – droit international des droits de la personne – droit international de l'occupation – primauté du droit – Cour suprême d'Israël – colonies israéliennes – population civile palestinienne — mesures de sécurité militaires – mur – Cisjordanie.

ABSTRACT

This thesis examines how the Israeli High Court of Justice (HCJ) has interpreted and applied principles of the international law of occupation and of international human rights law, in adjudicating petitions filed by Palestinians. The thesis focuses on HCJ judgments that were rendered since the outbreak of the Second *Intifada* (2000) in relation to petitions challenging the legality of measures implemented by Israeli authorities for the professed need of enhancing the security of Israeli settlements and settlers in the occupied West Bank.

The first question that this research seeks to answer is the extent to which the Court has provided Palestinian petitioners with a venue for an effective domestic remedy for alleged violations of their internationally protected rights. The research adopts the position of the HCJ that the law of occupation is guided by an internal logic of balancing between the occupant's security requirements and the fundamental rights of the occupied population. It also espouses that this logic is reflected in the three normative principles underlying this body of law: stating that occupation is 'temporary'; that it is a form of 'trust,' and that it does not bestow sovereignty by the occupant over the occupied territory. Hence, the second question that the research attempts to answer is whether the Court's adjudication has promoted or undermined those principles.

Israel's occupation of the West Bank has been a long one. Coupled with the heightened security threats after 2000 and the active government supported settlement policy, this provides a unique case study for testing the following hypothesis: the domestic courts of democracies, where those in the capacity of the highest judicial body of an occupying power, can successfully uphold fundamental rights and freedoms, and promote the international rule of law.

The first chapter analyses the HCJ judgments that were rendered in relation to petitions challenging the construction of the Wall inside the West Bank and its associated Seam Zone, as well as special security zones around settlements, to assess their implications for the first normative principle. The second chapter examines judgments that were rendered in relation to movement restriction imposed on Palestinians, allegedly for the safety of Israeli settlements and/or settlers, and their implications for the second normative principle. The third chapter

looks at decisions rendered in relation to the legality of the Wall's route in and around annexed East Jerusalem. The research is based on empirical data from Israeli lawyers who regularly petition the HCJ on behalf of Palestinians.

Keywords: Effective Domestic Remedy – International Human Rights Law – International Law of Occupation – International Rule of Law – Israeli High Court of Justice – Israeli Settlements – Palestinian Civilian Population – Military Security Measures – Wall – West Bank.

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LIST OF ABBREVIATIONS and WORD REFERENCES[1]

ACRI	Association for Civil Rights in Israel
Adalah	The Legal Center for Arab Minority Rights in Israel
Adh Genève	Geneva Academy for International Humanitarian Law
AI	Amnesty International
AIC	Alternative Information Center
Al-Haq	Law in the Service of Man
Al-Quds	The word 'Jerusalem' in Arabic
ARIJ	Applied Research Institute-Jerusalem
BBC	British Broadcasting Service
BDS	Boycott Divestment and Sanctions
Beit Mishpat	Hebrew name for the Israeli Supreme Court
Bimkom	Planners for Planning Rights in Israel
B'Tselem	The Israeli Information Center for Human Rights in the Occupied Territories
CA	Civil Administration
CAT	Convention against Torture
CEDAW	Convention on the Elimination of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CHR	Commission on HR
COGAT	Coordination of Government Activities in the Territories

[1] Throughout this research, the following will be in *italics* for easier identification: (i) names of Palestinian or Israeli governmental and non-governmental bodies; (ii) Arabic or Hebrew expressions, words and names; (iii) abbreviated names of judgments and (iv) abbreviated legislation (military orders, laws) and administrative plans.

CPS	Council for Peace and Security
CRC	Convention on the Rights of the Child
DCO	District Coordination Office
DIAKONIA	Name of a Swedish faith-based organization
DoP	Declaration of Principles between Israel and the PLO of 1993
Dunum	A metric measure for land. (4 dunums = 1 acre)
ECHR	European Court on Human Rights
ECOSOC	Economic and Social Council
EJ	East Jerusalem
Eretz Israel	Greater Israel' in Hebrew
ESCR	Economic Social and Cultural Rights
EC	European Commission
EU	European Union
FIDH	International Federation for Human Rights
FMEP	Foundation for Middle East Peace
FQRSC	*Fonds de Recherche, Société, et Culture*
GA	General Assembly
Hamoked	Center for the Defense of the Individual
HCJ	High Court of Justice
HEPG	Humanitarian and Emergency Policy Group
HPCR	Program on Humanitarian Policy and Conflict Research
HRC	Human Rights Council
HR Committee	UN Human Rights Committee
HRW	Human Rights Watch

ICAHD	Israeli Committee against House Demolitions
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICG	International Crisis Group
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ID	Identification Document
IDF	Israeli Defense Forces
IDI	Israel Democracy Institute
IHL	International Humanitarian Law
IHR law	International Human Rights Law
ILA	International Law Association
ILC	International Law Commission
Inter-Am Ct HR	Inter-American Court on Human Rights
Intifada	The word 'Uprising' in Arabic
Ir Amim	Hebrew Equivalent to 'City of Nations' or 'City of People'
JIIS	Jerusalem Institute for Israel Studies
JM	Israeli self-declared Jerusalem Municipality (includes annexed EJ)
JMB	Israeli self-declared Jerusalem Municipal Border
'Judea and Samaria'	Official Israeli phrase for the West Bank excluding Jerusalem
Knesset	Name in Hebrew for Israel's Parliament

LACC	Local Aid Coordination Committee
Machsom Watch	Women against the Wall and for Human Rights
MC	Military Commander
MO	Military Order
MoD	Ministry of Defense-Israel
MoFA	Ministry of Foreign Affairs –Israel
MoI	Ministry of Interior – Israel
MoJ	Ministry of Justice – Israel
Molad	Center for Renewal of Israeli Democracy
NAD	Negotiations Affairs Department- PLO
NGO	Non Governmental Organization
NIS	New Israeli Shekel (currency)
OCHA	Office for the Coordination of Humanitarian Assistance
OHCHR	Office of the High Commissioner for Human Rights
oPt	Occupied Palestinian Territory
Otef Yerushalaim	'Jerusalem Hugger' in Hebrew
PA	Palestinian Authority
PCBS	Palestinian Central Bureau of Statistics
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
PSR	Palestinian Center for Policy and Survey Research
RHR	*Rabbis for Human Rights*
RoL	Rule of Law
UdeM	Université de Montreal

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNISPAL	United Nations Information System on the Question of Palestine
UNRWA	United Nations Relief and Working Agency
US	United States
USD	United States Dollar (currency)
SC	Security Council
SSZ	Special Security Zone
SSZs	Special Security Zones
TIPH	Temporary International Presence in Hebron
Tfisah lohmatit	The phrase 'Belligerent Possession' in Hebrew
UNICEF	UN Children's Fund
USMEP	United States Middle East Project
VAT	Value Added Tax
WB	World Bank
West Bank	The territory west of the River Jordan that was occupied by Israel in 1967 including Israeli annexed East Jerusalem
'West Bank'	The same as above but without East Jerusalem
WHO	World Health Organization
WW II	World War II
WZO	World Zionist Organization
Yachad	Together for Israel

Yerushalaym	The word ‘Jerusalem’ in Hebrew
Yesh Din	Volunteers for Human Rights
Yishuv	The Hebrew word for Jewish community and Zionist political political institutions in Mandatory Palestine before 1948

In memory of my Father Essam, and for my mother Randa, who taught me that peace and justice come hand in hand.

To the Israeli and Palestinian human rights activists and lawyers, who struggle unrelentingly towards greater accountability, dignity, and fundamental rights for the victims of this conflict.

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Introduction: Adjudicating Human Rights and Security in Occupied Territory through the 'Rule of Law' Prism: Challenges and Prospects

1. Overview of the Research Topic and Context

> *The story of the Occupation […] is inseparable from the story of law. It is also inseparable from the settlement enterprise.*[1]
>
> — Orna Ben-Naftali, Israeli Academic and Lawyer —

Few conflicts in the world elicit as much heated debate and emotions as the Palestinian-Israeli conflict.[2] One major watershed in this conflict is the six day war that ensued in 1967-06-05 between Israel and neighboring Arab States and which ended in the former's military victory and the occupation of the West Bank, including East Jerusalem (EJ) and the Gaza Strip.[3] It also resulted in its Palestinian inhabitants coming under Israeli rule.[4]

Under international law, Israel's control of these territories is governed by the laws of

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1 Orna Ben-Naftali, "PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies" in Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law*, ed, (Oxford: Oxford University Press, 2011) 129 at 141.

2 The existence of two meta-national narratives "has spelled out defeat for all chances of reconciliation between our two peoples," Ilan Pappé and Jamil Hilal, eds, *Across the Wall: Narratives of Israeli-Palestinian History* (London: I.B. Tauris and Co. Ltd, 2010) at 2. For an overview of the Israeli-Palestinian conflict, see Avi Shlaim, *The Iron Wall: Israel and the Arab World* (New York: Norton and Company Inc., 2001).

3 Thereafter, Occupied Palestinian Territory (oPt). From the time of the first Arab-Israeli war in 1948 which resulted in Israel's establishment until 1967, Jordan administered the West Bank, while Egypt controlled the Gaza Strip. However, unlike the Gaza Strip to which Egypt never laid claim, the West Bank was officially annexed by Jordan in 1950. This move "was widely regarded as illegal by the international community." See *Encyclopedia of Public International Law*, vol 2, "Israel: Status Territory and Occupied Territories" by Peter, Manlanczuk, (Netherlands: Elsevier Science B V, Netherlands, 2013) 1468.

4 According to a Jordanian conducted census, in 1961 there were an estimated 880,000 Palestinians in the West Bank, 75,000 of whom were residents of EJ. An Israeli census conducted in the Gaza Strip estimates that in 1967, there were approximately 174,000 Palestinians living therein. See United Nations Conference on Trade and Development (UNCTAD), *Population and Demographic Developments in the West Bank and Gaza Strip until 1990*, UN Doc UNCTAD/ECDC/SEU/1, (1994), online: UNCTAD <http://unctad.org/en/docs/poecdcseud1.en.pdf>. By mid-2015, there was a total of 4.68 million living in the oPt, of which 2.86 million live in the West Bank and 1.82 million live in the Gaza Strip. See Palestinian Central Bureau of Statistics (PCBS), "On the Eve of the International Population Day 11/07/2015," online: PCBS <http://www.pcbs.gov.ps/portals/_pcbs/PressRelease/Press_En_IntPopDy2015E.pdf>.

belligerent occupation.[5] This body of law is part of international humanitarian law (IHL),[6] and is codified in legal instruments such as the Hague Regulations (1907),[7] the Fourth Geneva Convention (1949),[8] and the Additional Protocol to the Geneva Conventions (1977).[9] It is also governed by international human rights (IHR) law.[10] Many fundamental rules and principles[11]

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[5] Belligerent occupation has been defined as the occupation of party or all of an enemy territory in times of war (i.e. before an armistice agreement is concluded). See Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press, 1957) at 27. It is designed to balance the needs of the occupying power against the needs of the occupied population pending determination of the fate of the occupied territory. Grant T. Harris, "Human Rights, Israel, and the Political Realities of Occupation" (2008) 41 Isr LR 87 at 89. It also imposes a duty upon that power to establish a direct system of administration over the territory it controls. See Eyal Benvenisti, *The International Law of Occupation,* 2nd ed (New Jersey: Princeton University Press, 2004) at 5.

[6] Also known as *jus in bello*, this is a body of legal rules that sets to limit the effects of armed conflict by seeking to strike a balance between military necessity and humanitarian considerations. It protects people who are not or are no longer participating in hostilities and restricts the means and methods of warfare. International Committee of the Red Cross (ICRC), "War and Law," online: ICRC <https://www.icrc.org/en/war-and-law> [all links unless otherwise indicated last accessed 9 June 2016]. See also Cherif Bassiouni, "The Normative Framework of International Humanitarian Law: Overlap Gaps and Ambiguities" (1998) 8 Transnat'l L and Contemp Probs 199.

[7] *Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, Cons TS No 25, 277 (entered into force 26 January 1910) [Hague Regulations]. In a situation of occupation, it is particularly Section III (articles 42-56) which are applicable. Georg Schwarzenberger, "The Law of Belligerent Occupation: Basic Issues" (1960) 30 Nordisk Tidisskrift for Int'l Ret 10.

[8] *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949)*, 75:973 UNT 287 (entered into force 21 October 1950) [Fourth Geneva Convention].

[9] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977)* 1125 UNTS 3 (entered into force 7 December 1978) [First Additional Protocol]. Israel is not a State Party to the Protocol. However, certain provisions are also reflective of customary international law. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at para 84 [ICJ *Nuclear Weapons* Advisory Opinion]. These include for example, the distinction between civilians and combatants (articles 48, 51(2), and 52(2)) and the definition of who constitutes a combatant (article 43(2) and a civilian (article 50). Thus combatants must distinguish themselves from civilians while engaged in an attack (article 44(3)), are protected for the duration of their involvement in this attack (article 51(3)) and need to maintain proportionality in attack (article 51(5) (b)). See ICRC, *Customary IHL Database*, online: ICRC Customary Law Database <http://www.icrc.org/customary-ihl/eng/docs/home>.

[10] The ICJ underscored that "the protection offered by human rights conventions does not cease in the case of armed conflict." See ICJ *Nuclear Weapons* Advisory Opinion, *ibid* at para 25. See also *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, [2005] ICJ Rep 168 at para 216 [ICJ *Armed Activities in the Congo* Judgment]. *Bamaca Velasquez v. Guatemala* (25 November 2000), Inter-Am Ct HR (Ser C) No. 70 at para 207; *Juan Carlos Abella v. Argentina,* Inter-Am Ct HR *Case* 11.137, (November 1997), Report No. 55/97 at para 328. See also *Loizidou v. Turkey* (Merits),No 15318/89) [18.12.1996] IV ECHR 1996; *Ôcalan v. Turkey* (Merits), No. 46221/99 [12 March 2003] VI ECHR 2003; *Ilaşcu and others v. Moldova and Russia* [GC], No. 48787/99, ECHR 2004-VII. See also Francoise Hampson, "Other Areas of Customary Law in Relation to the Study" in Elisabeth Wilmshurst and Susan Breau ed, *Perspectives on the ICRC Study on Customary Humanitarian Law,* (Cambridge: Cambridge

of IHL,[12] IHR law,[13] and the law on the use of force (*jus ad bellum*)[14] are considered reflective

University Press, 2007) 50. See also Danio Campanelli, "The Law of Military Occupation Put to the Test of Human Rights Law" (September 2008) 90:871 Int'l Rev Red Cross 653.

[11] A principle inherent in or developed from a particular body of law is generally understood as a binding legal statement which describes obligations of conduct or obligations to achieve an objective. What distinguishes them from rules is that they are described in abstract rather than concrete terms for direct application. They also serve different purposes: they systematize legal norms or serve as a tool for interpreting, applying and developing law. In the case of rules, they may be more or less specific, but in any case they paraphrase an obligation. Such obligation may either order or prohibit a particular behavior of States. See Rüdiger Wolfrum, "General International Law (Principles, Rules, and Standards" (December 2010) in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008), online edition: <http://opil.ouplaw.com/home/epil>.

[12] The ICJ has explained that many rules of IHL reflected in the Hague Regulations and the Geneva Conventions, are obligations *erga omnes*, i.e. that they "are so fundamental to the respect of the human person and elementary considerations of humanity," that they must be observed by all states, regardless of whether they have ratified those conventions or not. This is "because they constitute intransgressible principles of international customary law." See ICJ *Nuclear Weapons* Advisory Opinion, *supra* note 8 at paras 79 and 83. For a elaboration of obligations *erga omnes*, see *Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain)*, Judgment, ICJ Rep 1970 3 at paras 33 & 34 [ICJ *Barcelona Traction* Judgment]. Common Articles 1 and 3 of the Four Geneva Conventions also reflect customary international law. See Fourth Geneva Convention, *supra* note 7. See ICRC Database, *supra* note 9. Common Article 3 was declared explicitly by the ICJ to be part of international customary law in *Case concerning Military and Paramilitary Activities in and against Nicaragua*, *(Nicaragua v. United States),* Judgment on Merits, [1986] ICJ Rep (1986) at para 218, [ICJ *Nicaragua* Judgment]. Both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have affirmed the customary law nature of Common Article 3. See ICTY, *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T Trial Chamber [31 March, 2003] at para 228 [ICTY *Naletilic* Judgment]. See also ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T Trial Chamber, [2 September 1998] at paras 608–609.

[13] State practice confirms that many of the provisions of the Universal Declaration of Human Rights (UDHR) do reflect customary international law. These include the prohibition on torture, the equal treatment and non-discrimination with respect to guaranteed human rights without distinction of any kind, and the prohibition on genocide. For example, ICJ *Armed Activities in the Congo* Judgment, *supra* note 9 at para 64. See Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law" (1995-1996) 25:1 and 2 Ga J Int'l and Comp L 287. The self-determination of people has evolved into a principle of *jus cogens*. See also *Declaration on Principles of International law concerning Friendly Relations and Cooperation amongst States in Accordance with the Charter of the UN*, GA Res 2625, UN GAOR, UN Doc. A/8028 (1970) [GA Declaration concerning Friendly Relations]. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, [1971] ICJ Rep 16 at para 31 [ICJ *South West Africa* Advisory Opinion]; *East Timor Case*, *(Portugal v Australia),* Judgment, [1995] ICJ Rep 90; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 at paras 159-199 [ICJ *Wall* Advisory Opinion]. At the same time, self-determination has usually been raised in conjunction with the principle of territorial integrity of existing sovereign states, as a way of protecting the territorial framework that emerged from the colonial period, even when nations were going through a decolonization process. Self-determination was made applicable during this period to non-self governing territories. As a concept it does not include the right of secession from existing states. See Malcom Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2004) at 230-233.

[14] Article 2(4) of the UN Charter embodies the principle that states must refrain from the threat, or use of force, against the territorial integrity or political independence of another state, except in self-defense under article 51, or when authorized by the UN Security Council (SC) under Chapter VII of the UN Charter. See *Charter of the United Nations,* 26 June 1945 Can TS 1945 No. 7 [UN Charter]. The ICJ recognized the prohibition on the use of force and the principle of non-annexation as a principle of customary law. See ICJ *Nicaragua*

of international customary law.[15]

Not long after 1967, Israeli government authorities began building and expanding Jewish communities (also known as settlements)[16] beyond the Green Line,[17] inside the West Bank, a territory which Israeli authorities began referring to as 'Judea and Samaria'.[18] In fact, few obstacles have featured as prominently between the Palestinians and successive Israeli governments,[19] or have attracted as much international attention, as the construction by the latter of settlements in the Palestinian territories it has occupied.[20] Settlement activity also took

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Judgment, *supra* note 12 at para 190 and ICJ *South West Africa* Advisory Opinion, *ibid* at paras 70 and 87. A state asserting the right to exercise self-defense within the territory of another state must demonstrate that its "necessity [is] instant, overwhelming, and [is] leaving no choice of means, and no moment for deliberation." This point was made in Daniel Webster, "Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline-April 24 1841" (1857) 29 British and Foreign State Papers 1129. See also Christopher Greenwood, "The Caroline" (April 2009) in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008), online edition: <http://opil.ouplaw.com/home/epil>.

15 See article 53 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [Vienna Convention on the Law of Treaties]. For a definition of *jus cogens*, see ICJ, *Nuclear Weapons* Advisory Opinion, *supra* note 9 at para 79.

16 John Quigley, "Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory," (1998) 10 Pace Int'l L Rev 1 at 5. See also Hagit Ofran and Noa Galili "West Bank Settlements-Facts and Figures" (June 2009), online: *Peace Now* <http://peacenow.org.il/eng/node/297> [West Bank Settlements – Facts and Figures 2009].

17 The term refers to the 'boundary' which separated Israel from the West Bank from 1948-1967. The ICJ accepts it as delimiting the dividing line between Israel and the oPt. See ICJ *Wall* Advisory Opinion, *supra* note 13, *Separate Declaration of Judge Buergenthal* at para 6, online: ICJ <http://www.icj-cij.org/docket/files/131/1687.pdf> [Declaration -Judge Buergenthal].

18 In December 1967, the Israeli military government issued a military order using the term 'Judea and Samaria Region' and stating that it shall be identical in meaning for all purposes to the term 'the West Bank Region'. A term that appears in the Old Testament, it has since become the official Israeli term. For an example, see Israel Ministry of Foreign Affairs (MoFA), "FM Avigdor Lieberman addresses Diplomatic Corps on Independence Day," online: MoFA <http://mfa.gov.il/MFA/PressRoom/2014/Pages/FM-Avigdor-Liberman-addresses-the-Diplomatic-Corps-on-Independence-Day-6-May-2014.aspx>.

19 International Crisis Group (ICG), "The Israeli-Palestinian Roadmap: What a Settlement Freeze Means and Why it Matters" (2003), online: ICG <http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Israel%20Palestine/The%20Israeli-Palestinian%20Roadmap%20What%20a%20Settlement%20Freeze%20Means%20and%20Why%20it%20Matters.pdf>.

20 As one author described "[e]very child is familiar of the story about the frog that fell into a vat of milk and avoided drowning by swimming in the milk long enough to turn the milk into butter. As far as international law is concerned, the enterprise of Israeli settlements in the occupied Palestinian territories is a frog swimming in a milk vat." Ariel Zemach, "Frog in the Milk Wat: International Law and the Future of Israeli Settlements in the Occupied Palestinian Territories" (2015) 53 Am U Int'l L Rev 53 at 54.

place in EJ, which Israel annexed *de jure* in 1980.[21] In 1993, the Oslo peace process between the Palestine Liberation Organization (PLO) and Israel was launched,[22] during which, to the dismay of the Palestinians, settlement related activities continued.[23] In 2005, Israel dismantled its settlements and withdrew both its military forces and all of its settler population from the Gaza Strip.[24] However, the policy continued in the West Bank. Currently, the territory houses

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[21] Basic Law: *Jerusalem: Capital of Israel*, unofficial English translation, online: *Knesset* <http://www.knesset.gov.il/laws/special/eng/basic10_eng.htm>. The incorporation of the territory of one state into another is considered illegal under customary international law as evidenced in Article 2(4) of the UN Charter, *supra* note 14 and GA Declaration concerning Friendly Relations, *supra* note 13.

[22] In 1993, Israel and the PLO signed the *Declaration of Principles* (DoP) outlining a framework of 'interim' self-government for the Palestinians. By virtue of this agreement Israeli forces subsequently redeployed from the oPt, but did not abolish the military government therein. MoFA, "Declaration of Principles on Interim Self-Government Arrangements," online: MoFA <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Declaration%20of%20Principles.aspx> [Declaration of Principles, 1993]. See also MoFA, "The Israeli-Palestinian Interim Agreement," online: MoFA <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx> [Oslo Accord, 1995]. Under these agreements, the West Bank was divided into different areas and shades of control: Area A (which comprises 18 % of the West Bank), would encompass urban Palestinian areas under the full control of a Palestinian Authority (PA); Area B (which makes up 22 % of the West Bank), consisting mostly of Palestinian rural area under PA control, while Israeli military authorities retain security control therein. In the remaining area, constituting 60 % of the oPt, also known as Area C, Israel retains control over the following: security matters, all land-related civil matters (such as land zoning and planning), transit roads between PA controlled areas and the West Bank's borders with Jordan and settlements. These were managed by the Civilian Administration (CA). See *B'Tselem*, "Acting the Landlord: Israel's Policy in Area C, the West Bank," Report (2013), online: *B'Tselem* <http://www.btselem.org/download/201306_area_c_report_eng.pdf>. See also Geoffrey Aronson, *Settlements and the Israeli-Palestinian Negotiations: An Overview* (Washington D.C.: Institute for Palestine Studies, 1996).

[23] Israel maintains that the prohibition contained in the Geneva Convention regarding forced population transfer to occupied territory cannot be applied to the voluntary movement of Israeli citizens to the West Bank. It also argues that the provision within the Oslo Accords which states that "neither side takes any unilateral measures to change the legal status of these areas," was not meant to prohibit settlement activity. See MoFA, "Israeli Settlements and International Law" (30 November 2015), online: MoFA <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx>. For the Palestinians on the other hand, the Israeli decision to continue with settlement building was described by one member of the Palestinian negotiations team to be like "[t]wo people negotiating over a pizza, while at the same time one of them is eating the same pizza slice by slice." Quoted by *Americans for Peace Now,* "Settlements 101," Video*,* online: *YouTube* <https://www.youtube.com/watch?v=plwRFcIEQQcandfeature=player_embedded>. During the 1990s, a decade dominated by the Oslo peace process, the number of Israeli settlers in the West Bank grew from 78,000 to nearly 200,000. Karen Tenenbaum and Ehud Eiran, "Israeli Settlement Activity in the West Bank and Gaza Strip: A Brief History" (April 2005) 21:2 Negotiation Journal 171.

[24] In 2006, as part of its Disengagement plan, Israel dismantled an estimated 25 settlements. 9,000 Israeli settlers were removed from the Gaza Strip and from two settlements in the northern West Bank. See MOFA, "Israel's Disengagement Plan: 2005," online: MoFA <http://www.mfa.gov.il/MFA/Facts+About+Israel/Israel+in+Maps/Israels+Disengagement+Plan-+2005.htm> [Disengagement plan]. Since the Gaza Strip will not be part of the geographic focus of this research. For more clarification, see section 4 of the Introduction entitled "Research Methodology and Sources."

125 government sanctioned settlements in which an estimated 547,000 Israeli settlers reside.[25] From those, it is estimated that 196,890 Israeli settlers live in 12 settlements in annexed EJ,[26] while an estimated 350,010 live in the rest of the West Bank.[27] In addition, there is an estimated 100 'unauthorized outposts', a term which refers to settlements that were built in violation of Israeli administrative requirements.[28]

That much of the construction and expansion of settlements in the West Bank has taken place with the active political and economic support of Israeli governments is no longer a contested fact.[29] According to the Israeli non-governmental organization (NGO) *Peace Now*, an

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[25] *B'Tselem*, "Statistics on Settlements and Settler Population," (updated 11 May 2015), online: <http://www.btselem.org/settlements/statistics>. See also UN Office for the Coordination of Humanitarian Affairs (OCHA)-oPt. "The Humanitarian Impact of Israeli Settlement Policies," Special Report (January 2012), online: OCHA-oPt <http://www.ochaOPt.org/documents/ocha_OPt_settlements_FactSheet_January_2012_english.pdf>.

[26] Figures for the end of the year 2012. They were provided by the Jerusalem Institute for Israel Studies (JIIS). See *B'Tselem*, "Statistics on Settlements and Settler Population," *ibid.*

[27] Figures by end of the year 2013. These figure were furnished by Israel's Central Bureau of Statistics. *Ibid*.

[28] This term refers to settlements that have been built without having obtained all formal government related authorizations, and without having met the required planning and building criteria under Israeli administrative law. According to a report authorized by former Israeli prosecutor Talia Sasson, an 'unauthorized outpost' is an Israeli community in the West Bank that fails to comply with one or more of the following requirements: (i) That there is an official government resolution authorizing the settlement to be built; (ii) that the settlement is built on Israel declared 'state land' and not on Palestinian privately owned land; (iii) that it is built according to a master plan, pursuant to which building permits may be issued and (iv) that its jurisdiction is determined by way of a military order of the military commander of the area. Nevertheless, they are still built with the support of government and quasi government authorities. In her report, Sasson depicts extensive complicity by various Israeli government bodies in helping settlers establish these outposts. According to the report, the violations have become "institutionalized." See MoFA, Prime Minister's Office, "Summary of the Opinion Concerning Unauthorized Outposts," (10 March 2005), online: MoFA <http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/summary%20of%20opinion%20concerning%20unauthorized%20outposts%20-%20talya%20sason%20adv.aspx> [Sasson Report]. The 2012 government appointed Levy Commission, reconfirmed that these outposts have been set up with the knowledge, encouragement and tacit agreement of senior political levels, and therefore to amount to an implied agreement. For a translation, see "The Levy Commission, "Report on the Legal Status of Building in Judea and Samaria" Conclusions and Recommendations, Jerusalem 9 July 2012" (Autumn 2012) 42: 1 J Palest. Stud 179 at 180 [Levy Report 2012]. By 2011, they housed approximately 100,000 Israeli settlers. See also Volunteers for Human Rights (*Yesh Din*), "From Occupation to Annexation: The Silent Adoption of the Levy Repot on Retro-Active Authorization of Illegal Construction in the West Bank," Position Paper (February 2016), online: *Yesh-Din* <http://www.yesh-din.org/en/from-occupation-to-annexation-the-silent-adoption-of-the-levy-report-on-retroactive-authorization-of-illegal-construction-in-the-west-bank/>.

[29] According to a recent UN report, since 1967, successive Israeli governments have "openly led and directly participated in the planning, construction, development, consolidation and/or encouragement of settlements by including explicit provisions in the fundamental policy instrument (basic policy guidelines), establishing governmental structures and implementing specific measures. These specific measures include (a) building infrastructure; (b) encouraging Jewish migrants to Israel to move to settlements; (c) sponsoring economic activities; (d) supporting settlements through public services delivery and development projects; and (e)

examination of the 2009 - 2010 government budgets indicates that nearly one billion NIS (i.e. approximately 265 million USD) have explicitly been earmarked for settlements each year.[30] It has also been estimated that the price of the settlements have in past years reached an approximate 2.5 billion NIS/year (i.e. an estimated 662.5 million USD).[31] This is in addition to various government subsidies and incentives designed to encourage Jewish migrants to Israel to move to the West Bank settlements and to boost their economic development.[32]

During the past decade, the annual growth rate of the Israeli settler population in the oPt has stood at a yearly average of 5.3 % (excluding EJ) in contrast to 1.8 % by the Israeli population as a whole.[33] Today, most settlements are no longer temporary constructs, but have developed into full-fledged small or medium sized towns with sophisticated highways and 'by pass'

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seizing Palestinian land, some privately owned." UN Human Rights Council (HR Council), *Report of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem*, HRC 22nd Sess, UN Doc A/HRC/22/63, (7 February 2013) at para 20, online: OHCHR <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf> [UN Fact-finding Mission on Settlements Report 2013]. Governmental schemes and subsidies have been put in place to encourage Israelis to move to the West Bank, *ibid* at para 22. See also *B'Tselem*, "Land Grab: Israel's Settlement Policy in the West Bank," Report (May 2002), online: *B'Tselem* <http://www.btselem.org/download/200205_land_grab_eng.pdf>.

30 This figure includes only special budget items that have been allocated towards the settlements and not general budget items. Most budget items are broken down according to subject items and not by geographical location. This makes it difficult to trace how much is actually designated for the settlements, and how much is allocated to communities in Israel proper. *Peace Now*, "The Price of Settlements in the 2009 and 2010 Budget Proposal," Special Report (June 2009), online: *Peace Now* <http://peacenow.org.il/eng/sites/default/files/Price_of_Settlements_June2009.pdf>. See UN Fact-finding Mission on Settlements Report 2013 *ibid* at para 21. According to a report published by an Israeli think tank (the Macro-Center for Political Economics), the additional budget that was transferred by Israeli government authorities to the local government councils of the settlements grew from 2014-2015 by 28.4% to an estimated 1.41 billion NIS (i.e. approximately 369.1 million USD). See Lior Dattel, "Special Funding for Israeli Settlements Soared in 2015, Report Shows," *Haaretz* (7 April 2016).

31 *Peace Now*, "The Price of Settlements in the 2009 and 2010 Budget Proposal," *ibid*. In 2015, settlement residents received a total of 540 million NIS, which represents 61% more capital than that received by residents of communities anywhere in Israel proper. See Special Funding for Israeli Settlements Soared," *ibid*.

32 See UN Fact-finding Mission on Settlements Report 2013, *supra* note 29 at para 21. See also *Americans for Peace Now*, "Settlements 101," *supra* note 23.

33 Hagit Ofran and Noa Galili, "West Bank Settlements – Facts and Figures 2009," *supra* note 16. See also OCHA-oPt "The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank," (July 2007), online: <https://www.ochaoPt.org/documents/thehumanitarianimpactofisraeliinfrastructurethewestbank_intro.pdf>.

roads to link settlements to each other, as well as to Israel proper, and with the necessary infrastructure to accommodate them.[34]

One could easily assume that the many aspects of the Israeli-Palestinian conflict, including the legal ones, have long since been exhausted by academic research and literature review. Much has also been written on the challenges faced by courts in constitutional democracies in their efforts to adjudicate issues of national security on the one hand and fundamental human rights on the other. However, a set of elements contribute to the uniqueness of the Israel-oPt case study from a legal perspective.

(1) The first element is the prolonged nature of the Israeli occupation of the West Bank, now entering its 49th year. One noteworthy consequence is that the Palestinian civilian population has been subjected to a military rule that has heavily circumscribed their rights.[35] Neither citizens nor residents of Israel proper, they are not accorded the constitutional rights and benefits that are enjoyed by Israeli citizens of the State, including by Israeli settlers living in the same occupied territory (i.e. the West Bank). In addition they have no say in the development of public policy and/or legislation or means to cast their vote in the Israeli ballot box.[36]

At the same time, and by virtue of constituting an occupied population, their fundamental rights find a source of protection in international law. Under the Fourth Geneva Convention, the Palestinian civilian population of the oPt enjoy the status of 'protected persons'.[37] As such,

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[34] *Ibid.*

[35] Ayelet Schachar, "Whose Republic? Citizenship and Membership in the Israeli Polity" (1998-1999) 13 Geo Immig LJ 233.

[36] As one author explains, citizenship rights have been regarded as involving three sets of rights: a civil component for the achievement of individual freedoms; a political component of participation in the exercise of political power, and a social component of welfare and security. See Guy Ben-Porat and Bryan S. Turner "Contemporary Dilemmas of Israeli Citizenship" (2008) 12:30 Citizenship Stud 195.

[37] Article 4 of the Fourth Geneva Convention stipulates amongst other things that "persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." See Fourth Geneva Convention, *supra* note 8.

they are entitled to respect of certain fundamental rights at all times and to humane treatment without any adverse distinction.[38]

(2) This brings us to the second element that has solicited interest in this case study: that the legality of the actions taken by the protagonists can and has been assessed against the backdrop of IHL and IHR law related treaties and conventions that have been deemed applicable to the oPt. In terms of IHL treaties and conventions, the *de jure* applicability of the Fourth Geneva Convention to the oPt has consistently been upheld by the UN General Assembly (GA) and the Security Council (SC).[39] It has also been reaffirmed by the International Court of Justice (ICJ) in its *Wall* Advisory Opinion of 2004,[40] and by the Conference of the Red Cross and Red Crescent and the International Committee of the Red Cross (ICRC).[41]

The illegality of the construction of settlements by Israeli authorities has featured prominently in the assessments of the same bodies that have underscored the *de jure* applicability of the Fourth Geneva Convention to the oPt, such as the UN SC,[42] the ICJ,[43] the UN GA[44] and the

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[38] "Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence [...]. All protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion." See Article 27 of the Fourth Geneva Convention, *ibid*.

[39] See for example the most recent *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including Jerusalem, and the Other Occupied Arab Territories*, GA Res 56/60, UN GAOR, 56th Sess, UN Doc A/RES/56/60 (10 December 2001), online: United Nations Information System on the Question of Palestine (UNISPAL) <https://unispal.un.org/DPA/DPR/unispal.nsf/0/765529CE2510ABC685256B7200556EFA>. and *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including Jerusalem, and the Other Occupied Arab Territories*, GA Res 58/97, UN GAOR, 58th Sess, UN Doc A/RES/58/97 (17 December 2003), online: UNISPAL <https://unispal.un.org/DPA/DPR/unispal.nsf/0/D6F5D7049734EFFF85256E1200677754>. See also UN SC Res 1544 (2004), UN Doc S/RES/1544 (2004) (19 May 2004), online: UNISPAL <https://unispal.un.org/DPA/DPR/unispal.nsf/0/38315A50277427DF85256E9A004C8FF0>.

[40] ICJ *Wall* Advisory Opinion, *supra* note 13 at para 101.

[41] ICRC, "Conference of High Contracting Parties to the Fourth Geneva Convention: Statement by the International Committee of the Red Cross," 5 December 2001, online: ICRC <http://www.icrc.org/eng/resources/documents/misc/57jrgw.htm> [ICRC Statement 2001]. The statement was also mentioned by the ICJ. See ICJ *Wall* Advisory Opinion, *ibid* at para 97.

[42] These resolutions have underlined that "the policy of Israel in establishing settlements in the occupied Arab territories has no legal validity and constitutes a violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949." Preamble of UN SC Resolution 452,

Conference of the Red Cross and the ICRC.[45] In this regard, the most commonly invoked provision of this Convention has been article 49(6), which stipulates that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."[46] State practice establishes this rule as a norm of customary international law

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2159th Sess, UN Doc S./RES/452 (1979) (20 July 1979), online: UN <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/370/66/IMG/NR037066.pdf?OpenElement>. The resolution was adopted with 14 in favor, 0 against and 1 abstention: The United States (US). They have also called on Israel "to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem." UN SC Resolution 465, 2203th Sess, UN Doc S/RES/465, (1980) (1 March 1980) at para 5, online: UN <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/465(1980)> adopted unanimously. See also UN SC Resolution 471, 2226th Sess, UN Doc S/RES/471 (1980) (5 June 1980), online: UN <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/471(1980)>. The vote was cast with 14 in favor, 0 against and 1 abstention: US.

[43] The ICJ explained that article 49(6) "prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an Occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory." ICJ *Wall* Opinion, *supra* note 13 at para 120.

[44] *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, GA ES-10/6, UNGAOR, 10th Emer, Agenda Item 5, UN Doc A/RES/10/6 (9 February 1999), online: UNISPAL <https://unispal.un.org/DPA/DPR/unispal.nsf/0/E29F7195C53CDDA905256729005035E4>; *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, GA Res 65/104, UNGAOR, 65th sess, agenda item 2, UN Doc A/RES/65/104 (20 January 2011), online: UNISPAL <http://unispal.un.org/UNISPAL.NSF/0/AA77DBDC4533690E85257823005E5162>; *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, GA 66/78, UNGAOR, 66th sess, Agenda Item 3, UN Doc A/RES/66/78, (12 January 2012), online: UNISPAL <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C2A00B6E6E1C02CF8525798E00578F75>; *Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem and Occupied* Syrian *Golan* GA Res 67/120, UNGAOR, 67th sess, Agenda item 3, UN Doc A/RES/67/120 (14 January 2013), online: UNISPAL <https://unispal.un.org/DPA/DPR/unispal.nsf/0/A87AB64E58B5F54785257AF60067435D>.

[45] ICRC Statement 2001, *supra* note 41. At an earlier conference convened by those parties in 1981, a resolution concerning the applicability of the Fourth Geneva Convention reiterated that civilian settlements established in occupied territory are incompatible with Articles 27 and 49 of the Fourth Geneva Convention, *supra* note 8. See Pierre-Yves Fux and Mirko Zambelli, "Mise en ouevre de la quatrième convention dans les territoires palestiniens occupe : historique d'un processus multilatéral (1997-2001)," (30 Septembre 2001) 847 Revue International de la Croix Rouge 661.

[46] Article 49(6) of the Fourth Geneva Convention, *supra* note 8. The negotiating history of the Convention suggests that only minor changes were made to article 49(6) which entailed changing the word 'civil' to 'civilian' in the text that was then adopted without a dissenting vote. There was no suggestion made by any state (including Israel) during the negotiating history, that a narrower or more restrictive meaning is to be given, nor were there any reservations entered by it to the text. See W.T. Mallison, Jr. and S.V. Mallison, "A Juridical Analysis of the Israeli Settlements in the Occupied Territories" (1998/1999) 10:1 Pal YB Int'l L 1 at 18. See the *Final Record of the Diplomatic Conference of Geneva of 1949* (Berne: Federal Political Department, 1949) Vol. 1, at 122, 308 and 349, online: Library of Congress <http://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-1.pdf>. See also Bianca Watts "Better than a Thousand Hollow Words is One Word that Brings Peace: Enforcing Article 49(6) of the Fourth Geneva Convention against Israeli Settlements in the Occupied Palestinian Territory" (2011) 24 Global Business & Dev L J 443.

applicable in international armed conflicts.[47] Moreover, as a legal opinion prepared by a former legal advisor to the Israeli Ministry of Foreign Affairs as early as 1967 had underscored, this "prohibition is categorical and not conditional upon motives for the transfer or its objectives."[48]

The Rome Statute of the International Criminal Court (ICC) of 1998 also defines "the transfer directly or indirectly by the Occupying Power of parts of its own civilian population into the territory it occupies" as a war crime,[49] which gives rise to individual criminal responsibility and to state responsibility.[50] Moreover, the transfer by an occupant of its civilian population into the occupied territory has been expressly listed as a grave breach of international law by article 85 (4) (a) of the First Additional Protocol to the Geneva Conventions.[51]

In this regard, it is important to mention that when referring and/or analyzing Israeli settlement activities, UN bodies, International, Palestinian and Israeli human rights organizations as well as scholars are not only alluding to the permanent transfer by government authorities of part of Israel's civilian Jewish population to the occupied territory. They are also referring to the 'associated regime' of physical and non-physical infrastructures and processes that have been

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47 Rule 130 emphasizes that "States may not deport or transfer parts of their own civilian population into a territory they occupy." See also "Rule 144: Ensuring Respect for International Humanitarian Law *Erga Omnes*" in Jean-Marie Henckaerts and Louise Doswald-Beck, eds, *Customary International Humanitarian Law* (Cambridge University Press: 2005) at 462-463, online: ICRC <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [ICRC Customary Law Study]. David Kretzmer, "The Advisory Opinion: The Light Treatment of International Law" (2005) 99 AJIL 88.

48 Letter from Legal Advisor Theodor Meron, "Settlement in the Administered Territories" (18 September 1997) at 4. Unofficial English translation on file with author.

49 Article 8 (2) (b) (viii) of the Rome Statute of the International Criminal Court (ICC), 2187 UNTS 90/37 ILM 1002, online: ICC <http://www.icc-cpi.int> [Rome Statute]. It is also a grave breach under article 85(4) (a) of the First Additional Protocol, *supra* note 9.

50 See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UNGAOR, 56th Sess, Supp No. 10, UN Doc (A/56/10), at article 2, online: International Law Commission (ILC) <http://legal.un.org/ilc/texts/9_6.shtml> [Draft Articles on State Responsibility]. The conduct shall be considered an act of the State if it was conducted by an organ that exercises legislative, executive, judicial, or any other functions. *Ibid* at article 4. See Fritz Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of The Hague Convention IV of 1907 to Article 91 of the Additional Protocol 1 of 1977 and Beyond" (1991) 40:4 ICLQ 827.

51 "[...] the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol: [...] the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies." See article 85(4)(a) of the 1977 First Additional Protocol, *supra* note 9.

put in place to enable and support the establishment, expansion and maintenance of these residential communities.[52] One associated policy that has been the subject of much criticism is the manner in which Israeli authorities have administered public land, or requisitioned Palestinian privately held land.[53]

Provisions of the Fourth Geneva Convention have also been commonly invoked in relation to alleged violations of international law resulting from the construction and/or expansion of settlements or as a result of security based measures implemented for the purported benefit of Israeli settlements and settlers.[54] These includes article 53 of the Fourth Geneva Convention, prohibiting the destruction of private property "except where such destruction is rendered absolutely necessary by military operations."[55]

In the case of the provisions of the Hague Regulations, while they do not address the transfer by an occupying power of its own civilian population into the occupied territory, they do deal with the use of private and public property, the violation of which has been invoked in relation

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[52] These include *inter alia* the Wall, checkpoints, closure obstacles, bypass roads, tunnels and permit system, legal systems, commercial and industrial infrastructure, planning and zoning regimes. See UN Fact-find Mission on Settlements Report 2013, *supra* note 29 at paras 36 and 96. Regimes have been defined as constituting of principles, norms, rules and decision making procedures which are perceived to regulate a given issue area. While this definition has been made in relation to international regimes it is useful for the purpose of this research. See Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" (1982) 36:2 Int'l Org. 185.

[53] As well as for the purpose of alleged security measures discussed in this research such as the Wall. While the ICJ has employed the term 'wall' to describe the structure Israel built, the HCJ has traditionally used the term 'Separation Fence'. This writer will adhere to the term Wall except when quoting and analyzing relevant judgments of the HCJ, in which case the term 'separation fence' will be used. Other terminology that has been used by Palestinian, International and Israeli organizations is: 'Annexation Wall', 'Separation Barrier', 'Security Fence' and 'Apartheid Wall'.

[54] Previous reports by the UN have alluded for example to the conclusion that the settlement activities have resulted in the extensive appropriation of property not justified by military necessity. See UN Human Rights Council (HRC) *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories occupied since 1967, John Dugard*, 4th Sess, UN Doc A/HRC/4/17 (29 January 2007) at para 8, online: OHCHR <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/105/44/PDF/G0710544.pdf?OpenElement> [UN Special Rapporteur Report 2007]; HR Council, *Report of UN Fact-Finding Mission on the Gaza Conflict*, 12th Sess, UN Doc A/HRC/12/48, (15 September 2008) at 1579, online: UN Office of the High Commissioner for Human Rights (OHCHR) <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/12/48>.

[55] Article 53 of the Fourth Geneva Convention, *supra* note 8. Extensive destruction and appropriation of property "not justified by military necessity and carried out unlawfully and wantonly," is listed as a grave breach of the Fourth Geneva Convention. See article 147 of the Fourth Geneva Convention, *ibid*. One measure in relation to which this has been invoked is the construction of the Wall (Chapter I). For more description of the notion of 'military necessity' refer to section 2 of this chapter.

to various settlement related policies. These include: article 43, outlining the responsibility of the occupying power to restore and ensure public order and safety;[56] article 46, concerning the prohibition on the confiscation of private property; article 52, concerning the requisitioning of property and services;[57] and article 55, concerning the administration of public property.[58] Israeli authorities have also invoked article 23(g) of these Regulations in relation to certain measures that they have implemented in connection to the settlements (such as the Wall's construction).[59]

In a similar vein, the extra-territorial applicability of IHR related treaties and conventions (that Israel has signed and ratified) to the oPt has also been upheld by the ICJ,[60] and by various UN treaty monitoring bodies.[61] This is in addition to the Palestinians' right to self-determination, a

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[56] For a discussion of petitions challenging settlement related measures in relation to the scope of the responsibilities of the occupying power under article 43 of the Hague Regulations, *supra* note 7, see Chapter II.

[57] Under article 52 of the Hague Regulations, an occupant is not allowed to requisition private property "except for the needs of the army of occupation." See Hague Regulations, *ibid*. The alleged violation of this prohibition has been invoked in relation to the requisition of land for the construction of settlements and its associated measure such as the Wall (described in Chapter I).

[58] Article 55, *ibid*. The article stipulates that an occupant is allowed to administer property and enjoy the fruits of the property of the occupied territory provided it respects certain limitations. The violation of this article has been invoked in relation to the practice by Israeli authorities to construct settlements on what they have defined as 'state land'. For more information, see Chapter II, section 5.2.

[59] Article 23(g) of the Hague Regulations stipulates that it is forbidden "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." See *ibid*. The relevance of this article has been challenged by the ICJ on the ground that it is not part of the rules of *jus in bello* that are applicable during belligerent occupation The international Court determined that since Israel exercises effective control over the West Bank, the law of belligerent occupation which includes only Section III of the Regulations applies. Article 23(g) belongs to Section II which is part of IHL that is applicable during hostilities. See ICJ *Wall* Advisory Opinion, *supra* note 13 at paras 124 and 132. See also Alexander Orakhelashvili, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction" (Spring 2006) 11:1 J Confl and Sec L 119. The fact that the Court failed to elaborate on this point was criticized by Judge Higgins. See ICJ *Wall* Advisory Opinion, *ibid*, *Separate Opinion of Judge Higgins*, online: ICJ <http://www.icj-cij.org/docket/files/131/1681.pdf> [Separate Opinion-Judge Higgins]. See also David Kretzmer, "The Advisory Opinion," *supra* note 47.

[60] ICJ *Wall* Advisory Opinion, *ibid* at paras 109-113.

[61] Thus, when examining Israel's compliance with the International Covenant on Civil and Political Rights (ICCPR), the Human Rights (HR) Committee stated that the applicability of IHL in a situation of armed conflict "does not preclude the application of the Covenant, including article 4 which covers situations of public emergency, which threaten the life of the nation," nor does it "preclude accountability of State parties under Article 2 paragraph 1 of the Covenant for actions of their authorities outside their own territories," "including in Occupied Territories." HR Committee, *Concluding Observations: Israel*, 63rd Sess UN Doc. CCPR/C/79/Add.93, (18 August 1998) at para 4, online: UNISPAL <https://unispal.un.org/DPA/DPR/unispal.nsf/0/335F22D5AC5A04FC85256CC50057BE8C>; HR Committee, *Concluding Observations: Israel*, 78th Sess, UN Doc CCPR/CO/78/ISR (5 August 2003) at para

right that has gained steady recognition from the international community over the years.[62] The consolidation of this right has been regarded as a logical consequence to developments in IHR law more generally and the principle self-determination of people in particular in the post World War II (WWII) era.[63]

10, online: UNISPAL <https://unispal.un.org/DPA/DPR/unispal.nsf/eed216406b50bf6485256ce10072f637/2e5a21a17aeb0c0285256d7f004f4d61?OpenDocument>; HR Committee, *Concluding on the Fourth Periodic Report Israel*, 112th Sess, UN Doc CCPR/C/ISR/CO/4 (21 November 2014) at para 5, online: UNISPAL <https://unispal.un.org/DPA/DPR/unispal.nsf/9a798adbf322aff38525617b006d88d7/724da0c48e837f0a85257d9a0070d766?OpenDocument&Highlight=0,CCPR%2FC%2FISR%2FCO%2F4>; UN Committee on Economic, Social and Cultural Rights (ESCR Committee), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel,* 30th Sess, UN Doc E/C.12/1/Add.90, (23 May 2003) at para 15, online: UNISPAL <https://unispal.un.org/DPA/DPR/unispal.nsf/0/778E860C0DDB295C85256D39005059C5>; UN Committee on the Convention on the Elimination of Discrimination against Women (CEDAW Committee), *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Israel,* 48th Sess, UN Doc CEDAW/C/ISR/CO/5, (5 April 2011), online: OHCHR <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/ISR/CO/5andLang=En> [CEDAW Concluding Observations 2011]; UN Committee against Torture (CAT Committee), *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Concluding Observations against Torture: Israel*, 42nd Sess, UN Doc CAT/C/ISR/CO/4, (23 June 2009), online: OHCHR <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/ISR/CO/4andLang=En>; UN Committee on Elimination of Racial Discrimination (CERD Committee), *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations: Israel,* 17th Sess, UN Doc CERD/C/ISR/CO/13, 70 Sess (14 June 2007); UN CRC Committee, *Concluding Observations: Israe*l, UN Doc CRC/C/15/Add.195, (9 October 2002), online: OHCHR <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/15/Add.195andLang=En>; UN Committee on the Rights of the Child (CRC Committee), *Consideration of Reports Submitted by States Parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict : Concluding Observations: Israel*, 53rd Sess, UN Doc CRC/C/OPAC/ISR/CO/1, (4 March 2010), online: OHCHR <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/OPAC/ISR/CO/1andLang=En>.

62 ICJ *Wall* Advisory Opinion, *supra* note 13 at para 115. In fact, the Court underscores in the opinion that "the existence of a "Palestinian People" is no longer an issue." *Ibid* at para 118. There have been significant landmarks in the acceptance by the international community of this right. See for example, *Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA 37/43, UNGAOR, UN Doc A/RES/37/43 (3 December 1982), online: UN <http://www.un.org/documents/ga/res/37/a37r043.htm>. In November 2012, the GA adopted a resolution that accorded the State of Palestine a non-member observer status. It also reaffirmed "the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967." See *Status of Palestine in the United Nations* GA Res 67/19 , UNGAOR 67th Sess, Item 37, UN Doc A/RES/67/, (4 December 2012), online: UN <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19>; 138 States voted in favor, 9 States against and 41 abstained.

63 David Kretzmer, "The Law of Belligerent Occupation as a System of Control: Dressing up Exploitation in Respectable Garb" in Daniel Bar-Tal and Itzhak Schnell, ed, *The Impacts of Lasting Occupation: Lessons from Israeli Society* (New York: Oxford University Press, 2013) 31.

While it has been often pointed out that in a situation of armed conflict IHL remains the *lex specialis*,[64] the point of departure of this research study is that the principle of *lex specialis* should not be understood as a principle to solve conflicts between normative orders *in abstracto* but as a principle that aids in the interpretation of concrete rules.[65] In other words, derogation from IHR law should not take place in its entirety.[66] This approach gives weight to the notion that "both spheres of [IHL and of IHR] law are complimentary, not mutually exclusive."[67]

(3) The third element that still attracts scholarly interests is that the Israel-oPt case study is the first situation in which an occupying power has established a distinct military government over the areas it has occupied, within the framework of the international law of belligerent occupation. Shortly after 1967, Israeli authorities established a military government in those territories, to "assume responsibility for security and maintenance of public order in the Area."[68] Subsequently, Israeli military authorities, headed by a Military Commander (MC) of the 'Area,' (a term that has since been used to refer to the West Bank) issued a military order

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64 ICJ, *Nuclear Weapons* Advisory Opinion, *supra* note 9 at para 25. See also ICJ *Wall* Advisory Opinion, *supra* note 13 at para 106. The principle *lex specialis* is an accepted principle of interpretation in international law which explains that when there is a contradiction between two bodies of law in a given situation, the more specific rule regulating this situation would displace the more general rule *lex specialis derogat legi generali*. See Cordula Droege "Elective Affinities: Human Rights and Humanitarian Law" (2008) 90:871 Int'l Rev Red Cross 501.

65 UN Human Rights (HR) Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) at para 11. In another case, the ICJ has progressively abandoned the *lex specialis maxims* argument. For example, the Court quoted the *Wall* Advisory Opinion in subsequent judgments, but this time omitted reference to *lex specialis* when it underscored that the Congo violated its obligations under the rules of IHL and of IHR law, both of which were deemed to be applicable in the specific situation." See also ICJ *Armed Activities in the Congo* Judgment, *supra* note 10 at para 180. See also Marko Milenovic, "A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law" (2010) 14:3 J Confl and Sec L 459.

66 Tristan Ferraro, ed, "Expert Meeting: Occupation and other Forms of Administration of Foreign Territory," Report, online: ICRC <https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>.

67 To determine which rule is the more specialized one that should apply to a specific situation, the most important indicator should be "the precision and clarity of a rule and its adaptation to the particular circumstances of the case." See Cordula Droege "Elective Affinities" *supra* note 64 at 524. See also Vaois Koutroulis, "The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation" (2012) 94: 885 Int'l Rev Red Cross 165. Viewing those two bodies of law as complimentary also contributes to the position adopted in this research study that they can be seen as part of a 'humanity' law. For more discussion of this notion, see sections 2 and 3.

68 *Proclamation concerning the Takeover of Administration by the [Israeli Defense Forces] IDF (No. 1) (5727-1967)* cited in Joel Singer, "The Establishment of a Civil Administration in the Areas Administered by Israel" (1982) 12 Isr YB Hum Rts 259.

(MO) which invested in this government all powers of the government, legislation, appointment, and administration in relation to the oPt, or to its population.[69] All powers not considered to be of a civilian nature (i.e. those strictly military and security related) were retained by that MC.[70]

Since then, this administration has promulgated thousands of primary security legislations, (i.e. MOs) and secondary legislations (i.e. 'regulations', 'provisions' or 'notices').[71] These were considered to prevail over all other laws that are in effect in the oPt, even when the former did not explicitly abrogate the latter.[72] At the time that the Israeli occupation of the West Bank and Gaza Strip began in 1967, these local laws included Ottoman laws, British Defense (Emergency) Regulations (1945) and Jordanian law (in the West Bank).[73]

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[69] *Proclamation concerning the Administration of Rule and Justice (West Bank Region), (No. 2) (5727-1967)* cited in Meir Shamgar, ed, *Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects*, vol. 1 (Jerusalem: Hebrew University, 1982).

[70] Jonathan Kuttab and Raja Shehadeh, *Civil Administration in the Occupied West Bank: Analysis of Israeli Military Government Order No. 947* (Ramallah: *Al-Haq*, 1982) at 25-26. It also established a military court system. See Yaron Butovsky, "Law of Belligerent Occupation: Israeli Practice and Judicial Decisions Affecting the West Bank" (1983) Can YB Int'l Law 217. Under article 64(2) of the Fourth Geneva Convention, an occupying power is prohibited from suspending or repealing existing laws in force in the occupied territory and to enact new legislation unless these provisions "are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them." See article 46(2) of the Fourth Geneva Convention, *supra* note 8.

[71] Since then more than 2,600 civil and penal military orders (MOs) were promulgated. See Sharon Weill, "Reframing the Legality of the Israeli Military Courts in the West Bank: Military Occupation or Apartheid" in Abeer Baker and Anat Matar ed, *Threat: Palestinian Political Prisoners in Israel* (London: Pluto Press, 2011) 136. See also Uri Shoham, "The Principle of Legality and the Israeli Military Government in the Territories" (1996) 153 Mil L Rev 245. In this regard, it is also important to mention that it was the MC of each region who was empowered to enact primary enactments of this nature in the oPt, while other commanders and the head of the civil administration issued secondary enactments. See Eyal Benvenisti, *The International Law of Occupation, supra* note 5.

[72] Section 8(A) of *Order concerning Interpretation (West Bank Region) (No 1301. 5727-1967 (Amendment 5728)* cited in The Israeli Center for Human Rights in the Occupied Territories (*B'Tselem*), "On the Way to Annexation: Human Rights Violations resulting from the Establishment and Expansion of the Ma'aleh Adumim Settlement," Information Sheet (July 1999), online: *B'Tselem* <http://www.btselem.org/sites/default/files/on_the_way_to_annexation.pdf>. See also Joel Singer, "The Establishment of a Civil Administration," *supra* note 68.

[73] These refer to laws that had been enacted up and till the Israeli occupation began, and includes laws that were enacted in Palestine when it was still part of the Ottoman Empire. It also includes the regulations that were first enacted by the British authorities during their mandate of Palestine (1922-1947), i.e. the *Emergency Defense (Temporary Provisions) Regulations of 1945*, which have been used to justify a number of security-based restrictions on Palestinians, such as house demolitions and movement restrictions. They also include the Jordanian laws that entered into force in the West Bank after its annexation in 1950. Uri Shoham, "The

Subsequently in 1981, a Civil Administration (CA) was created by way of an MO to administer the 'civil affairs' of the 'local population'.[74]

Israel perceives itself as a country that it is founded on important principles such as democracy,[75] the separation of power,[76] and the rule of law (RoL).[77] Hence, scholars have argued that the attempt by Israeli authorities, at least during the early years of the occupation, to base their actions and procedures of control in the oPt on an extensive web of legal rules

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Principle of Legality," *supra* note 71. See also Emanuel Gross, "Democracy in the War against Terrorism: The Israeli Experience" (2002) 35 Loy LA L Rev 1161.

74 The CA was created a sub-division of the military government to run civil affairs, as distinct from security issues. See MO *concerning the Establishment of the Civil Administration (Judea and Samaria) (No. 947) 5742-1981* printed in Jonathan Kuttab and Raja Shehadeh, *Civil Administration in the Occupied West Bank*, *supra* note 70.

75 Scholars have vigorously debated the nature of Israel's democratic model. Some contend that a self-declared 'Jewish State' remains in principle compatible with democracy. At the same time, they have underscored that the discrimination against the Palestinian Arab citizens of Israel in all areas of life is "doomed from the very beginning to produce a seriously flawed democracy." See Ilan Peleg, "Jewish-Palestinian Relations in Israel: From Hegemony to Equality" (Spring 2004) 17:3 Int J of Politics, Culture and Society 415 at 432. For a database of laws and bills that are allegedly discriminatory against the Palestinian Arab citizens of Israel see online: The Legal Center for Arab Minority Rights in Israel (*Adalah*) <http://www.adalah.org/en/content/view/7771>. Others have preferred to define Israel as an 'Ethnic State', pointing out that the long-term inequality of ethnic rights between the Arab Palestinian citizens of Israel (who constitute 20 % of the total population) and Jewish Israeli citizens cannot coexist with democratic rule. Oren Yiftachel, "Ethnocracy: The Judicialization of Israel/Palestine" (September 1999) 6:3 Constellations 364. See also See As'ad Ghanem, Nadim Rouhana and Oren Yiftachel, "Questioning 'Ethnic Democracy: A Response to Sammy Smooha" (Fall 1998) 3:2 Israel Studies 253. Nadim Rouhana, "Israel and its Arab Citizens: Predicaments in the Relationship between Ethnic States and Ethnonational Minorities" (1998) 19:2 TWQ 277.

76 Democracies are more likely to produce separation of powers, a feature that would result in more independent courts. Gretchen Helmke and Frances Rosenbluth, "Regimes and Rule of Law: Judicial Independence in Comparative Perspective," (2009) 12 Ann Rev of Pol Sc 345. The three branches of government in Israel are the legislature (*Knesset*), the executive, and the judiciary. Constitutionally, the Israeli system is similar to the British system, i.e. there is a lack of real separation of powers between the legislature and the executive. Moreover, the division of power between different government branches is not entrenched in a formal constitution. Eli Salzberger "A Positive Analysis of the Doctrine of Separation of Powers, or: Why do we have an Independent Judiciary?" (December, 1993) 13:4 Int'l Rev L and Econ 349.

77 "[…] in a state with a democratic regime - that is, government by the "will of the people" - the "rulers" are looked upon as agents and representatives of the people who elected them, and the latter are entitled, therefore, at any time, to scrutinize their political acts, whether with the object of correcting those acts and making new arrangements in the state, or with the object of bringing about the immediate dismissal of the "rulers," or their replacement as a result of elections." (HCJ 73/53) [1953] *Kol Ha'am Company Limited c, Minister of Interior*, official English translation, online: HCJ <http://elyon1.court.gov.il/files_eng/53/730/000/Z01/53000730.z01.htm>. Reprinted in 1 *Selected Judgments of the Supreme Court of Israel*, p. 90 (1962 [*Kol Ha'am* Judgment]. See also Horacio Spector, "Judicial Review, Rights, and Democracy" (July 2003) 22:3-4 Law and Phil 285; Harry Wellington, "The Nature of Judicial Review" (January 1982) 91:3 Yale LJ 486.

and procedures was driven by Israel's self perception as a 'benevolent occupant'[78] and as a "law-abiding 'defensive democracy'."[79] Both of these concepts attach great significance to the notion of the RoL,[80] expressed in both its formal[81] and substantive aspects.[82]

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[78] Raja Shehadeh, "Human Rights and the Israeli Occupation" (2008) 8:1 New Centennial Review 33 at 36. According to one scholar, during the first three decades of the occupation, "Israel saw itself as a quasi-trustee of the territories, responsible for their political and economic progress." Meron Benvenisti, *The West Bank Data Project: A Survey of Israel's Policies* (Washington: American Enterprise Institute for Public Policy Research, 1984) at 10.

[79] Orna Ben Naftali, "PathoLAWgical Occupation," *supra* note 1. See also Stephen Reinhardt, "The Judicial Role in National Security" (2006) 86 BUL Rev 1309.

[80] There appears to be little consensus on the scope of the RoL concept. The first modern articulation of this term was advanced by British scholar Albert Van Dicey who identified three aspects of this definition: (i) The first one is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power." (ii) The second one is "equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary courts." (iii) The third one is that the RoL entails that "the law of the constitution [...] are not the source but the consequence of the rights of individuals, as defined and enforced by the courts." See Albert Van Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1959) at 188, 193 and 195-196. Theories of RoL have been divided between those which offer a formal conception of the RoL and those which focus on its substantive conceptions. Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1977) Public Law 467.

[81] According to Dicey, the RoL does not amount to recognition of some minimal substantive rights and freedoms for individuals. It only underscores the belief that if and when a society wants to protect individual rights, the best way to do so is by using the British common law technique. Albert Van Dicey, *An Introduction*, *ibid*. See also Margaret Radin, "Reconsidering the Rule of Law" (July 1989) 69:4 BUL Rev 781. See also Stéphane Beaulac, "The Rule of Law in International Law Today" in Gianluigi Palombella and Neil Walker, eds, *Relocating the Rule of Law* (Portland: Hart Publishing, 2009) 197 at 198. Those emphasizing the former, evaluate the manner in which the law was promulgated, but do not judge the actual content of the law. Fuller specified eight (8) conditions to be met for the formal aspects of the RoL to be made possible; (1) the presence of a system of rules; (2) that rules are promulgated and published; (3) that there is no retroactive application of rules; (4) that rules are clear and intelligible; (5) that rules are not contradictory; (6) that they are practicable; (7) that rules are consistent over time and (8) that official actions are congruent with declared rules. Lon Fuller, *The Morality of Law*, 2d ed, (New Haven: Yale University Press 1969). See also Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 Law Q Rev 195.

[82] This conception does not reject the idea that the RoL has formal elements, but insists that the RoL must display certain substantive commitments as well. Dworkin, a principal scholar espousing this conception, argued that 'the rules in the book' must capture and enforce moral rights. This is because legal rights flow naturally from moral rights. This is because citizens have moral rights (enacted by a representative legislature), and which courts enforce, vis-à-vis each other or against the state as a whole. See Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985). See also David Kairys, "Searching for the Rule of Law" (2003) 36 Suffolk UL Rev 307. Courts should therefore be deciding legal questions according to the 'best theory of justice' "as part of the decision as to what rights people presently have." This requires judges to base their decisions on principles. Legislators, on the other hand are more competent to implement policies. This kind of judicial review, he argued, would restrain the pursuit of a policy within the bounds of what is consistent with equal concern and respect for all citizens. Otherwise, policies are considered utilitarian goals, which if they remain unconstrained by principle, would "aggregate human interests without concern for the individual. See Paul Craig, "Formal and Substantive Conceptions of the Rule of Law," *supra* note 80. See also David A J Richards, "Taking *Taking Rights Seriously* Seriously: Reflections on Dworkin and the Revival of American Natural Law" (December, 1977) 52: 6 NYUL Rev 1265. Emphasis in the original title.

Moreover, it was driven by an Israeli desire to gain recognition for this status from other democratic and law abiding nations of the world.[83] Thus, at the beginning of the occupation, government authorities announced that the military administration of the oPt will be guided by the RoL[84] and expressed a willingness to recognize the *de jure* applicability of the Fourth Geneva Convention to the oPt.[85] Although this MO was repealed shortly after, it has been argued that Israel's continued commitment to the RoL was reflected in the decision of its authorities to ensure that the conduct of its military in the occupied territory conforms with the provisions of the Hague Regulations, which it accepts as reflecting customary international law.[86] In addition, these authorities declared that they would remain bound by the 'humanitarian provisions' of the Fourth Geneva Convention.[87]

(4) Fourthly, since the late 1960s, Palestinians wishing to challenge the legality of Israeli actions in the oPt have been able to petition the highest judicial body of the Israeli legal system, the Israeli Supreme Court, in its capacity as the High Court of Justice (HCJ).[88] This

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[83] This explains why during the early years of the occupation, Israeli authorities remained highly sensitive to international criticism of its policies in the occupied territories. Alan Craig, *International Legitimacy and the Politics of Security: The Strategic Deployment of Lawyers in the Israeli Military* (Plymouth: Lexington Books, 2013); George Bisharat "Courting Justice? Legitimation in Lawyering under Israeli Occupation" (1995) Law and Soc Inquiry 349. According to Koh, the reason why states obey international law is a combination of several factors: self-interest; the fact that certain legal norms are part of the values of the international society which these states are part of; the political identity of the state (liberal democracies) or the horizontal and vertical processes by which rules of international law are developed and internalized at the level of the domestic legal system (i.e. the transnational legal process). See Harold Koh "Why do Nations Obey International Law" (1977) 106 Yale L J 2599.

[84] Meir Shamgar, *Military Government in the Territories*, *supra* note 69.

[85] *Proclamation Concerning the Entry into Force of the Order concerning Security Provisions (West Bank Area) (No. 3), 5727-1967*. In addition to these proclamations, the MC published another proclamation and several MOs that established criminal law and a system of military courts. The *Order concerning the Establishment of Military Courts (West Bank Area) (No 3) 1967, 7 June 1967*, states "the [Israeli] military court [...] must apply the provisions of the [Fourth] Geneva Convention with respect to judicial procedures, [and that] [i]n case of conflict between this order and the said Convention, the Convention shall prevail," cited in ICJ *Wall* Advisory Opinion, *supra* note 13 at para 93. It became the only occupying power since World War (WW) II to have accepted the applicability of this body of law as relevant. Eyal Benvenisti, *The International Law of Occupation*, *supra* note 5 at 107.

[86] More details will be forthcoming in section 2 of this Chapter.

[87] Meir Shamgar, "The Observance of International Law in the Administered Territories" (1997) 1 Isr YB Hum Rts 262.

[88] Article 15(c) of the Basic Law: *the Judiciary* stipulates that "[t]he Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court (*beit mishpat*)." See Basic Law: *the Judiciary*, online: *Knesse*t <http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm>.

represents the first of its kind in which the highest judicial power of an occupying power has established that it has jurisdiction over appeals from an occupied territory that were challenging the legality of actions by military authorities inside the occupied territory.[89]

While the HCJ's competence to exercise extra-territorial jurisdiction over acts committed beyond Israel proper was not self evident at first, shortly after the beginning of the occupation, the Court declared that it enjoyed legal jurisdiction over petitions from the oPt which challenged the legality of actions and decisions by Israeli military authorities.[90] Since then, the HCJ has consolidated its judicial review over the actions of the MC and its official functionaries.[91] As it were, the Court emphasized that it does not recognize 'institutional non-justiciability' as a ground for abstaining from the review of a petition "where recognition of it might prevent the examination of an infringement to human rights."[92]

In September 2000, in what some analysts considered to be a response to the breakdown of the peace talks between Palestinians and Israel and to on-going settlement activity, the Second

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[89] Eshter Rosalind Cohen, "Justice for Occupied Territory? The Israeli High Court of Justice Paradigm" (1985) 24 Colum J Transnat'l L 471. This decision was first made in. (337/71) [1972] *Christian Society for the Holy Places vs. Minister of Defense* (1972) 2 Isr YB Hum Rts 354 [*Christian Society* Judgment].

[90] Then acting Attorney General Meir Shamgar (who later became president of the HCJ) could have contested the Court's jurisdiction to deal with these petitions, on the ground that they were submitted by enemy aliens or that they relate to actions performed outside Israel. He chose not to. See David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (Spring 2012) 94:855 Int'l Rev Red Cross 207. See also Meir Shamgar, ed, *Military Government in the Territories*, *supra* note 69.

[91] (HCJ 796/02) [2006] *Public Committee against Torture et al v. Government of Israel et al* at para 55, unofficial English translation, online: Center for the Defense of the Individual-*Hamoked* <http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf> [*Torture* 2002-Judgment]. "Therefore the court examines here the orders issued not as judicial review of legislation by any means but only review of administrative action and decisions. The court is in this regard also responsible to make sure that the authorities act according to the administrative guidelines that they themselves have designed." See (HCJ 302/72) *Sheikh Suleiman Abu Hilu v. Government of Israel*, unofficial English translation by Avichay Sharon (August 2013) at 4 [*Hilu* Judgment]. See also English summary found in (1975) 5 Isr YB Hum Rts 384 at 385-386 [*Hilu* Judgment-Summary]. See also (HCJ 393/82) [1983] *Jam'iat Iskan case, al-Ma'almoun al-Tha'auniya al-Mahduda al-Masuliya, Cooperative Association Legally registered at the Judea and Samaria Area Headquarters v. Commander of IDF Forces in the Area of Judea and Samaria et al* at paras 32-34, unofficial English translation online: *Hamoked* <http://www.hamoked.org/items/160_eng.pdf> [*Iskan* Judgment]. See also Esther Cohen, "Justice for Occupied Territory," *supra* note 89. Yoav Dotan, "Judicial Accountability in Israel: The High Court of Justice and the Phenomenon of Judicial Hyper-activism" (2002) 8:4 Israel Affairs 87; Shimon Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (Dordrecht: Martinus Nijhoff Publishers, 2004).

[92] *Torture 2002* Judgment, *ibid* at para 50. However, up and till the 1970s, the Court kept itself at a distance from direct judicial involvement in political controversies by adopting a narrow definition of standing, justiciability and review, including in decisions taken by the military and other security agencies. See Yoav Dotan, "Judicial Accountability in Israel," *ibid*.

Palestinian *Intifada* broke out.[93] During this uprising, acts of violence, including suicide attacks by Palestinians, took place against Israelis living in both Israel and the oPt. Israeli military authorities also stepped up the implementation of harsh security-based measures against the Palestinian civilian population.[94] This situation exacted a heavy toll from the civilian populations of both sides, particularly from the occupied population, that is the Palestinians.[95]

Israeli military and government authorities regarded the outbreak of the Second *Intifada* as a source of intense national security crisis. However, even during this perceived crisis, the HCJ, particularly under the leadership of former Justice Aharon Barak,[96] underscored that the Court's role is to uphold fundamental values, such as democracy, the RoL and human rights. In his view, it was precisely during the times of war that citizens and government authorities are more willing to sacrifice individual rights. Hence, it was during these times, that the duty of courts to preserve democracy became even more pressing.[97] Arguably, this position has also

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[93] For some of the elements that resulted in this Uprising, see Ahmed Samih Khalidi and Jacque Christophe "Le conflict israélo-palestinien: retour vers le future" (2002) 3 Politique Etrangère 60; Carl Dundas, "In the Absence of Law: Legal Aspects on the Palestinian-Israeli Conflict," (Spring 2007) 14:1 Middle E Pol'y 42.

[94] These included arrest and detention, house demolitions, increased movement restrictions, targeted killings and excessive use of force by Israeli military forces. While Israeli authorities believed that their measures represented reasonable and restrained security measures in response to Palestinian unrest, the Palestinians viewed it as an effort to crush their open opposition to the continued Israeli occupation of the West Bank. See *Report of the UN Human Rights Inquiry Commission Established Pursuant to Commission resolution S-5/1 of 19 October 2000*, UN CHR, 57th Sess, UN Doc E/CN.4/2001/121, (16 March, 2001) at paras 34-38, online: OHCHR <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=2260> [UN Commission of Inquiry Report 2000].

[95] From September 2000- September 2010, it is estimated that 6,371 Palestinians were killed of whom 1,317 were minors. At least 2,996 of those were killed despite the fact that they were not participating in hostilities. During the same period, 1,083 Israelis were killed of which 741 were civilians (including 124 minors). See *B'Tselem*, "Ten Years to the Second Intifada-Summary of Data" (27 September 2010), online: *B'Tselem* <http://www.btselem.org/press_releases/20100927>. Carol Bisharat, "Palestine and Humanitarian Law: Israeli Practice in the West Bank and Gaza" (1988-1989) 12 Hastings Int'l and Comp L Rev 325.

[96] Barak briefly occupied the position of Israel's Attorney General (1975-1978), before serving as a judge on the bench of the HCJ from 1978-1995. He was the President of the Court from 1995-2006.

[97] (HCJ 3451/02) [2002] *Almandi v. Minister of Defense*, online: HCJ <http://elyon1.court.gov.il/files_eng/02/510/034/a06/02034510.a06.pdf> [*Almandi* Judgment]. See also Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv L Rev 16 at 150.

been adopted by the HCJ throughout its adjudication of petitions filed by Palestinians after the outbreak of the Second *Intifada*.[98]

The current research has identified four trends that have shaped the Court's perception of the purpose of its own judicial oversight. (a) The first trend is the individual rights tradition that gained prominence following the wave of constitutionalism that gripped Europe and other western style liberal democracies in the post WW II era.[99] As a result, many countries experienced the 'judicialization of politics'.[100] This granted courts judicial oversight over the power of the government, a phenomenon that was regarded as an effective tool for strengthening the protection of human rights and promoting adherence to the RoL.[101]

(b) A second trend is the increased interaction between national, international and regional

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[98] "Although a democracy must often fight with one hand tied behind its back [...] [p]reserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security." (HCJ 5100/94) [1999] *Public Committee against Torture et al v. Government of Israel et al*, at para 39, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/files/2012/260_eng.pdf> [*Torture 1994* Judgment]. Elsewhere, Judge Barak said that "our role as judges is not easy. We are doing all we can to balance properly between human rights and the security of the area. In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy." (HCJ 7015/02) [2002] *Ajuri et al v. IDF Commander in the West Bank et al*, para 41, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/files/2010/110_eng.pdf> [*Ajuri* Judgment]. See also Aharon, Barak, "A Judge on Judging," *ibid*. See also Ralph Ruebner, "Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel-A Comparative Perspective" (Spring 2003) 31:4 Ga J Int'l and Comp L 493. Arthur H Garrison, "Hamiltonian and Madisonian Democracy, the Rule of Law and why Courts have a Role in the War on Terrorism" (2008) 8 J Inst of Justice and Int'l Studies 120.

[99] Ruti Teitel, "For Humanity" (June 2004) 3:2 Hum Rts 225. See also Richard Pildes, "The Constitutionalization of Democratic Politics" (2004) 118 Harv L Rev 28.

[100] C. Neal Tate, "Why the Expansion of Judicial Power?" in C. Neal Taste and Torbjoern Vallinder, eds, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995) at 27. Since the governmental framework of democracies provides for essential pre-requisites for the ability of courts to provide judicial oversight over the two other branches of power, the structural independence of the HCJ will be assumed. Eli Salzberger, "Temporary Appointments and Judicial Independence: Theoretical Analysis and Empirical Findings from the Supreme Court of Israel" (2001) 35:2-3 Isr LR 481.

[101] This concept is deeply entrenched in the public political culture of today's democracies; including in the Anglo-American tradition found in common law legal systems. Lawrence Solum, "Equity and the Rule of Law" in Ian Shapiro, ed, *the Rule of Law Nomos XXXVI,* (New York: New York University Press, New York, 1994), 120. See also Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy" (2000-2001) 74 S Cal L Rev 1307. See also Aharon Barak, "The Role of a Supreme Court in a Democracy and the Fight against Terrorism" (2003-2004) 58 U Miami L Rev 125. The outlook is shared by the HCJ, which has underscored that "[c]ourts in a democratic society should undertake the role of safeguarding the rule of law." (HCJ 910/86) [1988] *Yehuda Ressler et al v. Minister of Defense*, at 28, online: HCJ <http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf> [*Ressler* Judgment].

courts, all of which contributed to a phenomenon of 'judicial globalization'.[102] Consequently, it has been argued that these developments also influenced the HCJ. Today, it views itself as part of a community of likeminded independent institutions,[103] which despite remaining sensitive to national interests, broadly share the same values and principles, such as democracy, accountability and human rights, and take advantage of similar normative sources.[104]

In addition, the Court has internalized the idea that its role includes upholding the substantive aspects of democracy[105] and of the domestic RoL. This, in the view of scholars, explains why despite the absence of a written constitution in Israel,[106] the HCJ has over the years adopted an

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[102] As a result, judges enjoy a certain power and visibility that does not stand well with the subordinate position that they have traditionally occupied in the Kelsian understanding of a judicial order. See Anne-Marie Slaughter, "Judicial Globalization" (2000) 40 VA J Int'l L 1103.

[103] In other words, they perform similar functions under broadly similar rules and pursue "common methods of legal reasoning." See Anne-Marie Slaughter, "A Typology of Transjudicial Communication," (1994-1995) 29 U Rich L Rev 99.

[104] Karen Eltis, "The Democratic Legitimacy of the 'International Criminal Justice Model': The Unilateral Reach of Foreign Domestic Law and the Promise of Transnational Constitutional Conversation" in Christopher P.M. Waters, ed, *British and Canadian Perspectives on International Law* (Netherlands: Martinus Nijhoff Publishers, Netherlands, 2006) 349 at 355. One author argued that an area in which one could discern this growing interaction and coordination between national courts, including the HCJ, is during its review of global counterterrorism measures taken by their governments in the post 9/11 era, and which became evident from their increasing reference to foreign and international statutes, case law, and decisions. See Eyal Benvinisti "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (April 2008) 102:2 AJIL 241. See also See Ruti Teitel, "Humanity's Law: A New Interpretive Lens on the International Sphere" (2008-2009) 77 Fordham L Rev 667.

[105] In one of his academic writings while serving on the bench, Justice Barak noted that "real or substantive democracy, as opposed to merely formal democracy, is not satisfied by the presence of these [formal] conditions. Democracy has its own internal morality, based on the dignity and equality of all human beings. Thus in addition to formal requirements, there must also be substantive requirements. These are reflected in the supremacy of certain underlying values and principles based on human dignity, equality and tolerance. There is no (real) democracy without recognition of values and principles such as morality and justice. Above all, democracy cannot exist without the protection of individual human rights that the majority cannot take away by force of its numerical superiority." See Aharon Barak, "The Role of a Supreme Court in a Democracy," *supra* note 101 at 127.

[106] Guy Carmi, "A Constitutional Court in the Absence of a Formal Constitution? On the Ramifications of Appointing the Israeli Supreme Court as the Only Tribunal for Judicial Review" (2005-2006) 21 Conn J Int'l L 67. While the possibility of enacting a constitution was raised during parliamentary discussions in as early as the 1950s, the rift that emerged between religious and secular Israeli Jews regarding the separation of state and religion prevented its enactment. Gad Barzilai, "Between the Rule of Law and the Laws of the Ruler: The Supreme Court in Israeli Legal Culture" (June, 1997) 49: 152 Int'l Soc Sci J 193. See also Dalia Dorner, "Does Israel have a Constitution?" (1999) 43 Saint Louis ULJ 1325.

'activist' approach[107] towards the promotion and protection of human rights both inside Israel proper and in the oPt.[108] Emphasizing the legitimacy of extra-statutory sources of law (such as Israel's *Declaration of Independence*,[109] IHR legal norms and the spirit of Jewish law) the HCJ used its judicial review to promote a rights based jurisprudence that is cantered on the protection of individual rights against the power of government authorities.[110] One way in which the Court made strides toward this objective was by strengthening its judicial review over the actions and legislation from other the branches of government[111] and by expanding

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[107] In its more positive connotation, 'judicial activism' has been referred to as the willingness of judges to actively review and, if need be, criticize and intervene in the decisions and actions of the executive, including those that affect fundamental rights. See Amos Guiora and Erin M Page, "Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theory of Judicial Activism" (2005-2006) 29:1 Hastings Int'l and Comparative Law Review 51. See also Karen Kmiec, "The Origin and Current Meaning of Judicial Activism" (2004) 92 Cal L Rev 5 1441. The role was particularly spearheaded and developed under the leadership of former Presiding Justice Aharon Barak. The HCJ's activism has been regarded by some scholars as exceeding the level of activism displayed by the highest ranking court in any other democratic country. See Martin Edelman, "Israel" in C. Neal Taste and Torbjoern Vallinder, eds, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995) 403.

[108] Eli Salzberger, "Judicial Activism in Israel" in Brice Dickson, ed, *Judicial Activism in Common Law Supreme Courts* (New York: Oxford University Press, 2007) 217. Some have even referred to it as a form of 'judicial hyper-activism.' See Yoav Dotan, "Judicial Accountability in Israel," *supra* note 91. See also Gad Barzilai, "Between the Rule of Law and the Law of the Ruler," *supra* note 106.

[109] Prior to the promulgation of Israel's basic laws (1992) Israel's *Declaration of Independence* was considered a document that offered guiding principles of a bill of rights. It emphasized that the State must be "based on freedom, justice and peace" and that it must "[...] ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race and sex, [and] guarantee freedom of religion, conscience, language, education and culture." It also underscored that Israel "will be faithful to the principles of the Charter of the United Nations." See (MoFA), "Declaration of Establishment of State of Israel" (14 May 1948), online: Israeli MoFA <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx> [*Declaration of Independence*].

[110] For example, it is in a case as early as 1953 that the HCJ established that certain overarching values, such as those spelled out by Israel's *Declaration of Independence* provide a normative umbrella that forms the basis of civil rights that must guide the interpretation of all statutes. It also underscored that the executive is not allowed to use its powers to restrict certain freedoms, unless these restrictions are necessitated by an immediate and serious danger for the security of the State or for public order. See *Kol Ha'am* Judgment, *supra* note 77. The roots of the Court's rights-based approach, it has been argued, resulted from the ideological commitment to a political liberal rights regime that was exhibited at the time by some of the HCJ leading judges. See Patricia Woods, "The Ideational Foundations of Israel's "Constitutional Revolution"" (December, 2009) 62:4 Pol Res Q 811.

[111] In a landmark decision from the late 1960s, the court revolutionized the system by establishing its right of *de facto* judicial supervision of the constitutionality of primary legislation. See (HCJ 98/69) [1969] *Bergmann v. Minister of Finance and State Comptroller*, Official English translation, online: HCJ <http://elyon1.court.gov.il/files_eng/69/980/000/Z01/69000980.z01.pdf> [*Bergmann* Judgment].

the types of issues that were deemed justiciable.[112] It also liberalized the notion of public standing interest.[113]

(c) Hence, a third trend is the concern that the HCJ has seemingly expressed for upholding the formal and substantial aspects of the domestic RoL when adjudicating petitions related to the oPt. In this regard, the Court's concern for the more formal aspects of the RoL, it is argued here, has been demonstrated by the manner in which the Court has invoked principles of Israeli administrative law.[114] Over the years, the HCJ has contributed to the presumption that an administrative organ must exercise the discretion granted to it by statute for the purpose specified in that legislation, specifically after weighing all the relevant considerations.[115]

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[112] The Court distinguished between normative non-justiciability, which addresses the issue of "whether legal standards exist for the determination of the dispute before the court," and institutional justiciability, which relates to "whether the court is the appropriate institution to decide a dispute, or whether perhaps it is appropriate that the dispute be decided by a different institution, such as the legislative or executive branches." See *Ressler* Judgment, *supra* note 101 at 46-47. The Court has rejected arguments of normative non-justiciability, because "there's always a legal norm according to which the dispute can be solved." See *Torture* 2002-Judgment, *supra* note 91 at para 48.

[113] In the past, the petitioner had to demonstrate a personal and concrete interest in the subject of the petition. This requirement was first dropped by the Court in the *Ressler* Case in the 1980s. In its judgment, the HCJ ruled that a petitioner's standing may be recognized if the petition raises a distinctively constitutional or RoL question; if it points to the violation of basis civil liberties or if it involves a serious flow in the functioning of a public authority See *Ressler* Judgment *ibid* at 46. See also Shoshana Netanyahu, "The Supreme Court of Israel-A Safeguard of the Rule of Law" (1993) 5:1 Pace int'l L Rev 1; Menachem Mautner, *Law and Culture of Israel* (Oxford: Oxford University Press: 2011) at 57. Daphne Barak-Erez, "Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint" (2009) Indian J Const Law 118. David Sasson, "The Israel Legal System" (1968) 16:3 Am J Comp L 405.

[114] Administrative law is the law pertaining to the functioning of the governing local authorities, statutory corporations and others who possess statutory powers. The manner in which the legality of administrative actions was conducted to ensure that human rights are protected against the intrusion of the government was based primarily on case law, mostly from the HCJ. Eyal Benvenisti "Introduction to Israeli Administrative Law" (1996) 2:2 Euro Pub L 194. Traditionally, English administrative law recognized the importance of procedure, mainly through rules that sought to guarantee fairness to individuals who were affected by administrative decisions, such as rules of natural justice. Daphne Barak Erez, "Israeli Administrative Law at the Crossroads: Between the English Model and the American Model" (2007) 40:1 Isr LR 56. Israeli administrative law includes "the basic principles of natural justice as derived from the system of law existing in Israel, reflecting similar principles developed in Western Democracies." See Meir Shamgar, ed, *Military Government in the Territories*, *supra* note 69 at 48.

[115] Due to its heavy case load, in the early 1990s the Court declared that some lower courts had concurrent jurisdiction to review administrative acts. At the same time, it decided that it would use its discretion to refuse hearing petitions if it was satisfied that other courts can provide adequate relief. Eyal Benvenisti, "Introduction to Israeli Administrative Law," *ibid.*

Authorities have also been required to strike a proper balance between the liberty of the individual and the needs of the public."[116]

In ruling on the legality of measures by Israeli authorities, including the military, the HCJ often invoked the need to determine whether the measure is proportional in its effect on the individuals alleging a violation of their interest as a result of the implementation of a certain policy. Towards this objective, the Court often resorted to the proportionality test that is grounded in Israeli administrative law. This requires an administrative authority seeking to impose a measure that infringes on the interests of individuals to satisfy three cumulative conditions or sub-tests. (i) The first condition is that the means employed by the administrative body must rationally lead to the realization of the objective (the 'rational means' test). (ii) The second one is that the means employed by the administrative body must injure the individual to the least extent possible ('least injurious means' test). (iii) The third condition requires that the damage caused to the individual by the administrative body in order to achieve its objectives be of proper proportion to the gain brought about by those means ('proportionality in the narrow sense' test). All three sub-tests must be satisfied before an administrative measure is deemed proportionate.[117]

Other principles that were emphasized by the HCJ throughout its adjudication include: good faith, substantial and procedural fairness, as well as due process of law.[118] Moreover, the Court has held that an administrative authority (including the military) must use its discretion in a reasonable and fair manner under administrative law. This remains the case even if the rights that are infringed on are not vested rights and therefore, are not protected under constitutional

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[116] (HCJ 3278/02) [2002] *Hamoked et al v. Commander of the IDF Forces in the West Bank* at para 23, online: HCJ <http://elyon1.court.gov.il/Files_ENG/02/780/032/A06/02032780.A06.HTM> [*Hamoked 2002* Judgment]. See also *Iskan* Judgment, *supra* note 90; (HCJ 69/81) [1981] *Bassil Abu Aita et al v. Regional Commander of Judea and Samaria et al*, official English Translation, online: HCJ <http://elyon1.court.gov.il/files_eng/81/690/000/Z01/81000690.z01.pdf> [*Abu Aita* Judgment]; *Ajuri* Judgment, *supra* note 98.

[117] Talia Einhorn, "Israel" in Diana Shelton, ed, *International Law and Domestic Legal Systems* (Oxford: Oxford University Press, 2011) 288.

[118] Uri Shoham, "The Principle of Legality," *supra* note 71. See also discussion in (HCJ 2056/04) [2004] *Beit Sourik Village Council v. Government of Israel*, (2005) 35 Isr LR 83 [*Beit Sourik*, Judgment] in Chapter I, section 3.1.

law.[119] Some scholars have hailed this approach as providing a way for petitioners to overcome evidentiary problems and to review the legality of measures even in situations where authorities had allegedly not resorted to irrelevant considerations.[120]

In the 1990s, the enactment of the Basic Law: *Human Dignity and Freedom*[121] and Basic Law: *Freedom of Occupation*[122] was greeted by the Court as a bringing about a 'constitutional revolution'.[123] The research study maintains that by using these laws to strengthen constitutional protections, the HCJ sought to consolidate the more substantive aspects of the domestic RoL. In the case of the Basic Law: *Human Dignity and Liberty*, the Court used it to argue that Israeli courts were entitled to strike down any ordinary legislation that did not meet the criteria of its limitation clause (section 8).[124] This took place even though the basic law lacked any specific entrenchment provisions.[125]

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[119] At the same time, it must be underscored that administrative law should be understood as being concerned with the balance between demands and interests, in contrast to constitutional law, which focuses on the protection of human rights. Daphne-Barak Erez, "Israeli Administrative Law at the Crossroads," *supra* note 114.

[120] Eyal Benvenisti, "Introduction to Israeli Administrative Law," *supra* note 114.

[121] When the Basic Law: *Human Dignity and Liberty* was promulgated, its section 11 stated that "[a]ll governmental authorities are obliged to respect the rights under this Basic Law." The law protects rights such as the preservation of life, body and dignity and the protection of property, of liberty and freedom. It also protects the right to leave Israel and for Israeli citizens to enter it, as well as the right to privacy and intimacy. See Basic Law: *Human Dignity and Liberty* (Isr), online: *Knesset* <www.knesset.gov.il/main/eng/home.asp>, as amended by Basic Law: *Human Dignity and Liberty - Amendment*, 1994, online: *Knesset* <http://knesset.gov.il/laws/special/eng/BasicLawLiberty.pdf> [Basic Law: *Human Dignity and Liberty*].

[122] The latter basic law protects the freedom to occupation. Originally enacted in 1992, it was replaced in 1994. Basic Law: *Freedom of Occupation*, 1992 as repealed by Basic Law: *Freedom of Occupation*, online: *Knesset* <http://knesset.gov.il/laws/special/eng/BasicLawOccupation.pdf>.

[123] Consequently, these "rights became constitutionally protected and were accorded supra-legislative constitutional status." (C.A. 6821/93) [1995] *United Mizrahi Bank Ltd. v. Migdal Cooperative Village et al* at para 94, official English translation online: HCJ <http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf> [*Mizrahi Bank* Judgment]. See also David Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law" (1992) 2 Isr LR 238.

[124] This section reads that "[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by such a law enacted with explicit authorization therein." Article 8 of the Basic Law: *Human Dignity and Liberty*, *supra* note 121. Article 4 of the Basic Law: *Freedom of Occupation*, *supra* note 122 contains a similarly worded phrasing.

[125] Since this basic law was the result of a political compromise, its constitutional statute and superiority over regular legislation was not clearly provided for in the text. Yoav Dotan, "Constitutional Adjudication and Political Accountability: Comparative Analysis and the Peculiarity of Israel," in Gideon Sapir, Daphne Barak-Erez and Aharon Barak, eds, *Israeli Constitutional Law in the Making* (Portland: Hart Publishing Ltd. Portland 2013) 91. However, according to the Court, "a statute incompatible with the conditions of the

With the adoption of these basic laws, the Israel approach to proportionality that had originated in Israeli administrative law was also imported into Israeli constitutional law, to form part of the Court's strategy of adjudicating the constitutionality of Israeli legislation.[126] This constitutional assessment was carried out in two steps. (1) The first one is to examine whether a constitutionally protected right has been infringed for the sake of a legitimate purpose-one that is consistent with the values of Israel as a Jewish and democratic state. (2) The second step involved the need to assess the requirement that the extent of the right's infringement 'does not exceed what is necessary'. It is with regards to the second step, that the proportionality doctrine and its three sub-tests were employed by the Court to determine the following: (i) that there is a rational connection between the appropriate goal and the means utilized by the law; (ii) that the objective cannot be achieved by means that are less restrictive of the constitutional rights and (iii) that a proportionate balance exists between the social benefit of realizing the appropriate goal and the harm caused to the right.[127]

(d) A fourth trend proposed by the research to explain the Court's perception of its role is that, similar to the courts of other western style liberal democracies,[128] it is genuinely interested in upholding international rules and principles, thereby contributing to the promotion of an

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limitation clause does not have the power to infringe a protected right," *Mizrahi Bank* Judgment, *supra* note 123 at para 44. This is because the structure, content and form of the basic law made it clear that it had constitutional status. *Ibid* at para 63.

[126] Mordechai Kemnitzer, "Constitutional Proportionality: (Appropriate Guidelines)," in Gideon Sapir, Daphne Barak-Erez and Aharon Barak, eds, *Israeli Constitutional Law in the Making* (Portland: Hart Publishing Ltd. Portland 2013) 225.

[127] See Aharon Barak, "Proportionality and Principled Balancing" (April 2010) 4:1 Law and Ethics of Human Rights 1.

[128] Kenneth Holland, ed, *Judicial Activism in Comparative Perspective* (New York: St. Martin's Press, 1991). The expansion of a rights based jurisprudence has been considered as a critical part of the development of constitutional traditions. Today, there is a little doubt that international law is being increasingly applied by national courts around the world. Courts of constitutional democracies like Canada, Australia and New Zealand have referred to international human rights standards when interpreting domestic law. See Eyal Benvenisti, "The Influence of International Human Rights Law on the Israeli Legal System: Present and Future" (1994) 28 Isr LR 28. Yuval Shany, "National Courts as International Actors: Jurisdictional Implications" (Research Paper No. 22-08 International Law Forum of the Hebrew University, Faculty of Law, 29 October 2008) at 2.

international RoL.[129] Again here, the research proposes that the former concept can be understood to consist of formal[130] and substantive features.[131]

With regards to the substantive version of the RoL, the Court's extensive invocation of principles of IHL and of IHR law has been pointed out as proof of its commitment to this notion.[132] In particular, it has been underscored that the HCJ has upheld the conclusion that Israel's control of the West Bank qualifies as an occupation[133] and that the authority of the MC

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[129] Although the RoL has been primarily devised to describe the state of affairs at a domestic national level, it can also be externalized onto the international legal plane. See Stéphane Beaulac, "The Rule of Law in International Law Today," *supra* note 81 at 204.

[130] Beaulac suggests that this is because three of the elements of the more formal version of this concept may be found in international law. The first element is the existence of principled legal normativity on the international plane that is sufficiently developed. The second element is the idea that legal norms apply equally to all of its subjects (the states). This is because every state can play a role in determining the formation of international customary law through their practice and their *opinion juris*. This renders them all equal in their ability to participate in the creation of this international normativity. The third element is that normativity on the international plane can be adjudicatively enforced, at least through the ICJ. *Ibid*. The concept of an international RoL has also been used to refer to the notion that nations accept that their "relationships to one another are to be ruled by law." Mattias Kumm, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model" (2003-2004) 44 VA J Int'l L 19 at 22.

[131] To better understand its substantive aspects, one needs to have a functional approach to the ideal of the international RoL: one in which it is regarded as a tool or means by which nation states seek to promote and protect human rights, development and peace. A substantive conceptualization of the international RoL also recognizes the emergence of a normative regime that touches directly upon the individual and which has contributed to the emergence of RoL values at the international level. "In this core sense the rule of law reflects the history of efforts to restrain sovereign power that continue in many states, including some well established liberal democracies confronting what the modern sovereign claims are emergencies requiring even greater claims to executive authority." See Simon Chesterrman, "An International Rule of Law?" (Spring 2008) 56 (2) AJIL 331 at 361. *Ibid*. Moreover, it underscores that "the rule of law in domestic law has become an international relations issue." See Stéphane Beaulac, "What Rule of Law Model for Domestic Courts Using International Law in States in Transition: Thin, Thick or 'A La Carte'," (25 June 2010). Transitional Justice Institute Research Paper No. 10-13 at 6. Hence, states can be held accountable for the manner in which governments exercise authority against individuals and non-state actors. See Machiko Kanetake, "The Interface between the National and the International Rule of Law: A Framework Paper" in Machiko Kanetake and André Nollkaemper, eds, *The Rule of Law at the National and International Levels: Contestations and Deference* (Oxford: Hart Publishing 2014) 11.

[132] According to one scholar, this is because "an assertive court will bolster not only the domestic democratic processes, but also its own authority to interpret and apply national and international law." See Eyal Benvenisti, "Reclaiming Democracy," *supra* note 104 at 248.

[133] *Abu Aita* Judgment, *supra* note 116; (HCJ 606/78) *Ayub et al v. Minister of Defense et al*, English summary in (1979) 9 Isr YB Hum Rts 337 [*Beit El* Judgment-Summary]; *Iskan* Judgment, *supra* note 91 at para 10; *Ajuri* Judgment, *supra* note 98 at para 13.

must be assessed against provisions of the international law of belligerent occupation,[134] and against its legal norms.[135] As the Court itself explains, some of these norms are international norms reflected in customary international law or in international conventions to which Israel is a State Party. Others are fundamental principles of Israeli public law.[136] Scholars have also underscored that well established principles of IHL, such as the principles of proportionality[137] and of military necessity[138] have all featured prominently (and quite regularly) in the Court's adjudication of the legality of the actions of the Israeli military authorities in the oPt.[139]

Here, it must be recalled that many of the main rules and principles constituting IHL (of which the law of belligerent occupation is a branch) are phrased in the legalist transnational language of 'right and wrong'.[140] They also reflect the need to ensure a minimum threshold guarantying human dignity in situations of violence.[141] In fact, one could safely argue that every one of the

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[134] (HCJ 390/79) [1979] *Azat Muhammad Mustafa Dweikat et al v. Government of Israel et al* at 11, unofficial English translation: online: *Hamoked* <http://www.hamoked.org/files/2010/1670_eng.pdf> [*Elon Moreh* Judgment].

[135] This is because those actions do "not take place in a normative void." *Torture 2002* Judgment, *supra* note 91 at para 17.

[136] *Ibid* at paras 17 and 18. See also *Iskan* Judgment, *supra* note 91 at para10; *Ajuri* Judgment, *supra* note 98 at para 13.

[137] Under IHL, the principle of proportionality has traditionally been invoked as a way of ensuring that an attack is not indiscriminate, i.e. that it does not cause "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." See Article 51(5) (b) of the First Additional Protocol, *supra* note 9.

[138] In IHL, the principle of military necessity refers to a given course of action that can be taken if it is required for the accomplishment of a particular military goal. More importantly, it functions as an exceptional clause to principal rules of IHL where the latter rules envisage them expressly and in advance. To qualify as an act that is military necessary, the measure has to fulfill the following three criteria: (1) that it was taken primarily for the attainment of some specific military purpose; (2) that it was required for the attainment of that purpose; (3) that the purpose for which the measure was deployed was in conformity with IHL and (4) that the measure itself was also otherwise in conformity with the law. Nobuo Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law," (10 March 2010) 28:1 BU Int'l LJ 39.

[139] David Kretzmer. "The Law of Belligerent Occupation in the Supreme Court of Israel," *supra* note 90.

[140] As one writer underscores, this notion underpins both implicitly and explicitly, many of the constraints on state conduct that can be found in IHL and in IHR law. See Ruti Teitel, "Humanity's Law," *supra* note 104.

[141] *Ibid*. One example found in IHL is the Marten's Clause which first appeared in the *Hague Convention (II) Respecting the Laws and Customs of War on Land of 1899*, and which is the immediate precursor of the *1907 Hague Convention Respecting the Laws and Customs of War*, see *supra* note 7. As cited in the preamble of the latter, it states that in cases not covered by treaty law or by customary international law, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." Arguably, this provides authority for looking beyond treaty law and custom to consider principles of humanity and the dictates of the public conscience. According to the ICJ, the Clause re-affirmed

rules of IHL reflects a consistent sensitivity to the balance between two opposing forces: military necessity on the one hand, and humanity on the other.[142]

It is maintained that these values have significantly impacted the development of the law of belligerent occupation.[143] Other developments in international law have also influenced the law of belligerent occupation, including the rise of concept of national self determination (delivered to the people by the French Revolution) and the ascendance of the principle of the sovereign equality among nations.[144]

In the case of the *Hague Convention Respecting the Laws and Customs of War on Land (1907)* and their Regulations, their drafting was "inspired by the desire to diminish the evils of war, so far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants."[145] They also came to underscore a number of rules for the protection of civilians and their private property in an occupied territory.[146] Moreover, by emphasizing the need to preserve public property in

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existing customary international law. See ICJ *Nuclear Weapons* Advisory Opinion *supra* note 9 at paras 78 and 84.

[142] This balance is driven by two different interests that nation states have traditionally harbored: (i) national interests, which explain why they resist the imposition of legal norms that would 'unnecessarily' restrict their freedom of action on the battlefield, and (ii) the obligation that they have towards their citizens and ensuring their well-being, and the provision of public good. This latter interest underpins the social contract between a state and its people. See Michael N. Schmitt. "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance" (2010) 50:4 Va J Int'l L 795.

[143] At the end of the 18th century, the concept of belligerent occupation was still associated with the traditional practice of the right of conquest and with legitimating the conqueror's acquisition of a territory by the use of force. However, by the beginning of the 19th century, attempts to mitigate this classical conception started to surface, a development that was certainly driven by the rise of the principle of humanity (amongst others). Salvatore F. Nicolosi, "The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty" (2011) 31 Polish YB Int'l L165.

[144] This in turn, helped to distinguish 'occupation' from 'conquest'. See Eyal Benvenisti, "Origins of the Concept of Belligerent Occupation" (2008) 26:3 LHR 621.

[145] James Brown Scott, ed, *The Reports to the Hague Conferences of 1899 and 1907* (Oxford: Clarendon Press, 1916) at 509, online: <https://ia600209.us.archive.org/14/items/cu31924007362407/cu31924007362407.pdf>. For an overview of the development of the law of belligerent occupation prior to the 1899 and 1907 Hague Conventions, see Michael Siegrist, "The Functional Beginning of Belligerent Occupation," Geneva Academy for International Humanitarian Law and International Human Rights Law (Adh Genève) (8 February 2010), online: Adh Genève <http://www.geneva-academy.ch/docs/ResearchActivities/Functional_Beginning_of_Belligerent_Occupation_Michael_Siegrist_2010.pdf>.

[146] Theodor Meron, "The Humanization of Humanitarian Law" (April 2000) 94:2 AJIL 239. The private aspect, the principle of immunity of private property of enemy nationals, was first raised by Vattel and Rousseau in

the occupied territory, they provided guarantees for the rights of the ousted sovereign.[147] This confirms that one of the essential tenants of the law of belligerent occupation is that occupation does not involve extinction of the rights of the ousted sovereign nor the transfer of sovereignty over the territory to the occupying power.[148]

However, it was the outbreak of World War I that highlighted the inadequate protection provided by the Hague Regulations to individuals who were not, or have ceased to participate in hostilities. The subsequent outbreak of WW II confirmed a grave phenomenon: that the civilians, including those in occupied territory were bearing the brunt of hostilities, including practices such as deportation, internment and starvation.[149] Several years later, the Fourth Geneva Convention was drafted and adopted. As the *Pictet* Commentary emphasizes, "the main object of the Convention is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy [...]."[150] By spelling out in detail the protection to be afforded to them, the Convention also achieved another milestone in the development of IHL more generally, and of the law of belligerent occupation in particular: it shifted the emphasis from the rights of belligerent parties to the rights of individuals, particularly civilians.[151]

Subsequent developments of an IHR discourse and the elaboration of IHL treaties, most notably in the form of the two additional protocols, have also confirmed that IHL had steadily moved in the direction of humanity.[152] Since then, the emerging juridical regime (also referred

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the second half of the 18th century, as an extension of the basic distinction between combatants and non-combatants. Eyal Benvenisti, "Origins of the Concept of Belligerent Occupation," *supra* note 144.

147 David Kretzmer, "The Law of Belligerent Occupation as a System of Control," *supra* note 63 at 31.

148 Salvatore F. Nicolosi, "The Law of Military Occupation," *supra* note 143. As Benvenisti explains, the new principles self-determination, democracy, and human rights which pierced the veil of national sovereignty in Europe during the 19th century and limited the 'sovereign', affected also the international law of belligerent occupation by modifying the restrictions on the occupant's exercise of authority. Eyal Benvenisti, "Origins of the Concept of Belligerent Occupation," *supra* note 144.

149 Michael Siegrist, "The Functional Beginning of Belligerent Occupation," *supra* note 145.

150 See Jean Pictet, ed, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* reprinted (Geneva: ICRC, 1994) at 10 [*Pictet* Commentary].

151 A French proposal for a preamble to the draft Convention at the 1948 ICRC Conference reiterated that "[t]he High Contracting Parties, conscious of their obligation to come to an agreement in order to protect civilian populations from the horrors of War, undertake to respect the principles of human rights which constitute the safeguard of civilization [...]." *Ibid* at 12.

152 Michael N. Schmitt. "Military Necessity and Humanity," *supra* note 142. Thus, general principles of IHL such as military necessity, distinction, prohibition of unnecessary suffering "are not based on a separate source of international law, but on treaties, custom or general principles of law. On the one hand, they can and

to as 'humanity's law') has had a significant impact on the development of international treaty law more generally.[153] Arguably, this has contributed to a paradigm shift in the way that we understand the international RoL: moving the traditional focus of the international legal system with its emphasis on a state based sovereignty (within the borders of the nation state),[154] and with the nation state as the main duty and rights holder under international law, towards a conceptualization of international law and relations that takes into account the rights and duties of non-state actors, including those caught up in political violence.[155]

In relation to this, the rise of an active transnational legal process has been identified as one process that has facilitated the 'internalization' of global norms of 'humanity' by domestic legal systems,[156] and their judicial branches. This, the aforementioned process made possible by providing opportunities for the judicial incorporation of international law norms into domestic law, statutes or constitutional norms.[157]

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must often be derived from the existing rules, expressing those rules' substance and meaning. On the other hand, they inspire existing rules, support those rules, make those rules understandable, and have to be taken into account when interpreting those rules." See Marco Sassòli and Antoine A. Bouvier, ed, *How Does Law Protect in War?* (Geneva: ICRC, 1999) at 112-113.

[153] In this regard, it has been argued that the First Additional Protocol further refined the international customary law principles and rules related to distinction and proportionality. A subsequent protocol reiterated the idea that IHL regulates the conduct of hostilities during situations of guerrilla warfare (during national liberation struggles) and non-international armed conflicts. See First Additional Protocol, *supra* note 9. See also Second *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977)* 1125 UNTS 609 (entered into force 7 December 1978).

[154] There are two aspects of sovereignty that are often raised by scholars: (1) The internal aspect, in which sovereignty is closely linked to legitimacy when discussions address issues such as the competence and power of the state in relation to society; the idea that the people are the ultimate authority in the state, or that in the Anglo-Saxon tradition, sovereignty is bestowed upon the parliament. (2) Its external aspect, which refers to the relationship between states in their equality as international legal persons. Here, certain rights and obligations are said to flow from this presumption: legal independence, jurisdiction over people and territory, international legal personality and capacity to be held liable. It has been suggested that it is not entirely inappropriate to argue that external sovereignty must be geared towards humanity, in the sense that it should involve responsibility for the protection of basic human rights and the state's accountability for human rights violations. For such a view, see Anne Peters, "Humanity as the A and Ω of Sovereignty" (2009) 20:3 EJIL 513.

[155] Ruti G Teitel, "Humanity's Law: Rule of Law for the New Global Politics" (2001) 35 Cornell Int'l LJ 355.

[156] This process refers to "the institutional interaction whereby global norms of international human rights law are debated, interpreted and ultimately internalized by domestic legal systems." See Harold Koh, "How is International Human Rights Law Enforced?" (1998-1999) 74 Indiana L J 1397 at 1399. This involves not only a horizontal process taking place between states, but also a vertical process in which non-state actors seek to advance specific interpretations of international law. *Ibid.*

[157] *Ibid.*

Other phenomena that have forced domestic courts, including the HCJ, to pay more attention to the development of international legal norms,[158] is the rise of supra national tribunals[159] such as the ICTY, the ICTR, and the ICC as well as courts of third party jurisdictions (including universal jurisdiction). This has opened up alternative avenues and prospects for holding individuals and states accountable for particularly serious violations of international law,[160] including war crimes, crimes against humanity and genocide.[161] Arguably, it also encouraged the HCJ to expand the limits of justiciability so that it can adjudicate issues that draw interest for judicial decision-making by these courts (such as the legality of actions by government and military authorities).[162]

Having outlined some of the elements that continue to attract scholarly interest and debate, the next section provides a more detailed account of what the research hopes to achieve.

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[158] Anne Marie Slaughter, "A Typology of Transjudicial Communication," *supra* note 103.

[159] Antonio Cassese, "On the Current Trends towards Criminal Prosecution and Punishment of Grave Breaches of International Humanitarian Law" (1998) 9 EJIL 2; Payam Akhavan, "Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for New World Order" (May 1993) 15:2 Hum Rts Q 262; Frederic Mégret, "Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law" (2001) 12:2 EJIL 247.

[160] According to Teitel, legal developments in the post WW II era internationalized what has been traditionally considered a 'domestic' form of rights protection through judicial processes. See Ruti Teitel. "For Humanity," *supra* note 99.

[161] For an enumeration and/or definition of these crimes, see articles 6- 8 of the Rome Statute, *supra* note 49.

[162] In 2003, a number of Palestinians filed a law suit against former Prime Minister Ariel Sharon for alleged war crimes that had been committed at two Palestinian refugee camps during the Lebanon War of 1982. However the indictment chamber at the Brussels appeals court declared the case inadmissible and the Belgian Universal Jurisdiction law was subsequently repealed. See Human Rights Watch (HRW): "Belgium: Universal Jurisdiction Law Repealed" (1 August 2003), online: HRW <https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>. See also HRW, "Israel: Ariel Sharon's Troubling Legacy" (11 January 2014), online: HRW <https://www.hrw.org/news/2014/01/11/israel-ariel-sharons-troubling-legacy>. Since then, Palestinian human rights NGOs have frequently sought to have Israelis government officials prosecuted for committing alleged war crimes by filing a law suit in third party jurisdictions such as the US and the United Kingdom (UK) which have laws granting courts universal jurisdiction over serious crimes such as war crimes. See Center for Constitutional Rights (CCR), "Matar et al v. Dichter," online: CCR <https://ccrjustice.org/home/what-we-do/our-cases/matar-et-al-v-dichter>. Ian Cobain and Ian Black, "British Court Issued Gaza Arrest Warrant for Former Israeli Minister Tzipi Livni" *The Guardian* (14 December 2009); Roni Sofer, "Spanish Court to Probe Israeli Officials for Alleged 'Crimes against Humanity'" *YNet* News (29 January 2009). On 1 January 2015, the Government of Palestine lodged a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014." On 2 January 2015, the Government of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. See "Palestine," online: ICC <https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx>.

2. Research Purpose

The overall purpose of this study is twofold: (1) The first one is to analyze the extent to which the HCJ has provided Palestinian petitioners who are alleging violations of their rights that are protected under humanity law (IHL and IHR law),[163] with a domestic venue for effective judicial remedy.[164] In particular, the research focuses on petitions that have challenged the legality of security-based measures implemented by Israeli government and military authorities for the alleged need of protecting Israeli settlements and settlers in the occupied West Bank after the outbreak of the Second *Intifada* (Uprising) in 2000 up and till 2014.

The analysis is strictly limited to those HCJ judgments that were rendered after 2000 in relation to settlement and settler related security based measures. The current research's point of departure is that the HCJ's adjudication of those petitions would best highlight the challenges that the highest domestic court of the occupying power would face in adjudicating pressing issues of human rights v. security. This is because the focus of this research is characterized by the following elements: (i) pressing security concerns and extensive resort to security based measures by the occupying power; (ii) the presence of a considerably large

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[163] For a definition of victim, see *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* Annex to GA Res 60/147, UNGAOR, 60th Sess, Supp No. 49, UN Doc A/RES/60/47 (16 December 2005) at para 8, online: Office of the High Commissioner for Human Rights (OHCHR) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> [UN Guidelines on Remedy]. See also Lisbeth Zegveld, "Victims' Reparation Claims and International Criminal Courts: Incompatible Values?" (2010) 8 J Int Criminal Justice 79.

[164] Remedies for gross violations of international human rights law and for serious violations of international humanitarian law include the victim's right to the following (i) equal and effective access to justice; (ii) adequate, effective and prompt reparation for harm suffered and (iii) access to relevant information concerning violations and reparation mechanisms. See article 11 of UN Guidelines on Remedy, *ibid*. The definition reparation for an international wrongful act has been developed by the Permanent Court of International Justice (PCIJ) primarily in relation to states when it noted that "[t]he essential principle contained in the actual notion of an illegal act [...] is [that] a reparation must, and as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear." See *Case Concerning the Factory of Chorzów (Germany v. Poland)* (1928), Permanent Court of International Justice (PCIJ) (Ser A) No. 17 at 47. In the *Wall* Advisory Opinion, the ICJ underscored the idea that reparations can be owned by states to individuals when it concluded that "Israel has the obligation to make reparation for the damage caused [by the Wall's construction] to all natural or legal persons concerned." ICJ *Wall* Advisory Opinion, *supra* note 13 at para.152. Reparation for harm suffered can come in many forms, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. See Principle 11 and 21 of the UN Guidelines on Remedy, *supra* note 163. See also Liesbeth Zegveld, "Remedies for Victims of Violations of International Humanitarian Law" (2003) 85:851 Int'l Rev Red Cross 497.

number of that power's own civilian population inside the occupied territory (iii) the presumption that the occupying power is a democracy that seeks to promote the domestic and international RoL (iv) and the fact that the rights of the occupied population are primarily protected in international law.

Israeli authorities continue to justify a wide spectrum of administrative, legislative, and military actions against the Palestinian civilian population in the West Bank, on the grounds of protecting the rights and security of its citizens. They also maintain that their actions, including measures driven by security concerns, conform to the requirements of international law, particularly the international law of belligerent occupation.

After the outbreak of the *Intifada* in 2000, Israel stepped up its resort to these measures and/or began to implement new ones. Many of them were also justified on the ground that they were necessary to protect its settlements and settler population in the occupied territory. One of them is the Wall which Israeli authorities began constructing in 2002, with much of its route running inside the West Bank (as opposed to on the Green Line or inside Israel proper). Israeli authorities have argued that the structure constitutes a lawful act of self defence. A second measure is the designation of much of the land that is trapped between the Green Line and the Wall as a Seam Zone and the imposition of an associated permit regime to govern the entry and exit of Palestinians to and from that zone. A third measure, is the special security zones (SSZs) which Israeli authorities have established around settlements and to which Palestinians have no or limited access.

Israeli military authorities have also stepped up the implementation of movement restrictions (particularly checkpoints and the requirement of holding a permit) on Palestinians commuting between different towns and villages inside the West Bank, or between the West Bank and annexed EJ for the alleged purpose of ensuring the safety of Israeli citizens. In this regard, the declared Israeli objective has been to protect not only Israeli settlers commuting inside the West Bank, but also other Israeli citizens commuting to and from Israel proper to the West Bank settlements, including those in EJ.

In addition, they have implemented a number of security based measures in *de jure* annexed EJ, the most dramatic of which is the construction of parts of the Wall in and around the city. Given that Israel considers EJ part of its sovereign territory, it regards the Wall as a necessary tool for protecting its own citizens and territory from infiltration, and attacks by Palestinians.

It has been argued that one of the most important accomplishments of the Court is that it has provided Palestinian victims alleging the violation of their rights with a domestic venue for effective judicial remedy,[165] and that it has subjected the actions of Israeli military authorities to judicial review in 'real time.'[166] Consequently, it has been maintained that government and military authorities know they are acting 'in the shadow' of the potential judicial decisions of the Court[167] and that they may be required to defend their actions in court on the basis of the norms of the international law of belligerent occupation.[168]

The right to a hearing presupposes that grievances concerning violations are taken seriously and that they are examined in 'good faith'.[169] However, sceptics have pointed out that the duty

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[165] A right to reparation can result from domestic law, especially from tort law. See Elke Schwager, "Reparation for Individual Victims of Armed Conflict" in Robert Kolb and Gloria Gaggioli, ed, *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Elgar Publishing Inc., 2013) 628. Although more recently, the right of the Palestinians who allege violations by Israeli military forces to access Israeli courts and to obtain a legal remedy has been hampered by the presence of numerous obstacles, the right remains in principle guaranteed by Israeli legislation and case law. In Israel, the right to compensation is a constitutional right that is derived from the individual's right to protection of his life, physical integrity and property. See Valentina Azarov and Sharon Weill, "Israel's Unwillingness? The Follow Up-Investigations to the UN Gaza Conflict Report and International Criminal Justice" (2012) 12 Int'l Crim L Rev 905. For an overview of the substantial, procedural and practical obstacles facing the efforts by Palestinians to receive effective remedy, see Fatmeh El 'Ajou, "Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts," (Briefing Paper, (May 2013), online: *Adalah* <http://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Obstacles-Palestinians-Court-Fatmeh-ElAjou-05-13.pdf>. See also Valentina Azarov and Sharon Weill, "Israel's Unwillingness?" *ibid*. In addition, it is worth mentioning that since Israeli law makes no mention of war crimes, indictments can only be achieved by matching the criminal IHL offense to others listed under Israeli law. The Turkel Commission that was appointed by the government in 2010 (headed by former HCJ Justice Jacob Turkel) recommended that legislative amendments are enacted to ensure full correspondence between the international system of law and the Israeli one. See *B'Tselem*, "Promoting Accountability: The Turkel Commission's Report on Israel's Addressing Alleged Violations of International Humanitarian Law," Report (August 2013), online: *B'Tselem* <http://www.btselem.org/download/position_paper_on_turkel_report_eng.pdf>.

[166] Amichai Cohen "Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law" (Spring 2011) 26:2 Conn J Int'l L 367.

[167] Daphne-Barak Erez, "Broadening the Scope of Judicial Review," *supra* note 113.

[168] David Kretzmer, "The Law of Belligerent Occupation," *supra* note 90.

[169] *Ibid.*

of a rights based society to provide aggrieved individuals (who possess rights) with an opportunity to challenge the collective decisions reached by the Israeli polity, to demand an explanation for these measures, and compel the government to reconsider its decisions, does not guarantee the quality of the judicial decision or increase the probability that the decision is correct, just or appropriate.[170]

Traditionally, the literature review that has analyzed the Court's adjudication of petitions by Palestinians has focused either on the manner in which judges have applied and interpreted international legal rules and principles on the one hand, or on the implications that its judgments have had for Israeli efforts to uphold the RoL on the other. However, it is maintained here that the English based literature has not drawn a distinction between the possible implications of the HCJ's review for the international RoL, as opposed to and independent from its repercussions for the domestic RoL. By analyzing the extent to which the Court has been capable of providing a domestic venue for effective remedy, the research hopes to shed light on the role that courts can play as 'gatekeepers' at the interface between the national and the international legal systems,[171] and the implications that it could have for the latter: the international RoL. Arguably, in a situation of occupation, where the role that domestic courts play in managing this interface, and where the main source of protection for the occupied population is international law, examining these dynamics is all the more pertinent.

(2) The second objective of this research is to determine whether the Court's adjudication of these security driven measures has undermined what several Israeli scholars have identified as the three normative pillars[172] underlying the international law of belligerent occupation,[173] and

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[170] Alon Harel, "The Right to Judicial Review: The Israeli Case," in Gideon Sapir, Daphne Barak-Erez and Aharon Barak, eds, *Israeli Constitutional Law in the Making* (Portland: Hart Publishing Ltd. Portland 2013) 25.

[171] The term interface has been borrowed from the title by Machiko Kanetake, "The Interface between the National and International Rule of Law," *supra* note 138.The reference to the term 'gatekeepers' was inspired by the title of an Israeli documentary in which, for the first time ever, six former heads of Israel's secret service were interviewed, thereby providing an account of how their security related decisions shaped the Israeli occupation since 1967. See Dror Moreh, *The Gatekeepers* (2013), online: <http://www.thegatekeepersfilm.com/>.

[172] Within a specific legal regime, legal norms dictate what its subjects must do (prescriptive), must not do (prohibitive) and may do (permissive). The violation of a norm is sanctioned with international responsibility.

which are: (i) that the occupation is temporary;[174] (ii) that it is a form of 'trust',[175] and (iii) that it does not bestow sovereignty.[176] This is because one of the points of departure of the current study is that the substantive version of the international RoL attaches great significance to norms and values as one way of providing a coherent, well- functioning body of rules and principles for states and non-state actors to respect.

True, the ability of the law of belligerent occupation to provide answers to the challenges resulting from the prolonged nature of the Israeli occupation has been criticized on several grounds: (a) that the law of belligerent occupation does not concern itself with bringing a situation of occupation to an end;[177] (b) that the drafters of the Convention did not (nor could they) foresee an occupation of such prolonged nature, (c) and that despite the clear prohibition on settlement activity that this body of law has spelled out, it suffers from a poor record of IHL's conventional enforcement mechanism.[178]

However despite these shortcomings, it is maintained that this body of law is still capable of

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See Stephen D. Krasner, "Structural Causes and Regime Consequences," *supra* note 51. See also Propser Weil, "Towards Relative Normativity in International Law" (1983) 77 AJIL 413. The test which spells out the authoritative procedure by which states agree to be legally bound by an international norm is stipulated by Article 38 of the Statute of the ICJ; which includes international customs, international convention, and general principles of law. Doctrine and judicial decisions are thus, subsidiary sources of law. See the *Statute of the International Court of Justice*, 26 June 1945, UNTS 1945 No. 993 [ICJ Statute]. See also Dinah Shelton "Normative Hierarchy in International Law" (2000) 100:2 AJIL 291.

173 Orna Ben Naftali, "PathoLAWgical Occupation," *supra* note 1.

174 Lassa Oppenheim, "The Legal Relations between an Occupier and the Inhabitants" (1917) 33 Law Q Rev 363; Adam Roberts, "What is Military Occupation" (1984) 55 Brit YB Int'l L 249.

175 Arnold Wilson, "The Laws of War in Occupied Territory" (1932) 18 Transactions of the Grotius Society 17.

176 Arnold D McNair, "Municipal Effects of Belligerent Occupation" (1941) Law Q Rev 33.

177 Sharon Weill, "Reframing the Legality," *supra* note 71 at 145.

178 Common article 1 to the Four Geneva Conventions, states that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances," See article 1 of the Fourth Geneva Convention, *supra* note 8. This signifies that third party states, even if not involved in an armed conflict, have a duty to take action to safeguard compliance with the Fourth Geneva Convention. Means for the enforcement of IHL include the inquiry procedure (article 149 of the Fourth Geneva Convention, *supra* note 8); Protecting Powers (article 9 of the Fourth Geneva Convention, *ibid*), and a fact-finding commission (article 20 of the First Additional Protocol, *supra* note 9). However, these methods have been criticized for their limited ability to enforce compliance with existing rules. Consequently, states violating IHL are not deterred from changing their course of action. See Tristan Ferraro, "Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities" (January 2008) 41; 1-2 Isr LR 331 at 342. For a discussion of the obligation by High Contracting States to the Four Geneva Convention under common article 1, see Knut Dörmann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Human Rights Violations" (2014) 96:895/896 Int'l Rev Red Cross 707.

furnishing clear rules and regulations, which if implemented in good faith by an occupying power, are capable of maintaining a balance between the different considerations of humanity and military necessity that must guide the actions of that power.[179]

The conformity of the aforementioned Israeli security based measures with provisions of IHL and of IHR law has been vigorously contested by a wide spectrum of UN treaty and non-treaty bodies, as well as International, Israeli and Palestinian human rights organizations and scholars documenting their impact on affected Palestinian communities and individuals.[180]

In the case of the Wall, the Seam Zone and the SSZs, the UN bodies and human rights organizations reject the argument by Israeli authorities that they constitute measures in response to legitimate security concerns. Instead they argue that they are spearheaded by illegitimate political considerations in violation of the law of belligerent occupation. In this regard, they point out that the real motive behind its construction is to consolidate Israeli *de facto* annexation over those parts of the West Bank, where the majority of Israeli settlements and settler population are located.[181] This, they emphasize, undermines the normative pillar on which the law of belligerent occupation has been established, namely that occupation is temporary in nature.[182]

In support of these contentions, critics have alluded to the advisory opinion rendered by the ICJ in 2004. In it, the international court ruled out the idea that the government of Israel can

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[179] "The problem of balancing between security and liberty is not specific to the discretion of a MC of an area under belligerent occupation. It is a general problem in the law, both domestic and international. Its solution is universal. It is found deep in the general principles of law, including reasonableness and good faith." See *Beit Sourik* Judgment, *supra* note 118 at para. 36.

[180] A particularly important article by Israeli scholars detailing the impact of Israeli policies in the oPt on these normative principle has is that of Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley J Int'l L 551. See also Orna Ben-Naftali, "PathoLAWgical Occupation," *supra* note 1.

[181] One useful definition of *de facto* annexation has been provided by Lustick, who notes that the term refers to "the creation of demographic, economic, and infrastructural 'facts' that would bind the areas and their Palestinian inhabitants (including expanded EJ) inseparably to Israel." Ian Lustick, "Israeli State- Building in the West Bank and the Gaza Strip: Theory and Practice" (Winter 1987) 41:1 International Organization 15 at 152. The space has been pointed out as one of the primary geostrategic objectives of the Israeli occupation in the West Bank. See also William Berthomiere, "'Le 'retour du nombre': permanence et limites de la stratégie territoriale israélienne" (2003) 19:03 Revue Européenne des Migrations Internationales 73.

[182] For more information, see Chapter I, section 1.1.

rely on the right of self defense as a legal justification for building the Wall.[183] Moreover, it reiterated the conclusion that the "Wall's sinuous route has been traced in such a way to include within that area the great majority of the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem)."[184] Coupled with the establishment of Israeli settlements, the Wall was also deemed by the ICJ to alter the demographic composition of the occupied territory and to impede the Palestinian people's right to self-determination.[185] Subsequently, the ICJ found that the construction of the Wall and its associated regime (including in and around EJ) is contrary to international law.[186] It then concluded that "Israel is under an obligation to terminate its breaches of international law,"[187] and that "[a]l1 States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction."[188]

In the case of the movement restrictions, the international and local human rights community that have documented the impact of these measures on Palestinians have underlined the disproportionate harm on a number of their fundamental rights, most notably their rights to move freely within the occupied territory, in contravention of international law. In this regard, they have singled out the numerous Israeli-run checkpoints and the associated permit regime that regulates the movement of Palestinians within the West Bank or to/from EJ, as presenting genuine challenges to their ability to realize a large spectrum of rights such as the right to work and to access essential health care, schools and places of worship. Moreover, restrictions have hindered Palestinian farmers from reaching their land that is located in the vicinity of

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[183] See ICJ *Wall* Advisory Opinion, *supra* note 13 at paras 138-142. The position of the Court however was criticized by two dissenting opinions See ICJ *Wall* Advisory Opinion, *supra* note 3, Declaration-Judge Buergenthal *supra* note 17 at 240-245 and in Separate Opinion-Judge Higgins, *supra* note 59 at para 33.

[184] ICJ *Wall* Advisory Opinion, *ibid* at para 119.

[185] *Ibid* at para 122. The Court noted that their right to self-determination is of an *erga omnes* character, i.e. states must ensure that "any impediment resulting from the construction of the Wall to that right must be brought to an end." *Ibid* at para 159.

[186] *Ibid* at para. 163 3(A). 14 Judges voted in favor and 1 judge dissented (Judge Buergenthal).

[187] *Ibid* at para. 163 3(B). 14 Judges concurred and 1 judge dissented (Judge Buergenthal).

[188] *Ibid* at para. 163 (D). 13 judges voted in favor and 2 judges dissented (Judge Buergenthal and Judge Kooijmans). Under Common In its judgment, the Court underscored the relevance of common article 1 to the Four Geneva Conventions, before emphasizing that "[g]iven the character and the importance of the rights and obligations involved, the Court is of the view that al1 States are under an obligation not to recognize the illegal situation resulting from the construction of the wall." See also *ibid* at paras. 158 and 159.

settlements. Other measures that have raised concern include the restriction and/or complete prohibition imposed on Palestinians from traveling on roads used by Israeli commuters, including settlers, to and from the West Bank ('by-pass' roads) or confining them to the use of secondary roads ('fabric of life' roads).

If viewed in tandem with other measures that have been implemented throughout the West Bank, it has been argued that the emerging picture is one in which the occupying power is taking advantage of the natural and physical resources of the occupied territory (including land and roads).[189] Moreover, Israeli authorities have been criticized for effecting long-term changes in the legal and physical landscape of the occupied territory for the benefit of one population group (Israeli settlers) at the expense of the occupied population (the Palestinians). Arguably, this has allowed two separate and disparate legal systems to prevail in the occupied territory: one for the Israeli settlers and one for the Palestinians living in the same territory (i.e. the West Bank).[190] This, it has been underscored, violates a second normative pillar supporting the law of belligerent occupation, namely that an occupying power must maintain that territory as a form of 'trust'.[191]

In the case of EJ, the most dramatic security measure put in place is the construction of parts of the Wall in and around Jerusalem. Given that Israel has *de jure* annexed EJ, it considers it part and parcel of its sovereign territory. Hence, it regards the Wall as a necessary tool for protecting its own citizens and territory from infiltration, and attacks by Palestinians. One of the primary consequences of building the Wall in the Jerusalem area has been the separation of Palestinian East Jerusalemites, who carry Israeli residency Identification Documentation (IDs) from each other, based on whether they live on the 'Israeli side' of the Wall or the 'Palestinian side'. It has also made it difficult for them to fulfill the Israeli imposed requirement that Jerusalem remains the 'center of their life' in order to maintain their ability to

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[189] UN Fact-finding Mission on Settlements Report 2013, *supra* note 29 at para 36.

[190] In 2007, a report by one of the UN special procedures claimed that Israeli practices in the oPt, particularly those denying freedom of movement violated the *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 1015 UNTS 241 (adopted 30 November 1973). See UN Special Rapporteur Report 2007, *supra* note 54 at p. 2. The crime of apartheid is listed as a grave breach by article 85 (4)(c) of the First Additional Protocol, *supra* note 9. It is also listed as a crime against humanity by article 7(1)(j) of the Rome Statute, *supra* note 49.

[191] See Chapter II.

reside in the city. It also has had dramatic consequences on the 'fabric of life' of Palestinian communities on both sides of the structure.

Critics have underscored that documentation of the Wall's impact on these communities suggests that the Wall's route in the area is influenced by the desire to consolidate its *de jure* Israeli annexation of EJ, as well as the *de facto* control over the 'West Bank' Israeli settlements surrounding the city.[192] This would come in addition to demographic considerations of maintaining a Jewish-Israeli majority inside the Israeli self-declared Jerusalem Municipal Boundary (JMB). As such it has been pointed out that its construction in the Jerusalem area undermines the third normative principle on which the law of belligerent occupation rests, namely that occupation does not bestow sovereignty on the occupant in the occupied territory.[193]

For any legal system to enjoy normative coherence, it must emanate from or be explainable by a set of consistent principles and rules.[194] Hence, the question as to the role that the HCJ's adjudication of these security-settlement related petitions plays in promoting or undermining the consistency of these rules and principles, and by consequence the normative foundation of the body of law, is an important one. This is because as some Israeli scholars have explained, in the event that the Court's judgments are found to undermine those normative foundations, the concern is that:

> Law itself becomes infected, and is likely to operate in a manner that will defy the normative purpose on both an individual and systematic level: its application to individual cases (through judicial review) would typically entail a dynamic interpretation designed to advance the interest of the Occupying Power at the expense of the occupied people and it will contribute to and facilitate the formation of an environment (indicative of a state policy) of tolerance towards systematic violations of human rights.[195]

Debate has already started within the scholarly and UN community as to whether or not Israeli policies in the oPt have changed the legal qualification of the situation, so that it can no longer

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[192] This term will be used to refer to the West Bank without EJ.

[193] See Chapter III.

[194] J M Balkin, "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence" (1993) 103:1 Yale LJ 105.

[195] Orna Ben-Naftali, "PathoLAWgical Occupation," *supra* note 1.

be considered (legally speaking) a situation of occupation. Studies and analysis have also advanced the argument that undermining the normative foundations of the law of belligerent occupation by Israeli authorities leaves no choice but to consider it an 'illegal occupation'.[196] Others have underscored that Israel's policies systematically discriminate against the occupied population[197] and that this has ramifications for the legal qualification of the situation.[198]

The next section explains in more detail the specific research objectives that this research seeks to accomplish.

3. Specific Research Objectives

The question of whether or not domestic courts can provide an avenue for effective remedy at the domestic level, including for violations of international law, is an important one. To begin with, the right of victims of violations of human rights and of serious violations of IHL to enjoy equal and effective access to judicial remedy has become well established.[199] IHL also stipulates a clear duty upon the High Contracting Parties to the Fourth Geneva Convention to enact legislation at the domestic level to provide effective penal sanctions, as well as to

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[196] Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation," *supra* note 180.

[197] See UN HRC, *Report of the Special Rapporteur on Human Rights in the Palestinian Territories Occupied since 1967, Richard Falk*, 25th Sess, UN Doc A/HRC/25/67, (13 January 2014) at paras 51-77 [UN Special Rapporteur Report January 2014]. In 2007, the former UN Special Rapporteur on Human Rights in the oPt suggested that the UN GA request an advisory opinion from the ICJ on the legal consequences of the prolonged Israeli occupation. See UN Special Rapporteur Report 2007, *supra* note 54. See also John Dugard and John Reynolds, "Apartheid, International Law and the Occupied Palestinian Territory" (2013) 24:3 EJIL 867.

[198] UN Special Rapporteur Report January Report 2014, *ibid* at paras 81(b) and (c).

[199] See article 11 of the UN Guidelines on Remedy, *supra* note 163. Under IHR law, there is the general obligation of states to provide for an effective remedy to individuals. See article 8 of the UDHR; article 2(3)(a) of the ICCPR; article 13 of the European Convention of Human Rights; article 1(1) of the American Convention on Human Rights; and article 7 of the African Charter on Human and Peoples Rights. It is also provided for under articles 68 and 75 of the Rome Statute of the ICC. Under IHL, article 3 of the Hague Convention IV and article 91 of the First Additional Protocol are said to stipulate a right of compensation for states only. However, with the development of IHR law, the individual has been increasingly recognized as a bearer of right under international law. See also Fritz Kalshoven, "State Responsibility for Warlike Acts," *supra* note 50. See also André Nollkaemper "Concurrence between Individual Responsibility and State Responsibility in International Law" (July 2003) 52:3 ICLQ 615.

investigate and prosecute persons who have committed or ordered the commission of serious violations of the IHL and to suppress all acts that are contrary to its provisions.[200]

Since claims for the violation of international law, including IHL, are typically raised before the forum of the wrong doing state, it can translate into a primary responsibility for national courts to enforce IHL obligations.[201] This urges one to revert to an examination of the important role that judicial interpretation by domestic courts plays in the legal internalization of international human rights and humanitarian law norms.

Given that the right to a remedy presupposes a victim whose primary rights have been violated, the degree to which individuals possess rights depends on two sub-factors: (a) The first factor is the extent to which those interests are directly laid down and protected by the rules of a given legal regime.[202] In the case of the Palestinian civilian population in the occupied West Bank these rights are laid down and protected primarily by international law (i.e. 'humanity' law). (b) The second factor is extent to which provisions of international treaties have been explicitly incorporated into domestic law. This is because incorporation remains one of the fundamental techniques pursued by nation states (including in constitutional democracies) to harmonize their domestic law with international law.[203] Consequently, it is only to the extent to which national legal rules of reception allow international law to be part of its national laws that the former can have an impact at the domestic level.[204]

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[200] States have a duty to investigate and if there is sufficient evidence, to prosecute persons responsible for violations. If the individual is found guilty, the State is also under the duty to punish him/her. The same applies in case of gross violations of international human rights law. See article 4 of the UN Guidelines on Remedy, *ibid*. Actions that must be taken by the state include the enactment of legislation to provide for effective penal sanctions Articles 49, 50, 129 and 146 of the Fourth Geneva Convention, *supra* note 8. See also Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 20-25.

[201] As a way of circumventing any efforts to trigger the state's international responsibility. See Sharon Weill, *The Role of National Court*, *ibid.*

[202] Liesbeth Zegvield "Victims Reparations' Claims," *supra* note 163. This is because rights under international law exist independently of the procedural capacity of the rights holder to enforce those rights pursuant to international law. See Elke Schwager, "Reparation for Individual Victims," *supra* note 165.

[203] See Karen Knop, "Here and There: International Law in Domestic Courts" (1999-2000) 32 NYUJ Int'l L and Pol 501 at 516.

[204] This is explained by the idea that the manner in which states operate and conduct international affairs remains based on the Westphalia model, which presumes the existence of two separate and distinct systems: one

1. — Hence, the first research objective is to analyze the Court's position vis-à-vis the applicability of the major treaties and conventions of the law of belligerent occupation to the oPt, particularly the Hague Regulations and Fourth Geneva Convention. Israel is a common law legal system,[205] in which generally speaking, international custom (and treaties that are declaratory of customary law) become automatically part of domestic law without the need for an act of transformation. Constitutive treaties on the other hand, need transformative legislation before they become applicable at the domestic level.[206]

As a result, government authorities have not challenged the assertion that the Hague Regulations reflect customary international law and have accepted the applicability of these regulations to the conduct of Israeli military and government authorities in the oPt.[207] However, a few months after the beginning of its occupation in 1967, Israeli authorities

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international and one domestic. Therefore, certain rules "determine, as a matter of law, how one legal system interacts, how it treats, the other legal system, including the way in which the normativity emanating from one may be taken into account or utilized in the other." Stéphane Beaulac, "Westphalia, Dualism and Contextual Interpretation: How to Better Engage International Law in Domestic Judicial Decisions" (2007) EUI Max Weber Programme Series Working Paper No. 2007/3 at 5.

[205] While the Israeli legal system combines elements from English common law and European civil law, due to more than 30 years of British rule over Mandate Palestine (1917-1948), Israel's jurisprudence has been primarily impacted by the common law legal culture and principles, particularly in the field of constitutional law. See Eli Salzberger, "Judicial Activism in Israel," *supra* note 108. See Menachem Mautner, *Law and the Culture of Israel*, *supra* note 113 at 37. Israeli case law remains typical of that in countries following a common law legal tradition. Daniel Friedmann, "Infusion of the Common Law into the Legal System of Israel" (1975) 10 Isr LR 324.

[206] Customary law can be directly applied by Israeli domestic courts, without the need for any specific domestic legislation, by virtue of the custom which underlies them. However, this is only the case when there is no contradiction between an international customary norm and an Israeli Statute. See Ruth Lapidoth, "International Law within the Israel Legal System" (1990) 24 Isr LR 451. If a treaty contains provisions that both reflect customary international law as well as new prescriptions, only the former would have automatic effect. See Eyal Benvenisti, "The Attitude of the Supreme Court of Israel towards the Implementation of the International Law of Human Rights" in Benedetto Conforti and Francesco Francioni, eds, *Enforcing International Human Rights in Domestic Courts* (Cambridge: Kluwer Law International, 1997) 207. This takes place unless the law in question is overridden by a Statute. See Eyal Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories" (Winter 1992) 26:1 Isr LR 24. If a contradiction arises between provisions of a domestic law and a customary rule of international law, a court must prefer the former, but try to interpret it, as conforming to international law. See Eshter Cohen, "Justice for Occupied Territory?" *supra* note 89.

[207] In the beginning, Israel hesitated to adopt the position that the Hague Regulations apply. Since these regulations are deemed to apply to the sovereign territory of a state which has been occupied by another State, its authorities feared that recognizing their applicability to the oPt may be interpreted as tantamount to the recognition that the territories are subject to foreign sovereignty. Subsequently, the *de jure* applicability of these Regulations was not challenged, particularly after the HCJ's *Beit El* Judgment. See *Beit El Judgment-Summary*, *supra* note 133. See Nissim Bar-Yaacov, "The Applicability of the Law of War to Judea and Samaria (the West Bank) and to the Gaza Strip" (1990) 24 Isr LR 485.

reversed their previously held willingness to apply the Fourth Geneva Convention. Since then, they have maintained a firm rejection of the *de jure* applicability of that Convention to the oPt.

Several arguments were put forward by these authorities in support of this position. Perhaps the most important one for our discussion is that they consider the Fourth Geneva Convention to be a constitutive treaty and therefore, not automatically incorporated into Israeli law without enforcing legislation.[208] Israeli government authorities have also pointed out that the claims by Jordan to hold a legitimate title to the West Bank (pre-1967) has consistently been contested by them. Consequently, Israeli authorities maintained that this territory cannot be considered as the territory of the High Contracting Party to the Fourth Geneva Convention, as required under article 2 of that Convention.[209] Following the signing of the Oslo Accords, these authorities have furthermore maintained that by virtue of these accords, the situation in the West Bank (and the Gaza Strip) can no longer be qualified as a military occupation,[210] particularly as far as 'Area A' is concerned.[211]

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[208] While Israel ratified the Fourth Geneva Convention on 6 July, 1951, to date it has not been incorporated into domestic legislation by the *Knesset*. See Ruth Lapidoth "The Expulsion of Civilians from Areas Which Came Under Israeli Control in 1967" (1991) 2 EJIL 97. Like the constitutional frameworks of other common law legal systems (including Canada and the USA), Israel has refrained from any explicit incorporation of international law in general, and of international human rights treaties in particular, into constitutional instruments. Yuval Shany, "How Supreme is the Supreme Law of the Land-Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts" 2005 Brook J Int'l L 341.

[209] UN GA "Annex I: Summary Legal Position of the Government of Israel" in *Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13* UNGAOR, 10th Emer Sess, Agenda Item 5, UN Doc A/ES-10/248, (24 November 2003) at para 3, online: Relief Web <http://reliefweb.int/report/israel/opt-report-secretary-general-prepared-pursuant-general-assembly-resolution-es-1013>. This position was first espoused by Professor Yehuda Blum, who argued that because Jordan's annexation of the West Bank in the 1950s was not recognized, by occupying this territory, Israel did not oust a legitimate 'sovereign'. See Yehuda Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria" (91968) 3 Isr LR 279 at 294. Others argued that because of the absence of a legitimate sovereign, the area constitutes "a *res nullius,* and as such, is open to the first lawful entrant to exercise effective occupation" [emphasis by author]. See Allan Gerson, "Trustee Occupant: The Legal Status of Israel's Presence in the West Bank" (1973) 14 Harv Int'l LJ 1.

[210] "[...] on the ground that [by virtue of these agreements] the control of the lives of over 98 per cent of the Palestinians has passed to the Palestinian Authority, which now has full control over the so-called A area which include most Palestinian cities and towns." See UN ECOSOC, *Report of the Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967*, UN ESC, 58th Sess UN Doc E/CN.4/2002/32 (6 March 2002) at para 9, online: UN <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/112/69/PDF/G0211269.pdf?OpenElement> [UN Special Rapporteur Report 2002]. In the position paper of the Israeli MoFA that had been updated in 2015, "[i]n legal terms, the

The official Israeli position in relation to the relevance of article 49(6) of the Fourth Geneva Convention is also worth mentioning. According to a recently updated memorandum by the Israeli MoFA, this provision was drafted in the aftermath of WW II as a response to the forced population transfers that took place in Europe before and during the war. Hence, and quite apart from the question of the de *jure* applicability of the Fourth Geneva Convention the position underscores that:

> [...] the case of Jews voluntarily establishing homes and communities in their ancient homeland, and alongside Palestinian communities, does not match the kind of forced population transfers contemplated by Article 49(6)). [...] The provisions of Article 49(6) regarding forced population transfer to occupied sovereign territory should not be seen as prohibiting the voluntary return of [Jewish] individuals to the towns and villages from which they, or their ancestors, had been forcibly ousted. Nor does it prohibit the movement of individuals to land which was not under the legitimate sovereignty of any state and which is not subject to private ownership."[212]

Interestingly, the conclusions of the Israeli government commissioned Levy Commission that was set up in 2012 to examine the legality of the whole settlement enterprise in the West Bank also stressed that:

> Our basic conclusion is that from the point of view of international law, the classical laws of "occupation" as set out in the relevant international conventions cannot be considered applicable to the unique and sui generis historic and legal circumstances of Israel's presence in Judea and Samaria spanning over decades. In addition, the provisions of the 1949 Fourth Geneva Convention, regarding transfer of populations, cannot be considered to be applicable and were never intended to apply to the type of settlement activity carried out by Israel in Judea and Samaria. Therefore, according to International law, Israelis have the legal right to settle in Judea and Samaria

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West Bank is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations." See Israeli MoFA, "Israeli Settlements and International Law," *supra* note 23.

[211] "[...] Even according to those who argue that the Geneva Conventions apply *de jure* to the West Bank and Gaza Strip territory, that can surely no longer be the case in Palestinian cities, towns and villages, where, according to the Israeli-Palestinian Interim Agreements, a vast degree of governmental powers have already been transferred to the elected Palestinian Authority." See *Statement of the Israeli Ambassador at the UN General Assembly*, reprinted in UN GA, Verbatim Records, UNGA 55th Sess, 68th plenary meeting, UN Doc A/55/PV.68 at 32, online: UNGA <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/755/23/PDF/N0075523.pdf?OpenElement>.

[212] Israeli MoFA, "Israeli Settlements and International Law," *supra* note 23

and the establishment of settlements cannot, in and of itself, be considered to be illegal.[213]

A third point worth highlighting is that after the outbreak of this *Intifada*, the Israeli Advocate General announced that the situation in the oPt qualified as an 'armed conflict short of war'.[214] In response to a petition in 2003, Israeli authorities clarified their position further by noting that given this legal qualification, all actions carried out by the military in the occupied territories would be treated as combat actions.[215] Although this qualification has been criticized by scholars and the human rights community[216] and there has been an 'ebb and flow'

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[213] "The Levy Commission, "Report on the Legal Status of Building in Judea and Samaria" Conclusions and Recommendations, Jerusalem 9 July 2012" (Autumn 2012) 42: 1 J Palest. Stud 179 at 179-180. The Committee was composed of retired High Court Justice Edmund Levy, retired Tel Aviv District Court Judge Tehiya Shapira and former Foreign Ministry legal adviser Attorney Alan Baker. *B'Tselem*, "Levy Committee Report: Where are the Palestinians?" (11 July 2012) online: *B'Tselem* <http://m.btselem.org/setllements/20120711_levy_committee_report>. To date, the recommendations have not been formally adopted. See *Yesh Din*, "From Occupation to Annexation," *supra* note 28. Following the release of the report, Israeli Prime Minister Netanyahu was quoted by government sources to have stated that "[t]his report, in my opinion, discusses the question of the legality and legitimacy of the settlement movement in Judea and Samaria on the basis of the facts and claims that merit serious examination." Israeli MoFA, "PM Netanyahu comments on retired Judge Edmund Levy's Report" (9 July 2012), online: Israeli MoFA <http://mfa.gov.il/MFA/PressRoom/2012/Pages/PM-comments-on-Levy-Report-9-Jul-2012.aspx>.

[214] See UN GA, *Letter dated 4 November 2002 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General* UNGA 57th Sess, UN Doc. A/C.4/57/4 (6 November 2002) at para 5, online: United Nations Information System on the Question of Palestine (UNISPAL) <http://unispal.un.org/UNISPAL.NSF/0/B1099239DEA7D8C185256C6F005899A7>. Consequently, only one regime was deemed applicable namely that of IHL as the *lex specialis*. Orna Ben-Naftali and Yuval Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories" (2003-2004) 37 Isr LR 17 at 33. See also UN HRC, *Consideration of Reports Submitted by States under Article 40 of the Covenant: Initial Report of Israel* UN Doc CCPR/C/SR.1675, (21 July 1998) at para 23 [HRC Committee Concluding Observations 1998]. UN ESCR Committee, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second Periodic Report submitted by State Parties under Articles 16 and 17 of the Covenant: Addendum: Israel*, UN Doc E/1990/6/Add.32, (3 August 2001), at para 5 [ESCR Committee Concluding Observations 2001].

[215] This is because, in their view, "[t]he common feature of all these actions is that they are intended to achieve a supreme interest – safeguarding the security of citizens of Israel – and that they pose an enormous danger to the soldiers who take part therein." The response was made by government authorities in relation to a petition that was filed by *B'Tselem*: (HCJ 9594/03) *B'Tselem et al v. the Judge Advocate General*. See *B'Tselem*, "Void of Responsibility: Israeli Military Police not to Investigate Killings of Palestinians by Soldiers," Report (September 2010) at 14, online: *B'Tselem* <http://www.btselem.org/Download/201009_Void_of_Responsibility_Eng.pdf>.

[216] As one scholar correctly points out, it does not correspond to either an international or a non-international armed conflict, "and thus is a purported novel classification which introduces ambiguity regarding the applicable law." Iain Scobbie, "Prolonged Occupation and Article 6(3) of the Fourth Geneva Convention: Why the International Court Got It Wrong Substantively and Procedurally" Blog of the European Journal of International law: EJIL Talk (16 June 2015), online: EJIL Talk <http://www.ejiltalk.org/prolonged-occupation-and-article-63-of-the-fourth-geneva-convention-why-the-international-court-got-it-wrong-substantively-and-procedurally/>. Another criticism leveled against Israel's qualification of the situation of a

in the intensity of hostilities and in the number of armed attacks against Israeli forces and civilians after 2005, government authorities have continued to qualify the situation in the West Bank as that of an 'armed conflict short of war'.[217]

In terms of the applicability of IHR related treaties, Israeli authorities have also denied the extra-territorial application of human rights obligations arising from IHR conventions to which it is a State Party. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination against Women (CEDAW).[218] After the

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'conflict short of war' is that it treats every action carried out by soldiers as an action in combat even in cases when these acts bear the clear hallmarks of a policing action. See *B'Tselem*, Void of Responsibility," *ibid* at 37. The conduct of hostilities paradigm does not prevent the killing provided that IHL related principles of proportionality, distinction and precaution in attack are fulfilled. In law enforcement on the other hand, lethal force must be used only as a last resort to protect life when other means remain ineffective or incapable of achieving the desired objective. Gloria Gaggioli, ed, "Expert Meeting: The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms," Report (15 November 2013), online: ICRC <https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf>. The distinction between law enforcement and conduct of hostilities has implications for the scope of what is permissible under international law in terms of the resort to force and the human consequences of a military operation. Hence, it is not directly relevant to the focus of this research. However the qualification by Israeli authorities serves to underscore the 'imperative security' mindset that is guiding the actions of Israeli in the oPt.

[217] *B'Tselem*, Void of Responsibility," *ibid*.

[218] On the ground that the term 'jurisdiction' which is found in the major human rights treaties should be interpreted narrowly "so as to cover only persons present within the sovereign territory of State parties or within other areas governed by their [domestic] laws." See Orna Ben-Naftali and Yuval Shany, "Living in Denial," *supra* note 214 at 33. According to the Israel, this position conforms to the jurisdictional principle outlined by the *Vienna Convention on the Law of Treaties,* which stipulates that "[u]nless a different intention appears from the treaty or is otherwise established a treaty is binding upon each party in respect of its entire territory." Article 29 of the Vienna Convention on the Law of Treaties, *supra* note 15. The position has been reiterated in front of various UN treaty monitoring bodies. UN HR Committee, *Summary Record of the 2717th Meeting*, UN Doc CCPR/C/SR.2717, (20 January 2011) at para 19. For a similar position in front of other UN treaty bodies, see UN CERD Committee, *Consideration of Reports, Comments and Information submitted by State Parties under Article 9 of the Convention: Seventh, Eighth and Ninth Report of Israel, Summary Record of the 1250th Meeting*, 52nd sess, UN Doc CERD/C/SR.1250 (9 March 1998) at para 7 [CERD Committee Government Report 1998]. See also UN CAT Committee, *Written replies by the Government of Israel to the list of issues (CAT/C/ISR/Q/4) to be taken up in connection with the Consideration of the Fourth Periodic Report of Israel (CAT/C/ISR/4)*, 42nd sess, UN Doc CAT/C/ISR/Q/4/Add.1 (20 August 2010) at para 7. See also UN ESCR Committee *Consideration of Reports submitted by State Parties under Articles 16 and 17 of the Covenant: Initial Report of Israel*, UN Doc E/C.12/1/Add.27 (4 December 1998) at para 8. As a result, Israel does not provide information in its periodic government reports to the various UN treaty monitoring bodies on the status of implementation of the different international human rights treaties and conventions to which it is a State Party in the oPt. In the Concluding Observations of the CEDAW Committee, the body "regrets the State party's position that the Convention does not apply beyond its own territory and, for that reason, the fourth and fifth periodic reports

signing of the Oslo Accords, Israel also maintained that, by virtue of these agreements, "[i]t lacks actual authority and responsibility in terms of civil or military control over the territory."[219]

Based on the above, it would be pertinent to examine the HCJ's position. In terms of IHL related treaties, the Court has in the past confirmed that the Hague Regulations are indeed declarative of customary international law.[220] At the same time, it has underscored that the MC is only restricted by rules of customary international law as long as there is no contradiction between those rules and domestic statutory law.[221] As we will see in subsequent sections of this research, this point is highly relevant to the manner in which the Court has adjudicated the legality of extending Israeli laws, jurisdiction and administration to EJ.[222]

In the case of the Fourth Geneva Convention, the Court has refused to accept the idea that it has attained customary law status.[223] Traditionally, it has also refrained from addressing the Convention's *de jure* applicability to the oPt.[224] In other instances, the Court has emphasized that since the Israeli government has declared that it would apply the Convention's 'humanitarian provisions,' whether or not it actually applies the Convention *de jure*, is a non

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did not provide any information on the status of implementation of the Convention in the Occupied Palestinian Territories." See CEDAW Committee Concluding Observations 2011, *supra* note 61 at para 12.

[219] HRC Concluding Observations 1998, *supra* note 214 at para 21. See also CERD Committee Government Report 1998, *ibid* at paras 24 and 25. See also ESCR Committee Concluding Observations 2001, *ibid* at para 6.

[220] *Beit El* Judgment-Summary, *supra* note 133. Consequently, they have been deemed part of Israeli domestic law, without the need for an act of transformation (by a statute) to make it binding at the domestic level. However, prior to this judgment, the Court had avoided expressing a view on whether the Hague Regulations apply to the oPt. See Uri Shoham, "The Principle of Legality," s*upra* note 71.

[221] (HCJ 351/80) [1980] *Jerusalem District Electricity Company Ltd. v Minister of Energy and Infrastructure et al* English summary in (1981) 11 Isr YB Hum Rts 354 [*Jerusalem District Electricity Company* Judgment-Summary].

[222] For a discussion of this point see Chapter III, section 2.1.1.2.

[223] (HCJ 785/87) [1988] *Affo et al v. Commander of the IDF et al* at 22-23, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=280> [*Affo* Judgment]; *Beit El* Judgment-Summary, *supra* note 131. For an argument to the contrary, see Theodor Meron, "The Geneva Conventions as Customary Law" (1987) 81 AJIL 348.

[224] Daphne Barak-Erez, "Israel: The Security Barrier-Between International Law, Constitutional Law and Domestic Judicial Review" (July 2006) 4:3 Int J Constitutional Law 540. In the beginning the Court preferred to leave for further review the question of whether the humanitarian provisions of the Convention, which the Israeli government had decided to uphold, do apply. See *Iskan* Judgment, *supra* note 91 at para 11.

issue.[225] As for the relevance of article 49(6) of the Convention, the Court has in the past argued that the article does not reflect customary international law.[226]

In terms of the applicability of IHR law treaties, following the outbreak of the Second *Intifada* the Court characterized the situation in the oPt as a situation of armed conflict and determined that IHL is the *lex specialis*[227] Hence, according to the justices, it is only when a gap (lacuna) exists that this law can be supplemented by IHR law.[228]

More recently, however, the Court has included IHR law treaties (such as the UDHR and the ICCPR) as part of the overall normative framework deemed relevant to its adjudication.[229] However, the Court has stopped short of ruling on the *de jure* applicability of IHR treaties to the occupied territories. A good example is the Court's position regarding the applicability of the ICCPR. In its 2002 *Hamoked* case ruling, the HCJ noted that Israel is a party to the ICCPR and invoked the relevance of article 10 of this Convention, as reflective of customary international law. However, it stopped short of explicitly pronouncing itself on the *de jure* applicability of the treaty to the oPt.[230] This approach, it is argued here, reflects a broader trend, suggesting that: Where it has referred to IHR law, it has not been referred to as an individual normative source for human rights, but as a source that can help in the interpretation of domestic law[231] (i.e. persuasive authority).[232] As a result, few decisions have been rendered by the Court in which it has squarely relied on IHR law or in which it has

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[225] *Ajuri* Judgment, *supra* note 98 at para 364; *Hamoked 2002* Judgment, *supra* note 116. This is despite the fact that the Israeli government has "never definitely clarified this point by specifying which provisions it regards as humanitarian." See Adam Roberts, "What is Military Occupation," *supra* note 174 at 66.

[226] *Elon Moreh* Judgment, *supra* note 134 and *Beit El* Judgment-Summary, *supra* note 133. See David Kretzmer, "The Law of Belligerent Occupation," *supra* note 63.

[227] *Torture 1994* Judgment, *supra* note 98 at para 18.

[228] *Ibid*.

[229] Yuval Shany and Orna Ben-Naftali, "Living in Denial," *supra* note 214.

[230] *Hamoked 2002* Judgment, *supra* note 116 at paras 23-25. See also (HCJ 5591/02) [2002] *Yassin et al v. The Commander of the Kziot Detention Facility et al* at para 11, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/items/6600_eng.pdf>.

[231] Orna Ben-Naftali and Yuval Shany, "Living in Denial," *supra* note 214.

[232] This term has been used to refer to authority which attracts adherence as opposed to a binding obligation. See Patrick Glenn, "Persuasive Authority," (1987) 32:2 McGill LJ (1987) 261. Invoking IHR law as persuasive, international law instruments and texts are often summoned as aids to the contextualization and construction of (municipal and international) prescriptive law. Lourens du Plessis, "International Law and the Evolution of (domestic) Human Rights Law," in Janne Nijman and André Nolkaemper, eds, *New Perspectives on the Divide Between National and International Law* (New York: Oxford University Press, 2005) 321.

dwelled upon the weight that should be given to IHR law in the interpretation of relevant IHL norms.[233]

2. — The second objective of this research is to examine the manner in which the HCJ justices have chosen to give meaning to the principles and to the rules of the law of belligerent occupation, as well as to principles of IHR law. This is because judicial interpretation of these rules and principles influences the manner and extent to which judges can effectively enforce international norms at the domestic level.[234] Here, it must be recalled that the interpretation of an international legal convention must take place with the ordinary meaning of its terms in their context and in light of its object and purpose.[235]

No doubt, the law of belligerent occupation, with its rules and principles, has been criticized for its inability to comprehensively address the challenges that arise from the prolonged nature of Israel's occupation of the West Bank.[236] It is also safe to assume that when interpreting IHL rules and principles, the Court has had to grapple at times with 'hard cases' in which its judges were faced with a lacuna. However, assuming that principles constitute an important tool for legal interpretation, has the HCJ's method of judicial interpretation remained faithful to the objectives of relevant IHL and IHR treaties and conventions? In answering this question, one

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[233] Orna Ben-Naftali and Yuval Shany, "Living in Denial," *supra* note 214.

[234] However, "a violation of international law may result from the misapplication of international law by judges as much as by other State officials." See Karen Knop, "Here and There: International Law in Domestic Courts," *supra* note 203 at 516. See also Eyal Benvenisti, "Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on The Activities of National Courts and the International Relations of their State," (1994) 5 EJIL 423.

[235] When the meaning is left ambiguous or obscure, or leads to a result which is absurd or unreasonable, supplementary sources such as the negotiating history, official commentary, preparatory work of the treaty or the circumstances of its conclusion can be resorted to as a way of identifying the intentions of the parties. See Article 27, 28 and 31 of the Vienna Convention on the Law of Treaties, *supra* note 15. See also Georg Schwarzenberger, "Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Convention on the Law of Treaties" (1968) 9 VA J Int'l L 1. See also Sharon Weill, *The Role of National Courts*, *supra* note 200.

[236] Prolonged occupation has been used by one scholar to refer to occupations that have lasted more than five years and where there is a quasi-absence of hostilities. Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967" (January 1990) 84:1 AJIL 44. However, it must be underlined that neither conventional nor customary IHL distinguishes between short and long-term occupation and that there is no separate legal category of 'prolonged occupation'. At the same time, it has been suggested that the duration of the occupation, affects the scope of application of IHL and of IHR law. This position has also been endorsed by the HCJ. See Vaois Koutroulis, "The Application of International Humanitarian Law and International Human Rights Law in Situations of Prolonged Occupation," *supra* note 67.

will assume for a moment that the theory advocated by former Justice Barak provides useful insights as to the reasoning followed by the Court.[237]

Barak considered the central role of a judge to be that of a retriever of the ultimate purpose of the legal text.[238] This requires that the interpreter (the judge) examines the relationship between the text's subjective[239] and objective purpose.[240] In cases where the subjective and objective purposes conflict (such as in the case of 'hard cases') and where the interpretation of the legal text does not lead to an unequivocal conclusion, the judge has discretion[241] to determine which of these elements must be accorded more weight.[242]

Similarly to Dworkin, he also believes that judicial reasoning must be based on fundamental moral values, such as justice, fairness and procedural due process. In his rights-based theory of interpretation, moral considerations amount to principles, something which courts must resort to when reasoning in 'hard cases'.[243] This is necessary, Dworkin argues, so that the judge can provide the best moral justification (i.e. the one that is coherent with the best theory of institutional history of the legal system) for his decision.[244] Where judges are discovering an already existing law, they must confine themselves to the considerations of the principle.

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[237] This is called the theory of Purposive Interpretation. See Aharon Barak, *Purposive Interpretation in the Law* (New Jersey: Princeton University Press, 2005). See also Aharon Barak, *The Judge in a Democracy* (New Jersey: Princeton University Press, 2008)

[238] This is a legal concept and refers to the goals, interests, and values that a text seeks to realize. See Aharon Barak, *The Judge in a Democracy*, *ibid.*

[239] By subjective elements, Barak refers to the intent of the specific author who drafted the text. Their source is the legal text itself, as well as the circumstances surrounding its creation (i.e. the social/historic context, jurisprudence, precedence). *Ibid*.

[240] By objective elements, he refers to the intent that a reasonable author (at the time the text was written) would have intended. At a higher level of abstraction, they would also reflect the fundamental values of the legal system. This is derived from the text itself, from the values of the legal system, as well as from comparative law. *Ibid*.

[241] Barak defines judicial discretion as "the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful." See Aharon Barak, *Judicial Discretion* (New Haven: Yale University Press, 1987) at 7.

[242] Thomas, Balmer, "What's a Judge to do?: Book Review of *Purposive Interpretation in Law* by Aharon Barak," (2006)18:1 article 4 Yale JL and Human 139.

[243] According to Dworkin, "rules are applicable in an all-or-nothing fashion, whereas principles have the extra-dimension of weight." See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 22-28. His theory holds that law consists not only of rules, but also of principles, thereby rejecting Hart's 'rule of recognition' as the single ultimate test for law. See J L Mackie, "The Third Theory of Law" (Autumn 1977) 7: 1 Phil. and Pub Aff 3.

[244] Ronald Dworkin, *Taking Rights Seriously*, *ibid* at 123-128.

Doing otherwise, he underscores, would result in sacrificing someone's rights in return for considerations of policy.[245] Taking into account principles, it is argued, also helps the judge to determine 'what the law is' on a particular question, which is always discoverable in principle.[246]

This leads one to assume that taking into account principles, is a regular feature of the Court's method of interpretation.[247] However, it is maintained here that whether or not the HCJ takes into account principles is not the contentious aspect of the manner in which the Court has adjudicated petitions by Palestinians from the oPt. Rather, it is a number of other processes that continue to characterize the Court's adjudication of petitions filed by Palestinians:

(a) — The first one concerns the meaning and content that judges have chosen to give to legal rules, principles and notions of the international law of belligerent occupation that are particularly relevant to the petitions examined here. One of them is the concept of 'local population' whose interests must be taken into consideration under article 43 of the Hague Regulations.[248]

Another element that is pivotal for an understanding of the Court's interpretation, relates to its interpretation of the notion of 'military necessity' exception found in specific provisions of the

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[245] This is not necessarily one and the same thing as saying that the judge is faced with mutually exclusive legal options (the way Hart sees it). Often it is not a clear cut difference between one and the other legal argumentation. *Ibid*.

[246] *Ibid* at 81, 279-290 and 286-287. It is therefore the duty of the judge to discover it. J.L. Mackie, "The Third Theory of Law," *supra* note 233.

[247] In one judgment, the HCJ explained that, "[t]he formation of rules of interpretation is not effected in a vacuum; rather it is adapted, as stated, to the system of law in which and from which these rules stem. The application of the said rules, in any concrete case in which the court is asked to give content to an enactment warranting interpretation, is carried out, as is accepted here, by applying judicial discretion. *Applying judicial discretion is necessary, mainly, where clarification of the wording of an enactment open to interpretation is required in the context of a decision regarding the weight to be given the words of the text, in determining the definition and scope of the legislative purpose* [emphasis added]." See *Affo* Judgment, *supra* note 223 at para 11. At the same time, it is important to underscore that much criticism has been leveled against Barak's method of interpretation, particularly for granting judges a broad power of discretion at every stage of the interpretive process. This discretion, some have argued, has empowered judges to infuse new values into legal texts through interpretation, and to legislate instead of interpreting a legal text. See Thomas, Balmer, "What's a Judge to Do?" *supra* note 242.

[248] This is a key provision of the law of belligerent occupation and underlines the considerations which can lawfully guide the actions of the MC when fulfilling his duty to restore and maintain public order and civil life in the occupied territory. This article features prominently in the discussions in Chapter II of this research.

Hague Regulations and the Fourth Geneva Convention.[249] However, since military necessity exempts a measure from abiding by certain rules of conduct that are prescribed by specific IHL rules, these exceptions must be interpreted in a restrictive manner.[250] Moreover, where the goal is itself illegitimate - i.e. where there is an absolute prohibition - whatever measures are adopted in pursuit of that goal are also illegal.[251] Hence, the Court's interpretation of military necessity has important implications for the extent to which measures implemented by Israeli authorities can (in the Court's view) be considered 'lawful' responses to alleged security concerns in the occupied West Bank.

(b) — The second process is the manner in which the Court has conducted the balancing act between the competing interests.[252] When explaining how the judge should exercise his/her judicial discretion Barak underscored that the judge must be faithful to the values of the legal system as a whole of which he is part and in line with society's fundamental conception.[253] Which legal system has the Court chosen as the lens through which to adjudicate the competing interests of settlers, Palestinians and Israeli government authorities? It is maintained here that the answer to this question is significant in explaining the outcome of this adjudicative process. By consequence, it also determines whether at the end of the day, the HCJ upholds the domestic RoL or the international RoL.

In this regard, there is no doubt that the HCJ has made extensive use of Israeli statutes, legal and social values and cannons of interpretation[254] when adjudicating the competing interests.

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[249] Such as article 23(g) of the Hague Regulations, *supra* note 7 and article 53 of the Fourth Geneva Conventions, *supra* note 8 that have been invoked by the Court when examining the legality of land requisition orders by military authorities for the purpose of constructing the Wall.

[250] As a way of reinforcing the protection that has been extended by these treaties. See Marco Pertile, ""Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory": A Missed Opportunity for International Law?" (2004) 14:1 Italian YB Int'l L 121 at 136. Emphasis by author in the Original Title.

[251] Nobuo Hayashi, "Requirements of Military Necessity," *supra* note 138.

[252] In this regard, former Justice Barak has argued that balancing allows for the determination of the correct decision through a careful calculation of the competing values. Alon Harel, "Skeptical Reflections on Justice Aharon Barak's Optimism" (2006) 39 Isr LR 261.

[253] Aharon Barak, *Judicial Discretion*, *supra* note 241 at 125-126.

[254] According to former Justice Barak, balancing is a normative process by which one attempts to resolve a clash between conflicting values. Alon Harel, "Skeptical Reflection," *supra* note 252. In many constitutional rights adjudication cases, courts explicitly undertake a weighing or balancing of parties' rights or interests in two steps. The first involves a determination of whether a constitutionally-protected right has been infringed. The second involves an examination of whether the alleged infringement is justified. This balancing exercise is

One of the most important tools that the Court has resorted to is the balancing act, during which the justices have relied heavily on the proportionality analysis as grounded either in Israeli administrative or constitutional law. In all of the judgments examined here, the HCJ has considered the extent to which a given security based measure can be deemed proportionate in its impact on the fundamental rights of the petitioners. As Kretzmer points out, the Court has usually conducted this assessment as part of a wider evaluation of the extent to which the MC has adequately balanced between the different considerations that must be taken into account when seeking "to restore, and ensure, as far as possible, public order and safety" (as stipulated by article 43 of the Hague Regulations).[255] Hence, when assessing whether the MC has successfully balanced between these different considerations, the Court has often adopted the following approach: It begins by emphasizing the relevance of the IHL based principle of proportionality as part of the overall legal framework that is pertinent for its efforts to assess whether the MC has successfully balanced between the different considerations that can legitimately guide his actions under article 43.

However, when conducting the actual assessment of his ability to balance between the security concerns of Israeli authorities and the interests/rights of the Palestinians, the Court has grounded its proportionality analysis in Israeli administrative law. In other instances, particularly those involving a clash of interests and/rights of Israeli settlers and of Palestinians, the HCJ has invoked a proportionality analysis that is grounded in Israeli constitutional law. In fact, it is not uncommon to find references by the Court to Israel's basic laws when addressing the rights of both Palestinians and Israelis in the occupied territory. Thus, while the Court reiterates that the Palestinian inhabitants of the West Bank (save for those living in annexed EJ) are 'protected persons' who have rights that are afforded to them under the law of

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not restricted to the constitutional context. See Paul-Erik Veel, "Incommensurability, Proportionality and Rational Legal-Decision-making" (2010) 4:2:2 Law and Ethic of Human Rights 178. This notion of judicial balancing has come all the more under the spotlight during the post 9/11 'war on terror', during which the highest courts in counties such as the US and the UK rendered significant decisions that were the product of judicial balancing. In the US examples of such cases include *Rasul v. Bush*, 542 US 466 (2004); *Hamdi v. Rumsfeld*, 542 US 507 (2004) and *Rumsfeld v. Padilla,* 542 US 426 (2004). In the UK, see *A (FC) v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2. In Canada, see *Suresh v. Canada* 2002 S.C.C. 1 and *In the Matter of an Application under Section 83.28 of the Criminal Code*, [2004] S.C.C. 42.

[255] David Kretzmer, "The Law of Belligerent Occupation," *supra* note 63. For more analysis, see the *Beit Sourik* Judgment, *supra* note 118 discussed in Chapter I.

belligerent occupation, it has often grounded its assessment of whether or not the MC has balanced between the competing rights of Israelis and Palestinians in principles of Israeli constitutional law.

Although this appears, at first sight, to be a welcome development, some aspects of the constitutional balancing process raise concerns about the suitability of this approach to the Israeli-Palestinian context of occupation. (i) The first aspect is that the Court has upheld the applicability of the basic laws, not only to Israeli (non-citizens) residing in Israel proper,[256] but also *in personae* to Israeli citizens residing in the oPt.[257] At the same time, it has refused to rule on the *de jure* applicability of this law to Palestinians living in the same territory.[258] This, it has been underscored, comes in response to the concern that "the political ramification of granting Palestinian inhabitants of the Territories rights and privileges under Israeli constitutional legislation, [...] would at least require implied recognition of the Israeli rule inherent in such a course of action."[259] (ii) The second aspect is that the right to equality is not a right that has been listed in the Basic Law: *Human Dignity and Liberty* as a constitutionally

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[256] See section 6 of Basic Law: *Human Dignity and Liberty*, *supra* note 121 and section 3 of Basic Law: *Freedom of Occupation*, *supra* note 122. The only right limited to Israeli nationals is that of entering Israel from abroad. See footnote 25 of Daphne Barak-Erez, "Israel: The Security Barrier," *supra* note 224 at 551. This is because as a matter of principle, Israeli legislation was, traditionally considered to be territorial. See Aharon Barak, *Purposive Interpretation in the Law*, *supra* note 237.

[257] The Court took note of this element when considering whether or not Israeli settlers who had been forcefully removed from the Gaza Strip during the implementation of the Disengagement plan were entitled to compensation schemes. (HCJ 1661/05) [2005] *Gaza Coast Regional Council v. Knesset*, unofficial English translation of extracts by Avichay Sharon, (December 2013), on file with author at para 13.

[258] In a controversial 2006 ruling regarding the legality of an amendment to the *Citizenship and Entry into Israel Law*, the Court refrained from examining whether the basic laws were applicable to the Palestinian residents of the oPt. The petition challenged the legality of *Citizenship and Entry into Israel Law* (Temporary Order) Law, 2003, online: *Knesset* <https://www.knesset.gov.il/laws/special/eng/citizenship_law.htm>. As amended in 2005 and 2007, the law suspended the possibility, with certain rare exceptions, of family reunification between an Israeli citizen and a person residing in the oPt. In its judgment, the Court noted that even where the amendment was found to infringe on those aforementioned rights, the infringements meet the standards set by the basic laws. It subsequently dismissed the petition. See (HCJ 7052/03) [2006] *Adalah et al v. Minister of Interior et al*, official English translation, online: HCJ <http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf>. See also Daphne Barak-Erez, "Israel: Citizenship and Immigration Law in the Vise of Security, Nationality and Human Rights" (2008) 6:1 Int'l J Const L 184-192.

[259] Uri Shoham, "The Principle of Legality," *supra* note 71 at 268. Another reason is the rights and freedoms protected by those Laws are the result of the "democratic nature of Israeli society [...] [from which] [t]he Territories [...] are far removed." *Ibid* at 267.

protected one.[260] (iii) Thirdly, the purpose of the aforementioned basic law is "to protect human dignity and liberty in order to establish in the Basic Law the values of the State of Israel as a Jewish, and democratic state,"[261] two values which the Palestinians of the oPt cannot affiliate with.

Arguably, the Court's decision to invoke principles of Israeli administrative and constitutional law promotes the substantive and procedural aspects of the domestic RoL and affords some level of 'domestic' protection to the rights or interests of the Palestinians that are being addressed in court. However, the question that this research seeks to grapple with is whether the Court's judicial approach is indeed capable of providing meaningful opportunities for upholding the substantive rights of the Palestinians as afforded to them under international law. Moreover, the research focuses on how the Court conducts the proportionality analysis with its three sub-tests (under Israeli constitutional an administrative law) and offers concrete examples of why these tests may or may not be limited in what they can achieve in terms of

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[260] David Kretzmer "The New Basic Laws on Human Rights," *supra* note 123. On one hand, a 1994 amendment to this basic law states that the principles enunciated in Israel's *Declaration of Independence*, including equality, are part of the values protected by the basic laws. Relying on the concept of human dignity, the HCJ recognized rights that were omitted from these laws such as equality. Thus, numerous landmark decisions delivered by the HCJ since 1994 appear to demonstrate an increased willingness on its behalf to apply the equality principle and to interpret ordinary laws in accordance with this principle. See Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19:4 EJIL 655. On the other hand, "an extended bench of the Supreme Court has not recognized the principle of equality as a "constitutional right" in any written decision to date." See "Historical Background: The Palestinian Minority in the Israeli Legal System," online: *Adalah* <https://archive.is/VllVw#selection-493.1008-493.1947>.

[261] Article 1 of the Basic Law: *Human Dignity and Liberty*, *supra* note 121 (also referred to as the 'purpose' section). This attracted criticism on the ground that it leads to a significant change in the balance of power between the values of liberalism and Judaism. See Menachem Mautner, *Law and the Culture of Israel, supra* note 113. According to another scholar, the purpose section attributes to the State values that are embedded in the State rather than society, a situation that is unacceptable in democratic societies. See Don Avnon, "The Israeli Basic Laws' (Potentially) Fatal Flaw" (1998) 32 Isr LR 535. To date, at least 11 of those basic laws also express a similar fundamental desire to preserve the 'Jewish character' of the State. In November 2015, the Israeli cabinet approved the Basic Law: *Israel has the Nation State of the Jewish People*. The purpose of this legislation is to constitutionally determine the identity of the State of Israel as the nation state of the Jewish people. It has been criticized for entrenching the subordination of the democratic component of the State to the Jewish component. See Moran Azulay, "Government Passes Controversial Jewish Nationhood Bill," *Ynet* News (23 November 2014). See The Center for the Renewal of Israeli Democracy- *Molad*, "Basic Law: Israel-Nation State of the Jewish People," online: *Molad* <http://www.molad.org/images/upload/researches/Basic-Law-Jewish-State-English.pdf>. For a Hebrew version of the Bill, see *Adalah*, "Discriminatory Bills in the 19th Israeli Knesset," online: *Adalah* <http://www.adalah.org/uploads/oldfiles/Public/files/English/Legal_Advocacy/Discriminatory_Laws/Discriminatory-Bills-19th-Knesset-October-2013.pdf>.

meaningful remedy, for alleged violations of rights that are first and foremost protected in international law.

(c) — The third process is the manner in which the Court has interpreted the government's assessment of an alleged security threat as constituting a fact. In this regard, the HCJ has adopted the English established practice of applying to the executive branch of the government for a conclusive assessment of facts.[262] However, it must be underscored that the Court has no fact-finding machinery of its own to acquire the necessary complex information. This confines the HCJ to the information it receives from parties to a case, and which the Court often considers to be information that lies within the experience and expertise of government departments or branches other than itself, "especially in foreign affairs and security matters."[263]

Scholars who have criticized the Court's approach point out that since Israeli government and military authorities have a margin of reasonableness within which they can operate; the Court only intervenes if authorities have exceeded these margins.[264] Moreover, since the Court applies to the executive branch of the government for a conclusive assessment of facts,[265] this makes it difficult for Palestinians to challenge its legal authority. This is all the more the case since the burden of proof – that the authority in fact failed to act in a reasonable manner – rests

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[262] Talia Einhorn, "Israel," *supra* note 117 at 300.

[263] Yaacov Zemach, *Political Questions in the Courts: A Judicial Function in Democracies Israel and the United States*, (Detroit: Wayne State University Press, 1976) at 183.

[264] Eyal Benvenisti "Introduction to Israeli Administrative Law," *supra* note 114. See also Emanuel Gross, "Democracy in the War against Terrorism," *supra* note 73.

[265] Talia Einhorn, "Israel," *supra* note 117 at 300. In the landmark case of *Elon Moreh*, the Court received conflicting expert opinions, one from the serving Chief of the General Staff regarding the security of the 'Area', and the other one from the former Chief of the General Staff. According to the Court "[i]n matters of security, when the petitioner relies on the opinion of a security expert and the respondent relies on the opinion of the person who is both an expert and the person in charge of the state of security in the state, it is natural that special weight is given to the opinion of latter." *Elon Moreh* Judgment, *supra* note 134 at 26. However, unlike in the *Beit El* judgment, the Court upheld the petition. This is because the Israeli Ministry of Defense himself had contradicted the information provided by the Chief of the General Staff (on behalf of government authorities) that the decision to confiscate a Palestinian privately owned plot of land for the construction of the settlement was indeed for security reasons. Thus the fact that "even the experts who are charged with state security are divided regarding the necessity of settlement in the area in question" is what forced the Court to uphold this particular petition and cancel the confiscation order. *Ibid* at 24. See also Yossi Wolfson, "Seizure of Private Land for the Purpose of Building Settlements: HCJ 390/79 Dweikat v. Government of Israel (judgment rendered October 22, 1979)," Court Watch (1 January 2013), online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=Documents1240>.

on the petitioner.[266] Since the Court tends to defer to the executive's judgment that a particular situations amounts to a genuine and imminent security threat, the research will examine the implications that the Court's stance vis-à-vis the executive's interpretation of the law has had for the outcome of the petitions.[267]

(d) — A forth process is the manner in which the Court has invoked other techniques of judicial interpretation when adjudicating petitions by Palestinians that have challenged the legality of settlement construction under international law. One position that has frequently been adopted by the Court is that the issue of settlements is a political question and therefore non-justiciable,[268] or that ruling on this legality is not relevant to the petition under consideration.[269] Although the Court has displayed a general willingness related to adjudicating settlement related petitions, where violation of private property rights were at stake, its general refusal to consider the legality of the settlements enterprise justiciable

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[266] Talia Einhorn, "Israel," *supra* note 117. An unreasonable act is one that a reasonable officer weighing all different considerations would not have reached. Eyal Benvenisti "Introduction to Israeli Administrative Law," *supra* note 114. Reiterating a conclusion, it has made in a judgment related to Israel proper (HCJ 6396/96) [1999] *Zakin v. The Mayor of Beer Sheva*, the Court emphasized that "[i]ndeed, an administrative authority seeking to enforce the law enjoys, like any administrative authority, the presumption of validity [...]. It stands to reason that only in rare cases said presumption will be refuted and selective enforcement substantiated. Firstly, usually an administrative authority which has the power to enforce the law, will exercise the power based on pertinent considerations in view of the underlying purpose of the law. Secondly, even when there is a concern that selective enforcement was applied, it is often difficult to prove that the administrative authority exercised its power to enforce the law based on an extraneous consideration or for the attainment of an inappropriate purpose. However, in the rare case, in which selective enforcement is proved, it should have legal-Ramifications." (HCJ 5290/14) [2014] *Qawasmeh et al v. Military Commander of the West Bank Area*, at para 30, online: *Hamoked* <http://www.hamoked.org/files/2014/1158616_eng.pdf>.

[267] Eyal Benvenisti, "Judges and Foreign Affairs," *supra* note 234.

[268] The Court ruled in one petition filed by *Peace Now* concerning settlements, that it should be denied on the grounds that the petition is not justiciable for three reasons: (i) adjudication by the Court would amount to an intervention in questions of policy that are in the jurisdiction of another branch of government; (ii) there is no concrete dispute at stake and (iii) thirdly, the issue is predominantly political in nature. See for example (HCJ 448/91) [1993] *Gavriel Bargil et al v. Government of Israel et al* printed in (1992) 4 Isr LR 158. See also Yoav Dotan, "Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada" (1999) 33:2 Law and Soc'y Rev 319. However, this argument is unconvincing, because the rules of IHL are legal rules, "compliance to which is a legal and not a political issue." Elke Schwager, "Reparation for Individual Victims," *supra* note 165 at 648.

[269] *Elon Moreh* Judgment, *supra* note 134. However, where the petition challenges related practices, such as the alleged illegal expropriation of Palestinian privately held property, the Court has explained that "[...] it's clear that issues of foreign policy-like a number of other issues-are decided by the political branches, and not by the judicial branch. However, assuming [...] that a person's property is harmed or expropriated illegally it is difficult to believe that the Court will whisk its hand away from him merely since his right might be disputed in political negotiations." *Beit El* Judgment-Summary, *supra* note 133 cited in *Torture 2002* Judgment, *supra* note 91 at para 50. *Elon Moreh* Judgment, *supra* note 134.

constitutes an important 'piece in the puzzle' in explaining the final outcome of its adjudication.

3. — A last element which this study examines is the overall success rate of these petitions.[270] If one excludes out-of-court settlements as a form of achieving effective redress,[271] the research examines the extent to which petitions adjudicated by the Court have been upheld. To date, a statistical examination of the judicial review exercised by the HCJ reveals that traditionally, petitions filed on behalf of Palestinians have a low chance of getting upheld by the Court, particularly if and when they challenge the legality of security-based measures.[272] Arguably, this is because government agencies enjoy extremely high success rates (as repeat players) in litigation that reaches final judicial dispositions.[273] By identifying the percentage of petitions that have been upheld or rejected, the research seeks to provide some basic insights as to whether this remains the case when the major issue at stake is, strictly speaking, the alleged security of the nationals of the occupying power (and not only that of its military forces). Since petitioning the Court is a relatively expensive endeavor for many Palestinians, whether or not the 'fortunate' petitions (those that see their day in court) are rejected or upheld, is an important indication of the extent to which the Court can provide remedy in the face of alleged violations resulting from state policies that have a severe and long lasting impact on the collective and individual rights of the Palestinians.

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[270] I.e. whether as a final outcome, the petition was upheld or rejected by the Court.

[271] It has been argued that in the out-of-court settlements, the success rate is considerable higher than what has been achieved from cases that have been exclusively disposed of through a judicial decision. See Yoav Dotan, "Judicial Rhetoric," *supra* note 268. One reason for the prominence of this form of settlement is that it has allowed the Court to articulate and implement a certain liberal discourse of individual rights while evading an institutional collision with the executive. Gad Barzilai, "How Far do Justices Go: The Limits of Judicial Decisions." (2004) Crit Issues in Israeli Society 55.

[272] According to one study, from 1967-1986 the HCJ has accepted only 1% of petitions. Ronen Shamir, "Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice" (1990) 24 Law and Soc'y Rev 781. Data cited by other Israeli scholars regarding judgments rendered by the Court until 2005, generate the same statistics, with the exception of the years during which the Oslo peace process was 'alive and well' (1993-1996). During that period, the percentage of petitions accepted by the HCJ reached 3%. See Orna Ben-Naftali, "PathoLAWgical Occupation," *supra* note 1 at 130 (footnote 8).

[273] The idea that lawyers are 'repeat players' was proposed by Marc Galenter, "Why the Haves Come out Ahead: Speculations on Social Change," (Autumn 1974) 9:1 Law and Soc'y Rev 95. Reasons include greater resources, expertise and better knowledge of the judicial process. In addition, legal doctrines that favor their position, such as that the courts normally defer to the position of agency officials, as well as the institutional relations of the latter with the court, have all made important contributions to this outcome. See Yoav Dotan, "Do the "Haves" Still Come Out Ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice" (1999) 33 Law and Soc'y Rev 1059.

The next section gives a brief overview of the main elements that have spearheaded the researcher's interest in this topic.

3. Choice of the Particular Theme

Several features of the subject area are responsible for sparking an interest in the overall purpose and objectives of this research topic. (1) The first one is that Israel's occupation of the West Bank exhibits a number of simultaneous trends: (a) it represents the longest military occupation in modern history; (b) its government sponsored settlement activity is significant in terms of intensity and the results it has generated on the ground; and (c) no other domestic court of an occupying power has adjudicated so many petitions related to the legality of measures that have been implemented throughout a situation of occupation.

(2) A second and often overlooked feature sparking interest in this particular topic is that the settlement policy has had the most serious consequences for the daily lives and fundamental rights of the Palestinian civilian population.[274] At the same time, it has been assumed, both theoretically and practically speaking, that the HCJ constitutes the first line of defense against infringements on the rights of the occupied population against encroachments by the executive and legislative powers. The judicial process in many ways is an opportunity for the Palestinian petitioners to tell 'their story' and express their narrative.[275] By contrast, the judgments offer useful insights not only on how the Court interprets 'the law' but also its position vis-à-vis this narrative.

In the meantime, one other ongoing discussion which lawyers and civil society organizations are having, concerns the usefulness of continuing their litigating on behalf of Palestinians in front of the HCJ. This point of interest is a direct consequence of the lively and regular debates between and amongst lawyers and human rights activists regarding the extent to which the

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[274] The detailed account provided in the research of the arguments made by the petitioners as well as the impact of the security based measures was deliberate in order to shed light on the very significant and quite often long-lasting impact on the day-to-day lives of millions of 'real people'.

[275] As one author explained, there is a need to "recognize the pervasive presence of narrative throughout the law: the many layers of storytelling involved in any adjudication before the law, the way stories are told and retold to different effects, the omnipresence of narrative used for both majoritarian and counter-majoritarian purposes." See Peter Brooks, "Narrativity of the Law" (2002) 14:1 Law & Literature 1 at 2.

HCJ is capable of providing a venue for effective judicial remedy at the domestic level and what should be done about it.[276]

(3) As well as this, a literature review regarding the performance of domestic courts vis-à-vis petitions that have challenged the legality of security-based measures, confirms that a wide range of constraints undermine the enforcement by courts of international law at the domestic level. For example, it remains true that domestic courts are less likely to challenge the executive in times of crisis and more likely to uphold the latter's security assessment, at the expense of individual human rights.[277] In addition, it has been argued that courts, like the HCJ, often share the narrative and language used by the executive branch for the origins and features of the conflict.[278] Moreover, they contend with important institutional limitations[279] and remain sensitive to national interests[280] and to public opinion.[281] This explains why judges have proven extremely deferential to actions by the political branches, including on national

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[276] The researcher worked in the occupied West Bank from 2003-2007 during which she has witnessed some of those debates and discussions first hand.

[277] Many courts treat statements of the executive, as 'facts' that must be treated as evidence. Anglo-American practice is inclined to treat it as conclusive. See Felice Morgenstern, "Judicial Practice and the Supremacy of International Law" (1950) 27 Brit YB Int'l L 42.

[278] "The Israeli legal regime is largely subject to the powerful grip of the country's national security narrative." See Barak Cohen, "Democracy and the Mis-Rule of Law: The Israeli Legal System's Failure to Prevent Torture in the Occupied Territories" (2001) 12 Ind Int'l and Comp L Rev 75 at 105. According to one scholar (and current judge of the HCJ), the Court's role as a narrator of history "represents the hidden side of the State's official history." This narrative is also deeply entrenched in the Jewish Zionist collective memory and vision. See Daphne Barak-Erez, "Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court," (2001) 16:1 CJLS 93 at 101. See also Gad Barzilai, "How Far do Justices Go?" *supra* note 271.

[279] In the case of the HCJ, the lack of specific entrenchment provisions for the Basic Law: *Human Dignity and Freedom* weakens its ability to withstand direct legislation aimed at constricting human rights. See Guy Carmi, "A Constitutional Court in the Absence of a Formal Constitution," *supra* note 106. See also Amos Shapira, "Judicial Review without a Constitution: The Israeli Paradox" (1983) 56 Temp L Q 405; Alex Mills and Tim Stephens, "Challenging the Role of Judges in Slaughter's Liberal Theory of International Law," (2005) 18 Leiden J Int'l L 1.

[280] Consequently, judges are reluctant to apply international norms whenever such an application is considered to impinge on national interests. Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 EJIL 159. Arguably, this judicial resistance/reluctance to use international legal standards "peaks in cases relating to matters of long-standing areas of sensitivity within that jurisdiction itself." See Fiona de Londras, "Dualism, Domestic Courts and the Rule of International Law" in Mortimer Sellers and Tadeusz Tomaszewski, eds, *The Rule of Law in Comparative Perspective* (New York: Springer Science and Business Media, 2010) 217.

[281] Daphne Barak-Erez, "Collective Memory," *supra* note 271. See also Gad Barzilai, "Between the Rule of Law and the Laws of the Ruler," *supra* note 106.

security matters.[282] Proponents of a sociological approach to law even go as far as suggesting that the role of courts has focused on granting legitimacy to government actions and on maintaining the integrity of the legal order itself, as well as the ideological conditions upon which legal dominance depends.[283] Moreover, a survey of the behavior of large number of national courts, in cases relating to the application of the law for belligerent occupation shows that, despite the seemingly independent application of its rules and principles, courts have often manipulated the law to reach outcomes that are in line with national interests.[284]

These constraints remain true in the case of the HCJ. While perceived as an 'activist' court when adjudicating Israeli cases, the record suggests that when adjudicating Palestinian petitions, it has adopted a different position regarding its role and relationship to the government. Here, it has been argued that although the Court considerably broadened the scope of its judicial review, the margin of appreciation that it has afforded to government authorities has in practice, ensured that the major political decisions have remained free from review.[285]

(4) Moreover, it has been maintained that supreme courts, including the HC, are entrusted with the development and maintenance of the normative coherence of their legal orders, by consistently reflecting in their adjudication the fundamental values of their legal systems and through their approach towards domestic and international law.[286] However, one hotly debated topic concerns the internal effect of ratified but unincorporated international treaties on the domestic laws of a dual legal system. In this regard, it has been argued that judges hesitate to introduce international legal standards into domestic law (ones that have not yet received legislative acceptance) for two reasons: (i) it is perceived by some critics as an act that undermines the populist democratic ideal of contemporary liberal democracies, which seeks to

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[282] Mark Tushnet, "Controlling Executive Power in the War on Terrorism," (2004-2005) 118 Harv L Rev 2673 at 2679.

[283] Roger Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworth and Co. Publishers Ltd., 1984) at 234. See also Sharon Weill, *The Role of National Courts*, *supra* note 200.

[284] Eyal Benvenisti, *The International Law of Occupation*, *supra* note 5.

[285] Daphne Barak-Erez, "Broadening the Scope of Judicial Review," *supra* note 113.

[286] Guy Harpaz. "When does a Court Systematically Deviate from its Own Principles? The Adjudication by the Israeli Supreme Court of House Demolitions in the Occupied Palestinian Territories," (2015) 28 Leiden J Int'l L 31.

ensure that law is made by the popularly elected legislators.[287] (ii) It weakens the constitutional balance of power amongst the executive, legislative and judiciary.[288]

However, it is troubling that where a state has signed and ratified international 'humane law' treaties (i.e. IHL and IHR law treaties), but has left those treaties unincorporated, these ratifications appear to have no practical effect at the domestic level. This in turn denies individuals the opportunity to fully benefit from the protection that is afforded by them.[289] It also confines those treaties to the rank of 'persuasive authority' that the HCJ may or may not invoke. In the case of the HCJ's own record, a review by Kretzmer indicates that it has often referred to international conventions that have not been incorporated into Israeli domestic law, as well as to decisions of international tribunals, treaty bodies and foreign courts.[290] However, according to him, they were never regarded as binding and "are simply employed as a part of the court's reasoning, generally, of course, to support the interpretation they favor in the particular case."[291] Given that (with the exception of the Hague Regulations) the IHL and IHR law treaties that are the focus of this research remain unincorporated and are considered by the HCJ to amount essentially to treaty law, the concern is that this approach encourages government authorities to adopt a 'pick and choose' attitude towards the applicability of their provisions to those who 'need it the most' (the occupied population).

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[287] Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship between International and Domestic Law" (2008) 53 McGill LJ 573 at 581-582. Given that international law remains based on the Westphalian model of state sovereignty, and in absence of any process of 'domestic implementation', it has been argued that "a court may choose to resort to international law as an element of context. A court does not "have to" do it though, no more than it "must" take into account any other argument of interpretation, be it also contextual, be it textual, teleological or else." See Stéphane Beaulac, "Westphalia, Dualism and Contextual Interpretation," *supra* note 204 at 12.

[288] René Provost, "Judging in Splendid Isolation" (Winter 2008) 56:1 Am J Comp L 125.

[289] Unless the particular right that is recognized in international law is part of domestic law, its violation will not be the basis for judicial remedy. In Israel, remedy will only be granted when the international norm that is violated, is either a norm of customary international law (that does not clash with a primary legislation) or is a norm that is recognized in Israeli common law, basic law or statutory law. See David Kretzmer, "Israel," in David Sloss ed, *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: Cambridge University Press, 2009).

[290] David Kretzmer, "Israel" *ibid*. For a review of the extensive use of foreign law by the HCJ, see Iddo Porat, "The Use of Foreign Law in Israeli Constitutional Adjudication" in Gideon Sapir, Daphne Barak-Erez and Aharon Barak, eds, *Israeli Constitutional Law in the Making* (Portland: Hart Publishing Ltd. Portland 2013) 151.

[291] David Kretzmer, "Israel," *ibid* at 298.

(5) Entering its 49th year, the prolonged nature of Israel's occupation introduces an important time related factor.[292] Israeli authorities have argued that this has magnified the challenges to their efforts to strike the balance between the needs of the occupied population and the security concerns of the occupant.[293] The Court has directly and indirectly addressed those arguments in its adjudication.

(6) Finally, decisions by courts constitute an important secondary source of international law.[294] One impact of litigation, especially in a common law system, is the creation of the basic legal norms themselves.[295] In this regard, the Court's judicial strategy establishes its legal reasoning regarding a certain principle and then asserts the principle as a legitimate legal precedent.[296] In the absence of any significant case law by the domestic court of other occupying powers, the judgments rendered by the HCJ constitutes a primary source of material for evaluating the application of the legal rules of the law for belligerent occupation.[297] Hence, it has been argued that the manner in which the HCJ interprets international law has consequences beyond the Israeli-Palestinian conflict. In addition, it has been suggested that the interpretation by the HCJ may not necessarily reflect the one that "is

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[292] Yuval Shany, "Forty Years after 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context" (2008) 21 Isr LR 6.

[293] ICRC, "International Humanitarian Law and Challenges of Contemporary Armed Conflict," Report, 31 International Conference of the Red Cross and Red Crescent, (28 November-1 December 2011), online: ICRC <https://app.icrc.org/e-briefing/new-tech-modern-battlefield/media/documents/4-international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts.pdf>. See also Adam Roberts, "What is Military Occupation," *supra* note 174 at 272-273 and Christopher Greenwood, "The Administration of Occupied Territory in International Law" in Emma Playfair, ed, *International Law and the Administration of Occupied Territories* (Oxford: Clarendon Press, 1992) 241.

[294] Article 38(1) (d) of the ICJ Statute, *supra* note 172.

[295] Lawrence Friedman, "Litigation and Society" (1989) 17 Annu Rev Sociol 25.

[296] Interestingly, it is this approach that was employed by the Court towards asserting its judicial review of the legality of actions by government bodies and to fundamentally rights jurisprudence as far as human rights in Israel is concerned. Patricia Woods, "The Ideational Foundations of Israel's," *supra* note 110.

[297] Vaois Koutroulis, "The Application of International Humanitarian Law and International Human Rights Law in Situations of Prolonged Occupation," *supra* note 67.

prevalent in other jurisdictions or that is supported by international authorities." [298] Consequently, its judgments should be analyzed with prudence.[299]

The unease is justified, given that today, domestic and transnational courts are increasingly citing the decisions of their other like-minded counterparts (particularly on cases involving human rights), [300] as a way of expanding judicial thinking regarding possible legal arguments.[301] Hence, some of the interest in this research is driven by the concern that the use of judicial arguments and conclusions from the HCJ allows the law of belligerent occupation to be altered in a way that expands the exceptions available to an occupying power when implementing measures and policies under the pretext of security. This runs the risk of producing an executive oriented jurisprudence "that initially would purport to be, but later would become evidence of customary international law."[302] It also provides a considerable opportunity for the Court to generate judicial precedents regarding petitions that challenge the legality of executive measures that have allegedly been taken by the security of settlements and/or settlers.[303] It may also contribute to the re-interpretation of the law of belligerent occupation, as it will be deemed applicable to other situations of occupation and/or annexation in the future; which may or may not involve transfer by the occupant of its own civilians.[304]

The next section describes the methodology that has been adopted in this research.

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[298] And which consists of interpretation that has been made for the purpose of upholding the legality of administrative action or security measure that are being challenged. See Daphne Barak-Erez, "The International Law of Human Rights and Constitutional Law: A Case Study for an Expanding Dialogue" (2004) 2 Int'l J. Const. L 611.

[299] *Ibid*.

[300] Anne Marie Slaughter, "A Typology," *supra* note 103.

[301] Aharon Barak, "A Judge on Judging," *supra* note 97 at 69 and 161-162.

[302] Eyal Benvenisti, "Judges and Foreign Affairs," *supra* note 234.

[303] It is argued that other elements augment the impact that the interpretation of the Court has had for Palestinians: the close geographic proximity of the occupied territory to the occupying power; the development and nurturing of a web of strategic, demographic, security and economic interests in the occupied territory through the settlement policy; the significantly large number of Israeli settlers therein and the fact that measures which have been implemented in the name of security (which many of the petitions discussed here challenge) have affected a wide spectrum of rights of the Palestinian population on the short and long-term basis.

[304] One author highlighting the impact of the adjudication by US courts of post 9/11 case law and their reference to IHL cautioned that this may result in the deformation of this body of law. Kenneth Anderson, "The Rise of International Criminal Law: Intended and Unintended Consequences" (2009) 20: 2 EJIL 331.

4. Research Methodology and Sources

While the research has relied on both primary and secondary sources, it has sought to give more emphasis to primary sources. The next sub-sections provide an overview of the two forms of primary sources that have been used.

4.1. Primary Sources

Different types of primary sources were exhausted for this research, most notably in the form of decisions generated by the HCJ and interviews conducted with lawyers who have petitioned the Court on behalf of the Palestinians. Other primary sources include Israeli legislation, international treaties, conventions and international or regional judicial decisions.

4.1.1. HCJ Judgments

In terms of relevant case law, the focus was on judgments that were rendered from 2000 to 2014, concerning petitions which raised issues related to Israeli settlements, settlers and their legal status. Given that the researcher does not have a command of written or spoken Hebrew, an Israeli research assistant was identified to assist with this project.[305] His help proved crucial in identifying relevant judgments from the HCJ's website in Hebrew,[306] and from Hebrew-based legal databases to which he had access.[307]

The search by the team generated a database of an estimated 110 HCJ judgments.[308] While most of them were post-2000 (year), a number of them were landmark decisions dating from

[305] Avichay Sharon.

[306] The HCJ database, while providing for all HCJ cases from recent years in Hebrew, also provides case-law that have been translated into English. However, for the moment, only few decisions have been translated. Therefore, the researcher has relied for the most part on the Hebrew website and database.

[307] *Nevo* database, a private Israeli company, is the most common legal database used by jurists in Israel, and therefore is provided for only in Hebrew, online: *Nevo* <http://www.nevo.co.il/> (only in Hebrew).

[308] In searching for the relevant cases, where the number of the case was lacking, the abovementioned sources and databases were searched using key words such as: settlement; military commander; occupation; belligerent occupation; Palestinian; settler; land confiscation; security; planning; civil administration; outpost; international law; separation wall etc. At times, key words were used in different combinations and at other times separately.

the 1970s and the 1980s.[309] Since the focus is on the ability of the Court to provide a venue for effective remedy to the Palestinians, the judgments where the sole plaintiffs were Israeli citizens were excluded.[310] When identifying case laws related to EJ, different keywords were used. This is the case since Israel considers it part of its sovereign territory (after its *de jure* annexation in the 1980s).[311]

The identified cases were then classified under one of three categories, namely (1) West Bank settlements (2) EJ Settlements and (3) 'unauthorized outposts'. In this regard, two comments are warranted. The first relates to HCJ judgments rendered in relation to settlements that had existed in the Gaza Strip. While the former is not part of the geographic focus of this research, judgments by the HCJ dealing with issues of Israeli settlements up and till (and including) Israel's disengagement from Gaza in 2005 were referenced to occasionally in the analysis, if it clarifies the Court's interpretation of important principles of international law and of Israeli constitutional law as invoked by the Court in relation to the petitions examined in this research. However, the HCJ Gaza Strip related decisions were not formally included as part of the total number of judgments rendered after 2000 that were analyzed in the Chapters I-III of this research.

The second comment relates to the 'unauthorized outposts'. Although one of the initial objectives of this research was also to analyze the HCJ's interpretation of petitions challenging the legality of the construction of these outposts, it was subsequently determined that these judgments should not be included. The primary reason for this decision is that the HCJ judgments make no reference to international law.[312]

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[309] This was deemed necessary because they provide insight into the position that the Court has traditionally adopted on important principles and aspects of international law. These cases have been identified primarily from academic articles on Israeli settlements by Israeli and International scholars.

[310] Israeli petitioners included often settler organizations and in some cases settlement regional councils. Where the Court decided to render a judgment regarding a number of petitions that were filed by Palestinians and Israelis (that the Court grouped together) and where they proved pertinent in addressing the legality of security-based measures, these decisions were also analyzed.

[311] Thus, in addition to key word such as 'East Jerusalem', other key words used were: wall; fence; separation barrier; names of specific Jerusalem neighborhoods, as well as the word *Otef Yerushalaim*.

[312] Only a few of the landmark decisions were analyzed to underscore a trend by the Court to uphold domestic RoL requirements. These have been discussed in the Chapter: General Conclusion.

From the identified case law, a total of 40 decisions were analyzed. This took place after the HCJ decisions, available in Hebrew only, were translated into English by the research assistant. Since many of the judgments were translated first hand, it was decided to include a detailed description of the facts of the cases (as they appeared in the judgments) in the footnotes. The objective is to provide the reader with information that is not readily available to a non-Hebrew reader. It is hoped that this provides a better overview of the context of the petition; the impact of the alleged security measures on the affected Palestinian individuals and communities and the Court's position in relation to the narrative of the petitioners and the respondents. The judgments were then analyzed, as they pertain to the three normative principles of the law for belligerent occupation that were stated earlier.

In the case of the first normative principle (that occupation is temporary), the analysis included all the HCJ judgments that were rendered in relation to petitions that have challenged the legality of the construction of the Wall in the 'West Bank' (i.e. West Bank excluding EJ)., the creation of the Seam Zone and imposition of a permit regime therein, as well as the establishment of SSZs around settlements. In the case of the second normative principle (that occupation is a form of 'trust'), all judgments relating to petitions that challenged the legality of imposing movement restrictions on Palestinians in response to alleged security concerns for Israeli citizens and primarily settlers were grouped together. Finally, in regards to the third normative principle (that occupation does not bestow sovereignty) all HCJ judgments that were identified in relation to petitions challenging the legality of the Wall in and around the Jerusalem area were grouped together.

The next section provides an overview of another source which served as a very important resource for corroborating the analysis of the HCJ judgments: Interviews.

4.1.2. Interviews

To compliment the analysis with information from the field, the researcher carried out interviews with a number of Israeli lawyers (both Jewish Israelis and Palestinian citizens of Israel) who regularly petition the HCJ on behalf of Palestinians to challenge the legality of

measures by Israeli military authorities.[313] The decision to conduct these interviews stems from a belief that international human rights norms are enforced "not just by nation states [...], but by people like us, by people with the courage and commitment to bring the international human rights law home."[314]

Another element spearheading the decision to interview these lawyers is the desire to take advantage of the knowledge and experience that they have accumulated as 'repeat players'. In particular, the purpose of the fieldwork is to conduct an in depth interview and thus gain qualitative data from the perspective of a sample of interviewees. The objective is to complement the research on two levels: descriptive[315] and evaluative.[316] The interviews largely focused on their analysis and feedback regarding the HCJ's interpretation of principles and rules of IHL and of IHR law in settlement related petitions (several of which they have been involved in) and its impact on the normative framework of the law of belligerent occupation. Another question put to them is whether there is any added value for Palestinians to continue petitioning the Court. Although this did not represent a main element of focus for the research, it is a relevant element since there is a lot of discussion as to whether doing so

[313] Lawyers appearing before the Court are required to be member of the Israeli Bar Association. The proceedings are only conducted in Hebrew. This has prevented Palestinian lawyers from the oPt (except for Palestinian East Jerusalemites by virtue of their 'Israeli' permanent residency) from representing clients. See George Bisharat "Courting Justice?" *supra* note 83. See also Hassan Jabareen, "Transnational Lawyers and Legal Resistance in National Courts: Palestinian Cases before the Israeli Supreme Court" (2010) 13 Yale Hum Rts and Dev L J 239.

[314] Harold Koh, "How is International Human Rights Law Enforced?," *supra* note 156 at 1417.

[315] On the descriptive level, the interviews sought to corroborate the accuracy of information related to legislation, policies, and measures taken in relation to the settlements and their associated policies.

[316] On the evaluative level, the interviews solicited feedback regarding the impact of petitioning the HCJ for the three normative pillars underlying the law of belligerent occupation. Their views provided valuable analysis regarding the Court's interpretation of principles of international law as well as Israeli constitutional and administrative law. Interviewees were also asked regarding the possible impact that the HCJ's judgments could have on the Court's domestic and international standing and the legal qualification of the Israeli occupation of the West Bank. Other questions related to the impact that settlement /settler related security-based measures have for these normative principles and the advantages and disadvantages of continuing to petition the HCJ on behalf of the Palestinians.

legitimizes the occupation.[317] The research was conducted after the necessary approval of the Research Ethics Committee at the Université de Montreal had been obtained.[318]

Out of 37 lawyers that were contacted by email or phone, six (6) lawyers agreed to be interviewed, or to give a written response.[319] Given the practical difficulties of obtaining an Israeli authorized permit for the researcher to enter Israel proper and/or EJ, the interviews were conducted by the research assistant during his stay in Israel during the summer of 2014.[320] In addition, two Palestinian legal experts residing in Ramallah (West Bank) were also interviewed. Similarly, two Israeli human rights activists provided answers to a list of questions that were sent by email.[321] An effort was also made to solicit written feedback or an interview from representatives of the Israeli Attorney's Office (the Ministry of Justice), which proved difficult. It was also not possible to receive feedback regarding a questionnaire that was forwarded to the Public Relations Office of the HCJ. The writer also tried to contact the former Presiding Justice of the HCJ, Professor Aharon Barak, but received no response.

4.1.3. Other Primary Resources

These included translated Israeli legislations (particularly the Basic Law: *Human Dignity and Liberty*) as well as international conventions and treaties related to the applicability of the law of occupation (primarily in the form of the *Fourth Geneva Convention* and the *Hague Regulations*). Likewise, IHL and IHR treaties and conventions, to which Israel is a State Party or which reflect customary international law, were also used. Other sources, such as UN GA and SC resolutions, reports and general comments by the UN treaty and non-treaty bodies,

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[317] There has been an extensive debate amongst the lawyering and scholarly community regarding the tension between concrete individual interest and long-term communal objectives. George Bisharat "Courting Justice?" *supra* note 83. See also Hassan Jabareen, "Transnational Lawyers and Legal Resistance," *supra* note 313.

[318] See Annex IV: Ethics Certificate.

[319] For a list of the names of lawyers interviewed, see "Interviews and Written Responses" included at the end of this research. Their contact details can be gathered from the website of the Israeli Bar Association, online: < http://www.israelbar.org.il/english.asp?catid=372>.

[320] The writer has a West Bank Palestinian ID. The interviews were conducted by Avichay Sharon based on a set of detailed questions that were provided by the researcher.

[321] One activist was also interviewed in person by the researcher during his visit to Montreal in October 2014.

judicial decisions and advisory opinions of the ICJ, and judgments of regional human rights courts have also been referenced.

4.2. Secondary Sources

A large number of articles and books by International, Israeli and Palestinian jurists, scholars and analysts were consulted, as they relate to the two domains: the legal and the political. When possible, English based summaries found in Israeli journals were also consulted. The relevant secondary sources were primarily available in English and to a lesser degree also in French. A significant part of the secondary sources that were consulted, includes the customary law study by the ICRC, as well as publications and statistics by UN agencies, treaty and non-treaty bodies.[322] It also includes documentation and a legal analysis provided by Israeli[323] and International[324] NGOs / research centers. Efforts were also made to consult official Israeli government sources,[325] as well as some Palestinian government sources.[326] Israeli,[327] Palestinian[328] and International daily media (published in English or Arabic), as well as independent news sources,[329] were also referred to as a way of keeping up-to-date of day-to-day legal and political developments.[330]

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[322] Such as (OCHA-oPt), online: <http://www.ochaopt.org/>; UN OHCHR, online: <http://www.ohchr.org/EN/Pages/WelcomePage.aspx>.

[323] Such as *B'Tselem*, online: <http://www.btselem.org/>; *Hamoked*, online: <http://www.hamoked.org/home.aspx>; *Yesh Din*, online: <http://yesh-din.org/>; *Peace Now*, *online:* <peacenow.org.il/eng/>; Association for Civil Rights in Israel-*ACRI*, online: <http://www.acri.org.il/en/> ; *Adalah*, online*:* <http://adalah.org/eng/>; *Ir Amim,* online: <http://ir-amim.org.il/en>; *Bimkom*, online: <http://bimkom.org/eng/>; *Rabbis for Human Rights*, online: <http://rhr.org.il/eng/>.

[324] HRW, online: <www.hrw.org> Amnesty International, online: <https://www.amnesty.org/en/>; ICG, online: <http://www.crisisgroup.org/> and *DIAKONIA*, online: <http://www.DIAKONIA.se/en/>.

[325] Such as MoFA, online: <http://mfa.gov.il/MFA/Pages/default.aspx>; the *Knesset*, online: <https://www.knesset.gov.il/main/eng/home.asp> and the Israeli Civil Administration, online: <http://www.cogat.idf.il/1279-en/Cogat.aspx>.

[326] Palestinian Negotiations Affairs Department-PLO, online: <http://www.nad-plo.org/>.

[327] Such as *Haaretz*, online: <http://www.haaretz.com/>; *YNet* News, online: *YNet* <http://www.ynetnews.com/home/0,7340,L-3082,00.html>; *Times of Israel*, online: <http://www.timesofisrael.com/>.

[328] Such as *Al Ayyam*, online: <http://www.al-ayyam.ps/>; *Ma'an* News Agency, online: <http://www.maannews.net/>.

[329] *+972 Magazine*, online: <http://972mag.com/>.

[330] *Al Jazeera International*, online: <http://www.aljazeera.com/news/middleeast/> and *New York Times*, online: <http://www.nytimes.com/pages/world/index.html>.

Here, a comment regarding the selection of NGO sources is warranted. Although information and data provided by Palestinian human rights NGOs and civil society have, on a few occasions, been cited in this research,[331] the researcher has made efforts to prioritize the referencing of reports and statistics provided by Israeli NGOs and UN agencies. In the case of the former, the first reason is to minimize allegations that information relied upon, for the purpose of this research, is inherently biased in favor of the occupied population. The second is that from a domestic Israeli RoL perspective, it is the Israeli NGOs who shoulder the primary responsibility to monitor and document alleged violations to human rights,[332] as a way of contributing to the promotion and advancement of democratic societies, institutions and processes.[333] Hence, the information generated has provided a valuable contrast to the information provided by Israeli official government sources. However, citing their information should by no means be interpreted as a judgment regarding the accuracy of statistics or the caliber of the documentation or the legal analysis generated by Palestinian human rights organizations.

In the case of UN agencies, their reports were also cited as a way of providing the input of the international human rights community on the impact of Israeli policies on the Palestinian civilian population, in order to compliment the information that has been provided by the Israeli non-governmental actors. While this researcher is aware of allegations by Israeli authorities, suggesting that these reports are biased, it is assumed that their primary objective is to ensure that the international RoL is upheld.

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[331] Law in the Service of Man-*Al-Haq*, online: <www.alhaq.org>; Applied Research Institute Jerusalem-*ARIJ* online: <http://www.arij.org/>.

[332] In a petition by the Israeli human rights NGO *B'Tselem* to challenge the decision of Israeli authorities to prevent three of its fieldworkers from entering the Gaza Strip after Operation Defensive Shield, then Attorney Menahem Mazuz (and current HCJ justice) was quoted to have stressed that "Human rights organizations – including "B'Tselem" and "HaMoked: Center for the Defense of the Individual" play an important and essential role in defending human rights in Israel and must be treated in accordance thereto, regardless of disagreements on one position or another adopted by the organizations. This is one of the substantive principles of respect for human rights." (HCJ 1838/09) *Abu Rokaya et al v. GOC Southern Command-Petition* at para 21, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/items/111200_eng.pdf>.

[333] *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* GA 53/144, 53rd Sess, Agenda item 110(b) UN Doc A/RES/53/144 (8 March 1999) at article 18, online: OHCHR <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx> .

The next section provides an overview of the structure of the research.

5. Structure of Research

Following this introduction, the research is divided into three main chapters, closing with a general conclusion. Chapter I examines the decisions that have been rendered in relation to the construction of the Wall in the West Bank (excluding EJ), the creation of the Seam Zone and the demarcation of SSZs around settlements. It also discusses the ramifications that the Court's approach has had for the first identified principle underlying the normative framework of the law for the belligerent occupation, namely that occupation is inherently temporary. Chapter II analyzes judicial decisions on petitions that challenge the legality of measures restricting the movement of Palestinians inside the West Bank and its implications for the second normative principle, that occupation is a form of 'trust'. Chapter III sheds light on the Court's adjudication of petitions that have challenged the legality of the construction of the Wall, in and around Jerusalem (including EJ) and the consequences that this has had on upholding the third normative principle, that occupation does not bestow sovereignty.

Each of the substantive chapters (I-III) begins with an overview of the IHL treaty and customary law provisions, scholarly debate and judicial decisions that underscore the prevalence of the normative principle that is the focus of the chapter. It also includes an overview of the political and legal aspects of the settlement related security-based policies that have been implemented by Israeli government and military authorities, allegedly in violation of this principle. Then, each chapter presents the petitions that have been filed by Palestinians to challenge the security-based measures that are the focus of each chapter, including the arguments made by petitioners and the respondents.

A subsequent section in each chapter examines the Court's interpretation of principles and rules of international law and its reference to Israeli administrative and constitutional law when adjudicating those petitions. The research seeks to demonstrate that the manner in which the HCJ has balanced between competing interests and rights has largely depended on the following: (1) What security concerns were at stake, (2) Whose interests/rights were being

considered (Palestinians, Israeli settlers, Israelis in Israel proper) and (3) What law is deemed by the Court to be the relevant framework for the adjudication (international/national).[334]

Last but not least, a general conclusion sums up the main findings from this research. It also offers a brief evaluation of the implication that the research findings have for the legal and political context affecting Israeli settlements, as well as for the ability for Palestinians to seek effective redress.

To a large extent, the research itself has focused on identifying those elements that are most important to explaining why the Court may or may not be successful in providing Palestinians with a domestic venue for the effective legal remedy of their internationally protected rights. It does not, however, purport to provide an in-depth analysis of what the Court can or should do to address the situation or to do things differently. This may require a separate research project: one that offers a comparative approach with domestic courts from other common law jurisdictions. At the same time, the unique features of this case study cannot be overemphasized, potentially rendering comparative efforts of limited utility. Another limitation that must be highlighted is that the research does not offer any insights as to whether or not the favorable decisions of the HCJ have been implemented by government authorities.

[334] This explains the choice for the title of the thesis. The fluidity with which the Court has approached the notions of security, rights and law explains why these notions were placed in inverted commas in the title.

Chapter I: The HCJ's Examination of Security-Related Measures in Light of the Occupation's Temporary Nature Requirement

> *This Court has emphasized time and time again that the authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander.*[1]
>
> — Justice *Aaron Barak*, Chief Justice at the HCJ —

1. Introduction

This chapter examines the adjudication by the High Court of Justice (HCJ) of petitions by Palestinians after 2000 which have challenged security-based measures implemented by Israeli authorities for the sake of settlements and settlers. The discussion in this chapter comes as part of a much broader examination of the implications of the Court's approach for the first pillar underlying the normative framework of the law for belligerent occupation, to the effect that the occupation must be temporary in nature.[2] In this regard, the chapter seeks to analyze some of the central aspects of these judgments in an attempt to draw conclusions about whether the Court has acted more as a legitimizing or as a restraining actor for the actions of government authorities. However, before embarking on this review, the next sub-section highlights important features of the relevant normative principle.

1.1. The Normative Principle: Occupation is Temporary

The idea that a situation of occupation is a temporary state of affairs is the most fundamental principle underlying the normative foundation of the international law of belligerent

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[1] (HCJ 2056/04) [2004] *Beit Sourik Village Council v.. Government of Israel*, (2005) 35 Isr LR 83 at para 27 [*Beit Sourik* Judgment]. This petition was upheld partially by the HCJ. Professor Aharon Barak was Chief Justice at the Court from 1995, up and till his retirement in 2006.

[2] Eyal Benvenisti, "Origins of the Concept of Belligerent Occupation" (2008) 26:3 LHR 621.

occupation and one that informs the two other principles that are discussed in this research.[3]

As developed in the late 19th century, the normative regime of this body of law assumes that an occupation would be a short-term provisional situation during which efforts are made to maintain the *status quo*.[4] Moreover, it underscores that situations of occupation are exceptional situations that must be managed in a way that brings about a return to normality.[5] Once such normalcy resumed, it was presumed that the inhabitants of the occupied territory would return to enjoying the rights and liberties that were recognized by their own domestic legal systems.[6]

International humanitarian law (IHL) provides guidelines for when a situation amounts to an occupation. The Hague Regulations stipulate that a "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."[7] Once it has been determined that a State has indeed established its authority over a given territory of another state and that it has the ability to exercise that authority,[8] the situation qualifies as an occupation.[9] This in turn, triggers the applicability of the aforementioned body of law,[10]

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3 Orna Ben Naftali, "'A La Recherche du Temps Perdu': Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion" (2011) 38 Isr LR 211.

4 Eyal Benvenisti, *The International Law of Occupation*, (New Jersey: Princeton University Press, 2004); Yoram Dinstein, *The International Law of Belligerent Occupation*, (Cambridge University Press, 2009). See also Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967" (1990) 84 AJIL 46.

5 Orna Ben Naftali, "'A La Recherche du Temps Perdu'," *supra* note 3.

6 David Kretzmer, "The Law of Belligerent Occupation as a System of Control: Dressing up Exploitation in Respectable Garb" in Daniel Bar-Tal and Itzhak Schnell, eds, *The Impacts of Lasting Occupation: Lessons from Israeli Society* (New York: Oxford University Press, 2013) 31.

7 Article 42 of *Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land, 18 October 1907*, Cons TS No 25, 277 (entered into force 26 January 1910) [Hague Regulations].

8 Yoram Dinstein, *The International Law of Belligerent Occupation*, *supra* note 4 at 42.

9 *Case concerning Armed Activities on the Territory of the Congo*. (Democratic Republic of the Congo *v.* Uganda) Judgment, [2005] ICJ Rep 168 at para 310 [ICJ *Armed Activities in the Congo* Judgment]. This prevents a situation in which the extent to which a State is bound by the rules of international law of belligerent occupation hinges on its own political will, rather than out of a legal obligation. See Shane Darcey and John Reynolds, "An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law" (2010) 15:2 J Confl and Sec L 211.

including the Hague Regulations and the Fourth Geneva Convention.[11] These laws apply as soon as this occupation begins and conversely, ceases to apply when the occupation itself ends.[12]

Whether a situation qualifies as occupation is a question of fact.[13] Traditionally, the presence of foreign forces is considered to be the way in which control over a foreign territory is established and exercised, thereby giving the occupying power the capability and obligation to administer the territory and its population. However, it has also been argued that where a foreign power exercises indirect overall effective control over a foreign territory, it would still be considered an occupant, thus remaining bound by the law of belligerent occupation.[14]

The law of belligerent occupation emphasizes the temporary nature of the occupant's authority over a given territory,[15] which flows from its *de facto* control of that territory.[16] Consequently,

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[10] International Committee of the Red Cross (ICRC), "Occupation and International Humanitarian law: Questions and Answers," online: ICRC <http://www.icrc.org/eng/resources/documents/misc/634kfc.htm>.

[11] According to article 2 of the Fourth Geneva Convention, the Convention applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." It also applies to "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." See *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (12 August 1949) 75:973 UNTS, 287 (entered into force 21 October 1950) [Fourth Geneva Convention]. See also International Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Mladen Naletilic* and Vinko Martinovic, IT -98-34-Trial Chamber (31 March 2003) at para 217, online: (ICTY) <http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf> [ICTY *Naletilic* Judgment].

[12] David Alonzo-Maizlish, "When does it End? Problems in the Law of Occupation," in Roberta Arnold and Pierre Antoine, eds, *International Humanitarian Law and the 21st Century Conflicts: Changes and Challenges* (Lausanne: Hildbrand, Editions Interuniversitaires Suisses, 2005) 97 at 98.

[13] US States Military Tribunal at Nuremberg, "Trial of Wilhem List and Others" (8 July 1947-19 February 1948) reprinted in United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Volune VIII (London: Majesty's Stationary Office, 1949) 34, online: <http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf>.

[14] *DIAKONIA*-International Humanitarian Law Resource Center, "Occupation" (11 December 2013), online: *DIAKONIA* <http://www.diakonia.se/en/IHL/The-Law/International-Humanitarian-Law-1/issues-addressed-by-ihl-2/Occupation/?_t_id=1B2M2Y8AsgTpgAmY7PhCfg%3d%3d&_t_q=Occupation&_t_tags=language%3aen%2csiteid%3adfed4c1a-bbd8-450f-954a-02cff1abcc09&_t_ip=24.201.7.109&_t_hit.id=Diakonia_Web_Models_Pages_ArticlePage/_f5911847-6f4f-4f5c-91f4-35ab4c4eebe2_en&_t_hit.pos=1>.

[15] According to the ICTY, it is "a transitional period following invasion and preceding the agreement on the cessation of the hostilities," *Naletilic* Judgment, *supra* note 11 at para 214.

[16] The existence of an occupation requires "a further degree of control than that needed to say that an armed conflict exists." *Ibid*. See also Michael Bothe, "Beginning and End of Occupation," in ICRC, *Current Challenges to the Law of Occupation, Proceedings of the Bruges Colloquium 20-21 October 2005*, published

it must be distinguished from annexation, "whereby the Occupying Power acquires all or part of the occupied territory and incorporates it into its own territory."[17] The distinction rests on the fact that an occupation does not bring about any lawful acquisition or transfer of rights for sovereignty to the occupant.[18] In other words, it continues only until an end to the armed conflict is achieved between the parties, whereby the territory is returned based on the terms of a peace treaty.[19]

This temporary nature of the occupation is reflected implicitly and explicitly in provisions of the Hague Regulations and the Fourth Geneva Convention.[20] A number of obligations flow from this assumption. The first is that the occupying power exercises its authority over the occupied territory, only by virtue of its effective control, for the duration of the occupation.[21] Secondly, although the occupant must establish a direct system of administration over the territory it controls,[22] any modifications of the existing order in the occupied territory by the

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in Dr. Marc Vuijlsteke, and Floricica Olteanu, ed, (Autumn 2006) 34 Collegium 26, online: <https://www.coleurope.eu/content/publications/pdf/Collegium%2034.pdf>.

17 See Jean S. Pictet, ed, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* reprinted (Geneva: ICRC, 1994) at 275 [*Pictet* Commentary].

18 *Ibid.*

19 Allan Gerson, "War, Conquered Territory and Military Occupation in the Contemporary International Legal System," (1977) 18 Harvard Int'l LJ 525. The jurisprudence of the ICTY confirms that "[a]n armed conflict may continue to exist after the hostilities in an area have ceased [and that] [t]he states of armed conflict ends when a peace agreement has been achieved." See also ICTY *Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber (2 October 1995) at para 70, online: ICTY <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [ICTY *Tadić* Judgment]. Should hostilities erupt inside an occupied territory (i.e. actual combat against the forces of the occupying power), the laws of war relating to combat must also be applied in conjunction with the laws of belligerent occupation (which do not disappear in this case).Yoram Dinstein, *The International Law of Belligerent Occupation*, *supra* note 4 at 100.

20 See articles 43 of the Hague Regulations restricting the occupant's ability to change laws in force in the occupied territory. Hague Regulations, *supra* note 7. In the case of the Fourth Geneva Convention, examples include article 47 underlining the non-recognition of annexation; article 49(6) prohibiting the transfer of the civilian population of the occupying power into the occupied territory, and article 64 which stipulates that the status of judges and public officials shall not be changed. See Fourth Geneva Convention, *supra* note 11. Orna Ben-Naftali,"PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies" in Orna Ben-Naftali, ed, *International Humanitarian Law and International Human Rights Law*, (Oxford: Oxford University Press, 2011) 129.

21 Lassa Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants," (1917) 33 Law Q Rev 249.

22 The fact that an occupant allows a new local government to be established (one that has a wide array of powers) is not inconsistent with a regime of belligerent occupation, provided that the occupying power maintains the paramount authority, and that the local government is not granted the ability to "wield the whole panoply of powers of a fully independent government." See Yoram Dinstein, *The International Law of Belligerent Occupation*, *supra* note 4. Even where the occupant fails to establish such an administration, this

former must also remain minimal.[23] Thirdly, the action of the occupying power in that territory is limited by international law to balancing between its own security-based needs against those of the occupied population.[24] As the HCJ elaborated, for the actions of the Military Commander (MC) in the occupied territory to be lawful under international law, they can be guided by only two considerations:

> Ensuring security interests in the area on one hand and safeguarding the interests of the civilian population on the other. Both are directed towards the area. Thus, the military commander may not weigh the national, economic and social interests of his own country, as they do not affect his security interest in the area or the interest of the local population. Military necessities are their military needs and not the needs of national security in the broader sense.[25]

Fourthly, this underscores that the measures which the occupying power can implement in the occupied territory are limited: They must be taken in good faith and must not violate *jus strictum* norms of IH.[26] This requires the occupying power to ensure that its policies and practices in the occupied territory, irrespective of whether they are proportionate responses to their immediate provocation, cannot be driven by illegitimate or unreasonable purposes (such as annexation).[27] In addition, IHL provisions providing for exceptions of military necessity

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does not relieve it of its duties under the law of occupation. See Eyal Benvenisti, *The International Law of Occupation*, *supra* note 4 at 5.

[23] Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights," (July 2006) 100:3 AJIL 580 at 582. For more on this, see Chapter II.

[24] Eli Nathan, "Israel Civil Jurisdiction in the Administered Territories," (1983) 13 Isr YB Hum Rts. 90. This remains the case pending the determination of the fate of the occupied territory, and the end of the occupation. See Grant T. Harris, "Human Rights, Israel, and the Political Realities of Occupation" (2008) 41 Isr LR 87 at 89. Consequently, this power is entitled to repeal or suspend any law if it is essential in order to maintain the existence of a military government, and to promulgate legally binding military orders (MOs) in order to fulfill its obligations under international law; to maintain the orderly government of the territory, and to ensure the security and safety of its military government and forces. See Meir Shamgar, ed, *Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects*, vol 1 (Jerusalem: Hebrew University, 1982).

[25] (HCJ 393/82) *Jam'iat Iskan case, al-Ma'almoun al-Tha'auniya al-Mahduda al-Masuliya, Cooperative Association Legally registered at the Judea and Samaria Area Headquarters v. Commander of IDF Forces in the Area of Judea and Samaria et al*, at para 13. See unofficial English translation online: Center for the Defense of the Individual (*Hamoked*) <http://www.hamoked.org/items/160_eng.pdf> [*Iskan* Judgment].

[26] See Peter Maurer, "Challenges to International Humanitarian Law: Israel's Occupation Policies" (Winter 2012) 94: 888 Int'l Rev Red Cross1503. See David Kretzmer, "The Advisory Opinion: The Light Treatment of International Law" (2005) 99 AJIL 88.

[27] Richard Falk and Burns H. Weston, "The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza" in Emma Playfair, ed, *International Law and the Administration of Occupied Territories* (Oxford: Clarendon Press, 1992) 125 at 138.

must be interpreted in a manner that does not render the safeguards enshrined in IHL treaties meaningless.[28] In other words, while the doctrine of military necessity "helps to clarify permissible acts of repression and deprivation, [it] has never been internationally recognized as an unqualified license to disregard the well-being of an occupied people, or as a pretext to undermine their underlying sovereign rights."[29]

As Ben-Naftali has correctly pointed out, a temporary occupation implies that the situation has an end. This is not one and the same as an indefinite occupation, "which may or may not have an end."[30] To assume that an indefinite occupation and a temporary one are interchangeable terms, risks rendering meaningless, the interests that the law of belligerent occupation is designed to protect. These interests are (1) the interests of the occupied population in regaining control over their lives and in exercising their right to self-determination, and (2) the interests of the international system, in promoting sovereign equality between states.[31]

This emphasis is important in light of allegations that have been made that Israeli government authorities are seeking (in the best of all scenarios) to hold on to the occupied West Bank indefinitely,[32] or in the worst situation, to *de facto* annex large parts of that territory through unilateral measures under the pretext of legitimate security needs. And while none of the legal instruments of the law of belligerent occupation offer any clear specifications regarding the end of the occupation,[33] the wording of Article 6(3) of the Fourth Geneva Convention underscores that the prevailing assumption, at the time of drafting the Convention, presumed

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[28] One example is article 53 of the Fourth Geneva Convention, which strictly limits the occupying power's ability to destroy property in the occupied territory to situations where this is "rendered absolutely necessary by *military operations* [emphasis added]." See article 53 of the Fourth Geneva Convention, *supra* note 11. According to the official commentary, "although it will be for the Occupying Power to judge the importance of such military requirements [...] unscrupulous recourse to the clause concerning military necessity would allow the Occupying Power to circumvent the prohibition set forth in the Convention. The Occupying Power must therefore try to interpret the clause in a reasonable manner." See *Pictet* Commentary, *supra* note 17 at 302.

[29] Richard Falk and Burns H. Weston, "The Relevance of International Law," *supra* note 27.

[30] Orna Ben-Naftali, "PathoLAWgical Occupation," *supra* note 20 at 22.

[31] *Ibid* at 23.

[32] *Ibid*. See also Richard Falk, "The Relevance of International Law to the West Bank and Gaza: In Defense of the Intifada" (Winter 1991) 32:1 Harvard Int'l LJ 129. See also Haggai El-Ad, "Four More Years of Occupation," online: The Israeli Information Center for Human Rights in the Occupied Territory-*B'Tselem* <http://www.btselem.org/four_more_years_of_occupation>.

[33] David Alonzo-Maizlish, "When does it End? Problems in the Law of Occupation," *supra* note 12.

situations of occupation to be of a short duration.[34] As the *Pictet* Commentary suggests, this was reflected in the wording of the aforementioned article, that after one year, "most of the governmental and administrative duties carried out at one time by the Occupying Power had been handed over to the authorities of the occupied territory,"[35] and that "the authorities of the occupied State will almost always have regained their freedom of action to some extent [...]."[36] However, where the occupation lasts longer than one year, the occupant would be "[...] bound by it, so far as it continued to exercise governmental functions."[37] It also stressed that the Convention would:

> [...] only cease to apply as the result of a political act, such as the annexation of the territory or its incorporation in a federation, and then *only if* [emphasis added] the political act in question had been recognized and accepted by the community of States. If it were not so recognized and accepted, the provisions of the Convention must, therefore, continue to be applied.[38]

While it remains true that the Palestinians had been granted a large degree of self autonomy by virtue of the Oslo Accords of the 1990s, the resulting redeployment of Israeli troops and the transfer of powers over certain civil spheres of the government at the time were not

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[34] Article 6(3) of the Fourth Geneva Convention, *supra* note 11. Stipulating that "in the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations," the Convention underscores that the occupying power will remain "bound for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory" by several provisions of the Convention. With the post-World War II occupations in mind, the expectation was that with time, the need to regulate the relationships between the occupied local population and the occupant would diminish. See Eyal Benvinisti, "Occupation, Belligerent" (May 2009) in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008), online edition: <http://opil.ouplaw.com/home/epil>. Once it became clear from practical experience, that situations of occupations are not always short term, the drafters of the First Additional Protocol to the Four Geneva Convention abrogated Article 6(3) by underscoring that the application of the Convention in the case of occupied territories shall generally speaking only cease "on the termination of the occupation." See article 3(b) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977)* 1125 UNTS 3 (entered into force 7 December 1978) [First Additional Protocol]. As Robert notes the abrogation of the 'one year after rule' may have been brought about by the desire of the international community at the time, "to maintain the full applicability of the law on occupations to areas occupied by Israel since 1967." See Adam Roberts, "What is Military Occupation" (1984) 55 Brit YB Int'l L 249 at 272.

[35] *Pictet* Commentary, *supra* note 17 at 62.

[36] *Ibid* at 63. This also appears to be the position of the ICRC. In a scholarly article, the president of the organization noted that "In the ICRC's view, Israel continues to be bound by obligations under occupation law that are commensurate with the degree to which it exercises control." See Peter Maurer, "Challenges to International Humanitarian Law," *supra* note 26 at 1508.

[37] *Pictet* Commentary, *supra* note 17 at 63.

[38] *Ibid*.

tantamount to an Israeli withdrawal from those territories.[39] Nor did it result in diminishing the powers of the Israeli military government,[40] which has continued to demonstrate the ability to exercise effective control over that territory after the accords were signed.[41] In addition, since 2002 when the Israeli military forces re-entered Area A of the West Bank as part of military operation 'Defensive Shield', the argument that Israel does not exercise effective control over all of the West Bank (including those designated as Area A) is no longer tenable.[42]

Israeli government authorities have argued that the measures which they have implemented in the West Bank remain in conformity with the requirement that occupation be a temporary state of affairs. This, they argue, is also the case for the range of security-based measures that they have put in place since 2000, which are described in the next section.

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[39] Following the Oslo Accords, Israeli government authorities argued in political fora that article 6(3) of the Fourth Geneva Convention limits it responsibilities in light of the establishment of the Palestinian Authority (PA). The position was cited in UN Economic and Social Council (ECOSOC), *Report of the Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the Situation of Human rights in the Palestinian Territories Occupied by Israel since 1967*, 58th session, UN Doc E/CN.4/2002/32 (6 March 2002) at para 9(c), online: UN Office of the High Commissioner for Human Rights (OHCHR) < https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/112/69/PDF/G0211269.pdf?OpenElement> [UN Special Rapporteur Report 2002]. However, this argument was never made in front of the HCJ. Orna Ben-Naftali, "'A La Recherche du Temps Perdu'," *supra* note 3.

[40] It must also be recalled that the *Declaration of Principle*s (DoP) signed between Israel and the Palestinians, stipulates that Israeli authorities retain, through the military government, responsibility for essential areas of governance not devolved to the PA, such as external security, foreign relations, and jurisdiction over Israelis and Israeli settlements in the territories. See articles I (1), XVII (4) of *Declaration of Principles on Interim Self Government* reprinted in (1993) 4 EJIL 542 [Declaration of Principles 1993]. For a discussion of the idea that the foreign relations arrangements of the Oslo Accords did not intend to lead to the establishment of an independent Palestinian entity, see Yoel Singer, "Aspects of Foreign Relations under the Israeli-Palestinian Agreements on Interim-Self Government Arrangements for the West Bank and Gaza," 28 (1994) Isr LR 268. See also Karin Calvo-Goller, "Legal Analysis of the Security Arrangements between Israel and the PLO" (1994) 28 Isr LR 236 at 251. See also Peter Malanczuk, "Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law" (1996) 7 EJI 485 at 497.

[41] Given that "[t]he tests for the application of the legal regime of occupation is not whether the occupying power fails to exercise effective control over the territory, but whether it has *the ability* to exercise such power [...] the fact that for political reasons it has chosen not to exercise this control, when it undoubtedly has the military capacity to do so, cannot relieve Israel of its responsibilities as an Occupying Power." See UN Commission on Human Rights [UN HR Commission] *Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000*, 57th Sess, UN Doc E/CN.4/2001/121, (16 March 2001) at para 41, online: UNISPAL < https://unispal.un.org/DPA/DPR/unispal.nsf/0/4A5FCB3241D55A7885256A1E006E75AD>. See also Orna Ben-Naftali and Keren Michaeli, "'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings" (2003) 36 Cornell Int'l LJ 233 at 261.

[42] UN Special Rapporteur Report 2002, *supra* note 39 at para 9. Hence, even if the argument carried any weight in the past, the developments in 2002 described above, have rendered the argument by Israeli authorities untenable.

1.2. Temporary Security Measures: of Walls, a Seam Zone and Special Security Zones

A look at the decisions of the HCJ reveals that three measures, allegedly temporary responses by government authorities to pressing security/military needs, have been vigorously adopted by Israeli authorities in their fight against security threats by Palestinians.

The first one is the Wall constructed since 2002. Israeli authorities have claimed that its route, most of which runs inside the West Bank, has been determined by the need to ensure the safety and security of not only Israeli citizens residing inside Israel proper, but also that of the Israeli settlements inside the West Bank, including East Jerusalem (EJ).[43] In this regard, representatives of government authorities have, time and time again, assured the HCJ justices that the Wall is a temporary defensive measure intended to block terrorist infiltration, and not a measure that seeks to consolidate political objectives.[44] Outside the court-room, however, Israeli public officials were increasingly alluding to Israel's intent on using one of the costliest projects in its nation's history,[45] (built as a border)[46] as a way of unilaterally influencing the delimitation of the final frontier between Israel and a future Palestinian state.[47]

The second measure addressed here is the Seam Zone, a term which refers to West Bank land that has been trapped between the Wall and the Green Line, or what the Court has often referred to as the 'Israeli side' of the Wall. According to the route of the Wall approved to

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[43] The Court refers to the West Bank as 'Judea and Samaria', a biblical term also used by Israeli officials. (HCJ 4825/04) [2006], *Muhammad Khaled Alian et al v. Prime Minister,* unofficial English translation by Avichay Sharon (March 2014), on file with author [*Alian* Judgment]. This petition was dismissed by the HCJ.

[44] Israel, Ministry of Foreign Affairs (MoFA), "Saving Lives: Israel's Security Fence," (26 November 2003) online: MoFA <http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Saving%20Lives-%20Israel-s%20Security%20Fence.aspx> [MoFA, "Saving Lives"].

[45] By 2012, it has cost the State more than New Israeli Shekels (NIS) 11 billion so far, and maintenance costs of about NIS 1 billion a year. See Shaul Arieli, "What we have Learned from the Barrier," *Haaretz* (10 July 2012).

[46] For example, the Ministry of Defense (MoD) tender for construction of the Wall referred to "the technical requirements of the IDF's experiment with a border fence." Moreover, "the same technological system for registration and border inspection that is used at Israel's airports and international border crossings was to be employed at the crossings and gates constructed along the Separation Barrier." The Israeli Information Center for Human Rights in the Occupied Territories (*B'Tselem*), "Arrested Development: The Long-term Impact of Israel's Separation Barrier in the West Bank," Report (October 2012), at 8, online: *B'Tselem* <http://www.btselem.org/download/201210_arrested_development_eng.pdf>.

[47] David Kretzmer "Introduction to Special Double Issue: Domestic and International Judicial Review of the Construction of the Separation Barrier" (2005) 38:1-2 Isr LR 6.

date, the total area of the Seam Zone amounts to 520,000 dunums. Of those, an estimated 137,219 dunums of land have been declared a closed military area, which Palestinians can only enter or reside in if they carry a valid Israeli issued permit.[48] According to government authorities, the Seam Zone and its associated regime seek to regulate and govern access by Palestinians to this area, to fend off infiltration into its West Bank settlements (and into Israel proper). Consequently, they remain necessary, for as long as the need for the Wall exists (itself, allegedly, a temporary measure).

The third and last measure discussed in this chapter are the Special Security Zones (SSZs), a terminology that refers to buffer zones which military authorities have authorized around Israeli settlements (long before the construction of the Wall). These have also been resorted to as a way of consolidating the security of the Israeli settlements that have been left outside of the Wall (or, in the words of the Court, on the 'Palestinian side' of the Wall).

After providing an overview of the legal and political implications arising from the implementation of each of these measures, the chapter highlights the kind of petitions that have been filed (mainly) by Palestinians and Israeli non-governmental organizations (NGOs). It also details the arguments by both the petitioners and the respondents (government and military authorities). In this regard, an effort has been made to emphasize, where possible, the arguments that have been presented to support the temporary nature of these measures as part of the parties' attempt to advance their respective positions in court.

For example, Palestinians challenging the legality of the Wall and the Seam Zone have, amongst other things, sought to demonstrate how these measures deprive them of their land, for the sake of 'thickening' Israeli settlements. They also sought to convince the Court that these measures seek to realize unacceptable policy objectives of the occupying power and that they have resulted in permanent changes amounting to the *de facto* annexation of land, in

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[48] Dror Etkes, "A Locked Garden: Declaration of Closed Areas in the West Bank" (*Kerem Navot*, March 2015), online: DIAKONIA-International Humanitarian Law Resource Center <http://www.diakonia.se/globalassets/documents/ihl/external/alockedgarden_keremnavot_finalversion.pdf>. According to *Hamoked*, the term Seam Zone is meant to conceal the fact that it is an area that is part of the West Bank. However, for the lack of an acceptable alternative, the term will be used in this research. See *Hamoked*, "The Permit Regime: Human Rights Violations in West Bank Areas known as the Seam Zone," Report (31 March 2013), at 5, online: *Hamoked* <http://www.hamoked.org/files/2013/1157660_eng.pdf>.

contravention of international law.[49] Similarly, in the case of the SSZs, petitioners have argued that the primary objective behind establishing these zones is to annex occupied West Bank land or, at the very least, to secure indefinite control by Israeli authorities of this land for the benefit of Israeli settlements.

For each of these measures (Wall, Seam Zone and its permit regime and SSZs), the chapter addresses the key elements that have featured in the Court's adjudication of petitions. To better explain the Court's judicial approach, the legal discussion in the next section provides an overview of the blue print that has been adopted by the Court for its analysis and adjudication of the security-based measures discussed here. This blue print has been elaborated in three landmark HCJ decisions on the Wall, including the *Beit Sourik* judgment,[50] the *Mara'abe* judgment[51] and the *Seam Zone* judgment.[52] The section concludes with an analysis of the main elements that have shaped the legal framework adopted by the Court and its implications for assessing Israeli practices in the West Bank, in light of the temporary nature requirement.

2. The Wall, Settlements and the Security Rationale: A Fateful Triangle?

2.1. Israel's Construction of the Wall: Legal and Political Developments

In April 2002, the Israeli Cabinet, under the leadership of then Prime Minister Sharon, approved a government decision to construct a security 'fence' inside the West Bank.[53] A sophisticated structure, it consists in some sections of a fence with electronic sensors.

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[49] (HCJ 9961/03) [2011] *Hamoked et al v. Government of Israel* et al, at para 16, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/files/2013/114260_eng.pdf> [*Seam Zone* Judgment]. The petition was dismissed.

[50] *Beit Sourik* Judgment, *supra* note 1.

[51] (HCJ 7957/04) [2004] *Mara'abe et al v. Prime Minister of Israel* (2005) 2 Isr LR 106 [*Mara'abe* Judgment]. The petition was upheld partially by the HCJ.

[52] *Seam Zone* Judgment, *supra* note 49 at para 1.

[53] The decision is that of the Israeli Ministerial Committee on National Security Affairs (Decision No. 64/B) cited in UN Office for the Coordination of Humanitarian Assistance (OCHA)-Occupied Palestinian Territory (oPt), "The Humanitarian Impact of the Barrier," Fact-Sheet (July 2013), online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_barrier_factsheet_july_2013_english.pdf>. See also *B'Tselem,* "Arrested Development," *supra* note 46 at 4; UN OCHA-oPt, "Ten Years since the International Court of Justice (ICJ) Advisory Opinion," Release, (9 July 2014), online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_10_years_barrier_report_english.pdf>. See also Dan Rothem, "How Israel's Security Barrier Affects a Final Border" *the Atlantic*, (4 November 2011).

Approximately 70 km of the structure (both constructed and under construction), are made up of 8-9 m high concrete walls, accompanied by a ditch, an asphalt two-lane patrol road, a trace road running in parallel, groomed sand paths, a buffer zone and depth barriers.[54] Befitted with an electronic monitoring system,[55] the average width of this Wall is estimated at 50-70 m.[56]

Justifying the move by the sharp increase in the frequency of Palestinian suicide attacks against Israelis inside Israel proper, the official position of the government has been that the construction of this Wall amounts to a lawful measure of self-defense, because it "block[s] [Palestinian] terrorists from entering Israeli population centres."[57] Two months after the aforementioned cabinet decision, the government approved the construction of the first phase of the structure.[58]

At a length of 712 km, (i.e. twice the length of the 320 km long Green Line), 85 % of the Wall's route runs inside the occupied West Bank.[59] Projections by different sources indicate that according to the route of the structure approved to this day, it will isolate an estimated 9.2 % of the West Bank inside the Wall, including Israeli annexed EJ and no-man's land.[60] Built in phases,[61] by July 2014, it was estimated that 62 % of the Wall's projected route had been

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[54] UN General Assembly (GA), *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, UN Doc A/ES-10/248, (24 November 2003), [UN Secretary General Report 2003].

[55] Particularly in urban areas such as Jerusalem, Bethlehem, Qalqiliya and Tulkarm. See UN OCHA-oPt, "Ten Years," *supra* note 53, and *B'Tselem*, "Arrested Development," *supra* note 46 at 13.

[56] In some areas it reaches a width of 100 meters, due to topographical condition. See *Beit Sourik* Judgment, *supra* note 1 at para 7.

[57] MoFA "Saving Lives: Israel's Anti-Terrorist Fence - Answers to Questions" (1 January 2004), online: MoFA <http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/saving%20lives-%20israel-s%20anti-terrorist%20fence%20-%20answ.aspx>.

[58] According to the HCJ, the first phase was constructed north center of the country and in the Jerusalem area, beginning in the area of Salam village (near the Megiddo junction), and which runs until the trans-Samaria Road. See *Beit Sourik*, Judgment, *supra* note 1 at para 4.

[59] UN OCHA-oPt, "Ten Years" *supra* note 53. See also *B'Tselem*, "Arrested Development," *supra* note 46 at 13.

[60] Dror Etkes, "A Locked Garden," *supra* note 48. Previous estimates put the figure at 9.4 %. See UN OCHA-oPt, "Seven Years after the Advisory Opinion of the International Court of Justice," Special Focus (July 2011), online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_barrier_update_july_2011_english.pdf>. See also UN OCHA-oPt, "The Humanitarian Impact of the Barrier," *supra* note 53, and *B'Tselem,* "The Separation Barrier," (1 January 2011), online: *B'Tselem* <http://www.btselem.org/separation_barrier/map>.

[61] The second phase involved the construction of the Wall segments from the Salam village east to the Jordan River, while the third phase resulted in the constructed of segements of the Wall in the 'Greater Jerusalem'

completed, while a further 10 % was still under construction.[62]

In addition to its security function,[63] military authorities have underscored several other features of the Wall that allegedly confirm its temporary nature, including (1) that "wherever possible, the fence is built on state-owned, rather than private lands,"[64] (2) that where Palestinian privately owned land has been requisitioned by military authorities[65] it was done by way of Israeli military orders (MOs), which have specified that the requisition has been conducted for security/military needs,[66] and (3) that these MOs are in themselves valid for a temporary period.[67] In addition, authorities have highlighted their readiness to pay compensation to affected landowners for the use of the land requisitioned for the construction of the Wall,[68] and have pointed to the existence of an orderly, administrative process through which Palestinians are allowed to appeal land confiscation orders. Objections can, therefore,

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area with the exception of the area where the Israeli settlement of Ma'ale Adumim is located. See *Beit Sourik*, Judgment, *supra* note 1 at paras 5-6.

62 The remaining 28 % has not been constructed yet. See UN OCHA-oPt, "The Humanitarian Impact of the Barrier," *supra* note 53. Because construction involves re-routing of segements of the Wall as ordered by the HCJ, construction of new sections of the structure has slowed down due to financial constraints. See UN OCHA-oPt, "Seven Years," *supra* note 60.

63 Israeli authorities underscore that the Wall has attained the declared objective of reducing suicide attacks carried out by Palestinians in Israel proper. Statistics provided by Israeli officials highlight that during the first half of 2004 armed attacks inside Israel proper have witnessed a drop of no less than 83 % compared to the same period in 2003, See UN HR Commission, *Report of the UN Special Rapporteur of the Commission on Human Rights John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967*, E/CN.4/2005/29, (7 December 2004) at 25, online: UNISPAL <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/166/92/PDF/G0416692.pdf> [UN Special Rapporteur Report 2004].

64 MoD, "Israel's Security Fence" (31 January 2007) online: MoD <http://www.securityfence.mod.gov.il/Pages/ENG/Humanitarian.htm>. See also *Beit Sourik*, Judgment, *supra* note 1 at para 8.

65 Four dunums is equivalent to approximately one acre.

66 Michael Sfard, "The Fight against the Separation Wall: The Legal Front in Israel," (Paper delivered at the UN International Conference of Civil Society in Support of the Palestinian People, (New York, September 13-14 2004), online: *Hamoked* <http://www.hamoked.org.il/items/7090.pdf>. In the Israeli self declared Jerusalem Municipality; land is requisitioned by the Israeli MoD. See UN Secretary General Report 2003, *supra* note 54.

67 Most of these MOs are valid for three years, after which they are renewable. UN OCHA-oPt, "Seven Years," *supra* note 60. *B'Tselem* and Planners for Planning Rights (*Bimkom*), "Under the Guise of Security: Routing the Separation Barrier to enable the Expansion of Israeli Settlements in the West Bank," Report (December 2005), online: *B'Tselem* <https://www.btselem.org/download/200512_under_the_guise_of_security_eng.pdf>.

68 See, for example, (HCJ 8414/05) [2007] *Ahmed Issa Abdallah Yassin v. Government of Israel* at para 36, online: HCJ <http://elyon1.court.gov.il/files_eng/05/140/084/n25/05084140.n25.pdf> [*B'ilin* Judgment]. This petition was upheld by the HCJ.

be submitted to an appeals committee,[69] designated by the Civil Administration (CA) for this purpose. Should the appeal be rejected, the decision can then be appealed to the HCJ.[70]

Furthermore, representatives of government and military authorities have made their own submissions to the HCJ, reiterating that the Wall is not intended to result in the establishment of a political border[71] (the route of which, they insist, must be determined by direct negotiations between Israel and the Palestinians).[72] Hence, where it makes incursions into the West Bank, it is for topographic reasons, to provide security for the Israeli settlements located there and to their residents.[73]

On the other hand, local and international skepticism has been expressed with regards to these assurances. By the date of its completion in 2020, the Wall's construction will have reached an

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[69] The appeals committee is composed of three members, of whom only one is required to be a legal professional. The *Ottoman Land Code 1858,* which is part of the local laws in effect in the West Bank, had established local land committees for the management of disputes over land ownership. The Jordanian *Initial Registration of Land Law (#6) of 1964*, also in effect at the time, created two committees for the administration of land registration in the West Bank: The committee for the first registration of land, and the land appeal committee, and which were composed of local judges, lawyers, and government officials. However, several Israeli MOs (particularly MO 1034 of 1982) amended the Jordanian law so that both committees are now officially run by Israeli institutions: the first by the Israeli Civil Administration (CA) and the second one by the Israeli military court system. See Irus Braverman, ""The Tree is the Enemy Soldier": A Sociological Making of War Landscape in the Occupied West Bank" (September 2008) 42:3 Law and Soc Rev 449.

[70] After the land requisition order has been signed, it is made public and the proper liaison body of the PA is contacted. An announcement is relayed to the Palestinian residents, who are invited to participate in a survey of the area affected by the order of land requisition, in order to present the planned location of the Wall. A survey is taken of the area, with the participation of the landowners, in order to point out the land which is about to be seized. After the survey, a one-week leave is granted to the landowners, so that they may submit an appeal to the appeals committee. The substance of the appeals is examined. Where it is possible, an attempt is made to reach understandings with the landowners. If the appeal is denied, leave of one additional week is given to the landowner, so that he may petition the HCJ. See *Beit Sourik*, Judgment, *supra* note 1 at para 8, and *Mara'abe* Judgment, *supra* note 51 at para 5.

[71] In a speech delivered at an Israeli think tank, former Israeli Prime Minister Sharon stated that the Wall allows Israel "to strengthen its control in those parts of *Eretz Yisrael* [i.e. Greater Israel] that will constitute an inseparable part of the State of Israel under any future arrangement." See British Broadcasting Service (BBC) "Full Transcript of Sharon Speech to the Harzliyya Institute of Policy and Strategy on 18 December 2003" (19 December 2003), online: BBC News <http://news.bbc.co.uk/2/hi/middle_east/3332941.stm>.

[72] MoFA, "Saving Lives," *supra* note 44.

[73] See for example, (HCJ 426/05) [2006] *Biddu Village et al v. Government of Israel et al* [2006] at paras 8-9, unofficial English translation by Avichay Sharon (October 2004) on file with author, [*Biddu Village Council* Judgment]. The petition was dismissed by the HCJ.

estimated 1.8 billion USD,[74] thereby representing the largest and costliest infrastructure project that Israel has undertaken since the 1960s.[75] To make way for the route, extensive destruction and damage of property (in the form of olive trees and water wells), much of which is irreversible, will also have taken place.[76]

In addition to this, several public statements were made by acting and ex-Israeli officials, as well as by the architect of the separation fence; all of which were aired daily in the Israeli media.[77] At the time, architect Colonel Dan Tirza (now retired) referred to wanting the Wall to "include as many Israelis inside […] and leave as many Palestinians outside"[78] and that the separation of the fence will "serve as the future border of Israel."[79]

More recently, during the United States' (US) efforts to revive Israeli-Palestinian peace talks, Israeli negotiators have vocalized more strongly and more directly to their Palestinian counterpart the demand that the Wall should indeed constitute their country's border with a future Palestinian state.[80] Moreover, the relationship between the Wall and the location of Israeli settlements inside the West Bank, and the fact that the majority of these settlements will

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[74] Law in the Service of Man (*Al-Haq*), "The Annexation Wall and its Associated Regime," Report (2012), online: *Al-Haq* <http://www.alhaq.org/10yrs/reports/wall-publications/item/the-annexation-wall-and-its-associated-regime?category_id=6>.

[75] *B'Tselem*, "Arrested Development," *supra* note 46.

[76] Encyclopedia of the Israeli-Palestinian Conflict vol. 2, "Israeli Supreme Court and the Occupation," by David Kretzmer, (Colorado, US: Lynne Rienners Publisher, 2010) 696 at 698.

[77] Human Rights Watch (HRW), "Israel's Separation Barrier" in the Occupied West Bank: Human Rights and International Humanitarian Law Consequences," Briefing Paper (February 2004), online: HRW <http://www.hrw.org/legacy/english/docs/2004/02/20/isrlpa7581_txt.htm>.

[78] Tirza is himself a resident of the West Bank Israeli settlement of Kfar Adumim and one of the principal persons appearing in court, on behalf of government authorities in many Wall related cases. See Scott Wilson, "Touring Israel's Barrier with its Main Designer," *Washington Post* (7 August 2007). According to one Israeli author, the Wall is one way through which Israel embarked on a spatial-physical restructuring of the West Bank, a process it had begun long before the Wall was built. He points out that a policy of profound spatial segregation between Jewish Israelis and the Palestinians in the West Bank underlies many of Israel's settlement related policies that were spearheaded in the late 1970s. These include the creation of separate roads for the use of settlers and Palestinians in the West Bank and the establishment of two different legal regimes applicable to Israeli settlers and to Palestinians in the West Bank. Thus, it is argued, the Wall is only one more detail in this policy and in Israel's 'architecture of occupation.' See Yishai Blank, "Legalizing the Barrier: The Legality and Materiality of the Israel/Palestine Separation Barrier" (2011) 46 Tex Int'l L 309. See also Eyal Weizman, *Hollow Land: Israel's Architecture of Occupation* (Brooklyn: Verso 2012).

[79] Yuval Yoaz, "Justice Minister [Tzipi Livni]: West Bank Fence is Israel's Future Border," *Haaretz* (1 December 2005).

[80] Robert Tait, "Israel 'Proposes Separation Barrier as Border' as Hope for Peace Talks Fade," *Telegraph* (5 November 2013).

remain on the 'Israeli side' of the Wall, have been pointed out as proof that the main driving force behind the Wall's construction, is to consolidate Israel's more permanent control over West Bank land on which these settlements lie.

The next section examines more closely the relationship between the route of the Wall inside the West Bank and along the Green Line and how it is influenced by the location of Israeli settlements in the area.

2.2. The Route of the Wall and Israeli Settlements: The Elephant in the Room?

Despite the vague language initially employed by government authorities regarding the relationship between the Wall's route and Israeli settlements,[81] according to a former UN Special Rapporteur for Human Rights in the oPt,the statistics confirm "the view that the main purpose of the Wall is not for security but for the incorporation of settlements."[82] An examination of the current route reveals that approximately 82 Israeli settlements located in the West Bank (including all the 12 settlements which Israel has built in annexed EJ), which house 85 % of the total settler population in the West Bank, will remain inside the Wall or, as the HCJ refers to it, on the 'Israeli side' of the 'fence'.[83]

Having examined the Wall, it is important to provide a quick overview of the most important tools by which Israeli government authorities are believed to have sought to consolidate their control of the West Bank land remaining between the Green Line and the Wall. According to human rights organizations and UN agencies, it is these tools that give credibility to their

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[81] Consequently, the government's declared objective of providing security to settlements or settlers as one reason for the Wall's construction (and which was highlighted extensively by government authorities in their submissions to the HCJ) never featured in the decision of June 2002, which authorized the construction of the first stage of the Wall. It only featured vaguely in a subsequent decision of October 2003, in which the third and fourth stages of the Wall were approved. See *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 67.

[82] Special Rapporteur Dugard Report 2004, *supra* note 63 at para 11.

[83] UN OCHA-oPt, "Seven Years after the Advisory Opinion," *supra* note 60. According to figures by Israel's Central Bureau of Statistics there were an estimated 515,000 settlers at the end of 2011, 190,000 of which live in the settlements inside Israeli annexed EJ, while the remaining 325,456 live in the rest of the West Bank. For a complete list of the settlements, see also *B'Tselem*, "Statistics on Settlements and Settler Population," update (August 2013), online: *B'Tselem* <http://www.btselem.org/settlements/statistics>. For a map of the Wall vis-à-vis the settlements, see "Map of the West Bank, Settlements and the Separation Barrier" (June 2012) attached as Annex I of this research.

allegations stating that the Wall's intended consequences on the ground are far from temporary and that they serve interests beyond the security based ones.

2.3. The Creation of a Seam Zone and its Associated Permit Regime

2.3.1. Overview

In 2003, upon the completion of phase A of the Wall, the Israeli MC of the Area signed a *Territory Closure Declaration*, whereby it was announced that large areas between the Green Line and the Wall were to be considered from now on a closed military area.[84] By 2011, this area, also known as the Seam Zone, comprised of an estimated 74 % of the total area of land inside the Wall, of which an estimated 67.7 % is land privately owned by Palestinians.[85] It also houses some of the most fertile land and water resources of the occupied West Bank.[86] In 2014, UN OCHA-oPt estimated that approximately 150 Palestinian communities had land located between the Wall and the Green Line.[87]

Subsequently, the military instituted a permit regime requiring all Palestinians over the age of 16 to obtain special and provisional permits to enter and remain in the zone from the Israeli CA, provided they can prove that they permanently reside in the Seam Zone or that they work and own land there. This also applied to them if they conducted agricultural activity, or have family and social ties in the area.[88] By 2014, it was estimated that approximately 11,000 Palestinians resided in the Seam Zone; and that once the Wall has been completed as planned,

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[84] *Territory Closure Declaration No. S/2/03 (Seam Zone) (Judea and Samaria 5764-2003)* cited in *Seam Zone* Judgment, *supra* note 49 at para 4. The declaration of Seam Zone areas was carried out in several stages, corresponding to the progress of the construction of the Wall.

[85] This amounts to an estimated 139,366 dunums. The rest of the land has been declared to amount to either 'state land' (31.8 %), or land that is "in the process of being acquired by Israelis" (0.05 %). See *B'Tselem*, "Arrested Development," *supra* note 46. See also *Hamoked* and Association for Civil Rights in Israel (ACRI), "High Court Approval of West Bank 'Permit Regime' – A Green Light to Expulsion of Palestinians from their Lands," update (5 April 2011), online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=Updates1091>.

[86] *B'Tselem*, "The Separation Barrier," *supra* note 60.

[87] UN OCHA-oPt, "Ten Years," *supra* note 53.

[88] *Seam Zone* Judgment, *supra* note 49 at para 4. The permit regime only applies to Palestinians. *Hamoked,* "The Permit Regime," *supra* note 48. See also UN Secretary General Report 2003, *supra* note 54, and UN OCHA-oPt, "Seven Years," *supra* note 60.

this figure will likely increase to 25,000 West Bank Palestinians.[89]

Israeli authorities claimed that the creation of the Seam Zone as a buffer zone is in fact, vital: Since it is located west of the Wall, with no other borders separating it from Israel proper, putting in place a permit regime, they argued, is necessary to prevent Palestinian attacks against Israeli civilians from originating in this zone.[90] As a result, government authorities have argued in Court that there is concern that adopting a liberal policy regarding the issuance of permits for Palestinians to enter and reside in the Seam Zone "would be used for the purpose of illegally entering Israel."[91]

At the same time, it is important to emphasize that the aforementioned declaration exempts Israelis, tourists, and Palestinians who work in settlements inside the Seam Zone, or who hold a permit to enter Israel proper, from applying for a permit when seeking to enter this zone.[92] Israeli authorities have also published extensive military legislation and processing protocols which regulate the permit regime, also known as the *Standing Orders for the Seam Zone* (thereafter *Standing Orders*), which authorities have promised to update from time to time.[93]

In addition, Israeli military authorities have also embarked amongst other things, on setting up more than 50 gates along the Wall for the alleged objective of enabling Palestinians to cross into and out of the Seam Zone. To do so, Palestinians wishing to enter the zone, must carry the right kind of permit and must have undergone the necessary security checks, as required by the *Standing Orders*. While government authorities have admitted in Court that the permit regime harms the Palestinians daily lives, they have insisted that this harm, incurred by the Palestinian

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[89] UN OCHA-oPt, "Ten Years," *supra* note 53. This does not include EJ Palestinians.

[90] *Seam Zone* Judgment, *supra* note 49 at para 4.

[91] Seam Zone Judgment, Government Response. Cited in *Hamoked*, "The Permit Regime," *supra* note 48. As one Israeli human rights non-governmental organization (NGO) explains, although Israel has every right to prevent Palestinians from entering its territory, to do so, it might build a Wall along the Green Line, or inside Israel proper, but should not restrict the rights of West Bank Palestinians to move freely or reside anywhere they want in the oPt. *Ibid*.

[92] Israeli military authorities use a less restrictive system of granting permits to Palestinians who work low paying jobs in Israeli settlements. See HRW, "Israel: Palestinians Cut off from Farmlands: A Year after Court Ruling a Worsening Situation," (5 April 2012), online: HRW <http://www.hrw.org/news/2012/04/05/israel-palestinians-cut-farmlands>.

[93] *Hamoked*, "HaMoked to the Military: A Selection of Provisions in the Revised "Standing Orders for the Seam Zone "Must be Amended," (18 May 2014), online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=Updates1299>.

residents, is proportional under the circumstances and is necessary for crucial security considerations.[94]

Similarly, UN agencies and Israeli human rights organizations documenting Palestinian access to and from the Seam Zone have criticized the orders on substantive and procedural grounds, highlighting amongst other things that the permit application procedure is bureaucratic and arduous, and that it lacks transparency and clarity.[95] Moreover, they have underscored that it is precisely the manner in which the permit regime is implemented which allows one to conclude that Israeli measures in the Seam Zone are driven by a desire to militarily "administer this area as if it were part of Israel."[96] They have also maintained that to achieve this objective, government authorities are, on the long-term, seeking to reduce the ability of Palestinians to access and farm land in the zone or to reside in it.

The next section offers a brief survey of the main points of criticism that has been leveled against the standing orders.

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[94] *Seam Zone* Judgment, *supra* note 49 at para 44.

[95] In this regard, two general and sweeping criteria must be met: that there is no ground for prevention of entry for security or police-related reasons and that the applicant provides proof of valid grounds for requesting the permit. However, the Palestinian applicant is not informed of the procedures and criteria by which the Israeli CA determines the issuance of permit. And since no grounds are given if and when an application is rejected, the applicant has no real opportunity to make a meaningful appeal. See *B'Tselem*, "Ground to a Halt; Denial of Palestinians' Freedom of Movement in the West Bank," Report *(*August 2007), online: *B'Tselem* <http://www.hamoked.org/files/2012/9260_eng(1).pdf>.

[96] See *Hamoked*, "The Permit Regime," *supra* note 48 at 10. See also *B'Tselem*, "Arrested Developments," *supra* note 46; HRW, "Israel: Palestinians Cut Off from their Farmlands," *supra* note 92. ACRI, "Demanding Access to Land for Palestinian Villagers in the Seam Zone" Intervention (21 June, 2009), online: ACRI <http://www.acri.org.il/en/2009/06/21/demanding-access-to-land-for-palestinian-villagers-in-the-seam-zone/>. See also UN Human Rights Council (HRC), *Report of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem,* HRC 22nd Sess, UN Doc A/HRC/22/63 (7 February, 2013), online: OHCHR <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf> [UN Fact-Finding Mission on Settlements Report 2013]. See also OCHA-oPt, "Three Years Later: The Humanitarian Impact of the Barrier since the International Court of Justice Opinion," Special Focus (9 July, 2007), online: Nations Information System on the Question of Palestine (UNISPAL) <http://unispal.un.org/pdfs/ICJ3SpFocusJul07.pdf>.

2.3.2. Procedural and Substantive Shortcomings of the *Standing Orders*

According to the Israeli organization *The Center for the Defense of the Individual: Hamoked*, which has extensively documented and litigated on issues related to the Seam Zone, some of the main shortcomings of the *Standing Orders* include: (1) the lack of their availability to the affected population in the Arabic language, (2) that they do not allow an applicant to receive a response before the permit in his/her possession expires, (3) that they do not allow for monitoring the application-handling process in real time,[97] and (4) that they are rejected on a routine basis without furnishing the applicant with the precise reasons for the rejection.[98] Because no hearing is held before a decision is made on a permit, Palestinian applicants can only file their appeal after a refusal and are only then summoned to a hearing.[99] Permits are often issued for a less than maximum validity period cited in the Order[100] and the processing of permit applications often fails to respect the time-limits as stipulated in the law.[101]

The impact that the permit regime operation has had on the ability for Palestinians to access the Seam Zone can, in fact, be best illustrated with an examination of challenges facing Palestinians who own agricultural land that has been separated from them, which has remained trapped in that zone. In this case, requests by Palestinians – who are seeking to continue the

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[97] *Hamoked*, "HaMoked to the Military: A Selection of Provisions," *supra* note 90. Many applications are not answered promptly, while others are not reviewed at all and remain unanswered. *Hamoked*, "The Permit Regime," *supra* note 48.

[98] From 2007-2010, an estimated 746 applications were rejected: 41 % of them were turned down for allegedly failing to meet the criteria, 48 % for other reasons, and 11 % on alleged security grounds. The assessment that a person poses a threat is not made as part of a judicial process in which evidence is presented by either security agency or the police. Nor is the suspect allowed to bring forward his/ her own evidence, examine witnesses, or present arguments. See *Hamoked*, "The Permit Regime," *ibid.*

[99] *Ibid.*

[100] The Israeli military has identified 13 different types of permits for the different needs. All permits are 'temporary', with the longest validity period of a permit amounting to two years. Most permits are issued for much shorter durations of three months at most. See *Hamoked*, "The Permit Regime," *ibid*. In a judgment issued by the HCJ on 2013-06-17, the Court ruled that that the military is entitled to issue Seam Zone entry permits for durations shorter than two years, thereby preferring not to intervene in this issue. See *Hamoked,* "Court Criticizes Army's Processing of Seam Zone Entry Permit applications: Timetables for Responses must be Kept, and Applicants Should be Able to Follow Up on their Applications," (20 October 2013), online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=Updates1328>.

[101] *Hamoked*, "Following Hamoked's Petitions, the Military has allowed Three Palestinians to Enter their Lands for the Purpose of cultivation: in the Hearing, the Justices Criticized the State's Conduct concerning Permits of Entry to the Seam Zone," (15 July 2013), online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=Updates1232>.

cultivation of their land in the zone – for permits are rejected by Israeli authorities if they are unable to provide convincing evidence of ownership of the land or a direct relationship to it. Given the fact that much of the West Bank land has not been formally registered during the Ottoman, British, or Jordanian rule, "the demand for the proof of landownership […] is often an insurmountable obstacle [for the Palestinian applicant]"[102] seeking to prove private ownership of land therein. Those who do manage to prove registered ownership of their land, are granted a permanent permit (of a two year validity), which entitles the concerned landowners to work their land during that period. Should they wish to continue doing so, they must go through the process of renewing the permit. In reality, however, many of these permits are given for less than a year.[103]

Furthermore, the *Standing Orders* do not regulate the issuing of permits to relatives of Palestinian landowners inside the zone.[104] They also respond poorly to the olive harvesting needs and do not allow regular access to land throughout the year. They also fail to address the needs of people who, even though they do not own the land that lies in the Seam Zone, lease it to others.[105] Use of permits is restricted to a limited time and requires its holders to pass through specific agricultural gates located in the Wall,[106] the majority of which are seasonal gates to begin with (i.e. they are open only during the olive harvesting season). Those which are open on a daily or weekly basis, operate only for a certain number of hours during the day or limited days during the week.[107]

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[102] Economic and Social Council (ECOSOC), *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, ECOSOC 62nd Sess, UN Doc E/CN.4/2006/29 (17 January 2006) at para 18, online: UN <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/102/18/PDF/G0610218.pdf> [UN Special Rapporteur Report January 2006].

[103] *Hamoked,* "The Permit Regime," *supra* note 48.

[104] *Ibid.*

[105] *Hamoked*, "HaMoked to the Military: A Selection of Provisions," *supra* note 93.

[106] According to *Hamoked*, "every permit lists the name of just one gate, the one closest to the home community of the permit holder, and he or she may pass from one side of the wall to the other only through that specific gate." See *Hamoked*, "HaMoked to the Military: Cancel at Once the Instruction Forbidding Entry of Farmers to their Plots inside the Seam Zone," update (6 August, 2014), online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=Updates1339>.

[107] According to UN sources, by 2013, there were 81 gates designated for agricultural access. Out of those, only 9 were open daily. An additional 9 are open for some days during the week in addition to the olive season, while the majority, (63) are open only during the olive harvesting season. UN OCHA-oPt, "Ten Years," *supra* note 53. Those which are open on a daily basis are available for access for periods of a quarter of an hour, to

This arduous process effectively hinders Palestinian farmers working lands in the Seam Zone from planning the agricultural year and using their lands throughout. The difficulty of reaching their land has also led to a change in the agriculture of the area. This has created a viscous circle, as it may result in the rejection of applications for farming permits, since the land is deemed to no longer require continuous maintenance.[108]

Here, an additional concern arises, namely that once landowners lose regular access to their property in this zone, they also risk losing this property. According to Israel's interpretation of the law applicable to the oPt, its authorities are entitled to declare unregistered land plots (which make up most of the land in the West Bank) that have not been cultivated for three consecutive years as 'state land'. It becomes an important element to bear in mind, given that the declaration of 'state land' has been the main policy implemented by government authorities to secure land reserves for the construction and expansion of settlements.[109] Arguably, this has also led to a situation of creeping dispossession of Palestinians and their land.[110]

West Bank Palestinians who reside or wish to relocate to the Seam Zone must also demonstrate very specific connections to it or reasons to enter the area, as defined in the *Standing Orders*. Any temporary absence from the Seam Zone might result in the applicant's failure to prove connection to that zone and, thereby, preclude his/her eligibility and right to live there. Permits are issued for short periods of time and must be renewed frequently, a process that is lengthy and bureaucratic.[111] One Israeli lawyer, who has dealt with countless cases revolving around the Seam Zone and its permit regime, explains that:

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an hour and a half a day. The weekly and seasonal gates are open for 1-3 days a week, while the third type of gates that are open during the olive harvest, are only available for access during that season between September and November each year. *B'Tselem*, "Arrested Development," *supra* note 46.

[108] Giving the difficulty of obtaining permits and of accessing the land regularly, many Palestinian farmers have stopped investing in profitable crops that require constant maintenance, in favor of ones that require less work that can be done intermittently. *Hamoked*, "The Permit Regime," *supra* note 48.

[109] For an overview of Israel's categorization of land in the West Bank as 'state land', and its implications, see Chapter II, section 5.2.

[110] *Hamoked,* "The Permit Regime," *supra* note 48.

[111] *Ibid.*

> Many people, including judges we face in court, don't understand the meaning of occupation's bureaucracy. Take farmers who want to reach their lands beyond the fence: they might not get an answer for their request for months, then not get it in writing, and procedures keep changing and growing harder all the time. Even when someone is summoned for a hearing at the DCO [District Coordination Office of the Israeli Civil Administration], they might find themselves waiting for hours only to be informed that the officer in charge just isn't around; so people despair, farmers give up on their trees. People living in the seam zone also lose touch with life in the West Bank and consider leaving home and crossing to the Palestinian side of the wall. The wall is still new, but it's frightening to see the process of annexation happening in front of your eyes.[112]

According to the human rights community documenting the impact of the Seam Zone and its associated permit regime, the characteristics described above underscore that considerations other than security or the maintenance of a temporary control are the driving forces behind these measures.

The next section provides an overview of the HCJ's experience with litigating petitions challenging the legality of these measures. In this regard, there is no doubt that the Court's decisions in the *Beit Sourik* and *Mara'ab*e cases have been extremely significant, not as judgments in and of themselves, but also as a stepping stones for the development of the legal blueprint that the HCJ has used in adjudicating subsequent Wall related petitions. It is these two judgments that the next section discusses.

3. The HCJ and the Wall

3.1. Developing a Legal Blueprint in the *Beit Sourik* and *Mara'abe* Judgments

> *The High Court of Justice, in its rulings over the fence is drawing the country's borders.*[113]
>
> — Israeli Justice Minister *Tzipi Livni* (2005) —

[112] Israeli Attorney Shira Hertzanu, cited in Haggai Mattar, "The Wall Ten Years On/Part 12: Where Do We Go from Here?" (11 August, 2012), online: *+972 Magazine* <http://972mag.com/the-wall-10-years-on-part-12-where-do-we-go-from-here/52652/>.

[113] Yuval Yoaz, "Justice Minister [Tzipi Livni]," *supra* note 79. In 2006, then acting Israeli Prime Minister Ehud Olmert stated that "the course of the fence - which until now has been a security fence - will be in line with the new course of the permanent border." See Aluf Benn and Yossi Verter, "Ehud Olmert: Permanent Borders within Four Years," *Ha'aretz* (9 March 2006).

3.1.1. Introduction

In 2004, the HCJ rendered its landmark decision in the *Beit Sourik* case, followed by the *Mara'abe* ruling less than a year later. Scholars who have studied the HCJ's adjudication of petitions by Palestinians in the oPt have identified these two judgments as the two most significant HCJ decision regarding the legality of the Wall.[114] Written by Chief Justice Barak, it is in these decisions that the HCJ "for the first time, found a section of an **intended** Barrier to be illegal."[115]

Prior to these two judgments, the initial efforts by Palestinians to petition the HCJ, together with the active support of Israeli human rights and civil society organizations,[116] were met by an unreceptive Court, one that adopted "the [government's] argument suggesting that the Barrier was needed for security reasons."[117] Thus, up until mid-2003, in cases challenging the legality of the Wall's route, the Court had refused to interfere, even where the damage caused by the Wall to Palestinian civilians and their property had been significant.[118]

As the route of the Wall made its way, extensive documentation of its human rights and

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[114] *Beit Sourik* Judgment, *supra* note 1; *Mara'abe* Judgment, *supra* note 51.

[115] Emphasis has been provided in the original. See Michael Sfard, "The Fight against the Separation Wall," *supra* note 66 at 4.

[116] NGOs which have petitioned the Court include *Hamoked* and ACRI. Even where organizations did not directly petition the High Court, several others, such as *B'Tselem*: *Rabbis for Human Rights* (RHR), *Ir Amim*, *Peace Now* and *Bimkom* have all documented the impact of the Wall on nearby Palestinian communities.

[117] *Encyclopedia on the Israeli-Palestinian Conflict*, "Israeli Supreme Court and the Occupation," *supra* note 76 at 702. As early as October 2002, a petition was filed in order to challenge the requisition of West Bank land for this construction due to the harm that it was causing the petitioners. However, the Court dismissed it on the basis that the decision to construct the Wall is the result of armed attacks taking place since the outbreak of the Second *Intifada* (2000), and which has caused huge loss of Israeli lives. Consequently, it considered the structure nothing but an essential element of Israel's security doctrine. The HCJ also reiterated the idea that "as is well-known this Court does not tend to interfere in operational security considerations." David Kretzmer, "Introduction," *supra* note 47.

[118] *Encyclopedia on the Israeli-Palestinian Conflict*, "Israeli Supreme Court and the Occupation," *ibid.* Here it must also be mentioned that the first wave of Wall-related petitions, did not raise the question of the Israeli military's authority to seize land for purpose of building that structure. It adopted as a point of departure that under international law, the Israeli Military Commander (MC) is authorized to confiscate such property for security reasons. Attorneys on behalf of petitioners were also willing to assume that the Wall does indeed fulfill a security need. In several cases the decisions of the military appeals committees were judicially reviewed at the HCJ by way of an administrative petition. See for example (HCJ 11344/03) [2009] *Faiz Salim et al v. Military Commander of Judea and Samaria*, unofficial English translation by Avichay Sharon (May 2013), on file with author [*Salim* Judgment]. This petition was dismissed by the HCJ. See also *Beit Sourik* Judgment, *supra* note 1 at para 8.

humanitarian impact on nearby Palestinian communities indicated that the harmful consequences arising from this construction were immense.[119] Thus, petitions filed by Palestinians at the time focused on the following: "to bring about the cancelation of the government decision concerning the construction of the fence – on the general level as well as with respect to specific aspects concerning different segments of the route of the fence, with respect of which it was argued that they were harmful beyond security needs."[120]

By the end of 2003, a new wave of petitions reached the HCJ to challenge the legality of the Wall's construction. These raised its illegality from an international law perspective and questioned the authority of the MC under the law of belligerent occupation to build the Wall or to seize land from Palestinians as protected persons under the Fourth Geneva Convention.[121] As the Court itself stated, by the time it had rendered its judgment in the *Mara'abe* case, about 90 petitions challenging the legality of the Wall had been submitted, with hearings in 44 cases completed.[122] By 2012, it was estimated that the HCJ had dealt with at least 150 petitions challenging the legality of the Wall,[123] the majority of which had been filed by Palestinians.[124]

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[119] UN OCHA-oPt, "The Humanitarian Impact of the Barrier," *supra* note 53; United Nations Children's Fund (UNICEF), "The Barrier Makes Getting to School a Daily Ordeal for Children in Abu Dis, in the Occupied Palestinian Territory" (23 July, 2012), online: UNICEF <http://www.unicef.org/infobycountry/oPt_65397.html>. HRW, "Israel: West Bank Barrier Endangers Basic Rights," release (1 October, 2003), online: HRW <http://www.hrw.org/news/2003/09/30/israel-west-bank-barrier-endangers-basic-rights>.

[120] *Seam Zone* Judgment, *supra* note 49 at para 1.

[121] Petitions either challenged the legality of the Wall's construction as a whole; specific segments of the Wall or the gates constructed in it, all on the ground that they impeded access of Palestinian farmers to the land west of that structure. See Michael Sfard, "The Fight against the Separation Wall," *supra* note 66 at 7.

[122] *Mara'abe* Judgment, *supra* note 51 at para 72.

[123] Petitions either challenged the legality of the Wall as a whole or sections of it. See *B'Tselem*, "Arrested Development," *supra* note 46.

[124] Petitions were also filed by representatives of Israeli settlement councils and towns inside Israel, some of whom adopted similar arguments to the Palestinian petitioners, including that the construction of the Wall harms their 'fabric of life' or violates their property and other fundamental rights. For example, see (HCJ 399/06) [2006] *Susya Agricultural Settlement Association et al v. Government of Israel et al*, unofficial English translation by Avichay Sharon (March 2014), on file with author [*Susya* Judgment]. See also (HCJ 10309/06) [2007] *Local Council of Alfei Menashe et al v. Government of Israel et al*, unofficial English translation by Avichay Sharon (January 2013), on file with author [*Alfei Menashe Local Council* Judgment], and (HCJ 11651/05) [2006] *Beit Arye Local Council v. Minister of Defense*, unofficial English translation by Avichay Sharon (August 2013), on file with author [*Beit Arye* Judgment]. This petition was dismissed by the HCJ.

But what exactly is the objection leveled against the route of the Wall? The first group of criticism raised by petitioners relates to the fact that the Wall's route deviates from the Green Line into the occupied West Bank, which would contravene international law.[125] Petitioners have also rebutted the government's argument that the deviation of the Wall's route from that line is effective from a security point of view, highlighting instead that it creates "a situation in which dozens of Palestinian communities remain west of the barrier [inside the Seam Zone]."[126]

As a direct challenge to Israeli assurances that the Wall is a temporary measure, petitioners have also emphasized that its planned route is mainly driven by political considerations (as opposed to legitimate security needs). Indeed, they have pointed out that the Wall seeks to "effectively incorporate, and make connections with Israeli illegal civilian settlements - whose location it has significantly taken into consideration,"[127] thereby *de facto* annexing the Zone in contravention of international law.[128]

Moreover, in an effort to highlight the long-term nature of the Wall (i.e. that it is here 'to stay') petitioners have emphasized that "for the State of Israel, the separation barrier project is a colossal enterprise, the cost of which [...] is millions of [Israeli Shekels] NIS per kilometre."[129] In addition, they noted that the creation of the Seam Zone and imposition of other measures affiliated with the Wall have had a "far-reaching economic, cultural, and social

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[125] In an unusual move, the ICRC issued in 2004 a communiqué reiterating that "[t]he ICRC's opinion is that the West Bank Wall, in as far as its route deviates from the "Green Line" into occupied territory, is contrary to IHL." See ICRC, "Israel: 'Occupied Autonomous Palestinian Territories': West Bank Barrier Causes Serious Humanitarian and Legal Problems," press release (18 February, 2004), online: ICRC <http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/5wacnx.htm>.

[126] "(HCJ 9961/03) *Seam Zone* petition" at para 30, online: *Hamoked* <http://www.hamoked.org/items/6653_eng.pdf> [Seam Zone-petition].

[127] HRW "Israel's Separation Barrier in the Occupied West Bank," *supra* note 77.

[128] In 2005, *B'Tselem* had expressed the concern that "a major aim in planning the route was *de facto* annexation of parts of the West Bank." See *B'Tselem,* "The Separation Barrier," *supra* note 60. According to the ICRC, its construction "runs counter to Israel's obligation under IHL to ensure the humane treatment and well-being of the civilian population living under its occupation […] [and] go far beyond what is permissible for an Occupying Power under IHL." See ICRC, "Israel: 'Occupied Autonomous Palestinian Territories'," *supra* note 125.

[129] They also alluded to the idea that the project results in a permanent (or at least long-term) change of the arrangements prevailing in an occupied territory, in violation of the authority vested in the occupying power. See Seam Zone-petition, *supra* note 126 at para 30.

impact on Palestinians."[130] Moreover, they have pointed out that the destruction and requisition of Palestinian privately owned property for the purpose of this construction cannot be justified under the exception of military necessity, because it applies only to the defense of the state and its military forces. Therefore, it cannot be included as a lawful military consideration for the security of the Israeli settler population."[131]

Secondly, petitioners have underlined the disproportionate and often severe harm which the Seam Zone and its associated permit regime have had for entire communities in areas close to the Wall. This includes: cutting them off from their farmland,[132] reducing their access to the rest of the West Bank[133] and generally compounding the harm resulting from the Wall's construction.[134]

Thirdly, human rights organizations have criticized on substantive and formal rule of law (RoL) grounds, the arbitrary manner in which the land requisitioning act is communicated to the affected Palestinians, as well as the operation of the appeals committees through which the legality of land requisitions can (in principle) be challenged by those individuals.[135] Many

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[130] Referring specifically to the Seam Zone, they underscored that one of the consequences of Wall's construction, is that it has created this new political entity which for all practical purposes is under the absolute control of the Israeli government authorities. *Ibid* at para 98.

[131] Article 46 and 52 of the Hague Regulations*, supra* note 7 and article 53 of the Fourth Geneva Convention *supra* note 11, cited in *ibid* at paras 90-92. With respect to Israeli settlers, the occupying power only has the authority to administer 'order' and 'public life'. Cited in *ibid* at para 78.

[132] In this regard, HRW, amongst others, has highlighted that the "[t]he construction of the barrier has already in some areas involved *changes of a permanent character* [emphasis added] including destruction of agricultural land and uprooting of olive trees [in addition to] [s]cores of demolition orders concerning houses in the vicinity of the barrier." HRW, "Israel's Separation Barrier in the Occupied West Bank," *supra* note 77.

[133] Daphne Barak-Erez "Israel: The Security Barrier between International Law, Constitutional Law and Domestic Judicial Review" (2006) 4:3 Int J Constitutional Law 540.

[134] See section 2.3 of this chapter.

[135] Documentation by UN agencies points out that land confiscation MOs get renewed without limitation; that the manner in which these orders are communicated to the landowners is arbitrary in nature; and that the appeals process is not impartial. Under international law, the appeal body should be both independent and impartial. However, affected Palestinians, have only one week to file an objection with the legal advisory of the Israeli military, to be reviewed by the appeals committee. This committee is also exempt from applying rules of evidence applicable under Israeli law, and the MC has the authority to reverse recommendations by the committee. In the majority of cases, the committee has rejected the appeals. It is the last step before appealing the HCJ. See *a Follow-Up Report on the Humanitarian and Emergency Policy Group (HHEPG) and the Local Aid Coordination Committee (LACC)* updated (30 November, 2003) at para 44, online: United (UNISPAL) [LACC Follow Up Report 2003]. In the past, the HCJ has declared that it will not interfere in the factual findings of the appeals committee, except in extreme cases of serious defects in administrative procedure. (HCJ 277/84) [1984] *Sabri Mahmud Araib v. Custodian of Abandoned and Government Property,*

have also criticized the policy of identifying and declaring land as a 'state land', which Israeli authorities allege is the primary type of land that is allocated for the construction of the Wall.[136]

The next section introduces the *Beit Sourik* and the *Mara'abe* decisions, since they adequately illustrate not only the arguments made by petitioners and respondents, which touches upon the alleged temporary and security-based nature of those measures, but also the Court's adjudication of these issues. By rendering its judgments in these two petitions, the Court has laid the ground for how it would regard and rule on many more Wall related case laws to follow.

3.1.2. Facts of the Cases

Delivered a few days before the ICJ's *Wall* Advisory Opinion,[137] the *Beit Sourik* case dealt with a petition filed by the Beit Sourik village council and other Palestinian West Bank village councils north-east of Jerusalem. Together with directly affected landowners, they challenged the decision of the Israeli MC to confiscate plots of village land by way of an Israeli MO, for the purpose of constructing the Wall.[138] In this regard, it is important to understand that the challenged route had encircled a number of Israeli settlements in the Jerusalem area (to include them on the 'Israeli side' of the Wall), thereby trapping land that belongs to them inside the Seam Zone.[139]

In this case, petitioners firstly underscored that the route of the Wall is illegal under international law, because it annexes some of its land to Israel proper. Consequently, the desire to annex the land, they argued, constitutes a political consideration that has been

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Judea and Samaria et al at 5, unofficial English translation by Avichay Sharon (March 2014) on file with author [*Araib* Judgment]. See also *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 64.

[136] For an overview of the policy of 'state land' declaration see Chapter II.

[137] *Legal Consequences on the Construction of Construction of a Wall in the Occupied Territory*, Advisory Opinion [2004] ICJ Rep 136 at para 125 [ICJ *Wall* Advisory Opinion].

[138] These villages were Beit Sourik, Bidu, El Kabiba, Katane, Beit A'anan, Beit Likia, Beit Ajaza and Beit Daku. See *Beit Sourik* Judgment, *supra* note 1 at para 9.

[139] The settlements of Mevo Choron, Har Adar, Gi`vat Zeèv, New Gibion and Har Shmuel. See David Kretzmer, "The Advisory Opinion and the Light Treatment," *supra* note 26. For location of the village, the settlements in respect to the Wall and the Green Line, type 'Beit Surik' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

disguised under the pretext of pressing security needs. In this regard, it is also worth mentioning that members of the *Council for Peace and Security* (CPS), an organization of high ranking Israeli reserve officers, had joined the petition as *amicus curiae* to raise strong security-related reservations regarding the usefulness of the route that had been chosen by military authorities.[140]

Furthermore, petitioners claimed that the Wall's construction does not serve the needs of the occupied population or the military needs of the occupying power in the occupied territory[141] and that, clearly, the fence is not of a temporary character.[142] Petitioners also focused on the idea that the injury caused by the Wall to the petitioners and their rights is severe and unbearable. Thus, it was stated that:

> Over 42,000 dunums of their lands are affected. The obstacle itself passes over 4,850 dunums, and will separate between petitioners and more than 37,000 dunums, 26,500 of which are agricultural lands that have been cultivated for many generations. Access to these agricultural lands will become difficult and even impossible. *Petitioners' ability to go from place to place will depend on a bureaucratic permit regime which is labyrinthine, complex, and burdensome* [emphasis added]. Use of local water wells will not be possible. As such, access to water for crops will be hindered. Shepherding, which depends on access to these wells, will be made difficult. Tens of thousands of olive and fruit trees will be uprooted. The fence will separate villages from tens of thousands of additional trees. The livelihood of many hundreds of Palestinian families, based on agriculture, will be critically injured. Moreover, the separation fence injures not only landowners to whom the orders of seizure apply; the lives of 35,000 village residents will be disrupted. The separation fence will harm the villages' ability to develop and expand. The access roads

[140] Those reservations were made despite the fact that the CPS is "among the first to suggest a separation fence as a solution to Israel's security needs," (i.e. it did not have an issue with constructing the 'fence' in the occupied territory). See *Beit Sourik* Judgment, *supra* note 1 at paras 10 and 16. Objections by the CPS include that the current route would require the respondent to build passages and gateways which will cause injury and bitterness to the local Palestinian population, and which in turn will increase security related dangers; that instead of building the Wall at a distance from Israeli towns to provide response time in case of infiltration, obstacles can be reinforced near Israeli towns, and that seizing hilltops to secure topographical control was unnecessary, and does not prevent fire upon the Wall. *Ibid* at para 18.

[141] Petitioners reiterated that "[w]here the route of the separation fence to pass along Israel's border, they would have no complaint." *Ibid* at para 10.

[142] *Ibid* at para 10. They also highlighted that the land seizure orders were illegal on procedural grounds. For example, they alleged that they were not allowed to participate in the drawing of the route of the Wall; that the seizure orders were not published; that they were not brought to the knowledge of most of the affected landowners; (with most petitioners learning of them by chance) and that they were given an extension period of only a few days for the submission of appeals. *Ibid* at para 10.

> to the urban centres of Ramallah and Bir Naballa will be blocked off. Access to medical and other services in East Jerusalem and in other places will become impossible. Ambulances will encounter difficulty in providing emergency services to residents. Children's access to schools in the urban centres, and of students to universities, will be impaired.[143]

As respondents, government authorities reiterated that the Wall is a security (and not a political) border, which seeks to prevent the unchecked passage of West Bank Palestinians and their infiltration into Israel proper. They also argued that the route of the Wall was chosen to allow Israeli military forces to control its topographic surrounding as a way of preventing direct fire, protecting the soldiers guarding the 'fence' and delaying/preventing infiltration into Israel proper.[144] While taking note of the security and military experiences of the CPS, government authorities stressed the idea that their own assessment as "the expert who is also responsible for security bears a much greater weight."[145]

In the *Mara'abe* case, the facts were similar to those of *Beit Sourik*. It involved a petition by Palestinians challenging the legality of the construction of the Wall surrounding the Israeli settlement of Alfei Menashe (housing an estimated 5,650 settlers), which had been established four (4) km beyond the Green Line, in close proximity to the Palestinian West Bank city of Qalqilya.[146] According to the projected route of the Wall, the structure was to surround the settlement from all sides, leaving a passage containing road *55* to connect the settlement to Israel proper.[147] This resulted in the creation of an enclave inside the Seam Zone, which included five (5) Palestinian villages of approximately 1,200 residents.[148] Access to these

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[143] *Ibid* at para 9.

[144] *Ibid* at para 29. Emphasis added.

[145] And although government authorities declared that they were ready to modify the route of the Wall adjacent to the settlement of Har Adar, and east of it in the area adjacent to the villages of Beit Sourik and Biddu, they reiterated that the remainder of the route proposed by petitioners does not provide an appropriate solution to the security needs that the Wall's construction seeks to address. *Ibid* at para 20.

[146] *Ma'arabe* Judgment, *supra* note 51 at para 75. For the location of the Palestinian city, the Israeli settlement vis-à-vis the Wall and the Green Line, type 'Alfei Menashe' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[147] This route is mainly used by Israelis travelling from the Israeli settlement of Alfei Menashe to Israel proper, as well as by Palestinians who have a valid permit to enter Israel proper or who are travelling within the boundaries of the enclave. *Ibid* at paras 9 and 11.

[148] *Ibid* at para 8.

villages is only allowed via one crossing and three (3) agricultural gates in the Wall.[149] In addition, part of the land requisitioned by Israeli military authorities for the Wall's construction was privately owned by Palestinians.[150]

Delivered after the ICJ *Wall* Opinion (July 2004), the petitioners (who heavily based their arguments on conclusions reached by the international court) confirmed that the Wall's construction in that area is, indeed, illegal[151] as its main objective is to *de facto* annex the enclave's territory to Israel proper and to ensure that the settlement of Alfei Menashe and road 55 remain inside the Wall.[152] Addressing the claims of the authorities that the Wall's route is necessary to provide for the security of the settlers, petitioners stressed the illegality of settlements activity under international law. Consequently, they argued, the protection of Israeli settlers residing in the occupied territory is not a legitimate military necessity. In addition, petitioners underscored that it is illegal for authorities to restrict their rights as 'protected persons' under the Fourth Geneva Convention for that purpose. It was also emphasized that rather than building the Wall inside the occupied territory as a way of guaranteeing the security of those settlers, government authorities should evacuate them back to Israel proper.[153] Furthermore, by enclaving five Palestinian villages inside the Seam Zone, military authorities have created a reality in which hundreds of Palestinians find themselves inside the Wall, without a checkpoint or gate between them and Israel, thereby undermining the security-based rationale for the Wall's route.[154]

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[149] Crossing 109 allows Palestinian residents of the enclave to pass (subject to security checks) at all hours of the day. As for the gates, one of them opens most of the day, whiles the three remaining ones are opened three times a day for only one hour each time. *Ibid* at para 9.

[150] *Ibid* at para 5.

[151] In relation to this, the petitioners argued that by including the residents of five Palestinian villages on the 'Israeli side' of the Wall in an area without any checkpoint or gates between them and Israel proper, it is difficult to conceive how this arrangement and the infringement on their rights, promotes security. *Ibid* at para 111.

[152] *Ibid* at para 80.

[153] As Attorney Sfard explains further, "[t]he question of military necessity is deeply connected to legitimate military necessity. It is one thing to say that I have a legitimate military necessity because I need to protect this thing, but this sentence must assume that this thing is a legitimate creature under international law." Interview of Michael Sfard, by Avichay Sharon on behalf of author (10 July 2014, Tel Aviv) [*Sfard* First Interview]. Mr. Sfard is an Israeli human rights lawyer and legal counselor who litigates extensively on behalf of Palestinians and of Israeli NGOs challenging measures by the Israeli authorities such as the construction of the Wall. Amongst other cases, he represented petitioners in the *Mara'abe* case, *supra* note 51.

[154] *Mara'abe* Judgment, *ibid* at para 111.

In addition, the disproportionate harm resulting from the Wall's route on their fundamental rights both under IHL and International Human Rights (IHR) law was also addressed by the petitioners' submissions.[155] Lastly, they highlighted that the legal regime in the Seam Zone "creates legal classes according to ethnicity, and only obfuscates itself with security claims,"[156] and that accordingly, it is discriminatory and illegal in nature.[157]

Respondents on the other hand (which included also Alfei Menashe's local settlement council),[158] advocated that the injury caused to the Palestinian petitioners is proportional and that it can be moderated by a series of logistical and structural improvements concerning the Wall and its associated permit regime. It also underscored that the construction of this structure is only intended as a legitimate right to self-defense and "a security act *par excellence* to provide a temporary solution to terrorism offense in Israel and the surrounding area [since 2000]."[159]

In addition, it was highlighted that under the law of belligerent occupation, the duty of the Israeli MC in the West Bank entails the requirement to protect all those present in that territory, including those residents who are not considered 'protected persons' under the Fourth Geneva Convention (in clear reference to Israeli settlers). Moreover, this duty would allow them to infringe on other rights for that purpose, as long as that infringement is reasonable and is driven by legitimate considerations, such as security needs.[160]

The next section highlights the main elements in the Court's judgments.

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[155] These included the right to property, freedom of movement, the right to make a living, the right to education, health, food, dignity, and equality. Petitioners allege that the measure is disproportionate in nature, even when assessed against the proportionality test that the HCJ had developed in the *Beit Sourik* Judgment. *Ibid* at para 82.

[156] *Ibid*. Petitioners have also alleged that any improvements which the respondent claims to have made in the structure or permit regime for the Seam Zone were cosmetic. *Ibid* at paras 76 and 92.

[157] *Ibid* at para 83.

[158] *Ibid* at para 93.

[159] Emphasis is in the original. *Ibid* at paras 86-87 and 90.

[160] Other sources cited by the government for the protection of the settlers were the Oslo Accords which had left responsibility for settlements and settlers with Israel; as well as the Israeli basic laws. *Ibid* at para 91.

3.1.3. The Judgments of the Court

In its judgments the Court laid out its position regarding two important issues: (1) the source of the legal authority governing the actions of the MC and (2) the manner in which a Commander must exercise this discretion, especially when it requires balancing between conflicting interests. It is these two aspects which are briefly overviewed in the next sub-sections.

3.1.3.1. The Source of Authority of the MC: The Normative Framework

The HCJ determined that both public international law and Israeli administrative law form part of the normative framework that influences the scope of the MC's authority to construct the Wall along the route he has chosen. In terms of the first source, the Court examined three aspects: (i) the applicability of the law of belligerent occupation to the oPt, (ii) the extent to which the Wall's construction serves as a temporary security measure, and (iii) whether or not the MOs giving way to land requisitioning and destruction of private property respect relevant provisions of the Hague Regulations and the Fourth Geneva Convention.

3.1.3.1.1. Public International Law

3.1.3.1.1.1. The Applicability of International Law to the oPt

Regarding the oPt, the Court reiterated the position which it had developed in previous judgments, namely that Israel's status in the West Bank is that of an occupant.[161] Hence, it is the international law of occupation, consisting primarily of the Hague Regulations[162] and the Fourth Geneva Convention;[163] which governs the legality of military actions.[164] The Court

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[161] *Beit Sourik* Judgment, *supra* note 1 at para 1. Contrary to the ICJ which had expressly included EJ in the territory deemed to be occupied by Israel, the HCJ did not refer to it as such. See Fania Domb, "The Separation Fence in the International Court of Justice and the High Court of Justice: Commonalities, Differences and Specifics" in Michael Schmitt and Jelena Pejic, eds, *International Law and Armed Conflict: Exploring the Fault lines: Essays in Honour of Yoram Dinstein,* (Leiden: Michael Martinus Nijhoff Publishers, 2007) 509.

[162] Hague Regulations, *supra* note 7. It must be recalled that government authorities have accepted that these Regulations are reflective of customary international law.

[163] The 'humanitarian provisions' which the Israeli government has accepted apply to the West Bank. See Fourth Geneva Convention, *supra* note 11.

also reiterated that the MC's actions in the occupied territory must be restricted by this body of law.[165]

At the same time, the justices noted that since the Israeli government has accepted the humanitarian aspects of the Convention, it ruled there was no need to "take a stand on that issue in the petition before us," regardless of the *de jure* applicability for the Fourth Geneva Convention.[166] Unlike the ICJ *Wall* Advisory Opinion, the Court also chose not take a position on the relevance of the illegality of settlement activity under Article 49(6) of the Convention to the issue of the legality of the determination of the Wall, stating that:

> It is not relevant whatsoever [...] to examine whether this settlement activity conforms to international law or defies it, as determined in the Advisory Opinion of the International Court of Justice at The Hague. For this reason, we shall express no position regarding that question.[167]

In terms of the applicability of IHR law and whether or not Israel's obligations under the international human rights conventions are legally binding on Israel in the oPt, the HCJ decided to leave the question open, even though it stressed that the "Court was willing, without deciding the matter, to rely upon the international conventions."[168]

Subsequently, the justices addressed the question of whether the action conforms to international law. This examination is described in the next sub-section.

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[164] *Beit Sourik* Judgment, *supra* note 1 at para 23 and *Mara'abe* Judgment, *supra* note 51 at para 14.

[165] *Beit Sourik* Judgment, i*bid* at paras 27 and 33. It also concluded that Israeli administrative law applies in the West Bank, since Israel has not annexed the 'area'. *Ibid* at para 14.

[166] At the same time, the justices stressed that "[w]e are aware that the Advisory Opinion of the International Court of Justice determined that The Fourth Geneva Convention applies in the Judea and Samaria area, and that its application is not conditional upon the willingness of the State of Israel to uphold its provisions." See *Mara'abe* Judgment, *supra* note 51 at para 14.

[167] *Ibid* at para 19.

[168] Thus in the *Mara'abe* case, while the Court makes a reference to the International Covenant on Civil and Political Rights (ICCPR), it reiterates extracts from a previous judgment (HCJ 1890/03 [2005] *Bethlehem Municipality v. State of Israel*) that "we need not, in the framework of the petition before us, take a position regarding the force of the international conventions on human rights in the area. Nor shall we examine the interrelationship between international humanitarian law and international law on human rights [...]." See *Mara'abe* Judgment, *supra* note 51 at paras 25 and 27.

3.1.3.1.1.2. A Temporary and Security-based Measure in Conformity with International Law

Having established the relevant legal framework, the Court then reiterated that a situation of occupation is, by definition, temporary in nature. Consequently, the justices underlined that the authority and governance of the MC in the Area (another term for the West Bank) is also of a limited duration.[169] Once this was established, the justices then proceeded to reiterate that the MC is only entitled to take measures in response to security considerations, as opposed to political considerations. This, according to them, means that even with "the passage of time [...] the military commander [...] [cannot] take into account considerations beyond the proper administration of the area under belligerent occupation" to build a Wall that seeks to annex territory to Israel or to demarcate a political border.[170]

However, the Court did not question the authorities' determination that security, and not political considerations, had spearheaded the implementation of the challenged measures.[171] It also accepted the government's assurances that these measures are indeed temporary in nature (particularly with land requisition orders being of limited duration) and that the Wall is "a central security component in Israel's fight against Palestinian terrorism."[172]

Given that the Court had in underscored that where the MC's actions outside Israel have military and political implications,[173] his discretion is not absolute,[174] in the two judgements discussed here, the Court reiterated the idea that it was entitled to review whether he had acted reasonably and within the limits and conditions of the law.[175] At the same time, the justices

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[169] *Ibid* at para 14.

[170] *Beit Sourik* Judgment, *supra* note 1 at para 27. See also *Mara'abe* Judgment, *supra* note 51 at paras 15.

[171] Of seeking to *de facto* annex land inside the Wall and which is populated by what the Court describes as "Jewish towns and neighborhood' (i.e. settlements). *Ibid* at para 10.

[172] *Mara'abe* Judgment, *supra* note 51 at para 100. See also *ibid* at para 2.

[173] *Beit Arye* Judgment, *supra* note 124 at paras 8-11. *Alian* Judgment, *supra* note 43 at paras 8-18.

[174] It must be one which any reasonable commander in the same situation would make. See *Alian* Judgment, *ibid* at paras 8-18. See also *Biddu Village Council* Judgment, *supra* note 73 at paras 10-15. (HCJ 2577/04) [2007] *Taha El Khawaja et al v. Prime Minister et al*, unofficial English translation by Avichay Sharon 2013, on file with author [*Ni'ilin* Judgment]. This petition was upheld by the HCJ.

[175] *Mara'abe* Judgment, *supra* note 51 at para 16. Beit Sourik Judgment, supra note 1 at paras. 46 and 48. See also *Susya* Judgment, *supra* note 124 at paras 7-11; *Alian* Judgment, *ibid* at paras 8-18. See also (HCJ 3680/05) [2005] *Tene Settlement Committee v. Prime Minister Sharon et al* at paras 8-14, unofficial English

underscored the idea that "we, Justices of the Supreme Court, are not experts in military affairs […]. All we can determine is whether a reasonable military commander would have set out the route as this military commander did,"[176] and that it is within his legal authority.[177]

Thus, not only did the Court internalize the government's position that its reasons for constructing the Wall along the designated route (such as topography, the need to establish a security zone, etc.) are security considerations *par excellence*,[178] it also adopted without hesitation the position of the MC that "[…] it is not a permanent fence, but rather a *temporary* [emphasis added] fence erected for security needs. We have no reason not to give this testimony less than full weight, and we have *no reason* [emphasis added] not to believe the sincerity of the military commander."[179]

Subsequently, the Court proceeded to an examination of the legality of the land requisition orders under international law, which is addressed in the next sub-section.

3.1.3.1.1.3. Upholding the Legality of the Land Requisition Orders under International Law: An Essential Stepping Stone Legitimizing the Wall as a Security Measure

Having established that, the test of reasonableness between the means (the Wall) and the ends (military necessity),[180] the Court then proceeded to address the legal provisions in the international law of belligerent occupation which allows an occupying power to requisition and destroy private property for security needs, primarily for the purpose of achieving

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translation by Avichay Sharon (August 2013), on file with author [*Tene* Judgment]. The petition was dismissed by the HCJ.

[176] *Beit Sourik* Judgment, *supra* note 1 at paras 45 and 46. See also *B'ilin* Judgment, *supra* note 68 at para 29.

[177] (HCJ 6027/04) [2006] *Taleb Radad v. Head of a-Zawiya Village Council v. Minister of Defense*, at para 15-23, unofficial English translation by Avichay Sharon (February 2013), on file with author [*Radad* Judgment]. This petition was dismissed by the HCJ. See also (HCJ 5624/06) [2006] *Beit Ummar Municipality et al v. Military Commander of the West Bank et al* at paras 7- 11, unofficial English translation by Avichay Sharon (May 2013) on file with author [*Beit Ummar* Judgment]. The petition was dismissed by the HCJ. See also *Beit Arye* Judgment, *supra* note 124 at paras 8-11.

[178] *Beit Sourik* Judgment, *supra* note 1 at para 29 and *Mara'abe* Judgment, *supra* note 51 at para 62.

[179] *Beit Sourik* Judgment *ibid* at para 29.

[180] *Ibid* at paras 28-31. "Indeed, our point of departure is that the separation fence is intended to realize a security objective which the military commander is authorized to achieve." *Ibid* at paras 44 and 45.

objectives that are "rendered absolutely necessary by military operation."[181] Here, the Court made extensive reference to articles 23(g), 43, and 52 of the Hague Regulations and to article 53 of the Fourth Geneva Convention, authorizing the MC to requisition privately owned property in occupied territory for security/military needs.[182]

In regard to article 23 (g) of the Hague Regulation, this provision which is listed under Section II of the regulations (on Hostilities) authorizes the destruction or seizure of enemy property if it is for 'imperative necessities of war'. In stark contrast to the conclusion reached by the ICJ in its *Wall* Advisory Opinion,[183] the Court upheld the relevance of this provision for destroying or requisitioning Palestinian privately owned property (including land) for the purpose of constructing the Wall. To justify this conclusion, the justices reiterated the notion that the situation in the West Bank is often fluid: i.e. it is one of belligerent occupation in which intermittent periods of combat activities are taking place and that, therefore, the rules and principles of the international law of armed conflict (applicable to hostilities) also become applicable in tandem with the law of belligerent occupation.[184] This led the Court to conclude that the rules and principles of IHL are applicable in tandem with the law of belligerent occupation.

Secondly, the Court stated that there is no need to discuss whether the fence's construction "is part of Israel's [defensive] combat actions [...] since the general authority granted the military commander pursuant to articles 43 and 52 of the Hague Regulations and article 53 of The Fourth Geneva Convention [has been deemed] as sufficient, as far as construction of the

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[181] *Mara'abe* Judgment, *supra* note 51 at para16.

[182] Article 52 of the Hague Regulations stipulates that possession of property must be for the needs of the army of the occupation). See *Hague Regulations supra* note 7. Article 53 of the Fourth Geneva Convention, *supra* note 11. See also *Beit Sourik* Judgment*, supra* note 1 at 32.

[183] The ICJ had rejected the idea that the occupation is one in which active hostilities and/or armed conflict is taking place. As a result, it determined that article 23(g) was not relevant because it is part of Section II of the Hague Regulations applicable during hostilities and not part of Section III that is applicable in situations of a "[m]ilitary Authority over the Territory of a Hostile State." ICJ *Wall* Advisory Opinion, *supra* note 137 at para 124.

[184] Moreover, in any case, the Court notes, "there is a view [...] by which the scope of application of regulation 23(g) can be widened, by way of analogy, to cover belligerent occupation as well." See *Ma'arabe* Judgment, *supra* note 51 at para 17.

separation fence goes."[185] At the same time, the language adopted by the judges suggests that they do not challenge the idea that the Wall is a legitimate act of self-defense noting that to the "extent [that] the Barrier is *intended to take the place of combat military operations* [emphasis added] [...] it is permitted by international law."[186]

After emphasizing the relevance of the international law of occupation, the Court underscored the relevance of another body of law: Israeli administrative law.

3.1.3.1.2. Israeli Administrative Law

In addition to the provisions of international law,[187] the justices highlighted that the principles of the Israeli administrative law also constrain the use of a public official's governing power (including the actions of the MC). Moreover, they stressed that his actions must take into account "substantive and procedural fairness (the duty to act reasonably)."[188]

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[185] Consequently, there was no need according to the Court, to examine whether its construction is lawful under the international law on the use of force, *ibid* at para 17. See also the *Beit Sourik* Judgment *supra* note 1 at para 32. In this regard, the Court stressed that article 52 of the Hague Regulations, and article 53 of the Fourth Geneva Convention, provided a legal basis for taking possession of land for military purposes, provided that compensation is paid. Regarding article 46 of the Hague Regulations, the Court stated that the construction of the 'fence' cannot be considered to amount to the confiscation of private property (in this case land), for purposes of the Wall's construction, because it will only amount to a temporary possession, and would be accompanied by payment of compensation of the damage caused. See *Mara'abe* Judgment *ibid* at para 16. According to Israeli military authorities, affected Palestinian land owners can seek lump sum compensation for damage to the land and structures with assessors from the MoD setting the compensation scales. However, it has been alleged that the compensation system remains unclear, with MOs providing that land owners can request compensation, but no formal procedures for determination being in place. It also remains unclear what guidelines will be in effect for determining compensation rates. Moreover, compensation covers only property requisitioned or damaged for the construction of the Wall and the depth barriers. Owners of land parcels damaged because they could not be accessed routinely for cultivation are not entitled to such compensation. In addition, many affected Palestinians have refrained from demanding compensation out of fear that they could thereby be lending legitimacy to the requisition process. See LACC Follow Up Report 2003, *supra* note 135.

[186] *Ibid* at para 15-17.

[187] According to one writer, "[t]he legal and normative importance of the reliance on international law is unquestionable." See Ron Dudai, "The Wall, the Law, and the Court: Reflections on the *Beit Sourik* Case in the Israeli Supreme Court" (2003-2004) 10 Yrbk Islam mid-East L 477 at 477.

[188] *Mara'abe* Judgment *supra* note 51 at para 14; *Beit Sourik* Judgment, *supra* note 1 at para 24. See also *Tene* Judgment, *supra* note 175 at paras 8-14; *Susya* Judgment, *supra* note 124 at paras 7-11. See also (HCJ 2942/05) [2006] *Nafez Mansour et al v. Government of Israel et al* at paras 21-33, unofficial English translation by Avichay Sharon (February 2013), on file with author [*Ariel Bloc* Judgment]. The petition was dismissed by the HCJ.

By examining the legality of the Wall through the lens of this body of law, the Court has concluded that, in some cases, the harm caused by certain segments of the Wall to the Palestinians and their rights is not proportionate and that, therefore, their route must be changed. Arguably, this demonstrates some of the instances in which the Court has managed to exercise its restraining function vis-à-vis the actions of military authorities. Unfortunately, as is demonstrated through the discussion to follow, the Court has only managed to strike down the legality of the route of certain segments of the Wall and/or of its associated regime, if their arbitrary nature is self-evident. Generally speaking, however, it has preferred not to interfere in the manner in which related processes are implemented by military authorities (such the requisition of land).[189]

The next section examines how the justices have adjudicated the legality of the manner in which the MC exercised his discretion when authorizing the construction of the Wall along the given route.

3.1.3.2. Analyzing the Discretion of the MC

According to the justices, there are three different sets of considerations and interests which the MC can lawfully take into account when determining the route of the Wall – all of which must be balanced against each other. These are: (1) security/military considerations, (2) the welfare of the 'local population' and (3) the protection of the life and safety of Israelis living, in what the Court referred to as, "Israeli communities in the Judea and Samaria area."[190] It is these three sets of considerations to which we now turn.

3.1.3.2.1. Security/Military Considerations

In terms of the first consideration, the HCJ underlined that the law of belligerent occupation recognizes the authority of the MC under article 43 of the Hague Regulations "to maintain

[189] Nevertheless despite these concerns, the Court "found no defect in the process of issuing the orders of seizure, or in the process of granting the opportunity to appeal them." *Beit Sourik* Judgment, *supra* note 1 at para 32, and *Mara'abe* Judgment, *supra* note 51 at para 34.

[190] *Mara'abe* Judgment, *ibid* at paras 18-19 and 101.

security in the area and to protect the security of his country and their citizens,"[191] as well as the security of the army.[192]

On the one hand, the justices paid lip service to the notion that the "military commander is not permitted to take the national, economic, or social interests of his own country into account [...] even when the needs of the army are the army's military needs and not the national security interest in the broad meaning of the term."[193] On the other hand, this did not prevent them from concluding, in the *Mara'abe* case, that "the regulation 43 of [t]he Hague Regulations authorizes the military commander to take all necessary action to preserve security. *The acts which self defense permits are surely included within such action* [emphasis added]."[194] According to the Court, it also includes the obligation to protect the safety of Israeli nationals travelling (on road 55) from the settlement to Israel and those wishing to travel from Israel proper to the West Bank settlement of Alfei Menashe."[195]

In the *Mara'abe* judgment, the Court ended up asking government authorities to re-route the Wall sections in this area. However, this was in response to the particularities of this specific case,[196] and not because the Court questioned the idea that ensuring the safety of Israelis (including settlers) travelling throughout the West Bank does not fall within the scope of the MC's authority. This responsibility, Barak explained, can be inferred from the MC's duty to

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[191] *Beit Sourik*, Judgment, *supra* note 1 at para 34.

[192] *Mara'abe* Judgment, *supra* note 51 at para 24.

[193] *Beit Sourik* Judgment, *supra* note 1 at para 27. This was first mentioned in the *Iskan* Judgment, *supra* note 25. The Court reiterated this in other settler related case law, including (HCJ 10356/02) [2004] *Yoav Haas v. IDF Commander in the West Bank et al*, unofficial English translation online: *Hamoked* <http://www.hamoked.org/items/8240_eng.pdf> [*Haas* Judgment]. The petition was dismissed by the HCJ. See also (HCJ 2150/07) [2009] *Abu Safiyeh et al v. Minister of Defense et al* at para 23, unofficial English translation online: *Hamoked* <http://www.hamoked.org/files/2011/8865_eng.pdf> [*Abu Safiyeh* Judgment]. The petition was upheld by the HCJ. For more in-depth discussion of the two cases, see Chapter II section 6.

[194] *Mara'abe* Judgment, *supra* note 51 at para 23.

[195] *Ibid* at para 101.

[196] In its submissions, the government had highlighted that road 55 connecting the settlement to Israel was a temporary road. In light of this statement, the Court was not convinced that from a security perspective, it was necessary to preserve the northwest section of the Wall's route, with its harsh impact on the Palestinians in the area. Therefore, it ordered government authorities to cancel this road, and to build a new one southwest of the settlement, as originally planned. As it became evident during the court proceedings, the plan to pave a new road had been scraped by the relevant authorities as a result of objections by residents of the Israeli town of Matan (inside the Green Line), who feared that running the Wall along this route would harm their quality of life. *Ibid* at para 113.

preserve public order and safety, as stipulated in article 43 of the Hague Regulations:[197] It "is a general authority, covering *any person present* [emphasis added] in the territory held under belligerent occupation," even if they are not protected persons as per the meaning of article 4 of the Fourth Geneva Convention.[198]

The Chief Justice at the time also cited the Oslo Accords as another source for the aforementioned duty of the MC vis-à-vis the Israeli settlers' security needs, noting that these accords stipulate that the question of the Israeli settlements in 'the Area' will be determined in the 'final status' negotiations between Israelis and Palestinians. Till then, according to the Court, Israeli authorities are responsible for the overall security of Israelis and settlements by virtue of these accords,[199] as well as by virtue of the applicability of Israel's basic laws to Israeli citizens.[200]

However, what other considerations, if any, of a non security-based nature could lawfully affect the determination by the MC of the route of the Wall in the area? In the particular case of the *Mara'abe* proceedings, it is important to highlight that Colonel Dan Tirza had acknowledged that a planning scheme for the development of the settlement in the direction of the south-western part of the enclave had been filed, thereby implicitly suggesting that these expansion plans had played a role in the determining the Wall's route in the area and in including the area of the planning scheme on the 'Israeli side' of the Wall. Still, the Court took at face value the assurances provided in court that those development plans were not the primary consideration determining the route of the Wall in the area.[201]

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[197] "It is called for, in light of the human dignity of every human individual." *Ibid* at para 19.

[198] This is in reference to Israeli settlers. Here the Court stated: "Is the military commander authorized to protect the lives and defend the safety of people who are not "protected" under [t]he Fourth Geneva Convention? In our opinion, the answer is positive." *Ibid* at para 18.

[199] *Ibid*. MoFA, "The Israeli-Palestinian Interim Agreement," (28 September, 1995), online: MoFA <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx> [Oslo Accord 1995].

[200] *Mara'abe* Judgment, *ibid* at para 21. See discussion below.

[201] *Ibid* at para 113. For more discussion regarding the government's considerations of future expansion plans of settlements in determining the route of the Wall and the HCJ's adjudication of petitioners challenging those considerations, see section 3.3.3 of this Chapter.

This position of the Court is very significant, and re-appears in subsequent cases in which petitioners challenging the Wall argued that the objective of providing territorial space for the expansion plans of settlements was one of the main considerations influencing the route of the Wall. For unless there was glaring evidence that considerations other than security had indeed been the primary consideration for choosing the route of the Wall, the Court has, in the majority of those cases, accepted the respondents' assurances that the security factor was the determining factor, and that, therefore, the Wall's route was motivated by considerations which are lawful under international law.

The next sub-section examines the Court's adjudication of the second consideration that can lawfully guide the actions of the MC in constructing the Wall along the route chosen.

3.1.3.2.2. The Welfare of the Palestinian Local Population

The Court has underlined that the Palestinians, as 'protected persons', have rights and that the legal source of those rights is IHL.[202] At the same time, the Court also underscored the idea that the "human rights, to which the protected residents in the area are entitled are not absolute, [...] they are relative. They can also be restricted."[203]

The Court also explained that the provisions of the Hague Regulations and the Fourth Geneva are particularly relevant to land seizure,[204] "creating a single tapestry of norms that recognizes both human rights and the needs of the local population, as well as recognizing security needs

[202] In this regard, the HCJ reiterated that this body of law imposed on the MC a double obligation: a negative one, of refraining from actions which injure the local inhabitants, and a positive one, requiring him to ensure that the 'local population' is not harmed. This is per article 46 of the Hague Regulations, which stipulates that: "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." See Hague Regulations, *supra* note 7. Article 27 of the Fourth Geneva Convention states (amongst other things) that "[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected [...] however, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war." See Fourth Geneva Convention, *supra* note 11. Both were cited in *Mara'ab*e Judgment, *supra* note 51 at para 26.

[203] *Ibid* at para 25.

[204] Regulation 23(g) and 52 of the Hague Regulations *ibid*, and article 53 of the Fourth Geneva Convention *ibid* cited in *Mara'ab*e Judgment *ibid* at para 36.

from the perspective of the military commander."[205] In this regard, and in order to determine the extent to which they can be restricted "a proper balance must be found."[206]

The next sub-section deals with the Court's examination of the third legitimate element influencing the actions and decisions of the MC in an occupied territory.

3.1.3.2.3. The Human Rights of the Israeli Settler Population

For the justices adjudicating the two cases discussed here, there was little doubt that what was needed is an assessment of whether or not the MC is under the duty to provide for the lives and safety (security) of the Israeli settlers. In the *Mara'abe* judgment for instance, the Court reiterated a conclusion which it had made in other renowned judicial decisions (such as the *Haas* case), stating that the MC:

> [M]ust ensure the wellbeing, safety and welfare of the residents of the *area*. This duty of his applies to all residents, without distinction by identity – Jew, Arab, or foreigner. This sits well with the humanitarian aspect of the military force's responsibility in belligerent occupation.[207]

Here, the relevance of the illegality of settlement activity under international law, as encapsulated by article 49(6) of the Fourth Geneva Convention, was dismissed by the justices. This is because "[...] even if a person is located in the area illegally, he is not outlawed."[208] For:

> Even if the military commander acted in a manner that conflicted with the law of belligerent occupation at the time he agreed to the establishment of this or that settlement and that issue is not before us, and we shall express no opinion on it, that does not release him from his duty according to the law of belligerent occupation itself, to preserve the lives, safety and dignity of every one of the Israeli settlers.[209]

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[205] *Beit Sourik* Judgment, *supra* note 1 at para 35.

[206] *Ibid* at paras 34-35. Other sections of this judgment, the Court mentioned that the MC must strike a balance "between *the needs of the army* [emphasis added] on one hand, and the needs of the local inhabitants on the other." *Ibid* at para 27.

[207] *Haas* Judgment, *supra* note 193 at para 14, reiterated in *ibid* at para 19.

[208] *Mara'abe* Judgment, *supra* note 51 at paras 18-19.

[209] *Ibid* at para 20.

According to Israeli attorney and human rights lawyer Michael Sfard, by declining the justiciability of the legality of the settlements under international law and insisting that as long as there are settlements in the occupied territory, the MC is responsible for the security of its settler population, this represents the closest that the HCJ has come to legitimizing the presence of settlements.[210] This is because, even if one were to adopt the point of departure that those Israelis residing illegally in a given territory have legitimate security concerns, the MC is constricted in terms of the measures he can lawfully take under international law to respond to those needs.[211] As some Israeli scholars explain, had the HCJ considered the relevance of the question of the illegality of the settlements, it would have found it necessary to examine whether, under international law, removing the settlers would have been the more appropriate measure to protect them (rather than including them inside the Wall as it had concluded).[212]

In the *Mara'abe* decision, the Court also reiterated another conclusion, one that it had made in the *Gaza Coast Regional Council* decision,[213] in which it had deemed that the:

> Basic Laws grant rights to every Israeli settler in the area to be evacuated. This jurisdiction is personal. It is derived from the State of Israel's control over HCJ the area to be evacuated. It is the fruit of a view by which the state's Basic Laws regarding human rights apply to Israelis found outside the state, who are in an area under its control by way of belligerent occupation.[214]

Here, the Court explained that the scope of human rights and level of protection of the rights of Israeli settlers is different from that afforded to Israelis living in Israel proper. This, the

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[210] *Sfard* First Interview, *supra* note 153. The view was shared by Attorney Dakwar, who noted that the HCJ in practice legitimized the settlement enterprise, in disregard to the international legal prohibition on the transfer of civilian persons by the occupying power into the occupied territory. Interview with Attorney Nasrat Dakwar by Avichay Sharon, translated into English (7 July 2014, Jerusalem) [*Dakwar* Interview]. He is an Arab-Palestinian citizen of Israel (or as commonly referred to is an Arab 48). He is also a staff attorney with the Israeli NGO ACRI.

[211] However, the Court did not want to grapple with this question. Interview with Israeli Attorney A-04 by Avichay Sharon, in English), (10 July 2014, Jerusalem) [Attorney *A-04* interview].

[212] *Encyclopedia of the Israeli-Palestinian Conflict* "Israeli Supreme Court and the Occupation," *supra* note 76. See also Daphne Barak-Erez, "Israel: The Security Barrier between International Law," *supra* note 133.

[213] Here, Israel settlers challenged the legality of evacuating them from the Gaza Strip, as part of the implementation of the *Gaza Disengagement* Law in (HCJ 1661/05) [2005] *Gaza Coast Regional Council et al v. Knesset* [*Gaza Regional Council* Judgment] cited in *Mara'abe* Judgment, *supra* note 51.

[214] *Gaza Regional Council* Judgment cited in *Mara'abe* Judgment, *ibid* at para 21.

justices pointed out, is because 'the area' (West Bank) is not part of the sovereign territory of the State of Israel. Therefore, and since they live "under the regime of belligerent occupation; [...] which is inherently temporary [...] [t]he rights granted to Israelis living in the area came to them from the military commander. They have no more than what he has"[215]. However, the Court also reiterated that the spectrum of fundamental human rights protected by the basic laws, remain afforded to the Israeli settler population in the West Bank. These include rights such as "the rights to life, dignity and honour, property, privacy, and the rest of the rights which anyone present in Israel enjoys."[216]

Subsequently, the Court examined whether the decision of the MC to construct the Wall was proportional. To conduct this assessment, they relied on the proportionality doctrine and its three sub-tests, to which we now turn.

3.1.3.3. The Proportionality Doctrine and its Three Sub-Tests

In its *Beit Sourik* and in *Mara'abe* decisions, the Court developed a way to assess the discretion of the MC to know, whether or not he had successfully balanced between the various considerations (described above). This was done by relying heavily on the proportionality doctrine. The Court first stressed that both international law and Israeli administrative law recognize the relevance of the proportionality principle[217] "as a standard for balancing between the authority of the military commander and the needs of the local population."[218]

When describing the significance of this principle in the international law of belligerent occupation, Justice Barak underscores that it seeks to prevent "incidental consequences of

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[215] "Therefore, in determining the substance of the rights of Israelis living in the *area*, one must take the character of the *area* and the powers of the military commander into account." See *Mara'abe* Judgment, *ibid* at para 22. Emphasis is in the original.

[216] In determining the level of compensation to be granted to the Israeli settlers of the Gaza Strip who had challenged the Disengagement plan, the Court highlighted that the rights granted to them as Israelis living in an occupied territory flow to them by virtue of the authority that the MC has over that territory and are determined by the authority granted to this Commander in the first place, which is an authority that is temporary in nature. See *Gaza Coast Regional Council* Judgment, *supra* note 213 at para 127 cited in *ibid* at para 21.

[217] *Beit Sourik* Judgment, *supra* note 1 at para 36.

[218] *Ibid* at para 39.

(lawful) military operations [emphasis added]."[219] Subsequently, he underscores how the three sub-tests used in Israeli administrative law give specific content to this doctrine, all of which must be satisfied before determining that "the means used to realize the governmental objective is of proper proportion:"[220] These are: (1) The 'rational means' test, by which the means used by the administrative body must rationally lead to the realization of the stated objective; (2) the 'least injurious means' test: that from the spectrum of lawful means which are available to the government authorities to achieve a given objective, they must resort to the means that are the least injurious to the rights of affected individuals; and (3) the 'proportionality in the narrow sense' test, advocating that the "benefit reaped by the public, against the damage caused to the citizen under the circumstances,"[221] must be proportionate. At the same time, the Court stressed that its role is only to determine whether the effect of a given measure falls within a lawful 'zone of proportionality' (similar to the idea of a 'zone of reasonableness').[222]

Thus, applying the first sub-test to the specifics of the *Beit Sourik* case,[223] the Court concluded that it fulfilled the requirement that a rational connection exists between the objective of the fence and the chosen route.[224] Similarly in the *Mara'abe* judgment, the Court also concluded that since the fence *separates between terrorists and Israelis living in Israel and the area* [emphasis added]," the measure fulfilled the rational connection between the objective and the

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[219] *Ibid* at para 37.

[220] *Ibid* at paras 40 and 42.

[221] *Ibid* at para 59. Other Wall related case law where the sub-tests were applied by the Court include the *B'ilin* Judgment, *supra* note 68 at para 30. See also (HCJ 2645/04) [2007] *Fares Ibrahim Nasser et al v. Prime Minister et al* at para 25-28, unofficial English translation by Avichay Sharon (February 2013), on file with author [*First Dir Qadis Village Council* Judgment]. The petition was dismissed by the HCJ.

[222] *Beit Sourik* Judgment, *supra* note 1 at para 42.

[223] *Ibid* at para 48-49. The route of the 'separation fence' in question is the part which separates the Palestinian villages of Beit Likia and Beit Anan from their lands (the latter of which remained on the 'Israeli side' of the Wall) as well as the part of the Wall's route separating between the Israeli settlement of Har Adar and the Palestinian villages of Katane El Kabiba, and Beit Sourik. The route also impinges upon the lands of the village of Beit Ajaza and Biddu and the part of the route separating the Israeli settlement of New Giv'on from the Palestinian village of Beit Ajaza, and leaving lands of the Palestinian village of Beit Daku on the 'Israeli side' of the Wall. *Ibid* at paras 48-49, 62-63, 73 and 77. For the location of the village and the settlement, type 'Bidu' or 'Givon Hahadasha' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[224] *Ibid* at paras 57, 66, 70, 75 and 80.

means for its attainment.[225] This conclusion was underlined by the Court in a number of other Wall related cases, when seeking to establish whether a security rationale was the element driving the decision to establish the structure.[226] For the second sub-test, while the Court upheld in its *Beit Sourik* judgment that it is not possible to attain a security objective of the Wall in a way that causes less injury to the local inhabitants,[227] it reached a different conclusion in the *Mara'abe* case. Thus although the justices upheld the government's reasoning that building the 'fence' on the Green Line would not achieve the desired security objectives,[228] they disagreed with the military assessment offered by the respondents that leaving the five Palestinian villages (or some of them) inside the fence is necessary to attain this objective. Instead, they highlighted the chokehold effect which the structure created around those inhabitants and the damage it caused to their 'fabric of life'.[229] According to the Court, this meant that the second sub-test had not been met. Israeli authorities were therefore ordered to seek an alternative route, one that would possibly remove some or all of the Palestinian villages trapped in the enclave outside of the Wall.[230]

With regard to the third feature of proportionality, it was on the basis of this sub-test that the Court concluded in the *Beit Sourik* case that certain segments of the Wall in the area had failed to fulfill the requirement that the "injury caused to the local inhabitants by the construction of the separation fence stands in proper proportion to the security benefit from the security fence

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[225] *Mara'abe* Judgment, *supra* note 51 at para 111.

[226] For example, see *Alian* Judgment, *supra* note 43 at paras 8-18; *N'ilin* Judgment, *supra* note 174 at paras 30-43. See also *First Dir Qadis Village Council* Judgment, *supra* note 221 at paras 25-28.

[227] In other words, the Court explained that "[b]y our very determination that we shall not intervene in that position [of the MC], we have also determined that there is no alternate route that fulfills, to a similar extent, the security needs while causing lesser injury to the local inhabitants." See *Beit Sourik* Judgment, *supra* note 1 at para 58.

[228] Since it would leave the settlement of *Alfei Menashe*, as well as traffic between Israel and that settlement, on the 'Palestinian side' of the Wall, and thereby, allegedly vulnerable to terrorist attacks. *Mara'abe* Judgment, *supra* note 51 at para 112.

[229] According to the Court, leaving the five Palestinian villages outside the Wall would create a natural link between the Palestinian villages of the enclave and the Palestinian towns of Qalqiliya and Habla. It would also create a link to the array of civil services which were provided to the residents prior to the construction of the 'fence'. *Ibid* at para 113. This was particularly the case in the south-western part of the enclave, as well as the northwest route of it. *Ibid* at para 113.

[230] As for route 55, since the government had noted that it is a temporary route, the Court ordered that this highway connecting Alfei Menashe to Israel be cancelled and that a new road be built southwest of that settlement. *Ibid* at para 113.

in its chosen route."[231] Thus, while the Court observed the allocation by respondents of Wall gates and the permit regime as a way of guaranteeing the affected Palestinian villagers access to their land, the justices still concluded that:

> This state of affairs injures the farmers severely, as access to their lands (early in the morning, in the afternoon, and in the evening), *will be subject to restrictions inherent to a system of licensing* [emphasis added]. Such a system will result in long lines for the passage of the farmers themselves; it will make the passage of vehicles (which themselves require licensing and examination) difficult, and will distance the farmer from his lands (since only two daytime gates are planned for the entire length of this segment of the route). As a result, the life of the farmer will change completely in comparison to his previous life. The route of the separation fence severely violates their right of property and their freedom of movement. Their livelihood is severely impaired.[232]

Consequently, the Court determined that the Wall disproportionately harms the rights guaranteed to the petitioners under both the Hague Regulations and the Fourth Geneva Convention,[233] particularly since "the gap between the security provided by the military commander's approach and the security provided by the alternate route [as suggested by the CPS] is minute, as compared to the large difference between a fence that separates the local inhabitants from their lands."[234] Consequently, it ordered military authorities to find a route that is less disruptive to the Palestinian inhabitants.[235]

In the *Mara'abe* judgment on the other hand, the Court expressed relief that there would be no need to assess the legality of the Wall in light of the third proportionality sub-test.[236]

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[231] *Beit Sourik* Judgment *supra* note 1 at paras 59 and 60.

[232] *Ibid* at paras 60-71. The Court highlighted that tens of thousands of trees would be uprooted; that agricultural land would suffer damage; that Palestinian residents will be cut off from the land which provides their livelihood; and that the 'fence' would in certain areas, cut them off from access routes to urban centers such as Ramallah and Jerusalem. *Ibid* at paras 73 and 84.

[233] *Ibid* at paras 67, 70, 76 and 85.

[234] *Ibid* at para 61.

[235] *Ibid* at para 83. The Court noted that government authorities could opt either for the route presented by the experts of the CPS, or another route to be determined by the military commander. *Ibid* at para 61.

[236] Thus, the Court concluded that "[i]t seems to us that the time has not yet come to confront this difficulty and the time may never come. We hope that the examination of the second of the proportionality subtests will allow the alteration of the fence route. In the spirit of our comments […]." *Mara'abe* Judgment, *supra* note 51 at para 116.

3.1.4. Concluding Observations

The *Beit Sourik* and *Mara'abe* judgments have generally been applauded as proof that the Court can be a venue for reigning in Israeli military authorities and their executive powers and as a demonstration of Israel's adherence to the international and domestic RoL in the face of serious legal dilemmas in times of security threats.[237] True, the HCJ "signaled a radical departure from the tendency, mentioned by the Court in the first decisions relating to Barrier, not to interfere in operational security considerations."[238] As this chapter explains, in light of these two judgments, Israeli authorities were forced to re-consider the disproportionate harm of other segments of the Wall for nearby Palestinian communities before petitions that challenge the legality of those segments were considered by the Court on the merit, and to come up with alternative routes.[239] In this regard, there is no doubt that the two judgments attest to the Court's ability to exercise a restraining function, not just a legitimating function.[240]

However, while the Court seemingly challenged the security assessment of government authorities using the proportionality doctrine, the two judgments discussed here represent the exception and not the norm. An examination of subsequent Wall related decisions indicates that the Court has, in the majority of cases, opted to uphold the security analysis of government and military authorities and has granted the former a wide discretion in assessing which measures best fulfill the security need of fighting 'Palestinian terror'.[241] In addition, the Court has endorsed the authorities' declared objective that the need to protect its citizens (both inside Israel proper and the occupied territories) and not only its military forces constitutes a legitimate military purpose under the international law of belligerent occupation which

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[237] Michael Lynk, (autumn 2005) "Down by Law: The High Court of Israel, International Law and the Separation Wall," 35:1 JPS, 6 at 7. For an example of such argument see Aharon Barak, "Proportional Effect: The Israeli Experience," (2007) 57:2, ULTJ 369.

[238] Referring here to (HCJ 8172/02) [2002] *Ibrahim v. IDF, Commander* cited in David Kretzmer, "Introduction" *supra* note 47.

[239] Michael Sfard, "The Fight against the Separation Wall," *supra* note 66.

[240] Ron Dudai, "The Wall, the Law," *supra* note 187.

[241] Thus, the Court has used interchangeably, phrases such as separation between 'Israel and terror', or between 'Israeli West Bank communities and Israel' on one hand, and 'Palestinian cities and areas' on the other.

necessitates the taking of security based measures (such as the Wall's construction) inside the occupied territory.

This has allowed the Court to subsequently conclude that the construction of the Wall is legal under international law.[242] Given the Court's point of departure, it is not difficult to understand why the Court (which first and foremost is a domestic court, belonging to the same society that perceives itself under attack) has tended to refrain from challenging the very authority of the MC to construct a Wall. This is despite the fact that the majority of its route runs inside the occupied territory, as opposed to the Green Line.[243] It also explains why for all practical effects and purposes it has been difficult for lawyers to challenge the Wall on fundamental principles of international law.[244]

Moreover, while we note that following the *Beit Sourik* and *Mara'abe* rulings, the Court has shifted into a much more engaging position vis-à-vis Wall related petitions (and its examination of those petitions on the merit), it continues to demonstrate extreme reluctance in taking advantage of any contradictory data and statements which suggest that the Wall's construction was driven by considerations other than security.[245] This remains the case even if the information has been provided by former Israeli military generals of the CPS, or by Israeli organizations studying and documenting the suitability of the Wall from a topographic, military and humanitarian point of view. Instead, we find the justices reiterating "our long-held view that we must grant special weight to the military opinion of the official who is responsible for security."[246] According to one lawyer, one reason for this is that as an

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[242] As Shaul Arieli, a member of the CPS and co-author of *The Wall of Folly* [Hebrew] noted, "[t]here is no real argument on the question of whether Israel has the right to build a wall. The entire world says we can use a fence, a wall, a river filled with alligators, just as long as it's on the Green Line. This is where Israel is in disagreement, and where the government willingly chose to endanger its citizens for the benefit of other interests, such as settlements." Cited by Haggai Mattar, "The Wall Ten Years On/Part 11: Security for Israel?" (14 July, 2012), online: *+972 Magazine* <http://972mag.com/the-wall-10-years-on-part-11-security-for-israel/50900/>. See also Seam Zone case-petition, *supra* note 123 at para 42.

[243] In many ways, petitioning the Court on this issue had the opposite effect of what the litigation strategy of petitioning the Court had in mind, namely to receive a ruling that it is unlawful to build a 'fence' on Palestinian land. See *Dakwar* Interview, *supra* note 210.

[244] *Ibid*.

[245] *Sfard* First Interview, *supra* note 153.

[246] *Beit Sourik* Judgment, *supra* note 1 at para 47. Israeli NGOs have highlighted that the considerations afforded by government authorities to settlement expansion when determining the Wall's route, means increasing the

institution:

> It [the Court] believes that it cannot do any better, that this is the maximum...the Court is not good in declaring a government policy illegal. What it is good with is ordering the State to adhere to its policy. So in a way I think at least in the eyes of the Court, the best it could do is to take what the State is arguing or saying "this is the policy," and demanding it to adhere to its policy. And this is basically what it is doing in the Wall cases. That is not [though] what the Court is supposed to do, definitely not a neutral court.[247]

The next section addresses the Court's reasoning for the legality of the establishment of the Seam Zone.

3.2. Is it a Lawful Security Measure? The Court's Initial Reactions to the Seam Zone and its Associated Permit Regime

In 2003, *Hamoked* filed a petition to challenge the authority of the MC to establish this Seam Zone under international law, which trapped an estimated 7,000 Palestinians.[248] The petition argued that under article 43 of the Hague Regulations, the MC's authority to administer public life in the occupied territory can only take into account legitimate self-defense purposes, a criteria which petitioners argued the creation of the Seam Zone does not fulfill.[249] Petitioners further contended that by seeking to consolidate political objectives of depriving Palestinians as 'protected persons' of their lands, the Seam Zone "entailed permanent changes and annexation of territories in a manner which contravened international law."[250] In addition, they alleged that military authorities are violating their duty under IHL to take care of the

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number of Palestinians holding permits to enter the Seam Zone, and who can then, if they wish, enter Israeli territory unimpeded. Hence, it was argued that that taking into account these settlement's expansion, effectively contradicts the security objective of the Wall as it was defined by the government, and which is to limit the entry of Palestinians into Israel unless they have a valid permit. *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 67.

[247] Attorney *A-04* Interview, *supra* note 211.

[248] *Seam Zone* Jugement, *supra* note 49.

[249] The petition explains that "the permit regime is not directed at terrorists, or even persons suspected of initiating and executing terrorist attacks, unless it is directed at the entire Palestinian nation as one. Every Palestinian, whether a new-born baby or an elderly person, requires a permit to enter and remain in the seam zone, unless he is a permanent resident therein, in which case he requires a permanent resident certificate." See Seam Zone case-petition, *supra* note 126 at para 100.

[250] *Seam Zone* Judgment, *supra* note 49 at para 10.

livelihood and welfare of the residents of the occupied territory;[251] they were thus harming a large spectrum of the Palestinians' fundamental rights. In addition, petitioners claimed that the permit regime has turned the Seam Zone into "a closed military zone for Palestinians who have been living there for hundreds of years, and [into] an open area without any restriction on freedom of movement for any Jew, including those of the Diaspora."[252] This turned it into a discriminatory regime of separation based on group affiliation (akin to apartheid),[253] prohibited under international human rights law, and also to discrimination and collective punishment under the law of belligerent occupation.[254]

The Court decided to uphold the legality of the creation of the Seam Zone and its associated regime on various grounds. Firstly, it accepted that a relationship exists between the construction of the Wall (which it deemed to be within the authority of the MC) and the creation of that zone. In this regard, the justices saw fit to highlight that in the past, "this Court [had] approved the route of the fence, despite a seam zone being created [...]."[255] It also concluded that petitioners have failed to substantiate their argument over the decision to close the Seam Zone.[256]

Turning subsequently to an examination of whether the measures adopted by government authorities in the Seam Zone complied with the requirements of international law, the HCJ

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[251] *Seam Zone* case-petition, *supra* note 126 at paras 68 and 94.

[252] *Ibid* at para 74.

[253] *Seam Zone* Judgment, *supra* note 49 at para 10. For example, according to *Hamoked*'s petition, the permit regime constitutes a corruption of the law, because it creates two kinds of inhabitants in the 'Area' (West Bank): (i) Israelis and tourists, to which the declaration does not apply, and (ii) Palestinians, who require various types of permits to access and reside in the Seam Zone. Consequently, the petition alleged that "[t]he legal regime that was chosen to maintain the seam zone is a regime that is defined from the outset as one which extends differential treatment to Jews and to Palestinians, and creates, in fact, a regime of apartheid, unprecedented in Israeli law in all of its manifestations and extent of reach in Israel and in the territories." In the petitioner's view, this regime constituted a form of Apartheid as underscored in article 2 (c) and (d) of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973. Discrimination based on ethnicity, the petition furthermore claims, is a crime against humanity according to article 7(1) (h) of the Rome Statute. See Seam Zone case-petition, *supra* note 126 at paras 89, 91 and 93. See also *Seam Zone* Judgment, *supra* note 49 at paras 71 and 134-137.

[254] The Court cited article 50 of the Hague Regulations, *supra* note 7, Common article 3 of the Four Geneva Conventions and article 27 of the Fourth Geneva Convention, *supra* note 11 and article 75 of the First Additional Protocol, *supra* note 34. See Seam Zone case-petition *ibid* at paras 82-85, 98-99. See also *Seam Zone* Judgment, *ibid* at para 98.

[255] *Seam Zone* Judgment, *ibid* at para 12.

[256] *Ibid* at para 17.

first held that the MC had the authority to close a certain territory within the West Bank.[257] Addressing the manner in which he exercised that power, the justices believed that "the decision to close the seam zone is based on a clear security purpose, which *complements the original purpose of the security fence* [emphasis added]."[258] In other words, since the Seam Zone is not separated from Israel proper by any Wall segments, the Court concluded that "it is difficult not to accept the [government's] argument that there is a security need to establish a mechanism that would enable a close supervision of those who enter through it."[259] In other words, the Seam Zone and its permit regime contribute to the declared security objective of the Wall.

However, although the Court acknowledged that the creation of the Seam Zone and its permit regime had resulted in severe injury to Palestinians, with much of it 'against their will', the justices were quick to point out that the harmed rights were relative rights: i.e. they can be restricted, for the sake of additional considerations, such as national security, public order and the rights of others.[260]

Using the three proportionality sub-tests once again, the Court then moved onto the examination of whether in the Seam Zone declaration and application of the permit regime, the MC had achieved a balance between the various considerations. Towards this objective, the Court conducted an analysis of the legality of three elements, including (a) the mere decision to close the area, (b) the various rules which were established under the permit regime, and (c) various aspects concerning the practical implementation of this process.[261] It follows here that because the justices had upheld the security assessment of the government,

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[257] *Ibid* at para 15. In (HCJ 9593/04) [2004] *Rashad Morar et al v. IDF Commander in Judaea and Samaria et, al* (2006) 2 Isr LR 56 [*Morar* Judgment]. The petition was upheld by the HCJ. Here, the Court explains that this authority is derived from his duty to provide for the safety and security of the residents of the 'Area' and to maintain public order in the area. *Ibid* at para 12. For a discussion of this judgment, see Chapter II, section 6.3.2.

[258] *Seam Zone* Judgment, *supra* note 49 at para 16.

[259] *Ibid* at para 17.

[260] *Ibid* at para 22. The Court also reiterated the legal sources giving rise to the rights of the Palestinian inhabitants to include the Fourth Hague Convention; the 'humanitarian provisions' of the Fourth Geneva Convention, as well as the various human rights conventions (such as the ICCPR) and Israeli legislation. *Ibid* at paras 20 and 33.

[261] *Ibid* at para 29.

they were able to conclude swiftly that the measures were legal under international law. This also allowed the Court to shift its subsequent focus to the evaluation of whether those measures were reasonable and proportionate (essentially as per Israeli administrative law requirements). In establishing whether the measures fulfilled the first sub-test (rational link sub-test) and given the justices' earlier conclusions that the closure of the zone and the creation of a permit regime compliment the security function of the Wall, they concluded that these measures did indeed fulfill the requirements of that sub-test.[262]

Moving on to the second sub-test, the Court believed that in terms of arrangements for the Seam Zone, petitioners had been unable "to point at other arrangements which realized the same security objective in a manner that caused less injury to the rights of the Palestinian population."[263] The justices also accepted the government's position that less harmful measures (such as mere physical individual check-ups as opposed to general closure of the area and the installation of a permit regime) were not sufficient to realize the stated objective. This led the justices to uphold as reasonable the arrangements that the government had put in place.[264]

Although the justices acknowledged that despite the practical arrangements by Israeli authorities, the situation created for Palestinians by the permit regime was a severe one, they concluded that the general petition filed had failed to provide detailed information regarding specifically incurred injuries. Consequently, they determined that it would be difficult for them to "thoroughly examine the condition on the scene and the specific balance system implemented in the case of each resident."[265] At the same time, they underscored that despite efforts by government authorities to "offer reasonable solutions to minimize the violation of the farmers' rights,"[266] further improvements in the arrangements and in the processing guidelines, governing the issuance of permit applications could be implemented.[267]

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[262] *Ibid* at para 30.

[263] *Ibid* at para 32.

[264] *Ibid* at para 31.

[265] *Ibid* at para 34.

[266] Petitioners had argued that the cumbersome handling process of the applications burdens the Palestinian local population and does not fulfill requirements of due process as required by administrative law. This has practically speaking, made it very difficult for them to maintain a proper life routine. They also pointed out

Lastly, in terms of the third proportionality sub-test, (proportionality in the narrow sense), having concluded all the above, the justices were satisfied that "the injury inflicted on the inhabitants-although it should not be taken lightly-is not the kind which should be regarded as overriding the security benefit which arises from closing the zone."[268] As regards the challenges to the allegations by petitioners that the creation of the Seam Zone is not intended as a temporary measure, the justices only noted that "we are only hopeful that this need [of restricting Palestinians' access] is *temporary in nature* [emphasis added], as a result of the need to fight terror."[269]

Having outlined the main elements that guide the Court's adjudication in the two landmark decisions of *Beit Sourik* and *Ma'arabe,* the next section examines the Court's adjudication of other wall-related cases.

3.3. Other Wall Related Case-Law

3.3.1. Introduction

There is no doubt that the *Beit Sourik* and the *Mara'abe* decisions have had some significant impacts on several levels. On a positive level, the tests developed by the HCJ for assessing sections of the Wall and their route, were taken into consideration by government authorities when determining the route of other sections of the Wall, as a way of fulfilling the requirements set out by the Court under these judgments.

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the severe limitations imposed on the opening of the various gates within the Wall. The Court on the other hand, noted that since the petition did not orient the justices' attention to specific cases that underscored the flaw in the system, it failed to establish whether there is a gap between the government's statements and the situation on the ground. Hence, they concluded that the petition had failed to demonstrate how, as a whole, the arrangements which were established in connection with the entry and presence in the Seam Zone are cause enough for the Court's intervention. *Ibid* at paras 31-40.

[267] *Seam Zone* Judgment, *ibid* at para 49. Measures suggested by the Court include: easing passage for those Palestinians who have managed to receive permits as 'permanent residents' in the zone, renewable every two years; expanding causes based on which persons may be recognized as a 'permanent residents'; that permits issued to an occasional 'interest holder' include situations which had not already been included as qualifying an applicant to be eligible for such a permit; and establishing clear time schedule for the handling of the different applications. *Ibid* at para 47.

[268] *Ibid* at para 41.

[269] *Ibid* at para 44. Before dismissing the petition, the Court also discussed "the comparison drawn by the petitioners between the policy which was applied in the seam zone which is founded on security reasons and the Apartheid regime which was applicable in South Africa." *Ibid* at para 44.

One such case was the *Salim* case,[270] where the HCJ examined four consolidated petitions challenging the legality of a segment of the Wall's route in the Tulkarem/Qualqilya area and of the Seam Zone permit regime. It is known that military authorities had completed the construction of the Wall in the area as early as 2003. However, after the HCJ had rendered the *Beit Sourik* ruling, changes were made to the northern section, thereby leaving one Palestinian village, (which by way of the original route had remained in the Seam Zone) on the 'Palestinian side'.[271]

In the *Tzufin* case, military authorities declared that in light of the HCJ's *Mara'abe* decision, they would re-route the Wall's eastern section. As a result, an estimated 1,000 dunums of land were left on the 'Palestinian side'. Authorities also declared that they would ensure proper access arrangements for the Palestinian farmers to their lands that were trapped on the 'Israeli side' of the Wall through the agricultural gates.[272] However, despite these statements, Palestinian petitioners decided to challenge the revised route of the Wall in several areas due to the harsh consequences that even this revised route continued to pose for them,[273] such as

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[270] *Salim* Judgment, *supra* note 118.

[271] *Ibid* at 3. In light of these legal developments and upon the Court's request that government authorities re-examine the Wall's route, the latter developed several alternative routes before choosing one (route D). This route, they claimed, would still respond adequately to the declared security objectives and to topographic concerns. At the same time, it would reduce the harm inflicted on the Palestinian residents. For the new route running closer to the Green Line, an estimated 2,448 dunums of the land (which under the original route was to remain in the Seam Zone) was left outside the Wall. Authorities also argued that this route less costly, while still providing control of the land between the villages and the settlement. *Ibid* at 4.

[272] Meanwhile, government authorities noted that 72 dunums of land will be requisitioned for the construction of the Wall along the new route, which are privately owned Palestinian land. (HCJ 2732/05) [2006] *Abdel Al-Teif Hussein Head of Azzun Municipality Council et al v. Government of Israel* at para5, unofficial English translation by Avichay Sharon (January 2013) on file with author [*Tzufin* Judgment]. The petition was upheld by the HCJ.

[273] *Biddu Village Council* Judgment, *supra* note 73. In the *First Dir Qadis Village Council* case, petitioners objected to the construction of the Wall in the area separating the village from a considerable amount of their land that remained inside Seam Zone. After the petition was filed in 2004 against the original route (thereafter route A), it soon became evident that in determining the route of the Wall, government authorities had taken into consideration future building plans which have not yet been approved. Upon considering several alternatives, government authorities decided to adopt route E as the final route alternative for the Wall segment in question. Petitioners challenged the alternative route nevertheless, as it required uprooting 1,000 olive trees, forcing them to succumb to the "bureaucratic and arduous requirements of the Seam Zones permit regime." See *First Dir Qadis Village Council* Judgment, *supra* note 221 at paras 1-7. For the location of the village and the wall, type 'Deir Qadis' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

maintaining their disconnection from major urban centres on which they relied for vital social services.[274]

Settlers and Israelis living in Israel proper also challenged the re-routing of the Wall in numerous petitions post *Beit Sourik*, particularly where the new route chosen by military authorities had left their settlements outside the Wall.[275] In other cases, they argued that the proposed route ran too close to the line of their houses, which reduced the ability of the Israeli military forces to react to any potential attacks.[276] They also claimed that the new route left land belonging to their settlement's jurisdiction on the 'Palestinian side' and that by failing to include inside the Wall an important route allowing Israelis to travel from the West Bank settlements to Israel proper or hilltops that overlook routes inside the Green Line, the authorities had failed to adequately provide for their security.[277]

Both Palestinian and Israeli petitioners sought to challenge the new route on the ground that the MC has not demonstrated the ability to successfully balance between the different considerations that must legitimately guide his actions in an occupied territory. Moreover, they sought to highlight the detrimental impact of the Wall on their 'fabric of life'.[278] After

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[274] In particular, it disconnected them from Bir Nabala and Ramallah in the West Bank. See *Biddu Village Council* Judgment *ibid* at paras 6-7. For an in-depth description of this case and the HCJ's Judgment, see Chapter III, section 4.3.3.1.2.

[275] *Tene* Judgment, *supra* note 175. For a location of the settlement, type 'Tene' into search engine of interactive map, online: *B'Tselem* < http://www.btselem.org/map>. In another case, Israeli settlers from that settlement challenged the route of the Wall after it had been re-routed by the MC in light of the *Beit Sourik* ruling, thereby leaving them outside the Wall. See *Susya* Judgment, *supra* note 124 at paras 1-2.

[276] *Alfei Menashe Local Council* Judgment, *supra* note 124. Representatives of settlers and of Israeli towns objected also to the specific route of the certain segments of the Wall. See also *Beit Arye* Judgment, *supra* note 124 at para 4-5. For an example of an Israeli town inside Israel located close to the Green Line (but inside Israel proper), see *Salim* Judgment, *supra* note 118 and *Biddu Village Council* Judgment, *supra* note 73.

[277] This was the case in the *Biddu Village Council* case, where representatives of the Israeli town of Mevaseret Zion argued that leaving hilltop 847 on the 'Palestinian side' of the Wall, even though it overlooks highway 1 connecting Jerusalem and the coastline of Israel proper, seriously undermined their security. This argument was raised in petition (HCJ 11409/5) which the Court joined with *Biddu Village Council* Judgment, *ibid* at paras 6-7. See also *Tene* Judgment, *supra* note 175.

[278] This is not to say that Palestinian petitioners have ceased to underline that irrelevant political considerations of seeking to incorporate neighboring Israeli settlements on the 'Israeli side' of the Wall is what influenced the decision of authorities to route the Wall along the specific route chose and that, therefore, land requisition orders are illegal under international and Israeli administrative law. Thus, in one case, Palestinians from the village of Um Salamune (Bethlehem district) petitioned the HCJ to challenge the decision of military authorities to requisition 152 dunums, primarily for the construction of a section of the Wall east and south

underscoring the detrimental impact of the permit regime in the Seam Zone,[279] Palestinian petitioners also sought to convince the justices that government authorities had intended to include some of their land on the 'Israeli side' of the Wall in order to accommodate new Israeli settlement neighborhoods at various stages of approval or construction. This, petitioners stressed, was carried out in order to allow for the future expansion of these settlements, which in turn constituted political considerations.

This was the situation in the *Bil'in* case,[280] which involved a petition filed by the Palestinian Bi'lin village council against the route of the Wall that separated the village from the settlement of Mod'in Illit.[281] Petitioners alleged that the route chosen by military authorities is primarily designed to ensure that two of the settlement's new neighborhoods, at different stages of construction, would be included on the 'Israeli side' of the Wall. Another ground for challenging the route of the Wall in the area, is that it allegedly separated the Palestinian villagers from an estimated 50 % of their privately held land.[282]

Alternative routes were also suggested by petitioners and their council, including ones that were (closer) to the Green Line, as a way of reducing their separation from the less land; their

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east of the Israeli settlement of Efrat (which resulted in the inclusion of the settlement on the 'Israeli side' of the Wall). In their petition, they alleged that this constitutes one of many land requisitioning orders in the area seeking to achieve the political objective of annexing settlements that are part of the Gush Etzion settlement bloc in the Jerusalem area (such as Migdal Oz) to Israel proper. See (HCJ 834/07) [2007] *Mahmoud Muhamed Takatka et al v. Government of Israel et al,* unofficial English translation by Avichay Sharon, (2013), on file with author [*Takatka* Judgment]. The petition was dismissed by the HCJ. For a location of the village and nearby settlements, type 'Um Salamuna' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>. See also Alian Judgment, *supra* note 43. In the *Radad* case, petitioners also highlighted the illegality of the settlements as articulated by the ICJ *Wall* Advisory Opinion. *Radad* Judgment, *supra* note 177.

[279] For example, petitioners from the Palestinian villages of Kafr Sur and Jayous argued that despite the changes to the route, 70 % of the agricultural land of these villages would still remain trapped on the 'Israeli side' of the Wall. They also highlighted that the Wall's agricultural gates are only open for a limited period of time (1-2 hours two or three times daily), were far away, and that, generally speaking, they could not access those gates with their agricultural vehicles. Petitioners from Farroun argued that more than 3,000 have failed to receive permits because of the high standard of proof required to demonstrate a link with the land that remained on the 'Israeli side' of Wall, and the difficulty of obtaining the legal documents for this purpose. *Salim* Judgment, *supra* note 118 at 5 and 6. For location type 'Kafr Sur' into search engine of interactive map online: *B'Tselem* <http://www.btselem.org/map>.

[280] *B'ilin* Judgment *supra* note 68.

[281] Established 1993, at about 0.6 km away from the Green Line, it is part of the Mod'in Settlement Bloc. Type 'Modi'in Illit' into the search engine of the interactive map, online: *B'Tselem* <http://www.btselem.org/map> See also 'Modi'in Illit', online: *Peace Now* <http://peacenow.org.il/eng/content/modiin-illit>.

[282] The land would remain in the Seam Zone.

main source of livelihood.[283] This was the argument raised by petitioners in the *Beit Arye Local Council* case,[284] where Palestinians had objected to the route of the Wall which surrounded the two Israeli settlements of Ofarim and Beit Arye, as well as an access route connecting them to Israel. Petitioners pointed out that this route separated them from privately owned land,[285] and had caused extensive damage to their property.[286] They also maintained that an alternative Wall route would be capable of providing for the same level of security for the settlements/settlers or for Israelis in Israel proper, while resulting in less damage for their fundamental human rights. These allegations were corroborated by the CPS (as *amicus curiae*).[287] Requests for re-routing the Wall by Israeli settlers also occurred so that their settlement would remain on the 'Israeli side' of the Wall.[288]

Respondents, for their parts, have generally sought to demonstrate that the measures in place reasonably mitigated the Wall's negative impact on the petitioners' lives as a way of balancing Israeli security needs with the human rights of the Palestinian population. Government representatives have also alleged that whenever possible, the Wall's route had been moved closer to the line of the houses in the Israeli settlement and that the structure had, whenever

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[283] *Alian* Judgment, *supra* note 43 at para 6. See also *Radad* Judgment, *supra* note 177 at paras 1-8.

[284] *Beit Arye* Judgment, *supra* note 124.

[285] Petition (HCJ 11651/05) was filed by Israeli settlers, while (HCJ 1998/06) was filed by Palestinians. For a location of the settlements, the route of Wall and the surrounding Palestinian villages, type 'Bet Arye' into search engine of the interactive map, online: *B'Tselem* <http://www.btselem.org/map>. In 2004, Ofarim and Beit Arye became one settlement that is situated 3.8 km from the Green Line in the Ramallah district. See 'Beit Arye', online: *Peace Now* <http://peacenow.org.il/eng/content/beit-arye>.

[286] Of the estimated 2,000 dunums of land required for the Wall's construction, approximately 1,400 are declared 'state land' while 560 are privately owned by Palestinians. It would also result in uprooting around 1,000 olive trees. See *Beit Arye* Judgment, *supra* note 124 at para 1-3.

[287] See, for example, the *Nilin* case, where Palestinian petitioners who were separated from over 1,000 dunums of land by the Wall argued that the declared security objective can also be attained by building the Wall along the line of the settlement's houses. The CPS, joining as an *amicus curia*, confirmed that both the initial route for the Wall and another route proposed by the government as an alternative were disadvantageous from a military perspective and entailed significant harm to the Palestinians. They therefore chose a route which passed closer to the line of the houses of the Hashmoneam settlement, and which was closer to the southern route that had initially been chosen by the government. See *Ni'lin* Judgment, *supra* note 174 at paras 1-15. For the location of the settlement, type 'Hasmoneam' into the search engine of the interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[288] *Tene* Judgment, *supra* note 175 at paras 1-3, In the *Susya* case, Israeli petitioners challenged the reasonableness of the route chosen on the ground that by failing to include them on the 'Israeli side' of the Wall their other rights (such as education, employment and their property rights) have been harmed. Consequently, they proposed an alternative route which would ensure their inclusion. See *Susya* Judgment, *supra* note 124 at paras 3-4. for a location of the settlement, type 'Susiya' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

possible, been built on declared 'state land'. In addition, they claimed that access of petitioners to their privately owned lands inside the Seam Zone was ensured through the construction and operation of agricultural gates[289] and that a number of roads would be built to ensure that Palestinian villages are not cut off from the urban centres in the West Bank (which they rely on for vital social services).[290] In other instances, government authorities also argued that the route chosen for the Wall is the route that caused the least harm to the villagers, even if it was not necessarily the most optimal from a security perspective.[291] Elsewhere, they sought to underscore during court proceedings that they have adopted technology-based security measures in the place of a physical barrier as a way of mitigating the harmful impact of the Wall on the petitioners.[292]

In this regard, it is also interesting to note that the government has sometimes alluded to the detrimental impact of the Seam Zone and its associated permit regime on Palestinians to justify arguments that the route of certain sections of the Wall would be modified. In other instances, it used the Zone's alleged impact on the Palestinians to cement the opposite argument, namely that the route must be kept as it is. For example, in response to objections by Israeli settlers regarding the route of the Wall in certain areas, government authorities have argued that from the proportionality point of view, choosing an alternative route for the challenged sections of the structure to accommodate the settlers' request would require more Palestinians to seek a permit to enter the Seam Zone. This, authorities argue would entail a change that would worsen the disruptive effect of the zone and its permit regime on the daily lives of the Palestinians in the area.[293] In other cases, primarily in response to objections by

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[289] *Takatka* Judgment, *supra* note 278 at paras 5-13; *Beit Arye* Judgment, *supra* note 124 at paras 6-7. See also *Alian* Judgment, *supra* note 43 at paras 1-5 and 7.

[290] In one case such a road was established by the Israeli military authorities between Bir Naballah and Ramallah to allegedly provide the petitioning villagers with access to those urban centers, to minimize the harm to their 'fabric of life' (hence the name). See *Biddu Village Council* Judgment, *supra* note 73 at paras 8-9.

[291] *Ni'lin* Judgment, *supra* note 174 at paras 20-23.

[292] In one case for example, government authorities decided not to surround a hill belonging to Palestinian petitioners inside the Wall, and instead maintained a patrol around the hill and established an observation tower. *Beit Arye* Judgment, *supra* note 124 at paras 6-7.

[293] *Tene* Judgment, *supra* note 175 at paras 4-7; *Susya* Judgment, *supra* note 124 at paras 7-11. Therefore, while emphasizing that the protection of Israelis is the primary consideration for the route of the Wall, it is only one consideration amongst several which the MC must take into account and which are that the route must be

Palestinians that the Wall's route is separating them from their land, they have adopted the opposite position: that the manner in which the permit regime operates is reasonable and corresponds adequately to both the needs of the local farmers and to their own professed security needs.[294] Similarly, where entire Palestinian communities were trapped on the 'Israeli side' of the Wall, government authorities argued that despite the severe harm that the creation of the Seam Zone and its permit regime posed, it was still proportionate to the security objectives that they sought to achieve.[295]

The next section provides an overview of some of the common elements that featured in the manner in which the HCJ adjudicated the petitions challenging segments of the Wall.

3.3.2. Common Denominators in the Court's Judicial Decisions on Wall Related Petitions Post *Beit Sourik* and *Mara'abe*

3.3.2.1. Upholding the MC's Security/Military Discretion

The Court has usually upheld the idea that the MC enjoys the required expertise, knowledge and responsibility to deal with security considerations and that, as a result, he must be granted wide discretion in determining which measure best achieves the stated security objective.[296] The justices have generally also upheld the legality under international law of the MC's

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reasonable and proportionate, and that the benefit must be balanced against the impact on the Palestinian population. See *Beit Arye* Judgment, *ibid* at paras 6-7.

[294] *Salim* Judgment *supra* note 118 at 8. See also the Israel Democracy Institute (IDI), "High Court of Justice Rejects Petitions against the Separation Barrier: HCJ 11344/03 9 September 2009," online: IDI <http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-15/high-court-of-justice-rejects-petitions-against-the-separation-barrier/>.

[295] In one case, the inclusion of an entire village (Nabi Samuel) on the 'Israeli side' of the Wall (with around 200 persons) was justified on the ground that it is located on a strategic hilltop overlooking the houses of the EJ settlement of Ramot, in addition to a strategic road inside Israel (road *1*). See *Biddu Village Council* Judgment, *supra* note 73 at paras 8-9. For a location, type 'a-Nabi Samwil' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>. And although their residents were not included in the Seam Zone, they were subject to similar requirements. *B'Tselem*, "Arrested Developments," *supra* note 46. For a description of the impact see UN Relief and Working Agency (UNRWA), "An Nabi Samuel: We are Living Inside of a Prison," (12 July 2012), online: UNRWA <http://www.unrwa.org/galleries/photos/nabi-samuel-%E2%80%9Cwe-are-living-inside-prison>.

[296] *Biddu Village Council* Judgment, *ibid* at paras 10-15. See also *Bilin* Judgment, *supra* note 68 at para 29.

decision to requisition privately owned property (including land) by the MC for that security related purpose.[297]

This has been the Court's approach, irrespective of whether petitioners challenging the suitability of the route chosen by the MC were Palestinian or Israeli. For example, in the *Alfei Menashe Local Council* case, representatives of the Alfei Menashe settlement council[298] had filed a petition in 2006 arguing against the route for the Wall that had been amended following the HCJ's judgment in the *Mara'abe* case, on the ground that the proposed route ran too close to their houses. Here, the Court upheld the MC's security-based assessment that this route provides the best protection to the settlements, reiterating in the process that petitioners had not succeeded in offering security-based facts that are strong enough to contradict the MC's security assessment.[299]

This was also the situation in the *Beit Aryeh* case. Here, the Court accepted the government's position that changing the route of the Wall that surrounds the Israeli settlement of Beit Arye to include land that was officially part of the settlement's jurisdiction, which had been left on the 'Palestinian side' of the structure, would result in disproportionate harm to the Palestinian petitioners, both in terms of land confiscated and in property that would be destroyed as a result of its construction.[300] The justices also agreed with the Israeli settlers who had challenged the legality of the original route that maintaining a larger distance between the Wall and their houses and including more land inside the Wall would augment their level of security. Nonetheless, they concluded that this still failed to justify the additional harm that would be caused to the Palestinian petitioners if their proposition were to be accepted.[301]

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[297] *Alian* Judgment, *supra* note 43. See also *Bi'ilin* Judgment *ibid* at paras 27-28; *First Dir Qadis Village Council* Judgment, *supra* note 221 at paras 20-28. The Court has also stated that security-based concerns may also require the violation of the property rights of Israelis. See for example *Alian* Judgment *ibid* at paras 8-18; *First Dir Qadis* Judgment, *ibid* at paras 25-28.

[298] Originally founded in 1983, under the settlement is located 3 km southeast of the Palestinian city of Qalqiliya and 5 kilometers from the Green Line. Due to its rapid growth, in 1987 it became a local council. See *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 67 at 33.

[299] *Alfei Menashe Local Council* Judgment, *supra* note 124 at 12 and 14.

[300] The building plans were in different stages of construction but had not yet been finalized or approved. See *Beit Arye* Judgment, *supra* note 124 at paras 1-3.

[301] Hence the decision of the MC not to do so was both reasonable and proportional. *Ibid* at paras 8-11.

However, the majority of petitions challenging the route of the Wall have resulted in the requisitioning of predominantly privately owned land belonging to Palestinians (as opposed to that of Israelis), and have allegedly resulted in the separation of the former from their source of livelihood (by including land inside the Seam Zone). Hence, it is not difficult to conclude that the decision of the Court to uphold the government's security assessment has had more frequent repercussions for the rights of Palestinian petitioners. Thus, even where the petitioners and their counsel had proposed several alternatives to the Wall's route as a way of minimizing the harm that it inflicts on them, the Court had been quick to uphold the validity of the original land requisitioning order. This was especially true in cases where respondents had rejected thes proposed routes' suitability from a security point of view. As a way of substantiating these conclusions, the justices had argued that despite the severe harm incurred by the petitioners, they had failed to demonstrate that the less harmful route they are proposing is, in fact, capable of achieving the declared security objectives of protecting Israeli lives from terror.[302]

Some would argue that the "conventional wisdom is that courts function poorly as guardians of liberty in times of crisis."[303] According to Israeli lawyer Michael Sfard, since Israeli measures that have been challenged by petitioners such as the Wall have allegedly been taken in response to pressing security needs, the Court has been unwilling and unable to grant anything more than sporadic acts of protection to the Palestinians in the oPt.[304]

Arguably, ascertaining the real motives spearheading the adoption of a given administrative order is a difficult endeavor most of the times.[305] However, many believe that this hardly absolves the Court of its responsibility as the highest judicial body of the occupying power: Given the massive documentation by third parties to the contrary, the Court should, at the very least, have scrutinized more vigorously assurances by government and military authorities that

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[302] *Takatka* Judgment, *supra* note 278 at paras 5-13. See also *Biddu Village Council* Judgment, *supra* note 73 at paras 10-15; *Radad* Judgment, *supra* note 177 at para 15-23.

[303] David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," (August 2003) 101: 8 Mich L Rev 2565 at 2565.

[304] *Sfard* First Interview, *supra* note 153.

[305] Marco Pertile, "'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory': A Missed Opportunity for International Law?" (2004) 14:1 Italian YB Int'l L 121 at 136. Emphasis by author in the Original Title.

their security-based assessments have been conducted in good faith.[306] In fact, given the prolonged nature of Israel's occupation of the West Bank and that Israeli security measures have touched upon all aspects of Palestinian daily life, all the more in the name of protecting Israeli settlers and settlements in the West Bank, it is contended here that the Court should have been more rigorous in probing relevant Israeli authorities. Embarking on such an exercise would not, as some fear, result in accusations being directed at the Court that it is substituting its own opinion for that of the military establishment. This is because assessing professional opinion that is presented to the justices is simply part of what they do (as justices) when they adjudicate.[307]

Furthermore, one should not lose sight of the fact that the law of occupation was designed in the first place to monitor and prevent excess and abuse of power by foreign forces in control of an occupied territory. This warrants a narrower interpretation of the exceptions under which the occupant is allowed to take measures in the name of security. Therefore, to assume that good faith underlines the rationale of the government's measures, especially security measures, means that the Court has adopted the view that the Israeli occupation of the West Bank is a benevolent occupation, and that it has played the artificial game of only listening to what is being told in the courtroom.[308]

A second element that has featured in the manner in which the Court has adjudicated Wall related petitions is its determination of the extent to which the rights afforded to the

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[306] *Dakwar* Interview, *supra* note 210. According to another attorney, the Court "should have regarded the reality, which was clear to everyone, including some of the judges." Attorney *A-04* Interview, *supra* note 211.

[307] According to one lawyer, "any court and not just the HCJ" has to assess whether arguments presented to them by health professionals, etc. whether they are convincing or not. However, when courts scrutinize military/security decisions, they are more likely to be subject to criticism because these issues are much more in the public eye." Attorney *A-04* Interview, *ibid*.

[308] *Sfard* First Interview, *supra* note 153. Sfard recalls an incident in which the Deputy Chief Justice at the time (Justice Cheshin) was sitting next to Justice Minister Livni, as part of a panel in a conference, in which the latter remarked that the Wall will constitute the political border of Israel. The Justice had then exclaimed that this is not the position that the government representatives had adopted in court. Despite that, the Court has never reversed any of its Wall related decisions in which it had accepted that the structure had indeed been constructed for security reasons. In one of the court proceedings, Attorney Sfard had tried to allude to the idea that 'things are being said outside this court room' which underscore that the motivation guiding the construction of the Wall include more than just security. However, he was interrupted by one of the justices, who remarked that: "Well Mr. Sfard, we are only listening to what we are being told inside this Hall." By entertaining only what is being said in the proceedings, this allows the Court to conveniently 'sterilize' the case from its political aspects surrounding it. *Ibid.*

Palestinian population can be lawfully restricted by the MC. This element is discussed in the next sub-section.

3.3.2.2. Restricting the Rights of Palestinians for the Sake of Israeli Rights or Security

Although the notion that the Wall's route is meant to protect settlers and settlements had featured vaguely in the initial security-based arguments of the government, with time, the former's submissions to the Court came to rely solidly on this argument when presenting its justifications for the Wall's construction. Referring to the fact that the HCJ itself had upheld the legality of taking such consideration into account, the Attorney General emphasized in one case:

> Indeed, part of the route was planned *with the objective of providing protection also for Israeli residents living in Judea and Samaria* [emphasis added], who also suffer from terror attacks. However, there is nothing wrong in this, for […] in accordance with Supreme Court decisions [...] Israel is of the opinion that the barrier is one of the necessary elements of this protection, so long as the route is proportionate.[309]

Hence, where petitioners contended that the protection of Israeli settlers cannot constitute a valid security consideration under IHL, given that it prioritizes the interests of those settlers at the expense of their interests as 'protected persons' under the Fourth Geneva Convention, the Court has rejected this argument.[310] Instead, the justices chose to underline that protecting Israeli residing in the West Bank and in the Seam Zone forms part and parcel of the MC's responsibility under article 43 of the Hague Regulations to protect all persons who are living under belligerent occupation.[311]

For example, in the *Biddu Village Council* case, the Court explained that while granting optimal security to Israeli settlements and residents would entail severe and disproportionate injury to Palestinian rights, avoiding any harm to the latter might put the former at risk. The solution must therefore be sought in an appropriate balance between these two conflicting

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[309] *Alian* Judgment *supra* note 43; Statement of Response, Section 469, cited in *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 67 at 10.

[310] *Takatka* Judgment, *supra* note 278 at para 3.

[311] *Salim* Judgment, *supra* note 118 at 9. See also *Biddu Village Council* Judgment, *supra* note 73 at paras 10-15.

interests,[312] since the right of both Palestinians and of Israelis living in the West Bank are, in the Court's view, relative rights that can be restricted.[313]

This approach has been confirmed in a number of Wall related case decisions, where the Court has widened the legitimate military consideration of the MC to include the need to guarantee the security of Israeli travelers to and from Israeli settlements (located partially inside the West Bank), or to ensure the security of travelers commuting on roads inside Israel proper. Thus, in the *Alian* case,[314] the Court accepted the government's argument that the construction of the Wall in the area is necessary because the area represents a convenient entry point into Israel proper (near the Mod'in area). It is also close to road 443 connecting Jerusalem and the Tel Aviv region.[315] Similar conclusions were reached by the Court in the other petitions such as the *Local Council of Alfei Menashe* case.[316] Following the HCJ's ruling in the *Ma'arabe* case, that a section of the Wall's route (which had kept five Palestinian villages trapped in the Seam Zone) was illegal,[317] Israeli military authorities developed three alternative plans for re-routing that section, as way of reducing the number of Palestinian villages that need to be included on the 'Israeli side' of the Wall. In addition, they had to determine whether or not to leave road 55 inside or outside the Wall.[318] Finally, when the MC decided to keep two of the

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[312] *Biddu Village Counci*l Judgment, *ibid* at paras10-15.

[313] *B'ilin* Judgment, *supra* note 68 at para 30. The question of whether restricting the constitutional rights of Israeli settlers living in the Gaza Strip as a result of implementing the Disengagement plan, came up in the *Gaza Regional Council* Judgment, *supra* note 213. Here the Court examined whether the implementing legislation and its purpose is sufficiently significant to justify infringing the settler's constitutional rights under the basic laws.

[314] *Alian* Judgment, *supra* note 43.

[315] *Ibid* at paras 1-5, and 7. Similarly in the *Biddu Village Council* Judgment, *supra* note 73 at paras 10-15, the Court upheld the State's argument that there is a need to secure road *436* leading to the settlement of Givat Ze'ev.

[316] *Alfei Menashe Local Council* Judgment, *supra* note 124. For an interactive map highlighting the location of the settlements and villages vis-a-vis the Wall, type 'Alfei Menashe' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[317] *Ma'arabe* Judgment, *supra* note 51.

[318] The three proposes alternatives were: (1) plan A would re-route the south-western part of the Wall so that three Palestinian villages would remain on the 'Palestinian side' of the Wall, while road 55 (connecting the settlement to Israel proper and used by thousands of Israeli commuters on a daily basis) would remain on the 'Israeli side' of the Wall, with the Palestinian villages of Arab a Ramadin and Abu Fardeh trapped inside the Seam Zone; (2) route A1, which would keep all the villages and road *55* on the 'Palestinian side' of the Wall, and (3) plan B, which results in keeping all the villages outside the 'Seam Zone; closing down road 55, and the construction of a new road connecting the southern end of the settlement to Israel proper, (through the

five Palestinian villages inside the Seam Zone, the Court endorsed this decision as proportionate and reasonable, noting that to do otherwise would undermine the ability of government and military authorities to guarantee the security of Israelis, including settlers, travelling on highway 55.[319]

As Shany points out, this interpretation by the Court, successfully took the pressure off the Israeli MC of having to find other means to protect the settlers. This the Court achieved when it evaded "the issue of the legality of the settlements altogether and adopt[ed] an individual security premise, which upholds the obligation of the IDF to provide security to all individuals residing in the Occupied Territories – Israelis and non-Israelis alike."[320] Had the illegality of settlements been taken into account, the Court may have been forced to examine "the consequent duty of the Occupying Power to return its civilians in those settlements to its own territory."[321] Others have suggested that while it remains true that the Israeli settler population living under the military jurisdiction of the MC, the Court's position that Israeli settlers are part of the 'local population' (as defined under IHL) is inaccurate. It has also been argued that the Court should have ruled on the illegality of the settlements and to interpret article 43 of the Hague Regulations in this light. Had the Court adopted such an approach, it would have restricted the lawful means available for the MC to guarantee the protection of the settler population.[322]

Since the Court has chosen not to do so, its current approach is nothing short of misleading because it allows the rights of Israeli settlers to be analyzed on the same par with those of the Palestinians, even though it is only the latter population group which under the Fourth Geneva Convention qualifies as 'protected persons'. Furthermore, the Court's approach has cemented the rights enjoyed by the Israeli settlers against the rights of the Palestinians, particularly since

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Israeli towns of Matan and Nirit). In the end, plan A was adopted. See *Local Council of Alfei Menashe* Judgment, *supra* note 124 at 5.

[319] And reduce the time available to respond to any potential attacks or infiltration attempts inside the settlement. See *Alfei Menashe Local Council* Judgment, *ibid,* at 13-14.

[320] An assessment that is questionable in light of article 4 of the Fourth Geneva Convention, which excludes the citizens of the occupying power from the Convention's scope of protection. See Yuval Shany, "Head against the Wall? Israel's Rejection of the Advisory Opinion on the Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territories" (2004) 7 YB Int'l Human L 352 at 364.

[321] David Kretzmer, "The Advisory Opinion: The Light Treatment," *supra* note 26 at 94.

[322] Attorney *A-04* Interview, *supra* note 211.

the Court has upheld that as citizens, Israeli settlers continue to enjoy the rights afforded to them under the basic laws.

The third common element that has featured in the Court's adjudication is its reliance on the proportionality doctrine as a way of determining whether the MC has succeeded in balancing between the different considerations guiding his actions in the occupied West Bank.

3.3.2.3. Balancing the Different Considerations through the Prism of the Proportionality Doctrine

The Court continues to rely on proportionality with its three sub-tests as a way of examining the MC's balancing between competing considerations. However, the assessment of the Wall related case law examined here points out that save for a few cases, the HCJ has been unwilling to strike down segments of the Wall on the basis of the proportionality test.[323] In terms of the first proportionality sub-test (rational link), the justices have usually upheld the existence of a rational link between the measure (the Wall) and the security objective it seeks to achieve, be it separation between Israelis and 'terror'; between Israelis and the West Bank,[324] or between Israeli settlements and Israel, on the one hand, and Palestinian major cities and areas, on the other.[325]

In the case of the second proportionality sub-test (the least harmful test), the justices have for the most part re-affirmed that the alternative route proposed by the Palestinian petitioners cannot achieve the stated security objectives. Thus in most petitions in which these petitioners relied on the expert opinion of professionals other than the Israeli military authorities (such as the opinion of ex-Israeli military or that of the CPS), the justices have (with the exception of a very few cases) decided that the petitioners have not convinced them of the need to prefer the expert opinion of those professionals or that a less harmful route capable of meeting the security needs (as outlined by the government) exists.[326] Therefore, where and when the Court

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[323] *Alian* Judgment, *supra* note 43 at paras 8-18.

[324] *Ibid* at paras 8-18.

[325] *Salim* case, *supra* note 118 at 9; *Bi'lin* Judgment, *supra* note 68 at para 37.

[326] *Alfei Menashe Local Council* Judgment, *supra* note 124. See also *Salim* Judgment, *ibid*. See also (HCJ 1882/08) [2010] *Adbel Rahman Shaib Naser et al v. Government of Israel et al* at 4, unofficial English

did acknowledge the considerable harmful impact that the Wall has had on Palestinian petitioners,[327] it has generally reached the conclusion that the harm is not disproportionate since "the purpose of the fence is to save Israeli lives from terrorist. This harm [...], therefore, means the benefit of the fence is very high."[328]

Here, it is important to point out that the determination of the topographic conditions, etc., is not the only thing the Court had taken into account when assessing the proportional impact of the measure (or the lack of it). In analyzing whether the Wall meets the requirements of the second sub-test, for example, the justices noted that it was crucial for them to take into account the impact of the Seam Zone and its permit regime. In some cases, the route of the Wall had succeeded in including less Palestinians in this zone (which, practically speaking implied that less people would be submitted to the permit regime). In others, the route of the Wall had not separated Palestinians from essential services. Highlighting these elements, the Court took them as proof that military authorities had taken all reasonable measures to alleviate the harmful impact of the Wall's construction on the Palestinian petitions.[329]

Other factors which the Court has traditionally taken into consideration when determining that certain section of the Wall did not disproportionately harm the Palestinian petitioners are: (1) the MC's assessment that the amended route of the Wall had reduced the amount of land inside the Wall;[330] (2) the assurances by government authorities that it would grant petitioners regular access to their privately owned land in the Seam Zone by establishing a gate or granting more access permits; (3) that they would put in place or improve the quality of measures that seek to ameliorate the 'fabric of life' of Palestinian communities remaining in

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translation by Avichay Sharon, (January 2013), on file with author [*Umm Saffa* Judgment]. The petition was dismissed by the HCJ. See also *Bi'lin* Judgment, *ibid* at para 37.

[327] For example, in the *Alfei Menashe Local Council* case, the HCJ acknowledged the remaining harmful effect of the Wall on the villagers (who were either separated from their land or had their land confiscated or whose 'fabric of life' was undermined as a result of remaining inside the Seam Zone) particularly since an estimated 2, 500 dunums of Palestinian privately owned land remained inside that zone. See *Alfei Menashe Local Council* Judgment, *ibid* at 14.

[328] *Alian* Judgment, *supra* note 43 at paras 8-18; *Beit Arye* Judgment, *supra* note 124 at paras 8-11, *Biddu Village Council* Judgment, *supra* note 73 at para 10-15; *Radad* Judgment, *supra* note 177 at paras 15-23.

[329] *Alian* Judgment, *ibid* at paras 8-18. See also *Salim* Judgment, *supra* note 118 at 9.

[330] *Salim* case, *ibid* at 9.

that Zone and their connectivity to other West Bank villages outside the Wall;[331] and (4) that Palestinians will be offered compensation for land that had been requisitioned and for property that had been damaged (such as trees) for the purpose of constructing the Wall itself,[332] and the possibility of petitioning the Court should the specific arrangements at the gate prove unsatisfactory.[333]

3.3.2.4. Concluding Observations

One main consequence of the *Beit Sourik* and *Ma'arabe* rulings is that generally speaking, lawyers litigating on behalf of Palestinians have come to the realization that they have little chances of convincing the Court that any considerations other than security have influenced the route chosen by authorities for the Wall. Nevertheless, in their litigation, they have continued to gather as many facts and indicators that could help demonstrate that political considerations had featured prominently in the decision to route the Wall along a certain way. As one lawyer explained, this was in the hope that if it became 'obvious for everybody' that considerations other than security were the driving force behind the Wall's route in a given area, it would be "easier [for the Court] to decide on the proportionality which it so loves," in order to strike down the route as illegal in some cases.[334]

In this regard, the very fact that the Court has traditionally assessed the proportionality of each segment of the Wall, rather than the proportionality of the harm of the structure as a whole (similar to the approach adopted by the ICJ in the *Wall* Advisory Opinion), has had a profound influence on the outcome of its Wall related adjudication.[335] To begin with, adopting a

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[331] Thus, in some cases, the Court has demanded of authorities that they ensure the Wall gates operate smoothly to allow access of Palestinians into the Seam Zone, before dismissing the petitions. *Ibid* at 10. See also *Beit Arye* Judgment, *supra* note 124 at paras 1-3.

[332] *Alfei Menashe Local Council* Judgment *supra* note 124 at 15; *Takatka* Judgment, *supra* note 278 at paras 5-13.

[333] *Biddu Village Council* Judgment, *supra* note 73 at paras 10-15. Similarly, where Israeli settlers objected to the route of the Wall on the ground that it does not provide them with the security that it seeks to ensure, the Court has upheld the government's arguments that in balancing the rights of the Israeli settlers against those of the Palestinians, moving the Wall along the route suggested by the former, would entail disproportionate harm to the Palestinians, thereby rendering it unlawful. See *ibid* at paras 10-15.

[334] Attorney *A-04* Interview, *supra* note 211.

[335] According to Attorney Sfard, it would have also forced Justice Barak (writing the *Beit Sourik* and *Ma'arabe*) to conclude that it was a political route. *Sfard* First Interview, *supra* note 153.

segment-by-segment approach has allowed the HCJ to regulate the impact of the security-based measures[336] on the rights of the petitioners more specifically and the impact on the Palestinian local population more generally. This also explains why the proportionality sub-tests end up representing the most likely ground that the Court invokes to strike down the legality of the Wall. This has provided an avenue for remedy for petitioners on a case by case basis.[337]

Still, in assessing whether a given route fulfils the proportionality sub-test, it is very indicative that the route of that structure has hardly ever been considered by the Court as failing to fulfill the requirements of the first test (rational link) or the third proportionality sub-test (proportionality in the narrow sense). In the former, it is again the result of the Court's acceptance of the alleged security-based rationale of the Wall. In the case of the latter sub-test, whenever the question has arisen as to whether the added benefit of increased security for the settlers or for Israelis travelling on the route justifies the extra harm inflicted on the Palestinians' right to property, the answer of the justices has usually been in the affirmative. Consequently, while it is true that Palestinian petitioners are left with an opportunity to challenge the legality of the Wall based on the second sub-test (least harmful measure), these opportunities are narrow and only have the potential to be exhausted in cases where a specific local remedy is being sought by the petitioners, as opposed to a change in the general policy of government and military authorities.[338]

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[336] The idea that the Court has been regulating the occupation has been made by a number of Israeli scholars. For example, see Guy Harpaz and Yuval Shany, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation," (2010) 43 Isr LR 514 at 515. See also Aeyal Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?" (2012) 18:1 EJIL 1.

[337] On an individual level, petitioning the Court resulted in some sections of the Wall moving several meters west so that a few hundred more dunums remained on the 'Palestinian side'; in forcing authorities to construct a Wall gate or to grant permits so that injured petitioners can access their land inside the Seam Zone and in obliging them to come up with an alternative route that further minimizes the damage to entire Palestinian communities trapped inside the Seam Zone so they are no longer separated from the rest of the West Bank or so that the damage to their 'fabric of life' is reduced. This was mainly achieved by relying on the three prong proportionality doctrine adopted by the HCJ and which, no doubt, allowed it to mitigate some of the harsh effects of the Wall on the Palestinians' everyday life. Some Israeli writers have made the argument that the area of the Seam Zone and population of Palestinians trapped therein shrunk by half. See Yishai Blank, "Legalizing the Barrier," *supra* note 78 at 341.

[338] *Dakwar* Interview, *supra* note 210.

In this regard, it remains an extremely challenging endeavor for petitioners to provide evidence that the Court would consider strong enough to refute the security-based assessment of military authorities which, in the words of the Court, remain the security experts. As the case law suggests, in most situations, the Court has also accepted that measures taken by the government reflect a reasonable attempt to reduce the harm on the Palestinians (thereby making the harm proportional). Examples include: the promises of the military authorities to grant permits to farmers to access their land or to allow them access through gates and even though, the functioning of the permit regime or of those gates on the ground that they have fallen short of offering the regular access to Palestinians that had been promised.[339] For example, as part of the defense in the *Seam Zone* case, the counsel for the petitioners had highlighted the inconsistencies between the promises made by authorities and what actually took place on the ground. Yet:

> The HCJ did not follow up and really check how these permit procedures work and what this whole complex bureaucracy means for the residents. Even more so in some cases the state outright lied and misled the court. For example in some cases the state issued permits for deceased people in order to spike up the numbers of permits it presented to the court. We asked the court to actually go into the small details and see that in fact on the ground for example many people are not allowed to cross the fence and reach their lands. But the court failed here and took the bait of the state and believed that living under such a complex regime of permits is in fact possible and therefore it allowed it.[340]

In other cases, the severe impact of the Wall's route and the creation of the Seam Zone have not been considered of sufficient gravity by the Court to merit changing the route of the Wall in a manner that would exclude more land or more Palestinians from remaining in that zone. This, is as long as the effect of the measure falls within, what the Court determined, was a zone of proportionality:

> So even when for instance you show the court that a farmer will have to walk now 4 km to reach his land instead of 500 meters the court says- yes this is

[339] A third example is that the Court mentions that where a route of the Wall has been built on 'state land', this is a commendable effort of the State to reduce the disproportionate impact of the Wall. The Court does so, even though the whole process of the 'state' land declaration has been severely criticized on substantive and formal rule of law grounds. In this case, the HCJ accepts that state land declarations by government authorities are made in good faith.

[340] *Dakwar* Interview, *supra* note 210.

> inconvenient but still proportional especially when balanced against security. In what sense is this proportional? In one of these cases I tried to explain to [Justice] Beinisch, using a power point presentation and maps and everything, that when you see it so close on the map in reality it is 2 km each direction. For a farmer to carry his goods and tools by foot, because he can't cross with a vehicle, means a detour of 4 km. But this is extremely difficult to explain in theory. Therefore the language of 'proportionality' can easily cover for all these different situations.[341]

There have been instances in which the Court's willingness to go through great lengths to question the security-based justifications of the government representatives for the route of a particular segment of the Wall did arise. This was particularly the case where information coming to light during court proceedings had revealed that the decision by the respondents to establish the Wall along a certain route was influenced by their desire to encompass unauthorized building plans inside settlements to remain inside the Wall. However, it is contended here, that the Court's tougher stance was only possible because domestic Israeli law requirements stipulate that a certain number of criteria need to be fulfilled before the construction in new neighborhoods can proceed, in terms of planning and building approvals. Hence, the Court's concern for ensuring that domestic legal requirements and procedures (related to approval of building plans) are fulfilled is what truly emboldened the Court in those cases to adopt a much more scrutinizing approach vis-à-vis the kind of considerations that are allegedly guiding the MC determination of the route of the Wall.

To substantiate these contentions, Wall related petitions concerning such expansion plans and the Court's adjudication of these petitions are discussed in the next section.

3.3.3. Future Plans to construct New Neighborhoods in Existing Settlements: When are they a Legitimate Consideration determining the Wall's Route?

3.3.3.1. Introduction

Once the construction of the Wall had begun, senior government officials began to allude more directly to the fact that the consolidation of settlements blocks on the 'Israeli side' of the

[341] *Ibid.*

Wall had been one major objective guiding the route of the Wall.[342] In 2005, a study conducted by the two Israeli NGOs *B'Tselem* and *Bimkom* highlighted that at least in twelve (12) cases, there was sufficient evidence to suggest that the main consideration in determining the route of the Wall was the desire of government authorities to accommodate future expansion plans of Israeli settlements.[343] And even when new evidence had come to the forefront during proceedings that future expansion plans had indeed been taken into account, government authorities did not shy away from arguing that, where the Wall's route provides space for the expansion of settlement (i.e. a planned neighborhood), ensuring the safety of those future neighborhoods constituted legitimate considerations of military security.[344]

In this regard, the Court has generally accepted at face value the assurances by the respondents that these future expansion plans were not taken into account when determining the route of the Wall in the area.[345] A closer look at its decisions in those cases is given in the next sub-section.

3.3.3.2. Unauthorized Building Plans: Striking the Legality of the Wall based on Domestic Requirements

A review of Wall related judgments suggests that the Court has in a few instances concluded that illegal political considerations had filtered into the determination by military authorities of the route of the Wall. This was the case for example, when it became clear that plans for the expansion of existing settlements have been taken into account by the MC when determining the route of the Wall, and even though these plans had not yet gained the necessary political approval from the relevant government authorities.

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[342] *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 67.

[343] Including plans for which the process of obtaining approval from the CA's Supreme Planning Council had not even commenced. *Ibid*.

[344] For example, see *Bi'lin* Judgment, *supra* note 68 also cited in Aeyal Gross, "The *Construction of a Wall* between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation" (2006) 19 Leiden J Int'l L 393. Emphasis in the title is in the original.

[345] In one case, Colonel Dan Tirza had stated in court that a planning scheme for the development of the Israeli settlement of *Alfei Menashe* in the direction of the southwestern part of the enclave has been filed (implicitly suggesting that that elements other than security, such as expansion plans of Israeli settlements, played a role in the planning the route of the Wall). Nevertheless, the Court took at face value the assurances of the government that the Wall's route was chosen based on security considerations. See *Ma'arabe* Judgment, *supra* note 51 at para 113.

This only took place if and when strong unequivocal evidence had emerged during the case proceedings that government authorities had indeed misled the Court regarding the main considerations motivating their determination of the Wall's route. One example is the *Bi'lin* case, where Palestinian petitioners had submitted a number of petitions to challenge the decision of the MC to requisition land for the construction of the Wall in the area. They alleged that the Wall's route which kept land belonging to the village, together with the Israeli settlement of Mod'in Illit, on the 'Israeli side' of the Wall was chosen to secure land for the settlement's eventual expansion. They also pointed out that the objective was to make way for the two new neighborhoods of Naot HaPisga and East Mattitayahu. Petitioners also claimed that in the case of the latter neighborhood, construction had been carried out without conforming to Israeli domestic regulations governing the expansion and building inside settlements.[346]

The petitioners' counsel also underscored that the Wall's route followed the line of a planning scheme (plan 210/8) which had allowed for the development of the East Mattitayahu neighbourhood after it had been revised (plan 210/8/1).[347] This took place even though the revised plan had not yet received the final approval by the Ministry of Defense.[348] Once the scheme had been re-deposited it also became evident that the Wall's route had deviated from the area of the settlement's municipal jurisdiction, to include enclaves of privately owned land by Palestinians from B'ilin, and that several hundreds of dunums of land, which lay outside the jurisdictional limit of the settlement, had been attached to the revised plan of the

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[346] Either without a permit (in some part of the neighborhood) or according to illegal permits (in other parts *B'ilin* Judgment, *supra* note 68 at para 12.

[347] For the location of the plan, see *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 67 at 55. Covering an estimated 872 dunums, the revised scheme which also lies within the jurisdictional area limit of the settlement was designated amongst other things, for the construction of approximately 3,000 housing units, as opposed to only 1,500 housing units under the original plan. *Ibid* at 56.

[348] As the decision explains, "[i]t turns out that the developers took the law into their own hands and began to build the neighborhood according to the future plan 210/8/1 before it had come into force." *Bi'lin* Judgment, *supra* note 68 at paras 5 and 13. Upon inquiring with the CA about the illegal construction taking place, Israeli human rights organizations were assured that 'stop work' orders had already been issued. However, site visits confirmed that the construction works were still moving ahead quickly. *B'Tselem* and *Bimkom*, "Under the Guise of Security," *ibid.* Moreover, although various faults in the process to approve the new planning scheme had been established by the Attorney General (including the fact that there were no building permits), construction had already begun in the area by an Israeli Real Estate Company. Agencies of the government had also ordered the annulment of the planning proceedings of the scheme and the plan to be re-submitted. See *Bi'ilin* Judgment, *ibid* at paras 6 and 7.

neighborhood. Moreover, information had emerged that this land had been allocated for the construction of more than 1,000 additional settlement housing units.[349]

The petitioners' counsel explained that instead of following the topographic line, or the line of settlement houses (traditionally considered by the military authorities when determining the route for a given section of the Wall), the route set by the MC followed the line of the revised planning scheme (plan 210/8/1).[350] This, they argued, casted doubt on whether the Wall's route had indeed been chosen for the security reasons alleged by the government or whether its main purpose was to secure more territory for the future development of the settlement of Modi'in Illit.[351] Government authorities however, maintained that the route of the Wall in that area was chosen based on security considerations for the aforementioned settlement, including the need to provide for the safety of any future residents, and that doing so is a legitimate military consideration.[352]

During the proceedings, severe faults in the original planning scheme 210/8 and the revised planning scheme (210/8/1) came to light.[353] After affirming that the MC had the authority to build the Wall[354] and examining whether lawful considerations had indeed been taken into account, the justices subsequently concluded that:

> It is clearly apparent that the determination of the fence route was significantly affected by the plans to erect new neighborhoods [of *East Mattiyahu]* east of *Modi'in Illit*" [...] The planning of the route of the security fence *should not be based on the desire to include on the "Israeli" side of the fence territory intended for the expansion of settlements* [emphasis added], specifically when

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[349] *B'Tselem* and *Bimkom*, "Under the Guise of Security," *ibid* at 28.

[350] *B'ilin* Judgment, *supra* note 68 at paras 6, 7 and 16.

[351] And to annex it to the State of Israel, in contravention of the ICJ's *Wall* Advisory Opinion. *Ibid* at paras 13 and 19.

[352] They also argued that the MC was authorized to take new neighborhoods into account and "to consider valid planning schemes that have real chances of being implemented within a reasonable period, as there is no logic in building the fence and leaving new neighborhoods beyond it." Furthermore, the fact that the developers of the East Mattityahu "took the law into their own hands and chose to commence illegal construction in the area of the neighborhood, should not prevent the assigning of appropriate weight, in determination of the route, to the fact that a new neighborhood *will be built* on site." The respondents, therefore, required that the petition be rejected *in limine. Ibid* at paras 21-22.

[353] This includes the deviation of the former from the Mod'in Illit's area of municipal jurisdiction and the fact that construction was taking place in the enclave of privately owned Palestinian land. *Ibid* at para 33.

[354] *Ibid* at para 34.

> the planning schemes *are not about to be implemented in the near future* [emphasis added].[355]

Consequently, when information came to light that the particular building plan had not yet received the final approval from the relevant government authorities, the justices opted for an assessment of the legality of the measure using the proportionality doctrine.

After confirming that the route chosen had fulfilled the requirements of the first proportionality sub-test (rational link),[356] they moved on to the second sub-test (least harmful measure). Here they determined that since phase B (east) was conditional upon approval by the Ministry of Defense (an approval which had not been granted at the time) and, given that no construction or development work had already been conducted there, the justices concluded that "we cannot accept the argument that defending the eastern part of the "East Mattiyahu" neighborhood is a necessary security objective."[357] Addressing more forcefully and directly, the government's argument that it had been a security need to construct the Wall on topographically controlling territory, the Court elaborated that:[358]

> It seems that in light of the desire to ensure the construction of the eastern neighborhood in the future, the fence route was drawn in a place that has no security advantage. The current route of the fence also *raises questions pertaining to the security advantage it offers* [emphasis added]. It is clear that the route mainly traverses territory that is topographically inferior, both vis-à-vis Modi'in Ilit and vis-à-vis Bil'in. It leaves a number of hills on the Palestinian side and two hills on the Israeli side. It endangers the forces patrolling along the route. Against the background of the security outlook presented to us in many other cases, according to which there is security importance in building the fence in topographically dominant areas, the existing route raises questions. In general, in many cases of planning the fence route, the military commander presents the occupation of dominant hills as a

[355] *Ibid* at para 35.

[356] "This is the separation between the Israeli settlements and the Palestinian settlements in the Judea and Samaria area, and protection of Israelis from terrorist attacks." *Ibid* at para 37.

[357] *Ibid* at para 37.

[358] The contested route had passed mostly through territory which is topographically inferior to the settlements it purports to protect. *Ibid* at para 38.

> significant security advantage, while in the case before us a route was drawn that is at least partly located in inferior territory in relation to the hills.[359]

The justices also stressed that they failed to see how the route of the Wall could fulfill the third proportionality test (proportionality in the narrow sense). In their analysis, they held that the government's intention of developing the eastern part of the aforementioned settlement neighborhood is not a consideration that justified leaving the hundreds of dunums of privately owned Palestinian land on the 'Israeli side' of the Wall. Nor did it justify, in their opinion, the severe harm and hardship caused by the Wall's route to the petitioners' 'fabric of life', which had resulted from restricted access to their land due to checkpoints and agricultural gates.[360] Consequently, the Court ordered Israeli military authorities to devise an alternative route for the Wall.[361]

No doubt, the Court's assessment in this case is commendable and demonstrates that where petitioners have been able to provide strong evidence to counter the arguments of the government – indicating that political considerations are at play – the Court has struck down the legality of the Wall's route in certain areas. However, despite the strong evidence that government authorities had taken political considerations into account,[362] the justices still refrained from concluding that the MC lacked the authority under international law to route the Wall along the route he had chosen, preferring instead to state that:

> [D]ue to the conclusion we have reached on the question of proportionality, *we refrain from deciding* [emphasis added] the question whether the fact that the "East Mattiyahu neighborhood" was a decisive consideration in the planning of the route leads to the conclusion *that a fault occurred regarding the military commander's very authority* [emphasis added] to order the

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[359] *Ibid* cited in Shaul Arieli, "A Wall of Folly: 'The War' the IDF is Waging via the 'Seam Zone,'" (lecture delivered in January 2010 at the Van Leer Institute in the framework of Workshop, "Space and Security," online: <www.shaularieli.com>.

[360] *B'ilin* Judgment, *supra* note 68 at para 41.

[361] It also demanded that land planned for the future construction of phase B of the *East Mattityahu* neighborhood remain on the 'Israeli side' of the Wall. *Ibid* at paras 36-42.

[362] As the HCJ explained, "it turned out that scheme 210/8/1 replaced, *de facto*, scheme 210/8 which had been in effect since 1999 but had not been implemented. The route of the fence thus took into account a planning scheme which had been abandoned, prior to the approval of the new planning scheme." *Ibid* at para 35. In this regard, the Court underlined that even though it is aware of the fact that the new scheme had passed the new approval proceedings, the implementation of 'phase B' in the eastern part was still conditional upon approval to be granted by the Minister of Defense. *Ibid*.

> erection of the fence on Bi'lin land, or whether it should be determined that it is a fault in discretion, as opposed to lack of authority. We thus assume for the sake of the discussion that the construction of the fence was within the authority granted to the military commander.[363]

A second example is the Tzufin case,[364] and which involved a petition by Palestinians from the villages of Azzoun and Nabi Elias (in the Qalqilya area of the West Bank) who challenged the legality of the Wall's route in that area. Seeking to surround the Israeli settlement of Tzufin, the route chosen by military authorities had also resulted in keeping 1,000 dunums of agricultural land belonging to the petitioners inside the Wall.[365] Here, petitioners who had twice in the past petitioned the Court in relation to the route of the Wall argued that new information had come to light which confirmed that plan 194/5 allowing for the future expansion of the settlement (and which had not yet been approved),[366] had been taken into consideration when determining that route. This contradicted assurances by government authorities that had been made in previous petitions that only security considerations had influenced its decision regarding the Wall's route in that area.[367]

After the Court issued an *order nisi*, government authorities filed a new response in which they admitted to the fact that "in planning the route in the area, consideration was given to the existence of a plan that is under preparation, but has not yet gained official approval."[368] This new admission was received rather sternly by the justices, who added that:

> In the petition before us, a severe phenomenon became apparent: In the initial petition, the full picture was not presented to the Supreme Court. The court rejected the first petition based on information that was substantiated only in part […] The petition before us describes an incident that is unacceptable and,

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[363] *Ibid* at para 35.

[364] *Tzufin* Judgment, *supra* note 272. For a location of the settlement, type 'Zufin' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[365] 650 dunums of which was privately owned by Palestinians on the west side of the Wall. *Ibid* at paras 1-4.

[366] The land under this plan was allocated for the establishment of an industrial zone. See *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 67 at 6.

[367] *Tzufin* Judgment *supra* note 272 at para 4. Petitioners had petitioned the Court back in 2002. (HCJ 8172/02) [2002] *Ibrahim v. Military Commander*. However, the petitions were dismissed because the HCJ accepted the government's argument that the route of the Wall was based on security considerations and had committed itself to build agricultural gates to allow petitioners access to their land remaining on the 'Israeli side' of the Wall. *Tzufin* Judgment, *ibid* at paras1-4.

[368] State response, section 17 cited in *B'Tselem* and *Bimkom* "Under the Guise of Security," *supra* note 67 at 4.

> according to it, the information provided to the court did not reflect the complete considerations that stood before the decision makers […] We hope this will not happen again.[369]

The Court subsequently decided to make the *order nisi* permanent and upheld the petition. According to one Israeli lawyer, familiar with the case:

> The HCJ [here] determined that it was not lawful on the grounds that the source of the authority to erect the fence stems from the necessity to protect people that at the relevant period of time are already present in the area and not potential future residents. In this case we can see a narrow interpretative approach of the court. The court restricted and minimized the lands that can be taken by the commander under the claim of "security" and that under this objective lands cannot be taken in order to expand settlements.[370]

A third example is the *Nilin* case, where the contradictory actions of Israeli military authorities furnished proof that security considerations were not the primary consideration for the route of the Wall, despite assurances to the contrary. In this case, Palestinian residents of the West Bank village of N'ilin had challenged the military's decision to requisition land (including Palestinian privately owned) for the construction of a Wall section. The construction had also effectively kept other parts of their land inside the Seam Zone. The MC had alleged that the route of the Wall in the area was influenced by the desire to include an area of land where several future building plans for the expansion of Modi'in Illit bloc had been initiated (but

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[369] *Tzufin* Judgment cited in Shaul Arieli, "The Wall of Folly," *supra* note 359 at 6-7. See also *Hamoked,* "(HCJ 2732/05) *Abdel Al-Teif Hussein Head of Azzun Municipality Council et al v. Government of Israel et al*: Application for an Order of Contempt of Court" at para 6, online: *Hamoked* <http://www.hamoked.org.il/items/6656_eng.pdf>. It also reiterated that the respondent must ensure free passage by the petitioners to their land till the section of this Wall is constructed on a new route. *Tzufin* Judgment, *supra* note 272 at paras 6-7. Two years after the ruling was issued, the government had not implemented that ruling. Hence in September 2008, *Hamoked* filed an application under the Contempt of Court Ordinance. Only then did the State begin to dismantle the route. See *Hamoked*, "In a decision on an application under the Contempt of Court Ordinance filed by *HaMoked* regarding the state's delay in implementing the judgment establishing that the route of the separation wall in the area of the villages of 'Azzun and An Nabi Elyas is unlawful and therefore null and void, the court harshly criticized the state's conduct in the case: In the decision, the court emphasized that its judgments are not merely recommendations and ordered the state to pay expenses to the sum of NIS 20,000" (October, 2009), online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=847_update>.

[370] Written response by an Israeli attorney who wishes to remain anonymous to Questionnaire (English) (10 July 2014) at 4, [*Attorney A 03-B* Written Submission].

which had not been approved at the time), so that they remain on the 'Israeli side' of the Wall.[371]

The Wall's route, first decided upon in 2003 had in light of the *Beit Sourik* ruling been re-routed. From amongst the three alternatives which the MC considered at the time, it was determined that the southern route option, which left the lands for a future building plan (plan 208/03) on the 'Israeli side', would strike the necessary balance between the security considerations on the one hand, and the rights of the Palestinians, on the other.[372]

However, soon thereafter, this route was challenged by the Hashmoneam Local Settlement Council on the ground that moving the Wall's route closer to the line of their houses would undermine the ability of the military forces to protect them.[373] In response, government authorities decided to drop that option in favor of another alternative route (thereafter intermediate route). While this route expanded the distance between the Wall and the line of the settlement's houses, it had also resulted in separating Palestinians from more of their lands than what had been envisaged, had the initial southern route of the Wall been followed.[374]

In their petitions, the affected Palestinian residents argued that the intermediate route chosen for the Wall only confirmed that the main objective behind the route was to accommodate the future building plans of Hashmoneam and to trap land on the 'Israeli side' of the Wall for the proposed expansion of the settlement.[375] They also relied on the submission of the CPS (joining as *amicus curiae*) which highlighted that both the initial route for the Wall and the

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[371] The main plan (208/3) was intended for the construction of the future neighborhood of Ganei Modi'in Illit over a surface of more than 147 dunums. See *Ni'lin* Judgment, *supra* note 174 at paras 1-15.

[372] Even though the State claimed that it was not the optimal route from a security perspective. *Ibid*, at paras 1-15.

[373] *Ibid* at paras 20-23.

[374] This would take up 326 dunums for the construction of the Wall and will leave 3,490 dunums in the Seam Zone. Among these lands are 1,355 dunums of privately owned lands while the rest are 'state' lands. See *Ni'lin* Judgment, *supra* note 174 at paras 1-15. The southern route was also challenged by an Israeli private investment company involved in the Ganei Mod'in neighborhood, which claimed that they had purchased part of the land. It also argued that the intermediate route would be less harmful because it would leave enough land on the 'Israeli side' of the Wall to allow them to move forward with the proposed building plans. See *ibid* at paras 20-23.

[375] *Ibid* at para 20-23.

intermediate route were disadvantageous from a military/security perspective and that they entailed significant harm to the Palestinians and their rights.[376]

In employing the proportionality sub-tests, the Court ruled that the intermediate route had failed to meet the second proportionality sub-test (the least harmful sub-test).[377] Pointing out that the respondents had already commenced issuing requisitioning orders for land based on the 'southern route' option, the justices noted that it was only after the plea had been made by the settlement council that government authorities decided to adopt the 'intermediate route'. The justices also underscored that the respondents had failed to explain why the necessary distance between the Wall and the settlement's line of houses had to be increased. This is all the more true, because authorities had given assurances that the optimal distance between the Wall and the line of settlement houses is, from a security point of view, that which they had deemed necessary when they had decided on the initial 'southern route'.[378]

Finally, the Court concluded that government authorities had also failed to fulfill the third proportionality sub-test (proportionality in the narrow sense) because the proposed security added value of the northern route could not justify the great harm inflicted on the petitioners from N'ilin (separating them from their land; requiring them to seek access to apply for permits to enter the Seam Zone etc.).[379] Explaining its conclusions, the justices reiterated that the route of the fence cannot take into consideration future building plans, particularly if those

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[376] In this regard, they chose a route which passed closer to the line of the houses of the Hashmoneam settlement and, therefore was closer to the southern route which had initially been chosen by the respondents. See *Ibid* at paras 1-15. However, it was refuted by the respondents who maintained that the route was purely determined by security considerations. The CPS's proposal would only leave a distance of 240 m between the Wall and the housing of the settlement, while the intermediate route would leave 500-600 m. *Ibid* at paras 20-22.

[377] *Ibid* at paras 30-43.

[378] At the same time, the Court did not see any reason to prefer the alternative route suggested by the CPS, stating that in its opinion the 'southern route' for the Wall (that had been adopted by the MC) is the one that most adequately balances between the security concerns of government authorities and the harm it inflicts on the Palestinian petitioners. They also rejected the petitioners' request to place the route of the Wall along the houses of the settlement on the ground that leaving a distance between those houses and the route of the Wall is a security imperative. *Ibid* at paras 30-43.

[379] Here it is worth mentioning that the interim route requires confiscation of approximately 45 dunums more than the amount of land confiscated for the 'southern route' option. It also places an additional 200 dunums inside the Seam Zone. *Ibid* at paras 30-43.

plans had not been approved.[380] The petition was consequently accepted and the land requisition orders for the intermediate route cancelled.

The above mentioned decisions were rendered in relation to cases in which the expansion plans for settlement neighborhoods had not yet been approved. But what about neighborhoods which are at advanced stages of construction? The next section addresses this issue.

3.3.3.3. Neighborhoods at an Advanced Stage of Construction

In petitions where the expansion plans for Israeli settlement neighborhood to be included on the 'Israeli side' of the Wall were taken into consideration by government authorities, the Court remained open to the possibility of considering the route to be lawful. This was the case where these settlement neighborhoods were at advanced stages of construction and where government authorities were able to convince the Court that security remains either the only, or the primary factor that has influenced the determination of the route. Thus in the *Bi'ilin Village Council* case, the justices noted that since the Israeli settlement neighborhood of Naot HaPisga had been built according to valid domestic planning schemes and regulations and was at an advanced stages of construction, a 'legitimate' need for defending it has arisen.[381]

3.3.3.4. Upholding the Legality of the Wall Route due to Harm/Benefit Considerations

There have been other instances where, despite the fact that new information had surfaced to underscore that future unapproved building plan involving the expansion of Israeli settlements had been taken into consideration when routing the Wall, the justices still proved unwilling to strike down the legality of that route. This was the situation in certain petitions even though the Court had established that the route chosen by the military authorities had failed to fulfill the requirements of one or more of the proportionality subtests, citing a number of elements to justify its conclusion. For example, in the *Umm Saffa* case, Palestinians challenged the legality of the Israeli MO which requisitioned the agricultural land belonging to a village west of

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[380] In addition, it highlighted that just as security needs require and justify limiting the property rights of Palestinians; it could also lead to restricting those rights for Israelis (by requiring that this property is left on the 'Palestinian side' of the Wall). *Ibid* at paras 30-43.

[381] *B'ilin* Judgment, *supra* note 68 at para 35.

Bi'lin (in the Ramallah district) for the construction of the Wall.[382] Resulting in the inclusion of the close-by Israeli settlements of Kfar Ha-Oranim and Kfar Ruth (part of Mod'in Illit settlement bloc) on the 'Israeli side' of the Wall,[383] petitioners argued that the choice for the northern section of the Wall's route in the area,[384] was based on consideration involving future unapproved building plans seeking to expand the aforementioned settlements. They also stressed that the measure was taken in a bid to annex the land to Israel proper.[385]

Here, the justices confirmed that the future unapproved building plans of Kfar Ha-Oranim should not play a role in the consideration of the Wall's route.[386] In addition, when embarking on an assessment of the proportionality of the proposed route, the Court noted that in the case of the second sub-test (least harmful means) an alternative route closer to the actual line of the houses of the settlement would cause less harm to the petitioners. Still, the Court decided to uphold the government's reasoning that altering the Wall's route (after the passage of all of this time) would cause harm that would outweigh the benefits.

In an effort to justify this conclusion, the justices underscored a number of elements: that the respondent would only be able to move this section of the Wall by 100-250 meters to the west, thereby returning only a small part of the land currently inside the Wall, that re-routing the Wall sections in that area would result in damage to more land elsewhere, and that the re-routing would cost the government an additional 24 million NIS.[387] Furthermore, given the

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[382] *Umm Saffa* Judgment *supra* note 326 at 1. For a location of the village, type 'Um Saffa' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[383] IDI, "High Court Rejects Petition to Change Route of Security Barrier [HCJ 1882/08]" (17 August 2010), online: IDI <http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-21/high-court-of-justice-rejects-petition-to-change-route-of-security-barrier/>.

[384] The section of the Wall in question is 3.2 km long and can be divided into a northern and southern section. The path of the southern section was agreed upon by all the relevant parties following a petition that was filed in 2004, while the northern part became the subject of this petition. *Ibid.*

[385] With this land remaining on the west side of the Wall, petitioners argued that it was difficult for them to access the land since they are dependent on the permit regime to cross through agricultural gates. *Umm Saffa* Judgment, *supra* note 326. See also IDI, "High Court Rejects Petition to Change Route of Security Barrier [HCJ 1882/08]," *supra* note 383.

[386] *Umm Saffa* Judgment, *supra* note 326 at 4.

[387] According to the respondents, only 257 dunums would be returned, while causing damage to another estimated 172 new dunums elsewhere. In this regard, the respondents had argued that this was mainly due to topographic conditions, *ibid* at. 4. See also IDI, "High Court Rejects Petition to Change Route of Security Barrier [HCJ 1882/08]," *supra* note 383.

significant time lapse and the fact that moving the Wall would cause harm elsewhere, the justices then decided to dismiss the petition. This confirms that even where a challenged route of the Wall did not satisfy the requirements of the second sub-test it did not necessarily lead the Court to order that it be re-routed.[388]

Finally, upon examining the third proportionality sub-test (the 'proportionate means' test), the Court also put a different spin on how it analyzed the last requirement. While it reiterated the idea that the harm caused to the petitioners is high, amongst other things, because of the strict requirements of the permit regime, the justices determined that the test should be applied to the cost/benefit analysis of moving the Wall sections onto a new route (as opposed to its current route). Consequently, they determined that the harm that would be caused to other plots of land, coupled with the expense of re-routing the Wall, had outweighed the benefit that would accrue to the Palestinian residents if the structure's route in the area is changed.[389] This granted a seal of approval to the larger state of affairs created by the Wall. At the same time, in an apparent effort to regulate the severe impact of the occupation on the Palestinians, the Court urged government authorities to extend the operational period of the Wall's agricultural gates. It also demanded military authorities to consider opening another gate in accordance with the needs of the petitioners as a way of minimizing the injury to the inhabitants in that area.[390] Still a disturbing consequence of the way the Court has chosen to implement the proportionality sub-tests here is that:

> [O]ne could argue that the judgment effectively encourages the State to establish unlawful facts on the ground in accordance with political interests – in the hope that changing such facts at a later point would be deemed disproportionally harmful. It is not clear why the Palestinian villagers whose land was unnecessarily cut off – and not the State – should ultimately assume the burden of the State's initial decision to select an inappropriate route for the barrier.[391]

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[388] (HCJ 1882/08) *Umm Saffa* Judgment, *supra* note 326 at 4 and 5.

[389] *Ibid* at 5.

[390] IDI, "High Court Rejects Petition to Change Route of Security Barrier [HCJ 1882/08]," *supra* note 383.

[391] *Ibid.*

3.3.3.5. Concluding Observations

According to one lawyer, "statistically out of around 130 fence cases there were only real victories and rulings in favor of Palestinian petitioners in seven or eight cases. Most cases were dismissed, altogether around 70. These facts speak for themselves, to a certain extent."[392]

Thus, in the few instances in which the HCJ had demonstrated a willingness to depart from its traditional stance of not challenging the security-based assessment of the government, it only took place when glaring evidence had come to the forefront which helped to contradict the security-based position of the government or when information confirming the arbitrary nature of the Wall's chosen route emerged. According to Attorney Nasrat Dakwar, a lawyer who was involved in litigating the *Tzufin* case, the Court only decided to uphold the petition in this case because petitioners had succeeded in refuting the security-based argument of government authorities: "we were able to put our hands on the future plans themselves and could show the correlation between the plans and the route of the fence [...] we could show that the fence was distanced way beyond what is necessary from the existing houses in the settlement."[393]

According to another lawyer who has litigated extensively in front of the HCJ on behalf of Palestinians (but who chose to remain anonymous) the reason why this decision was one of the rare instances in which the Court had chosen to apply a more rigorous test "might have to do with the fact that the government was caught presenting false and partial information before the court." Another reason is "the fact that we were able to present the expansion plans made a difference in this regard."[394]

A third attorney, Netta Amar, believes that the Court can be more rigorous with the government, but that the decision of whether to do so or not to do so is within the discretion of the Court. Given the Court's sensitivity to both the possibility of their domestic decisions being used on the international scene to criticize Israeli authorities and to how it is perceived

[392] Attorney *A03-B* Written Response, *supra* note 370 at 4.
[393] *Dakwar* Interview *supra* note 210.
[394] Attorney *A03-B* Written Response, *supra* note 370 at 4.

domestically by the Israeli public, the question that we should ask ourselves is: "why would we expect the Court to be rigorous? We would need the Court to be the smokescreen [...]."[395]

After examining the Wall and its Seam Zone, the next section focuses on the policy of establishing SSZs around settlements. Here, this practice is not directly related to the construction of the Wall. In any event, an examination of HCJ decisions in petitions challenging the legality of establishing these zones around settlements indicates that the Court has followed the blueprint it had developed in the Wall related decisions in analyzing the different elements.

4. Providing Protection or expanding *de facto* Land Control? The Case of the SSZs around Settlements

4.1. Introduction

Israeli authorities established the SSZs at the height of the Second *Intifada* to serve as buffer zones around Israeli settlements that would remain outside the Wall (on the 'Palestinian side').[396] Contrary to what one may assume, the construction of Israeli settlements has not waned down on that side of the structure.[397]

Each fence marking a particular SSZ runs far from both the immediate fence surrounding a particular settlement and the last line of its houses. Covering a radius of approximately 300-

[395] Interview with Attorney *Netta Amar-Shiff* by Avichay Sharon, (24 August, 2014, Jerusalem) on file with author [*Amar-Shiff* Interview]. Mrs. Amar-Shiff is a lawyer and legal advisor for the Israeli NGO *Rabbis for Human Rights*. She was also former legal advisor for *DIAKONIA*'s International Humanitarian Law Resource Center.

[396] Already during the Oslo period, Israeli military authorities had decided to put in place several means for restricting access by Palestinians to land surrounding the settlements, including fences, patrol roads, lighting, up to a width of about 50 meters from the outermost houses of the settlements. *B'Tselem,* "Access Denied: Israeli Measures: Israeli Measures to Deny Palestinians Access to Land around Settlements," Report (September, 2008), online: *B'Tselem* <http://www.btselem.org/download/200809_access_denied_eng.pdf>.

[397] According to *Peace Now*, of the 1,747 new housing units in West Bank settlements in which construction began in 2012, over a third of the construction (36.4 %) was carried out in isolated settlements, outside the approved route of the Wall (on 'Palestinian side'). By way of comparison, *Peace Now* mentions that of the new housing units on which construction began, (36.1 %) were built west of the already-built Wall. See *Peace Now*, "Summary of Year 2012 in Settlements" (16 January, 2013), online: *Peace Now* <http://peacenow.org.il/eng/2012-summary>. By 2014, areas of the West Bank that have been declared as closed military areas for various reasons, such as military training areas; settlement jurisdiction areas and SSZs make up an estimated 1,765 million dunums. This makes up an estimated one third of the area of the entire West Bank, and over one half of Area C. See Dror Etkes, "A Locked Garden," *supra* note 48 at 9.

400 m of land, it includes in many instances a significant amount of privately owned Palestinian land. According to a report by *B'Tselem*, which examined the impact of SSZs that were established around 12 settlements, prior to the demarcation of these SSZs the overall area under these settlements' jurisdiction already included hundreds of dunums of privately owned Palestinian land. However, following the creation of these zones, the overall area now spans 3.7 times more Palestinian privately owned land than before.[398]

Sometimes, the SSZ related fence is an 'engineering' fence, which is demarcated by a physical fence and other physical means blocking access. In other instances, it is an 'electronic; fence which refers to a technological system of visual and sensory devices enabling the supervision of entry by Palestinians into the zone, but which does not physically block it. Other times, the SSZ combines the two methods.[399] In these zones, special rules of engagement apply, allowing Israeli soldiers to fire at anyone who tries to infiltrate these areas.[400]

Generally speaking, the Israeli MC issues three 'temporary' MOs for the purpose of setting up a SSZ: (1) an order to requisition the land on which the SSZ patrol road and fence is constructed; (2) an order to declare the area encompassed by the zone as a closed military zone and (3) an order which prohibits building on the requisitioned land, even by its owners. The orders, which last between a few months to a few years, are extended time and time again, "making them permanent for all intent and purposes."[401] Even where closure orders are not renewed, generally speaking, the prohibition of entry into the SSZ continues to be enforced by the Israeli military on the ground.[402]

In some instances, land that had been requisitioned from Palestinians that are residing in surrounding villages has been used for the construction of a security fence around the SSZs,

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[398] Before the creation of the SSZs, at least 881 dunums of land were privately owned by Palestinians from nearby villages. Following the creation of these zones, the overall area of these settlements now includes 3,242 dunums of privately owned Palestinian land. See *B'Tselem*, "Access Denied," *supra* note 396 at 35.

[399] *Ibid*.

[400] Amos Harel, "IDF Creating Buffer Zones Around West Bank Settlements," *Haaretz* (26 December 2002).

[401] *B'Tselem*, "Access Denied," *supra* note 396 at 42.

[402] While in some cases such as (HCJ 959304) *Morar* Judgment, *supra* note 257, the HCJ noted that closing of land must be preceded by the issuance of written MO; other times, it accepted the government's promise to extend them and has not further criticized the lack of renewal. *Ibid*.

with the idea of eventually connecting the SSZs-fences to the Wall. This was the situation in the *Ariel Bloc* case,[403] where Palestinians from nearby villages challenged the legality of land requisition orders for the construction of a security fence around the SSZ, established around the settlements of Immanuel, Karnei Shomron, and Ma'ale Shomeron,[404] and whose connection to the actual Wall was pending a full examination and final approval by government authorities.[405]

In this regard, Israeli military authorities have provided assurances in the past that the creation of these zones does not grant settlements surrounded by them, the right to expand the area under third jurisdiction or the right to build houses or other infrastructure in the SSZs. They also noted that they must not infringe on the Palestinians' farmlands. However, developments on the ground indicate that the Palestinian privately owned lands that have been encompassed by the SSZs have been *de facto* annexed to the settlements which are surrounded by these zones.

In theory, the MOs described above prohibit the entry of people into these zone and construction in what is supposed to remain an empty buffer zone. In practice however, Israeli settlers have often been granted free access to the SSZs. Palestinians, on the other hand, have generally been forbidden from entering the zone to work their land, save for exceptional

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[403] *Ariel Bloc* Judgment, *supra* note 188.

[404] Both are part of the *Ariel* settlement bloc. The term 'Ariel bloc' generally refers to an area of the West Bank delimited to the east by the settlement of Ariel, to the north by the settlement of Kedumim, to the northwest by the settlements of Karnei Shomron and Ma'ale Shomron, and to the south by the settlements of Beit Arye and Ofarim. The resulting bloc includes numerous other settlements and at least seven 'unauthorized outposts'. The area which Israel is planning to encompass within the Wall that includes Ariel and the Ariel bloc is 47 miles and includes about 37,000 settlers. See Dror Etkes, "Ariel and the Ariel Bloc," (May 2005), online: *Peace Now* <http://peacenow.org.il/eng/content/ariel-and-ariel-bloc>. For location of settlement type 'Karnei Shomron' into search engine of interactive map, online: *B'Tselem* < http://www.btselem.org/map>.

[405] Since SSZs are buffer zones that are declared by Israeli military authorities as closed military zones, they are inaccessible for Palestinians, unless they have a valid permit. See *Ariel Bloc* Judgment, *supra* note 188 at 2. On February 20, 2005, the Israeli government approved a route for the Wall that includes the Ariel bloc, see "Israel's Security Fence: Route," online: MoD <http://www.securityfence.mod.gov.il/Pages/ENG/route.htm>. The part of the Wall which is supposed to be constructed around the *Ariel* bloc is noted on the map's legend as: "Route Subject to Completion of Further Inter-Ministerial Examination." *Peace Now* suspects that this may indicate an effort by the government to gain time needed to sell the plan to the international community. This is in light of the substantial opposition amongst its member states to Israel building this portion of the Wall (including the US). In the meantime, Israel decided to proceed with building a fence that partially surrounds *Ariel*, which could be connected to the larger Wall in the future. See Dror Etkes "Ariel and the Ariel Bloc," *ibid*.

circumstances: under stringent conditions, and after fulfilling a number of very demanding criteria articulated by the CA.[406] Moreover, even if and when they were granted entry, Palestinian farmers seeking to access their land (that has become part of these SSZs) have not been able to dictate the time and length of their stay nor have they been allowed to bring in agricultural machines. This has had the consequence of lowering the profit that they can make from agricultural activity on this land, which constitutes their main source of livelihood. The difficulty of meeting the lengthy and bureaucratic requirements has also been documented to have the impact of wearing out the Palestinian applicant and of discouraging many on the long run, from trying to fulfill those requirements in order to access their land.[407]

Moreover, since the judicial system allows the expropriation of uncultivated land, Palestinians farmers have feared that the consistent closing off of these lands to their access would increase the possibility that control of this land would eventually be officially transferred to Israeli government authorities or that Israeli settlers consolidate their control over this land by cultivating it.[408] According to documentation by human rights organizations, once a given SSZ becomes part of the settlement, the construction of settlement related structures takes place therein (despite the official building ban).[409]

Lastly, it is important to highlight that UN agencies and Israeli human rights NGOs have also documented a practice by Israeli settlers of installing fences on their own initiative around adjacent land that belongs to Palestinians, thereby leading to the significant expansion of the

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[406] Such as proving ownership of the land they wish to access, obtaining a set date of entry (each time) from the CA and consent of the Israeli settlement security coordinators to enter the area to work their land.

[407] As mentioned in other parts of this thesis, most land is not formally recorded, so Palestinian farmers who have traditionally attended to the land find it difficult to prove ownership. Similarly, Palestinians who graze the land cannot prove private ownership, even if they have grazed the same land for dozens of years. The presence of the security guards in the SSZs, who are not soldiers but residents of the Israeli settlement surrounded by the Zone, strengthens the claim that the SSZs has been attached to the settlement. See *B'Tselem*, "Access Denied," *supra* note 396.

[408] *Ibid.* Although legally speaking Israeli settlers are barred from entering closed military areas, according to recent statistics furnished by an Israeli NGO, to date, they have cultivated an estimated 14,000 dunums of agricultural land in closed military areas, 60% of which is Palestinian privately owned. Dror Etkes, "A Locked Garden," *supra* note 48.

[409] *Ibid*. *Dakwar* Interview, *supra* note 210.

outer limits of the area that is under the jurisdiction of a settlement.[410] By 2008, the aforementioned *B'Tselem* study estimated that the overall area of 12 settlements east of the Wall increased by 2.4 times, from 3,235 dunums (800 acres) to 7,794 dunums (1,825 acres), more than half of which constitutes privately owned Palestinian land.[411]

4.2. The Position of the Parties

The position of the opponents in the SSZs related cases is very similar to the position that petitioners have adopted in Wall related case law. Palestinians challenging the legality of confiscated land (including privately owned land) for the purpose of establishing a SSZ around a specific settlement[412] have traditionally articulated a number of arguments. One of them is the illegality of settlement activity under international law and that, consequently, Israeli military authorities do not have the legal authority to provide for the settlement's security. [413] A second one is the disproportionate impact of the establishment of this SSZ in terms of the appropriation of their land, the uprooting of trees and the restrictions on their access to it.[414] Thirdly, they have reiterated that Israeli authorities could establish the fence surrounding the SSZ closer to the settlement's line of houses and/or adopt a technological system for surveillance (instead of a physical fence), thereby reducing the amount of their

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[410] No land requisition orders or notification were given to the Palestinian landowners prior to the installation of this infrastructure and no procedure to allow access of farmers to the closed areas was established. See UN-OCHA-oPt, "How Dispossession Happens," special focus (March 2012), online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_springs_report_march_2012_english.pdf>. According to the former Head of the Settlement Watch Unit at *Peace Now*, "[t]he ongoing neglect of law enforcement when it comes to illegal settler activity enables the settlers to take over vast areas of land that otherwise would have never been possible." See Dror Etkes, "Kerem Navot: Israeli Settler Agriculture as a Means of Land Takeover in the West Bank," Report (August 2013) p. 37, online: RHR <http://rhr.org.il/heb/wp-content/uploads/Kerem-Navot.pdf>.

[411] *B'Tselem*, "Access Denied," *supra* note 396.

[412] One example is the SSZ around the settlement of Shavei Shomron east of Tulkarem in the West Bank. See (HCJ 11395/05) [2006] *Mayor of Sebastia et al v. Government of Israel et al* at para 3, unofficial English translation by Avichay Sharon (August 2013) on file with author [*Sebastia* Judgment]. The petition was dismissed by the HCJ. For location, type "Shavei Shomron" into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>. In another case, a SSZ was established around the settlement of Carmei Tzur. See *Beit Ummar Municipality* Judgment, *supra* note 177. For location, type 'Carmei Tzur' into search engine of interactive map, online: *B'Tselem* <http://www.securityfence.mod.gov.il/Pages/ENG/route.htm>.

[413] *Ariel Bloc* Judgment, *supra* note 188 at paras 11-14. See also *Beit Ummar Municipality* Judgment, *ibid* at paras 1-5.

[414] *Sebastia* Judgment, *supra* note 412 at para 3.

privately owned land which is included in the SSZ and the disproportionate harm that this has had for them.[415]

Meanwhile, the government has generally contended that the location of land owned by Palestinians close to the settlements has been a source of ongoing security risks for the settlements' inhabitants.[416] As a result, the creation of a buffer zone of 200-400 m from the first settlement houses is advocated as a necessary measure to fend off any attempts to infiltrate or target these settlements. Secondly, they have claimed that the distance between the SSZ fence and the line of houses of the settlements constitutes the minimum distance that is needed to provide the military forces with the necessary time to respond to any security breaches.[417] Thirdly, they have pointed out that the measure is both reasonable and proportionate for the following reasons: (i) it requires the confiscation of only a limited amount of land (for the purpose of constructing the SSZ-fence); (ii) compensation will be offered to the affected Palestinian landowners/farmers and (iii) the affected individuals will have access to their lands that will remain inside the SSZ through gates set up for this purpose.[418]

4.3. The Court's Assessment

The legal framework which the Court has adopted when examining cases related to SSZs is very similar to the one it follows in the Wall related petitions. In fact, the justices usually begin their examination of petitions challenging their construction by reiterating that the relevant legal framework is one and the same as that laid down by the HCJ in its *Beit Sourik* and *Ma'arabe* judgments. Consequently, the Court has usually begun its analysis by

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[415] *Beit Ummar* Judgment, *supra* note 177 at paras 1-5.

[416] In one case, representatives of several Palestinian village councils challenged the decision to requisition their land close to the settlements of Enav and Avne Hefetz. The respondents alleged that those nearby plots of land have been the source of concrete incidents such as stone throwing by Palestinians against Israeli settlers. (HCJ 5139/05) [2007] *Falah Mitzah Ahmed Shaib, Head of Beit Lid Village Council et al v. Government of Israel et al* at 1 and 3, unofficial English translation by Avichay Sharon (March 2013), on file with author [*Shaib* Judgment]. The petition was dismissed by the HCJ. For the location of the settlements and the Palestinian villages, type 'Enav' and 'Avne Hefetz' in search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[417] *Sebastia* Judgment, *supra* note 412 at paras 1-2, and at 4. See also *Ariel Bloc* Judgment, *supra* note 188 at paras15-20 and *Beit Ummar* Judgment, *supra* note 177 at paras 1-4.

[418] *Sebastia* Judgment, *ibid* at paras 1-2.

underlining the idea that the MC is authorized under the international law to construct a 'fence' in 'Judea and Samaria' and to confiscate private property (including land) in the occupied territory, if this is necessary to meet genuine security-based objectives.

Here as well, the Court has generally upheld the government's assessment that the establishment of those SSZs is necessary from a security/military point of view. It has usually also reiterated that, as a matter of principle, the MC is authorized to implement measures that are allegedly geared towards enhancing the security of the Israeli settlers in 'the Area', even if the former do not constitute 'protected persons' under the Fourth Geneva Convention.[419] Here too, its justices have stressed that the issue of the legality/illegality of the settlements under international law does not impact the obligation of the MC to secure the lives, dignity and freedom of all persons living under the law of belligerent occupation. That authority behind securing the settlers' lives, they noted, can also be derived from article 43 of the Hague Regulations, even if their presence in the territories is unlawful.[420]

Subsequently, by relying on the proportionality doctrine, the justices have then moved on to an assessment of whether or not the MC has successfully balanced between the three main considerations which, according to the Court, can lawfully guide the actions of the MC. They are: (1) security of the State and its military forces; (2) the human rights of the Palestinians as 'protected persons'; and (3) the human rights and/or security of the Israeli settlers.

In first place, the justices assessed whether the MC's decision to establish the SSZ is reasonable. Similar to their positions in Wall related the petitions, the justices underscored that they do not replace the MC as the security/military expert. They also reiterated that it is the latter who is entitled to establish which measure best addresses the declared security objective and that their own role is confined to that of reviewing the legality of the decision taken by the MC.[421] Consequently, the Court has tended to accept the assessment of the military authorities that establishing an electronically based surveillance system (as opposed to a physical fence)

[419] *Ibid* at paras 5-6.
[420] *Beit Ummar* Judgment, *supra* note 177 at paras 7-11.
[421] *Sebastia* Judgment, *supra* note 412 at paras 5-6.

around the SSZs would not suffice to respond to the security needs of the settlers.[422]

As for the first proportionality sub-test (rational link test), the justices have occasionally re-affirmed that since the primary aim of the SSZs is to separate between the Israeli settlement and the neighboring Palestinian villages, this measure (the fence and its route) is rationally linked to the objective it aims to achieve (security). In fact, one judgment quite bluntly elaborated their conviction that "[t[he fence creates separation between the terror and the Israelis."[423]

The Court has also generally upheld that the measure satisfied the second sub-test (least harmful measure). In this regard, the justices have pointed out that petitioners have proposed alternative measures or route for the fence, to reduce the harm that they would allegedly have to incur. However, they were quick to underscore, later on, that petitioners had not succeeded in proving that their alternative routes would achieve the security objective that was laid out by the MC.[424] At the same time, when concluding that the route identified by the MC is the most optimal from a security perspective, the justices reiterated that they have taken into account promises made by government authorities that they would implement measures that would reduce the harm resulting from these zones on the petitioners. They also accepted the idea that these measures demonstrated that authorities have made a reasonable effort to strike an appropriate balance between the different considerations. These measures include: (1) ensuring that the SSZs would not block the access of petitioners to any nearby Palestinian cities or villages and their essential services,[425] (2) that only a limited amount of Palestinian privately owned land would be appropriated for the purpose (with the majority of land requisitioned to constitute 'state land');[426] (3) that compensation will be offered to the affected landowners, and (4) that the access of the landowners to their land in the SSZs for farming purposes will be guaranteed.[427]

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[422] *Beit Ummar* Judgment, *supra* note 177 at paras 7-11.
[423] Word for word translation. See *Ariel Bloc* Judgment, *supra* note 188 at paras 25-32.
[424] *Ibid* at paras 25-32.
[425] *Sebastia* Judgment, *supra* note 412 at paras 5-6.
[426] *Ariel Bloc* Judgment, *supra* note 188 at paras 15-20.
[427] *Beit Ummar* Judgment, *supra* note 177 at paras 7-11.

Here too, there is no doubt that petitioning the Court in and of itself, could and has indeed resulted in authorities deciding to modify the scope of their MOs. This, no doubt, has reduced some of the harm that would have been incurred by the Palestinian petitioners, had they not petitioned the Court. This was the situation in the *Beit Lid* case, where the respondents assured the Court that they have decided to modify the MOs requisitioning the land in order to stipulate that certain parts of the SSZ related fence would run closer to the settlement line of houses. This effectively reduced the amount of land belonging to Palestinians that would have otherwise been included in those zones. Authorities also declared that they would replace some physical sections of it by an electronic surveillance system based fence. In addition, they promised to ensure access of farmers to the land that lay in the SSZ through agricultural gates and to offer compensation.[428]

Similarly, in the *Beit Ummar* case, after objections had been filed by the affected Palestinians against the MOs requisitioning their land, government authorities claimed that despite a certain compromise to the security objectives, they have decided to modify the aforementioned orders to move the outer fence of the SSZ closer to the line of settlement houses. They also expressed readiness to rely on technological surveillance in some parts surrounding the zone. Similarly to their position in the previous case, they also committed themselves to granting access permits to all Palestinian landowners, to construct agricultural gates through the fence for this purpose and to offer compensation and rental fees.[429]

5. Concluding Observations

On a positive note, it remains true that the Court has been able to provide isolated and individual windows of legal remedy to affected Palestinian petitioners by reducing some of the harmful impact that security-based measures discussed in this chapter have had on them. However, as the discussion seeks to demonstrate, the Court has generally upheld the legality of the measures that have been proposed by the government and focused its efforts on

[428] *Shaib* Judgment, *supra* note 416 at 3.

[429] Instead of constructing a physical fence to surround the entire zone, parts of it would consist of electronic sensors to detect movement. The fence would also run at a distance of 75-200 m from the settlement's house line instead of the original 400 m, and which would result in appropriating an estimated 25 dunums instead of 45 dunums. *Ibid* at paras 1-4 and 6.

regulating their impact. This is because the Court has been more comfortable in grounding its decisions in domestic Israeli law (primarily administrative law) through the proportionality doctrine, as a way of seeking certain amendments to the way security measures are implemented by the respondents, and without challenging the very authority of the MC under international law to resort to those measures in the first place.

In order to be able to answer the question of whether the Court has generally been able to provide a venue for effective legal remedy, one is bound to examine whether in adjudicating the petitions discussed in this chapter, the Court has consolidated the rights of the Palestinians as protected under international law or contributed to diluting them. An assessment of the Court's decisions highlights shortcomings in its ability to challenge the security-based rationale of the government. Save for a few exceptional cases, the Court has remained unconvinced that any considerations, other than security, have spearheaded the actions of Israeli government and military activities in the West Bank. It has also widened the military necessity exceptions under international law of belligerent occupation, authorizing an occupying power to implement measures such as requisitioning land or destroying private property, by including into the military/security considerations which an MC is entitled to undertake, the need to preserve the security and wellbeing of Israeli settlers and Israelis travelling in and out of the West Bank.

Secondly, through its combined approach to international law and Israeli administrative law, the Court has in fact beefed up the rights and protection afforded to the Israeli settler population living in the occupied territory, while undermining the substantive protection afforded to the Palestinian occupied population. This is achieved through the way in which the Court has sought to balance between different considerations affecting the decision of the MC. In fact, it is the manner in which the Court has understood these considerations and what they can lawfully entail that has had the most profound consequences for the extent to which the justices have been willing to acknowledge that certain political considerations were at play (as opposed to strictly security-based considerations). It has also undermined the Court's ability to entertain the idea that the measures that were implemented by Israeli authorities have resulted

in long-term and more permanent form of changes in the West Bank, not justified by legitimate considerations of security, thereby rendering them unlawful under international law.

As the analysis of the case law sought to demonstrate, this has undermined for all practical effects and purposes the human rights guarantees afforded to the Palestinian local population as the 'protected persons' under the Fourth Geneva Convention. In addition, the refusal of the Court to rule on the legality of settlement activity reflects a pick and choose attitude by the Court towards upholding fundamental principles of international law. To a large extent, it has pre-determined the outcome and parameters of its judicial rulings. These conclusions cannot be seen in isolation from the Court's silence on the issue of whether the rights of the Palestinian population are also anchored in international human rights conventions that have been deemed applicable to the oPt.[430]

The Court's internalization of the security rationale furnished by government authorities is clearly reflected in the language it uses in its judgments. For example, the West Bank is referred to in its biblical term 'Judea and Samaria' or simply as 'the Area', a term that does not include EJ. Settlements are referred to in the judgments of the Court as 'Jewish communities in Judea and Samaria' or more generally as '*Yishuv*' (which refers to a demographic centre of a 'settlement' more generally) while Israeli settlers are considered 'residents'. West Bank areas remaining outside the Wall are described by the Court as lying on the 'Palestinian side' of the 'fence', while the term 'Israeli side' is used interchangeably by the Court to refer to those areas of the West Bank that have been included inside the Wall (including the Seam Zone).[431]

This internalization provides the stepping stone for upholding the legality of the land requisition orders for the sake of the construction of the Wall as a temporary possession of the

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[430] *Mara'abe* case*, supra* note 51 at para 27. It must be recalled that the HCJ has to date not ruled on the *de jure* applicability of international human rights conventions to the occupied territory.

[431] Equally significant is the fact that when referring to Israel holding the West Bank in 'belligerent occupation,' the Hebrew word *tfisah lohmatit* (belligerent possession) is used in the original version of the judgments. See Nimer Sultany, "The Legacy of Justice Aharon Barak: A Critical Review," online: (2007), Harvard ILJ Online 48 <http://www.harvardilj.org/wp-content/uploads/2011/05/HILJ-Online_48_Sultany.pdf>.

land.[432] As long as the requisition orders meet formal RoL requirements,[433] the Court upholds them, irrespective of other indications which are underscoring the physical permanence of the Wall or of other security-related measures and the legal consequences arising from them.[434] This has been facilitated by the fact that many of the measures discussed here have been cloaked in formal legality. As Blank explains:

> [T]he barrier is erected on the basis of authorized government decisions, administrative regulations, and military orders. Every piece of land confiscated, each section of erected wall, and every area declared a "special security zone" - these were all done in a highly legalized fashion according to legal chains of authorizations. I am not arguing, of course, that some of the actions were not in violation of international law or contradictory to Israeli constitutional or administrative law [...]. Yet, the state of Israel behaved as if it were bound by law. Every action was done in accordance with administrative procedures, under explicit authorization, and often received the approval of the Israeli courts which reviewed them.[435]

Even where the ability of some of the security based measures discussed here (such as the Seam Zone permit regime or the legality of the land requisition orders) to fulfill procedural criteria or formal aspects of the RoL has been seriously put into question, the Court has still refrained from examining the legality of the procedures. This remains the case unless the justices have received what they would consider strong evidence indicating that a measure has been arbitrarily implemented by government authorities. Unless such evidence emerges, they

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[432] According to the Court, "[c]onstruction of the fence does not involve transfer of ownership of the land upon which it is built. The construction of the fence is done by way of taking possession. Taking of possession is temporary. The seizure order orders its date of termination." See *Mara'abe* Judgment, *supra* note 51 at para 16.

[433] Israeli government authorities have always argued that the land requisition orders to build the Wall in the West Bank are for a limited period of time, thereby indicating that the structure is temporary in nature. *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 67. Thus even when land requisition orders for the Wall's construction are renewed on a constant basis, the Court prefers to consider this requisitioning to amount to a temporary take-over of land for a limited period of time. David Kretzmer, "The Advisory Opinion: The Light Treatment of International Law," *supra* note 26.

[434] As the petition by one human rights NGO explains, "[A] colossal construction project such as that of the separation wall, the effects of which on the occupied civilian population, on the economy of the occupied territories and on all aspects of civilian life conducted therein, are far-reaching and long-term, to the extent that one might say that they are permanent [...] insofar as its route runs inside the occupied territory and materially modifies the fabric of civilian life in the occupied territory, isolating in fact considerable portions of the occupied population, creating hermetic enclaves and constituting a de-facto annexation of parts of the occupied land." See Seam Zone petition, *supra* note 126 at para 3.

[435] Yishai Blank, "Legalizing the Barrier," *supra* note 78 at 317.

have preferred to assume that administrative measure in question has been implemented in good faith by the relevant government and military authorities. Arguably, this is what domestic courts tend to do in times of national security crisis: namely, to uphold the security rationale of government and military authorities. However this approach seriously undermines the ability of the highest domestic court of the occupying power to provide effective legal remedy to the petitions challenging the legality of those measures.

Thirdly, the HCJ's adjudication has had a limited success in ensuring that the actions of government authorities do not undermine the first normative principle underlying the law of belligerent occupation, namely that it is temporary in nature. In this regard, there is no doubt that the HCJ has consistently underscored in its judgments the following notions: (a) the idea that the occupation must indeed remain temporary in nature to be lawful, and (b) that an occupying power cannot be guided by political considerations, such as annexation, or the desire to establish a political boundary when implementing measures in the occupied territory. Indeed, the Court also makes extensive reference to the principles of IHL when examining the legality of these measures.

However, despite the assurances by government authorities regarding the international and domestic legality of these measures, Palestinian and Israeli human rights NGOs, as well as UN human rights and humanitarian agencies, have consistently painted a different picture. This is one of concern that these policies have had far from temporary consequences: consolidating Israel's control of large swaths of the West Bank, and underscoring that political considerations, reflecting an Israeli desire to *de facto* annex significant portions of this territory, are at play. At the very least, their various efforts at documenting the impact of the security based measures discussed in this chapter underscore that what they are witnessing, is genuine effort by the occupying power to hold indefinitely to large parts of the West Bank, in violation of the first normative principle discussed above.[436]

[436] By contrast, the fact that the ICJ in its *Wall* Advisory Opinion, took the bigger picture into consideration, has allowed it to conclude that "the construction of the wall and its associated regime, create a "fait accompli" on the ground that *could well become permanent* [emphasis added], in which case […] it would be tantamount to *de facto* annexation [emphasis in the original." ICJ *Wall* Advisory Opinion, *supra* note 137 at para 121.

The Court's approach is consistent in not questioning or examining in depth the wider and long-term consequences arising from the implementation of the measures discussed here, and how they stand in contrast to the formal assurances made by government representatives in their submissions that these policies adhere to the temporary nature requirement. This has allowed government authorities to consolidate control over the land in question, such as in the Seam Zone, and has spared the Court any confrontation with these authorities as to whether considerations, other than security have been at play.[437]

It has also allowed the Court to brush aside the question of how these measures fit into the wider picture: one in which (a) military authorities have confiscated thousands of dunums of land (including Palestinian privately owned land) for the construction of the Wall under temporary but renewable requisition orders; (b) significant and often irreversible damage to much property and land has resulted from this construction; (c) massive financial investment by the government into the Wall's construction has taken place; (d) the fact that a majority of Israeli settlements and its population have been deliberately included on the 'Israeli side' of the Wall,[438] (e) that building plans for Israeli settlements are developed for implementation in areas that the military has declared as a buffer zone; (f) the contribution of the 'permit regime to the 'de-Palestinianization' of the Seam Zone,[439] and (g) the severe and long term nature of the harm caused by the creation of this zone and its permit regime on the collective and individual rights of the Palestinian communities.[440] While one could accept the idea that at the time of the *Beit Sourik* and *Ma'arabe* judgments, the Court could not have declared the Wall has anything other than a temporary measure, it is hard to justify those conclusions "after so many cases are still being litigated against the wall,"[441] ten years after the Wall's construction has begun.

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[437] The *Seam Zone* and *Mara'abe* judgments are good examples.

[438] This idea was alluded to by the petitioners and their lawyers in one case when they noted that: "[t]he separation wall is designed to separate between the territory subject to Israeli law, governance and administration and the occupied territories, *which are an entirely different political and legal being* [emphasis added]. Merging occupied land into the State of Israel by the separation wall is wrongful – it constitutes a breach of weighty obligations owed by the State of Israel to such territories." See Seam Zone petition, *supra* note 126 at para 4.

[439] See UN Special Rapporteur Report January 2006, *supra* note 102 at para 26.

[440] *B'Tselem,* "Arrested Development," *supra* note 46.

[441] *Amar-Shiff* Interview, *supra* note 395.

In the case of the SSZs, the manner in which the Court has adjudicated petitions challenging the creation of these zones generally speaking has done little to preclude the inclusion of vast areas of land inside these zones. In this regard, the justices tend to accept the argument by military authorities that these zones are temporary and necessary security based measures. However, if seen in tandem with other elements that have effectively limited the Palestinians' use of land, such as the systematic resort to the creation of closed military areas throughout the West Bank (to which Palestinian access is off limit) and weak enforcement on Israeli settler building or cultivation activities in those zones, the emerging picture is of a consolidated Israeli control over these areas, including large areas of Palestinian privately owned land, for the long term benefit of the Israeli settler population.[442]

When asked whether Israeli policies in the West Bank violates, in their opinion, the first pillar underlining the normative framework of belligerent occupation (that it must be temporary in nature), all the lawyers interviewed for this research agree that they have. According to Attorney Sfard, the steps taken have narrowed the gap between being an occupant and a sovereign. In this regard, he identifies the settlements as the main catalyzing agent:

> [H]aving your own national community, imposing your own laws, creating settlements that by definition are not temporary...the demographic change, the immense way in which the territory is changed (handled and built), and the refusal to advance to an end of occupation.[443]

In this regard, one cannot dismiss the fact that the Court remains a government branch pursuing state interests. Furthermore, the Court considers itself to be accountable in first place to the Israeli public. Since the Israeli public considers the Palestinians of the occupied territory the enemy, providing protection to them even by the esteemed HCJ is arguably seen by the former as act of betrayal, as undermining security and as providing help to this enemy in times of conflict. Moreover, public polls conducted amongst the Israeli Jewish public confirm that the majority of this public has supported the construction of the Wall when it began,[444] a

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[442] The creation of these SSZs has added approximately 18,000 more dunums to the total closed areas in the West Bank. Dror Etkes, "A Locked Garden," *supra* note 48.

[443] *Sfard* First Interview, *supra* note 153.

[444] According to a survey conducted in 2004, an overwhelming 84 % of the Israeli-Jewish public supported the construction of the Wall, with about two-thirds of the Jewish public believing that it should be based on

feature that the judiciary is mindful of.[445] It also provides one more explanation for why the chances of Palestinians receiving effective legal remedy on security related petitions have remained very slim,[446] and why the Court in almost all cases has upheld the policy of the government,[447]granting a kosher stamp of approval to it.[448] Moreover, the claim by military authorities that there have been fewer infiltrations by West Bank Palestinians into Israel proper as a result of the Wall's construction explains also in part why the Court has not been willing to challenge the allegations by the government that the Wall or other measures discussed here are anything but temporary in nature.[449]

Therefore, one cannot help but remain skeptical that petitioning the Court of the occupying power on the legality of security measures which have allegedly helped consolidate *de facto* control by that power over large areas of the occupied territory, can effectively hinder its government from channeling political considerations through the back door of alleged security-based measures. As early as 2004, Former UN Special Rapporteur for Human Rights in the oPt warned that:

> Like the settlements it seeks to protect, the Wall is manifestly intended to create facts on the ground. It may lack an act of annexation, as occurred in the case of East Jerusalem and the Golan Heights. But its effect is the same: annexation. Annexation of this kind goes by another name in international law – conquest. Conquest, or the acquisition of territory by the use of force, has

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security considerations, and not necessarily on the Green Line. See Ephraim Yaar and others, "Peace Index: Most Israelis Support the Fence despite Palestinian Suffering," *Haaretz*, (10 March 2004).

[445] Judge Barak wrote in one judgment that "[w]e are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens." *Beit Sourik* Judgment, *supra* note 1 at para 86.

[446] *Sfard* First Interview, *supra* note 153.

[447] Attorney *A-04* Interview, *supra* note 211.

[448] This phrase was used by Sfard in the interview conducted. At the same time, he also noted that many liberal Israelis "sleep well at night because they know the Court is 'on it' and that "we are not going completely crazy in terms of breaches of human rights." Furthermore, since the Court enjoys a high standing internationally as a professional and independent Court, it is also perceived as a domestic court that is "making sure Israeli policies are not arbitrary or violating international law." *Sfard* First Interview, *supra* note 153.

[449] This is because "[i]n terms of results, there are results, so why give in to the [un]temporary argument. [the judge] must be a very courageous judge to negate the temporary aspect...you go against a whole facade of temporariness." See *Amar-Shiff' Interview*, *supra* note 395.

> been outlawed by the prohibition on the use of force contained in the Kellogg-Briand Pact of 1928 and [...] the Charter of the United Nations.[450]

In terms of the provisions of the international law of belligerent occupation more specifically, it is submitted that applying this body of law to a determination of whether Israeli measures described here have resulted in the *de facto* annexation of parts of the West Bank is challenging. This is due to four elements: Firstly, while the law of occupation provides useful indications as to when a situation of occupation has started, it offers no concrete answers as when it has ended.[451] Secondly, although the label *de facto* annexation has frequently been invoked by legal and political scholars seeking to underscore that certain Israeli measures have resulted in a flagrant delinquency to the law of occupation,[452] the word *de facto* annexation does not feature in any of the relevant treaties and conventions. Thirdly, there is a big disconnect between what Israeli authorities underscore, namely that their security based measures are temporary in nature, and the documented impact of the policies in practice. Fourthly, due to the prolonged nature of Israel's occupation of the West Bank, government authorities have claimed that they are lawfully entitled to implement measures that might have far reaching consequences for the legal and political landscape of that territory. Arguably, these measures have facilitated alleged efforts by Israeli authorities to advance political considerations. This has blurred the line between 'temporary' and 'indefinite' control, particularly as the occupying power claims to be implementing these measures in order to respond to the changing economic and social needs of the territory's 'local population'. [453]

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[450] UN Special Rapporteur Report 2004, *supra* note 63 at para 14.

[451] Tristan Ferraro, ed, "Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory," Report (March, 2012), online: ICRC <https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>.

[452] Interview with Charles Shamas, Partner in the Mattin Group, with author via skype (21 November 2014, Ramallah) [*Shamas* Interview]. For examples of such arguments amongst legal and political scholars, see Aeyal Gross, "The *Construction of a Wall*," *supra* note 344; Ian Lustick, "Israeli State-Building in the West Bank and the Gaza Strip: Theory and Practice" (Winter 1987) 41:1 International Organization 15 at 152; Eyal Benvenisti, *The International Law of Occupation*, *supra* note 4; Raja Shehadeh, "Negotiating Self-Government Arrangements" (Summer, 1992) 21:4 J Palest Stud 22; Orna Ben-Naftali, Gross and Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley J Int'l L 551; UN HRC, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Richard Falk*, 16th Sess, UN Doc A/HRC/16/72 (10 January 2011) at para 10, online: UNIISPAL<http://docbox.un.org/DocBox/docbox.nsf/GetFile?OpenAgent&DS=A/HRC/16/72&Lang=E&Type=PDF>. Meron Benvenisti, "The Inevitable Bi-national Regime," *Haaretz* (22 January 2010), English translation, online: USMEP <http://www.usmep.us/usmep/2010/01/22/the-inevitable-bi-national-regime/>.

[453] For more information, consult the following chapter (Chapter II).

The above observations highlight the need for more in-depth interpretation and elaboration of the rules and principles of current law of occupation as they apply to the challenging Israeli-Palestinian context. In this regard, there is a need to spell out more clearly the criteria which, absent a formal declaration by the occupant of *de jure* annexation of parts of an occupied territory, could help establish whether its measures in that territory still demonstrate that it has for all practical purposes *de facto* annexed it.[454] In addition, there must be an effort to stipulate more clearly what legal consequences, if any, would arise for States from the determination that Israel has indeed *de facto* annexed the Seam Zone: Are they the same legal consequences that would arise from a *de jure* annexation by the occupant of parts of the occupied territory or are they different? This is much needed elaboration particularly in light of the obligation incumbent upon States not to "recognize as lawful a situation created by the violation of an obligation arising under a peremptory norm of general international law."[455]

The Israeli occupation has brought with it its own sets of challenges. It has also led critics to argue that many security based measures have undermined the second pillar underlying the normative framework of the law of belligerent occupation, namely that an occupation is a form of 'trust'. It is the HCJ's adjudication of these petitions and a discussion of their impact for this second principle that is the focus of the next chapter.

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[454] Here it must be recalled that while the ICJ *Wall* Advisory Opinion has indicated that the construction of the Wall might create a 'fait accompli' on the ground that could well become permanent, in which case it would be tantamount to *de facto* annexation, unfortunately the ruling has failed to provide a much needed legal analysis on this issue. See ICJ *Wall* Advisory Opinion, *supra* note 137 at para 121. At the same time, according to one legal scholar, what 'label you put' on measures that are absolutely prohibited under the international law of occupation should not be overemphasized. *Shamas* Interview, *supra* note 452.

[455] International Law Commission (ILC), "Responsibility of States for International Wrongful Acts," Article 41(2), GA Resolution 56/83 (2001), 12 December 200, online: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

Chapter II: Security and Welfare of the 'Local Population': Implications of the HCJ's Adjudication for the Normative Principle that Occupation is a Form of 'Trust'

> *[...] Within the framework of the duty of the military commander to exercise his discretion reasonably, he must also take into account, among his considerations, the interests and rights of the local population.*[1]
>
> — Dorit Beinisch, Chief Justice at the HCJ —

1. Introduction

This chapter examines the manner in which the Israeli High Court of Justice (HCJ) has adjudicated petitions by Palestinians which have challenged Israeli security-based measures that have implications for the second normative principle underlying the law of belligerent occupation, namely that occupation is a form of 'trust'.[2] Initially developed to cover situations of colonial trusteeship as well as government-conducted foreign territorial forms of administration under international mandate and trusteeship systems,[3] the concept of 'trusteeship' has also been invoked by the ICJ[4] and by legal scholars[5] as a way of understanding not only those aforementioned systems, but also situations of occupation.

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1 (HCJ 1890/03) [2003] *Bethlehem Municipality et al v. Government of Israel et al* at para 15, online: HCJ <http://elyon1.court.gov.il/files_eng/03/900/018/n24/03018900.n24.pdf>, [*Bethlehem Municipality* Judgment]. The petition was dismissed by the HCJ. Justice Beinisch presided over the HCJ from 2006 to 2012, and was the first female president in the history of the HCJ.

2 Scholars have also suggested that the idea of 'trusteeship' is implicit in all occupation law. See Adam Roberts, "What is Military Occupation" (1984) 55 Brit YB Int'l L 249 See also Orna Ben-Naftali, "PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies" in Orna Ben-Naftali, ed, *International Humanitarian Law and International Human Rights Law*, (Oxford: Oxford University Press, 2011) 129 at 139.

3 For an overview of the development of this concept, see Ralph Wilde "From Trusteeship to Self Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship and the Framework of Rights and Duties of Occupying Powers" (2009) 31 Loy LA Int'l and Comp LJ 85.

4 In its advisory opinions, the International Court of Justice (ICJ) has also elaborated that the mandate system, that had been created to manage situations where people were not self-governing, was established on "the principle that the well-being and development of such people form a sacred trust of civilization" and "that the "trust" had to be exercised for the benefit of the peoples concerned [...]." See *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council*

Similarly to a trustee, the occupying power is perceived to be under the obligation to administer the occupied territory as sacred 'trust', in the interests of both the local inhabitants and the sovereign government.[6] The analogy is derived from the manner in which legal and beneficial ownership is split in a 'trust' between the trustees on the one hand, who exercise legal discretion regarding the disposition of the assets of this 'trust', and the beneficiaries on the other hand, who receive the benefits flowing from it.[7]

Those who advocate understanding occupation as a form of trusteeship explain, that this is guided by the two other main normative principles underlying the law of belligerent occupation, namely (a) that occupation is supposed to be temporary in nature and (b) that the occupying power does not enjoy sovereignty over the occupied territory.[8] This implies that the occupant does not acquire any positive rights (in a strict sense) within the occupied territory to instigate legislative changes or to implement structural reform.[9] Instead, it is left with the

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Resolution 276 (1970), Advisory Opinion, [1971] ICJ Rep 16 at paras 45 and 46. It also emphasized that this applied to the occupied Palestinian territory, "as a former mandated territory, on whose behalf the international community holds a sacred trust." See *Legal Consequences on the Construction of Construction of a Wall in the Occupied Territory*, *Advisory Opinion*, Advisory Opinion, (2004) ICJ Rep 136 at para 89 [ICJ *Wall* Advisory Opinion], *Opinion of Judge Koroma* at para 7.

5 Sir Arnold Wilson, "The Laws of War in Occupied Territory" (1932) 18 Transactions of the Grotius Society 17 at 38.

6 Ralph Wilde "From Trusteeship to Self Determination and Back Again," *supra* note 3. As one scholar explains, this characterization is used to describe in broad terms the kind of obligations on the occupying power, and is not intended to describe the juridical nature of the occupation in a strict sense. It also should not be confused with 'trusteeship occupation', a concept that has been developed by one scholar to categorize the occupation of a territory that had not been under full sovereignty prior to occupation where, in his opinion, the occupation can hence be qualified as 'lawful' and where the occupant allegedly seeks to develop the territory economically and socially. That Israel's control of the West Bank amounts to one of a 'trusteeship occupation' was an argument that was advanced in Allan Gerson, "Trustee Occupant: The Legal Status of Israel's Presence in the West Bank" (1978)14 Harv Int'l Law J 1.

7 The obligation of usufruct and administration of public assets in article 55 of the Hague Regulations is practically similar to the way in which legal and beneficial ownership is split in a 'trust. See Conor McCarthy, "The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq," (2005) 10:1 J Confl and Sec L (2005). For a discussion of the principle of usufruct, see section 1.2 of this Chapter.

8 Ralph Wilde "From Trusteeship to Self Determination and Back Again," *supra* note 3. See for example Christopher Greenwood, "The Administration of Occupied Territory in International Law" in Emma Playfair, ed, *International Law and the Administration of Occupied Territories* (Oxford: Clarendon Press, 1992) 241; Eyal Benvenisti, *The International Law of Occupation*, (Princeton: Princeton University Press, 2004).

9 It is only left with *de facto* administrative powers. See Jean Pictet, ed, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* reprinted (Geneva: ICRC, 1994) at 273 [*Pictet* Commentary]. See also Conor McCarthy, "The Paradox of the International Law of Military Occupation," *supra* note 7. In other words, the occupant has an authority "au regard du caractère fonctionnel (besoin de l'occupation), limite (compétence d'attribution) et temporaire (occupation comme brève parenthèse de

temporary task of administering *de facto* provisional powers that it has acquired in the occupied territory,[10] until a peace treaty is concluded.[11]

In this regard, it is the notion of acting on behalf of the beneficiary which arguably obliges the occupant to refrain from enacting changes that may alter the status of the occupied territory. This concept finds ground in article 43 of the Hague Regulations,[12] which stipulates in the authoritative French version that:

> L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.[13]

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guerre." Robert Kolb "Deux questions ponctuelles relatives au droit de L'occupation de guerre" (2008) 61 : 1 Rev Hellenique Droit Int'l 347 at 351. See also Iain Scobbie and Alon Margalit, "The Israeli Military Commander's Powers under the Law of Occupation in relation to Quarrying Activity in Area C " (July, 2012), online: *DIAKONIA*- International Humanitarian Law Resource Center <https://www.DIAKONIA.se/globalassets/documents/ihl/ihl-resources-center/expert-opinions/quarrying-in-area-c---final---july-2012.pdf> [*Scobbie* and *Margalit* Expert Opinion].

[10] The authority of the occupant over a given territory is one that is *de facto*, and is not by virtue of any legal right/entitlement and, therefore, is limited by international law. Lassa Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants" (1917) 33 L Q Rev 363. See also Eli Nathan, "Israeli Civil Jurisdiction in the Administered Territories" (1983) 13 Isr YB Hum Rts 90.

[11] See Robert Kolb "Etude sur l'occupation et sur l'article 47 de la quatrième convention de genève du 12 aout 1949 relative à la protection des personnes civiles en temps de guerre : le degrée d'intangibilité des droit en territoire occupé" (2002) 10 Afr YB Int'l L 267. See Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967" (January 1990) 84:1 AJIL 44. See also Dr. Theó Boutrouche and Marco Sassòli "On International Humanitarian Law Requiring the Occupying Power to transfer back Planning Authority to Protected Persons regarding Area C of the West Bank" (February, 2012), online: *DIAKONIA*-International Humanitarian Law Resource Center <https://www.DIAKONIA.se/globalassets/documents/ihl/ihl-resources-center/expert-opinions/ihl_expert_opinion_transfer_planning_authorities_feb2011.pdf> [*Boutrouche* and *Sassòli* Expert Opinion].

[12] See *Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, Cons TS No 25, 277 (entered into force 26 January 1910) [Hague Regulations].

[13] See French version of the Hague Regulations, *ibid*, online: International Committee of the Red Cross (ICRC) <**h**ttps://www.icrc.org/applic/ihl/dih.nsf/Article.xsp?action=openDocumentanddocumentId=48B0C736A648E654C12563BD002BA3E**F**>. The term 'l'ordre et la vie publics' (public order and life) is rendered in the English translation as 'public order and safety'. Hence, the English version reads as follows: "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Only the French version is the authentic one. See Yoram Dinstein, "Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding" (Fall 2004), online: Program on Humanitarian Policy and Conflict Research Harvard University <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf>.

Often viewed as "the gist of the law of occupation"[14] or the 'mini constitution' of an occupation regime,[15] this article provides a "general framework for the manner by which the military commander exercises its duties and powers in the occupied territory." [16] It also sets out the considerations which may influence the decision of the occupant to embark on changing the *status quo* (i.e. the state of affairs existing in the eve of the occupation).[17]

The first consideration is the security needs of the occupying power.[18] Given the manner in which occupying powers conducted their relationships with the local occupied population at the time that the Hague Regulations were developed, this 'military necessity' or the 'exigencies of war' were deemed to be the only concern that may prevent them from maintaining the old order. In light of the minimal interaction between the occupier and the occupied population, article 43 of the Hague Regulations envisaged that the former would not have an interest in the laws of the area under its control except for the security of its military forces and the maintenance of public order.[19] Consequently, it was not expected at the time, that the occupant would have any self-interests in regulating the social functions within the occupied territory. [20]

The second consideration consists of preserving the interests of the ousted sovereign or the duly constituted successor in title. The focus of the Hague Regulations on this second consideration was strong. In case of conflict between the interests of the ousted government

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[14] Eyal Benvenisti, *The International Law of Occupation*, *supra* note 8 at 7. Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers," (2005) 16:4 EJIL 661.

[15] David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel," (Spring 2012) 94: 885 Int'l Rev Red Cross 207 at 213 and 218.

[16] See (HCJ 2164/09) [2011] *Yesh Din-Volunteers for Human Rights v. the Commander of IDF Forces in the Judea and Samaria Area et al*, at para 8, unofficial English translation, online: *Yesh Din* <http://www.yesh-din.org/userfiles/file/%D7%94%D7%9B%D7%A8%D7%A2%D7%95%D7%AA%20%D7%93%D7%99%D7%9F/psak.pdf> [*Quarry* Judgment] [last accessed on 29 November 2015]. The petition was dismissed by the HCJ.

[17] *Scobbie* and *Margalit* Expert Opinion, *supra* note 9. See also Edmund H. Schwenk, "Legislative Power of the Military Occupant under Article 43, Hague Regulations," (March 1945) 54:2 Y L J 393.

[18] Lassa Oppenheim, "The Legal Relations," *supra* note 10.

[19] Eyal Benvenisti, "The Security Council and the Law on Occupation: Resolution 1483 on Iraq: Historical Perspective" (2003) 1 IDF LR 19.

[20] Therefore, no one raised the possibility that the occupant would intervene to further its own policies in the occupied territory. *Ibid*.

and the interests of the 'local population' (the third consideration), the occupying power was supposed to grant more consideration to the interests of the former.[21]

The third consideration is the interests of the 'local population' in the territory under the effective control of the occupant. The advent of the Fourth Geneva Convention accorded great weight to the idea of safeguarding the interests and rights of individuals under foreign rule by granting them the status of 'protected persons'.[22] Moreover, the developments in international human rights (IHR) law, particularly the principle of the self-determination of people, led to greater recognition of the proposition that sovereignty is vested in the population under occupation.[23] This recognition has gained legitimacy in determining what is to be done during a trusteeship.[24]

A common assumption is that the term 'local population' in the Hague Regulations refers to the 'protected persons' and the original inhabitants of the occupied territory.[25] Furthermore, the Fourth Geneva Convention's emphasis on the rights of the 'protected persons', when read in tandem with the restrictions on the occupying power's authority as spelled out in the Hague Regulations, suggests that the law of belligerent occupation should be interpreted as prioritizing the rights of those who are simultaneously living under occupation, yet are not nationals of the occupying power.[26] The argument that a situation of occupation constitutes a regime of temporary 'trust', which requires that any long-term alterations made to the

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[21] Eyal Benvenisti, "The Security Council and the Law on Occupation," *ibid.*

[22] Eyal Benvenisti, *The Law of Belligerent Occupation*, *supra* note 8 at 110. See Article 4 of the Fourth Geneva Convention *(IV) Relative to the Protection of Civilian Persons in Time of War* (12 August 1949)," 75:973 UNTS, 287 (entered into force 21 October 1950) [Fourth Geneva Convention]. Thus, by reiterating that "persons who find themselves in the hands of the Occupying Power of which they are not nationals are 'protected persons' under this Convention," it explicitly excludes nationals of that power. See also Yuval Shany and Guy Harpaz, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under the Law of Belligerent Occupation," (2010) 43 Isr LR 514.

[23] See Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley J Int'l L 551, at 579–92. See also Aeyal Gross, "The *Construction of a Wall* between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation," (2006) 19 Leiden J Int' L 393. Emphasis in title by original author.

[24] Ralphe Wilde "From Trusteeship to Self Determination and Back Again," *supra* note 3.

[25] Noam Lubell, "Human Rights Obligations in Military Occupation" (Spring, 2012) 94: 885 Int'l Rev Red Cross 317 at 333.

[26] Aeyal Gross "Human Proportions: Are Human Rights the Emperor' New Clothes of the International Law of Occupation?" (2007) 18:1 EJIL 1.

occupied territory be made to benefit the local population of 'protected persons', has also been made by Palestinian petitioners addressing the HCJ.[27]

As a way of preserving the interests of the occupied population and the ousted government, the law of belligerent occupation imposes limitations on the ability of the occupying power to change the *status quo* in the occupied territory. Two limitations that are particularly relevant are (1) the limitation that it imposes on the ability of the occupant to change the laws that exist in the territory on the eve of its occupation, and (2) the restrictions that this body of law imposes on the occupant's use of that territory's local resources.[28] They are addressed in turn.

1.1. The Restrictions on the Occupant's Ability to Change the Laws that exist in the Territory on the Eve of its Occupation

For the purpose of local government, the occupying power has been described as the entity that "stands in the shoes of the legitimate sovereign."[29] However, an occupation is supposed to be a temporary state of affairs and does not bestow sovereignty on the occupying power in the occupied territory. Consequently, the law of belligerent occupation imposes certain restrictions on that power's ability to revise criminal and penal laws,[30] as a way of maintaining the *status quo*.[31] The duties and powers of the occupant to revise legislation are set out in broad terms in article 43 of the Hague Regulations. The basic principle underscored by this article is that the occupying power is prohibited from extending its own legislation over the occupied territory.[32]

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[27] This argument was made by one Israeli organization petitioning the Court to challenge the legality of the decision of the MC to exploit existing quarries and establish new ones in Area C of the West Bank. See "(HCJ 2164/09) *Yesh Din-Volunteers for Human Rights v. the Commander of IDF Forces in the Judea and Samaria Area et al* –Petition" at para 39, unofficial English translation, online: *Yesh Din* <http://yesh-din.org/userfiles/file/Petitions/Quarries/Quarries%20-%20Petition%20ENG.pdf> [last accessed 29 November 2015] [Quarry case-Petition].

[28] Eyal Benvenisti, "Water Conflicts during the Occupation of Iraq" 97:4 AJIL (October 2003) 860.

[29] Pilip C. Jessup, "A Belligerent Occupant's Power over Property" 38:3 AJIL (July 1944) 457 at 460.

[30] Although article 43 refers to "laws," it is widely recognized that the term must be understood to broadly include decrees, ordinances, court precedents (especially in territories of common law tradition), as well as administrative regulations and executive orders. See *Boutrouche* and *Sassòli* Expert Opinion *supra* note 11.

[31] These limitations are the result of the emphasis in the law of belligerent occupation that occupation does not confer title, and that it is temporary in nature. See Eyal Benvenisti, *The International Law of Occupation*, *supra* note 8.

[32] *Boutrouche* and *Sassòli Expert Opinion*, *supra* note 11.

Two diverse obligations are imposed on the occupying power by article 43: (a) to restore and ensure, as far as possible, 'public order and life' in the occupied territory. This has been interpreted as an obligation that extends beyond the guaranteeing of security to relate to 'the whole social and economic and commercial life of the community'.[33] In this regard, changes to existing legislation or institutions are only lawful if they enhance 'civil life', compared with the situation under previous legislation.[34] (b) The second point refers to respecting the local laws in force in the occupied territory 'unless absolutely prevented'. This requirement underscores that the occupying power is prohibited from repealing or suspending existing laws,[35] as a way of preserving the *status quo* that was in effect at the beginning of the occupation.[36]

At the same time, the law of belligerent occupation entitles the occupant to make changes to the civil laws and penal laws in effect in the occupied territory if it meets a number of considerations. The first is the security needs of the occupying power's armed forces, administrative staff and those employed in its service.[37] The second is the preservation of 'public order and civil life'. The third consideration is if it is necessary for the occupant to "abrogate any discriminatory measures incompatible with humane requirements,"[38] and to

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[33] *Ibid*. See also Yoram Dinstein. *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009) at 89-90. This position has been endorsed by the HCJ. See section 4.2.1 of this Chapter.

[34] *Boutrouche and Sassòli* Expert Opinion, *supra* note 11.

[35] See Yoram Dinstein. *The International Law of Belligerent Occupation supra* note 33 at 89-90. See also Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 20-25.

[36] Yuteka Arai-Takahashi, "Preoccupied with Occupation: Critical Examinations of the historical Development of the Law of Occupation" (Spring 2012) 94:885 Int'l Rev Red Cross 51. See also "Occupation," online: *DIAKONIA*-International Humanitarian Law Resource Center <http://www.diakonia.se/en/IHL/The-Law/International-Humanitarian-Law-1/issues-addressed-by-ihl-2/Occupation/?_t_id=1B2M2Y8AsgTpgAmY7PhCfg%3d%3d&_t_q=Occupation&_t_tags=language%3aen%2csiteid%3adfed4c1a-bbd8-450f-954a-02cff1abcc09&_t_ip=24.201.7.109&_t_hit.id=Diakonia_Web_Models_Pages_ArticlePage/_f5911847-6f4f-4f5c-91f4-35ab4c4eebe2_en&_t_hit.pos=1>.

[37] This also includes the purpose of maintaining safe lines of communication. See Yoram Dinstein, "Legislation under Article 43," *supra* note 13. The official commentary explains that "[t]he provision is sufficiently comprehensive to cover all civilian and military organizations which an Occupying Power normally maintains in occupied territory," and that "[t]he Convention mentions the Occupying Power itself "referring to the members and property of the occupying forces or administration" so that general activities such as activities on behalf of enemy armed forces are covered." *Pictet* Commentary *supra* note 9 at 337.

[38] *Pictet* Commentary, *ibid* at 335.

discharge its obligations under the Fourth Geneva Convention.[39] This has been stipulated by article 64(2) of the Fourth Geneva Convention, a provision that has been interpreted as amplifying rather than replacing article 43 of the Hague Regulations.[40] Together, these two articles (43 and 64(2)) emphasize the idea that the occupant can make legislative changes to implement measures that fulfill its obligations towards the 'local population'.[41]

1.2. Restrictions on the Occupant's Use of the Local Resources of the Occupied Territories

Under the law of belligerent occupation, privately owned property in the occupied territory is generally immune from being taken by the occupant, unless this is necessary for imperative military reasons.[42] In the case of public property, movable public property and most immovable public property can be used, subject to certain restrictions. Where movable public property is concerned, the army of occupation can take possession of property "of the State which may be used for military operations."[43] In the case of immovable public property, article 55 of the Hague Regulations entitles the occupying power to use all property of such nature,[44] provided it safeguards the capital of that property and administers it in accordance with the principle of *usufructs*.[45]

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[39] This requirement is stipulated more specifically in article 64(2) of the Fourth Geneva Convention, which provides that existing penal laws in the occupied territory must be suspended by the occupying power where they constitute a threat to the application of the Fourth Geneva Convention. See also Marco Sassòli, "Legislation and Maintenance," *supra* note 14.

[40] Conor McCarthy, "The Paradox of the International Law of Military Occupation," *supra* note 7. Article 154 of the Fourth Geneva Convention states that "this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of the Hague." See Fourth Geneva Convention, *supra* note 22.

[41] Eyal Benvenisti, "Water Conflicts during the Occupation of Iraq," *supra* note 28. A historical survey of the law of occupation, underscores that when a reading of article 43 of the Hague Regulations is supplemented by the Fourth Geneva Convention (most notably article 64), "this concept has been adjusted in the direction of promoting the rights and wellbeing of civilian populations under occupation." See Yuteka Arai-Takahashi, "Preoccupied with Occupation," *supra* note 36 at 68.

[42] See article 52 of Hague Regulations, *supra* note 12 and article 53 of the Fourth Geneva Convention, *supra* note 22. See also Eyal Benvenisti, "Water Conflicts during the Occupation of Iraq," *supra* note 28.

[43] Article 53(1) of the Hague Regulations, *supra* note 12. See also Brice M. Clagett and O. Thomas Johnson, "May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Resources?" (1978) 72 AJIL 558.

[44] This article states that "[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the

In accordance with this principle, the occupant must ensure that the resources of the occupied territory are protected against potential damage, destruction, theft, overuse or the diminution of its quality and quantity.[46] This is because under the rules of the law of belligerent occupation, the economy of the occupied territory can only be required to bear the 'expenses of the occupation'[47] and cannot be made to cater to general 'military needs' or the needs of the occupant's civilian population.[48] The occupying power may also use these resources to meet its own security needs to defray the occupation related administration costs and to promote the needs of the 'local population'.[49]

For an occupant's actions to enjoy a solid basis under international law, the use of the resources must be carried out in good faith, for the management of the 'local population' and

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occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." Hague Regulations, *supra* note 12.

[45] Usufruct is a distinctively civil law concept; the obligations of a common-law life tenant are practically identical with those of civil law usufructuary. Brice M. Clagett and O. Thomas Johnson, "May Israel as a Belligerent Occupant," *supra* note 43. It has been defined as the right "to draw from them profit, interest or advantage, without reducing or wasting them [...]. It may be established in any property which is capable of being used as far as is compatible with the substance not being destroyed or injured." See US States Military Tribunal at Nuremberg, "The Flick Trial: Trial of Friedrich Flick and Five Others," Law Reports of Trials of War Criminals Vol IX (1945), at 42, online: <http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-9.pdf> [*Flick* Judgment]. While the Hague Regulations did not offer a specific definition of the term usufruct, the drafters chose a well-defined legal term of the art that included within its meaning the widely shared practices of applying the rules of usufruct at the time, and which included within its meaning the prohibition on usufructuaries from opening new mines. See Brice M. Clagett and O. Thomas Johnson, "May Israel as a Belligerent Occupant," *ibid*. See also Jamal El-Hindi, "West Bank Aquifer and Conventions regarding Laws of Belligerent Occupation" (1989-1990) 11 Mich LJ 1400. The HCJ has defined 'usufruct' as the "right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time." See *Quarry* Judgment, *supra* note 16 at para 7.

[46] Eyal Benvenisti, "Water Conflicts during the Occupation of Iraq," *supra* note 28. See also Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press 1957).

[47] *Flick* Judgment, *supra* note 45 at 22. In another post WWII trial, the term "expenses of the occupation" was made use of by the US States Military Tribunal at Nuremberg to underscore that those expenses do not include the cost of waging war more generally against the sovereign of the occupied territory or against its allies: "Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner." See US States Military Tribunal at Nuremberg, "The Flick Krupp Trial: Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others," Law Reports of Trials of War Criminals Vol X (1949), at 134, online: <http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf> [*Krupp* Judgment].

[48] Dobie R Langenkamp and Rese Zedalis, "What Happens to Iraqi Oil? Thoughts on some Significant Unexamined International Legal Questions" (2003) 14:3 EJIL 417.

[49] Eyal Benvenisti, "Water Conflicts during the Occupation of Iraq," *supra* note 28.

not for its own enrichment.[50] The occupant's duty to respect article 55 of the Hague Regulations does not allow for a change in its scope depending on the duration of the occupation.[51] Violations by the occupant of this prohibition, amounts to pillage which constitutes a war crime under the Rome Statute of the International Criminal Court (ICC).[52]

The Israeli occupation of the West Bank, now entering its 49th year, is no doubt, an occupation of a prolonged nature. While this does not render the law of belligerent occupation inapplicable, scholars have argued that nevertheless, this introduces an important time-related factor.[53] It arguably also "places the law under considerable strain."[54] Moreover, it begets the question of whether the occupying power is entitled to affect a wider spectrum of changes in the occupied territory. This debate is examined in the next section.

1.3. How Much Change is Lawful? The Challenges of a Prolonged Occupation

1.3.1. Overview

It has been argued that with the ever increasing regulation of markets and other social activities by central governments in the 20th century, this state of affairs has granted an occupant the authority to prescribe and create changes in a wide spectrum of affairs.[55] It has also been suggested that the factual situation arising from the prolonged nature of an occupation, coupled with the changing needs of the 'local population' during that time, create the need for increased governmental activity and regulation in different spheres of life, including social and economic.[56] These elements must be taken into account when analyzing

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[50] Philip C Jessup, "A Belligerent Occupant's Power over Property," *supra* note 29.

[51] Vaois Koutroulis, "The Application of International Humanitarian Law and International Human Rights Law in Situations of Prolonged Occupation: Only a Matter of Time?" (Spring 2012) 94:885 Int'l Rev Red Cross 165.

[52] *Quarry* case-Petition, *supra* note 27 at paras 113 and 114.

[53] Yuval Shany, "Forty Years after 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context" (2008) 21 Isr LR 6.

[54] Christopher Greenwood, "The Administration of Occupied Territory," *supra* note 8 at 263. One primary reason, is that this occupation's long duration has exposed strains in that body of law, as it was intended for "much briefer and more precarious periods of foreign military control." See Adam Roberts, "What is Military Occupation," *supra* note 2 at 272-273.

[55] Eyal Benvenisti, "Water Conflicts during the Occupation of Iraq," *supra* note 28.

[56] Grant T. Harris, "Human Rights, Israel, and the Political Realities of Occupation" (2008) 41 (1-2) Isr LR 87.

the duties of the occupying power,[57] particularly regarding its obligation to restore and ensure public order, civil life and safety.[58] Hence, over-emphasizing the need to maintain the *status quo* would be counter-productive since it would lead to the territory's economic and political stagnation[59] and prevent the occupant from effectively responding to the evolving needs of local inhabitants.[60]

On the other hand, it has also been maintained that while International Humanitarian Law (IHL) treaties provide only general guidelines regarding the extent to which the occupant is obliged to preserve the *status quo ante*,[61] they are flexible enough to accommodate some of the needs arising in a situation of prolonged occupation[62] or other more recent forms of occupation/control.[63] Furthermore, the criteria which they spell out for assessing the legitimacy of the changes that an occupying power can make remain relevant nevertheless. This is because the long-term nature of the occupation does not entitle the occupant to import special rules that deviate from its IHL obligations.[64] They also underscore that the occupying power must not abuse the powers granted to it under this body of law for the purpose of implementing far reaching changes that are intended to further its own political and economic

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[57] Vaois Koutroulis, "The Application of International Humanitarian Law," *supra* note 51.

[58] *Boutruche and Sassòli* Expert Opinion, *supra* note 11.

[59] Eyal Benvenisti, *The Law of Belligerent Occupation*, *supra* note 8. International Committee of the Red Cross (ICRC), "International Humanitarian Law and Challenges of Contemporary Armed Conflict," Report, 31st International Conference of the Red Cross and Red Crescent (28 November - 1 December, 2011) at 2, online: ICRC <https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>.

[60] Robert Kolb and Gloria Gaggioli, ed, *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar Publishing Limited, 2013). See also Noam Lubell, *supra* note 25. See also Albert Lequin, "L'occupation allemande en Belgique et l'article 43 de la convention de la haye du 18 Octobre 1907" (1916) 1 Int'l L Notes 54.

[61] Since given that there is no *a priori* formula for establishing the rules for modifying the legal landscape of the occupied territories in a 'lawful' manner. Eyal Benvenisti, *The Law of Belligerent Occupation*, *supra* note 8.

[62] Christopher Greenwood, "The Administration of Occupied Territory," *supra* note 8.

[63] That the basic tenants of the old law of occupation have withstood the test of time and changed circumstances was arguably proved when its utility to the occupation of Iraq became evident. See Eyal Benvenisti, "The Security Council and the Law of Occupation," *supra* note 19. See also Kaiyan Homi Kaikobad, "Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004" (January 2005) 54:1 ICLQ 253.

[64] David Alonzo-Maizlish, "When does it End? Problems in the Law of Occupation," in A Arnold and Pierre Antoine, eds, *International Humanitarian Law and the 21st Century Conflicts: Changes and Challenges* (Lausanne: Hildbrand, Editions Interuniversitaires Suisses, 2005) 97.

objectives in the occupied territory,[65] or that "serve as a means of oppressing the population."[66]

Thus, while the prolonged nature of the occupation should in principle allow the occupant to deviate from the general rule of preserving the *status quo* by granting it a wider latitude to enact new legislation,[67] this is only permitted in so far as it benefits the 'local population'.[68] Since a situation of occupation bears an inherent conflict of interest between the occupant and the occupied,[69] in a situation of long-term occupation it becomes all the more pertinent to take the welfare and benefit of the population into consideration.[70] Hence, any effort to recognize wider, instead of more curtailed powers for the occupant, risks granting it "all the powers a modern sovereign would yield."[71]

Even where the Military Commander (MC) is allegedly acting for the benefit of the 'local population', as a general rule, he must also ensure that the measures he implements in the occupied territory do not have a long-term effect that is designed to 'outlive' the occupation itself or to bring about changes in the fundamental institutions of the occupied territory.[72] A more conservative interpretation of the right of the occupant to change or amend existing legislation or institutions would hence ensure that the law is not abused to render the interests of the 'local population' secondary to the security concerns of the occupant.[73] In relation to this latter point, it has been pointed out that interests beyond the narrow scope of the immediate military needs of Israel's armed forces, such as the security of Israeli citizens (not only in Israel proper but also in the West Bank) are spearheading government led measures to change the physical and legal landscape of the occupied territory.

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[65] David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002).

[66] *Pictet* Commentary, *supra* note 9 at 337.

[67] Yoram Dinstein, "Legislation under Article 43 of the Hague Regulations," *supra* note 13.

[68] *Scobbie* and *Margalit* Expert Opinion, *supra* note 9 at para 18.

[69] Eyal Benvenisti, *The International Law of Occupation, supra* note 8 at 4.

[70] Adam Roberts, "Prolonged Military Occupation," *supra* note 11.

[71] Eyal Benvenisti, *The International Law of Occupation*, *supra* note 8 at 147.

[72] Yoram Dinstein, "Legislation under Article 43 of the Hague Regulations," *supra* note 13.

[73] Eyal Benvenisti, *The International Law of Occupation*, *supra* note 8 at 143.

The next section examines the Israeli position and the main points of concerns that have been raised by the human rights organizations and scholars concerned with assessing the legality of these measures.

1.3.2. The Israeli Position and the Counter-Positions

Government authorities have made the argument that many of the changes effected in the legal landscape and institutions of the occupied West Bank are lawful under international law. This is the case because they have been taken in response to legitimate security needs or because they respond to the needs of the 'local population' in compliance with international law, including article 43 of the Hague Regulations. A narrow interpretation of the duties of the MC under this article, they maintain, would not allow the occupant to carry out its duty vis-à-vis this population and, therefore, run contrary to the rationale guiding the duties imposed under the international law on them as the authorities of the occupying power.[74]

In this regard, it is also important to underline that Israeli authorities have often argued that the settlers constitute part and parcel of the 'local population' whose interests, security and wellbeing, the MC is entitled to uphold as part of his duties under that article 43 of the Hague Regulations. Moreover, they have underscored that many policies, such as the measures discussed in this current chapter, have been implemented with the benefit of the local Palestinian population in mind.[75]

However, this position stands in stark contrast with the bigger picture painted by members of the international and local human rights community, as well as legal scholars who have identified three grounds for their criticism. The first is that government and military authorities have implemented far reaching changes in the occupied territory in order to guarantee the security and interests of the Israeli settlers in the West Bank, which are not legitimate considerations of the MC under the law of belligerent occupation. In relation to this, critics

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[74] See "(HCJ 2164/09) *Yesh Din-Volunteers for Human Rights v. the Commander of IDF Forces in the Judea and Samaria Area et al*-State Response" (May 2010) at para 46-47, unofficial English translation, online: *Yesh Din* <http://www.yesh-din.org/userfiles/file/Petitions/Quarries/Quarries%20State%20Response%20May%202010%20ENG.pdf> [last accessed 29 November 2015] [Quarry case-Government Response 2010].

[75] For an overview of the arguments of Israeli authorities, see sections 2.1 and section 3.2.2 of this chapter.

also point out that the Israeli government position ignores the fact that settlers are not 'protected persons' under the Fourth Geneva Convention. Moreover, since the transfer by the occupying power of its civilian population into the occupied territory is unlawful ,[76] "taking settlers' interest into account is thus unlawful from an additional aspect: it legitimizes violations of international law."[77] Failure to fulfill certain legal obligations under international law may carry individual criminal responsibility and give rise to State responsibility.[78]

Secondly, critics have argued that the measures implemented by government and military authorities have allowed the occupying power to channel some of its vested general political and economic interests into the occupied territory in a manner that facilitates its indefinite control of that territory. It allegedly also promotes considerations that exceed what can legitimately influence the decision of the MC under article 43 of the Hague Regulation.[79] According to skeptics, this is particularly true of Israeli measures in Area C of the West Bank, where most of the Israeli settlements are located.[80] Towards this objective, criticism has underscored that government authorities have amended local laws and institutions in the occupied territory, and implemented strategies and policies, in order to promote a privileged access by Israeli citizens, including settlers, to the natural resources of the occupied territory (mostly its land and water resources). They are also geared towards ensuring an advantageous use by its citizens of the physical infrastructure of that territory (such as roads and highways).

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[76] Article 49(6) of the Fourth Geneva Convention, *supra* note 22. Therefore, measures designed to expand or consolidate settlements are also illegal. See ICRC "What does the Law Say about the Establishment of Settlements in Occupied Territory?" (5 May, 2010), online: ICRC <https://www.icrc.org/eng/resources/documents/faq/occupation-faq-051010.htm>.

[77] *Scobbie* and *Margalit* Expert Opinion, *supra* note 9 at para 15.

[78] Article 49(6) of the Fourth Geneva Convention; 8(2) (b) (viii) of the Rome Statute of the International Criminal Court, 2187 UNTS 90, online: ICC <https://www.icc-cpi.int/iccdocs/PIDS/publications/RomeStatutEng.pdf>. The point was made in *Scobbie* and *Margalit* Expert Opinion, *ibid* at para 8.

[79] Yuval Shany and Guy Harpaz, "The Israeli Supreme Court and the Incremental Expansion," *supra* note 22.

[80] More than 60 % of the West Bank is considered Area C, including 87 % of the Jordan Valley and Dead Sea area. Approximately 150,000 Palestinians live in that area in 542 communities. See UN Office for the Coordination of Humanitarian Assistance (OCHA)-oPt, "Area C of the West Bank: Key Humanitarian Concerns," (January 2013), online: OCHA-oPt. <http://www.ochaopt.org/documents/ocha_opt_area_c_factsheet_january_2013_english.pdf> [OCHA-oPt Area C Report].

In this regard, it is important to point out that on the one hand, Israeli military rule has been applied to the entire territory of the West Bank and its resident, so that Israeli settlers residing in the occupied territory are also subject to the military legislation of the MC. On the other hand, both Israeli lawmakers and the MC, have over the years, gradually applied Israeli law to the Israeli settlements and its population. This has had the effect of removing, in practice, those settlements and their residents from the jurisdiction of the military law. It has also provided that settler population living in the West Bank with the ability to enjoy a legal environment and rule of law (RoL) resources, similar to the one that prevails in Israel proper.[81]

However, given that this legal environment applies only to Israelis living in the occupied territory, not to the Palestinians (living in the same jurisdictional area), reports by UN bodies, Israeli and international human rights organizations have reiterated that this state of affairs has resulted in the creation and prevalence of an official institutionalized legal regime consisting of two separate legal systems and sets of institutions for the two population groups living in the same territory. They also allege that this has resulted in systematic discrimination that affects every aspect of the lives of the Palestinians.[82]

Moreover, not only have these strategies operated in large part to the detriment of the Palestinian occupied population, they arguably have also been responsible for bringing about long-term and profound changes in the occupied territory that are likely to last beyond the end of the occupation. Hence, allegations have re-surfaced that Israel's control of large parts of the

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[81] Raja Shehadeh, "Negotiating Self-Government Arrangements" (Summer 1992) 21:4 J Palest Stud 22. See also Aeyal Gross, "The *Construction of a Wall*," *supra* note 23. See also Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation," *supra* note 23.

[82] Association for Civil Rights in Israel (ACRI), "One Rule, Two Legal Systems: Israel's Regime of Law in the West Bank," Report (October, 2014), online: ACRI <http://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>; Human Rights Watch (HRW) "Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories," (December, 2010), online: HRW <http://www.hrw.org/sites/default/files/reports/iopt1210webwcover_0.pdf>; UN HR Council, *Report of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem*, HRC 22nd Sess, UN Doc A/HRC/22/63, (7 February, 2013), online: Office of the High Commissioner for Human Rights (OHCHR) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf> [UN Fact-finding Mission on Settlements Report 2013]. The report focuses on how the unequal treatment affects the Israeli settlers and Palestinians living under exclusive Israeli control in the West Bank such as Area C and East Jerusalem (EJ).

West Bank has transformed its control from a situation of occupation into a situation of *de facto* annexation.[83]

Given the fact that the current research focuses on petitions challenging security related measures, the discussion will address two specific measures that have allegedly been implemented by Israeli military authorities to protect Israeli settlers, and which have been the subject of the petitions by Palestinians discussed in this chapter. The first is the requisition of land (including Palestinian privately owned land) by way of an Israeli military order (MO), for the construction and/or expansion of roads which primarily service Israelis. This, Israeli authorities have maintained, is lawful under the law of belligerent occupation.[84] The second type of security related measures challenged by Palestinian petitioners are those that have restricted or completely denied their access on certain roads throughout the occupied West Bank, on the ground that this constitutes a necessary response by military authorities to ongoing security threats against its nationals residing or commuting through that West Bank after 2000.[85]

While a discussion of these measures would essentially involve an analysis of the extent to which the requisition or restriction on movement can be justified by imperative security needs, the decision to discuss the HCJ's adjudication of petitions challenging the legality of those measures and its implications for the occupation is a form of 'trust' principle is driven by two main considerations: (i) One, is that the arguments made by petitioners and which have highlighted that the measures they are challenging in Court are illegal because they violate

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[83] Ian Lustick, "Israeli State- Building in the West Bank and the Gaza Strip: Theory and Practice" (Winter 1987) 41:1 International Organization 15 at 152. See also William Berthomiere, "'Le 'retour du nombre': permanence et limites de la stratégie territoriale israélienne" (2003) 19:03 Revue Européenne des Migrations Internationales 73.

[84] Piet Van Nuffel, "The Story of the Israeli Settlements in the West Bank as it is told in International Law" (19940) 33 Mil L and L War Rev 354. See also The Israeli Information Center for Human Rights in the Occupied Territories (*B'Tselem*), "Seizure for Military Needs and the Elon Moreh Ruling," (13 March, 2013), online: *B'Tselem* <http://www.btselem.org/settlements/seizure_of_land_for_military_purposes>.

[85] OCHA-oPt, "Area C: Vulnerability Profile," (March, 2014), Fact-sheet, online: OCHA-oPt: <http://www.ochaopt.org/documents/ocha_opt_fact_sheet_5_3_2014_en_.pdf> [OCHA-oPt, Area C: Vulnerability Profile]. These include the Wall, roadblocks and a permit regime. See UN Committee on the Convention on the Elimination of Racial Discrimination (CERD), *Consideration of Reports Submitted by States Parties under article 9 of the Convention: Concluding Observations: Israel*, 8th Sess, UN Doc CERD/C/ISR/CO/14-16 (3 April 2012) at para 24, online: OHCHR <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ISR.CO.14-16.pdf>.

article 43 of the Hague Regulations. This is because the changes brought about by the land requisition for the purpose of constructing 'by-pass' roads has altered the physical landscape of the occupied territory in a profound manner, for the sake of tailoring the physical landscape to the transportation needs and security of Israeli civilians (including Israeli settlers). As such, these interests do not constitute lawful considerations. (ii) In the case of movement restrictions, it remains true that an occupying power is entitled to restrict the movement of the occupied population. However, it must respect certain fundamental principles of international human rights and humanitarian law when doing so. Examining the petitions challenging the legality of these measures and their implications for the second principle helps to underscore how the restrictions on the Palestinians' freedom of movement within the occupied territory cannot be divorced from the larger political context. This context is one in which the interests, rights and security of the settler population in the West Bank have all been upheld by Israeli authorities as part and parcel of the legitimate considerations of the MC under article 43 of the Hague Regulations.[86]

Not surprisingly, the authorities' point of departure has been that the movement restrictions imposed on the Palestinians are pertinent for achieving legitimate security and other objectives. Consequently, the examination of the Court's adjudication of these petitions (and of relevant international legal principles) helps to shed light on how considerations related to the wellbeing of the settlers have also been internalized by the HCJ as lawful considerations. Moreover, the discussion of these judgments pursued here seeks to explain how the Court's interpretation has often worked to the detriment of the interests and rights of the occupied Palestinian population particularly when it attempts to balance their interests against those of the Israel settlers.

While most petitions have challenged the lawfulness of policies allegedly implemented for the security of Israeli nationals, the chapter also makes reference to a petition that was filed by

[86] According a renowned Palestinian human right lawyer and writer, "the whole point behind the international law on occupation is to prevent the occupier from benefiting from its belligerent action, and that is at the core of it." Interview with Raja Shehadeh, (2 October 2014, Ramallah), by author via skype, [*Shehadeh* interview]. Mr. Shehadeh is the founder of the pioneering Palestinian human rights organization *Al-Haq*, an affiliate of the International Commission of Jurists. He is the author of a number of books on the legal aspects of the Israeli occupation, including *from Occupation to Interim Accords*. His latest book is *Language of War, Language of Peace, Palestine, Israel and the Search for Justice*.

Palestinians in order to challenge the decision of Israeli military to restrict farmers from accessing their lands, on the ground that it was necessary for the protection of those farmers against 'settler violence'.[87] Since the security of Israelis was not at stake, the discussion of this case also helps to demonstrate that the Court is capable of adopting a more robust stance vis-à-vis Israeli military authorities, both in terms of the language it employs and the judicial conclusions it reaches. This takes place when two conditions are fulfilled: (a) the security of Israelis or their rights are not the main focus of a given petition, and (b) the challenged measure raises domestic RoL issues as opposed to international law related arguments.

To better situate the arguments, the chapter first provides an overview of the general policy of movement restrictions and of land requisition for the purpose of constructing 'by-pass' roads for the Israeli settler population and/or 'fabric of life' roads for the Palestinians. The discussion regarding the scope of the authority of the MC under article 43 of the Hague Regulations has enjoyed an important role in shaping the arguments raised by both petitioners and respondents. Hence, and before highlighting the arguments of petitioners and respondents, the chapter will first provide an overview the Court's interpretation of key aspects of this article: Who according to the Court constitutes part of the 'local population'? How has the HCJ interpreted the scope of interest that can lawfully guide the MC's actions in a situation of long-term occupation? More specifically in assessing the legality of security-based measures under international law, has the Court continued its traditional approach of upholding the security-based assessment of the MC? How has it employed some of its favorite tools of adjudication, such as balancing and the proportionality doctrine when assessing the value that should be granted to the conflicting interests?

The chapter also offers an overview of some of the HCJ's landmark decisions regarding petitions challenging government measures that have allegedly been implemented out of

[87] This involves a case where Palestinians petitioning the HCJ regarding violations of their rights that had reached what one Israeli scholar qualified an 'absurd extreme': The Israeli army forbade Palestinians to work their lands in order to protect *them* from settlers' attacks. See (HCJ 9593/04) [2004] *Rashad Morar et al v. IDF Commander in Judaea and Samaria et, al*, (2006) 2 Isr LR 56 at paras 1, 2, 4 and 6 [*Morar* Judgment]. The petition was upheld by the HCJ. See also Aeyal Gross, "Human Proportions," *supra* note 26. The petition is discussed in depth in section 6.3.2 of this Chapter.

concern for the welfare of the Palestinian local population.[88] It is hoped that this would explain how the Court's interpretation of key aspects of article 43 has helped to broaden the scope of the authority of the MC to include interests other than the occupying power's narrow security based considerations and to expand the categories of the beneficiaries of his authority beyond the category of 'protected persons'.[89]

Subsequently, the chapter analyzes the judgments rendered by the Court in relation to the petitions that have been identified. Lastly, the chapter includes closing remarks regarding the extent to which the Court's judicial approach has provided Palestinians with effective remedy and the implications of its judgment for the second principle that occupation is a form of 'trust'.

First, a brief description of the two security-based policies as implemented by Israeli military authorities in the occupied West Bank: movement restriction and land requisitioning for the purpose of constructing 'by-pass' roads. This will provide an important context for understanding the arguments made by petitioners and counter-arguments by the respondents.

2. The Movement Restrictions and Land Requisition for building Roads

2.1. Movement Restrictions in the West Bank in the Name of Security

Given the depth and duration of these movement restrictions, human rights organizations have called into question the allegations by Israeli authorities that these measures are implemented to meet absolutely necessary military needs.[90]

A few months into the Second *Intifada* (2000), Israel stepped up its policy of closure and movement restrictions on Palestinians in the West Bank, thereby constricting their ability to enter, leave or remain along large areas inside that territory.[91] Although these restrictions were

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[88] Many of these policies were not based on security needs.

[89] Aeyal Gross, "*The Construction of a Wall*," *supra* note 23.

[90] *B'Tselem*, "Background on the Restriction of Movement," (updated 15 July 2012), online: *B'Tselem* <http://www.btselem.org/freedom_of_movement>.

[91] While the restrictions of the Palestinians' freedom of movement inside the West Bank had started before the outbreak of the Second *Intifada*, the scope and duration of these restrictions after 2000 became 'unprecedented'. See *B'Tselem*, "Ground to a Halt: Denial of Palestinians' Freedom of Movement in the West

officially in response to the outbreak of that second uprising, it is important to bear in mind that they never constituted an isolated phenomenon. Instead, they must be seen as a by-product of the construction and expansion of Israeli settlements.[92]

In this regard, Israeli authorities have highlighted that many of these measures were put in place for the protection of not only Israelis in Israel proper, but also to provide security for the Israeli settler population, citing an increased frequency of attack against them since 2000.[93] Hence, these restrictions have been presented by government and military authorities as an invaluable tool for securing Israeli settlers, most notably as a way of reducing their interaction with the Palestinian local inhabitants. They have also been employed to surround settlements with areas that are 'off-limits' to the Palestinians, all the while connecting those settlements with Israel proper and with each other and facilitating the unhindered commute of settlers to and from Israel.[94]

One main feature of those policies, particularly relevant to the West Bank, is a series of permanent and 'flying' checkpoints, as well as physical obstacles, that have been set up throughout the West Bank.[95] However, despite Israeli assurances regarding the legitimacy of

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Bank," Report (August, 2007), at 7-9, online: *B'Tselem* <http://www.btselem.org/sites/default/files2/publication/200708_ground_to_a_halt_eng.pdf>. From 1950-1967 the Green Line had served as a tool of integration of Israel and the oPt. However, after the outbreak of the First *Intifada* 1987, Israel embarked on implementing a series of measures restricting the access of Palestinians into Israel proper and their movement inside the West Bank, as part of a policy of separation from the Palestinians of the oPt, and which continued during the years of the Oslo Accords (1991-1993). See Blendine Destremau "Fragmentation territoriale et problème d'Intégration: Le cas palestinien," in Joël Bonnemaison and al, eds, *La Nation et le Territoire : Le Territoire, Lien ou Frontière ?* (Paris: Harmettan: 1999) 61.

[92] Settlements allegedly represent "the single largest impact on the configuration of the system of access restrictions applied to the Palestinian population." UN OCHA-oPt, "West Bank Movement and Access," Special Focus, (June, 2010), at 3, online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_movement_access_2010_06_16_english.pdf>.

[93] *B'Tselem*, "Ground to a Halt," *supra* note 91.

[94] UN OCHA-oPt, "Movement and Access in the West Bank," (September 2012), online: United Nations Information System on the Question of Palestine (UNISPAL) <https://unispal.un.org/DPA/DPR/unispal.nsf/0/BB7BD3D5A0DCB21785257A77004D5730>. See also *B'Tselem*, "Access Denied: Israeli Measures to Deny Palestinian Access to Land around Settlements," Report (2008), online: *B'Tselem* <http://www.btselem.org/download/200809_access_denied_eng.pdf>.

[95] By November 2013, there were an estimated 59 permanently staffed Israeli military checkpoints inside the West Bank, more than 30 of which are permanently staffed checkpoints that exist on route intersections with the Wall restricting the access of Palestinians to the Seam Zone, the Jordan Valley, EJ, and Israel proper. In addition, there were approximately 25 partial checkpoints and 243 ad-hoc or 'flying' checkpoints that were

the considerations underlying the measures discussed here, UN agencies and Israeli and Palestinian human rights organizations have all painted a different picture. Firstly, they have argued that although more recently there has been a gradual and considerable relaxation of movement restrictions between main towns and villages in the West Bank, access for Palestinians continues to be difficult to East Jerusalem (EJ), the Seam Zone and to agricultural areas, particularly in and around Israeli settlements in Area C.[96] Secondly, they contend that these restrictions continue to violate IHR law [97] and IHL.[98] Thirdly, it has been pointed out that the breadth of these restrictions calls into question government assurances they are absolutely necessary for military needs. Fourthly, by applying them in large part only to Palestinians, these measures appear to be based on national origin, thereby violating the right to equality.[99] Fifthly, even where they have been put in place for the allegedly legitimate purpose of protecting Israeli settlers inside the West Bank that these considerations perpetuate the settlement policy, itself in violation of international law.[100]

In sixth place, they have criticized the operation of the checkpoints by the Israeli military. A source of harassment, humiliation, and friction with the local Palestinian population, they have resulted in long waiting hours for the civilian population;[101] reduced Palestinians' access to

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set up by Israeli military authorities throughout the occupied area during that time. See UN OCHA-oPt, "Humanitarian Monthly Report: November 2013," online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2013_12_16_english.pdf>. For a discussion of movement restrictions on West Bank Palestinians wishing to enter annexed EJ, see Chapter III.

[96] UN OCHA-oPt, "Fragmented Lives: Humanitarian Overview 2013," Report (March, 2014), online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_annual_review_2014.pdf>.

[97] *Ibid.* International human rights law guarantees the right of every person to move freely inside his own country. This right can only be restricted if this is necessary in a democratic society to protect national security and public order. See article 12 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 17, (entered into force 23 March 1976) [ICCPR].

[98] Under the law of belligerent occupation, freedom of movement is implied in the rights mentioned in article 27 of the Fourth Geneva Convention, which guarantees a number of personal rights. See Fourth Geneva Convention, *supra* note 22. While this provision stipulates that "the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war. What is essential is that the measures of constraint they adopt should not affect the fundamental rights of the persons concerned." *Pictet* Commentary, *supra* note 9 at 202.

[99] *B'Tselem*, "Background on the Restriction of Movement," *supra* note 90.

[100] This is according to *B'Tselem*, "Ground to a Halt," *supra* note 91.

[101] *B'Tselem*, "Activity Report, 2003," online: *B'Tselem* <http://www.btselem.org/download/2003_activity_report_eng.pdf>, and *B'Tselem*, "Beatings and Abuse in the Shadow of War," Release, (20 August 2006), online: *B'Tselem* <http://www.btselem.org/beating_and_abuse/20060821_rise_in_security_forces_violence>. See also ACRI

employment, education, and health services within the West Bank;[102] and undermined the function of the Palestinian economy as a whole.[103] Additionally, the creation of road infrastructure tailored to the needs and security of the Israeli settler population and the associated movement restrictions imposed on Palestinians have physically fragmented the occupied territory.[104] This has brought about far-reaching changes of a more permanent nature in the occupied territory.[105]

The second measure that has been challenged by petitions is the requisition of land belonging to Palestinians for the purpose of constructing 'by-pass' roads for Israeli citizens traveling to/from the West Bank and Israel proper. It is discussed in the next section.

2.2. Requisitioning Land for the Construction of 'By-Pass' Roads serving Israeli Nationals in the West Bank: A Legitimate Security Response?

According to *Peace Now*, with the push for building and expanding settlements in the 1970s, the idea of 'bypass' roads was first raised by government and military authorities on the

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"ICCPR Implementation in East Jerusalem," (August 2014) submitted to the UN Human Rights Committee (HR Committee), Review of Israel, 112th Sess (7-31 October 2014), online: ACRI <http://www.acri.org.il/en/wp-content/uploads/2014/09/ICCPR-2014-Shadow-Report.pdf> at 10 and 11 [ACRI Shadow Report 2014]. See also Amnesty International (AI), "Annual Report (2013)," online: AI <http://www.amnesty.org/en/region/israel-and-occupied-palestinian-territories/report-2013#section-14-9>.

[102] World Health Organization (WHO), "Right to Health: Barriers to Health Access in the Occupied Palestinian territory, 2011 and 2012," Special Report (No. WHO-EM/OPT/004/E), (2013), online: WHO <http://www.emro.who.int/images/stories/palestine/documents/WHO_Access_Report-March_5_2013.pdf>. See also World Council of Churches, "Education under Occupation," Report (2013), online: UNICEF <http://www.unicef.org/oPt/UNICEF_Under_Occupation_final-SMALL.pdf>.

[103] UN Fact-finding Mission on Settlements Report 2013, *supra* note 82 at pars. 93-99. Restrictions on movement and access constitute one of the main elements which undermine the Palestinian investment climate. The report also cites growth of Israeli settlements and their 'associated infrastructure', and continued limitations on access to resources in Area C as reasons for the economic investment related uncertainty. See World Bank (WB) Group, "West Bank and Gaza Investment Climate Assessment: Fragmentation and Uncertainty," Report (No: AUS2122) (2014) at p. xiii and p. 24, online: WB <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/09/09/000470435_20140909140008/Rendered/PDF/AUS21220REVISE0A0REPORT0SEPT0902014.pdf>. They have also led to a rise in unemployment and poverty amongst Palestinians. See *B'Tselem*, "Effects of Restrictions on the Economy," (1 January 2011), online: *B'Tselem* <http://www.btselem.org/freedom_of_movement/economy>.

[104] This fragmentation has also undermined the possibility of creating a territorial contiguous future Palestinian state. Cécile Jolly, "Les difficultés d'émergence d'un état: la palestine" 2 Annuaire Français de Relations Internationales 78.

[105] As one veteran Israeli journalist observed, "[u]ntil the late 1980s, the Israeli settlements seemed to be scattered enclaves in a continuous Palestinian territory [...] now it is the enclaves that are Palestinian, swallowed up by and obscured within the pan-Israeli territory that stretches from sea to river." See Amira Hass, "For Palestinians, Life is without Horizon or Hope," *Haaretz*, (7 June 2014).

ground that "[t]he road is the factor that motivates settlement in areas where settlement is important, and [where] its advancement will lead to development and demand."[106] This approach encouraged Israeli authorities to develop a new transportation grid and road system in the West Bank, the objective of which was to 'bypass' Palestinian towns and villages, connecting Israeli settlements to each other, and linking them to the Israeli transportation grid inside Israel proper (i.e. across the Green Line). Since one of their main functions is also to connect the existing Israeli settlements to each other, these 'bypass' roads are for the large part, located throughout Area C of the West Bank [107] and form "a grid that crisscrossed the entire West Bank [...]."[108] Palestinians are also often restricted, (completely or partially) from accessing these roads.[109]

Here, it is important to also point out that at the time that these roads were constructed, government authorities had argued that this comes as a way of fulfilling the duty of the MC under article 43 of the Hague Regulations to promote the welfare of the Palestinian local population. As a result, they underscored that requisitioning land, including privately owned land, for this purpose is lawful under international law. Palestinian privately owned land has also been requisitioned for the sake of widening roads used by Israelis in the West Bank. Here too, government authorities have argued that this policy is in response to pressing security related needs of its population, thereby rendering this requisition order within the scope of the authority of the MC under international law.

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[106] *Peace Now*, "Bypass Roads in the West Bank," (August 2005), online: *Peace Now* <http://www.peacenow.org.il/eng/content/bypass-roads-west-bank>. This was articulated by the Israeli Ministry of Agriculture and the Settlement Division of the World Zionist Organization (WZO) in the M*aster Plan for Settlement of Judea and Samaria [West Bank] Plan for Development of the Area (1983-1986),* cited in *B'Tselem*, "Forbidden Roads: The Discriminatory West Bank Road Regime," Report (August 2004), online: *B'Tselem* <http://www.btselem.org/download/200408_forbidden_roads_eng.pdf>.

[107] *B'Tselem*, "Ground to a Halt," *supra* note 91.

[108] This has created in many areas a physical barrier between areas under Palestinian control (full or partial), which has blocked the development of many of these Palestinian communities located in area A and B of the West Bank. See *Peace Now*, "Bypass Roads," *supra* note 106.

[109] While sometimes restrictions have been imposed by way of a written military order (MO) in other instances, no written order was issued. Instead, they are handed down the chain of command verbally until they reach the soldier at the checkpoint or patrolling the roads. Often, there is no order precisely specifying the restriction's purpose, scope, or duration. See *B'Tselem*, "Ground to a Halt," *supra* note 91 at 98. See also Cécile Jolly, "Les difficultés d'émergence d'un état: la palestine," *supra* note 103.

According to the Israeli organization *Peace Now*, the fact that these roads have been dedicated for the needs of the Israeli settler population has contributed to "a situation where for the average Israeli, the distinction between Israel and the West Bank is increasingly blurred."[110] Moreover, the large scale of the Israeli financial investment in this road network "raises troubling questions about Israel's long-term intentions for the West Bank."[111] Arguably, it is also propagating a system of *s*eparation between Israelis and Palestinians residing in the West Bank based on national origin.[112]

In terms of restricting Palestinian access and movement, three different types of roads exist: (1) completely prohibited roads, designated for the exclusive use and mobility of Israelis (including settlers) and foreign nationals;[113] (2) partially prohibited roads, on which Palestinians are only allowed to travel, if they have successfully obtained special permits

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[110] For example, when an Israeli drives from Tel Aviv to the settlement of Ariel inside the West Bank (less than an hour away) or from Jerusalem to the West Bank settlement of Ma'ale Adumim (a 10- minute drive), he/she is unlikely to encounter any signs that they have crossed into the West Bank, and see almost no Palestinian cars or houses. See *Peace Now* "West Bank Settlement Blocs," (May 2008), online: *Peace Now* <http://peacenow.org.il/eng/content/west-bank-%E2%80%9Csettlement-blocs%E2%80%9D>.

[111] *Report of the UN Human Rights Inquiry Commission Established Pursuant to Commission resolution S-5/1 of 19 October 2000*, UN CHR, 57th Sess, UN Doc E/CN.4/2001/121, (16 March, 2001) at para 70, online: [*UN* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G01/118/72/PDF/G0111872.pdf?OpenElement>. *Commission of Inquiry 2000*]. Funds are mainly provided by the Israeli Ministry of Defense and the Ministry of Transportation. See *Peace Now*, "By-Pass Roads," *supra* note 106.

[112] In this regard, *B'Tselem* has charged that this road network bears striking similarities to the one that existed in South Africa during the Apartheid era. See *B'Tselem*, "Forbidden Roads," *supra* note 106 at 3. The crime of apartheid has been defined to "include similar policies and practices of racial segregation and discrimination as practiced in southern Africa," and applies to "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them." See *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 1015 UNTS 241 (adopted 30 November 1973), and [Apartheid Convention]. It has been argued that neither Israeli Jews nor Palestinians constitute 'racial groups' per se. However, former UN Special Rapporteur for Human Rights in the oPt Richard Falk explains that in defining racial discrimination, article 1 of the Convention on the Elimination of Racial Discrimination (CERD), underscores that discrimination can be based on "any distinction, exclusion, restriction or preference based on race, color, descent, or *national* [emphasis added] or ethnic origin." *Report of the Special Rapporteur on Human Rights in the Palestinian Territories Occupied since 1967, Richard Falk*, 25th Sess, UN Doc A/HRC/25/67 (13 January 2014) at para 53. The CERD Committee has also stressed in one of its general recommendation (24) that the Convention "relates to all persons who belong to different races, national or ethnic groups or to indigenous peoples." See also CERD Committee, "General Recommendation No. 24 concerning Article 1 of the Convention 27 August 1999," 55th Sess, (1999), online: OHCHR <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7496andLang=en>.

[113] Foreigners with valid visas to visit or stay in Israel. *B'Tselem*, "Ground to a Halt," *supra* note 91.

issued by the Israeli Civil Administration (CA),[114] and (3) roads on which Palestinian access is not prohibited.[115]

Up and until1979, the promulgation of Israeli MOs has been one of the most common ways by which Israeli authorities have taken over privately owned Palestinian land for the construction of settlements on the ground that this constitutes a military necessity. In the 1980s and 1990s, they also began taken over such land for the construction of 'by-pass' roads.[116] Theoretically speaking, requisitioning land under this pretext leaves the land's official ownership in the name of its original owners and results only in the transfer of control of the land for a designated and temporary period of time to the military authorities. This authority is also obliged to pay compensation for the land's use, after which the military must either renew the seizure MO relinquish control of the land back to the owners.[117]

Practically speaking however, relinquishing control over requisitioned land is something that rarely happens in the West Bank.[118] From 1968-1979, an estimated 47,000 dunums of private owned Palestinian land were confiscated,[119] (allegedly for military purposes, on which many

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[114] This category of roads, also known as 'restricted use' roads, refers to roads on which Palestinian-owned vehicles are not allowed to travel without obtaining permits. Access to the road is restricted by concrete blocks and other obstacles which are manned by Israeli soldiers who check the vehicle and the persons wanting to use the road. There are no fixed criteria for accepting or rejecting requests for permits by the Israeli CA and the District Civil Liaison Offices. See *B'Tselem,* "Forbidden Roads," *supra* note 106. For a list of roads which Palestinian vehicles are totally or partially prohibited from accessing see *bid* at 21-22.

[115] Israel has created a separate and contiguous road network for Palestinians running from the north to the south of the West Bank. Also known as the 'fabric of life' roads, they intersect with the roads which are designated for use of Israeli travelers. While the latter travel on fast upper lanes, the former travel on lower leveled roads. See *B'Tselem*, "Alternative Roads for Palestinians," (1 January 2013), online: *B'Tselem* <http://www.btselem.org/freedom_of_movement/alternative_roads_for_palestinians >.

[116] Piet Van Nuffel, "The Story of the Israeli Settlements in the West Bank," *supra* note 84.

[117] *Peace Now*, "Methods of Confiscation: How does Israel Justify and Legalize Confiscation of Land," online: *Peace Now* <http://peacenow.org.il/eng/content/methods-confiscation-how-does-israel-justify-and-legalize-confiscation-lands>. See also *B'Tselem*, "Seizure for Military Needs and Elon Moreh Ruling," *supra* note 84.

[118] *Peace Now*, *ibid.* However, Israeli news outlets have reported that information released by the CA indicates that by 2008, more than one third of all existing settlements, many of which have existed for decades, and include tens of thousands of residents, continue to exist on privately owned Palestinian lands that had been 'temporarily' seized for alleged security purposes, and which to date have not been returned. This includes some of Israel's largest settlements such as Ariel, Efrat and Kiryat Arba. See Meron Rapoport, "Third of Settlements Built on Land Seized for 'Security Purposes'," *Haaretz*, (17 February 2008).

[119] *Peace Now*, *ibid*. See also *B'Tselem*, "Seizure for Military Needs and Elon Moreh Ruling," *supra* note 84.

Israeli settlements were established).[120] Moreover, while a number petitions were submitted to HCJ in the 1970s to challenge Israel's land requisitioning policy, on the ground that using this land for the purpose of establishing settlements violates provisions of IHL, the HCJ has habitually dismissed those petitions.[121]

Nonetheless, the situation changed significantly in October 1979 when the HCJ rendered its *Elon Moreh* judgment.[122] In this judgment, the Court ruled that such land requisitioning could be considered lawful under Israeli domestic law, only if and when the establishment of that settlement serves a clear and predominant security interest.[123] Following this landmark decision, Israeli government authorities committed themselves (at least publically speaking) to implementing the Court's decision,[124] and did not resort to MOs in order to seize land for the

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[120] *Peace Now*, "Breaking the Law in the West Bank-One Violation Leads to Another: Israeli Settlement Building on Private Palestinian Property," Report (October 2006), online: *Peace Now* <http://peacenow.org.il/eng/sites/default/files/Breaking_The_Law_in_WB_nov06Eng.pdf>. See also *B'Tselem*, "Land Grab: Israel's Settlement Policy in the West Bank," Report (May 2002), online: *B'Tselem* <http://www.btselem.org/download/200205_land_grab_eng.pdf> and Idith Zertal and Akiva Eldar, *Lords of the Land: The War over Israel's Settlements in the Occupied Territories 1967-2007*, translated by V Eden, (New York: Nation Book 2007).

[121] For example, (HCJ 302/72) [1972] *Abu Hilu v. Government of Israel*, English summary in (1975) 5 Isr YB Hum Rts 384, [*Hilu* Judgment-Summary]; (HCJ 606/78) [1979] *Ayub et al v. Minister of Defense et al* English Summary in (1979) 9 Isr YB Hum Rts 338, [*Ayub* Judgment-Summary]; (HCJ 834/78) [1978] *Al-Salam Salameh et al v. Minister of Defense et al*, English summary in (1980), 10 Isr YB Hum Rts 330 [*Salameh* Judgment-Summary], and (HCJ 258/79) [1979] *Amira et al v. Minister of Defense et al*, English summary in (1980) 10 Isr YB Hum Rts 331 [*Amira* Judgment-Summary]. As one lawyer explains, "[t]he rationale behind those judgments was that Israeli civilian settlements provided the Israeli army with a loyal home front thereby helping it carry out its security missions." See Yossi Wolfson, Court Watch, "Seizure of Private Land for the Purpose of Building Settlements: HCJ 390/79 Dweikat v. Government of Israel (judgment rendered October 22, 1979)" (1 January 2013), online: Center for the Defense of the Individual (*Hamoked*) <http://www.hamoked.org/Document.aspx?dID=Documents1240>.

[122] Two affidavits by Palestinians challenged the claim of the government that the establishment of the settlement of *Elon Moreh* in the West Bank was driven by strict military needs` (HCJ 390/79) [1979] *Azat Muhammad Mostafa Dweikat et al v. Government of Israel et al* [*Elon Moreh* Judgment], unofficial English translation, online: *Hamoked*: <http://www.hamoked.org/Document.aspx?dID=1670>. See also *B'Tselem*, "Seizure for Military Needs and the Elon Moreh Ruling," *supra* note 84.

[123] The Court ordered the settlement to be dismantled, and the land to be returned to its Palestinian owners. See *Elon Moreh* Judgment, *ibid* at 15 and 20.

[124] Israel Prime Minister's Office, Israel State Archives, "Prime Minister Menachem Begin on Justice and the Rule of Law": Selected Documents on the 20th Anniversary of his Death," online: Government of Israel <http://www.archives.gov.il/ArchiveGov_Eng/Publications/ElectronicPirsum/MenachemBegin>. The government also decided that from then onward, settlements would only be established on state-owned land. See *B'Tselem,* "The Ofra Settlement: An Unauthorized Outpost," Report (October 2008), online: *B'Tselem* <https://www.btselem.org/download/200812_ofra_eng.pdf>.

explicit purpose of establishing settlements.[125]

However the policy was re-introduced after the signing of the Oslo Accords in the 1990s in order to construct 'by-pass' roads,[126] alleging that this was necessary to facilitate the travel of Israelis (civilians and military) to/from oPt.[127] Here, it is also worth noting that traditionally, the Court has upheld the government's contention that the construction of these 'by-pass' roads is carried out for absolute security needs.[128]

After the year 2000, Israeli authorities once again argued that the need to build such roads is pertinent in light of increased attacks by Palestinians against Israeli settlements and settlers in the West Bank.[129] Consequently, MOs aimed at requisitioning land were issued, supposedly to replace old roads or other 'by-pass' roads that were deemed unsafe for the travel by Israeli settlers.[130]

Sometimes, Israeli authorities also expropriated privately owned land for 'public' use by

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[125] *B'Tselem*, "Seizure for Military Needs and the Elon Moreh Ruling," *supra* note 84. In some instances, the Israeli military requisitioned the land for the purpose of establishing a military base, only to allow Israeli settlers to reside within the seized area. In 2008, the practice was challenged by *Peace Now* in a petition to the HCJ, arguing that the land had not been requisitioned for genuine military needs and that allowing Israeli settlers to reside therein, violates the carnal principle of distinction between combatants and civilians under international humanitarian law (IHL). See The Court rejected the petition. See *Peace Now,* "The Hebron Military Base Settlement Petition," online: *Peace Now* <http://peacenow.org.il/eng/content/hebron-military-base-settlement-petition>.

[126] *B'Tselem*, "Seizure for Military Needs and the Elon Moreh Ruling" *ibid*. This was the case, since those roads were part of the preparations by government authorities for the redeployment of the Israeli military forces from the occupied Palestinian territory, following the signing of these accords. See Samira Shah, "On the Road to Apartheid: The Bypass Road Network in the West Bank" (1997-1998), 29 Colum HRL Rev 221. See also *B'Tselem*, "Land Grab," *supra* note 120.

[127] According to the Israeli Ministry of Defense, these roads were essential for the purpose of meeting the following objectives: allowing Israeli civilians to travel in the oPt without passing through Palestinian population centers; enabling them to travel across the Green Line by the shortest route possible; ensuring that Palestinian traffic does not pass through Israeli settlements, and finally, maintaining the internal 'fabric of life' inside those settlements. See *B'Tselem*, "Seizure for Military Needs and the Elon Moreh Ruling," *ibid*.

[128] In one case, petitioners challenged the requisition of land in Hebron for the purpose of constructing a 'by-pass' road serving Israeli settlers. Amongst other things, petitioners argued that the land confiscation is not driven by genuine security needs, but by the desire to ensure the expansion of the settlement. The HCJ however upheld the respondents' arguments that these roads would "provide security to both Arab and Israeli travelers." See (HCJ 2717/96) [1996] *Wafa v. Minister of Defense et al*, unofficial English translation by Avichay Sharon, September 2013 (on file with author) at 3 [*Wafa* Judgment].

[129] In 2013, the UN also reported that 65 Israeli settlers were injured as a result of Palestinian violence, compared to 49 in 2012. See UN OCHA-oPt, "Fragmented Lives: Humanitarian Overview 2013," *supra* note 96.

[130] *B'Tselem*, "Land Grab," *supra* note 120.

relying on the provisions of a local Jordanian law (that had been extensively amended by way of Israeli MOs).[131] While this method of land control had not been used extensively for the purpose of building settlements, it has been applied towards the construction of 'by-pass' roads on the ground that they help meet the transportation needs of the Palestinian local population.[132] This argument has been upheld by the Court.[133] In other cases, settlers have also planned and built roads servicing their communities without waiting for the necessary approval from the CA, including on Palestinian privately owned land; have diverted public funds allocated for other purposes,[134] or have establishes and operated these roads *de facto*.[135]

Palestinian petitioners have challenged the requisition order for the purpose of constructing roads of this nature or contested the movement restrictions that have been imposed on them. In response, and as part of an effort to demonstrate that they seek to reduce the harm incurred by

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[131] *Jordanian Law No 2, Expropriation of Land for Public Purposes (1953),* See Raja Shehadeh, *Occupier's Law*: *Israel and the West Bank* (Institute for Palestine Studies: 1988). This law was amended by way of Israeli MO No. 131, 321 and 949. See Meron Benvenisti, *West Bank Data Project: A Survey of Israel's Policies* (American Enterprise Institute for Public Policy Research: 1984). Changes made to the implementation of the law, by means of these orders allowed for the transfer of the authority of the Jordanian Ministerial Council (which under the Jordanian law had enjoyed the authority to examine the purpose behind the decision of a public body to expropriate private land, and to determine whether this indeed was in the 'public interest') to what subsequently became the deputy head of the Israeli CA. It also allowed Israeli authorities to abolish the requirements (stipulated in that law), to publish the decision in the official gazette and to deliver them to the land owner. It also moved the legal authority entitled to examine appeals against the expropriation order from the local court (as established by the Jordanian law) to a military appeals committee. In the 1980s, an amendment forced the 'empowered authority' to publish its decisions in the compilation of proclamations and to inform the land owner personally or through the *mukhtar* (mayor) of the village in which he resides. See *B'Tselem*, "Land Grab," *ibid*.

[132] The reason why Israeli authorities have not used it extensively for settlement construction is that the law specifically states that the expropriated land must be used for a public purpose. See *B'Tselem*, "Land Grab," *ibid*.

[133] In the early 1980s, Palestinian petitioners challenged the legality of confiscating land for the construction of a road connecting a new neighborhood in the Israeli settlement of Qarne Shomeron with Israel proper, while circumventing the Palestinian West Bank city of Qalqilya. In dismissing the petition, HCJ Justice Shilo acknowledged on the one hand, that the road's route does not pass far from the area intended for the establishment of the new neighborhood and that it intends to create an access route for this community. On the other hand, he endorsed the government's argument that since it also shortens and improves the road for a number of smaller Palestinian villages, it fulfills the requirement of being constructed for the benefit of the 'local population'. See (HCJ 202/81) [1981] *Tabib et al v. Minister of Defense* English summary in (1983) 13 Isr YB Hum Rts 364 [*Tabib* Judgment-Summary]. See also (HCJ 2056/04) [2004] *Beit Sourik Village Council v. Government of Israel*, (2005) 35 Isr LR 83 [*Beit Sourik* Judgment]. The petition was upheld partially by the HCJ.

[134] *Peace Now*, "By-Pass Roads," *supra* note 106.

[135] Jack Khoury and Chaim Levinson, "Council Builds West Bank Bypass on Palestinian-Owned Land, for Israelis Only," *Haaretz* (3 October 2014).

the Palestinian civilian population, Israeli authorities have pointed out their efforts to construct what has become known as 'fabric of life' roads.

Running north-south (parallel to the roads on which Palestinian vehicles are forbidden),[136] these separate road systems were allegedly constructed to meet the transportation needs of the Palestinians.[137] Although these roads do improve the flow of Palestinian traffic in certain areas, they have also effectively diverted this traffic further away from the main roads, thereby allowing these roads to become 'Israeli roads' *de facto.*[138] As a result, petitioners have argued that constructing those roads has paved the way for the creation dual road system in the West Bank: one for settlers and one for Palestinians.[139] This in turn has had serious implications for the human rights of the Palestinian population, both on the short and the long-term.[140]

But how exactly have measures of movement restrictions and land requisition for the construction of roads become the subject of legal contention, in a manner that has implications for the second normative principle underlying the law of belligerent occupation? The next section makes a preliminary step towards providing an answer by offering an overview of the petitions that have been filed, as well as the main arguments highlighted by both petitioners and respondents.

3. Overview of Petitions

3.1. Introduction

In their petitions to the HCJ, Palestinians have primarily focused their efforts on challenging three kinds of measures. The first ones are the land requisition orders allegedly issued by the

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[136] *B'Tselem,* "Ground to a Halt," *supra* note 91.

[137] *B'Tselem,* "Alternative Roads for Palestinians," *supra* note 115.

[138] They also allow the Israeli military to restrict Palestinian movement when needed, without disrupting the travel of Israeli commuters on West Bank roads. *B'Tselem,* "Ground to a Halt," *supra* note 91 at 27.

[139] "The interaction between the two networks is intentionally kept to a minimum." Meron Benvenisti, *The West Bank Data Project*, *supra* note 131 at 23.

[140] For example, construction of those roads also entails confiscation of privately owned property. In addition, Israeli authorities determined those routes unilaterally, without giving considerable weight to the interests of the Palestinians who use them or to their living arrangements. See *B'Tselem*, "Alternative Roads for Palestinians," *supra* note 115.

Israeli MC to enhance the security of settlers and other Israelis in the West Bank, including those that commute on the road to and from Israel.

For example, in the *Haas* case**,** Palestinians objected to the MC's decision to issue MOs to requisition privately owned land and to demolish two buildings belonging to the petitioners, for the purpose of building a concrete wall and widening a road that is accessed by Israeli worshippers.[141] In another, the *Ad-Dhahiriya* case,[142] Palestinians together with Israeli human rights NGOs – the *Association for Civil Rights in Israel* (ACRI) and *Rabbis for Human Rights* – asked the Court to rule against the requisitioning of land for the purpose of building a concrete barricade along roads between the Israeli settlements of Tene and Carmel (in the south Hebron hills).[143]

In a third one, the *Bethlehem Municipality* case,[144] two Palestinian municipalities filed a petition challenging a 2003 Israeli MO requisitioning large amounts of land for the purpose of building a 'by-pass' road for Jewish worshippers traveling from Jerusalem to Rachel's Tomb, situated on the outskirts of the Palestinian city of Bethlehem. The road, which is protected by walls that formed part of the sections of the Wall in the Jerusalem area, was declared by Israeli authorities to constitute an essential security measure in light of an alleged increase in attacks against Jewish worshippers in the area since 2000.[145] In other instances, petitioners challenged land requisition order for the purpose of constructing a road to service a particular

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[141] According to Israeli military authorities, widening the road was necessary for the purpose of providing a pedestrian side-walk and widening the southern area of the road so that it can be entered by military vehicles if necessary to intervene for security reasons. See (HCJ 10356/02) [2004] *Yoav Haas v. IDF Commander in the West Bank et al* at paras 1 and 2, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/items/8240_eng.pdf> [*Haas* Judgment]. The petition was dismissed by the HCJ.

[142] (HCJ 1748/ 06) [2006] *Mayor of Ad-Dhahiriya v. IDF Commander in West Bank.* (2006) 2 Isr LR 603 [*Mayor of Ad-Dhairiya* Judgment]. The petition was upheld by the HCJ.

[143] The requisition order covered approximately 320 dunnams of land (4 dunnums = 1 acre). The barricade is 41 km long, 82 cm high and 60 cm wide. See *Mayor of Ad-Dhahiriya* Judgment, *ibid* at paras 2-3. Located in Area C of the West Bank the south Hebron hills are home to approximately 30 Palestinian villages of an estimated 4,000 Palestinians, See *B'Tselem* "South Hebron Hills," (1 January 2013), online: *B'Tselem* <http://www.btselem.org/south_hebron_hills>.

[144] *Bethlehem Municipality* Judgment, *supra* note 1. The petition was denied by the HCJ.

[145] According to the respondent, this includes sniper fire, placing explosive charges, throwing Molotov cocktails and disturbances of public order. *Ibid* at para 7.

settlement[146] (and which the petitioners claimed was being built on privately owned land)[147] or in relation to a train line which the Israeli authorities sought to establish as a way of connecting Tel-Aviv and Jerusalem.[148]

The second type of the MC authorized measures challenged by petitioners involve those which have effectively restricted the movement of Palestinians and their vehicles alongside parts of roads in the West Bank, while these roads continue to be made available to Israelis including settlers and other Israeli citizens living in Israel proper. This was the situation in the *Dir Samit Village Council* case,[149] where several Palestinian village councils had petitioned the Court to revoke an Israeli MO that led to the closing off of sections of roads 3265 and 345 to Palestinian vehicles and pedestrians, and which were located at a distance of a few kilometers from an Israeli settlement and an 'unauthorized outpost'.[150]

Similarly, in the *Abu Safiyeh* case,[151] ACRI together with residents of Palestinian villages objected to the imposition of a complete travel ban on Palestinians vehicles and pedestrians on

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[146] This was the settlement of Nili established in 1981, and which is located on the 'Palestinian side' of the Wall in the Ramallah district, at 3.8 km from the Green Line. See *Peace Now*, "Nili" online: *Peace Now* <http://peacenow.org.il/eng/content/nili>. Type also 'Nili' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[147] (HCJ 5098/11) [2011] *Head of Dir Qadis Village Council et al v. Minister of Defense et al*, unofficial English translation by Avichay Sharon (2013), on file with author, [*Second Dir Qadis Village Council* Judgment]. The petition was dismissed by the HCJ.

[148] (HCJ 281/11) [2011] *Head of Beit Iksa Council et al v. Minister of Defense*, unofficial English translation, online: *Hamok*ed <http://www.hamoked.org/files/2012/115140_eng.pdf>, [*Beit Iksa* Judgment]. The petition was dismissed by the HCJ on grounds of latency.

[149] (HCJ 3969/06) [2009] *Dir Samit Village Council et al v. Military Commander*, unofficial English translation, online: H*amoked* <http://www.hamoked.org/files/2011/1294_eng.pdf>, [*Dir Samit Village* Judgment]. The petition was upheld partially by the HCJ.

[150] The Israeli settlement in question is Negohot, established 1998 on the 'Palestinian side' of the Wall at 2.6 km from the Green Line and the unauthorized outpost of Mitzpeh Lachish. The latter came into being in 2002 outside the boundaries of the parent settlement (Negohot). See *Peace Now*, "Negohot," online: *Peace Now* <http://peacenow.org.il/eng/content/negohot> and <http://peacenow.org.il/eng/content/mitzpe-lachish>. Road 3265 was completely closed off to Palestinian movement between the Green Line and the Palestinian village of F'qaiqis, using gates which were erected on both sides of the Beit Awwa junction. Another gate was erected east of Negohot and between the settlement and F'qaiqis. In addition, Palestinian movement was prohibited on the south-north road (road 345). See *Dir Samit Village* Judgment *ibid* at paras 1-4 and 7-9. For location of Dir Samit and Negohot, type 'Deir Samit' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[151] (HCJ 2150/07) [2009] *Abu Safiyeh et al v. Minister of Defense et al*, unofficial English translation online: *Hamoked* <http://www.hamoked.org/files/2011/8865_eng.pdf> [*Abu Safiyeh* Judgment]. The HCJ upheld the petition.

a major road throughout the West Bank (also known as road 443) which represented the sole route connecting the Palestinian city of Ramallah and the Palestinian villages lying to the west.[152] At the same time, the route is used daily by thousands of Israelis on their way between towns that are located inside Israel proper[153] and is known to connect the coast of Israel proper to Jerusalem (including annexed EJ) and to the Mod'in Illit settlement bloc.[154]

Here, it is worth mentioning that in the early 1980s, the requisitioning of land for the construction of this very road had been the subject of an earlier petition by Palestinians in the *Iskan* case. Back then, petitioners had challenged the assertions by government authorities that the road's construction was driven by a desire to benefit the Palestinian local population. The petition was dismissed by the HCJ. However, following the outbreak of the Second *Intifada* in 2000, Palestinians were increasingly banned from using this vital road, after several attacks by Palestinians against Israeli vehicles using the road were alleged.[155] In 2002, the ban against the use of this road by Palestinians and their vehicles was made absolute on the ground that their continued use of the road facilitated terrorist attacks against Israeli travelers and their vehicles.[156]

The third type of measures challenged by Palestinians is the decision of the MC to prohibit Palestinians from entering areas adjacent to or in the vicinity of Israeli settlements. The ground invoked was related to the dual purpose of effectively protecting the Israeli settler population in those 'Israeli towns' and of protecting the Palestinian farmers accessing these lands against settler violence.[157]

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[152] ACRI, "Route 443: Fact Sheet and Timeline," (25 May, 2010), online: ACRI <http://www.acri.org.il/en/2010/05/25/route-443-fact-sheet-and-timeline/>.

[153] *B'Tselem*, "Route 443-West Bank Road for Israelis Only," (1 January, 2011), online: *B'Tselem* <http://www.btselem.org/freedom_of_movement/road_443>.

[154] *Abu Safiyeh* Judgment, *supra* not 151 at para 1.

[155] There were seven Israeli civilian casualties as a result of these attacks. See *B'Tselem,* "Road 443," *supra* note 153. See also ACRI "Route 443," *supra* note 152.

[156] *Abu Safiyeh* Judgment, *supra* note 151 at para 3-4. See also *B'Tselem*, "Route 443," *ibid*. After the petition was filed, Israeli military authorities signed a written MO officially banning the Palestinians from using the road. This took place after the HCJ had ordered the respondents to explain this prohibition. See ACRI, "Road 443," *ibid*.

[157] *Morar* Judgment, *supra* note 87 at paras 1, 2, 4 and 6. According to one UN agency documenting cases of settler violence, in 2013 this kind of actions resulted in injury to 146 Palestinians. Another 306 incidents were reported of damage to the private property of Palestinians. This represents an 8 % increase from cases

Having reviewed the content of the petitions, the next section highlights the main legal arguments expressed in court.

3.2. The Legal Arguments and Counter-Arguments

3.2.1. The Petitioners' Arguments

In their petitions to the HCJ, petitioners have mainly challenged the authority of the MC to implement a certain security related measure on the ground that this exceeds the scope of the MC's authority under the international law of belligerent occupation. In this regard, one argument put forward by several petitioners is that that the decision of that Commander has been motivated by (irrelevant) political considerations, as opposed to genuine security or military needs.

This was the situation in the *Haas* case: petitioners alleged that the decision of military authorities to confiscate land for the widening of a road used by Israeli worshippers under the guise of security, is unlawful, because it serves political considerations of creating "territorial continuity between [the settlement of] Kiryat Arba and the Machpela Cave [Tomb of the Patriarchs] by means of establishing a promenade that will, in the future, allow the expansion of Jewish settlement in the area."[158] In the *Dir Samit* case, petitioners also argued that the reason behind the MC's closure decision was to allow the Israeli residents of the outpost to expand their community and to take over more land.[159] Similarly, in the *Mayor of ad-Dhahiriya* case, petitioners made the point that the route of the barricade is very close to the original route that had initially been chosen by military authorities for the route of the Wall (before they decided to re-route the Wall in light of the HCJ's *Beit Sourik* ruling) and that the

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documented throughout 2012. See UN OCHA-oPt, "Fragmented Lives: Humanitarian Overview 2013," *supra* note 96.

[158] *Haas* Judgment, *supra* note 141 at para 3. Established in 1972 in the Hebron district, the settlement is located outside the Wall. See *Peace Now* "Kiryat Arba," online: *Peace Now* <http://peacenow.org.il/eng/content/kiryat-arba>. For location, type 'Kiryat Arba' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>. In the *Bethlehem Municipality* case, petitioners argued that the contested measure was motivated by irrelevant political considerations of seeking to annex Rachel's Tomb to Israel proper. See *Bethlehem Municipality* Judgment, *supra* note 1 at para 7.

[159] *Dir Samit Village* Judgment, *supra* note 149 at para 20.

decision to put in place a barricade in that area constituted a "way of circumventing the requirement of determining a proportionate route for the separation fence."[160]

In several other instances, petitioners have also sought to bolster their arguments by having alternative security expert opinions backing their petitions. This included an opinion by the *Council for Peace and Security* (CPS) as a way of challenging the reasonableness of the assertion made by military authorities that the measures they wanted to implement would indeed reduce the alleged security risks.[161] This was the situation in the *Dir Samit* case where the counsel for the petitioners contended that by turning the road into one that caters exclusively for the travel of Israelis, the security risks posed to those travelers would be augmented not reduced.[162] The expert opinion also sought to demonstrate that less harmful alternatives were indeed available to enhance the protection of Israeli settlers. For example, in the *Bethlehem* Municipality case, petitioners put forward the argument that safeguarding the Jewish worshippers visiting Rachel's Tomb can be addressed through other less invasive means, such as the construction of a tunnel under the tomb to be used by those worshippers.[163]

A second line of arguments advanced by petitioners is that the challenged measure has not been implemented for the benefit of the occupied territory or its 'protected persons', thus violating the MC's obligations under article 43 of the Hague Regulations. This was the situation in the *Abu Safiyeh* case.[164] There, petitioners claimed that by closing off road 443 to Palestinian traffic, the road was effectively reserved as internal Israeli traffic route only. Hence, it no longer addressed the transportation needs of the occupied population. They also pointed out that by closing off this road, the government had contradicted assurances it had made to the Court years earlier during the proceedings in the *Iskan* case. At the time,

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[160] *Mayor of Ad-Dhahiriya* Judgment, *supra* note 142 at para 10.

[161] In *Ad-Dhahiriya* case the CPS asserted that the barricade's construction would in fact create more, not less, security problems in the area, and that it fails to provide the alleged protection needed for persons traveling on the roads. They also contested the government's allegations that terrorist activities had taken place in the area. *Mayor of Ad-Dhahiriya* Judgment, *ibid* at para 11. For location of the village and surrounding Israeli settlements, type 'a-Dhahiriyah' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[162] An opinion which was endorsed by a former head of the Israeli CA Brigadier General (reserves) Ilan Paz. See *Dir Samit Village* Judgment, *supra* note 149 at para 6.

[163] *Bethlehem Municipality* Judgment, *supra* note 1 at para 7.

[164] *Abu Safiyeh* Judgment, *supra* note 151 at para 8.

government authorities had argued that building that very same road had been necessary to respond to the needs of the Palestinian local population.[165] Petitioners also cast doubt on the idea that the Israeli settler population was entitled to use the public resources of the occupied territory, underscoring that one way of ensuring their safety would be to prevent them from entering the occupied territory.[166]

Another case in point is the *Beit Iksa Council* case, where the petition challenged the requisition of land for the construction of a railway line that would connect Tel Aviv and Jerusalem. Here, petitioners argued that since the planned railway intends to only serve Israeli commuters, this declared purpose did not serve one of the two legitimate considerations of the MC under international law: (i) imperative security needs or (ii) the interests of the Palestinian local population.[167] Moreover, they casted doubt on the government's assurances that the railway might in future serve Palestinians living in the West Bank, noting that this constitutes nothing short of a pretext for legitimizing the illegal route and for effectively annexing the expropriated land to Israel proper.[168]

Thirdly, petitioners have highlighted the disproportionate harm that these measures inflicted on their human rights[169] and sought to demonstrate how it disrupted all aspects of their 'fabric

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[165] *Ibid* at para 8. In this regard, it is worth recalling that in the 1980s when Israeli military authorities requisitioned land for the purpose of building this road as part of a sophisticated road system, this confiscation order was subject of a petition by Palestinians to the HCJ. At the time, Israeli authorities argued in Court that building this road was necessary to fulfill the needs of the Area's 'local population'. See (HCJ 393/82) [1983] *Jam'iat Iskan case, al-Ma'almoun al-Tha'auniya al-Mahduda al-Masuliya, Cooperative Association Legally registered at the Judea and Samaria Area Headquarters v. Commander of IDF Forces in the Area of Judea and Samaria et al*, unofficial English translation online: *Hamoked* <http://www.hamoked.org/items/160_eng.pdf> [*Iskan* Judgment]. For an in depth discussion of this case, please refer to section 4.2 of this chapter.

[166] *Abu Safiyeh* Judgment, *ibid* at para 31. Similarly, in the *Dir Samit* case it was argued that the protection of settlers is not part of the legitimate considerations of the MC under international law. See *Dir Samit Village* Judgment, *supra* note 149 at para 5.

[167] The railway connects Tel-Aviv-Jerusalem without any stations inside the West Bank. *Beit Iksa* Judgment, *supra* note 148 at paras 1and 27. For a location of the village, type 'Beit Iksa' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[168] Therefore, the decision to build the railway is motivated by extraneous considerations. *Ibid* at paras 5 and 25.

[169] Petitioners have focused on how these measures have undermined their ability to move freely to other parts of the West Bank; and to access their agricultural land. For example, in the *Mayor of Ad-Dhahiriya* case, Palestinian petitioners argued that despite the existence of 24 openings in the barricade, it seriously undermined the passage of livestock, and pedestrians. Together with the Wall being built to the south, they contended that an enclave (containing 20 Palestinian villages of approximately 2000 people) has been created;

of life'.[170] Even where certain amendments were subsequently introduced by the MC,[171] petitioners insisted that the measure continued to impose a heavy burden on them.[172] In other instances, they alleged that the practice employed by the MC amounted to collective punishment, prohibited under IHL,[173] and that it "constituted wrongful discrimination on the basis of nationality,"[174] prohibited under international human rights law.

Procedurally, petitioners have also shown that travel restrictions have been imposed on them without written authorization[175] and that land has been requisitioned from them without

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that farmers are unable to access their lands, and that the economic and demographic viability of the villages in the enclave is under threat. See *Mayor of Ad-Dhahiriya* Judgment, *supra* note 142 at paras 6 and 7. See also *Beit Iksa* Judgment, *ibid* at paras 5 and 25 and *Morar* Judgment, *supra* note 87 at para 11.

[170] The petitioners underlined that it infringed on their freedom of movement, their right to earn a living, their right to education, family life, and their right to life in dignity. The challenged measures, they argued, prevented thousands of Palestinians who pose no security threat from using the road, thereby amounting to wrongful discrimination on the basis of national/ethnic origin. *See Abu Safiyeh* Judgment, *supra* note 151 at paras 8 and 30.

[171] Following the HCJ's *Beit Sourik* ruling, government authorities in the *Bethlehem Municipality* case introduced another set of changes to the proposed route of the 'by-pass' road. As a result, the scenario of trapping a large number of Palestinian residents in an area completely surrounded by walls without access to Bethlehem was successfully avoided. Nevertheless, petitioners alleged that the amendments did nothing to alleviate the severe harm incurred on the freedom of movement of those who live in the vicinity of the tomb, particularly in the area where the planned 'by-pass' road would connect with the Hebron road. They also highlighted that the mere fact that military authorities had adopted less harmful measures did not make those measures which were ultimately chosen, either reasonable or proportionate. See *Bethlehem Municipality* Judgment, *supra* note 1 at paras 3, 5, 6 and 18.

[172] In one case, the Court only alludes to the fact that the access restrictions create a burden on the Palestinians local population, but stops short of providing any further details. See (HCJ 11235/04) [2011] *Hebron Municipality and Others v. Government of Israel et al* at 1, unofficial English translation by Avichay Sharon (2013), on file with author, [*Hebron Municipality* Judgment]. The petition was dismissed by the HCJ. During the Second *Intifada*, military authorities had created a contagious strip of land in the Old City of Hebron, along which the movement of Palestinian vehicles was forbidden. In 2009 these authorities decided to grant passage to Palestinian vehicle owners who hold individual permits on one of the roads (Othman Bin Affan/Zion road). See *B'Tselem,* "Hebron City Center," (updated January 2011), online: *B'Tselem* <http://www.btselem.org/hebron>. See also OCHA-oPt, "The Humanitarian Impact of Israeli Settlements in Hebron City" (29 November, 2013), online: UN OCHA-oPt <https://www.ochaopt.org/documents/ocha_opt_hebron_h2_factsheet_november_2013_english.pdf>.

[173] *Abu Safiyeh* Judgment, *supra* note 151 at para 8.

[174] This they argued is the case because the travel restrictions were applied to all Palestinian residents regardless of whether or not they posed an individual security risk. However, it was not applied to Israelis, even though (in reference to settler violence) they may also pose as a risk to the Palestinian local population. *Dir Samit Village* Judgment, *supra* note 149 at paras 5 and 6.

[175] In the *Dir Samit Village* case, one of the claims by petitioners was that the movement restrictions on the road were not anchored in a written MO, *ibid* at para 7. In the *Abu Safiyeh* case, petitioners showed that restrictions had been in place for seven years and that there was no intention by authorities to lift them in the near future. Petitioners had also requested that the Betouniya road (connecting road 443 to the Palestinian city of Ramallah), be made accessible to Palestinian private cars. However, the Court rejected the argument, noting

granting them a fair and effective hearing.[176] This was the situation in the *Morar* case, where petitioners alleged that their access to the land for farming and harvesting purposes was done without a formal closure order being promulgated by way of an Israeli MO.[177]

The next section provides an overview of the position of the respondents.

3.2.2. The Position of Respondents

Respondents, for their parts, have generally sought to convince the Court that the MC has a duty and authority "to ensure [that] security in the territory apply with regard to all the persons who are present in the territory that is subject to belligerent occupation," including Israeli nationals travelling or residing therein.[178]

Where the challenged measure involved the imposition of movement restrictions or the requisition of Palestinian privately owned land for the purpose of security-related measures, government authorities claimed that these requisition orders were temporary in nature. They also alleged that these measures were driven by two genuine security needs: (a) the need to protect Israelis inside the West Bank from attacks by Palestinians[179] and (b) the need to protect Israelis travelling to/from settlements (including 'unauthorized outposts') in the West Bank, to Israel proper.[180] This rendered the land requisition for this purpose lawful under the international law.[181]

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that expanding the crossing would create an additional area of friction that would be prone to attacks, and that the decision not to do so "was a clear security issue within the discretion of the Military Commander." See *Abu Safiyeh* Judgment, *supra* note 151 at paras 8, 9, 13 and 38.

[176] *Beit Iksa* Judgment, *supra* note 148 at paras 4-5.

[177] Section 90 of the *Security Measures (Judaea and Samaria) (no. 378) Order, 5730-1970*, cited in the *Morar* Judgment, *supra* note 87 at para11.

[178] *Ibid* at para 13. See also *Abu Safiyeh* Judgment, *supra* note 151 at para 9, and *Mayor of Ad-Dharyeriya,* Judgment, *supra* note 142 at paras 10 and 15.

[179] *Dir Samit Village* Jugement, *supra* note 149 at para 8. See also *Abu Safiyeh* Judgment, *supra* note 151 at para 35; *Haas* Judgment, *supra* note 141 at para 1 and *Bethlehem Municipality* Judgment, *supra* note 1 at para 7.

[180] *Mayor of Ad-Dhahiriya* Judgment, *supra* note 142 at paras 10 and 11. In the *Dir Samit Village Council* case, it claimed that the measure to keep restrictions on the breadth of the road was necessary for security considerations, as this road constitutes the only one connecting those establishments to Israel proper. *Dir Samit Village* Judgment, *ibid* at paras 8-9.

[181] *Haas* Judgment, *supra* note 141 at para 4.

Government authorities have maintained that genuine security conditions are the one element guiding their decision to put in place measures that have restricted the petitioners' rights.[182] In addition, they denied that the harm incurred by the Palestinian local population is disproportionate to the security advantage to be gained, particularly in light of the added value that this would bring to the safety of Israeli settlers and other Israeli citizens or to their ability to exercise some of their essential human rights (such as the right to worship).[183] Furthermore, they argued that they have often modified the implementation of a given security based measure in order to significantly reduce the injury to the petitioners' daily lives. For example, in the *Abu Safiyeh* case, the respondents underscored their efforts (at the time) to construct 'fabric of life' roads for the Palestinian local population.[184] In the *Bethlehem Municipality* case, they pointed out that instead of requisitioning land for the purpose of constructing a ring road to guarantee safe passage of the Jewish worshippers traveling to Rachel's Tomb, it was decided to build the 'by-pass' road that would be secured by walls.[185] In other instances, government authorities contended that resort to the implementation of a specific security measure was necessary to protect Palestinians. They also underscored even though the impact of this measure was harsh, there was no better alternative, capable of resulting in less harm for them or their property.[186]

In response to claims of a more procedural nature, the government also argued that Israeli MOs in force in the occupied territory authorized the MC to restrict movement within the occupied territory even in the absence of a written order.[187] They also pointed out that the roads, whose construction were being challenged, had been built (for the most part) on 'state

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[182] *Haas* Judgment, *ibid* at para 12.

[183] *Abu Safiyeh* Judgment, *supra* note 151 at para 9. *Dir Samit Villag*e Judgment, *supra* note 149 at paras 8-9. *Haas* Judgment, *ibid* at para 5.

[184] *Abu Safiyeh* Judgment, *supra* note 151 at paras 8, 9, 13 and 34.

[185] This, they argued, reduced by 70 %, the number of Palestinian residents whose houses would be surrounded by these walls, compared to the ring-road. *Bethlehem Municipality* Judgment, *supra* note 1 at paras 2, 3, 7 and 18.

[186] In the *Morar* case, government authorities argued that since the Palestinian farmers often suffered from harassment by Israeli settlers, particularly during the olive harvesting seasons, closing off the area to those farmers, is the only viable means for ensuring their safety. See *Morar* Judgment, *supra* note 87 at para 23.

[187] Section 88 of the MO *regarding Defense Regulations (Judea and Samaria) (No. 378) 5730-1970*. See *Dir Samit Village* Judgment, *supra* note 149 at paras 5 and 7. In other instances they highlighted that a retroactive written authorizations had been issued, thereby rendering the petitioners argument regarding the procedural flaws redundant. See also *Abu Safiyeh* Judgment, *supra* note 151 at para 8; *Morar* Judgment, *ibid* at para 11.

land,' and not on privately owned land as the petitioners contend, or that the road would only be used by the security personnel of the settlement.[188]

In some cases, most notably *Head of Beit Iksa Council*, the respondents provided a variety of arguments to justify their decision of requisitioning land for the building of an alternative road that would service emergency rescue operations.[189] These include the argument that the occupying power is entitled to take measures to ensure the safety of its citizens in the West Bank. Another argument is that it can requisition land under the international law of belligerent occupation. This is because the MC is authorized under this body of law to use property of the occupied territory and to reap its benefits, as long as the residents of the occupied territory also benefit from it.[190] Thus in this particular case, the respondents highlighted that "parts of [the railway] which go through the Judea and Samaria [i.e. West Bank] area, must be seen as one component of the overall land transportation system"[191] and that, therefore, its construction must be:

> Examined from a broad perspective in which the railroad is seen as a single component of an overall plan for a regional steel railway, including such that would allow connecting the Judea and Samaria Area to the railway infrastructure inside Israel and others that would allow a future connection between the Judea and Samaria Area and the Gaza Strip, as accepted in railroads in other parts of the world.[192]

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[188] In the *Dir Qadis* case, they maintained that the road built to service the settlement of *Nili* had been done on 'state land.' They also pointed out that even though the road work had not fulfilled planning and construction requirements, it would only be used by the security personnel of that settlement. See *Second Dir Qadis Village Council* Judgment*; supra* note 147 at paras 2-3.

[189] Should there be a need to use the emergency road. An estimated 11.5 out of the 50 dunums of land expropriated were privately owned land. The designated route is intended to "protect the lives of train passengers and ensure their safety, including when they are inside the Judea and Samaria Area." See *Beit Iksa* Judgment, *supra* note 148 at paras 2-3 and 7. For a map of the railroad, see Attorney Yotam Ben Hillel, Court Watch, "On Tearing Down Walls, Peace Among Nations and Trains: HCJ 281/11 - Head of Beit Iksa Local Council et al v. Minister of Defense et al (Judgment of September 6, 2011) (1 January 2013) at 1, online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=Documents1911>.

[190] *Beit Iksa* Judgment, *ibid* at para 10.

[191] *Ibid* at para 2.

[192] *Ibid* at para 7. Government authorities argued that some of these railway lines connecting various cities with each other in the West Bank" are under construction, while others will be built in the future, and that in any case, the "overall planning and monetary investment in railway planning in the West Bank serve the Palestinian residents of the area." See *ibid* at para 27.

Before examining the judicial reasoning of the Court, the next section discusses key developments in how the Court has interpreted article 43 of the Hague Regulations. It also provides an overview of old and more recent decisions of the HCJ on petitions challenging the assurances of Israeli authorities that measures were implemented for the benefit of the 'local population'. This context provides for a better understanding of the evolution of the Court's interpretation of article 43 of the Hague Regulations over the years. It also provides an important point of reference for judicial decisions rendered on petitions challenging security-based measures discussed in this chapter.

4. The HCJ's Interpretation of Key Aspects of Article 43 of the Hague Regulations

4.1. Introduction

This section examines HCJ case law that has addressed the scope of interests which the MC can lawfully take into consideration under article 43 of the Hague Regulations, as well as the scope of beneficiaries that are entitled to benefit from his duty to provide for their welfare. In the case of security interests, it is contended here that the Court has migrated from a strict emphasis on the security/military needs of the occupying power inside the occupied territory, to the adoption of a wide definition: one that encompasses the security needs of that power and its nationals, both inside and outside the occupied territory.

Furthermore, the analysis reveals that the Court has, over the years, gradually expanded the authority of the MC to take a wider spectrum of measures as a way of allegedly ensuring the welfare of the 'local population'. This the Court has achieved in two ways: Firstly, it enlarged the scope of the beneficiaries who can be considered part of the 'local population' to include, other than the 'protected persons' (i.e. the Palestinians), the Israeli settler population. Secondly, it upheld the idea that in light of the prolonged nature of Israel's occupation, the MC must be allowed to introduce in the occupied territory a set of institutional and legislative changes of a more profound nature. This is despite the fact that no distinct category of

'prolonged occupation' exists in IHL.[193] To better understand the gradual development of the Court's arguments, the next section provides a brief discussion of earlier judgments by the Court involving the MC duties under article 43 of the Hague Regulations.

4.2. On the Interests Guiding the Lawful Actions of the MC

In 1972, the HCJ 's judgment in the *Christian Society Place* case was the first landmark decision requiring the Court to interpret article 43 of the Hague Regulations.[194] In this case, a Palestinian charitable society with headquarters in the USA had challenged the decision of the Israeli MC for the West Bank to amend Jordanian labor laws in effect in the West Bank. This was deemed necessary to facilitate the settlement of a labor dispute through the use of compulsory arbitration.[195] In this regard, petitioners argued that the MC had exceeded his legislative powers under article 43 of the Hague Regulations, requiring him to respect the local laws in force in the occupied territory, 'unless absolutely prevented'.[196]

In its judgment, the HCJ developed a number of legal arguments that have become the cornerstones for its interpretation of the MC's duties as stated in article 43 in subsequent decisions. According to the Court, this duty revolved around two axes: (1) the need to ensure the legitimate security interests of the occupying power and its forces in the territory under belligerent occupation; and (2) the obligation to respond to the needs and interests of the 'local population' "and to ensure its 'civil life'."[197]

The justices also reiterated that the French version of Article 43 is the authoritative one. Therefore, the term 'safety' in this article is more precisely translated as 'civil life', which

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[193] As one scholar correctly point out, the HCJ started raising the 'prolonged occupation' argument, only four years after the Israeli occupation of the West Bank had begun. See (HCJ 337/71) [1972] *Christian Society for the Holy Places v. Minister of Defense* (1972) 2 Isr YB Hum Rts 354 [*Christian Society* Judgment-Summary].

[194] *Christian Society* Judgment-Summary, *ibid.* See also Sharon Weill, *The Role of National Courts*, *supra* note 35.

[195] Although traditionally, labor disputes of Palestinians civilians were mediated by arbitration councils, the MC initiated an amendment to the Jordanian labor law, to introduce changes to the procedure of appointing arbitrators to those councils. See *Christian Society* Judgment-Summary, *ibid* at 344-345.

[196] *Ibid* at 354-355.

[197] *Ibid* at 355. See also the (HCJ 256/72) [1972] Electric *Corporation for Jerusalem District LTD v. Minister of Defense* 5 Isr YB Hum Rts 381 at 383 [*Electric Corporation* Judgment-Summary]; and the *Iskan* Judgment, *supra* note 165 at para 16.

refers to the "whole commercial, economic and social life."[198] This position was consolidated in subsequent judgments by the Court.

In another case, *Abu Aita*, the Court was asked to rule on the legality of the MC's decision to impose the value added tax (VAT) in the oPt, in conjunction with a decision to impose it inside Israel proper.[199] Here, it must be recalled that after 1967, government authorities had devised and implemented "numerous policy measures aimed at increasing the level of physical integration between Israel and the occupied territory primarily through the creation of a common market."[200] This allowed the occupied territories to continue to exist in principle as a separate economic entity, "while practically speaking, ensuring that it becomes fully integrated within that of Israel."[201]

In its judgment, the justices explained that a more precise translation of the MC's duty to refrain from altering existing laws unless 'absolutely prevented' is that he cannot unless it is 'necessary'. According to Chief Justice Shamgar:

> [...] Absolute prevention may [...] arise from the legitimate interests of the military government and the maintenance of public order, or from *interests of concern for the local population* [emphasis added] and the assurance of its public life, all, of course, whilst maintaining a reasonable balance between the considerations.[202]

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[198] Sharon Weill, *The Role of National Courts*, *supra* note 35.

[199] The decision was imposed by way of a MO. See (HCJ 69/81*)* [1981] *Bassel Abu Aita v. the Regional Commander of Judea and Samaria*, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/files/2011/290_eng.pdf> [*Abu Aita* Judgment].

[200] Areas included taxation, traffic laws, import duties and abolished internal custom barriers and the passage of people between Israel and those territories. Imports to the oPt were subjected to the same duties as those imports to Israel; a number of indirect taxes and anti-inflationary measures were introduced into the oPt simultaneously with their introduction into Israel proper. See Eyal Benvenisti, *The International Law of Occupation, supra* note 8 at 123-134. The imposition of similar import duties in the oPt was the focus of the petition in the *Abu Aita* Judgment *ibid*.

[201] This prevented the economy of the oPt to develop, while allowing for the improvement of the standard of living, mainly by enabling the oPt to act as a source of cheap labor in Israel. The dependency was enhanced by interconnecting all roads, electricity, water and communication grids. See Meron Benvenisti, *The West Bank Data Project, supra* note 131 at 9. This continued until the 1980s, when Israel adopted a policy of separating from the Palestinians. See Neve Gordon, "From Colonization to Separation: Exploring the Structure of Israel's Occupation" in Adi Ophir, Michal Givoni and Sari Hanafi, ed, *The Power of Inclusive Exclusion: Anatomy of Israeli Rule in the Occupied Palestinian Territories* (New York: Zone Books 2009) 239.

[202] *Abu Aita* Judgment, *supra* note 199 at 129 and 130.

In the judgment, the Court also underscored the position that it won't consider legislative changes needed in response to security needs or to further the welfare of the 'local population' to be unlawful under the law of belligerent occupation, just because the MC had not been 'absolutely prevented' from undertaking those amendments.[203] Subsequently, it ruled that imposing an additional tax in the occupied territory can be considered lawful under article 43 of the Hague Regulations if it could be established that a genuine necessity for its doing so existed.[204]

In a subsequent case, *Iskan*, the Court interpreted the MC's duty to restore and ensure 'public order and safety' imposed by article 43 to amount to a twofold duty on the MC: Firstly, to restore 'public order and safety' in places where it was interrupted and, secondly, to ensure continued existence of 'public order and safety' in situations in which "these had not been disrupted, or where 'public order and safety' had already been restored."[205] Reiterating once more its own understanding of that phrase, the Court explained that this encompasses all aspects of public order and safety and applies to a variety of civilian issues, such as economy, society, education, welfare[206] and transportation.[207] Thus according to the justices, it would not be possible for the MC to secure the necessary growth and development that arise in a situation of long-term occupation and to respond to the constant changing needs of the inhabitants of the occupied territory, unless the law evolved[208] to address those needs.[209]

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[203] See David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15.

[204] *Abu Aita* Judgment, *supra* note 199. See also an English summary in (HCJ 69/81*)* [1981] *Bassel Abu Aita v. the Regional Commander of Judea and Samaria*, English summary in 13 Isr YB Hum Rts 348 [*Abu Aita* Judgment-Summary].

[205] *Iskan* Judgment, *supra* note 165 at paras 18 and 25.

[206] *Ibid* at para 18. According to Justice Shamgar, this is because the original French version of this provision of the Hague Regulation, which the Court considered as authoritative, refers to: "l'ordre et la vie publics," which has a wider meaning than the equivalent English term 'public order' and, therefore, includes all social, commercial and economic life of the community. In another case, the Court underlined that the term 'public order and safety' encompasses all its agencies practices in a civilized country'. See *Abu Aita* Judgment, *supra* note 199 at 100. See also *Christian Society* Judgment-Summary, *supra* note 193 at 355 and 356.

[207] In the *Tabib* Judgment, the HCJ underscored its conclusion that the term 'public life' includes proper administration of all its branches as accepted in a well-functioning country and that this includes security, health, welfare and quality of life and transportation. See *Tabib* Judgment-Summary, *supra* note 133. Also cited in David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15 at 219 (footnote 61).

[208] In this regard, the Court noted that the Hague Regulations must be interpreted according to these needs, and that a distinction must be maintained "between short term military government and long-term military government." See *Iskan* Judgment *supra* note 165 at paras 21-22.

However, given that occupation is inherently a temporary situation, the justices explained that:[210]

> The military commander *may not weigh the national, economic and social interests of his own country* [emphasis added], insofar as they do not affect his security interest in the Area or the interest of the local population [...] Military necessities *are his military needs and not the needs of national security in the broader sense* [emphasis added].[211]

Years later, the Court relied on this concept to rule that the decision by the MC to purchase the undertaking of Jerusalem District Electricity Company relative to the West Bank was null and void. According to the justices, this was the case because the modifications which he wished to introduce by purchasing the company were too far reaching to amount to a legitimate action under international law. The government argued that the reason they submitted a notice of purchase of the company's undertaking in the West Bank was to ensure the proper administration of vital services to the 'local population'. The Court rejected this argument, noting that:

> [I]n the absence of special circumstances, the Commander of the region should not introduce in an occupied area modifications, which, even if they do not alter the existing law, would have far-reaching and prolonged impact on it, far beyond the period when the military administration will be terminated one way or another, save for actions undertaken for the benefit of the inhabitants of the area.[212]

However, as Kretzmer notes, subsequent judgments by the Court proved that this "decision was a voice in the wilderness."[213] Over the years, the important principle that had been developed by the Court in the *Iskan* judgment lost much of its significance because of two elements: (a) the willingness of the Court to grant a wider interpretation to the authority of the MC to enact changes under article 43 of the Hague Regulations due to the long-term nature of

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[209] *Ibid* at para 26. The idea was initially elaborated in the *Christian Society* Judgment-Summary, *supra* note 193.

[210] *Iskan* Judgment *ibid* at paras 20 and 23-24. This is because "the basic premise is that the military commander does not inherit the rights and status of the defeated regime. It is not the sovereign in the held area." *Ibid* at para 12.

[211] *Ibid* at para 13.

[212] See (HCJ 351/80*)* [1980] *Jerusalem District Electricity Company Ltd. v. Minister of Energy and Infrastructure et al* (1981) 11 Isr YB Hum Rts 354 at 357-358 [*Jerusalem District Electricity Company* Judgment-Summary].

[213] David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15 at 219.

the occupation; (b) the Court's decision to uphold the government's interpretation of the term 'local population' to include the Israeli settler population.

The next sub-section will examine the Court's interpretation of the scope of the MC authority in an occupation of a long-term nature.

4.2.1. The Authority of the MC to Effect Changes in a Situation of 'Prolonged Occupation'

The *Christian Society Place* judgment, rendered less than a decade after Israel's occupation of the West Bank (beginning in 1967) provided important insights to the evolution of the Court's approach regarding the lawful considerations that can guide the MC's decision under international customary law (the Hague Regulations) in a situation of prolonged occupation.

Addressing the legality of the MC's decision to amend the Jordanian labor law by way of a MO, the justices noted that the prohibition on his ability to do so unless 'absolutely prevented' (as spelled out in article 43) must be interpreted while keeping in mind the duty that it imposed on the occupying power to respond to the economic, commercial and social needs of the 'local population'. Since in a situation of prolonged occupation those needs are constantly evolving, it would be pertinent to adapt local laws to those evolving needs. This led the justices to conclude that by promulgating an MO that led to the appointment of a person in the arbitration council, the MC had acted within the scope of his authority under international law. This was the case because doing so was deemed necessary for allowing the institution established under Jordanian law to function properly. The petition was dismissed.[214]

It is also worth pointing out that a minority opinion disagreed, noting that the authority of the occupant must remain focused on restoring public order and civil life to the *status quo ante* (i.e. to restore it to the level that had existed before the beginning of Israel's occupation of the

[214] See *Christian Society* Judgment-Summary *supra* note 193 at 355.

West Bank), and not on bringing about a novel situation, one where the residents had not existed in the occupied territory before the MC took this decision.[215]

Similarly, in the *Electric Corporation* judgment, the justices reiterated the idea that military authorities must respect the laws in force in the occupied territory, unless 'absolutely prevented' in line with the requirements of article 43 of the Hague Regulations.[216] However, in this specific case, the petitioners had challenged the decision of the MC to have electricity needs in the West Bank city of Hebron be supplied through the Israeli Electric Corporation on the ground that this runs counter to an existing Jordanian law (still valid in that territory). Given that the Court had concluded that providing for the needs of the 'local population' is part of the MC's duties under international law, it upheld the MC's decision to amend existing local laws by way of a MO[217] and found no reason to interfere in his decision.[218]

In the *Abu Aita* case, the Court underscored the idea that the longer the duration of the military occupation, the more extensive the obligations that arise for the MC.[219] This is because when interpreting article 43 of the Hague Regulations, "the time element is a factor affecting the scope of the powers, whether we regard military needs, or whether we regard the needs of the territory, or maintain equilibrium between them."[220]

The *Iskan* case (examined by the Court a few years later) provided the Court yet with another opportunity to clarify and consolidate its interpretation of the scope of the MC's duty under article 43 of the Hague Regulations. In this case, the requisitioning of land for the construction of road 443 was presented by Israeli authorities as a necessary step in response to an out of date road system. They also argued that the main objective of the plan was to serve the

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[215] According to Justice Cohen writing the minority opinion, the 'filling of a gap', which the MO thought of bringing about, constituted a modification which the previous legislator (i.e. Jordan) had chosen not to include. *Ibid* at 355-356.

[216] *Electric Corporation* Judgment-Summary *supra* note 197 at 381. As the Court explains, under article 43 of the Hague Regulations the "existing laws in the occupied territory may not be altered unless a legislative change is required in order to realize the powers of the military government (whether on the civilian or military level." *Iskan* Judgment, *supra* note 165 at para 17.

[217] *Electric Corporation* Judgment-Summary, *supra* note 197 at 383.

[218] *Ibid* at 383.

[219] *Abu Aita* Judgment, *supra* note 199 at 134.

[220] *Ibid* at 134.

Palestinian local population.[221] However, this proposition was challenged by the Palestinian petitioners, who argued (amongst other things) that under the temporary nature requirement underlying the normative framework of the law of occupation, an occupying power "is not permitted to plan, and implement an action, which creates permanent facts, that are designed to continue to exist following the termination of military rule in the Area."[222]

In its judgment, the Court first embarked on determining whether the MC had the authority to plan and implement a civilian project in the West Bank, which was not driven by military considerations. This was deemed necessary by the Court given that the creation of roads would result in "long-term permanent ramifications, [which continue] sometimes beyond the limits of the term of the military government itself."[223] In this regard, the justices first pointed out that even though the Hague Regulations were formulated "against the backdrop of a short-term occupation,"[224] "in a 'long-term' military occupation, the needs of the 'local population' receive extra validity."[225] It also required investments in all domains of life.[226] This, they concluded, justified a more profound interference by the MC in the administration and the legislation of the occupied territory.

Addressing the legality of constructing the road, Justice Barak accepted the government's argument that in a situation of prolonged occupation, the MC was under the duty to provide for the changing needs of the Palestinian local population. He also accepted at face value the argument that the development of the road had indeed been carried out for the benefit of that population. Hence, he concluded that even though the infrastructural changes would result in permanent changes which are likely to outlast the end of the occupation itself, they were not

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[221] *Iskan* Judgment, *supra* note 165 at para 5. The Interchange would connect between two highways which would be built in the West Bank: the first is the Ben Shemen Atarot road, part of which runs through Israel, while the other part runs through the West Bank. The second is road 4, connecting the West Bank cities of Ramallah and Bethlehem with Jerusalem. *Ibid* at para 3. Here it is worth mentioning, that the same road became the subject of another petition years later in the *Abu Safiyeh* Judgment, *supra* note 151. For a discussion of this latter judgment, see section 6.3.1 of this chapter.

[222] According to petitioners the authority of the military government must therefore remain restricted to the maintenance and routine administration of the existing, infrastructure and is prohibited from making far reaching changes through the implementation of this road system. See *Iskan* Judgment, *ibid* at para 8.

[223] *Ibid* at para 16.

[224] *Ibid* at para 22.

[225] *Ibid* at para 22.

[226] *Ibid* at para 26.

illegal. In justifying his decision, he stated that this was the case because the proposed changes to be brought about fulfilled two criteria (i) "they are reasonably required for the needs of the local population"[227] and (ii) they did not "bring about a substantive change in the fundamental institutions of the Area."[228] The Court subsequently upheld the requisition order and dismissed the petition.[229]

In the more recent *Naale Association* judgment,[230] the Court examined a petition filed by Israelis from the settlements of Naale and Nili, which challenged the legality of the CA's decision to allow an Israeli company to build and operate a nearby quarry.[231] Petitioners maintained that under article 55 of the Hague Regulations, the occupying power was prohibited from utilizing local resources of the occupied territory for its own benefit. As a result, the decision to build a quarry, they argued, was also not consistent with the limited authorization of the MC under the international customary law (to administer and generate fruit).[232]

The justices disagreed. In their opinion, the prolonged nature of the Israeli occupation entitles the MC to effect changes of a long-term nature. In addressing the legality of the action under the Hague Regulations, the justices explained that that these regulations were:

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[227] *Ibid* at para 27.

[228] *Ibid* at para 27.

[229] In reaching this decision, the Court underlined that compensation must be paid and the right to a fair hearing must be granted (prior to expropriation), in line with the requirements of Israeli administrative law. *Ibid* at paras 31 and 37. However, as mentioned in Chapter I, the appeals process is before a military appeals committee which in the absolute majority of cases has upheld the MC's decision to expropriate a given a parcel of land for security reasons.

[230] (HCJ 9717/03) [2004] *Naale-Association for Settlement in Samaria of Employees of the Israel Aerospace Industries et al v, the Civil Administration for Judea and Samaria et al*, unofficial English translation: *Hamoked* <http://www.hamoked.org/items/112080_eng.pdf> [*Naale Association* Judgment]. The petition was dismissed by the Court.

[231] The settlers contended that the decision to establish quarry would undermine the quality of their life, because of noise and pollution that would result from its operation. After initially rejecting the plan, the Mining and Excavation Committee decided to approve the plan. When the decision was contested by the petitioners, the Contestations Committee decided to dismiss these objections whilst imposing various limitations and determining specific conditions regarding the operation of the quarry. *Ibid* at paras 1-3 and 7.

[232] As the Court explains, "[t]his Regulation determines that the state which controls another area, from a military aspect, may administrate and generate fruit from (administrator and usufruct) public buildings, real estate, forests and agricultural works." *Ibid* at para 6.

> Developed against the background of various wars which led to the belligerent occupation lasting a relatively short period of time [...] there appears to be a justification to acknowledging that the occupying state [during a long-term occupation] is entitled to make moves which can have a long-term effect on the area which is under belligerent occupation.[233]

The petition was, therefore dismissed.[234]

Having outlined the Court's reasoning as to the extent to which the MC is responsible for securing a wide variety of elements that are connected to the development of the occupied territory in order to ensure the welfare of the 'local population', the next section looks at the important question of who – in the eyes of the Court – is part of the notion of 'local population' whose interests the MC must take into consideration.

4.2.2. On the Notion of the 'Local Population'

4.2.2.1. The Israeli Settler Population: Do They Constitute a Legitimate Part of the 'Local Population'?

In examining this element, the *Electric Corporation* judgment provides an important insight into the Court's interpretation of the notion of 'local population'. In an effort to determine the extent of the duty of the MC to provide for the welfare of that population, the Court held that the Israeli residents of the settlement of Kiryat Arba also constituted part of the 'local population' in the occupied territory and that, therefore, the MC was obliged to provide them with a regular supply of electricity.[235]

In the aforementioned *Na'ale Association* judgment, the Court admitted initially that excavation acts cannot be included within the scope of the MC's prerogatives under customary international, because of their tendency to deplete natural resources of the occupied territory. Nevertheless, it then concluded that since the material extracted from the quarries would go

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[233] *Ibid* at para 6. Nevertheless, the petition was dismissed by the Court because the justices concluded they were sufficiently re-assured by reviews that had authorized the quarry, that the quality of life of the settlers will not be significantly affected. The justices also underscored that in case, "the Court does not act as a supreme planner." *Ibid* at paras 7 and 8.

[234] *Ibid* at para 8.

[235] David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15 at 223.

towards construction works in the West Bank settlements and since Israeli settlers are part of the 'local population', the MCs decision meets the test of benefiting the 'local population' and does not violate article 55 of the Hague Regulations.

However, to what extent must the interests of the 'local population' feature as the primary consideration spearheading the implementation of a given measure for it to be lawful under international law? This point is addressed in the next section.

4.2.2.2. The Welfare and Interests of the 'Local Population': Must they be a Primary Consideration?

An analysis of earlier landmark judgments indicate that the Court has generally upheld the decision of the MC to implement measures that might be driven by non-security objectives (such as servicing its own nationals) provided that the dominant factor guiding the measure, was the security or welfare of the 'local population'.[236]

Again in the *Abu Aita* judgment, the Court appears to sanction the efforts of government authorities to create (at the time) a common market consisting of the economies of both Israel and the oPt, noting in this regard that "to separate them […] would impede the possibility of return to orderly life and prevent the effective observance of the duty regarding the assurance of 'la vie publique'.[237] The justices also accepted the claim advanced by government authorities that uncoupling those two economies would be detrimental first and foremost to the Palestinian local population.[238]

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[236] *Christian Society* Judgment-Summary, *supra* note 193 at 355. This test was recognized explicitly in the *Elon Moreh* Judgment, where the HCJ used the test to determine that the claimed interest of government authorities (security) had been secondary to the main and illegal interest (of a political nature) and that, therefore, the land requisition for the purpose of constructing the settlement was not legal. See "Expert Legal Opinion (HCJ 2164/09) [2011] Yesh Din Volunteers for Human Rights v. Commander of IDF Forces in Judea and Samaria (December 26, 2011)" at para 43, online: *Yesh Din* <http://yesh-din.org/userfiles/file/%D7%97%D7%95%D7%95%D7%AA%20%D7%93%D7%A2%D7%AA/QuarriesExpertOpinionEnglish.pdf> [last accessed 29 November 2015] [Quarry case- Expert Legal Opinion]. See also *Elon Moreh* Judgment, *supra* note 123 at 18, 21, 22 and 33.

[237] *Abu Aita* Judgment, *supra* note 199 at 143.

[238] Hence "[h]aving seen that a value added tax must be introduced in Israel, the wheel could not have been turned back without affecting the proper fulfillment of the duties deriving from Article 43." *Ibid* at 143.

Once again, the justices suggested that one relevant criterion which would guide their determination of whether genuine considerations for the welfare of the civilian population had spearheaded the proposed amendments to local laws is whether or not authorities would have implemented the measure in Israel proper out of a similar concern for the welfare of its own population.[239] However, the Court's approach was criticized for sidelining how beneficial the integration was first and foremost to the Israeli economy and Israeli citizens, but not necessarily as beneficial for the occupied Palestinian population.[240]

In a second case, the petitioners argued that the road which Israeli authorities had sought to build, mainly served the transportation needs of the Israelis going to and from Israeli cities to the West Bank and that, therefore, it had "nothing to do with the benefit of the Area."[241] Government authorities, for their part, remained adamant that "the benefit of the [Palestinian local] population stands at the center of this plan,"[242] thereby rendering the relevant land requisition order lawful.[243] At the same time, the respondents did not refute the fact that:

> This plan is connected to planning inside Israel; it takes it into consideration and forms a joint project for Israel and the Area. It [the plan] *will serve not only the residents of the Area but also residents of Israel and the traffic between Judea and Samaria and Israel* [emphasis added].[244]

Therefore, despite strong indications by the respondents regarding some of the considerations

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[239] In other words, the litmus test would be to establish "whether the military government is filled with the same concern in regard to its *own people* and applies the same measures taken in the area of military government in its own area." *Ibid* at 136. See also *Abu Aita* Judgment-Summary, *supra* note 204 at 357. This test was proposed by Professor Dinstein. See Yoram Dinstein, *The International Law of Belligerent Occupation*, *supra* note 33 at 121.

[240] The oPt was an important source of cheap labor and a sizeable market for Israel's consumer goods. According to Benvenisti, if economic integration is really necessary to maintain "public order and civil life', then national institutions should have under the law of belligerent occupation given serious consideration to the interests of the area's inhabitants, which was very unlikely. Furthermore, the economic integration, he argued, is likely to create unwarranted incentives for the occupant to carry on with the occupation. Effectively, the approach thus legitimized the notion that 'economic unification' came to mean 'economic annexation'. He suggests that integration if at all justifiable should only last as long as the economic situation in the occupied territory is severe and the separation is unlikely to improve the situation; it should not be allowed to last for the duration of the occupation. See Eyal Benvenisti, *The International Law of Occupation*, *supra* note 8 at 142-144.

[241] *Iskan* Judgment, *supra* note 165 at para 7.

[242] *Ibid* at para 5.

[243] *Ibid* at para 6.

[244] *Ibid* at para 8.

driving the construction of the road,[245] Justice Barak (writing the opinion) accepted the assertion that the civilian needs of the Palestinian local population did indeed constitute the dominant consideration guiding the decision of the authorities to build the road.[246] This is true even though the action being challenged, admittedly also served Israeli nationals.[247]

The same approach was adopted by the HCJ in a third case; *Beit Iksa Council*. Having initially decided to reject the petition,[248] the Court finally decided to embark on a determination of whether or not the petition could be examined on the merits.[249] Addressing in first place the petitioners' argument that by connecting Tel-Aviv and Jerusalem, the construction of the railway amounted to an illegal action under international law,[250] the justices emphasized correctly that "the military government may not implement a road system in an area held under belligerent occupation, if the purpose of this planning and implementation are simply to constitute a 'service road' *for its own state* [emphasis added]."[251] Should it be the case, the Court further explained, this would mean that expropriating land for the purpose of a project "that would serve only residents of a country who do not live in the territory under belligerent

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[245] In this regard, the Court explained that "[a]lthough the development of the Area for the benefit of the population therein stands at the centre of his plan, the respondents do not ignore the fact that this plan is connected to planning inside Israel, it takes it into consideration and forms a joint project for Israel and the Area. *It will serve not only the residents of the Area, but also residents of Israel and the traffic between Judea and Samaria and Israel* [emphasis added]." *Ibid* at para 5.

[246] *Ibid* at paras 9 and 14-16. Thus, as Kretzmer points out, in the *Iskan* case, rather than adopting a narrow interpretation of the concept of 'military needs', the Court chose to embrace the wider approach it had initially upheld in the (HCJ 606/78) *Ayub* judgment of the 1970s, namely that the security interests of the occupying power and that of its citizens, are a legitimate military need, reflects more accurately the approach of the court. See David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15. See also *Ayub* Judgment-Summary, *supra* note 121.

[247] David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *ibid*.

[248] This was because of 'undue delay' in submitting it. According to the Court, the petitioners' failure to file the petition in a timely fashion amounted to a subjective and objective delay. *Ibid* at paras 13 -15 and 22.

[249] In this regard, the Court wanted to establish whether in the event of a decision to nullify the measure, any benefit could be secured for the rule of law (RoL) in a manner that exceeds the harm caused to the various parties and the public interest and which, therefore, could justify that it conducts a review of the merits despite the delay in submitting the petition. *Beit Iksa* Judgment, *supra* note 148 at para 24.

[250] According to the petitioners, this is because the railway construction is not driven by a lawful consideration such as a military/security needs or the needs of the Palestinian local population. In this regard, they also pointed out the absence of any stations for the railway in the West Bank as proof that it is not meant to serve their needs as the respondents had claimed. *Ibid* at para 27.

[251] *Iskan* Judgment, *supra* note 165 at para 13 cited by the HCJ in *ibid* at para 26.

occupation contravenes international law and as such exceeds the competency of the military commander."[252]

In addressing whether a measure can be considered lawful in a situation where the beneficiaries are not only the Palestinian local population but also Israeli nationals traveling through the West Bank, the justices chose not to articulate a clear position on whether it would be imperative for the interests of the former (i.e. the Palestinians) to constitute the primary consideration. Instead, the justices argued that it is not entirely clear whether "land expropriation in the Judea and Samaria Area for a purpose that serves *both protected persons and Israelis living inside the Green Line* [emphasis added] [can] be considered as ensuring the needs of the population in the territory held under belligerent occupation?."[253] In reaching this conclusion, they pointed out that the government authorities had committed themselves to ensuring that West Bank Palestinian residents would benefit from the overall project and that future plans would link the West Bank to the railway infrastructure inside Israel.[254] Finally, the justices declined to rule on the merits of the petition,[255] thereby forfeiting an important opportunity to provide legal accuracy on this matter.

The fourth case relevant to our discussion is the HCJ's *Quarries* judgment.[256] This concerned a petition filed by the Israeli human rights NGO *Yesh Din* against the government and ten Israeli quarries operating in the West Bank.[257] Here, most of the quarried material been transported into Israel proper. Moreover, the CA had been collecting significant payments

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[252] *Beit Iksa* Judgment, *supra* note 148 at para 27.

[253] *Ibid* at para 27. See also David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15.

[254] *Beit Iksa* Judgment, *supra* note 148 at paras 29-32.

[255] Hence the Court concludes that since "the extent of this harm does not exceed the harm that would be caused to the interests of the railway, third parties and the public interest in a manner that would justify hearing the petition despite its late submission," it would not be necessary to analyze whether or not international law has been breached. *Ibid* at paras 27, 28 and 32.

[256] *Quarry* Judgment, *supra* note 16.

[257] Established in the mid-1970s on 'state land' (in Area C of the West Bank) that had been allocated by the CA, an estimated 94 % of the production of the active private Israeli quarries operating in that area had been transported within the border of Israel proper. See Quarry Case-Government Response 2010, *supra* note 74

(which include leasing fees and royalties) from the quarries' operation.[258] Petitioners argued that article 55 of the Hague Regulations must be interpreted to mean that the occupant must manage and yield fruit from them for the benefit of the 'protected persons',[259] except when their exhaustion or damaging use is required for security reasons.[260] According to the petitioners, even if one contends that during a prolonged occupation the occupying power was entitled to instigate wider changes, or that it was entitled to mine resources in that territory in a way that causes damage to the capital,[261] such changes cannot be made "to benefit the occupying power or any other body that is not the occupied people."[262] Therefore, and since the mining is yielding products which almost exclusively serve the population of the occupant and its economic needs, the measure is illegal under international law.[263]

The respondents acknowledged that most of the quarried material from the Israeli-operated quarries in the West Bank was being transferred into Israel proper, offering the commitment to freezing the establishment of any new quarries that would produce quarrying material for the sale thereof inside/to Israel proper.[264] In addition, they underscored that some of the quarried

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[258] The total amount of royalties paid in 2009 for the exploitation of the quarries by Israeli entities stood at approximately 25 million NIS [New Israeli Shekels]. See *Quarry* Judgment, *supra* note 16 at para 1. See also Quarry case -Government Response 2010, *ibid* at para 17.

[259] See Article 55 of the Hague Regulations *supra* note 12 cited in the *Quarry's* Judgment, *ibid* at para 3.

[260] *Quarry* Case, Petition, *supra* note 27 at paras 46, 48, 53, 54, 56.

[261] In this regard, the petitioners acknowledged that there exist more lenient interpretations, certainly in the context of long-term occupation, which allows for a legal limited use of natural resources in the occupied territory as a way of addressing the gap between the permission to use the fruit of public property on the one hand, and the ban on the exploitation of non-renewable ones, on the other hand. It therefore cited the writings of some scholars who have called for the adherence to a principle *of continuity*, whereby the occupier is allowed to exploit the mineral resources at the same pace that had existed before the beginning of the occupation. However, that use must still respect the rules of occupation: observing the administrative trust and adhering to the usufructuary rules. *Ibid* at para 70. See also Quarry case- Government Response 2010, *supra* note 74 at para 4. It therefore follows that the production of new minerals is prohibited. See *Quarry* Judgment, *supra* note 16 at para 8.

[262] Quarry case- Petition *supra* note 27 at para 92.

[263] *Ibid* at paras 44, 65 and 75. See also *Quarry* Judgment, *supra* note 16 at paras 1-.3.

[264] (HCJ 2164/09) *Yesh Din v. Commander of IDF Forces in Judea and Samaria et al* -State Response (30 September 2009), at para 9, unofficial English translation online: *Yesh Din* <http://yesh-din.org/userfiles/file/Petitions/Quarries/Quarries%20-%20State%20response,%20Sept_%202009%20ENG.pdf> [last accessed 29 November 2015] [Quarry Judgment - Government Response 2009]. See also *Yesh Din*, "Legality of Quarry Activity in the West Bank" (9 March, 2009), online: *Yesh Din* <http://yesh-din.org/infoitem.asp?infocatid=15> [last accessed 29 November 2015]. They also argued that the petition should be rejected for substantial delay and also because the Oslo Accords foresaw the continuation of the Israeli quarrying activities during the interim period. See the

material had in any case been allocated for use inside the occupied territory, (including for the use by Israeli settlements). On the merits, the respondent also argued that given the prolonged nature of the occupation, it was necessary to adjust the interpretation of article 43 of the Hague Regulations to fit the unique circumstances of Israel-West Bank.[265] Hence, they advocated that in order to prevent the stagnation of the economy of the occupied territory, a broader interpretation of this article was needed: one that would allow the occupying power to exploit new minerals in an occupied territory as long as it did not exhaust the capital in question.[266] Moreover both the government and the Israeli quarries (joining the petition) sought to emphasize that the activities were contributing to the economic development and modernization of the West Bank and served as a source of livelihood for the Palestinians employed therein.[267]

After contemplating the possibility of rejecting the petition on preliminary grounds,[268] the Court finally decided to tackle it on the merits.[269] Addressing the relevance of article 55 of the Hague Regulations, Chief Justice Beinisch (writing the opinion) stressed that the administration of public property by the occupant cannot result in the depletion or the exhaustion of the exploited natural resource. At the same time, as long as the resource was not being exhausted by the quarrying, the use of that resource by the occupying power remains lawful even if that usage took place outside the boundaries of the occupied territory.[270] Moreover, while the Court did acknowledge that it is debatable whether it is permissible for

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Quarry case- Government Response 2010, *supra* note 74 at paras 20-23, and *Quarry* Judgment*, supra* note 16 at para 4.

[265] *Quarry* Judgment, *ibid* at paras 4, 8 and 9.

[266] Quarry case- Government Response 2010, *supra* note 74 at paras 41-43, 52-54.

[267] This confirms that their activities contributed to the benefit of the 'local population' and their needs. See *Quarry* case- Government Response 2010, *ibid* at paras 5, 54 and55.

[268] The Court cited a few elements. They include: that the petition is too general in nature; that it did not include any concrete claims of injury; that there was significant delay in submitting the petition; that it had compromised the interests of third parties, most notably the Israeli quarrying companies; and that the quarries' issue is political in nature given that it will be determined by Israelis and Palestinians in the course of "future negotiations over a final agreement." *Quarry Judgment, supra* note 16 at para 6. See also David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15.

[269] Although the Court had stated that there was no need to examine the petition on the merits, it decided to dive into the legal analysis and examination of the arguments. "So finally the case was not exactly deemed to be not justiciable due to the political nature." Written response by Israeli Attorney A03-B to Questionnaire by author via Avichay Sharon (10 July 2014) at 2, [Attorney *A 03-B* Written Submission].

[270] *Quarry* Judgment, *supra* note 16 at paras 7 and 8.

the occupant to undertake quarrying activities of new sources (i.e. of quarries that had not existed before to the beginning of the occupation), the exploitation of the resource did not amount to a depletion of the mine. Given that government authorities had committed themselves to refraining from establishing new quarries, the Court concluded that the interpretation of article 55 of the Hague Regulations by the respondents was reasonable.[271]

More significantly for our discussion here, the Court consolidated its earlier interpretations, namely that the MC may enjoy a considerably wider scope of authority to enact measures for the alleged benefit of the 'local population' during a situation of prolonged occupation. Thus the justices implied that even if the benefit accruing to the 'protected persons' is a side effect of a given measure implemented by the MC rather than the direct aim, this does not detract from the lawfulness of the measure.[272] To support this conclusion, three elements were highlighted: (1) that some of the quarried stone was used by the 'local population', a notion, which legitimately also included the Israeli settlers; (2) that the quarries provided employment opportunities to a significant number of Palestinians; and (3) that royalties paid to the CA by the operators of the quarry were being used to finance the administration and projects of the Israeli military authorities in the West Bank for the benefit of the Palestinians.

After reiterating that the responsibilities of the MC under article 43 of the Hague Regulations must be interpreted more broadly in a situation of long-term occupation,[273] the Court concluded that the measure was indeed in "the best interests of the Area [...]" [274] and dismissed the petition.[275]

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[271] *Ibid* at paras 11 and 12.

[272] David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15.

[273] This is in order to ensure the normal life, economic growth, and development of the occupied area. Here the Court cited previous case law, most notably the *Iskan* Judgment, *supra* note 165. *Quarry* Judgment, *supra* note 16 at para 10.

[274] The Court pointed out that this was especially the case, "in light of the common economic interests of both the Israeli and Palestinian parties and the prolonged period of occupation." *Quarry* Judgment, *ibid* at para 13.

[275] On 10 January 2012, *Yesh Din* submitted a request to the Court to hold a further hearing with a broader panel of judges, arguing that the judgment was both erroneous and dangerous and likely to implicate Israel in the commission of grave violations of the provisions of IHL applicable to the occupied territories. See *Yesh Din*, "Legality of Quarry Activity in the West Bank," *supra* note 264. The HCJ dismissed the request of the NGO to re-open the case on procedural ground. Since the petition had been rejected outright, there was no need to re-examine the ruling. However, it also noted that "nothing prevents future petitioners from raising these

4.2.2.3. Concluding Observations

On one hand, the Court can be commended for spelling out in theory, that the MC cannot be guided by national, economic or social interests of his own country when introducing changes that are lawful under article 43 of the Hague Regulations. On the other hand, the Court's approach in these judgments must be criticized because it considerably relaxed the limitations placed on the MC's authority under customary international law.[276] In first place, this is because the Court adopted an approach of not questioning more rigorously whether the dominant factor guiding the implementation of a certain measure was indeed the interests of the Palestinian population. This approach, it is contended here, allowed illegal considerations (most notably in the form of the economic interests of the occupying power) to filter into the decision to implement this activity, without much judicial scrutiny.[277] It also permitted the MC to take into account the interests of third parties (such as the quarrying companies in the *Quarry* case), even though their interests are a completely irrelevant consideration under the law of occupation.[278] Consequently, the test has been completely watered down.

A second element characterizing the Court's approach is that Israeli settlers are deemed part and parcel of the 'local population', whose interests (in addition to their security) the MC is entitled to take into consideration under article 43 of the Hague Regulations. This is the situation even though "the Israeli settlers are not mentioned directly or indirectly as

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arguments again in the future, especially in the case of a petition against opening a new quarry." Written response by Attorney *A 0*3-*B*-Written Submission, *supra* note 269.

[276] Eyal Benvenisti, "Water Conflicts during the Occupation of Iraq," *supra* note 28.

[277] Even though several factors had indicated that at best, the interests of the Palestinian local population are subordinate to the interests of Israel.

[278] Legal experts criticizing the judgment have pointed out that the Court accepted that the royalties be used by the CA for the benefit of the local population, even though those 25 million which government authorities declared that they would transfer to the CA is only part of an estimated benefit of about 90 million, thereby underscoring that the larger part of the royalties has still been allocated towards the interests of the occupying power outside the occupied territory. Even in the case of the royalties paid to the CA, they pointed out that there were no guarantees that they would be used only to fund projects for the benefit of the Palestinian population, as opposed to the mere operation of the CA. See *Quarry* -Expert Legal Opinion, *supra* note 236 at para 36-45. According to Kretzmer, "[t]he Court's approach smacks of a colonial approach, under which the activities of the colonial power are claimed to bring benefit to the colonized peoples" and that, even if one were to accept the argument that the opening of new quarries would contribute to the local economy, there is no reason why the MC allowed Israeli and not local Palestinian quarries to operate them. See David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15 at 222.

beneficiaries of the occupation by article 43 of the Hague Regulations."[279] Such an interpretation, it is contended here, has diluted the special weight or priority that the MC must grant to the rights of the 'protected persons' (the Palestinians).[280] It has also undermined the very rationale guiding this provision and "which was meant to protect the interests of the community of occupied civilians."[281]

Thirdly, this approach has considerably widened the scope of the MC's authority under article 43 of the Hague Regulations to implement significant changes in the occupied West Bank, all in the name of promoting the welfare, rights and security of the Israeli settler population. In addition to amending existing local laws for purposes beyond what is permissible under the law of belligerent occupation (for immediate security needs and/or the welfare of the 'protected persons'),[282] the Court's approach leaves the door wide open for national laws of the occupying power to be duplicated in the occupied territory in a manner that results in the "assimilation of the legal landscape of the two regions."[283]

To appreciate just how profound and permanent these changes have been which has undermined the second normative principle the following section provides an overview of a number of these policies.

5. 'Separate and Unequal' Population Groups: The Case of Israeli Settlers and Palestinians in the West Bank[284]

5.1. Privileged Access to Resources and Infrastructure

Over the years, Israeli government authorities have sought to consolidate an advantaged access of the Israeli settler population to the natural resources of the West Bank, particularly in

[279] Quarry Case-Legal Expert Opinion, *ibid* at para 33.

[280] David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15.

[281] Quarry case-Petition, *supra* note 27 at para 99.

[282] See section 6 of this chapter.

[283] Eyal Benvenisti, *The International Law of Occupation*, *supra* note 8 at 16.

[284] The term 'separate and unequal' has been borrowed from the title of the report by Human Rights Watch (HRW), "Separate and Unequal," *supra* note 82.

regard to water use;[285] allocation of 'state land',[286] and the use of the physical infrastructure (including road networks).[287] While it remains difficult to provide an accurate estimate for the overall budget allocated by the Israeli government towards the construction and expansion of settlements,[288] the HCJ has in its judgments acknowledged that this government support is indeed extensive.[289]

The next sub-section describes the first measure of declaring and allocating 'state land'.

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[285] The Palestinian Authority has been compelled to lend its formal approval to the large-scale expansion of Israeli settlement water infrastructures. See Jan Selby, "Cooperation, Domination and Colonisation: The Israeli-Palestinian Joint Water Committee," (2013) 6:1 Water Alternatives 1 at 40, online: Sussex Research Online <http://sro.sussex.ac.uk/12318/1/Art6-1-1.pdf>. Water consumption dips to 20 liters/capita/day in most Palestinian herding communities in the Jordan Valley. This stands in stark contrast to the recommendation by the World Health Organization (WHO) of 100 liters/capita/day, not to mention the average settlement consumption of 300 liters/capita/day. See UN OCHA-oPt, "Humanitarian Fact Sheet on the Jordan Valley and the Dead Sea," (February 2012), online: OCHA-oPt. <http://www.ochaopt.org/documents/ocha_opt_jordan_valley_factsheet_february_2012_english.pdf>. The unequal allocation of water enjoyed by Israeli settlers and Palestinians was also documented by various UN committees and fact-finding missions. See for example UN Fact-Finding Mission on Settlements Report 2013, *supra* note 82 at paras 80-88.

[286] While the term 'state land' traditionally means that it belongs to the general public, in the West Bank 'state land' has been effectively allocated for the most part for the construction and expansion of settlements and the benefit and interests of the Israeli settler population.

[287] See David Kretzmer, *Occupation of Justice*, *supra* note 65. See also *B'Tselem*, "Access Denied," *supra* note 94 .

[288] Hagit Ofran and Noa Galili, "West Bank Settlements-Facts and Figures" (June 2009), online: *Peace Now* <http://peacenow.org.il/eng/node/297>.

[289] In one decision, as a way of countering the argument by settlers that the decision to freeze construction of settlements during the 1990s amounted to a discriminatory act against them, the Court underscored that over the years government authorities had provided generous advantages and aid to Israeli settlements in the West Bank. It also noted that according to the Israeli Ministry of Housing, during the past several years, hundreds of millions of shekels have been invested in the planning of infrastructure in settlements. In the Court's opinion this cannot lead one to conclude that there is a policy of discrimination against the settlers. See (HCJ 4400/92) [1992] *Kiryat Arba Local Council v. Yitzhack Rabin,* at 6, unofficial English translation by Avichay Sharon (September 2013) on file with author [*Kiryat Arba Local Council* Judgment].

5.2. The Allocation of Land in the West Bank declared as 'State Land'[290]

Following the *Elon Moreh* ruling, government authorities sought to develop a legal formula that would preclude further successful challenges to settlement related land seizures. They built up a strategy based on two pillars.[291]

The first pillar is Israel's ingenious interpretation of the *Ottoman Land Code 1850* (revised and amended by British and Jordanian laws) [thereafter *Ottoman Land Code*].[292] Here, it must be pointed out that the HCJ's *Elon Moreh* decision had distinguished between privately owned land and public land for the purpose of constructing settlements. At the time, no representative body existed in the West Bank that could claim standing to sue in Israeli domestic courts for lands that were seized illegally from the public or government domain (in alleged violation of article 55 of the Hague Convention). Hence, the only seizure that could be prevented through recourse to the HCJ was that of privately owned land. Bearing those two points in mind, Israeli authorities devised a strategy that would help establish more clearly the distinction between land that is privately owned and land that is publicly owned.[293]

According to the land classifications stipulated by the *Ottoman Land Code*, most land in the West Bank constituted of *miri* land. In other words, it belonged to the ruling power, unless a private claim to the land arises. According to this *Code*, if a farmer proves uninterrupted cultivation of a parcel of *miri* land for ten consecutive years, without objection from any parties, he would be given the right to this land. Otherwise, the possession reverts back to the

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[290] The term has been used to refer to two distinct categories: land which belonged to the Jordanian government prior to 1967, and which was transferred to the Israeli authorities after 1967 ['Registered State Land']; and land which Israel has classified as 'state land,' even though it did not enjoy that status under Jordanian rule. It is the second category that will be referred to. See *B'Tselem*, "Under the Guise of Legality: Israel's Declaration of State Land in the West Bank," Report (February, 2012), online: *B'Tselem* <http://www.btselem.org/download/201203_under_the_guise_of_legality_eng.pdf>.

[291] The strategy relied on administrative adaptations, as opposed to concrete legislative actions. Ian Lustick, "Israel and the West Bank after Elon Moreh: The Mechanics of De Facto Annexation" (autumn 1981) 35:4 Middle E J 557.

[292] This Code has allowed the Ottoman Sultan to confiscate land that had not been recognized as privately owned, which was neither planted nor cultivated for several years in a row. See *B'Tselem*, "Under the Guise of Legality," *supra* note 290. See also Capucine Vallon "Droit international et colonisation israélienne" Institute de Relations Internationales et Stratégiques (11 February 2015).

[293] Ian Lustick, "Israel and the West Bank," *supra* note 291.

government.[294] Thus where Palestinian farmers could not prove registered ownership, the parcel of land was seized by Israeli government authorities and subsequently declared as 'state land'.[295] These lands were then placed under the control of the *Custodian for Government and Absentee Property*.[296]

Furthermore, through the promulgation of a MO in the 1960s, Israeli military authorities ended the process of land registration.[297] This in turn made it extremely difficult at the time, for Palestinian landowners to register their landownership, in spite of documents or other proof of ownership they might have had.[298]

Government authorities also established military appeals committees to hear appeals against the 'state land' declaration order.[299] However, in the majority of cases, these committees displayed a built-in bias towards the aforementioned Custodian.[300] This effectively reduced to a minimum any chance that the Palestinian landowners may have to reverse a 'state land'

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[294] This is according to articles 20 and 78. See Quamar Mishriqi-Assad, "Legal Recourse Based in Local Law for Palestinians in the West Bank against Settler Takeover of Private Palestinian Land" (Appendix II) in Dror Etkes "Israeli Settler Agriculture as a Means of Land Takeover in the West Bank," Report, (August 2013) at 106, online: *Rabbis for Human Rights* (RHR) <http://rhr.org.il/heb/wp-content/uploads/Kerem-Navot.pdf>.

[295] Quamar Mishriqi-Assad, "Legal Recourse Based in Local Law," *ibid*.

[296] The Custodian's office was created by virtue of MOs issued in June 1967, entitled *Order concerning Abandoned Property of Private Individuals No. 58-1967* and *Order concerning Government Property No. 59-1967*. See Ian Lustick, "Israel and the West Bank," *supra* note 291.

[297] For example, in 1969, by way of *Order Regarding the Regulation of Land and Water (Judea and Samaria) (No. 291), 5729-1968*, Israel ended the process of registering land, claiming this was necessary for protecting the rights of landowners of land parcels that had been abandoned, against any efforts by fellow Palestinians trying to register ownership of that land in their absence *Peace Now*, "Breaking the Law in the West Bank," *supra* note 120. *B'Tselem*, "Land Grab," *supra* note 120. However as Kretzmer underlines, "[i]t requires a fair degree of naiveté to believe, however, that the sole or even dominant purpose of the authorities […] was to protect public land for the benefit of the local population." David Kretzmer, *The Occupation of Justice*, *supra* note 65 at 93.

[298] See Hagit Ofran and Lara Friedman, "At Least 70 Outposts are located on Private Palestinian Land," (2 March, 2011), online: *Peace Now* <http://peacenow.org.il/eng/content/least-70-outposts-are-located-private-palestinian-land>. At the same time, it was decided that the MO would not apply to the registration of 'state land' in the name of Israel's *Custodian for Government Property*. See *B'Tselem,* "Land Grab," *ibid.* See also *Peace Now*, "Breaking the Law in the West Bank," *ibid*.

[299] This committee consists of three members, at least one of which has to be a lawyer. See Ibrahim Matar, "Exploitation of Land and Water Resources for Jewish Colonies in the Occupied Territories" in Emma Playfair, ed, *International Law and the Administration of Occupied Territory* (Oxford: Clarendon Press, 1992) 443.

[300] *B'Tselem*, "Under the Guise of Legality," *supra* note 290 at 6.

declaration.[301] Thus even if the creation of these committees may in theory provide Palestinians with an appeals process that satisfies the formal aspects of RoL, in the sense that it provides affected individuals with an opportunity to appeal the measure harming their interest, such a process has not succeeded in meeting the RoL's more substantive aspects.[302]

Several factors support this conclusion: along with the high burden of proof and the many requirements that needed to be fulfilled for filing an appeal.[303] Palestinian owners of land often find themselves unable to challenge the 'state land' declaration successfully at the judicial level,[304] including in front of the HCJ.[305] In this regard, it must also be recalled that the HCJ's *Elon Moreh* case had not dealt with land ownership issues.[306] Furthermore, the Court has consistently refused to get involved in disputes over issues of land ownership determination by the appeals committees, even where petitioners had challenged the legality

[301] This can be explained by the fact that the decisions of the appeals committee serve only as 'recommendation', with the final decision of whether to accept an appeal resting with the Regional MC who is entitled to accept or reject this recommendation, "without any public criteria being established for his decision." See *B'Tselem,* "Land Grab," *supra* note 120 at 58. According to one lawyer, it costs about 200 NIS to submit an appeal. Written response from Attorney Quamar Mishriqi (13 September 2015) on file with author [*Misriqi* Written Response September 2015.

[302] *Shehadeh* Interview, *supra* note 86.

[303] Palestinians have only 45 days to submit an appeal from the date of the land seizure order and to commission a cadastral survey of the land. They often learn about the decision to declare the land as 'state land' only much later and still have to afford court fees, lawyer related expenses and other costs for submitting precise land maps, which many cannot afford. See *B'Tselem*, "Land Grab," *supra* note 120. Submitting an appeal to the HCJ costs alone an estimated 2,000 NIS. However, as one lawyer explains, "it's not the main and only element since in land cases an expert opinion is essential also aerial photos and measure maps tens of thousands shekels [NIS]." *Misriqi* Written Response September 2015, *supra* note 301.

[304] Courts often treat land shown to be uncultivated at any point in time by government aerial photographs as if fallow for 3 years, thereby allowing authorities to declare it as 'state land'. Thus even if Palestinians have receipts for payment of land tax to Jordanian authorities and the CA for a given piece of land, according to Israeli jurisprudence, it has not been considered evidence of ownership for the purpose of an appeal against the government, and does not impair the government's rights to make such a declaration. See *B'Tselem,* "Land Grab," *ibid*.

[305] Thus, in instances where the Court had been petitioned in the past against a 'state land' declaration, it has ruled that "when a dispute arises over the question of whether a given parcel of land is public property or private property, the accepted rule is that the property should be considered public property until the question of ownership is finally decided." (HCJ 285/81) [1981] *Fadil Muhammad Al Nazar v. Commander of Judea and Samaria* (1983) 13, Isr YB Hum Rts 368 at 368-370 [*Al Nazar* Judgment]. The quote was cited in *B'Tselem*, "Under the Guise of Legality," *supra* note 290 at 58.

[306] Piet Van Nuffel, "The Story of the Israeli Settlements in the West Bank," *supra* note 84. In the *Elon Moreh* case, the Court reiterated that it was not prepared to intervene in disputes involving the status of land ownership. For a discussion of the case, see Raja Shehadeh, *Occupier's Law*, *supra* note 131 at 18-22.

of these appeals committees under international law in the first place.[307]

Thus, to date, the HCJ has maintained its traditional stance of not interfering in the factual findings and decisions of the *Custodian of Government Property* or of the military appeal committee, except if it can be proven that there is a serious defect in administrative procedures. This remained the case, even where petitioners had argued that a given 'state land' declaration violated article 55 of the Hague Regulations, relating to the lawful use of public land by the occupying power as an administrator and usufructuary.[308] The Court has also maintained that the burden of proving legal title or ownership through cultivation rest on the petitioner. The Court's position has meant that practically speaking "no further avenue of appeal for a West Bank resident who disputed the decision of the military government on matters of land ownership."[309] As a result, few petitions have been filed by Palestinians to challenge the legality of Israel's 'state land' declaration policy under international law.[310]

In the larger picture, this state of affairs has allowed government authorities, since 1967, to declare an estimated one million dunnams as 'state land.'[311] While an occupying power has

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[307] Petitioners had argued that the MO *Objections Committees (Judea and Samaria) (No. 172), 1968* introduced modifications in the local legal landscape of the occupied territory which exceeded the authority of the MC under article 43 of the Hague Regulations. However, the HCJ decided that the appeals committees are the competent authority to consider disputes regarding the classification of a given piece of land and that there is nothing in the MO establishing these committees which may be regarded as a violation of Article 43. *Al Nazar* Judgment, *supra* note 305 at 369-370.

[308] For example, this argument was made by a West Bank Palestinian who challenged the decision of the military appeals committee to declare land as 'state land' on the ground that it is 'miri' land that he had cultivated for ten consecutive years, a period which entitles him to own it. He also underscored that the real intention behind the 'state land' declaration was to facilitate the establishment of a new Israeli settlement (later known as Givon Hahadasha settlement). After confirming the position of the respondent that this was indeed 'state land', the Court dismissed the petition, ruling that "it does not appear from the language [of the text of article 55] what the standing of petitioner is in this matter and what right he has to raise doubts about the way of dealing with property, which, as we have said, is government and not private property." (HCJ 277/84) [1984] *Sabri Mahmud Araib v. Custodian of Abandoned and Government Property, Judea and Samaria et al* at 5, unofficial English translation by Avichay Sharon (March 2014) on file with author [*Araib* Judgment]. Quotation cited in David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel," *supra* note 15 at 214.

[309] Ian Lustick, "Israel and the West Bank," *supra* note 291 at 568.

[310] *B'Tselem*, "Under the Guise of Legality," *supra* note 290.

[311] In 1979, Israeli authorities launched a massive land survey to map out systematically all areas under cultivation, using aerial photographs taken periodically. This double investigation led to the location and marking of lands that the 'sovereign' was entitled to seize under the *Ottoman Land Code 1858*. See *B'Tselem*, "Land Grab," *supra* note 120. By 1985, more than 90 % of Israeli settlements in the oPt had been built on 'state land.' See David Kretzmer, *The Occupation of Justice*, *supra* note 65. By the time the Declaration of

the duty to proclaim and make known what land amounts to 'state land',[312] the policy of 'state land' declaration as implemented by Israeli authorities in the West Bank has been criticized by lawyers interviewed for this research on numerous grounds.

One primary criticism is that the policy's implementation has promoted an interpretation of the *Ottoman Land Code* in a manner that is detrimental to the Palestinians' right to private property.[313] A second one is that through the promulgation of MOs to amend existing local laws, Israeli authorities have violated the obligation to maintain local laws that were in effect in the occupied territory intact (unless the proposed amendments fulfilled the considerations provided for by article 43 of the Hague Regulations).[314] Thirdly, it has been argued that this policy has shifted the burden of proof from the government to the individuals objecting to the 'state land' declaration.[315] A fourth criticism is that most of the land declared as 'state land' has, over the years, been allocated to the exclusive use by Israeli settlers,[316] by including them within the jurisdiction of local and regional Israeli settlement councils.[317] This is the case because, even if one presumes that all the land in question has been lawfully declared by

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Principles was signed between Israel and the Palestinians in 1993, the former had classified between 50-70 % of the land in the West Bank as 'state land.' Geoffrey Aronson, *Settlements and the Israeli-Palestinian Negotiations: An Overview* (Washington D.C.: Institute for Palestine Studies, 1996) at 1.

[312] This is because under the Hague Regulations, the occupant has a duty to protect public property. Therefore, if the protection of public property is the purpose, then the declaration can serve a needed tool, and is a legal one. Interview with Attorney Michael Sfard by author (21 October 2014, Tel Aviv) via skype [*Sfard* Second Interview].

[313] *Ibid.* Shehadeh argues that the way in which the 'state land' policy was implemented amounted also to a violation of the local laws in effect at the time. *Shehadeh* Interview, *supra* note 86.

[314] *Ibid*.

[315] "In the case of Israel, they made a unilateral declaration that this is 'state land', and if anyone had claims let him prove otherwise... and of course the burden was very high." *Ibid.*

[316] Even if one presumed that all of the land in question has been lawfully declared as 'state land', *Sfard* Second Interview, *supra* note 312.

[317] To date, it is estimated that 42 % of the West Bank, mostly in Area C, are included within the jurisdiction of settlements. See also *B'Tselem*, "Acting the Landlord: Israel's Policy in Area C, the West Bank," Report (June 2013), online: *B'Tselem* <http://www.btselem.org/download/201306_area_c_report_eng.pdf>. In the majority of cases, the land is leased by the *Custodian for Absentee and Government Property* for 49 years to the Settlement Division of the WZO which in turn sub-leases the land to specific settlement associations. Sometimes land is also sub-leased to private persons. Written response by Former Head of Settlement Watch at *Peace Now* (Dror Etkes), via email (1 February 2015) at 1 [*Etkes* Written Submission].

government authorities as 'state land', its allocation must be carried out for the sake of serving the needs of the local occupied population.[318]

According to *Peace Now*, based on information provided by the CA, by 2006, an estimated 54 % of the land in the West Bank on which settlements have been built, constitutes of land that has been declared as 'state land'.[319] This undermines the possibility of "Palestinians making use of these lands, even in cases where they have not yet been allocated for any Israeli use."[320] Of the total area of 'state land' that has been allocated in Area C since 1967, only 0.7 % has been allocated to Palestinians. By contrast, 31 % of all such land has been allocated to entities which develop many Israeli settlements, including the World Zionist Organization (WZO).[321] In many instances, once the land had been seized; settlers would embark on cultivating the land and physically preventing Palestinians from reaching it[322] before subsequently applying to the CA to have it declared as 'state land'.[323]

Legally speaking, government authorities have also implemented several policies that helped create and maintain a dual legal system in the occupied West Bank, one that applies differently to Israeli settlers than to Palestinians living in the West Bank.

The next section describes some of these processes, which challenge the basic tenets of the law of belligerent occupation in two ways: Firstly, by applying exclusively to Israeli settlers, but not to Palestinians living in the same territory, Israeli authorities have privileged the rights and welfare of the nationals of the occupying power, to the detriment of the Palestinian local population. Secondly, by applying extensive sections of Israeli domestic law to Israelis living

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[318] *Sfard* Second Interview, *supra* note 312. See also *B'Tselem*, "Acting the Landlord," *ibid*. See also *Attorney A-03B*-Written Submission, *supra* note 269.

[319] See *Peace Now*, "Breaking the Law," *supra* note 120 at 15-17.

[320] See ACRI, "Allocation of State Land in the OPT," Information Sheet (15 May 2013) at 3, online: ACRI <http://www.acri.org.il/en/2013/04/23/info-sheet-state-land-opt/>.

[321] Another 8 % has been allocated to Israeli cellular phone companies and settlement municipal authorities, while 12 % has been dedicated to the use of Israeli government ministries and infrastructure companies. *Ibid*.

[322] Such was the situation in the *Morar* Judgment, *supra* note 87.

[323] Settlers would invoke the argument that because of their uninterrupted cultivation of the land, they could declare ownership of it, based on the *Ottoman Land Code 1858*. See Meron Rapoport, "Court Case Reveals How Settlers Illegally Grab West Bank Lands," *Haaretz* (17 March 2008). In this case it becomes 'Mahloul' land and the 'sovereign' may seize possession of it or transfer rights to another person. See *B'Tselem*, "Access Denied," *supra* note 94.

in the West Bank on a personal and extra-territorial basis, Israeli lawmakers have effectively allowed the settler population to be subject to a legal system that is similar, if not identical to the Israeli domestic legal system. This legal system prevails in the occupied territory in parallel to the Israeli military legal system to which Palestinians are subjected to. Similarly, the MC has also extended the application of Israeli civil laws and administrative laws to Israeli settlers through the promulgation of MOs that apply exclusively to Israeli settlements.[324]

5.3. Legal Processes

Two processes stand out as having consolidated the ability of Israeli settlers to enjoy a legal situation that is similar to the one in Israel proper, which applies differently to them than to Palestinians residents in the same territory. (1) The first is through the application of Israeli domestic law to the Israeli settler population by way of MOs. In principle, the military rule enforced by the MC and the laws legislated by him apply to the entire occupied West Bank and its residents. In practice however, Israeli military authorities have by means of MOs extended the application of Israeli civil and administrative laws to exclusively apply to Israeli settlers and settlements.[325] Prominent examples of such orders are those concerning the administration of local and regional settlement councils which have bestowed upon these councils a set of powers and responsibilities that are identical to those enjoyed by Israeli municipalities in Israel proper.[326] This has effectively created two types of communities in the West Bank: (a) Palestinian cities and villages subject to the local laws in effect in the occupied territory on the eve of the occupation (ex: Jordanian law) as amended by Israeli MO promulgated by the MC; and (b) Israeli local and regional settlement councils subject to Israeli law.[327]

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[324] ACRI, "One Rule, Two Legal Systems," *supra* note 82.

[325] *Ibid*.

[326] Eyal Benvenisti, *The International Law of Belligerent Occupation*, *supra* note 8. These MOs are *Order regarding Management of Regional Councils (No 783) (5739-1979)* and *Order regarding Management of Local Council (No. 892)* (5741-1981) [Regional Councils Regulations] cited in *B'Tselem*, "Land Grab," *supra* note 120 and in ACRI, "One Rule, Two Legal Systems," *ibid*. See also *B'Tselem*, "On the Way to Annexation: Human Rights Violations resulting from the Establishment and Expansion of the Ma'aleh Adumim Settlement," Information Sheet (July 1999), online: *B'Tselem* <http://www.btselem.org/sites/default/files/on_the_way_to_annexation.pdf>.

[327] ACRI, "One Rule, Two Legal Systems," *ibid*.

In addition, the *Regulations for Regional Councils*[328] grant local Israeli settlement councils the authority to enact by-laws, collect taxes, hold local elections, etc. The legal arrangements included in the aforementioned orders and in the regulations are based on the municipal legislation that applies to local councils in Israel proper, save for some minor changes.[329] The provisions of these regulations also allow for the establishment of rabbinical courts and of courts for local affairs in order to deal with municipal matters pertaining to Israeli settlements in the West Bank. It also authorizes the latter courts to deliberate on a long list of civil and criminal matters not only according to Israeli military legislation, but also to Israeli domestic legislation.[330] These courts were also granted jurisdiction over twelve areas in relation to which Israeli laws were applied to the settlements.[331] One consequence of these developments is that it has enabled the Israeli MC to relinquish whenever necessary his power over the settlements (to Israeli civilian authorities that exist either within the settlements or in Israel proper).

(2) The second one is the application of Israeli domestic law to the settlers through Israeli legislation. Shortly after the 1967 war, the *Knesset* enacted the *Emergency Regulations Law Offenses in the Occupied Territories- Jurisdiction and Legal Assistance 5727- 1967*. This allowed Israeli civilians who have committed offenses in the occupied territories to be tried in Israeli civil courts.[332] In addition, the annex to these emergency regulations lists an additional 17 laws as applicable *in persona* to Israeli citizens living in the West Bank, such as laws

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[328] *Regional Councils Regulations, supra* note 326 cited in *ibid* at 19.

[329] The MO establishing the local councils is a copy of the Israeli Municipal Ordinance (with minor changes). See Meron Benvenisti, *The West Bank Data Project*, *supra* note 131. See also ACRI, "One Rule, Two Legal Systems," *supra* note 82. As a result, the status of the local administration of settlements is regulated "in a way similar to the common administrative regulations and arrangements in Israel," (HCJ 1661/05) [2005] *Gaza Coast Regional Council v. Knesset*, unofficial English translation of extracts by Avichay Sharon, (December 2013), on file with author, at para 13 [*Gaza Coast Regional Council* Judgment].

[330] In such areas as planning and building; traffic, labor law and local authorities ACRI, "One Rule, Two Legal Systems," *supra* note 82.

[331] These areas are welfare law, statistics law, family law, education law, health law, labor law, agriculture law, condominium law. *Ibid*.

[332] *B'Tselem*, "Dual System of Law" (1 January 2011) online: *B'Tselem*. <http://www.btselem.org/settler_violence/dual_legal_system>. See also Sharon Weill, "Reframing the Legality of the Israeli Military Courts in the West Bank: Military Occupation or Apartheid" in Abeer Baker and Anat Mata, eds, *Threat: Palestinian Political Prisoners in Israel* (London: Pluto Press, 2011) 136.

regarding taxation, product supervision, national insurance and the right to participate in Israeli elections.[333]

The HCJ has underscored that Israeli settlements can exist as long as the Israeli military regime remains in place in the West Bank (which according to the Court is in itself temporary in nature). Hence, so long as this is the case, the settlements remain governed by the laws of belligerent occupation.[334] Even when some of the laws and regulations applicable in Israel proper are extended to the settlements by way of MOs, this, in the Court's view, did not change the legal status of Israeli settlements or the fact that they continue to be governed by the law of belligerent occupation.[335]

Furthermore, the HCJ has in its decisions not questioned the applicability of some Israeli MOs exclusively to Israelis. If MOs apply differently to Palestinians than to Israelis in the West Bank, it is due to existence of valid distinctions between the two populations and, therefore, is not discriminatory in nature:

> The Israeli settlements in Judea and Samaria are established from their beginning by a separate legal order- just like the establishing of the settlement local councils was unique to the settler population and did not apply to the Palestinian. Therefore there is a legal distinction between the two and the mere fact that the order applies only to the Israeli settlers does not deem it discriminatory [...].[336]

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[333] Khaled Diab, "Why Palestinians should Demand to be Ruled by Israeli Law," *Haaretz*, (20 November, 2014). For example, in the 1980s, the *Knesset* amended the *Israeli Income Tax Ordinance* to stipulate that the income of an Israeli citizen produced or received in the 'territories' is considered as if its source originates in Israel proper, and as if it has been received there. See *B'Tselem*, "On the Way to Annexation," *supra* note 326 at 18 and ACRI, "One Rule, Two Legal Systems," *supra* note 82. See also Orna Ben-Naftali, "PathoLAWgical Occupation," *supra* note 2. HRW, "Separate and Unequal," *supra* note 82. Allowing Israeli settlers to vote in the elections constitutes an exception to the principle that no voting outside the border of Israel is granted to Israelis (save for envoys and representatives of the government). See ACRI, "One Rule, Two Legal Systems," *ibid*.

[334] *Gaza Beach Regional Council* Judgment, *supra* note 329 at paras 8, 9, 12-14.

[335] *Ibid* at para 13.

[336] The Court's reasoning came in response to a petition by Israeli settlers, who had challenged the decision of the government to freeze the approval of building plans in a number of Israeli settlements following the rise of the Labor Party in 1992. Settlers alleged that the application of the MO resulting in the freeze of building was discriminator in nature because it only applied to Israeli settlers as opposed to Palestinians in the West Bank and that this violated their rights for political purposes. *Kiryat Arba Local Council* Judgment, *supra* note 289 at. 2, 3 and 5.

However, this approach fails to take into consideration that for all practical reasons, both Israeli settlements and Israeli settlers have thus been subjected to an external legal system, one that is very similar (if not identical) to the Israeli domestic legal system. Palestinians, on the other hand, remain governed by a combination of the local laws and the MOs promulgated by what purports itself to be a temporary military administration.[337] This, in the words of one Israeli scholar, has transformed the occupied territory "from an escrow governed by the rules of international law into a mongrel of two different legal systems." [338]

In fact, with the expansion of the jurisdiction of Israeli settlements and its respective population,[339] the extra-territorial applicability Israeli domestic legislation through MOs has exported much of the Israeli domestic law to apply to Area C of the West Bank. This has blurred the 'territorial' divide between Israel proper and its occupied West Bank,[340] in a manner that undermines the obligation on the occupying power not to act as a sovereign in the occupied territory. Given that the Israeli 'enclave law' applies exclusively to one population group (Israeli settlers), [341] the resulting legal differentiation between Palestinians and Israelis living in the same territory has provided preferential treatment to the Israeli nationals living therein in every aspect of their daily lives. Arguably, this has also jeopardized the second normative principle underlying the law of belligerent occupation (that occupation is a form of 'trust').

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[337] ACRI, "One Rule, Two Legal Systems," *supra* note 82.

[338] Amnon Rubinstein, "The Changing Status of the Territories (West Bank and Gaza): From Escrow to Legal Mongrel" (1988) 8 Tel Aviv U Stud L 59 at 79.

[339] In the years following the signing of the Oslo Accords, Israel defined or expanded areas of jurisdictions for an estimated 92 settlements in the West Bank. By 2007, the total area of settlements' jurisdiction covered an estimated 9 % of its total area, and approximately 84 % of Area C. See *Peace Now*, ""And Though Shalt Spread […]" Construction and Development of Settlements beyond the Official Limits of Jurisdiction" (2007) at 8 and 9, online: *Peace Now* <http://peacenow.org.il/eng/sites/default/files/Jurisdiction2007.pdf>.

[340] As one author explains, "In the eyes of the Israeli authorities the territorial boundaries between Israel and the occupied territories – the 'Green Line – are not strictly binding and definite borders have never been officially declared." See Sharon Weill, "The Judicial Arm of the Occupation: The Israeli Military Court in the Occupied Territories" *(*June 2007) 89: 866 Int'l Rev Red Cross 395 at 405.

[341] The term has been used to describe the legislative layer applied to Israeli citizens on a personal basis. See Gilead Sher and Keren Aviram, Insight No. 638, "The Application of Israeli Law to the West Bank: De Facto Annexation?" (4 December, 2014), online: Institute for National Security Studies <http://www.inss.org.il/index.aspx?id=4538andarticleid=8272>.

Two areas where the unequal applicability of 'the law' to Israelis as opposed to the Palestinians in the West Bank is at its clearest concerns the applicability of criminal laws and procedures as well as building and planning laws. The next section discusses them briefly.

5.3.1. The Applicability of Criminal Laws and Procedures

Given that the application of Israeli military rule to the West Bank is territorial, it ostensibly applies to all residents in the area, including Israeli settlers. However, practically speaking, a separate criminal justice system has been applicable to Palestinians and to Israelis living therein. [342]

Following the establishment of military rule in the West Bank, an Israeli military court system was established,[343] one which enjoys a wide jurisdictional reach[344] and in which due process rules and criminal legislation are channeled through Israeli MOs.[345] While in theory this court system was granted the authority to try both Palestinians and Israelis who commit offenses in the West Bank, a number of steps implemented by Israeli authorities have ensured that the latter population group is not tried before these courts, save for extreme situations.[346]

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[342] ACRI, "One Rule, Two Legal Systems," *supra* note 82.

[343] *Order concerning Security Provisions*, 5727-1967; and *Order concerning the Establishment of Military Courts (West Bank Area)* (No. 3), 5727-1967. These orders and proclamation were aggregated in 2009 into the *Order concerning Security Provisions [consolidated version] (Judea and Samaria)* (No. 1651), 5770-2009. See ACRI, "The Status of the Right to |Demonstrate in the Occupied Territories (2014)," online ACRI <http://www.acri.org.il/en/wp-content/uploads/2014/12/Right-to-Demonstrate-in-the-OPT-FINAL.pdf>.

[344] The military court system operates throughout the West Bank, with the exception of annexed EJ and has jurisdiction to try all cases which the Israeli military authorities classify as security offences. All its judges are serving Israeli army officers. These courts have concurrent jurisdiction with local non-military courts to try alleged criminal offences. However, it is for Israeli military authorities to decide whether or not a particular criminal case is to be heard by a military court or by a local court. See Paul Hunt, "Justice? The Military Court System in the Israeli-Occupied Territories," *Al-Haq*: Law in the Service of Man and Gaza Center for Right and Law, Report (February 1987).

[345] Sharon Weill, "Reframing the Legality," *supra* note 332.

[346] The only situation in which matters of settlers has been deliberated by these courts is when the former appeal administrative orders issued against them (including administrative detention orders). The policy of the State Attorney's Office is not bringing settlers to trial before military courts. While this policy is "not anchored in written regulations [...] official documents indicate that it exists and is being passed along." See ACRI, "One Rule, Two Legal Systems," *supra* note 82 at 33.

One step taken in this direction is that after 1967, Israeli civil courts were allowed to extend their jurisdiction over offences committed by Israelis in the occupied territories,[347] "if those acts would have constituted an offence had they occurred in the territory under the jurisdiction of Israeli courts."[348] At the same time, the extension of Israeli criminal law to Palestinians living in the occupied territories was circumscribed.[349] Secondly, it was held that torts committed in the occupied territories between Israelis are to be governed by Israeli law.[350] It is also worth mentioning that by virtue of the Oslo Accords, the Palestinian Authority (PA) does not have any jurisdiction over Israeli citizens who commit offenses in areas under its control.[351]

The HCJ has upheld the practice of applying Israeli criminal law only to Israeli settlers[352] while not excluding on a matter of principle that Israeli MOs also apply to them. At the same time, it left open the more general question of whether all legislative and executive powers vested in the MC of 'the Area' apply equally to all inhabitants of the occupied West Bank (Israelis and Palestinians alike).[353]

Although several factors have contributed to this situation, it has allowed an entire criminal legal system (together with its legislation, policies and tribunals) to be determined by the

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[347] See Eli Nathan, "Israel Civil Jurisdiction in the Administered Territories," *supra* note 10.

[348] Sharon Weill and Valentina Azarov, "Shielded from Accountability: Israel's Unwillingness to Investigate and Prosecute International Crimes," Report at 16, online: International Federation for Human Rights (FIDH) <http://www.fidh.org/IMG/pdf/report_justice_israel-final-3-2.pdf>.

[349] To prevent the extension of Israeli criminal law to Palestinians living in the oPt, section 2(a) and (c) of the, *Law for Amending and Extending the Validity of Emergency Regulations (West Bank-Jurisdiction in Offenses and Legal Aid, 5727-1967)* which was amended several times, states that this Regulation does not apply for residents of the Region or the PA who are not Israelis. Until the final version was reached, this section was amended a few times, initially excluding all residents of the West Bank, then including the Israeli settlers, and finally amending it to take into account the Israeli-Palestinian interim agreements. See Sharon Weill and Valentina Azarov, "Shielded from Accountability," *supra* note 348 at 16.

[350] Eyal Benvenisti, *The International Law of Occupation, supra* note 8 at 139.

[351] Sharon Weill, "Reframing the Legality," *supra* note 332.

[352] (HCJ 163/82) *David v. State of Israel* cited in footnote 98, Sharon Weill and Valentina Azarov, "Shielded from Accountability" *supra* note 348.

[353] In one petition, filed by an Israeli settler who had been placed in administrative detention provided for by a MO, the ground for that challenge was that this policy was designed to apply only to the Palestinian population in the region, and not to Jewish Israeli citizens The Court dismissed the petition. See (HCJ 2612/94) [1994] *Shaer v. Commander of IDF Forces in the Judea and Samaria Region*, 30 Isr YB Hum Rts (2000), 314 [*Shaer* Judgment-Summary].

nationality of the perpetrator and the victim."[354] It has also provided for "the separation of jurisdiction without explicitly legislating discriminatory laws,"[355] and has promoted a situation where Palestinians and Israelis residing in the same territory face "stark inequalities before the law."[356] Some of the most significant differences that emerge concerns situations in which Israeli criminal laws are applied to Israelis in the West Bank while Palestinians continue to be governed by MOs is in the areas of search and detention procedure,[357] the right to due process[358] and the definition of the offenses committed.[359]

The operation of Israeli military courts has also been criticized. Weill argues for example, that while the Israeli military court system has taken it for granted that, similarly to a 'sovereign,' the MC is entitled to enact extra-territorial provisions in light of the *protective principle*, the right of an occupying power to impose criminal provisions affecting individuals in an occupied territory (beyond its territorial jurisdiction) is questionable since it is not the

[354] While Israeli Jewish citizens as a matter policy are no longer tried before Israeli military courts, Palestinian Arab citizens of Israel or Palestinians with Israeli residency status committing an offense within the oPt and who have challenged the jurisdiction of Israeli military courts, have had their claim systematically rejected. The main ground for doing so is that the aforementioned *Emergency Regulations regarding Jurisdiction and Legal Assistance* does not annul the jurisdiction of those courts. Sharon Weill, "Reframing the Legality," *supra* note 332 at 136. Thus, Palestinian courts only have jurisdiction to try an offense, if both the perpetrator and the victim were Palestinian.

[355] Sharon Weill and Valentina Azarov, "Shielded from Accountability," *supra* note 348 at 16.

[356] UN Fact-finding Mission on Settlements Report 2013, *supra* note 82 at para 46. Israelis are guaranteed significantly more favorable procedural rights during the investigation, detention, and trial. Sharon Weill and Valentina Azarov, "Shielded from Accountability," *ibid*.

[357] For example, up until recently, a Palestinian can be arrested for up to 8 days before appearing before a judge, while under Israeli criminal law an Israeli cannot be held for more than 24 hours before seeing the judge. While amendments following a petition in 2010 have reduced the gap in the detention period applying to both Israelis and Palestinians, differences still exist. For a comparison see table in ACRI, "One Rule, Two Legal Systems," *supra* note 82 at 46-47.

[358] For example, under military legislation, the investigative authority is entitled to prevent a Palestinian detainee from meeting his/her attorney for up to 96 hours, as opposed to a period of 48 hours for an Israeli suspected of the same offense, under the Israeli detention related laws. In the case of a suspected security offense, the meeting of the accused with the lawyer can be prevented for up to 60 consecutive days if the accused is Palestinian, in comparison to 21 days for an Israeli who is accused of the same crime under Israeli domestic laws. *Ibid* at 55.

[359] A Palestinian convicted of manslaughter can expect life imprisonment according to local laws, while an Israeli convicted of the same offence can expect a maximum sentence of 20 years' imprisonment under Israeli law. See Idith Zertal and Akiva Eldar, *Lords of the Land*, *supra* note 120 at 373.

'sovereign' in that territory. She also concludes that there is no explicit or implicit rule of IHL which allows extraterritorial jurisdiction for the occupying power.[360]

Another area where there are striking inequalities in the application of laws and regulations to Israeli settlers as opposed to Palestinians is regarding building and planning, which we now turn to.

5.3.2. Planning and Building Rights

Different measures have been applied in response to the planning and building needs of both Israeli settlers and Palestinians in the West Bank, which have considerably played against the interests of the Palestinians (particularly in Area C).[361]

In 1971, an Israeli MO amended the Jordanian law which had regulated the operation of local and district planning committees in force in the West Bank: it transferred their authority to a the Higher Planning Council that is appointed by the MC and which is operated by Israeli nationals only. Today, the Council which operates as part of the CA "constitutes the civilian authority for residential zoning and infrastructure and is responsible for addressing the needs of Israeli settlements in the West Bank."[362]

While 16 local planning committees exist for local settlement councils and four local committees exist for settlements which enjoy the status of cities, not one Palestinian village council has a local committee designed for it or for any area in Area C.[363] Another point worth

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[360] She also points out that this state of affairs violates provisions of the Oslo Accords. See Sharon Weill, "The Judicial Arm of the Occupation," *supra* note 340. Lisa Hajjar, *Courting Conflict: The Israeli Military Justice System in the West Bank and Gaza* (University of California Press 2005); Ra'anan Alexandrowicz and Liran Atzmor, "The Law in these Parts" DVD: (2011), online: <https://www.thelawfilm.com/eng#!/the-film>.

[361] Although the 1995 Oslo Accord had stipulated the gradual transfer of Area C planning and zoning related powers and responsibilities from the CA to the Palestinian Authority, it never took place. UN OCHA-oPt, "Fragmented Lives: Humanitarian Overview 2013," *supra* note 96.

[362] Coordination of Government Activities in the Territories (COGAT), "Who Are We," online COGAT <http://www.cogat.idf.il/1279-en/Cogat.aspx>.

[363] In 2011, a petition was filed by the Israeli NGO *Rabbis for Human Rights* (RHR) and a Palestinian village council in the Hebron area, demanding the reinstatement of Palestinian local and district planning committees in Area C, which had been revoked by a MO in the 1970s. The petition argued that a failure to do so exceeds the MC's authority to amend local laws, under article 43 of the Hague Regulations, *supra* note 12 and article 64 of the Fourth Geneva Convention, *supra* note 22. The petitioners argued that under international law and Israeli public law, the MC is obliged to reinstate the local and district planning committees of Palestinian

noting is that the CA has not approved any master plan for more than 90 % of the Palestinian villages that are located entirely within that area.[364] These, and other restrictions, have effectively reduced the ability of Palestinians to obtain a building permit,[365] while allowing for extensive construction in the Israeli settlements to continue.[366]

This has reduced the space available to Palestinians in which to build legally as a way of sustaining their livelihoods and the natural growth of their communities. Consequently, many Palestinians have, over the years, resorted to the construction of structures, including homes,

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villages in Area C that were provided for by the Jordanian local law that had been in force before enactment of MO 418 from 1971 had amended those laws. They also underscored that the failure to do so has created "a separate but discriminatory planning apparatus on principle-removing presentation of the Palestinian population-and by outcome, the scope, quality, and enforcement of planning" in violation of international law." See (HCJ 5667/11) *Ad-Dirat Al-Rifai-ya Village Council et al v. Minister of Defense et al*, Petition, at paras 1, 3, 5and 8 [*Area C Planning* Case- Petition], online: RHR <http://rhr.org.il/eng/wp-content/uploads/PlanningPetitionEng.pdf>. In response to the this petition the HCJ ordered the government to provide, within 90 days, a response as to why the Palestinian local and district planning committees were not involved in matters of planning in the West Bank. It also urged government authorities to "make a certain improvement – as long as the long awaited political agreement has not been achieved – in the involvement of the Palestinian population in Area C in matters of planning." (HCJ 5667/10 [2014] *Ad-Dirat Al-Rfai'ya Village Council et al v. Minister of Defense et al* at 1, unofficial English translation online: RHR <http://rhr.org.il/eng/wp-content/uploads/PlanningAppealRulingTranslation.pdf> [*Area C Planning* Judgment].

[364] Instead, the CA has maintained the sub-district master plans that had been approved during the British Mandate era in the 1940s, which designated most of the land as agricultural (thereby allowing for a limited number of buildings to be built in every original plot of land). These laws remained in force during the Jordanian rule of the West Bank, which Israeli authorities chose not to alter when they made changes to the planning law. To date, there are master plans for only 16 of the 180 Palestinian villages whose land is situated entirely within Area C, with the entire area of those plans covering less than 1 % of Area C. Master plans are usually approved without the participation of the residents of the Palestinian villages and exclude the open land surrounding the villages. However, there have also been positive changes the CA's planning process in Area C, including a willingness to accept objections from Israeli professional planning entities such as Planners for Planning Rights (*Bimkom*); a readiness to revoke already prepared for plans to order drafting new plans; and a willingness to maintain contact with the PA about planning for villages in Area C. However, it is difficult to evaluate with precision the extent of this change given that, since 2008, no CA master plan has gone into effect. See *B'Tselem*, "Acting the Landlord," *supra* note 317.

[365] UN OCHA-oPt, "Restricting Space: The Planning Regime Applied by Israel in Area C of the West Bank" Special Focus (December, 2009), online: OCHA-oPt <http://www.ochaopt.org/documents/special_focus_area_c_demolitions_december_2009.pdf>. According to the figures provided by the CA, from January 2000 to September 2007, only 91 of the 1,624 applications submitted by Palestinians for building permits were approved, i.e. 5.6 %. See *Bimkom*, "The Prohibited Zone: Israeli Planning Policy in the Palestinian Villages in Area C," Report (June 2008), online: *Bimkom* <http://bimkom.org/eng/wp-content/uploads/ProhibitedZone.pdf>.

[366] *Bimkom*, "The Prohibited Zone: Israeli Planning Policy," *ibid*. OCHA-oPt, "Restricting Space," *ibid*.

without permits. This has led to rising rates of demolitions of these buildings by government authorities in recent years.[367]

This policy stands in stark contrast to the fate of construction without authorization by Israeli settlers. In this regard, information by human rights organizations demonstrates that Israeli authorities have executed a smaller number of demolition orders or have even sought to retroactively approve plans that would validate this construction.[368] According to *B'Tselem*, from 2000-2009, the Palestinian population of Area C was issued nearly three times as many demolition orders for buildings that lacked permits in Area C as the Israeli settler population. In addition, the demolition rate of Palestinian-owned building was 3.4 times higher (for the same period of time) than the demolition rate of buildings built without permits by Israeli settlers.[369]

5.3.3. Concluding Remarks

On a more general level, these and other developments confirm the operation of a two-tier system of laws rules and services: one for Israeli settlers and one for Palestinians.[370] As a result of these measures, the Israeli organization *B'Tselem* points out that:

> [...] in the Occupied Territories a regime of separation and discrimination, with two separate systems of law in the same territory [exists]. One system, for the settlers, de facto annexes the settlements to Israel and grants settlers the rights of citizens of a democratic state. The other is a system of military law that systematically deprives Palestinian of their rights and denies them the ability to have any real effect on shaping the policy regarding the land space in which

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[367] According to OCHA, 60 % of all Palestinian property demolished by Israeli authorities in 2011 for lack of Israeli issued building permits were located in parts of Area C allocated to settlements. In 2013, the number of structures demolished was 663 and number of Palestinians displaced was 1,013, which represents an increase of 1 % and 25 % respectively from documented incidents in 2012. See UN OCHA-oPt, "Fragmented Lives: Humanitarian Overview 2013" *supra* note 96.

[368] *B'Tselem*, "Forbidden Considerations in "Administrative" Demolitions," (January 2011), online: *B'Tselem* <http://www.btselem.org/planning_and_building/forbidden_considerations>. OCHA-oPt, "The Humanitarian Impact of Israeli-Declared 'Firing Zones'," Fact-sheet (February 2012) at 1, online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_firing_zone_factsheet_august_2012_english.pdf>; *B'Tselem*, "Acting the Landlord," Report, *supra* note 317.

[369] *B'Tselem*, "Acting the Landlord," *ibid*.

[370] HRW, "Separate and Unequal, *supra* note 82.

> they live and with respect to their rights. These separate systems reinforce a regime in which rights depend on the national identity of the individual.[371]

Lawyers petitioning the HCJ on behalf of Palestinians who have been interviewed for this research agree with this statement: In their view, the existence of a dual legal system in the West Bank undermines one of the foundations of the notion of the RoL, namely that all people living in the same territory are subject to the same laws and that there is no discrimination in the applicability and enforcement of the law. Furthermore, the prevalence of such a system explains why Israel's control of that territory cannot be reconciled with the RoL, particularly its substantive aspects.[372]

By maintaining that Israeli settlements and settlers are under the jurisdiction of the MC, yet channeling whatever domestic legislation is needed to apply to the Israeli settlements through the promulgation of relevant Israeli MOs, there is only one result: it allows the MC to by-pass the limitation imposed by international law on the occupant's ability to amend existing laws in the occupied territory save for certain exceptions (security; and the welfare of the 'local population'). Given that most of these MOs seek to ensure that Israeli settlers enjoy rights and a legal environment that is similar to the one enjoyed by their fellow citizens in Israel proper, it would be difficult to argue that extending relevant Israeli domestic laws to apply to Israeli settlements and settlers is carried out only in response to pressing security needs. Indeed, channeling legislation of the *Knesset* through MOs, to apply exclusively to Israeli settlements or settlers in the West Bank, means that effectively speaking the MC is acting as extension of

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[371] *B'Tselem*, "Land Expropriation and Settlements" (23 January 2014), online: *B'Tselem* <http://www.btselem.org/settlements>. See UN Fact-finding Mission on Settlements Report 2013, *supra* note 82 at para 39. See also *B'Tselem*, "By Hook or by Crook: Israel's Settlement Policy in the West Bank," Report (July 2010), online: *B'Tselem* <http://www.btselem.org/download/201007_by_hook_and_by_crook_eng.pdf>. Former UN Special Rapporteur for HR in the oPt John Dugard has underscored that Israel actions in the oPt are part of "an institutionalized and systematic regime of discrimination." See John Dugard and John Reynolds, "Apartheid, International Law and the Occupied Palestinian Territory" (2013) 24:3 EJIL 867at 904.

[372] *Sfard* Second Interview, *supra* note 312. The same opinion was expressed by Attorney N Amar-Shiff, Interview with Avichay Sharon on behalf of author, (24 August 2014, Jerusalem) [*Amar-Shiff* Interview]. Mrs. Amar-Shiff is a lawyer and legal advisor for the Israeli NGO RHR. She was also former legal advisor for *DIAKONIA*'s International Humanitarian Law Resource Center. Another Israeli lawyer (who wishes to remain anonymous) noted that determining whether the existence of a dual legal system in the West Bank can be reconciled with the RoL concept depends on how one defines the RoL, which is not easy. See Interview with Israeli Attorney by Avichay Sharon on behalf of author (23 July 2014, Jerusalem) [Attorney *A-04* Interview].

the *Knesset,* and that the latter is acting as the 'sovereign' in those territories. This contradicts the normative principles on which the law of occupation rests.

Having sought to provide the overall context as to how the law and the geography of the West Bank has been changed to serve Israeli citizens residing in the West Bank, as well as their rights, the next section discusses the implications of this approach for the Court's adjudication of the security-related measures.

6. Whose 'Rights', and which 'Local Population'? Adjudicating Security Related Petitions in Light of Article 43 of the Hague Regulations

6.1. The Source of Authority of the MC: The Normative Framework

6.1.1. International Law of Belligerent Occupation

The HCJ has emphasized that the West Bank is under a regime of belligerent occupation, and that as the 'long arm of the State', the MC derives his powers from "the rules of public international law relating to belligerent occupation; from local laws in effect in the Area which comprise of the law prior to the military occupation; from new local statutes enacted by the military administration, and from the principles of Israeli law."[373]

Although the Court has reiterated, that Israel's belligerent occupation is to be assessed against norms of customary international law (reflected in the Hague Regulations), in the judgments discussed in this chapter, the Court has continued to abstain from ruling on the *de jure* applicability of the Fourth Geneva Convention. Instead, it has chosen to emphasize the government's willingness to uphold the humanitarian provisions of this Convention.[374] Still, it is worth noting that the Court has also affirmed that provisions of both the Fourth Geneva

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[373] *Abu Safiyeh* Judgment, *supra* note 151 at para 14. See also *Morar* Judgment, *supra* note 87 at para 12. In terms of Israeli administrative law, it includes "reasonableness, proportionality, and a proper balance between individual rights and liberties and the public interest." *Dir Samit Village* Judgment, *supra* note 149 at para 11.

[374] Thus, the Court has underscored that it will "assume that they apply in our matter." At the same time, the HCJ stated that "[t]he questions to what extent the Geneva Convention applies in this sphere has not yet been finally determined." See *Haas* Judgment, *supra* note 141 at para 8 and *Dir Samit Village* Judgment, *ibid* at para 10.

Convention and of the First Additional Protocol to the Geneva Conventions – which reflect customary international law – have become part of Israeli law.[375]

6.1.2. International Human Rights Law

In the case of international human rights law (IHR law), the Court has to date, not ruled on its applicability to the occupied territory;[376] preferring to invoke the law of belligerent occupation. However, in some of the decisions discussed here, the justices have acknowledged that "where there is a gap in the aforesaid laws of armed conflict, it may be completed from within international human rights law."[377] They also have made references to specific IHR treaties and conventions.[378] In other decisions, the Court has underscored IHR law as the normative source for these rights, (in tandem) with Israeli law.[379]

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[375] *Abu Safiyeh* Judgment, *ibid* at para 16. See also *Dir Samit Village* Judgment, *ibid* at para 10. One explanation that has been offered is that, even though upholding the *de jure* applicability of the Fourth Geneva Convention is not part of Court's competence, the Court's readiness to entertain that some of the provisions of the Geneva Convention reflect customary international law signals that it takes note of this body of law. At the same time, the fact that it has refrained from ruling on the *de jure* applicability of the Convention as a whole is because the "Israeli Court is much more cautious: it doesn't look at the position and commitments of the State and say: create facts that are relevant to my analysis of how Israeli law should apply. The Israeli Court simply says: I apply customary law, and I apply Israel's national law, including its basic laws and administrative law." Interview with Charles Shamas, Partner at the *Mattin* Group, via skype with author (21 November 2014, Ramallah) [*Shamas* Interview]. Established in 1983, the *Mattin* Group is a partnership of expert practitioners dedicated to promoting more adequate and effective implementation of IHL and IHR law in situations of armed conflict and belligerent occupation. Its work is focused on operationalizing self-enforcing third party responsibility, including the customary duty of non-recognition. It seeks to activate internal institutional processes that pressure states, international organizations and corporate entities to construct and implement their external dealings consistently with their own international law based positions and commitments. It is incorporated in Brussels as a not for profit organization and its members maintain an office in Ramallah, West Bank.

[376] It must be recalled here, that Israel rejects the notion that its obligations arising under IHR law govern its conduct in the occupied territory. For a review of this position, see Chapter I of this research.

[377] *Abu Safiyeh* Judgment, *supra* note 151 at para 16. See also *Dir Samit Village* Judgment, *supra* note 149 at para 10.

[378] When discussing the human rights of the Palestinians, the Court referenced article 27 of the Geneva Conventions, and article 46 of the Hague Regulations, to then underline that the principles guiding their judgment include the ICCPR. See *Dir Samit Village* Judgment, *ibid* at paras 10 and 17.

[379] In one case, it stressed that the Palestinians' right to freedom of movement, is a right that is a fundamental rights enshrined in both Israeli law and IHR law. *Ibid* at para 17.

6.1.3. Israeli Administrative Law

The Court has also maintained that, in addition to international law and local law, the framework guiding its judicial review are made of "fundamental principles of Israeli administrative law, [...] including the norms of fairness, reasonableness and proportionality that are to be exercised when using power."[380] Similarly, the Court has emphasized that under this body of law, the MC must strike a balance "between individual liberty and the public interest, all whilst taking security needs into account."[381]

6.1.4. Israeli Constitutional Law

It is interesting to note that in petitions where the interests/rights of Israelis were at stake and where they had to be balanced against the rights of the Palestinians, the justices stressed the idea that the rights enjoyed by both populations were fundamental rights that are protected by Israeli constitutional law.[382] Moreover, they have often embarked on a constitutional balancing between these rights in order to determine whether the restrictions on the rights of the Palestinians petitioners for the sake of the realization of the rights of the Israelis, was warranted.

However, the Court's invocation of Israeli constitutional law, as well as its interchangeable reference to this body of law and to other normative frameworks (Israeli administrative law, IHL, IHR law) has been inconsistent.[383] For example, in some cases the Court has stressed that the rights enjoyed by Palestinians and Israelis were constitutional rights and expressly referred to Israeli constitutional law when outlining the normative framework guiding its judgments.[384] In other instances, the Court noted that there was no need to address the applicability of basic

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[380] *Beit Iksa* Judgment, *supra* note 148 at para 25. *Abu Safiyeh* Judgment, *supra* note 151 at para 14; *Haas* Judgment, *supra* note 141 at para 8; *Morar* Judgment, *supra* note 87 at para 11.

[381] *Dir Samit Village* Jugement, *supra* note 149 at para 11. See also *Bethlehem Municipality* Judgment, *supra* note 1 at paras 8 and 9.

[382] Yaël Ronen, "Applicability of Basic Law; Human Dignity and Freedom in the West Bank" (2013) 46 Isr LR 135.

[383] One author described the Court's approach as 'chaotic', because it ignores "the differences in the substantive and normative distinctions between these bodies of law and paying insufficient attention to the uncertainty as to the applicability of some of them." *Ibid* at 164.

[384] *Has*s Judgment, *supra* note 141 at paras 14, 15 and 17.

constitutional rights since the rights of the Palestinians (that have allegedly been restricted) are also entrenched in international law.[385] Still elsewhere (such as in the *Morar* judgment), the Court held that the rights enjoyed by the Palestinian petitioners were not only basic rights at the heart of the international law of belligerent occupation, but were also rights that were enshrined in and protected by Israeli constitutional law.[386]

The lack of clarity is compounded by the fact that the Court has upheld the applicability of the Basic Law: *Human Dignity and Liberty in personae* to Israeli settlers living in the West Bank.[387] In this regard, the justices reiterated that "Israelis present in 'the Area' enjoy the right to life, dignity and honor, property, privacy, and the rest of the rights which anyone present in Israel proper enjoys,[388] and that this law:

> [P]rovides rights to every Israeli settler in the evacuated area. It reflects the perception that Israelis situated outside the state but in the territory under its control by way of its belligerent occupation are governed by the state's Basic Laws regarding human rights.[389]

At the same time, it has so far refrained from articulated itself on whether the basic law applies to the Palestinians living in the same territory.[390]

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[385] This was the situation in one case where the Court reiterated that the right to property of the Palestinians was protected under the international law of belligerent occupation. See *Beit Iksa* Judgment, *supra* note 148 at para 26.

[386] See *Morar* Judgment, *supra* note 87 at para 14.

[387] Israeli *Knesset*, Basic Law: *Human Dignity and Liberty* online: *Knesset* <http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm> [Basic Law: *Human Dignity and Liberty*]. Enacted in 1992, it includes a list of basic rights such as the right to life, body, dignity and the protection of these interests (section 2 and 4); the right to property (section 3); the liberty of the individual (section 5), right to leave and enter the country (section 6); and the right to privacy. See David Kretzmer, "New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law" (1992) 26 Isr LR 238.

[388] See also (HCJ 7957/04) [2004] *Mara'abe and Others v Prime Minister of Israel and Others* (2005) 2 Isr LR106 at para 21 [*Mara'abe* Judgment]. The petition was upheld partially by the HCJ. At the same time, the Court has emphasized that "the scope of the human rights of the Israelis living in the area and the level of protection of the right, are different from the scope of the human rights of an Israeli living in Israel and the level of protection of that right." *Ibid* at para 22.

[389] The idea that the basic laws bestow rights on Israeli settlers was also made in a case in which Israeli settlers had challenged the decision of the government to implement the *Gaza* Disengagement plan. See *Gaza Coast Regional Council* Judgment, *supra* note 329.

[390] Orna Ben Naftali, "PathoLAWgical Occupation," *supra* note 2.

The idea of limiting the extra-territorial applicability of this and other basic laws to Israeli nationals has been criticized on many grounds. Scholars and lawyers interviewed for this research have pointed out that this effectively amounts to establishing a distinction between nationals and non-nationals when it comes to the protection of rights that are in essence universal rights.[391] Secondly, some have opined that this constitutionalized existing legal discriminations between Israeli settlers and Palestinian residents in the occupied territory.[392] Thirdly, by applying a human rights discourse (grounded in domestic law) to a conflict of interest between an occupying power and the occupied population (especially when the civilian population of the occupant is also involved), the approach runs the risk of rendering the law of belligerent occupation meaningless.[393] Fourthly, this creates "a semblance of uniformity of law between Israel and the West Bank, at least in so far as it concerns Israelis."[394] Lastly, when viewed as part and parcel of other measures that have resulted in the expanded use of Israeli domestic law in relation to settlers and settlements more generally (as reviewed in the previous sections), the applicability of the basic law to Israeli settlers in the West Bank contributes to the formalization of the *de facto* annexation of the areas of the West Bank where settlements have been constructed.[395]

Having outlined the legal framework guiding the Court's interpretation (which is at times confusing), the next section examines the second element setting the parameters of the HCJ's judicial decisions.

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[391] This argument was advanced by Ronen, who stressed that while there may be a legitimate distinction under constitutional law between nationals and non-nationals; this is less justifiable in regard to the kind of rights protected by the Basic Law: *Human Dignity and Liberty*. Moreover, he argues that the language of section 11 of this basic law underlining that "all governmental authorities are bound to respect the rights under the Basic law," which suggests that the obligations on government authorities to respect certain rights must take place regardless of where they act and who the beneficiary is. See Yaël Ronen, "Applicability of Basic Law," *supra* note 382.

[392] Daphne Barak-Erez, "Israel: The Security Barrier-Between International Law, Constitutional Law and Domestic Judicial Review" (July 2006) 4:3 Int J Constitutional Law 540 at 551.

[393] Yaël Ronen, "Applicability of Basic Law," *supra* note 382. Others have argued that since the Fourth Geneva Convention defines the contours of the rights it protects subject to the special security needs of the occupying power, the scope of these rights thus being narrower than that of constitutional rights in ordinary circumstances. See Daphne Barak-Erez, "Israel: The Security Barrier," *ibid*.

[394] Yaël Ronen, "Applicability of Basic Law," *ibid* at 162.

[395] *Ibid.*

6.2. Determining the Scope of Discretion of the MC

6.2.1. The Duty of the MC under article 43 of the Hague Regulations vis-à-vis the Israeli Settler Population

On one hand, the Court has stressed the idea that Palestinians of the West Bank constitute 'protected persons' under the Fourth Geneva Convention,[396] while Israeli settlers do not.[397] On the other hand, the Court has also cemented the idea that the Israeli settler population constitutes part of the 'local population' whose rights and needs the MC must take into consideration as part of his duties under article 43 of the Hague Regulations.

Thus, in the *Haas* judgment, the Court established that the duty of the MC under international law, "to ensure proper living conditions, applies to all spheres of life, extending beyond security and essential needs to include economic and social needs that arise in a modern society."[398] The aforementioned duty concerns "both the Arab and Israeli inhabitants" of the occupied territory.[399] This, they opined allows the MC to lawfully restrict rights that are enjoyed by the 'protected persons', including their property rights.

For example, revisiting the *Haas* judgment, petitions had challenged the decision of the MC to requisition land belonging to Palestinians for the purpose of widening the path used by Israeli worshippers to access the Tomb of the Patriarchs. In its judgment, the Court upheld the legality of the land requisition on the ground that "where it shall be required *in order to satisfy essential living needs of the population residing in the* area [emphasis added], [...] the need for the requisition of private land for the purpose of paving roads and access routes to various locations in the area has been recognized."[400]

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[396] *Morar* Judgment, *supra* note 87, *Dir Samit Village* Judgment, *supra* note 149 at para 32; *Abu Safiyeh* Judgment, *supra* note 151 at paras 20 and 28.

[397] *Morar* Judgment *ibid* at para 20; *Mayor of Ad-Dhahereya* Judgment, *supra* note 142 at para 12; *Abu Safiyeh*, Judgment *ibid* at para 21. It was also underlined in the *Gaza Beach Regional Council* Judgment, *supra* note 329 at para 12.

[398] *Haas* Judgment, *supra* note 141 at para 14. This was reiterated in the *Morar* Judgment, *ibid* at para 13.

[399] *Haas* Judgment, *ibid* at para 8.

[400] *Ibid* at para 9. As the Court emphasizes, the tomb is holy to adherents of the Jewish and Moslem faith: it is the burial site of Rebecca, Jacob, Leah and also (in the non-Jewish tradition) of Joseph. *Ibid* at para 16.

6.2.2. Upholding the Security Expertise of the MC

When examining security related petitions, the justices have reiterated that their normative point of departure is "identical to the normative position that was determined for considering the petitions concerning the separation fence."[401] Thus in many decisions discussed here, the Court has accepted at face value the assurances by government and military authorities that only reasonable security concerns for the safety of Israelis residing or traveling through the West Bank have guided their decision to implement the movement restriction measures.

It was reiterated by the judges that they are not experts on security and military issues, that "determining the security limits in the specific case is of course within the jurisdiction of the military commander,"[402] and that their judicial role is confined to the examination of the legality of this Commander's discretion, not to replacing this discretion with that of the Court.[403] Moreover, they confirmed that special weight would be granted to the MC's expertise and that his decision enjoys "the presumption of administrative propriety as long as no factual basis has been established to the contrary."[404]

As a logical conclusion, the Court has refrained from entertaining the possibility that irrelevant political considerations or hidden objectives may have enticed the MC to implement the contested measure. It has also concluded that, by contrast to the factual analysis provided by the government which alleges the existence of real security risks for the Israeli settlers and other nationals, the petitioners had failed to prove that considerations other than security had influenced the decision of the MC.[405] This was the Court's conclusion in the *Hebron Municipality* judgment. Hence, despite taking note of the overall improvements in the overall security situation in the West Bank city of Hebron (which had resulted in lifting several

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[401] *Mayor of Ad-Dhahereya*, Judgment, *supra* note 142 at para 12.

[402] *Morar* Judgment, *supra* note 87 at para 21.

[403] *Haas* Judgment, *supra* note 141 at para10, *Abu Safiyeh* Judgment, *supra* note 151 at para 27.

[404] *Haas* Judgment *ibid* at para12; *Abu Safiyeh* Judgment *ibid* at para 27.

[405] *Bethlehem Municipality* Judgment, *supra* note 1 at paras 9 and 19. See also *Haas* Judgment, *ibid* at para 12. In the *Abu Safiyeh* Judgment, the Court actually noted that "[n]o major effort at persuasion is required to prove [that] [...] the passage of thousands of pedestrians in an area infamous for terror attacks, whose alleys are so narrow that a vehicle cannot pass along certain parts of them, and abandoned buildings next to it may serve as hideouts for terrorists." *Ibid* at para 12.

movement restrictions imposed in some parts of the city)[406] the Court did not challenge the assessment of military authorities that it was necessary to maintain another set of movement restrictions imposed by the MC elsewhere.[407]

This was also the case in the *Dir Samit Village Council* case, in which petitioners alleged that closing off the road, had forced residents of twelve Palestinian villages along that road to make a long detour to reach essential social service centres.[408] The Court demonstrated an unwillingness to question the government's security-based assessment and also dismissed alternative military opinions presented by the petitioners on the ground that:

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[406] Located in the southern part of the West Bank, the Governorate of Hebron is the largest Palestinian governorate in terms of size and Palestinian population; it includes 22 Israeli settlements. The city of Hebron is the second West Bank city after EJ, with the most embedded Israeli settlements inside its urban area, with more than 600 Israeli settlers living in four settlements and an estimated 1,500 Israeli soldiers to protect them. The part of the Wall constructed in this area is approximately 125.5 km long, 109 km of which has been semi-finished. The 'H2 area' of the city of Hebron includes four downtown Israeli settlements which houses 500 settlers and is inhabited by an estimated 30,000 Palestinians is surrounded with checkpoints, roadblocks and military barriers. See Temporary International Presence in Hebron (TIPH), "Hebron," online: TIPH <http://www.tiph.org/hebron/> See also OCHA-oPt, "The Humanitarian Impact of Israeli Settlements in Hebron City," Fact-Sheet (November 2013), online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_hebron_h2_factsheet_november_2013_english.pdf>; *Peace Now* "Hebron Settlements in Focus," (October 2005), online: *Peace Now* <http://peacenow.org.il/eng/content/hebron-settlements-focus>; The Applied Research Institute-Jerusalem (ARIJ); "Geopolitical Status in the Hebron Governorate" (2006), online: *ARIJ* <http://www.ARIJ.org/files/admin/2006-1_Geopolitical_Status_in_Hebron_Governorate.pdf>. See also Chloé Yvroux "L'impact du contexte géopolitique sur "l'habiter" des populations d'Hébron-Al Khalil (Cisjordanie) " (2009) 38:3 L'Espace Géographique 222. Recently, Prime Minister Netanyahu underlined that Israel would not withdraw from Hebron as part of a final peace deal with the Palestinians. Barak Ravid, "Netanyahu: Israel will not Evacuate Hebron, Beit El as Part of a Final Peace Deal," *Haaretz* (7 January 2014). See Gideon Alon and Aluf Benn, "PM Demands `Quick' Changes in Hebron for Jewish Control" *Haaretz* (8 November 2002); Alternative Information Center (AIC), "Occupation in Hebron," Report (2004) online: OCHA-oPt <http://www.ochaopt.org/documents/opt_prot_aic_hebron_dec_2004.pdf>.

[407] In this regard, Israeli military authorities had decided to allow some Palestinians living on Othman Ben Affan road to access this road with their vehicles and granted some 36 permits to access this road. However, they also decided to maintain the ban on the ability of Palestinians to access other roads within the area with their vehicles. Consequently, the HCJ ruled that there is no ground to intervene since the reasons for imposing those movement restrictions are security-based and, therefore, are deemed within the authority of the MC. It also expressed confidence in that the MC will lift the remaining restrictions and will allow for the re-opening of shops when the 'security situation' permits. See *Hebron Municipality* Judgment, *supra* note 172 at 2. See also *Bethlehem Municipality* Judgment, *supra* note 1 at para 18. The majority of H2 zone has been closed to access of Palestinian vehicles. Once the section of the Wall in that area will be completed, the Rachel's Tomb will be on the 'Israeli side' of the Wall.

[408] *Dir Samit Village* Jugement, *supra* note 149 at para 1. As a result, residents of 12 Palestinian villages along the road have been forced to make a long detour to reach service centres - See OCHA-oPt, "West Bank Movement and Access Update" (November 2009), online: UNISPAL <https://unispal.un.org/DPA/DPR/unispal.nsf/0/EAD44F7163AF410F8525767700593335>.

> The question of the proportionality of the chosen security measure cannot be decided by presenting an alternative security position or security approach which differs from that of the military commander, who has the power and duty with regards to the security of the residents of the Area. The military commander is the professional body with expertise in the area of security and those wishing to refute the security position of the military commander bear a great burden.[409]

In this regard, the Court emphasized that it would not intervene in the discretion of the MC as to which methods best respond to an alleged security risk, particularly as long as they did not depart from the margin of proportionality and reasonableness.[410] Similarly, in the *Second Dir Qadis* case, the Court (presided by Justice Grunis) accepted the government's assurances that the road would only be used by the security personnel of the settlement, thereby avoiding having to rule on whether government authorities had failed to fulfill the whole planning procedures related to the road.[411]

6.3. Managing Conflicting Human Rights Values and Interests through the Balancing Act: An Analysis of the Court's Approach

In its adjudication, the Court has often emphasized that it must examine whether the MC has successfully balanced between the different considerations. What are the main considerations that were at stake according to the Court?

A review of the HCJ decisions indicates that the manner in which the Court balanced between various rights and interests can be divided into three main categories. The first category is one where the security of Israelis was balanced by the Court with the human rights of the Palestinian local population. The second category is where the right of the Palestinians to physical security and safety required the restriction of other fundamental rights that they enjoy, such as freedom of movement and right to property. And the last category is one in which various rights of the Israelis (mainly, but not exclusively Israeli settlers) were balanced

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[409] Petitioners had annexed an expert opinion that creating roads that are exclusively dedicated to the movement of Israelis would increase rather than decrease the overall security risks. See (HCJ 3969/06) *Dir Samit Village Council* Judgment, *supra* note 149 at para 23.

[410] *Bethlehem Municipality* Judgment, *supra* note 1 at para 19.

[411] The judgment therefore, does not discuss allegations by the petitioners that the land is not 'state land'. See *Second Dir Qadis Village Council* Judgment, *supra* note 147 at paras 2-4.

by the Court with the rights of the Palestinians. The next section examines each in turn.

6.3.1. Balancing the Security of Israeli Settler Population with the Rights of the Palestinian 'Protected Persons': A Structurally Biased Equation?

The Court has assessed the MC's ability to balance the security of the Israeli settler population and the rights of the Palestinians by focusing on two steps: (i) establishing whether the security of those Israelis lies within the scope of the authority of the MC; and (ii) conducting the three prong proportionality test.

6.3.1.1. The Security of Settlers and other Israeli Nationals: A Part of the MC's Legitimate Military Considerations?

Having established that the MC is responsible for the security of all persons under his effective authority, the Court has traditionally treated the security of Israeli settlers, and/or other Israeli citizens (including travelers) as "a derivative of the security military consideration" which the MC can lawfully take into consideration which then must be balanced against the rights of the Palestinian civilian population. [412]

That article 43 of the Hague Regulations and Israeli domestic law are sources for this obligation has been well established by the Court in the Wall related judgments.[413] Clarifying the duty of the MC further in the *Haas* case, the justices explained decision that the MC must:

> *[E]nsure the safety, security and welfare of the area inhabitants. The said duty applies to him in respect of all the inhabitants, regardless of their identity – Jews, Arabs or foreigners* [emphasis added] [...] The duty of the Area Commander to

[412] In a judgment dating from the 1980s, the HCJ confirmed that the MC is responsible for the security of Israeli settlers. Israeli military authorities allowed settlers to occupy the upper floors of a building in the city of Hebron (which they alleged to own). The Palestinian petitioners argued that the measures were not reasonable and were spearheaded by a desire to remove them from the area (as opposed to genuine security needs). Before dismissing the petition, the Court underlined that the "formal power to take the necessary measures to protect the life of the settlers in the Hadassah House is vested with the respondents [...]. This power is quite broad, and applies to any person who is present in the Area, whether a permanent resident of the Area or a new resident thereof." (HCJ 72/86) [1987] *Zalum et al v. the Military Commander of the Judea and Samaria Area*,) at para8, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/files/2013/1158750_eng.pdf> [*Zalum* Judgment].

[413] *Mara'abe* Judgment, *supra* note 388 at para 23. For a discussion see Chapter II, section 3.1.

> guard the safety of their lives and their human rights is derived from *their mere residence in the area* [emphasis added].[414]

As in previous cases, the Court did not consider the illegality of an occupant's transfer of its own civilians into occupied territory under international law to be an element that necessarily negates the authority of this Commander to guarantee the settlers' security. This was the situation in the *Morar* judgment, where upon considering whether the decision of the MC to close off areas adjacent to Israeli settlements is lawful, the justices stressed the idea that "the protection of the security of the Israeli inhabitants in the territories is the responsibility of the military commander, even though these inhabitants do not fall within the scope of protected persons."[415] In other judgments, the Court explained that this duty "to guard the safety of their lives and their human rights is derived from their mere residence in the area,"[416] and that his "duty to protect the life of any person – where life is at risk – *is not subject to the legality of the dwelling in any specific case* [emphasis added]."[417]

However, it is also important to highlight that the Court did not limit itself to reiterating that ensuring the security of the Israeli settlers falls within the legitimate authority of the MC (under article 43 of the Hague Regulations). In several judgments discussed here, the Court upheld the idea that he is also responsible for providing for the security of Israeli nationals who usually reside in Israel proper and who are traveling inside the West Bank. Consequently, the justices determined that the rights and security of theses Israeli citizens can also be balanced against the rights of the Palestinian population.[418] This was the situation in the *Abu Safiyeh* case, where the Court concluded that in addition to Palestinians and Israeli settlers, the MC's duty to ensure 'public order and safety' in 'the Area' must also be conducted vis-à-vis

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[414] *Haas* Judgment, *supra* note 141 at para 14. See also *Abu Safiyeh* Judgment, *supra* note 151 at para 20.

[415] *Morar* Judgment, *supra* note 87 at para 20.

[416] *Haas* Judgment, *supra* note 141 at para 14.

[417] *Dir Samit Village Council* Judgment, *supra* note 149 at para 16.

[418] *Abu Safiyeh* Judgment, *supra* note 151 at para 28. The worshippers in another case included Israelis living in West Jerusalem (i.e. inside Israel proper). See *Bethlehem Municipality* Judgment, *supra* note 1 at para 7. In the *Beit Iksa* case the railway benefited Israeli travelers between Tel Aviv and Jerusalem, and therefore includes amongst those who benefit from it Israeli nationals not living in annexed EJ. *Beit Iksa* Judgment, *supra* note 148 at para 5.

the "residents and citizens of Israel who do not reside there, but who might be traveling inside the West Bank."[419]

Similarly, in the *Dir Samit* case, the Court noted that the "security considerations indeed justify measures to protect the Israelis using the road," in clear reference to the fact that Israelis – who are not necessarily settlers – also travel between Israel proper and Israeli settlements in the West Bank. Again, in this case, the Court upheld that, as a matter of principle, the MC was entitled to restrict the Palestinians' freedom of movement. Only when the subsequent examination of whether "there is justification to take such an extreme measure as *completely closing* [emphasis added] the breadth road to a large population that depends on freedom of movement in the area in order to maintain the basic necessities of life,"[420] did the Court strike down the legality of his measure.[421]

The same stance was adopted by the Court to uphold the legality of an MO which had led to the requisitioning of land belonging to Palestinians for the alleged protection of settlers and other Israeli citizens who are present in the West Bank (for travel, worship etc.). For example, in the *Haas* case, the Court was faced, on the one hand, with the fact that the laws of belligerent occupation strictly forbade the destruction of buildings in the occupied territory except for imperative operational military needs. However, the Court effectively widened the exceptions under that body of law by ruling that the objective of "paving roads in order to protect Israeli inhabitants residing in the area" can be considered part of the MC's legitimate military/security considerations and that, therefore, the land requisition order by the MC fulfilled the requirements of article 52 of the Hague Regulations.[422]

Implicitly, the manner in which the Court has approached the security considerations of the under article 43 has allowed the security of not only the settlers, but also of Israelis in Israel

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[419] See *Abu Safiyeh* Judgment *ibid* at para 20. Consequently, the justices upheld the right of the MC to impose restrictions on vehicular traffic in general and on Palestinian traffic in particular if he deems it necessary for ensuring the security of those travelers on the road, stressing that it would therefore not interfere in the decision of the MC as to which measures best achieved this objective. *Ibid* at paras 22, 26 and 28.

[420] *Dir Samit Village* Judgment, *supra* note 149 at para 19.

[421] For more discussion of how the Court analyzed the proportionality of the measure, see section 6.3.1.2 of this Chapter.

[422] *Haas* judgment, *supra* 141 at para 9. Previous case law includes the *Wafa* Judgment, *supra* note 128.

proper to constitute part of the balancing equation. Thus although the Court underscored in the aforementioned judgment that the Palestinians' rights to freedom of movement are protected in Israeli constitutional law,[423] it decided that "[w]hen there is a direct confrontation and there is a concrete risk to security and life, the public interest indeed overrides protected human rights, and the same is the case where there is a concrete *likelihood* of a risk to life."[424]

At the same time, the Court also stressed that to prevent an absolute negation of one's ability to exercise a protected right the MC must maintain a balance between the conflicting values. To assess whether the Commander had indeed achieved in striking the appropriate balance, the justices applied the proportionality doctrine and its three sub-tests.[425]

6.3.1.2. Of Proportionality: the HCJ and the Three Sub-Tests

A review of the petitions discussed in this chapter shows once again, the central role afforded by the HCJ to the proportionality doctrine as a way of determining the legality of the actions of the MC in the occupied territories under IHL.[426] When balancing the security of Israelis against the rights of the Palestinian inhabitants, the Court has generally upheld the idea that the security measure implemented by the MC fulfilled the requirement of the first proportionality sub-test (i.e. the rational connection test) in all cases discussed here.[427] Similarly, to other cases, the Court continued to prioritize the assessment of the military

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[423] This is in addition to freedom of worship and property rights, which the HCJ underscored as constituting rights that are protected by Israeli constitutional law, to be enjoyed by both Israelis and Palestinians in the West Bank.

[424] *Morar* Judgment *supra* note 87 at para 16. Emphasis is in the original. This conclusion was originally made by the HCJ as part of its deliberations of a petition filed against the *Citizenship and Entry into Israel Law*-2003*[Temporary Order]*, adopted by the Knesset. This order prohibits Palestinians from the oPt from entering Israel proper and EJ for the purpose of family unification with their Israeli spouses (mainly the Palestinian Arab citizens of Israel). With a majority of six to five judges, the Court ruled that the law does not infringe on constitutional rights of the petitioners and that, even if it did, this infringement was proportionate. (HCJ 7052/03) [2006] *Adalah et al v. Minister of Interior et al* at para 124 and 125, official English translation, online: HCJ <http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf>. For a discussion of this judgment see *Adalah*, "Israeli Supreme Court Upholds Ban on Family Unification," Press Release, (12 January 2012), online; *Adalah* <http://adalah.org/eng/Articles/1185/Israeli-Supreme-Court-Upholds-Ban-on-Family>.

[425] *Abu Safiyeh,* Judgment, *supra* note 151 at para 29.

[426] Sharon Weill, *The Role of National Courts, supra* note 35. See *Morar* judgment, *supra* note 87 at para 18. See also *Mara'abe* Judgment, *supra* note 388 at para 30.

[427] *Morar* Judgment, *ibid* at para 20. *Abu Saifyeh* Judgment, *supra* note 151 at para 30. *Dir Samit Village* Judgment, *supra* note 149 at para 23.

authorities, even where alternative military sources have questioned the soundness of the MC's decision from a security perspective.[428]

It is when the Court embarked on examining whether the challenged security-based measure fulfilled the second proportionality sub-test (the least harmful sub-test) that the justices demonstrated a certain readiness to strike down its legality in some instances. Thus in several judgments, they held that less harmful alternative measures were available to government authorities and if implemented, would have achieved the same security benefits. This was the case in the Mayor of *Ad-Dhahiriya* judgment.[429] Although the justices ordered government authorities to dismantle the concrete barricade that had impeded the access of the Palestinians in the area, they did not rule out that "the respondents may construct an alternative barrier that is consistent with this judgment."[430]

Adopting a similar stance in the *Dir Samit* judgment, the Court decided to strike down the decision of the MC to close off road 443 almost entirely to Palestinian movement. In explaining its decision, the justices stated that "even if we were to accept the position that the existing threats justify the measure of separation and prevention of friction between the Israeli population and the Palestinian population," the respondent had not examined all possible alternative measures for protecting the Israeli settlers and other Israelis traveling on the road. They also opined that the existing threat did not justify the sweeping measures that had been put in place by the MC, which effectively amounted to a complete prohibition on Palestinians from using the road, while permitting it to Israelis.[431] Likewise, in the *Abu Saifyeh* case, the Court remained convinced that less invasive security measures were at the disposal of Israeli

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[428] For example, in the *Abu Safiyeh* case, petitioners had alluded to the security opinion of a reserve Brigadier General in the Israeli army in another petition, in which he had argued that allowing only Israeli vehicles to travel along a given road, may address in a satisfactory manner the threat of drive by shooting attacks, but may facilitate attack by other methods. See *Abu Safiyeh* Judgment, *ibid* at para 30 and *Dir Samit Village* Judgment, *ibid* at para 6.

[429] *Mayor of Ad-Dhahiriya* Judgment, *supra* note 142 at paras 21-22.

[430] The Court therefore did not rule out that government authorities can have it replaced by "an alternative barrier that is consistent with this judgment." *Ibid* at para 22. These lower barricades would allow Palestinian pedestrians and their livestock to pass through and would constitute a less invasive security-based measure. See also paras. 19-20.

[431] *Dir Samit Village* Judgment, *supra* note 149 at para 26.

authorities to secure the safety of Israeli passengers on the road which at the same time were less injurious to the Palestinian inhabitants of the area.[432]

As for the third proportionality sub-test (proportionality in the narrow sense), the justices have in some cases concluded that the benefit of protecting Israelis and their security justified the level of harm that the Palestinian petitioners would have to incur. At the same time, they called upon government authorities to implement specific measures which would ensure that the given security measure would be proportionate in its effect. For example, in the *Morar* judgment, while reiterating that it is within the authority of the MC to determine the range of the area to be closed off to the access of Palestinian farmers, and its distance from the boundaries of the Israeli settlements, the Court emphasized that it would still be necessary to grant Palestinians an opportunity to enter their land in order to complete their agricultural work 'to the last olive'. Moreover, while preserving in principle the right of the MC to give oral instructions for closing off an area (in exceptional circumstances and for a limited period of time), it also held that this should be done on an exceptional basis and that, as a general policy, closing off an area should generally be done by means of a written order.[433]

In some judgments where the Court had already struck down the legality of a given measure under the second sub-test, it decided that there was no need to examine whether the contested measure also fulfilled the requirements of the third sub-test.[434] In other judgments, it did embark on this analysis, most notably in cases where petitioners had argued that the security-based measure that they were challenging was sweeping in nature. This was the case in the *Dir Samit* judgment. Here, the Court challenged the government's assurances that the injury caused to the petitioners was no more than longer commuting time (to get from one place to the other). According to the justices, the injury caused to the 'fabric of life' of thousands of

[432] *Abu Safiyeh* Judgment, *supra* note 151 at paras 32 and 35.

[433] It was also pointed out that, in the absence of such a written communication, Palestinians should not be denied access to their land. See *Morar* Judgment, *supra* note 87 at para 21.

[434] *Mayor of Ad-Dhahiriya* Judgment, *supra* note 142 at para 21.

Palestinians was so disproportionate, that it makes it impossible for them to conduct "a reasonable daily life."[435]

Equally, in the A*bu Safiyeh* case, the Court concluded that the complete travel ban on Palestinians had not satisfied the criteria of the third proportionality sub-test. The justices explained that "[t]he additional security achieved by the *flat ban* [emphasis added] does not equal a complete denial of the right of protected persons to travel on a road which was designed for their needs and built on lands some of which were expropriated from them."[436] It does not justify that the road is exclusively used for the needs of the occupying power, while the 'protected persons' are barred from using the very same road.[437] According to the Court, the resulting situation was unacceptable because:

> It is possible to say that, as a rule, a *sweeping measure is constitutionally "suspect"* [emphasis added]. Absolute measures require, even more so than usual, substantiated reasoning powerful enough to persuade that they are justified. This is due to the inherent contradiction between blanket measures and the protection of human rights.[438]

In the end, however, the Court refused to hold that as a matter of principle, the segregation/separation between the Palestinian and the Israeli population in terms of their access to the road was illegal[439] or that it amounted to an institutionalized form of discrimination as petitioners had alleged.[440] Instead, it chose to recall that in the past it had

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[435] *Dir Samit Village* Jugement, *supra* note 149 at paras 28-32. Hence, it declared the measure to be unlawful because it contravenes the duty of the MC to provide for the welfare of the 'local population' and to enable it to conduct a normal life. However, while it rendered the *order nisi* absolute, it chose to suspend the judgment for three months in order to allow that Commander to formulate a more reasonable security solution. *Ibid* at paras 34- 35.

[436] *Abu Safiyeh* Judgment, *supra* note 151 at para 35.

[437] *Ibid* at para 35.

[438] *Ibid* at para 5.

[439] Instead, she suggested that the question must be examined on a case by case basis. See *ibid*, *Separate opinion by Chief Justice Beinisch* at para 2.

[440] In a separate opinion by Justice Beinisch, the petitioners' claim that the measure amounts to discrimination based on race and national origin was addressed. While she acknowledged that the challenged measure gave rise to a sense of inequality and was driven by unacceptable motives, she rejected the correlation which petitioners had attempted to establish between this policy and the apartheid policy of South Africa. According to the Chief Justice, the Israeli led policy was taken for security reasons. Moreover, she noted that "[n]ot every instance of distinguishing between people under any circumstances necessarily constitutes wrongful discrimination, and not every instance of wrongful discrimination constitutes Apartheid." See *ibid Separate opinion by Chief Justice Beinisch* at para 6.

upheld the right of the MC to requisition land for the purpose of constructing 'by-pass' roads for the use of Israelis (primarily settlers) in the West Bank, if this reduces the friction between the two populations.[441]

6.3.1.3. Concluding Observations

In analyzing the Court's interpretation of the lawful duties of the MC under article 43 of the Hague Regulations, this chapter confirms that a number of features remain discernible from the Court's judicial approach to petitions that have been filed by Palestinians. Firstly, the Court continues to exhibit a reluctance to challenge the security/military assessment of government and military authorities regarding the existence and scope of security threats or to question, as a matter of principle, their authority to implement the measure they have chosen in response to these threats. Only when there has been a clear misfit: – i.e. when the Court has a *prima facie* factual basis brought to its attention, indicating that the action of the MC was arbitrary or not performed in good faith – has the Court struck down the legality of a measure allegedly implemented for the protection of Israelis.[442] Unfortunately however, when the Court has done so, the decision of the HCJ has not bridged the "untenable gap between lofty principles and concrete instructions for the military."[443]

Secondly, the Court continues to rely on the proportionality doctrine to regulate some of the harsher impact of a given measure on the rights of the Palestinians. This in turn explains why this doctrine has only been useful in so far as it has allowed the Court to strike down the legality of measures that are sweeping in nature or arbitrary. The approach has not proved to

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[441] In this specific case, the HCJ deemed the 'by-pass' road construction to be necessary, in order to allow the settlers in the settlement *of* Kiryat Arba and other settlements in and around Hebron to reach their destinations without having to pass through Palestinian villages and Hebron itself. *Wafa* Judgment, *supra* note 128 at 5.

[442] It has been argued that "Courts are usually not in the position to contradict the assessment of the MC. The Court does not dispute that the Palestinians may have suffered serious injury to their rights. It is just concerned with whether or not it was done arbitrarily - disproportionately or unnecessarily." *Shamas* Interview, *supra* note 375.

[443] For example, while the justices had struck down the legality of the absolute travel ban imposed by Israeli authorities against the Palestinians, the Court granted the MC five months, "to formulate a different security solution which would provide protection for the Israeli residents who use the Road." *Abu Safiyeh* Judgment, *supra* note 151 at para 39. However, the Court did not call for the opening of the Beituniya crossing, which connects the Palestinian villages to the metropolitan centre of Ramallah. See ACRI, "Road 443," *supra* note 152. Time to formulate another plan was also granted to authorities in the *Dir Samit Village* Judgment, *supra* note 149 at para 35.

be very useful in allowing the Court to challenge the very authority of the MC to implement a given action as a matter of principle. A very clear demonstration can be found in the *Abu Safiyeh* judgment where, instead of ruling that that the MC lacked the authority to exclude Palestinian vehicles from using a highway (ostensibly built for the benefit of the Palestinian local population), the justices upheld the discretion of military authorities to impose less sweeping travel restrictions (as rational response to security concerns) and preferred to focus their criticism on the fact that the ban was absolute and, therefore, disproportionate in nature.[444]

This can be partially explained by the limited (and perhaps even detrimental) impact that using the proportionality doctrine can have in the context of a military occupation, for it shifts the judicial discourse to an analysis of the extent to which the human rights violations are still proportional, not on whether or not the contested measure resulting in those violations is lawful or unlawful to begin with. It also:

> Assumes an accountable democratic government committed to the collective good of its citizens, but occasionally forced to violate the rights of whole or part of the population in order to attain legitimate ends. The benefits to the population are then weighed against the infringement of their rights, the point being that the benefits accrue to the *same* population whose rights were violated. But it is questionable whether this logic can apply when the government is a military occupier promoting the collective security interests of its *own* citizens while violating the rights of the people it occupies.[445]

The end result is that security of the Israelis almost always trumps the rights of the Palestinians, thereby relegating the rights of the latter to second place.

Thirdly, the Court's decision to consider Israeli settlers part of the 'local population' whose safety and security the MC must protect under article 43 of the Hague Regulations has also granted domestic legitimacy to both the presence of Israeli nationals in the occupied territory

[444] However, had the Court done so, this would have been a much more powerful statement regarding the rights of the 'protected persons. David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15.

[445] Aeyal Gross, "The *Construction of a Wall*," *supra* note 23 at 407. Emphasis in the original.

and their right to use the territory's resources and infrastructure.[446] It has also added one extra layer to the many layers of 'military need' exception under the international law of belligerent occupation, which allows the MC to lawfully restrict the rights of Palestinians 'protected persons'.

No doubt, this latter element cannot be viewed in isolation from the fourth element, namely that the Court has consistently refused to rule on the illegality of settlement activity under article 49(6) of the Fourth Geneva Convention.[447] It has also refused to entertain the possibility that the illegal presence of those settlers in the occupied territory[448] has implications for the scope of the MC's authority under article 43 of the Hague Regulations.[449]

Even if one's initial point of departure is that every natural person under the effective control of the MC deserves protection (i.e. including Israeli settlers), the justices should have demanded that the measures taken by Israeli authorities for protecting the settlers be influenced by the question of the illegality of the transfer by the occupying power of its civilian population into the occupied territory under the Fourth Geneva Convention.[450] Had this been taken into consideration, the Court could (or should) have instructed the MC to restrict the presence of settler in the occupied territory, as a less invasive way to protect their personal security:[451]

> [...] the commander's responsibility and obligation to guarantee that person's security and the security of others [should have] meant not allowing that person to settle there. Not the opposite and creating a new friction zone. The

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[446] Yuval Shany and Guy Harpaz, "The Israeli Supreme Court and the Incremental," *supra* note 22. Others have argued that this way the Court has implicitly granted legitimacy to their very presence.

[447] According to *Shehadeh*, this goes back to the Court's position that the issue of the settlement is unjustifiable because it is a political question. *Shehadeh* Interview, *supra* note 86.

[448] *Sfard* Second Interview, *supra* note 312; *Attorney 04* Interview, *supra* note 372. Interview with Attorney Nasrat Dakwar by Avichay Sharon on behalf of author and translated into English (7 July 2014, Jerusalem) at 2 and 7 [*Dakwar* Interview].

[449] This is because "[t]here is a fundamental principle and rule in law that an unlawful act cannot give rise to legal claim." *Ibid* at 7.

[450] Daphne Barak-Erez, "Israel: The Security Barrier," *supra* note 392 at 549. This is because from a legal perspective, "your citizens are not allowed to be there." See *Attorney 04* Interview, *supra* note 372.

[451] David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15. See also Yuval Shany and Guy Harpaz, "The Israeli Supreme Court and the Incremental," *supra* note 22 and Daphne Barak-Erez, *ibid*. See also Interview with Attorney Michael Sfard by Avichay Sharon on behalf of author (10 July 2014, Tel Aviv) [*Sfard* First Interview].

> commander has the authority and obligation to prevent people from entering certain areas in order to prevent precisely these security risks. The court should have started from the basic principle in [international law] IL which forbids the transfer of population into that area. This is what should have guided the court and based on that the obligation of the commander is clearly to prevent that presence [...].[452]

The Court's conclusions in the cases discussed here were only possible because it has decided to treat the presence of the Israeli settlers in the West Bank as the only significant fact and refused to entertain whether their presence is the result of an action that is illegal under international law.[453]

The next section examines how the Court balances competing values when one or both of these values do not touch upon the security or interests of Israelis.

6.3.2. Balancing the Security needs of the Palestinians vis-à-vis. their Rights: Within the Court's 'Comfort Zone'

6.3.2.1. Overview

By now, it is fairly evident that most HCJ decisions have traditionally revolved around the issue of balancing the security of the Israeli settlers against the rights of the Palestinians. However, there have been petitions that have challenged the decision of the MC to close off an area of land privately owned by Palestinians, thereby preventing their landowners from accessing it. What distinguishes this case is that Israeli military authorities argued that closing it off was necessary for ensuring the Palestinians' own physical security in the face of violence by Israeli settlers against them and their property.[454]

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[452] Attorney *Dakwar Interview*, *supra* note 448 at 6.

[453] I.e. it was not interested in 'why they are there', but only in the fact that 'they are there'. See *Shamas* Interview, *supra* note 375.

[454] Human rights reports have documented a phenomenon by which Palestinian privately owned land that exists around Israeli settlements are taken over by the Israeli military authorities to create a security related buffer zone. However, with time this land is being increasingly used as land reserves for agricultural activities by the settlers and for the *de facto* expansion of these settlements with few Palestinian landlords being allowed to enter the area to work their land. See Dror Etkes "Israeli Settler Agriculture as a Means of Land Takeover in the West Bank," *supra* note 294. See also Chaim Levinson, "Settlers using West Bank Security Zones to Expropriate Palestinian land," *Haaretz* (5 July 2015).

This was the situation in the *Morar* case. Here, petitioners representing five Palestinian villagers challenged the decision of the MC to prevent them from accessing their lands nearby Israeli settlement, a measure claimed necessary both for the protection of Israelis and for ensuring the Palestinian farmers' own protection.[455] Meanwhile, petitioners highlighted that Israeli military forces had consistently failed to take effective measures against settlers that were involved in those acts, in violation of the MC's obligations under international law and of Israeli administrative law.[456]

In this regard, it must be recalled that the phenomenon of Israeli settler violence against Palestinians and their property in the West Bank (including in EJ) has steadily increased over the years.[457] In addition to displacing vulnerable Palestinian families,[458] the policy has been criticized for contributing to the withdrawal of Palestinians from land nearby Israeli settlements.[459] Moreover, poor standards of law enforcement by Israeli authorities have also been cited as the main element encouraging the perpetuation of this policy.[460] This has been

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[455] *Morar* Judgment, *supra* note 87 at paras 1-2, 7 and 19.

[456] It is unreasonable, disproportionate in nature and a violation of the duty of the MC to maintain order and security under Article 43 of the Hague Regulations. *Ibid* at paras 5, 11 and 13.

[457] By 2013, there were 110 Palestinian communities, with a combined population of over 315,000 people, who were vulnerable to settler violence. Of these, almost 60 communities (of more than 13,000) were at 'high risk'. See UN-OCHA-oPt, "12-18 November 2013," online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_report_2013_11_21_english.pdf>. According to the monitoring and documentation by one Israeli NGO, from 2005 to August 2015, of the 1,104 cases of ideologically motivated crimes against Palestinians and their property in the West Bank, 46 % involved complaints by Palestinians regarding damage to their property; 34.4 % involved suspected violence against their person and 14.5 % revolved around complaints of attempts by Israelis to seize their land. See *Yesh Din*, "Law Enforcement on Israeli Civilians in the West Bank" (date sheet, October 2015), online: *Yesh Din* <http://www.yesh-din.org/userfiles/Datasheet_English_Oct%202015.pdf> [*Yesh Din* Settler Violence 2005-2015 Statistics].

[458] OCHA-oPt, "Israeli Settler Violence in the West Bank," (November 2011), online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_settler_violence_factsheet_october_2011_english.pdf>.

[459] European Union (EU) Heads of Missions Report, (April 2011), online: EU-Observer <http://euobserver.com/media/src/98756cdc181c4af037b59d4711fc7e8d.pdf>. Settlers take over land and use it to grow field crops, plant trees, and graze sheep, while physically preventing Palestinians from accessing it. Even when Palestinians appeal the trespass, the settlers claim that under the *Ottoman Land Code 1858* and by virtue of having cultivated the land for more than ten years, they have a right to register it under their name (pursuant to article 78) or, at the very least, that they are protected from being evicted from it (article 20). See Quamar Mishriqi-Assad, "Legal Recourse based in Local Law" in *supra* note 294.

[460] From 2005-August 2015, 84.9 % of all investigations by the Israeli Samaria and Judea District Police and the Nationalistic Crime Unit into alleged acts of violence by Israeli civilians against Palestinians (1,104 cases) did not bear fruit: 91.6 % of those cases (940) were closed without indictments, while 1% of case files (11) were lost and never investigated. Only in 7.3 % of these cases were indictments served against suspects. See *Yesh Din* Settler Violence 2005-2015 Statistics, *supra* note 457. For previous updates, see *Yesh Din* "Law

the target of much criticism from Israeli quasi-independent bodies[461] and the HCJ (including in the *Morar* judgment).[462]

The Court's decision in this judgment is briefly examined.

6.3.2.2. The Court's Decision

On one hand, the Court endorsed again the idea that it was within the MC's authority under international law to decide whether or not movement restrictions are a necessary security measure.[463] It also stressed that the purpose for which the closure was exercised was a proper one, namely to protect public order and security under article 43 of the Hague Regulations. According to the Court, this as a duty of the MC applies "with regard to all persons who are

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Enforcement on Israeli Civilians in the West Bank," (data sheet, July 2013) at 2, online: *Yesh Din* <http://www.yesh-din.org/userfiles/file/datasheets/DataSheet%20July%202013%20-%20Law%20Enforcement%20-%20Eng.pdf> [last accessed 29 November 2015]. In addition convicted individuals, including those accused of for manslaughter, almost invariably receive light sentences or have their prison terms shortened considerably. See *B'Tselem*, "Tacit Consent: Israeli Policy on Law Enforcement towards Settlers in the Occupied Territories," Report (March 2001) at 43-44, online: *B'Tselem* <http://www.btselem.org/press_releases/200122>. From 2005-2012, an estimated 75-86 % of cases alleging settler trespassing were closed without indictments, while the rest remain under investigation. See Quamar Mishriqi-Assad, "Legal Recourse based in Local Law," *ibid*.

[461] *B'Tselem*, "Tacit Consent," *ibid*. For example, the *Karp Commission*, established in April 1981 by Deputy Attorney General Judith Karp, identified significant defects in police activity in the oPt. See Foundation for Middle East Peace (FMEP) "Israel's Policy of Arming Israeli Settlers is Endangering Palestinians in the Territories" in Report on Israeli Settlements in the Occupied Territories (May 1994), online <http://fmep.org/wp/wp-content/uploads/2015/01/4.3.pdf> . According to the government appointed *Shamgar* Commission, despite instructions by high-ranking Israeli military officials that soldiers are responsible for arresting settlers and turning them over to the police for investigation, once in the field, soldiers have consistently reported that they were forbidden from arresting settlers except in the most extreme circumstances. HRW, "Playing the Communal Card: Communal Violence and Human Rights," Report, (1995), online: HRW <http://www.hrw.org/reports/1995/communal>. In 2009, the rise in settler violence against Palestinians has led to a decision of Central Command of the Israeli military to establish "a new rapid-response security team that will be responsible for cracking down on right-wing extremists and preventing violence between Jewish settlers and Palestinians in the West Bank." Yaacov Katz, "New IDF Unit to Combat Israeli Settlers," *Jerusalem Post* (24 September 2009). See also *B'Tselem*, "Tacit Consent," *ibid.* In 2012 Israel's Internal Security Minister formed a special police unit to combat the rising phenomenon of 'price tags', which refers to violent indiscriminate attacks on nearby Palestinian communities and their property by Israeli settlers. See Omri Efraim, "New Police Unit to Battle Jewish Terror," *YNet News* (9 October 2012).

[462] The Court underscored that settler violence and the lack of effective law enforcement and measures is "without a doubt a serious problem with which the State of Israel has been contending for many years" *Morar* Judgment, *supra* note 87 at para 30.

[463] In the *Morar* case that Court underscored that the MC is indeed competent to "make an order to close the whole of the territories or any part thereof, and thereby to prevent anyone from entering or leaving the closed area [...] [and that] this power is derived from the rules of belligerent occupation under public international law." *Ibid* at para 12.

present in the territory that is subject to belligerent occupation."[464] These persons included the Israeli settlers, "even though these inhabitants do not fall within the scope of the category of protected persons."[465]

On the other hand, the Court noted that what was at stake in this particular case is to determine the extent to which the MC had successfully balanced between the two opposing poles: the security of the inhabitants of the territories and the rights of the Palestinian inhabitants.[466] After stressing that the 'right to life and to physical integrity', is protected under both the international law of belligerent occupation and Israeli constitutional law,[467] Judge Barak (writing the opinion) explained that: "the existence of risks to public safety does not justify in every case an absolute denial of human rights."[468]

After acknowledging that the Palestinians' right to freedom of movement is a basic right entrenched in Israeli constitutional law and in international law, he stressed that the restrictions imposed by government authorities to this right must be reduced to a minimum.[469] In the particular situation of the *Morar* case, this was all the more necessary since the petitioners were trying to access land "*that belongs to them.*"[470]

Moving on to an assessment of the legality of the measure based on the three-pronged proportionality test, the Court first explained that the measure did not meet the requirements of the first sub-test. This is because the closure, while likely to achieve its declared objective of protecting the Palestinian farmers, "results in serious harm to basic rights while giving into

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[464] *Ibid* at paras 13 and 14.

[465] *Ibid* at para 20.

[466] *Ibid* at para 15.

[467] Thereby amounting to a right "that is on the highest normative echelons." Here the Court cited section 2 and 4 of the *Basic Law on Human Dignity and Liberty*, *supra* note 387. *Ibid* at para 14.

[468] *Ibid* at para 16.

[469] According to the Court, the restrictions on the freedom of movement in public areas should be examined differently than restrictions imposed on a person's freedom of movement within an area, to which he is connected to 'his home'. *Ibid* at para 14.

[470] Emphasis in the original by the Court. The Court cited the *Bethlehem Municipality Judgment*, *supra* note 1. *Ibid* at para 14. At this point the Court reiterated that the right to property is both a right that is enshrined in public international law, and in Israeli constitutional law. *Ibid* at para 14.

violence and criminal acts."[471] Addressing the second and the third proportionality sub-test requirements, the justices were not convinced that less harmful measures capable of achieving the objective of protecting the Palestinian petitioners without disproportionately violating their rights to access their land could not be found.[472] At the same time, they underscored that they were not ruling out that the MC retained, as a matter of principle, the authority to close off any given area to the party that is subjected to attacks, as a way of bolstering that party's security. In this particular case, the decision to restrict the access of Palestinian farmers to their privately owned land was deemed illegal because of the sweeping nature of the closure, and the fact that it had been put in place over a protracted period of time.[473]

The subsequent discussion by the Court of the problem of law enforcement against settler violence is very insightful for a number of reasons. It offers a glimpse into the forceful language that the Court can and has adopted vis-à-vis government authorities in judgments where the government has not done enough to address the poor state of this law enforcement. According to the Court, ensuring proper law enforcement is "a fundamental element of the rule of law [...] [and] one of the main functions of any government."[474] In addition, the judgment demonstrates a clear departure from the Court's traditional approach of not challenging the respondent's version of the facts on the ground and of accepting – at face value – that the measures adopted by the government have been implemented in 'good faith':

> It would appear that *the facts on the ground speak for themselves* [emphasis added] and that too little has been done in order to protect the rights of the petitioners. We are aware that the declaration of intentions made by the counsel for the respondents in this matter is not mere words. We are persuaded that the establishment of the inter-ministerial committee and the experience in dealing with law enforcement in the territories are steps *that were chosen in good faith* [emphasis added]. *But plans and intentions are one thing and results in another, and the results do not indicate success in the field of law enforcement* [emphasis added].[475]

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[471] In the Court's words, "it is like a policy that orders a person not to enter his home in order to protect him from a robber who is waiting for him in order to attack him." *Ibid* at para 25.

[472] *Ibid* at para 26.

[473] Noting that whether or not this is an appropriate measure depends on the threat, the circumstances, and the human rights that are being violated as a result. *Ibid* at para 27.

[474] *Ibid* at para 33.

[475] *Ibid* at para 32- 33.

More pro-actively than in some of its other judgments, the Court concludes its judgment in this case, by giving a number of clear directives on how the law enforcement by Israeli military authorities can be significantly improved.[476]

6.3.2.3. Analysis

The *Morar* judgment provides an interesting illustration of how the Court can adopt a more reprimanding attitude towards Israeli authorities for shortcomings in their law enforcement. This is due to two elements: (a) that the aspect of the petition addressing allegations of settler violence against Palestinians touches on an issue of domestic RoL enforcement issue (and not so much on issues of international law); and (b) that the security of Israelis is not really the main focus this part of the petition, so the rights of the Palestinians need not be balanced against concern for the former.

Arguably, these two elements have allowed the Court to adopt a much stronger stance with government authorities, regarding the discrepancy between intentions and the hard facts on the ground, and their duty to uphold domestic RoL requirements. The manner in which the Court addressed the issues also reinforces the conclusions made earlier, regarding the Court's distaste for the implementation of sweeping measures.[477]

The next section discusses the Court's balancing efforts when the competing interests consist of the rights of Israeli settler's vis-à-vis the rights of Palestinians.

6.3.3. On Balancing the Rights of Israelis versus the Rights of Palestinians: Shifting the Focus from the International Source of Protection to the Local Level

In some of the judgments, the Court has determined that the MC's duty to ensure the needs of the civilian population includes not only preservation of public order and the safety of these residents, but also their human rights. This includes the constitutional status granted to

[476] Such as providing protecting to the Palestinian farmers while they work their land, giving precise instructions to the military forces how to act so as not to prevent the former from access in their land. *Ibid* at paras 33.

[477] "But in order that these exceptional cases do not become the rule, we cannot agree to preventative measures of a sweeping closure of large areas for lengthy periods of time." *Separate Opinion of Justice Jubran* in *ibid* at para 6.

them.[478] Consequently, when assessing conflicting rights of Israelis and Palestinians, the HCJ justices have in some cases embarked on a horizontal balancing, a method "which is practiced in Israel in the context of conflicting rights between two equal rights-holding communities."[479]

In conducting this assessment, after first establishing that the measure/limitation has fulfilled the constitutional requirements of being prescribed by law and of satisfying an appropriate goal, the justices proceeded to an examination of whether the challenged security-based measure had also satisfied the requirement of being proportional. Here, we see the Court resorting once again the proportionality doctrine and its three sub-tests, as established in Israeli constitutional law, to determine the extent to which constitutional rights can be limited.[480] This test establishes that for a measure to be deemed constitutional three requirements must be fulfilled: (1) that there must be a rational connection between the appropriate goal and the means utilized by the law; (2) that the objective cannot be achieved by means that are less restrictive of the constitutional rights and (3) that there must be a proportionate balance between the social benefit of realizing the appropriate goal and the harm caused to the right.[481]

The next subsection gives examples from the judgments discussed in this chapter of how the Court conducted such balancing.

6.3.3.1. Of Constitutional Balancing: Analysis

The *Haas* judgment is perhaps one of the more suitable decisions for demonstrating how the Court has conducted an exercise of balancing between the conflicting constitutional rights. In this case, the justices sought to establish whether the MC's administrative decision to

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[478] *Mara'abe* Judgment, *supra* note 388 at para 28. *Haas* Judgment, *supra* note 141.

[479] Sharon Weill, *The Role of National Courts*, *supra* note 35 at 32.

[480] To recall, the principle is formally anchored in the Limitation Clause of the Basic Law: *Human Dignity and Liberty,* (section 8) which states that an infringement of a constitutional right can only be justified if the infringement is made "by a law befitting the values of the State of Israel, enacted for a proper purpose and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law." See Basic Law: *Human Dignity and Liberty*, *supra* note 387. See also Mordechai Kemnitzer, "Constitutional Proportionality: (Appropriate Guidelines," in Gideon Sapir, Daphne Barak-Erez and Aharon Barak, eds, *Israeli Constitutional Law in the Making* (Portland: Hart Publishing Ltd. Portland 2013) 225.

[481] See Aharon Barak, "Proportionality and Principled Balancing" (April 2010) 4:1 Law and Ethics of Human Rights 1.

requisition land and to demolish the two buildings belonging to Palestinians for the purpose of widening the road used by Jewish worshippers visiting the Machpela Cave is consistent with constitutional standards.

In terms of the first constitutional requirement (that there must be a rational connection between the goals and the means) the Court endorsed the position of military authorities that the MOs allowing for the requisition of the lands and buildings were issued in response to genuine security considerations.[482] In relation to the second constitutional requirement (that the objective cannot be achieve by less restrictive measures), the Court did not question the authorities' position that "any other alternative involves much greater costs in terms of security risks for the worshippers and anticipated harm and damage to the area's inhabitants."[483]

Regarding the third constitutional requirement (that a proportionate balance between the benefit and the harm) has been attained, it is this requirement that was the focus of much of the rest of the Court's analysis. To determine whether this requirement was fulfilled, the justices conducted their analysis in two stages. The first stage (a) is that of determining whether the MC has properly balanced between the Jewish worshippers' constitutional right of praying at the holy site and between their constitutional right to safety of life.[484] According to the justices, "where the exercise of the right of worship creates near certainty of the occurrence of severe and heavy damage to the public's safety [...], then the value of the public's safety shall prevail and the constitutional right shall give way to it."[485] However, this does not justify an absolute negation of the worshippers' right of worship particularly if military authorities can take certain measures to bolster order and public safety in the area. Hence, with regards to the first stage, the justices concluded that since the constitutional right

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[482] And not for the purpose of what the Court referred to as 'irrelevant political considerations.' See *Haas* Judgment, *supra* note 141 at paras 11 & 12.

[483] *Ibid* at para 21.

[484] *Ibid* at paras 17 & 18.

[485] "Protecting the safety of life is a condition to the exercising of human rights and therefore the importance of such protection overrides the [...] right, where there is a proper probability, in the sense of 'near certainty' that the exercising of the right might result in major harm to the public's safety." *Ibid* at para 19.

to prayer at a holy site is of great value, the MC must seek to facilitate the passage [of the Jewish worshippers] to these sites "while taking enhanced security measures."[486]

The second stage (b) consisted of examining whether the MC balanced between the freedom of worship of the Israelis and the value of protecting the Palestinians' right to property, which also qualifies as "a protected constitutional right."[487] This required the justices to assess whether the security of the Israeli worshippers justified the requisitioning of land and the demolition of houses of the Palestinian petitioners.[488] In this regard, they first stressed that the constitutionally protected right to property of the Palestinians is not an absolute right, but one that can be restricted for the purpose of guaranteeing the constitutional rights of others (in this case, the Israelis' right to worship).[489] Subsequently, they concluded that the MC's decision to requisition the land for the sake of ensuring the right to worship satisfies the constitutionality test because of the following: it befits acceptable social value; is designated for a proper purpose and is not excessive in the harm it renders to Palestinian right to property.[490] The Court then dismissed the petition.[491]

A similar approach was followed by the Court in the *Bethlehem Municipality* judgment. The justices first reiterated that when determining the extent to which the MC can restrict the Israelis' right to worship at certain places, he must first examine whether the adoption of certain security based measures could help realize this right.[492]

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[486] *Ibid* at para 19.

[487] *Ibid* at para 17.

[488] *Ibid* at para 16.

[489] *Ibid* at para 17. In this regard, the justices stated that even if they were to assume that they are concerned with constitutional rights of equal importance and status, even then, within the horizontal balancing between them, a certain diminution of the one may occur in order to allow the relative exercise of the other. *Ibid* at para20.

[490] Therefore fulfilling the requirements set out by the limitation clause in section 8 of the Basic Law: *Human Dignity and Liberty, supra* note 387; *Haas* Judgment, *ibid* at paras 20 and 21. In determining that the measure is not excessive in its effect, the Court took note of the assurances by Israeli military authorities that the widening of the road was reduced to a few meters on each side; that all the buildings that are being contemplated for requisition are abandoned and that affected individuals have a right to receive compensation. See *ibid* at para 21.

[491] The Court also explained that "there is no need to take a decisive position regarding the conceptual hierarchy between the right of worship and the right of property in order to decide the question of how to balance them in case of a conflict." *Ibid* at para 20.

[492] And which according to the Court, were violated, "as a result of the danger presented by terror activities that may be directed at them." *Bethlehem Municipality* Judgment, *supra* note 1 at para 14.

Subsequently, the Court embarked on effecting a balancing between constitutional rights in two stages. In the first stage (a) it examined whether the measure adopted by the MC had struck a balance between the Israelis' right to worship and the Palestinians' freedom of movement.[493] In analyzing the extent of harm inflicted on the Palestinian petitioners, the justices again took note of the measures implemented by Israeli authorities to (i) reduce the geographic scope of the restrictions of movement imposed on the petitioners and (ii) maintain the interests of the persons seeking to realize this right. In addition, (iii) the Court took into account the government assurances that these restrictions were temporary in nature and that they would be lifted once the security situation improves.[494] The Court then concluded that the harm to the rights of the petitioners was not sufficiently grave to render the security measure disproportionate or unreasonable and, therefore, illegal. [495]

The second stage (b) consisted of the need to determine whether the MC had balanced between the Israelis' right to worship on one hand, and the Palestinians' right to property on the other. In this regard, the justices took note of the claims by military authorities that the petitioners' parcels of land had suffered only marginal damage (as a result of the requisition orders) and that compensation had been offered. The Court subsequently concluded that the

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[493] The Court explained that the two rights constitutional rights are of equal weight (and therefore required horizontal balancing). *Ibid* at para 1 and 16. In this regard, it is worth mentioning that Court acknowledged on one hand, that the right to freedom of movement of Palestinians is protected as a fundamental right by a number international human rights conventions and treaties such as the ICCPR, and the Universal Declaration for Human Rights. It also underscored that their fundamental right to property is enshrined in the Hague Regulations and the Fourth Geneva Conventions. Still the Court chose to frame the value of these rights in Israeli constitutional law, and did not explain further what the implications of the fact that the freedom of movement is a right protected by IHR law are, if any, for the value of the rights of the Palestinians when balanced against those of the Israelis. See *Bethlehem Municipality* Judgment, *supra* note 1 at paras 17 and 20.

[494] *Ibid* at para 17.

[495] According to the Court, the amended route suggested by the respondents will ensure that access by Palestinians within Bethlehem will remain unimpeded by any roadblocks. Moreover, in light of the respondents' decision to cancel the originally proposed ring road, none of the petitioners will find themselves in an area surrounded by walls. And although the Court conceded that the time of travel will increase for those Palestinians wishing to travel east of Bethlehem, because of the need to circumvent the Rachel's Tomb area, it concludes that it is considerably less than the level of harm that they would have incurred had authorities decided to keep the roadblocks in place. As for the time period during which these restrictions would remain in place, the Court underscored that the MOs are temporary in nature, and would only remain in place as long as the security situation required. Interestingly, however, the Court noted that "naturally this is an unknown period of time that depends on all the circumstances that prevail in the territories *which may continue for a long time* [emphasis added]." *Ibid* at para 18.

balance between the competing rights has been achieved. The petition was dismissed.[496]

6.3.3.2. Closing Remarks

The Court has in its narrative underlined the idea that different legal regimes apply to different populations (Palestinians as 'protected persons') and Israelis who are not. However practically speaking, it has refrained from "following the consequences of those statements to their logical end."[497] The discussion of the previous judgments seeks to demonstrate the shortcoming of assessing the conflicting rights of Palestinians and Israelis through the prism of Israeli constitutional law and the balancing of constitutional rights. It also sought to explain why it is not an adequate formula for evaluating the conflict of rights in the situation of occupation, particularly if the balancing involves the interests of the nationals of the occupying power.

The first reason for this conclusion is that adopting such a judicial approach has diluted the special weight accorded to the rights of the occupied population as 'protected persons' under the law of belligerent occupation. One good example to illustrate this point is the right to property, which under the law of belligerent occupation is considered a fundamental right of those persons which must be protected by the occupant, save for very stringent exceptional situations. By turning this right into a constitutionally protected one that can be balanced against other constitutionally protected rights of Israelis (who are not 'protected persons'), the exceptions to the prohibition on the occupying power to refrain from violating this right, are further relaxed.

Secondly, by grounding the analysis of the rights in a domestic human rights framework, the Court has transformed the relationship between the occupier and the occupied into a relationship requiring constitutional protection, as if the clash of interests is taking place

[496] The Court also took into consideration the promise by the respondents that they "will be prepared to examine any application for an amendment of the route at a specific point, in order to reduce the harm to the owners of the land." *Ibid* at para 18.

[497] Yaël Ronen, "Applicability of Basic Laws," *supra* note 382 at 149.

between equal parties.[498] This may have worked if the Palestinians of the West Bank were a minority that is part of a democratic polity in which they have a say.[499] Therefore, as long as they are not citizens of the State, the importance granted to their rights is likely to occupy second place whenever they are balanced against those of the Israelis. In this regard, one has only to recall the explanation of former HCJ justice Barak who exclaimed that when determining what weight should be accorded to each side of the scale of the balancing act (i.e. the goal versus the limitation on the right):

> I contend that the criterion is that of the relative social importance attached to each of the conflicting principles or interest at the point of conflict, which assesses the *importance to society of the benefit gained* [emphasis added] by realization of the law's goal as opposed to the importance to society of preventing the limitation of human rights. Even rights of the same normative level are not necessarily of the same social importance. The social importance of a right—and by extension its weight in relation to conflicting principles—is derived from its underlying rationale and its importance within the framework of *society's fundamental conceptions* [emphasis added].[500]

Hence, there is little doubt that it is the importance to Israeli society that will be taken into consideration in the petitions examined here by the Court.

Thirdly, even if one concedes that the HCJ's constitutional balancing is an appropriate tool for determining the value that should be granted to the conflicting rights of both Israelis and Palestinians, the fact that the Basic law: *Human Dignity and Liberty* applies only to the Israeli settler population in the West Bank but not *de jure* to Palestinians living therein has exacerbated the gap in terms of legal protection afforded to both.

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[498] Aeyal Gross, "Human Proportions," *supra* note 26. See also Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation," *supra* note 23 at 590-592. As one lawyer explains, "I see no problem in incorporating basic human rights of settlers, [but] Palestinians have more rights as 'protected persons'. But the judiciary gives them less rights always (not on a formal level though). They usually say they have equal rights. This is incorrect. They have more rights." See *Amar-Shiff* Interview, *supra* note 372.

[499] Arguably, norms, derived from one community's vision are being imposed on another community, one that has been divorced from the making of those norms. Thus one can only wonder whether the criteria of substantive and formal requirements of democracy are indeed being met, for "[i]f norms demand obedience by virtue of one's association to a particular political community, how can binding 'outsiders' who can neither identify nor shape an alien society's institutions ever be justified?" Karen Eltis, "The Democratic Legitimacy of the "International Criminal Justice Model": The Unilateral Reach of Foreign Domestic Law and the Promise of Transnational Constitutional Conversation" in Christopher P.M. Waters, ed, *British and Canadian Perspectives on International Law* (Netherlands: Martinus Nijhoff Publishers, 2006) 349 at 360.

[500] Aharon Barak, "Proportionality and Principled Balancing," *supra* note 481 at 7 and 9.

Advocating for the applicability of the basic law to Palestinians may not be wise since it could be interpreted as recognition of a *de jure* annexation of the occupied West Bank. However, it is argued here that extending the *Basic Law* to Israelis living therein but not to the Palestinians is not a tenable situation either: it has created an impossible situation in which annexation is taking place *de facto* while a dual legal system of law is allowed to prevail. Coupled with the fact that the Court has refused to rule on the applicability of IHR law to the actions of Israeli authorities in the occupied territory and to their relationship with its Palestinian population,[501] the situation has resulted in a protection gap for the Palestinian occupied population.[502]

7. Concluding Observations

This chapter sought to analyze and describe some of the main features of the adjudicative process of the HCJ regarding petitions by Palestinians challenging security-based measures, as well as implications for the second principle underlying the law of belligerent occupation, namely that occupation is a form of 'trust'. It also discussed the ability of the Court to provide a venue for effective remedy for the Palestinians.[503]

On the one hand, the Court should be commended for stressing the centrality of article 43 of the Hague Regulations and for underscoring at least in principle, the notion that Palestinians are 'protected persons' under the Fourth Geneva Convention (despite the fact that it has never ruled on the *de jure* applicability of this Convention to the occupied territories). In addition, the Court has stressed the duty of the MC under international law to balance between military/security needs and the welfare of the 'local population'.

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[501] It should be recalled though that Israel does not recognize the applicability of IHR law to the oPt. Federica d'Alessandra "Israel's Associated Regime, Exceptionalism, Human Rights and Alternative Legality" (2014) 30 Utrecht J. Int'l and Euro L 30.

[502] This is because many of the guarantees provided to Israelis through the basic laws are provided to Palestinians under IHR law. See *Sfard* Second Interview, *supra* note 312. In this regard it is important to note that some basic rights expressly mention in IHR conventions and treaties were not included in the Basic Law: *Human Dignity and Liberty* such as the right to equality. See David Kretzmer, "New Basic Law," *supra* note 387.

[503] Just because the law of occupation has reached the jurisdiction of certain courts does not mean that "the actions of the Occupying Powers have concretely and effectively been reviewed to faithfully enforce occupation law provisions." Tristan Ferraro, "Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities" (January 2008) 41; 1-2 Isr LR 331 at 342.

On the other hand, in terms of its interpretation of article 43 of the Hague Regulations, the Court's approach has slowly but surely expanded the considerations which the MC can take into account, when considering security and the welfare of the 'local population', in a manner that has relaxed the limitations imposed on that Commander's authority.[504]

In terms of security, the Court has upheld the notion that the security of Israeli settlers and commuters are part of the legitimate security interests guiding the MC actions. This has significantly widened the security considerations beyond strict military needs of the armed forces in the occupied territory. Along with the Court traditionally upholding the MC security assessments[505] and the limited usefulness of the proportionality doctrine in challenging the very authority of the MC to implement the security-based measure as matter of principle, it is not surprising after all, that the security of the settlers, almost always trump the rights of the Palestinians once the Court conducts the balancing act.[506]

In terms of the welfare of the 'local population', by upholding the idea that Israeli settlers are part of the former for whose rights the MC is also responsible under international law, the Court has rendered the notion of 'local population' and its composition a "factual question devoid of any normative meaning."[507] The Court's interpretation also stands at odds with the manner in which article 43 of the Hague Regulations has been understood to limit the powers of an occupying power, not to expand them. The interpretive approach it grants to this article widens the scope of measures which the MC is lawfully allowed to implement under the pretext that this is necessary to respond to evolving needs in a situation of prolonged occupation.

Several factors have further limited the ability of the Court to scrutinize whether the measures and changes implemented in the occupied territory were carried out in response to lawful considerations under international law. The first factor is that the Court has rarely questioned

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[504] Sharon Weill, "The Legitimating Role of the Israeli High Court of Justice: From Occupation to Segregation" Global Jurist (2015).

[505] "I can understand any act from the court can jeopardize its place as a domestic court. I don't have a solution of what is the wise thing to do, but it is unacceptable to do this." *Attorney A-04* Interview, *supra* note 372.

[506] Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation," *supra* note 23.

[507] Yuval Shany and Guy Harpaz, "The Supreme Court and the Incremental," *supra* note 22 at 531.

the government's assurances that the welfare of the Palestinians is indeed the dominant factor spearheading a given policy.[508] Moreover, it has in the majority of cases accepted the government's argument that the contested policy was implemented in good faith to serve the Palestinian local population (even when other considerations involving the interests of Israeli nationals cast significant doubt on these contentions). As some scholars have warned, this has provided the occupying power with a backdoor through which professed humanitarian concerns may camouflage the hidden agenda of the occupant.[509]

In the case of the West Bank, particularly given the prolonged nature of the occupation and that there is no foreseeable end in sight for Israeli control over this territory, the Court's approach has allowed for the creation of legal environment and the allocation of natural resources and physical infrastructure of the occupied territory in a manner that favors the rights and interests of the nationals of the occupying power. This has allowed it to consolidate its long-term non-security related interests in the territory (both economic and political).[510] It also distorts the critical balance reflected in the law of belligerent occupation, between the needs of the occupier and occupied population.[511]

Secondly, throughout its adjudication, the Court has focused on the micro-level or details of the specific case at hand, devoid of any considerations for the larger (macro-level) political context of occupation. As it has done in the Wall related decisions,[512] the Court chooses to present Israeli settlers and the Palestinian occupied population as equals who are entitled to the same treatment.[513] Reaching this conclusion is possible, because the justices do not examine

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[508] David Kretzmer, "The Law of Belligerent Occupation and the Supreme Court," *supra* note 15.

[509] Yoram Dinstein, *The International Law of Belligerent Occupation*, *supra* note 33 at 122.

[510] Sharon Weill, The Role of National Courts, *supra* note 35. See also Yuval Shany and Guy Harpaz, "The Supreme Court and the Incremental," *supra* note 22 at 531. It is only expected that the occupant is "prejudiced in favor of its own country's interests at the expense of the indigenous community." See Eyal Benvenisti *The International Law of Occupation*, *supra* note 8 at 147.

[511] Noam Lubell, "Human Rights Obligations," *supra* note 25.

[512] In those decisions, the Court chose to rule on the Wall segment by segment, thereby evading the need to look at its impact as a whole on the spectrum of rights of the Palestinians.

[513] For example, Palestinians are de-nationalized as 'Arabs', while Israeli settlers are de-stigmatized as 'Jewish residents' of the 'Area. See Sharon Weill, "The Legitimating Role of the Israeli High Court of Justice," *supra* note 504. See also Attorney Yossi Wolfson, "Racial Discrimination – yes, Apartheid – no: HCJ 3969/06 Head of Deir Samit Village Council v. Commander of the IDF Forces in the West Bank (judgment rendered

how the security-based measures challenged in the petitions discussed here fit into a political context in which government and military authorities have systematically dedicated much of resources, infrastructure and RoL features of the occupied territory to the well-being of the Israeli settlers. They have also chosen to ignore that the presence of those settlers in the West Bank is illegal to begin with or that their privileged access to its resources, at the expense of the occupied inhabitants, has the potential of aggravating the security situation of the Israeli settlers. The end result is that:

> A complex reality that involves a matrix of political actors and interests is reduced into the distant courtroom to a calculated selection and evaluation of evidence and facts, which are taken out of any broader context of power relationships and transformed into an anonymous dispute on which so-called *neutral* legal codes are applied.[514]

This stands in stark contrast to the Court's approach in other decisions involving the rights of Israeli settlers, in which it has proved that it can, and indeed has taken the bigger political context into consideration.[515]

Thirdly, the Court's decision to apply standards of Israeli constitutional law on an 'equal' basis to both Palestinians and Israelis is ill-suited in a context of occupation, where there is active government-sponsored settlement construction by the occupying power. The chapter also sought to demonstrate how such an approach weakens the special protection afforded to

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October 22, 2009)," (15 November, 2011), online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=Documents1482>.

[514] Sharon Weill, "The Legitimating Role of the Israeli High Court of Justice," *supra* note 504 at 27 and 28.

[515] Again the *Kiryat Arba Local Council* judgment offers a good demonstration. Allegations by Israeli petitioners underscored the argument that the freezing of settlement construction by Israeli government authorities at the time constitutes unlawful discrimination because it is applied only to Israelis and their settlements, as opposed to Palestinians. However, the Court remained unconvinced, noting that "[e]ven if the court was willing to engage in such a comparison when doing so it must examine the full context. For many years the state has provided generous advantages and aid to the Israeli settlements in Judea and Samaria. In the response submitted by the respondents they mentioned that according to the data collected by the Ministry of Housing in the several recent years alone hundreds of millions of shekels have been invested in planning and infrastructure which among other things included mobilizing caravans, building residential buildings- all in the settlements. In addition, the ministry also purchased many residential buildings that were built by private investors who did not succeed to sell them in the market. *So when we look at the full picture* [emphasis added] we see that we cannot talk about discrimination wh*en for many years these settlements have enjoyed a wide range of benefits* [emphasis added]. Now that the policy has changed the petitioners are claiming that they are being discriminated against- however, as mentioned above this is not a case of unlawful discrimination but of a valid and relevant distinction between the two communities" See *Kiryat Arba Local Council* Judgment, *supra* note 289 at 5 and 6.

Palestinians under international law.[516] Thus even if one were to assume that the Court's resort to constitutional balancing was driven by a sincere desire to augment the protection afforded to Palestinians, given the Court's refusal to rule on the *de jure* applicability of IHR law to the oPt, this approach has allowed the Israeli authorities to maintain two separate legal regimes in the occupied territory, without opting for *de jure* annexation, thereby explicitly appearing as a government which condones institutionalized discrimination.[517] This has had "the effect of leaving a whole population in legal and political limbo: neither entitled to the citizenship of the occupying state, nor able to exercise any other political rights, except of the most rudimentary character [..]."[518] In the meantime incoming human rights reports and the assessment by Israeli lawyers highlight a different situation: one of *de facto* annexation that is taking place in the context of a military regime,[519] or as a former UN Special Rapporteur has explained: a *de jure* framework of occupation transforming into a *de facto* condition of annexation.[520]

While recent legislative initiatives are pushing for the wholesale applicability of Israeli laws to Israeli settlers and/or settlements, [521] and for the *de jure* annexation of the jurisdictional areas

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[516] Aeyal Gross, "Human Proportions," *supra* note 26.

[517] One author used the term 'apartheid state'. See Sharon Weill, "The Legitimating Role of the Israeli High Court of Justice," *supra* note 504. Dror Etkes explains that "[w]hat can't be disputed is the fact that in the West Bank there are two separate legal and political regimes. Now, how do you want to call this type of reality? It has certainly some similar aspect to the South African reality and some distinct one as well. I think that it is not irresponsible to use the term apartheid in this case, though one has to be aware of the fact that this is not exactly as the South African model of apartheid." See *Etkes* Written Response, *supra* note 317.

[518] Adam Roberts, "Prolonged Occupation," *supra* note 11. David Kretzmer points out that "the real inequality on the West Bank is that the Israeli settlers have political rights in the state that controls their lives and the Palestinians do not. That is one of the grounds for the claim that the system there has elements of apartheid." David Kretzmer, "Bombshell for the Settlement Enterprise in Levy Report," *Haaretz* (10 July, 2012). Also "Video/Prof. Avi Shlaim: Settlements Turned Israel into an Apartheid State," *Haaretz* (21 November, 2008).

[519] *Amar-Shiff* Interview, *supra* note 372.

[520] See UN HR Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, R Falk*, 16th Sess, UN Doc A/HRC/16/72 (10 January, 2011) at para 10 [UN Special Rapporteur Report January 2011]. According to one international organization, in the Israeli political discourse, it "is no longer [about] whether or not Israel should press ahead with *de jure* annexation, but rather how much of the West Bank should be included in the plan and what to do with the Palestinian population therein." *DIAKONIA,* "Rule of Law: A Veil of Compliance: A Veil of Compliance in Israel and the oPt 2010-2013," Report (March 2014) at 11, online: *DIAKONIA* <http://www.DIAKONIA.se/globalassets/documents/ihl/ihl-resources-center/rule-of-law_final_mar5.pdf>.

[521] In November 2014, the Ministerial Committee for Legislation approved draft bill entitled the "Norm Law," which would have made it mandatory for the West Bank Israeli Regional MC, within 45 days of a law's passage in the *Knesset*, to promulgate an identically-phrased MO that effectively ensures that all ratified

of Israeli West Bank settlements (primarily Area C[522] and the Jordan Valley),[523] these efforts have not been formally adopted by government authorities. Nevertheless they do indicate a shift in the Israeli political discourse towards a more readily acceptance of the idea of the *de jure* annexation of large parts of the West Bank.[524]

Legal scholars argue that the *status quo* is more dangerous than a *de jure* annexation of the territories. This is because the current situation ensures for Israel the benefits of annexation without requiring it to grant Israeli citizenship or its associated rights and privileges to the Palestinians under occupation, all the whole shielding its authorities from legal consequences that may arise if they *de facto* annex that area.[525] Practically speaking, this also means that Israeli settlers in the West Bank are allowed to participate in electing representatives for the government institutions of the occupying power that controls this territory. Palestinians, for their part, even though they are subject to the actions and decisions of that power's government and military institutions and authorities, cannot do the same.[526]

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legislation also applies to Israeli settlers living in the West Bank. If passed, this bill would effectively limit the authority of the MC, who temporary speaking occupies the position of the legal and legitimate 'sovereign' under international law (for as long as he has effective control over the occupied territory), and subordinates it to the will of the *Knesset*. This changes "the status of the region from territories subject to 'belligerent occupation' to territories that have undergone de facto unilateral annexation to the State of Israel." See Gilead Sher and Keren Aviram "The Applicability of Israeli Law," *supra* note 341. See also Reuters, "Israeli Ministers Approve Applying Israeli Law to West Bank Settlers," (9 November 2014).

[522] In June 2011, a draft bill was introduced to *de jure* annex Area C endorsed by the parliamentary caucus that was established earlier for that purpose. And while deliberations on the draft bill were ultimately postponed by Prime Minister Netanyahu, they could resume any time. See *DIAKONIA*, "Rule of Law," *supra* note 520.

[523] The second bill is one in which the parliamentary caucus tabled in July 2012, a bill calling for the annexation of the Jordan Valley and the application of Israeli sovereignty to all Israeli settlements. While the draft bill was approved in December 2013 by the Ministerial Committee for Legislative Affairs, it was later appealed by then Justice Minister Livni and is opposed by Prime Minister Netanyahu. *Ibid*.

[524] As the report by *DIAKONIA* underlines, "[t]he openness with which annexation is being discussed at a political level [...] represent a precarious shift in the Israeli political discourse, from informal annexation of the West Bank through the establishment of settlements (and their associated infrastructure), towards formal annexation." *Ibid* at 10.

[525] Aeyal Gross, "The *Construction of a Wall*," *supra* note 23 at 428. Sharon Weill, "The Law and the Occupied Palestinian Territories: The Role of the Israeli High Court of Justice," (Janvier 2011-Décembre 2012) 9 *Droits Fundamentaux*, Centre de Recherche sur les Droits de L'Homme et le Droit Humanitaire, Université Panthéon-Assas Paris at 8 and 34. It also explains why to date, these measures have had no implications for the nature of the Israeli system of government, and why they have not impacted the statutory framework through which the territories are controlled. See Amnon Rubinstein, "The Changing Status of the Territories," *supra* note 338.

[526] ACRI, "One Rule, Two Legal Systems," *supra* note 82.

So far, the discussion has been about a possible *de facto* annexation of parts of the West Bank. But what has the Court's position been regarding petitions that have challenged security based measures taken in an occupied territory (EJ) that has been *de jure* annexed? The next chapter examines these kinds of petitions and their implications for the third normative principle: that occupation does not bestow sovereignty.

Chapter III: The HCJ's Examination of Security-Related Measures in Light of the Requirement that Occupation does not Bestow Sovereignty

> *The unique status of Jerusalem creates difficult situations and especially delicate legal problems. Yet, these sensitive matters must be dealt with within the given legal framework. There is no different or special law that applies specifically to the fence in Jerusalem. The legality of the fence along the Jerusalem borders or within it must be examined according to the same law and threshold upon which the other sections of the barrier are examined elsewhere in Judea and Samaria or inside Israel.*[1]
>
> — Justice *Aharon Barak*, Chief Justice at the HCJ —

1. Introduction

This chapter examines the HCJ's resort to principles and rules of international law in adjudicating petitions by Palestinians that have challenged the legality of the construction of the Wall in the Jerusalem area including annexed East Jerusalem (EJ). In particular, it discusses the implications that the Court's interpretation has had for the third normative principle of the law of belligerent occupation: that occupation does not bestow sovereignty on the occupying power.

1.1. The Normative Principle: Occupation Does Not Bestow Sovereignty

Under this body of law, occupation is considered a temporary situation which results from the occupant's ability to impose its *de facto* authority on the occupied territory through the projection of its military might.[2] However, the use of this force "cannot imply any right

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1 (HCJ 5488/04) [2006] *Al-Ram Local Council et al v. Government of Israel et al*, unofficial English translation by Avichay Sharon (January 2014), on file with author at 2-3 [*Al-Ram Local Council* Judgment]. The petition was dismissed by the HCJ.

2 Christopher Greenwood, "The Administration of Occupied Territory in International Law," in Emma Playfair, ed, *International Law and the Administration of Occupied Territories* (Oxford: Clarendon Press, 1992) 241. See also Conor McCarthy, "The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq," (2005) 10:1 J Confl and Sec L 43.

whatsoever to dispose of the territory."[3] It also does not entitle the occupant to annex the occupied territory or otherwise change its political status.[4] This is the case irrespective of whether or not the belligerent power's use of that force qualifies as a war of aggression or had been carried out in self-defense.[5]

True, there is no explicit reference in the major treaties and conventions in the field to the idea that occupation does not bestow sovereignty over the occupied territory to the occupant.[6] However, legal scholars have explained that "[t]he foundation upon which the entire law of occupation is based, is the principle of inalienability of sovereignty through the actual or threat of the use of force.[7] This principle is implicitly reflected in several provisions of the relevant treaties such as the Hague Regulations and the Fourth Geneva Convention. In the case of the Hague Regulations, one highly relevant example is the emphasis in article 43 on the duty of the occupant to respect the laws that are in force in the occupied territory at the time it falls under to the control of the former. By virtue of the same provision, the occupant is prohibited from implementing legislative changes or structural reforms therein,[8] as a way of "protecting the separate existence of the State, its institutions, and its laws."[9] This normative principle is also reflected in the restrictions that the article places on the ability of this power to legislate save for limited exceptions.

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3 Jean Pictet, ed, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* reprinted (Geneva: ICRC, 1994) at 275 [*Pictet* Commentary].

4 Eyal Benvenisti, *The International Law of Occupation*, (New Jersey: Princeton University Press, 2004).

5 John Quigley, "Sovereignty in Jerusalem," 45Cath U L Rev 765.

6 Except pursuant to the conclusion of a peace treaty. In the commentary of the International Committee of the Red Cross (ICRC) on the Fourth Geneva Convention, Jean Pictet states that "as long as hostilities continue, the Occupying Power cannot therefore annex the occupied territory, even if it occupies the whole of the territory concerned. A decision on that point can only be reached in the peace treaty. That is a universally recognized rule which is endorsed by jurists and confirmed by numerous rulings of international and national courts." See *Pictet* Commentary, *supra* note 3 at 275.

7 Eyal Benvenisti, *The International Law of Occupation*, *supra* note 4.

8 See Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land, 18 October 1907, Cons TS No 25, 277 (entered into force 26 January 1910) [Hague Regulations]. Christopher Greenwood, "The Administration of Occupied Territory in International Law," *supra* note 2. The duty to re-establish public order and civil life, reflect the duty incumbent upon it to restore those mechanisms which facilitate the exercise of sovereignty. See Conor McCarthy, "The Paradox of the International Law of Military Occupation," *supra* note 2. See also Yoram Dinstein, *The International Law of Belligerent Occupation*, (Cambridge University Press, 2009).

9 *Pictet* Commentary, *supra* note 3 at 273.

These restrictions, it is argued, are the result of the Hague Regulations' efforts to maintain the *status quo* as a way of guaranteeing the rights of the ousted government.[10] However, with the ushering of the era of decolonization and self-determination of people, the focus on the concept of 'sovereignty' has shifted from a state centered approach to one of 'popular sovereignty', expressed as the will of the people in the quest for their right to self-determination.[11] This shift has also found expression in the Fourth Geneva Convention, where many provisions seek to guarantee a spectrum of fundamental rights and welfare to populations who "find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[12]

Put differently, the normative principle is reflected in the Fourth Geneva Convention which emphasizes that the members of the civilian population of an occupied territory, who qualify as 'protected persons', remain entitled in all circumstances to respect for certain fundamental rights including the right to move freely, respect for their religious convictions and practices, humane treatment and family rights.[13] In this regard, it remains true on the one hand that an occupant may implement security related measures "in regard to protected persons as may be

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[10] Other articles of the Hague Regulations include article 45, which prohibits the occupying power from forcing the occupied population to swear allegiance to it; article 55, which states that the occupant is only an administrator or usufructuary of public buildings and resources; as well as articles 48 and 49, concerning the collection of taxes. Hague Regulations, *supra* note 8. See also Conor McCarthy, "The Paradox of the International Law," *supra* note 2.

[11] The principle of self-determination rests on the idea that sovereignty over people and territory must be derived from a source other than the State, that of the people it claims to represent. See Nathaniel Berman, "Self-Determination in Abeyance: Self-Determination and International Law," (1986-1989) 7 Wis Int'l L J 51. First reflected in the mandate system of the League of Nations, it later found expression in Article 1 and 55 of the UN Charter 1945 ATS 1 / 59 Stat. 1031; TS 993 [UN Charter]. See also *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 (XV), UNGA, 15th Sess, UN Doc A/RES/154 (XV), (14 December 1960), online: GA <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1514(XV)>, and *Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States*, GA Res. 2625 (XXV), UN GA, 25th Sess, UN Doc A/RES/2625 (XXV), (24 October 1970), online: UN <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2625(XXV)> [GA Declaration on Friendly Relations]. See also Nicholas Lancaster, "Occupation, Law, Sovereignty and Political Transformation: Should the Hague Regulations and the Fourth Geneva Conventions till be considered Customary International Law," (2006) 189 Mil L Rev 51.

[12] Article 4 of the *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (12 August 1949), 75:973 UNTS, 287 (entered into force 21 October 1950) [Fourth Geneva Convention]. This point was underscored by one author in Martti Koskenniemi, "Occupied Zone–"A Zone of Reasonableness?"" (January 2008) 41: 1- 2 Isr LR 13. See also Peter Maurer, "Challenges to International Humanitarian Law: Israel's Occupation Policy," (Winter 2012) 94: 888 Int'l Rev Red Cross 1503 at 1507.

[13] Article 27(1) of the Fourth Geneva Convention, *ibid*. See also *Pictet* Commentary, *supra* note 3 at 202-207.

necessary as a result of war,"[14] including practices that restrict their freedom of movement. On the other hand:

> [T]hat in no wise means that it is suspended in a general manner. Quite the contrary: the regulations concerning occupation [...] are based on the idea of the personal freedom of civilians remaining in general impaired. [...] What is essential is that the measures of constraint they adopt should not affect the fundamental rights of the persons concerned. [...] [T]hose rights must be respected even when measures of constraint are justified."[15]

Equally important, the Fourth Geneva Convention underscores the idea that these persons may not be "deprived in any case or in any manner whatsoever of the benefits of the present Convention by any changes introduced, as a result of the occupation [...] *nor by annexation by the latter of the whole or part of the occupied territory* [emphasis added]."[16]

The next section provides an overview of the security-based measure which Israeli government authorities have resorted to, which has allegedly consolidated Israel's *de jure* annexation of EJ.

1.2. The Wall in and around the Jerusalem: A Security Measure or Tool for Consolidating the Annexation of EJ?

In 1967, Israel occupied the West Bank including EJ.[17] Shortly thereafter, the Israeli government applied Israeli law, jurisdiction and administration over it. At the time, these measures were understood by the international community to effect an annexation,[18] "in all but name."[19] It also provoked strong criticism by the United Nations (UN), the Security Council

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[14] Article 27(4) of the Fourth Geneva Convention, *supra* note 14.

[15] *Pictet* Commentary, *supra* note 3 at 202 and at 207.

[16] Article 47 of the Fourth Geneva Convention, *supra* note 14. As Pictet writes: "the reference to annexation in this Article cannot be considered as implying recognition of this manner of acquiring sovereignty [...] an Occupying Power continues to be bound to apply the Convention as a whole, even when, in disregard of the rules of international law, it claims during a conflict to have annexed all or part of an occupied territory." See *Pictet* Commentary, *supra* note 3 at 276.

[17] For a historic overview of the city of Jerusalem, see *Encyclopedia of the Israeli-Palestinian Conflict*, vol 2, "Jerusalem" by Michael Dumper, (Colorado, US: Lynne Rienners Publisher, 2010) 731.

[18] This is despite initial Israeli assertions to the contrary. See Eyal Benvenisti, *The International Law of Occupation*, *supra* note 4.

[19] John Quigley, "Sovereignty in Jerusalem," *supra* note 5 at 775.

(SC) and the General Assembly (GA).[20]

Israel's subsequent adoption of the 1980 Basic Law: *Jerusalem*, declaring 'unified Jerusalem' to be the capital of Israel, forced about a similar wave of strongly worded resolutions in response. Indeed, the UN SC adopted Resolution 478, in which it affirmed "that the enactment of the basic law by Israel constitutes a violation of international law and does not affect the continued application of the [Fourth] Geneva Convention in the [...] territories occupied since 1967, including East Jerusalem."[21] It also decided "not to recognize the basic law and other such actions by Israel that, as a result of the former, seek to alter the character and status of Jerusalem."[22] The language employed in the resolution can be explained by the prohibition on the acquisition of territory by force under customary international law.[23] The prohibition of annexation and the obligation of third States not to recognize as lawful any territorial changes brought about by this serious violation also form part of customary international law that is of a peremptory character.[24]

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[20] The UN GA "*[c]alls upon* Israel to rescind all measures already taken and to desist forthwith from taking any action would alter the status," See *Measures Taken by Israel to Change the Status of the City of Jerusalem*, GA Res 2253 (ES-V), 5th Emergency Session, UN Doc A/RES/2253 (ES-V) (4 July 1967) at para 2, online: UN <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2253(ES-V)>. The UN SC declared that "all legislative and administrative measures taken by Israel all [...] which tend to change the legal status of Jerusalem are invalid and cannot change the status." UN SC, Resolution 252 UN Doc S/RES/252 (1968) (2 May 1968), online: UN <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/252(1968)>.

[21] UN SC Resolution 478, UN Doc S/RES/478, (1980) (20 August 1980), para 2, online: UN <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/478(1980)>.

[22] *Ibid* at para 5.

[23] Article 2(4) of UN Charter, *supra* note 11; article 43 of the Hague Regulations, s*upra* note 8. See also Rainer Hofmann, (February, 2013), "Annexation" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008) online edition: <http://opil.ouplaw.com/home/epil>. The majority of States have not moved their embassies from Tel Aviv to Jerusalem. See Monique Chemillier-Gendrau, "Jérusalem, le droit international comme source de solution," (2013) 3:86 Confluences Méditerranée 57.

[24] Art. 41 (2), "Responsibility of States for International Wrongful Acts," Article 41(2), Annex to UN GA Resolution 56/83, 56th Sess, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002), online: UN <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/83>. Article 53 of the Vienna Convention on the Law of Treaties defines peremptory norms of international law as a "norm accepted and recognized by the international community of States as a whole as a norm form which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character." See *Vienna Convention on the Law of Treaties* (May 1969), 11155 UNTS 105, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>. That States may not encourage violations of IHL by parties to an armed conflict, as reflected in Common Article One to the Four Geneva Conventions has also been established by state practice and *opinio juris* as a norm of customary international law applicable in both international and non-international armed conflicts. See "Rule 144: Ensuring Respect for International Humanitarian Law *Erga Omnes*" in JM

Following EJ's annexation, the Palestinians of the city, who at the time of the occupation were physically present therein, were also granted 'Israeli residency' status.[25] This under Israeli domestic law bestowed upon them a status that was distinct from that of 'West Bank' Palestinians, who were subjected to the rules and regulations of a military regime. While initially denying that the legal actions taken to extend Israeli law and administration to EJ had amounted to its *de facto* annexation, with time, government authorities became more explicit and firm regarding their claim that EJ is part and parcel of its 'capital'[26] and of its 'sovereign territory'.[27]

According to human rights nom-governmental organizations (NGOs) documenting the impact of Israeli policies, authorities have over the years, implemented a series of measures that were designed to consolidate this status of EJ as part of 'Jewish Jerusalem: Capital of Israel',[28] in contravention to the prohibition on annexation. One of these latest measures is the

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Henckaerts and L Doswald-Beck, eds, *Customary International Humanitarian Law* (Cambridge University Press: 2005) at 462-463 online: ICRC <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144#Fn_11_6> [ICRC Customary Law Study]. See also Rainer Hofmann, "Annexation" *supra* note 23.

[25] Palestinian residents of EJ have the status of 'permanent residents of Israel'. They carry Israeli Identity Cards (IDs), and have access to social benefits under Israeli law. They can move freely around Israel proper and EJ and work therein. They can, in theory, apply to acquire Israeli citizenship. Ruth Lapidoth, "Jerusalem: Some Legal Issues," (2011) at 162, online: Jerusalem Institute for Israel Studies <http://www.jiis.org/.upload/lapidoth-jerusalem.pdf>. While in the past only a few thousands applied, in the past decade the number of applicants has significantly risen. For many, the objective is to strengthen their roots in Jerusalem, particularly since Israeli authorities could revoke their residency status. Maayan Lubell, "Breaking Taboo, East Jerusalem Palestinians Seek Israeli Citizenship," *Haaretz* (5 August 2015). In October 2010, the Israeli Cabinet Ministers approved by a majority vote an amendment to the Citizenship Law requiring every non-Jew wishing to become a citizen of Israel to pledge loyalty to the State of Israel as a Jewish and Democratic State. Jonathan Lis, "Cabinet Approves Loyalty Oath but only for Non-Jewish New Citizens," *Haaretz* (10 October 2010).

[26] In December 1949, Israel declared West Jerusalem to be the capital of the state. After Israel occupied EJ, it was united with the western part forming one administrative unit. Michael Dumper, "Jerusalem," *supra* note 17.

[27] "Response of *Ir Amim* to the Fourth Periodic Report of Israel (CCPR/C/ISR/4) in accordance with the List of Issues adopted by the Human Rights Committee at its 105th Session 9-27 July 2012" (September 2014), online: UN Office of the High Commissioner for Human Rights (OHCHR) <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ISR/INT_CCPR_CSS_ISR_18193_E.pdf> [*Ir Amim* Response 2014]. In a statement to the UN SC (convening in an emergency session, to discuss the flare up of recent tensions in Jerusalem and the decision of the Israeli government to authorize the construction of more housing units in Israeli settlements in the West Bank), Israel's Permanent Representative to the UN, Ambassador Ron Prossor stated that "the people of Israel are not occupiers, and we are not settlers [...] and Jerusalem is the eternal capital of our sovereign State [..]. Throughout history, Jerusalem has been the capital for one people and only one people – the Jewish people." See UN SC, 7291st Mtg, UN Doc S/PV.729 (29 October 2014) at.7, online: UN <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7291>.

[28] *Ir Amim* Response 2014, *ibid*.

construction of the Wall, including in and around EJ. Officially referred to as *Otef Yerushalaym* (Jerusalem Hugger/Envelope), government representatives have argued that the Wall's route in the area was guided by two main sets of legitimate considerations: The first is the desire to provide security for residents of Israel proper, including 'all of Jerusalem.'[29] The second is the need to protect the residents of the major Israeli settlement blocs in the 'West Bank' that have been built around the Israeli self-declared Jerusalem Municipality (JM).[30] At the same time, they underscored the need to ensure that "[m]inimum disruptions to the daily life of the [Palestinian] population residing on both sides of the Security Fence will occur along its course."[31]

Israeli authorities have made it clear that they do not consider EJ to be occupied territory. Thus government authorities have admitted in court that the route of the sections of the Wall in and around Jerusalem, challenged by Palestinians, is not driven only by security considerations, but also by considerations that support "diplomatic political state interests."[32] Since Israel considers all of Jerusalem (including annexed EJ) to be part of its sovereign territory, it considers that the requirement that an occupying power's measures in an occupied territory be guided only by security or by the interest of the 'local population' does not apply.[33]

However, scholars, as well as Israeli human rights NGOs and UN agencies documenting the route of the Wall in the area, have all highlighted that the Wall's construction cannot be viewed in isolation from other policies that have been spearheaded by the objective of

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[29] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 31-39. The term 'West Bank' will be used in this chapter to refer to all of the West Bank excluding those parts of Jerusalem which were annexed by Israel in 1967. See Béatrice Meitaireau, "Derrière la clôture de sécurité israélienne en cisjordanie: une future frontière politique ?" (Mars, 2005) Bulletin de l'Association de Géographes Français: Israel-Palestine/Risques Naturels et Territoires 36.

[30] For example, (HCJ 11205/05) [2006] *Al-Ezariyah Village Council et al v. Government of Israel et al*, unofficial English translation by Avichay Sharon (February 2014), on file with author, at para 7 [*Al-Ezariyah Village Council* Judgment]. The petition was dismissed by the HCJ.

[31] Israeli Ministry of Defense (MoD), "Israel's Security Fence: Route," online: Israeli MoD <http://www.securityfence.mod.gov.il/Pages/ENG/route.htm>.

[32] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 31-39.

[33] For a discussion of those exceptions, see Chapter II section 1.

consolidating the annexation of EJ.[34] Furthermore, it is precisely the route of the Wall in the Jerusalem area and its consequences, they argue, that underscores the legitimacy of their fears that the Wall's construction in the area is primarily driven by political considerations, as opposed to legitimate factors such as security.[35]

The first set of political considerations and its associated policies relates to the consolidation of physical control over two key areas: (a) EJ, *de jure* annexed by Israel, and (b) the 'West Bank' land outside the JMB, on which some of the largest 'West Bank' Israeli settlement blocs are located. Here, critics have shown that the Wall's route contributes towards this objective by following the Jerusalem Municipal Border (JMB) in some parts, while veering sharply away from that border in other areas, deep into the West Bank. The deviation, they note, is in order to include major Israeli settlements inside the Wall (or as the Court likes to refer to it: on the 'Israeli side'), as a prelude to their *de facto* annexation to Israel proper.[36]

The second set of political considerations, allegedly spearheading the Wall's construction in and around Jerusalem, are demographic ones intended to ensure the prevalence of a demographic majority in favor of the Israeli Jewish inhabitants. This comes at the expense of its Palestinian population, who carry 'Israeli residency' Identification Documents (IDs) [thereafter Palestinians with Jerusalem IDs].[37] A population of approximately 300,000-370,000, East Jerusalemite Palestinians constitute an estimated 31-39 % of the overall population of the JM,[38] and 8-10 % of all Palestinians living in the West Bank.[39] In this regard,

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[34] This allegedly takes place through a process of inclusion/exclusion of territory and population groups. See for example, Francesco Chiodelli "Reshaping Jerusalem: The Transformation of Jerusalem's Metropolitan Area by the Israeli Barrier" (2013) 1 Cities 417. See also Béatrice Meitaireau, "Derrière la Clôture de Sécurité," *supra* note 29.

[35] *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories occupied since 1967* J Dugard, UN Doc A/62/275 (17 August 2007) online: UNISPAL<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/463/16/PDF/N0746316.pdf> [UN Special Rapporteur August Report 2007).

[36] *Peace Now*, "The Etzion Bloc and the Security Barrier" (November 2006), online: *Peace Now* <http://peacenow.org.il/eng/content/etzion-bloc-and-security-barrier>.

[37] *B'Tselem*, "Revocation of Israeli Residency" (January 2011), online: *B'Tselem* <http://www.btselem.org/jerusalem/revocation_of_residency>.

[38] This amounts to an estimated 371,000 persons. Association for Civil Rights in Israel (ACRI), "East Jerusalem-By the Numbers" (updated 7 May 2013), online: ACRI <http://www.acri.org.il/en/2013/05/07/ej-figures/>. One UN agency working in the Occupied Palestinian Territory (oPt) estimates that the total number of Palestinians in EJ is 300,000. See Office for the Coordination of Humanitarian Assistance OCHA, oPt,

the Wall has been singled out as the most recent measure complementing earlier Israeli driven practices since 1967, aimed at ensuring that Jerusalem is predominantly Jewish in both its physical character and demographic make-up.[40]

In relation to this latter consideration, critics have also pointed out that the Wall seeks to influence the demographics of the city by walling out densely populated EJ Palestinian neighborhoods, which to date are officially part of the jurisdiction of the JM.[41] At the same time, it consolidates the physical integration of the nearby Israeli settlements and its population within the bigger Jerusalem metropolis. Thus, although the Wall leaves a little over 200,000 Palestinians with Jerusalem IDs on the 'Israeli side' of the Wall, in other areas it deviates away from the JMB. This deviation has resulted in the exclusion of an estimated eight Palestinian neighborhoods, together with a population of 55,000 – 80,000 Palestinians (with Jerusalem IDs) to remain outside the Wall (or as the HCJ refers to it, on the 'Palestinian side' of the Wall). Thus by cutting into the JMB at select locations, "the barrier achieves a substantial reduction, *de facto*, in the number of Palestinian residents in the city."[42]

At the same time, the Wall includes, on the 'Israeli side' a significant number of settlements. Although physically located outside the JMB, today they constitute some of the most densely populated settlements that Israel has created in the West Bank.[43] However, and despite Israeli

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"Key Humanitarian Concerns: East Jerusalem" (August, 2014), online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_jerusalem_factsheet_august2014_english.pdf>.

[39] Figure for 2011. United Nations Conference on Trade and Development (UNCTAD), *The Palestinian Economy in East Jerusalem: Enduring Annexation, Isolation and Disintegration*, UN Doc UNCTAD/GDS/APP/2012/1, online: UNCTAD <http://unctad.org/en/PublicationsLibrary/gdsapp2012d1_en.pdf>.

[40] "This wall, which is built through Palestinian neighborhoods and separates Palestinians from Palestinians, is an exercise in social engineering, designed to achieve the Judaization of Jerusalem by reducing the number of Palestinians in the city. It cannot conceivably be justified on security grounds." UN Special Rapporteur Report August 2007, *supra* note 35 at para 30.

[41] *Ir Amim* and *Yachad:* Together for Israel, "Frequently Asked Questions about Jerusalem" reference document (2013), online: *Yachad* <http://yachad.org.uk/wp-content/uploads/2013/07/FAQ-about-Jersualem.pdf>.

[42] *Ir Amim*, "Beyond the Wall," Report (January 2007) at 3, online: *Ir Amim* <http://www.ir-amim.org.il/en/reports_1/641>.

[43] *Peace Now*, "West Bank Settlement Blocs" (May, 2008), online: *Peace Now* <http://peacenow.org.il/eng/content/west-bank-%E2%80%9Csettlement-blocs%E2%80%9D>. See also Menachem Klein, "Jerusalem as an Israeli Problem-A Review of Forty Years of Israeli Rule over Arab Jerusalem" (Summer 2008) 13:2 Israel Studies 54 at 5. Francesco Chiodelli, "Res-shaping Jerusalem," *supra* note 34.

unilateral measures and efforts to step up construction of settlements and housing units in EJ 'neighborhoods' beyond the Green Line,[44] the accepted international legal position, the official one, has been that EJ's legal status is the same as that of the entire West Bank (as an occupied territory), to which the Fourth Geneva Convention applies.[45]

A third political consideration highlighted by critics is the desire by government authorities to fracture EJ's position as the cornerstone of the occupied West Bank in functional, economic, social, religious and symbolic terms.[46] This is being achieved by severing the social, cultural and economic connections that have existed for decades between Palestinian communities of EJ and the 'West Bank', for whom the Israeli unilaterally imposed JMB has (up and till recently) constituted nothing more than an administrative divide, one that has traditionally been survived by strong communal links between those communities on both sides of this border.

An examination of the HCJ's adjudication of the petitions challenging the legality of the Wall in and around Jerusalem sheds light on the legal reasoning employed by a domestic court when adjudicating security related issues arising with respect to a territory that has been occupied and annexed by other branches of power. Here, one must at the outset emphasize that, in adjudicating those petitions, the HCJ has drawn up two sets of distinctions. The first distinction is between parts of the Wall that run either inside the JM or along the JMB and those that have been built inside the 'West Bank' (i.e. beyond the JMB). In this regard, the Court has applied a different legal framework (international v. domestic) when analyzing the route of the different sections of the Wall, depending on their physical location.

By analyzing the judicial reasoning of the Court, the chapter seeks to demonstrate how it has

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[44] Jack Khoury, "Israel Issues 558 Permits for East Jerusalem Housing," *Haaretz* (5 February 2012).

[45] In its advisory opinion, the ICJ confirmed that: "[a]ll these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of Occupying Power," and that the Fourth Geneva Convention is applicable to it. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICI Rep 136 at paras 78 and 97 [ICJ *Wall* Advisory Opinion]. See also Talia Sasson, "The Legal Status of Jerusalem" in *Permanent Residency: A Status Set in Stone* (May 2012) 7, online: *Ir Amim* <http://www.ir-amim.org.il/sites/default/files/permanent%20residency.pdf>. See also *B'Tselem*, "Legal Status of Jerusalem and its Residents" (1 January 2013), online: *B'Tselem* <http://www.btselem.org/jerusalem/legal_status>.

[46] Francesco Chiodelli, "Res-shaping Jerusalem," *supra* note 34.

internalized the annexation of EJ and how this, in turn, has served as an important point of departure for its judicial decisions. It also seeks to demonstrate how this has undermined any possibility for the justices to entertain arguments raised by petitioners, that political considerations were the driving force behind the implementation of certain measures by government and military authorities and, hence, to show that the actions of those authorities in EJ are in contravention to the law of belligerent occupation.

The second distinctions made by the Court relates to the population groups affected by the construction of the Wall in the Jerusalem area i.e. if they are Israeli citizens or Israeli 'permanent residents' (the latter including Palestinians with Jerusalem IDs) or if they are Palestinians with 'West Bank' IDs. This distinction is not likely in conformity with international law because it does not acknowledge that the Palestinian inhabitants of all the occupied territory, including EJ, are 'protected persons' under the Fourth Geneva Convention.

This outlook has also affected the outcome of the decisions, particularly with regards to the Court's analysis of the proportionality of the structure's impact on the petitioners, particularly in terms of their freedom of movement. In this regard, human rights organizations and UN agencies documenting the impact of the Wall, as well as petitions to the HCJ, have all stressed the significantly disruptive impact of the structure on the 'fabric of life' of Palestinians with Jerusalem IDs and with 'Wes Bank' IDs living on both sides of the structure. Where possible, the chapter discusses aspects of the Wall's construction, the petitions and the Court's reasoning with these two levels of distinctions (made by the Court) in mind.

Before examining the petitions in depth, the next section provides insight into Israeli measures implemented since 1967 that have allegedly consolidated the government's physical and demographic control over annexed EJ. Many of them have been challenged by Palestinian petitioners in the cases discussed here.

2. Israeli Policies and Practices in EJ: Consolidating Physical and Demographic Control

> *Determining that all measures are taken to change the physical character, demographic composition institutional structure or status of the Palestinian [...] territories occupied since 1967 including Jerusalem, or any part thereof have no legal validity.*[47]
>
> — *UN Security* Council —

Israel has implemented a series of legal and political measures geared towards changing the status of EJ from an occupied territory to one that is part of Israeli sovereign territory. These efforts have focused on attaining two objectives: "annexation and near demographic parity with the original population."[48] The next sub-section discusses the measures aimed at consolidating Israeli physical control over that part of the city.

2.1. Strengthen Physical Control over annexed EJ

The first category of measures implemented has focused on consolidating the idea that EJ is geographically part and parcel of the territory of Israel proper. Towards this objective, Israeli authorities have affected the *de jure* annexation of EJ through legislative initiatives, most notably through the promulgation of the Basic Law: *Jerusalem-Capital of Israel*. A second way in which they have sought to achieve this objective is through the construction and expansion of Israeli settlements in and around EJ. Those two policies are briefly described below.

2.1.1. The *De Jure* Annexation of EJ

2.1.1.1. Introduction

When in November 1947, the UN GA voted to approve resolution 181 to partition Palestine into two States it recommended that Jerusalem be designated as a *corpus separatum*.[49]

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[47] UN SC Resolution 465, UN Doc S/RES/465, (1980) (1 March 1980), para 5, online: UN <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/465(1980)>.

[48] Menachem Klein, "Jerusalem as an Israeli Problem," *supra* note 43 at 56.

[49] The resolution proposed that Jerusalem is turned into an internationalized enclave that was to be demilitarized and to be administered by the UN Trusteeship Council. See John Quigley, "Sovereignty in Jerusalem," *supra* note 5 at 765. The resolution also included provisions for the Holy Places and religious minority. However it

Between 1948 and June 1967, the city was divided into two distinct areas: West Jerusalem (approx. 38 km²) under Israeli control and EJ (approx. 6 km²) under Jordanian control.[50] When Israel secured control of West Jerusalem (1948), it extended its domestic law to that part of the city by way of a proclamation issued by the Ministry of Defense and by means of the *Areas of Jurisdiction and Powers Ordinance 5708-1948*.[51] Shortly thereafter, Jerusalem was declared an inseparable part of the State of Israel and as its eternal capital.[52]

Following its occupation of the West Bank and EJ in 1967, Israel extended the municipal boundaries of 'Unified Jerusalem',[53] to include two additional areas: (a) the 6 km² comprising the newly occupied EJ, and (b) an estimated 64 km² of additional West Bank territory.[54] On 28 June 1967, Israel also applied the *Law and Administrative Ordinance (Amendment No. 11) Law, 5727-1967*, declaring that "the state's law, jurisdiction, and administration will apply to any area of the Land of Israel that the government decides by decree."[55] The area, to which those elements would be applied, was delineated by the Ministry of Interior under another law, the *Municipalities Ordinance (Amendment No. 6) Law, 5727–1967*. This law authorized the

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was never a feasible option because of opposition from both Israel and Jordan. UNCTAD, "The Palestinian Economy in East Jerusalem," *supra* note 39.

[50] *B'Tselem*, "Legal Status of Jerusalem and its Residents," *supra* note 45. In 1949, Israel and Jordan signed an armistice agreement. See *General Armistice Agreement*: *Hashemite Jordan Kingdom-Israel*, 42 UNTS 303, (entered into force 3 April 1949). In 1950, Jordan's parliament annexed the West Bank, including EJ. Following the outbreak of the First *Intifada* (1987), Jordan announced in July 1988 that it would dismantle its legal and administrative links with the West Bank relinquishing any claims that it had to the territory to the Palestine Liberation Organization (PLO) as 'the sole and legitimate representative of the Palestinian people'. See Philip Robins, "Shedding Half a Kingdom: Jordan's Dismantling of Ties with the West Bank," (February 1989) 16:2 British Society for Middle East Studies. 162. See also Ruth Lapidoth, "Jerusalem: Some Legal Issues," *supra* note 25.

[51] Ruth Lapidoth, "Jerusalem: Some Legal Issues," *ibid*. It stated that "[a]ny law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defense has defined by proclamation as being held by the Defense Army of Israel." Terry Rempel, "The Significance of Israel's Partial Annexation of East Jerusalem" (autumn 1997), 51:4 Middle E.J. 520.

[52] The declaration was made in 1949 by Prime Minister David Ben-Gurion (at the time) in the *Knesset*, which approved this position. In 1950, Jerusalem was officially declared by Israel as its capital. See also Ruth Lapidoth (May 2013) "Jerusalem" in *Max Planck Encyclopedia of International Law* (Oxford University Press, 2008) online edition: <http://opil.ouplaw.com/home/epil>.

[53] And which up and till then was essentially the western part of the city.

[54] Most of the 64 km² had belonged to some 28 'West Bank' Palestinian villages and to the municipalities of Bethlehem and Beit Jala. See *B'Tselem*, "Legal Status of Jerusalem and its Residents," *supra* note 45.

[55] Israeli MoFA, "Law and Administration Ordinance –Amendment No. 11-Law," online: MoFA <http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/13%20Law%20and%20Administration%20Ordinance%20-Amendment%20No.aspx>.

extension of the JMB where Israel's jurisdiction had been applied in accordance with the above amendment.[56]

Scholars studying the process have underscored that determining Jerusalem's MB at the time "was largely based on security [...] and demographic considerations."[57] As a result, heavily populated Palestinian villages and/or neighborhoods of EJ were left outside the JMB, while some of their lands were included.[58] Back then, Israeli authorities also claimed that the measure did not amount to the *de facto* annexation of EJ and was only meant to help integrate this part of the city into the administrative and municipal spheres of the Israeli-self declared JM.[59] Today, the Israeli-defined JM spans an estimated 108 km².[60]

Government authorities also conducted a census in the annexed areas and granted permanent residency status to those Palestinians who were resident and present at the time in those areas, (an estimated 66,000 Palestinians). This granted them the right to buy property, to work in Jerusalem and in Israel and to receive social benefits (in return for the payment of taxes).[61] Palestinians, who traditionally resided in EJ but who, for whatever reason, were not present in the city at the time of the census, forever lost their right to reside in the city.[62] Instead, they were granted, together with the rest of the 'West Bank' residents, 'West Bank' IDs.[63]

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[56] Ruth Lapidoth, "Jerusalem: Some Legal Issues," *supra* note 25.

[57] "The guiding consideration when setting these municipal borders was that they would ultimately become the State's borders." Municipal planning considerations were only of secondary importance. *B'Tselem*, "A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem," Report (May, 1995) at 10, online: *B'Tselem* <http://www.btselem.org/publications/summaries/199505_policy_of_discrimination>.

[58] This includes for example the Palestinian areas/neighborhoods of Beit Iksa and Beit Hanina. Those moves tripled the area of the JM, turning it into the biggest city in Israel. See *B'Tselem*, "Legal Status of Jerusalem and its Residents," *supra* note 45.

[59] These assurances were made in July 1967 in writing by then Minister of Foreign Affairs Aba Ebban to the UN Secretary General. See Ruth Lapidoth, "Jerusalem: Some Legal Issues," *supra* note 25.

[60] *Ir Amim* and *Yadach*, "Frequently Asked Questions on Jerusalem," *supra* note 41.

[61] Such as health insurance, social security and public schooling. Danielle C Jefferis, "Institutionalizing Statelessness: The Revocation of Residency Rights of Palestinians in East Jerusalem," (2012) Int'l J Refugee L 1. See also Talia Sasson, "The Status of Jerusalem," *supra* note 45.

[62] See International Crisis Group (ICG), "Extreme Makeover? (I): Israel's Politics of Land and Faith in East Jerusalem," Middle East Report No.134 Report (20 December 2012), online: ICG <http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Israel%20Palestine/134-extreme-makeover-i-israels-politics-of-land-and-faith-in-east-jerusalem.pdf>.

[63] The ID card states the village/city of residence in the 'West Bank', religion, the card-holder's marital status and the name of other family members. It does not contain any information regarding citizenship. Children under 16 are listed on their parents' IDs. OCHA-oPt, "The Humanitarian Impact of the Barrier on Palestinian

Moreover, an estimated 30,000 Palestinian residents of Jerusalem, who lived nearby the Israeli declared JMB, were also excluded.[64]

In June 1980, the Israeli *Knesset* adopted the Basic Law: *Jerusalem: Capital of Israel* [Basic Law: *Jerusalem*], which expressed "unequivocally Israel's claim to the right to exercise its sovereignty over the area",[65] and that "Jerusalem complete and united is the capital of Israel,"[66] and seat of the "State, the Knesset, the Government and the Supreme Court."[67] The Law also explained that "[t]he jurisdiction of Jerusalem includes, […] all of the area that is described in the appendix of the proclamation expanding the borders of municipal Jerusalem beginning […] (June 28, 1967)."[68]

It is worth mentioning the temporary nature of the JMB, i.e. one that could be modified in the future. This was reflected in the *Knesse*t's decision in 1980 to delete from the aforementioned Basic Law: *Jerusalem* the statement that the "integrity and unity of greater Jerusalem in its boundaries after the [1967] Six Day War shall not be violated."[69] In 2000, entrenched sections were also added to the statute, making the transfer of power (whether permanent or provisional) concerning Jerusalem in its 1967 boundaries more difficult.[70]

However, since neither *Amendment No. 11*; *Amendment No. 6*, nor the Basic Law: *Jerusalem* have used the word 'annexation,' the issue of whether these legal measures amounted to a *de jure* annexation by Israel of EJ was, (at least) during the early stages of the occupation, a

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Communities: East Jerusalem" (June, 2007), online: OCHA-oPt <http://www.ochaopt.org/documents/jerusalem-30july2007.pdf>.

[64] *Ibid.*

[65] Eyal Benvenisti, *The International Law of Occupation, supra* note 4 at 113.

[66] Basic Law *Jerusalem: Capital of Israel*, (unofficial translation) at section 1, online: *Knesset* <http://www.knesset.gov.il/laws/special/eng/basic10_eng.htm> [Basic Law: *Jerusalem*].

[67] *Ibid* at section 2.

[68] *Ibid* at section 5. In November 2000 this basic law was amended to include an entrenchment clause in section 7, which underlines that "[c]lauses 5 and 6 shall not be modified except by a *Basic Law* passed by a majority of the members of the *Knesset*," see *ibid* at section 7.

[69] Ian Lustick, "Yerushalaym and Al-Quds: Political Catechism and Political Realities," (autumn, 2000) 30:1 J Palestine Stud 5 at 7. Equally interesting to note is that "[...] t]he new municipal boundary in June 1967 had never appeared on any map in the five-thousand-year history of the holy city." *Ibid*.

[70] The entrenched clauses require the consent of the majority of the members of the *Knesset* (61), and relates to any power entrusted by Israeli law to the government or the JM. See Ruth Lapidoth, "Jerusalem: Some Legal Issues," *supra* note 25.

subject of debate amongst Israeli scholars.[71] Today, however, Israeli efforts to insist that Jerusalem is part and parcel of Israeli sovereign territory, has dispelled any doubts that may have existed.[72] Hence, the question of high interest is this: what has the HCJ's position been regarding this issue? The next section is dedicated to this.

2.1.1.2. The HCJ's Position on the Annexation of EJ

Preliminarily, as far as the interaction between international law and domestic law is concerned, Israel follows the common law tradition distinguishing between customary international law and treaty law.[73] Following the dualist logic, an international treaty to which Israel is a state party is not legally binding domestically and could not serve in and of itself as a basis for individual claims in its domestic courts, unless it has been incorporated into its domestic law through specific Israeli legislation.[74] In the case of treaties which Israel considers to be a reflection of customary international law, (i.e. declarative treaties) – which would follow a monist logic – they have been applied directly in its domestic courts, without the need for any specific domestic legislation. This takes place so long as those treaties are not inconsistent with domestic rules that have been enacted by statute or which have been declared as final by national courts and tribunals.[75]

The Court has never challenged the extension by Israel of its administration and jurisdiction over EJ. In the first few years following EJ's occupation, the Court did not articulate a clear statement on whether the legislative measures amounted to *de jure* annexation of that part of

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[71] For a similar position that Israel has not annexed EJ, see Ian Lustick, "Has Israel Annexed East Jerusalem" Middle E Pol'y (October 2008) 5:1 34. Others pointed out that the ambiguity of the law concerning annexation was a deliberate policy by the government who was sensitive to international criticism, but also sensitive to domestic pressure as a way of accommodating opposing claims regarding Jerusalem. See Terry Rempel, "The Significance of Israel's Partial Annexation," *supra* note 51.

[72] Alan Baker, "International Humanitarian Law, ICRC and Israel's Status in the Territories," (Winter 2012) 94:888 Int'l Rev Red Cross 1511.

[73] Eyal Benvenisti, "The Attitude of the Supreme Court of Israel towards the Implementation of the International Law of Human Rights" in Benedetto Conforti and Francesco Francioni, eds, *Enforcing International Human Rights in Domestic Courts* (Kluwer Law International 1997) 207.

[74] *Ibid*.

[75] However, subsidiary legislation cannot derogate from international custom, unless a statute authorizes such derogation. *Ibid*.

the city. Instead, it has preferred to focus on the factual description of the situation and the consequences that arise.

One of the earlier cases requiring the Court to address the question of the status of Jerusalem was (H. Ct. 283/69) *Ruidi and Maches v. Military Court of Hebron*.[76] In this case, the justices were asked to examine whether EJ can be considered 'abroad' vis-à-vis the 'West Bank'. In its decision, it was held that neither the HCJ nor the Israeli military government has the authority to determine whether EJ was annexed or not. Consequently, the Court's judgment against the appellant in this petition would not, they stressed, mean a judicial determination of what they considered to amount to a political question. On the contrary, the judgment "was based only on the fact that the appellants agreed that East Jerusalem had been annexed to the State of Israel and that Hebron (in the 'West Bank') had not been annexed."[77] The justices concluded that since EJ had become part of Israel, it can be considered 'abroad' with regard to the 'West Bank' city of Hebron.[78]

With the promulgation of the Basic Law: *Jerusalem* in the 1980s, it appears that this emboldened the Court to adopt a slightly less ambiguous position regarding any subsequent petitions which challenged Israel's control of EJ. In the *Awad* case for example, a Palestinian with a Jerusalem ID challenged the legality of the government's reliance on *the Entry into Israel Law, 5712-1952*, for the purpose of revoking his Jerusalem residency status and for deporting him from Jerusalem (where he was born).[79] In discussing whether the aforementioned law can be relied on by Israeli authorities, Justice Barak explained that:

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[76] This case involved antiquities dealers from the city of Hebron who transferred antiquities from that city to EJ without having first obtaining an export license, as required by the Jordanian antiquities law that applies in the 'West Bank' (including Hebron). The dealer had requested a restraining order against the military government, which brought the matter to the HCJ, which ruled against him. The case was discussed in Ruth Lapidoth, "Jerusalem and the Peace Process" (1994) 28 Isr LR 402 at 416.

[77] Ian Lustick, "Has Israel Annexed East Jerusalem," *supra* note 71 at 41.

[78] Ruth Lapidoth, "Jerusalem: Some Legal Issues," *supra* note 25.

[79] (HCJ 282/88) [1988] *Awad v. Yitzhak Shamir, Prime Minister and Minister of Interior*, unofficial English translation, online: *Hamoked*: Center for the Defense of the Individual <http://www.hamoked.org/files/2010/1430_eng.pdf> at para 14 [*Awad* Judgment]. The petitioner, who had acquired American citizenship, was also a Palestinian leader advocating non-violent forms of resistance against the Israeli occupation (during the First *Intifada* 1987). Israeli government authorities claimed that the petitioner's preaching of his ideas and goals, as well as continued presence in Jerusalem, "constituted a

> In the Law and Administration Order (No. 1) 5727-1967, the government set fourth that "East Jerusalem" is a territory of the land of Israel wherein the law, jurisdiction and administration of the state apply. This determination created an integration of the area and its residents into the law, jurisdiction, and administration system of the state. East Jerusalem was united with Jerusalem. This is *the significance of the annexation of East Jerusalem to the state and its becoming part thereof* [emphasis added].[80]

In another instance, the *Temple Mount Faithful Association* case,[81] the petitioners requested the HCJ to order the Attorney General and other government authorities to prosecute the *Wagf*, (Muslim religious trust) for undertaking works on the Dome of the Rock, allegedly in contravention to Israeli domestic law.[82] While the Court decided not to interfere in the discretion of the aforementioned authorities, it still held that the religious site was part of Israel proper and that the sovereignty of the State extended over unified Jerusalem more generally and over this site in particular.[83] It also stressed that a clear expression of Israeli sovereignty can be found in the Basic Law: *Jerusalem*, which proclaimed the city 'whole' and 'united' as the capital of Israel. It follows, from this that all laws of the Israeli State are in force.[84]

In the more recent *Rabah* case,[85] one of the main arguments raised by petitioners is that the

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substantive breach of security and public order." *Ibid* at para 3. For an English translation of the law, see *Entry into Israel Law, 5712-1952*, online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=2240>.

[80] *Awad* Judgment, *ibid* at para 7. See also Ian Lustick, "Has Israel Annexed East Jerusalem," *supra* note 71 at 41.

[81] (HCJ 4185/90) [1993] *The Temple Mount Faithful Association et al v. Attorney General et al* (2000|) 30 Isr YB Hum Rts 311 [*Temple Mount* Judgment].

[82] Petitioners argued it was illegal under the *Planning and Building Law (1965)* and the *Antiquities Law (1978)*, *ibid.* The Dome of the Rock is also referred to as the Noble Sanctuary (*Qubbat Al Sakhra*) by Muslims and as the Temple Mount (*Har Habayit*) by Jews. As one organization describes it, it represents "the iconic national and religious symbol for both sides." To date, it is managed by an Israeli-Jordanian condominium. For decades after 1967, Israel was content to leave in place a *status quo* under which entry of Jews was on Jordanian sufferance, and non-Muslim prayer on the site was banned. However, this is being challenged by right wing Zionist groups which want to change the status quo. See ICG, "The Status of the Status Quo at Jerusalem's Holy Esplanade" (Middle East Report No. 159) (30 June, 2015) at p. i, online: ICG <http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Israel%20Palestine/159-the-status-of-the-status-quo-at-jerusalem-s-holy-esplanade.pdf >.

[83] Hence, it also concluded that all laws of Israel apply to the site. Ruth Lapidoth, "Jerusalem: Some Legal Issues," *supra* note 25.

[84] *Temple Mount* Judgment, *supra* note 81 at 313.

[85] Six Palestinian petitioners had challenged the competency of the Jerusalem municipal court to hear matters relating to the construction by Palestinian residents of Jerusalem of houses without obtaining first a building permit from Israeli authorities. See (HCJ 256/01) [2002] *Ibrahim Rabah et al v. Jerusalem Municipal Court*

relevant legislation extending Israeli sovereignty over EJ violated the prohibition on annexation under customary international law.[86] After providing an overview of the Israeli legislative process through which the law, jurisdiction, and administration of the State was applied to EJ,[87] Justice Cohen delivered the opinion and concluded that, "[e]ven if I were to accept the supposition that domestic Israeli legislation is inconsistent with customary international law [...] Israeli law trumps international law."[88] Therefore, and since the application of the law, jurisdiction and administration of the State to EJ is regulated by clear and unequivocal domestic legislation, it "trumps international law in as much as it is inconsistent therewith."[89]

In a more recent decision, concerning the legality of the disengagement from Gaza law, the justices explained that the legal order which applies in EJ is different from the one that applies in the 'West Bank' and the Gaza Strip. After providing an overview of the legislative sources for the application of Israeli law in EJ, including *Amendment No. 11* and the *Basic Law: Jerusalem*,[90] they explained why in their view the legal order in the 'West Bank' and Gaza

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and Government of Israel at para 1, unofficial English translation, online: *Hamokded* <http://www.hamoked.org/files/2012/115170_eng.pdf> [*Rabah* Judgment]. For an English summary, see also (2000) 30 Isr YB Hum Rts 356 [*Rabah* Judgment-Summary].

86 "Therefore, it must be held that Israeli sovereignty was never applied to East Jerusalem *de jure* and that Israeli law and jurisdiction must not be applied thereto." *Rabah* Judgment *ibid* at para 5.

87 *Rabah* Judgment-Summary, *supra* note 85 at 357.

88 However, he also was quick to dismiss the idea that Israeli legislation was indeed incompatible with customary international law, as baseless. *Rabah* Judgment *supra* note 85 at para 7. Consequently, the Court ruled that the municipal court was competent to hear the case against the petitioners. *Ibid* at para 9.

89 *Ibid* at para 7. See also *Rabah* Judgment-Summary, *supra* note 85. This reasoning underscores a conclusion that the HCJ had reached in a case from the 1980s, *Sajdiya*, where petitioners had challenged the legality of holding Palestinians from the occupied West Bank and Gaza Strip in prison facilities inside Israel proper, on the ground that it violated provisions of the Fourth Geneva Convention. (HCJ 253/88) [1988] *Ibrahim 'Abd al-Hamid Sajdiya v. Minister of Defense*, at paras 1 and 2, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/files/2014/4060_eng.pdf> [*Sajdiya* Judgment]. Petitioners pointed out that Israeli "municipal law must be interpreted, to the extent possible, in a manner which reconciles its provisions with those of public international law." *Ibid* at para 4. After concurring with the respondent that this Convention is a treaty convention which requires specific legislative measures for its implementation at the domestic level the Court addressed the applicability of customary international law, such as the Hague Regulations. *Ibid* at para 6 (c) (2). Here, justices affirmed that "[t]he presumption should be that the legislature sought to have its law correspond to the principles of international law (which have received general acceptance)." However, where a statute clearly does not correspond with the latter, "this presumption loses its value and the court must not consider it." *Ibid* at para 6 (c) (2).

90 (HCJ 1661/05 [2005] *Gaza Regional Council et al v. Knesset et al*, unofficial English translation by Avichay Sharon (December 2013), on file with author at para 1 [*Gaza Regional Council* Judgment]. For a summary see also (HCJ) 4014/05 *Gaza Coast Regional Council v. Knesset of Israel* (2007) 37 Isr YB Hum Rts 358.

Strip were not one and the same as the one applicable to EJ:

> The Israeli law, judicial and administrative orders do not apply. The government of Israel has never issued any legislation or order applying Israeli law or administration in these territories [...].These territories, *thus, have not been annexed to Israel and do not make part of the state territorial jurisdiction* [emphasis added]. Without any express legislation, Knesset laws can therefore not apply in these territories.[91]

2.1.1.3. Concluding Remarks

When asked whether the HCJ could have challenged the annexation of EJ by government authorities, Israeli lawyers interviewed for the purpose of this research expressed mixed views. According to one lawyer, had the Court challenged the legislative measures to annex EJ during the early days of the occupation, it would have enjoyed a bigger leeway to invoke the international law in that regard. This is because:

> [...] the laws and ordinances which annexed East Jerusalem left room for principles from the international law of belligerent occupation to come in. The word annexation does not appear in the 'annexing' ordinances. They apply Israeli laws and bureaucracy to EJ, so the Court could [have] interpret[ed] these laws as applying Israeli law, but not dismiss the relevance and application of international law [...] [Back then] [t]here was still some width of discretion that the judges could have used to allow for the application of international law of belligerent occupation in EJ.[92]

Another lawyer noted that "legally speaking, [I am] not sure if it had the option to challenge annexation, given it is a domestic court [...].We know that if there is a domestic law that contravenes international law, it has precedence. [...] As a domestic court it must accept that it is part of Israel."[93]

A third lawyer opined that, while the Court does in principle enjoy the authority to disqualify legislation that it deems unlawful or unconstitutional, when questions of legislation are deeply connected to questions of policy it is less likely that the Court will intervene. Needless to

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[91] *Gaza Regional Council* Judgment, *ibid* at para 3.

[92] Interview with Attorney Michael Sfard by author (21 October 2014, Tel Aviv) via skype [*Sfard* Second Interview].

[93] Interview with Anonymous Attorney 04 by Avichay Sharon on behalf of author (23 July, 2014, Jerusalem) [Attorney *A-04* Interview].

mention the annexation of EJ has always been too much of a 'hot potato' for the Court.[94] Hence, similar to the reasons that explain why the HCJ has not addressed the legality of settlements under international law, it appears that the Court worries that it would suffer a domestic backlash: "For in the end, it needs to maintain domestic support for itself [as an institution] within Israel."[95] As will become evident, the Court's lack of willingness and/or ability to question the legality of annexing EJ has served an important point of departure for the way it has analyzed the petitions challenging the legality of the Wall in that area.

Since one of the declared objectives of the Wall has been to bolster the security of Israeli settlements in and around Jerusalem, the next section provides a short overview of efforts to construct and expand those settlements. It is hoped that this will shed light on criticism leveled by the human rights community that the Wall's route has been largely determined by the desire to consolidate Israeli physical and demographic control of the areas on which those settlements have been established.

2.1.2. The Construction and Expansion of Settlements in and around Jerusalem

Since 1967, Israeli authorities have invested resources and effort into constructing Israeli settlements in and around Jerusalem (including EJ). To date, Israel has built 12 settlements in EJ, (as part of the JMB).[96] Housing an estimated 200,000 Israeli settlers,[97] this represents 40 %

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[94] "In this sense I think this issue of EJ was too big for the HCJ. It couldn't really tackle this or go against it when we see the full context. [...] I think this is one case where the court is limited." Interview with Attorney Nasrat Dakwar by Avichay Sharon on behalf of author and translated from Hebrew (7 July, 2014, Jerusalem) at 9 [*Dakwar* Interview].

[95] Interview with Attorney Quamar Mishriqi by Avichay Sharon on behalf of author (26 June, 2014, Jerusalem) [*Mishriqi* Interview].

[96] These have been commonly referred to by Israeli authorities, and the HCJ as 'Jewish neighborhoods', *B'Tselem*, "Arrested Development: The Long-term Impact of Israel's Separation Barrier in the West Bank," Report (October, 2012) at 8, online: *B'Tselem* <http://www.btselem.org/download/201210_arrested_development_eng.pdf>. In 2011, Israel announced the creation of a new 'neighborhood' in EJ called Givat Hamatos [settlement]. This was the first time a completely new settlement would be constructed there since 1997, when the Israeli settlement of Har Homa was established. *Peace Now*, "Givat Hamatos - A New Israeli Neighbourhood in East Jerusalem" (13 October, 2011), online: *Peace Now* <http://peacenow.org.il/eng/GivatHamatosEng>. For location type 'Giv'at Hamatos' into search engine of *B'Tselem* Interactive map at <http://www.btselem.org/map>. See also *Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem and the Occupied Syrian Golan: Report of the Secretary General*, Human Rights Council (HRC) 28th Sess, UN Doc A/HRC/28/44 (9 March 2015) at para 7 online: OHCHR

of the 530,000 Israeli settlers living across the Green Line.[98] Attempts to consolidate control over EJ have also resulted in the creation of "concentric belts of Jewish presence"[99] around Jerusalem. This term refers to large settlement blocs which extend approximately 10 km from the JMB into the 'West Bank'.[100] In close proximity to the Green Line and to major cities in Israel proper, they also house the majority of Israel's settler population in the 'West Bank'.[101] With most of its working force employed in Israel,[102] the Israeli residents of these blocs are also integrated in their daily life with the JM and with Israel proper, commuting to and from them for work, school and social activities.[103]

One of these blocks east of Jerusalem is the Adumim Bloc, which includes the Ma'ale Adumim settlement,[104] with a total settler population of 36,000 – 40,000.[105] A second bloc is that of Giv'at Zeev (also called the Givon bloc), located northwest of Jerusalem, with an estimated population of 13,000.[106] The third bloc, also known as the Gush Etzion bloc, is

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<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx> [UN Secretary General Report 2015].

97 UN OCHA-oPt, "Settlements in Palestinian Residential Areas in East Jerusalem," Report (April, 2012), online: OCHA-oPt <https://www.ochaopt.org/documents/ocha_opt_ej_settlements_factsheet_april_2012_english.pdf>. See also Associated Press, "A Look at Settlers by the Numbers" (18 August, 2013), online: *Times of Israel* <http://www.timesofisrael.com/a-look-at-israeli-settlers-by-the-numbers/>.

98 Shaul Arieli, "Why Settlements have not killed the Two State Solution," Expert Opinion (January 2013), online: Britain Israel Communications and Research Center <http://static.bicom.org.uk/wp-content/uploads/2013/01/121207-Arieli-Settlements-VIII.pdf>.

99 ICG "Extreme Makeover?" *supra* note 62 at 7.

100 *Ibid*.

101 Shaul Arieli, "Why Settlements have not killed the Two State Solution," *supra* note 98.

102 *Ibid.*

103 *Peace Now*, "West Bank Settlement Blocs," *supra* note 43. In the last few years, the Israeli settler population in the West Bank has been witnessing a demographic explosion. See Youssef Courbage, "Les enjeux démographiques en palestine après le retrait de gaza" (2006) No. 31 Critique Internationale 2:, 23.

104 Established in 1975, this settlement is situated close to the Green Line and was the first Israeli settlement to be granted the municipal status of a city (1991). Encompassing approximately 4,800 hectares, it is the largest Israeli settlement in its jurisdictional area and the third largest in population size (after Beitar Illit and Modi'in Illit). See *B'Tselem* and *Bimkom*: Planners for Planning Rights, "The Hidden Agenda: The Establishment and Expansion Plans of Ma'ale Adummim and their Human Rights Ramifications," Report (2009), online: *B'Tselem* <http://www.btselem.org/download/200912_maale_adummim_eng.pdf>.

105 *Peace Now*, "West Bank Settlement Blocs," *supra* note 43. For a location, type 'Ma'ale Adumim' into search engine of interactive map, online: *B'Tselem* < http://www.btselem.org/map>.

106 This bloc stretches across 6,246 acres of land and includes the settlement-town of Giv'at Ze'ev and another four settlements, with a total population of around 13,000-18,000 settlers. *Ibid*.

situated southwest of Jerusalem and is believed to house an estimated 46,000 settlers.[107] All of these blocs remain within the Israeli political and public consensus as settlements that should be incorporated into Israel,[108] irrespective of the outcome of Palestinian-Israeli peace negotiations.[109] By including all of them on the 'Israeli side' of the Wall, it has been argued that "the barrier mothers a 'Greater Jewish Jerusalem' a 10/15 km radius predominantly Jewish metropolitan area."[110]

In case of Israeli settlements that were built in the Jerusalem area but outside the JMB, Israeli authorities have requisitioned the land for this purpose, using the same land confiscation procedures that they have used for this purpose elsewhere in the 'West Bank'.[111] Authorities have also confiscated land on the ground that it would be necessary for public use. However in many cases, once this land has been confiscated, it has been allocated for the construction of settlements.[112]

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[107] It includes the huge ultra-Orthodox city of Beitar Illit and another nine settlements, with a total population of approximately 46 000 settlers, covering an area of a little over 18,000 acres. *Ibid*.

[108] ICG "Extreme Makeover?" *supra* note 62 at 8.

[109] Prime Minister Ehud Olmert was quoted to have stated that Israel "will separate from most of the Palestinian population that lives in the West Bank […] we will gather ourselves into the main settlement blocs and preserve united Jerusalem. [..] Ma'aleh Adumim, Gush Etzion and Ariel will be part of the state of Israel." See Aluf Benn, "Olmert: Israel will Separate from most Palestinians," *Haaretz* (8 February, 2006). However, it must be recalled that article 5 of the Israeli-Palestinian Declaration of Principles signed on 13 September, 1993 provides that the permanent status of EJ is to be determined and shall be addressed in final status negotiations between the two sides to begin no later than 1996. See "Declaration of Principles on Interim Self-Government Arrangements 13 September, 1993" 32 ILM (1993) 1535.

[110] Francesco Chiodelli, "Reshaping Jerusalem," *supra* note 34 at 418.

[111] This includes the method of declaring the land as 'state land'. In the case of settlements built inside EJ, other methods for confiscating land have been used, such as declaring the land as absentee property and confiscating land for 'public use'. In 1950, the *Knesset* passed the *Absentee Property Law (1950)*. This law established that property, including land, in Israel proper, which belongs to someone who from 29 November, 1947 until the end of the state of emergency (declared in May, 1948 and still in effect) was outside of Israel can be declared 'absentee property'. Those EJ Palestinians who during the 1967 War, were physically present in the 'West Bank' but outside the JMB, and who owned land in the JM, were still listed under that law as absentees. See *Absentees' Property Law (5710-1950*), unofficial English translation online: Israel Law Resource Center <http://www.israellawresourcecenter.org/israellaws/fulltext/absenteepropertylaw.htm> [*Absentees' Property* Law 1950]. *Ir Amim*, "Absentees against Their Will-Property Expropriation in East Jerusalem under the Absentee Property Law," Report (July, 2010) at 1, online: *Ir Amim* <http://www.ir-amim.org.il/en/printpdf/595>. See the Legal Center for Arab Minority Rights-*Adalah*, "Adalah to Attorney General and Custodian of Absentee Property: Israel's Sale of Palestinian Refugee Property Violates Israeli and International Law" (22 June, 2009), online: *Adalah* <http://www.adalah.org/eng/Articles/1003/Adalah-to-Attorney-General-and-Custodian-of-Sale-of->.

[112] This was under the *1943 Land (Acquisition for Public Purposes) Ordinance*. From 1968-1970, an estimated 16,991 dunums were confiscated for 'public use' and allocated for building the following Israeli settlements:

The next section provides an overview of a number of measures implemented since 1967 which have allegedly been driven by the desire to consolidate demographic objectives in the city. However, the list of measures detailed below is not exhaustive, and only seeks to focus on describing those measures which have been identified as relevant for understanding the background for the petitions examined in this chapter.

2.2. Vying for a Demographic Balance in favor of a Jewish Majority in the City

Israeli scholars concerned with the study of Jerusalem and the status of the EJ Palestinian population have explained that the government's consideration of EJ Palestinians as a demographic threat started taking shape after 1967.[113] One policy through which Israeli authorities have allegedly sought to control the number of EJ Palestinians is the requirement that those Palestinians demonstrate that EJ continues to be their 'center of life'. The policy has serious implications for those Palestinians with Jerusalem IDs who after the Wall's construction have found themselves on the 'Palestinian side' of the structure.

The next section provides an overview of this policy, as an essential element of context to understanding the issues raised by petitioners that will be examined.

2.2.1. Centre of Life Requirement and Revocation of Residency Rights in Jerusalem

As 'Israeli residents', Palestinians with Jerusalem IDs are entitled to live and work in Israel without the necessity of special permits. They also can receive Israeli social benefits, such as health insurance.[114] However, this residency status subjects the Palestinian East Jerusalemite

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French Hill, Ramat Eshkol, Ramot, Gilo,Talpiot Mizrah, Neve Yaakov, Maalot Dafna and Atarot. In 1980 another 4400 dunums were confiscated and used to build the Pisgat Ze'ev settlement. See Usama Halabi, "Legal Status of the Population of East Jerusalem since 1967 and the Implications of Israeli Annexation on their Civil and Social Right," Report, online: Civic Coalition for Defending the Palestinian Rights in Jerusalem <http://civiccoalition-jerusalem.org/system/files/documents/chap._1-legal_status_of_the_population_of_ej.pdf>.

[113] Menachem Klein, "Jerusalem without East Jerusalemites: The Palestinians as the "Other" in Jerusalem" (2004) 23:2 Journal of Israeli History: Politics, Society Culture 174.

[114] Permanent residents only have the right to vote in local elections, while Israeli citizens can vote in parliamentary elections (*Knesset*). See *B'Tselem*, "Legal Status of Jerusalem and its Residents," *supra* note 45. Jews from anywhere in the world are granted the right to return to Israel at any time, and are entitled to automatically receive Israeli citizenship by virtue of Israel's *Law of Return (1950)*. For an English translation of the law, see online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=2240>.

to constant verification that his/her 'centre of life' lies within the JM or Israel proper. Thus if an individual has lived outside of those areas for seven years or more, he/she risks the revocation of his/her permanent residency.[115]

In contrast to what is required from Israeli Jewish settlers living in EJ and the 'West Bank' as full Israeli citizens,[116] the onus lies on Palestinian East Jerusalemites to prove (through the submission of extensive documentation) that Jerusalem remains their 'center of life'.[117] This equally applies if the individual has physically moved to other parts of the 'West Bank' even if he/she resides in close proximity to the JMB. It also applies if the person obtained citizenship or residency in another country.[118] On this issue, the HCJ has ruled that: "[a] permit for permanent residency, when granted, is based on a reality of permanent residency [...] Once

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[115] UN OCHA-oPt, "East Jerusalem: Key Humanitarian Concerns" Special Focus (March 2011), online: OCHA-oPt <https://www.ochaopt.org/documents/ocha_opt_jerusalem_report_2011_03_23_web_english.pdf>.

[116] Although Israeli citizenship was offered to Palestinian EJ who resided in the city at the time of its annexation, only an estimated 2,700– 5,000 accepted. Menachem Klein,"Old and New Walls in Jerusalem" (2005) 24 Political Geography (2005) 53. In the past, most of the residents have not filed this Israeli citizenship application for political reasons. ICG "Extreme Makeover?" *supra* note 59.

[117] UN OCHA-oPt, "The Humanitarian Impact of the West Bank Barrier" (2007), *supra* note 63. Such as salary slips, school registration proof for their children, bills, rent contracts. *B'Tselem*, "Revocation of Residency in East Jerusalem," *supra* note 37. Jewish settlers are exempt from having to prove that Jerusalem is their 'center of life'. Human Rights Watch (HRW), "Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories," Report (19 December, 2010), online: HRW <http://www.hrw.org/reports/2010/12/19/separate-and-unequal>. The UN Human Rights Committee (HR Committee) also expressed its concern "at the treatment of EJ's Palestinians residents as aliens and the insecurity of their permanent residency status that can be revoked if they live outside the municipal boundary of Jerusalem." See *Concluding Observations on the Fourth Periodic Report of Israel*, UN Doc CCPR/C/ISR/CO/4), 21 (November 2014) para 9, [HR Committee Concluding Observations 2014].

[118] UN OCHA-oPt, "Fragmented Lives: Humanitarian Overview 2011," Report (May 2012), online: OCHA-oPt <http://www.ochaoPt.org/documents/ocha_oPt_fragmented_lives_annual_report_2012_05_29_english.pdf>. In December 1995, the Ministry of Interior (MoI) began to demand that EJ Palestinians prove that the city is their 'centre of life' as a matter of daily reality. Even when some of them returned from abroad during the 7 years to have their permits extended, this was rendered meaningless. *B'Tselem*, "Revocation of Residency in East Jerusalem," *supra* note 37. In 2000, the MoI declared that it would revert to the pre-1995 policy, declaring that EJ residents would maintain their status if they renew their exit permits on time. This, they argued, would be the case even if they lived abroad or moved to the 'West Bank' neighborhoods of Jerusalem or elsewhere in the 'West Bank'. However, only those whose residency had been revoked after 1995; had visited Israel and/or EJ within the period of validity stamped on the exit card, and who lived in Israel and/or EJ for at least two years, could have their card renewed. It did not apply to those whose residency status was revoked before 1995 or who had acquired permanent residency or citizenship in another country. See OCHA-oPt, "East Jerusalem: Key Humanitarian Concerns," *supra* note 115.

this reality disappears, the permit no longer has anything to which to attach, and is, therefore, revoked of itself, without any need for a formal act of revocation."[119]

Israeli human rights NGOs have voiced criticism over the policy in general and the judgment by the Court in particular, noting that it allows government authorities to treat EJ Palestinians "as immigrants without the Basic right to live in their homes. [...] This attitude does not take into account that many of these Palestinians were born in Jerusalem, have lived there for years and have no home or legal status elsewhere."[120] From 1967-2013, the Ministry of Interior has revoked an estimated 14,309 residency status of Palestinian East Jerusalemites.[121] This has also included the revocation of the residency permits of those who have relocated to the 'West Bank',[122] as opposed to overseas.

Demographic considerations would also explain the unequal access of Palestinians with Jerusalem IDs to planning and building in EJ. This has created a severe housing shortage, a phenomenon that has driven many Palestinians with Jerusalem IDs to seek housing in the suburbs of EJ located in the 'West Bank' beyond the JM. With the construction of the Wall in the Jerusalem area, these suburbs where physically separated from EJ neighborhoods that remained on the 'Israeli side' of the Wall. This resulted in significant issues of access for those Palestinians.

A brief consideration of this unequal access to planning and building opportunities is now appropriate.

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[119] The Court has also ruled that the status of Palestinian East Jerusalemites is regulated by the *Entry into Israel Law (1952)*, which defines their permanent residency permits. See *Awad* Judgment, *supra* note 79 at para 14.

[120] *B'Tselem*, "Revocation of Israeli Residency in East Jerusalem," *supra* note 37. For a critical review of the judgment, see Advocate Yossi Wolfson, "Revocation of Permanent Status from East Jerusalem Residents: HCJ 282/88 'Awad v. Shamir (judgment dated June 5, 1988)," Court Watch, online: *Hamoked* <http://www.hamoked.org/Document.aspx?dID=Documents1317>.

[121] *Ir Amim* Response 2014, *supra* note 27.

[122] In 2012, 183 individuals have had their Israeli residency permit revoked for relocating to the 'West Bank'. Prior to 1995, years of residence in the 'West Bank' did not affect their status. *B'Tselem*, "Revocation of Residency in East Jerusalem," *supra* note 37.

2.2.2. Unequal Access to Planning and Building

Israeli organizations concerned with the planning and housing rights situation in EJ, have maintained that the planning policy in that area is affected by political considerations, mainly as a way of guaranteeing a significant Jewish majority in the city. They also allege that it is characterized by systematic discrimination against its Palestinian population.[123]

Following EJ's annexation, Israeli law, such as the *Planning and Building Law (1965)*, was applied to that part of the city. With that, Jordanian outline plans that had been valid for the area were (in contrast to Israeli policy in other parts of the 'West Bank') largely annulled.[124] Although Palestinian EJ neighborhoods witnessed a number of improvements in essential infrastructure after 1967, the first priority of government authorities was "to counter the demographic threat it believed they [Palestinian East Jerusalemites] presented to the city's Jewish majority."[125]

The enforcement of the law was criticized for leading to discriminatory outcomes.[126] One area concerns zoning and planning.[127] In the 1980s, the JM began preparing outline plans for all of

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[123] *B'Tselem*, "Discrimination in Planning, Building and Land Expropriation" (1 January, 2011), online: *B'Tselem* <http://www.btselem.org/jerusalem/discriminating_policy>. According to one Israeli NGO, planning and zoning policy in EJ has, since 1967, "served, not only normal planning functions, but also geo-political goals: to maintain a significant Jewish demographic advantage in Jerusalem." *Ir Amim* and *Yachad*, "Frequently Asked Questions about Jerusalem," *supra* note 41 at 2. See also Menachem Klein, "Jerusalem as an Israeli Problem," *supra* note 43. In its recent concluding observations, the UN HR Committee also expressed its concern regarding "the discriminatory zoning and planning regime regulating the construction of housing [...] including the East Jerusalem periphery, that makes it almost impossible for them to obtain building permits, while facilitating the State party's settlements in the Occupied Palestinian Territory." See HR Committee Concluding Observations 2014, *supra* note 117 at para 9.

[124] *B'Tselem*, "Discrimination in Planning, Building," *supra* note 123. See also *Bimkom and ACRI v Chair of the Jerusalem District Planning and Building Committee* (extracts from petition in English), (April, 2013) at para 9, online: ACRI <http://www.acri.org.il/en/wp-content/uploads/2013/04/Planning-Petition-ENG.pdf> [*ACRI* and *Bimkom* Petition].

[125] Menachem Klein, "Jerusalem as an Israeli Problem," *supra* note 43 at 59.

[126] The law stipulates that any person (whether Israeli citizen or someone with a Jerusalem ID) must have a building license issued before building. Although planning institutions ostensibly apply objective criteria when enforcing demolition orders, they have usually prioritized enforcement on lands defined as open landscape areas, leading to an over-enforcement in the Palestinian neighborhoods, where large areas are zoned like this. See *Bimkom*, "Violation of Civil and Political Rights in the Realm of Planning and Building in Israel and the Occupied Territories: Shadow Report-Response to the State of Israel's Report to the UN regarding the Implementation of the International Covenant on Civil and Political Rights" (September, 2014), at 15, online: OHCHR <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ISR/INT_CCPR_CSS_ISR_18128_E.pdf>

the EJ Palestinian neighborhoods. Of the 70.5 km² of land in EJ, 35 % was expropriated for the construction of Israeli settlements.[128] This resulted in a corresponding reduction in land and resources available for construction and development in the Palestinian EJ neighborhoods.[129] Outline plans, meanwhile, covered only a small part of the total area of land in those neighborhoods.[130]

Other elements resulted in severe shortage in housing units available in the EJ Palestinian neighborhoods, including in the number of buildings performing public needs.[131] These include: the difficulty and high costs of obtaining building permits;[132] the allocation of substantial areas in that part of the city to the establishment of national park;[133] and difficulties

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[*Bimkom* Shadow Report 2014]. Building regulations are more strictly enforced against Palestinian buildings violating legal limitations on density of construction and maximum height of buildings than on Israeli settlement buildings inside the heart of Palestinian neighborhoods. See HRW, "Separate and Unequal," *supra* note 117.

[127] *B'Tselem*, "Discrimination in Planning, Building and Land Expropriation," *supra* note 123.

[128] By 2001, 461,978 housing units for Israeli Jews were established, but not one unit for Palestinians *ibid*. See also OCHA-oPt, "East Jerusalem: Humanitarian Concerns," *supra* note 115.

[129] OCHA-oPt, "East Jerusalem: Key Humanitarian Concerns," *ibid*. For example, by 2011, West Jerusalem had 1,000 public parks compared to only 45 in EJ; 34 swimming pools compared to 3 in EJ; 26 public libraries compared to merely two libraries in EJ; and 531 sports facilities against only 33 in EJ. See *B'Tselem,* "East Jerusalem: Neglect of Infrastructure and Services in Palestinian Neighbourhoods" (1 January 2013), online: *B'Tselem* <http://www.btselem.org/jerusalem/infrastructure_and_services>. There are only nine postal offices in EJ compared to 42 in West Jerusalem. ACRI, "East Jerusalem-By the Numbers," *supra* note 38.

[130] From the entire area of the JM (around 126,000 dunums), 17 % was included in outline plans for the Palestinian neighborhoods of EJ. By contrast, 27 % of the area was allocated for Israeli development, of which 40 % is located in EJ. Of the aforementioned 17 %, only 46 % has been designated for housing purposes, in accordance with detailed outline plans that are still valid. Thus the planned area destined for housing for Palestinians in EJ covers only 14 % of the area of this part of the city, or 7.8 % of the area of the JM. *ACRI and Bimkom* Petition, *supra* note 124 at para 42. Of the land which has outline plans, 22 % was designated as 'green areas', a policy that has been used in the past to maintain land 'clear' for future construction of Israeli settlements. See also Ardi Imseis, "Facts on the Ground: An Examination of Jerusalem Municipal Policy," (1999-2000) Am U Int'l L Rev 1069.

[131] The average demographic growth of the Palestinian population of Jerusalem is an estimated 2.9 % a year. This has led to a severe shortage in social welfare offices, health centers, kindergartens and other service providers. *ACRI* and *Bimkom* petition, *supra* note 124 at paras 86 and paras 89-90. An estimated 75 % of the Palestinian population of Jerusalem lives below the poverty line. *Bimkom* Shadow Report 2014, *supra* note 126 at 15.

[132] From 2005-2009, an estimated 3,215 residential building permits were granted in the JM, 20.6 % in the EJ Palestinian neighborhoods, while 19.3 % were granted for construction in Israeli settlements therein, and 60.1 % to construction in West Jerusalem. *Bimkom* Shadow Report 2014, *ibid* at 14.

[133] *B'Tselem*, "National Parks as a Tool for Constraining Palestinian Neighborhoods in East Jerusalem" (16 September, 2014), online: B*'Tselem* <http://www.btselem.org/jerusalem/national_parks>. A recent report by the Israeli NGO *Bimkom* concludes that "national parks in East Jerusalem [...] add up into a cumulative picture of a trend, whose political-demographic characteristics and motives cannot be ignored. Such motives are much too often incompatible with the values that the national parks are supposed to preserve." See

encountered by Palestinians (who were seeking to build) in the licensing stage.[134] In addition, while the *Jerusalem 2000 Local Outline* plan[135] allowed for the improvement in the planning situation of EJ Palestinian neighborhoods,[136] it also stipulated conditions that were exceedingly difficult to meet.[137] Concern was also expressed about the extent to which the plan bases efforts of zoning and planning in the JM on an officially adopted government policy of maintaining a ratio of 70 % Jewish Israelis and 30 % Arab Palestinians.[138]

Prior to the construction of the Wall in the Jerusalem area, the resulting severe housing crisis led thousands of Palestinian with Jerusalem IDs over the years to move into the 'West Bank' villages and suburbs of Jerusalem (outside the JMB).[139] Others have resorted to illegal construction inside the city, to which the JM has responded by issuing administrative demolition orders.[140] Recent estimates project that 33 % of all Palestinian homes in EJ lack an

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Bimkom, "From Public to National: National Parks in East Jerusalem," Report (2012), online: *Bimkom* <http://bimkom.org/eng/from-public-to-national-national-parks-in-east-jerusalem/>.

[134] Since much of the land of EJ has never been formally registered, the requirements for building permits (such as proof of ownership) and other bureaucratic hurdles prevent many Palestinians from applying. *Ir Amim and Yachad*, "Frequently Asked Questions about Jerusalem," *supra* note 41.

[135] This is the first outline plan to include the municipal lands of both East and West Jerusalem. See *Bimkom*, "From Public to National: National Parks," *supra* note 133. In April 2014, *ACRI* and *Bimkom* submitted a petition to the Jerusalem Administrative Court to order the Committee to stop relying on the *Jerusalem 2000 Outline Plan* as a policy document because it was never approved and validated. The petition was rejected. See ACRI, "Panel Unlawfully Using Outline Plan for Jerusalem" (1 October, 2013), online: *ACRI* <http://www.acri.org.il/en/2013/10/01/jerusalem-2000-petition/>. For extracts of the petition see *ACRI* and *Bimkom* Petition, *supra* note 124.

[136] This was the result of increasing the construction rates in some of the already built up areas. *Bimkom* Shadow Report 2014, *supra* note 126.

[137] In 1995, a legal amendment made it possible for private landowners to submit outline plans. However, the momentum in the ability to submit specific plans was stymied by the requirement to have an overall planning approval for the areas and for depositing detailed plans. It was also undermined by the authorities' avoidance to advance overall planning. *Ibid* at 4 and 13.

[138] The plan addresses this goal, and offers suggestions on how to achieve a 60/40 ratio instead, in light of the unlikelihood of meeting the 70/30 target because of high birth rates amongst the Palestinian population. See OCHA-oPt, "East Jerusalem: Key Humanitarian Concerns," *supra* note 115. For an unofficial English translation of the Jerusalem Outline Plan, see "Master Plan 2000-English Translation," online: Coalition for Jerusalem < http://www.coalitionforjerusalem.org/master-plan-2000-english-translation/>.

[139] Usama Halabi, "Legal Status of," *supra* note 112. See also *B'Tselem*, "Revocation of Residency in East Jerusalem," *supra* note 37.

[140] UN OCHA-oPt, "Report 4-17 June 2013," online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_report_2013_06_21_english.pdf>.

Israeli-issued building permit, placing approximately 93,000 Palestinians at risk of displacement.[141]

The next section describes government led policies that contribute to isolating EJ from the rest of the 'West Bank'.

2.3. Isolating EJ from the Rest of the 'West Bank'

Following EJ's annexation, only Palestinians with Jerusalem IDs were allowed to access it unhindered.[142] Up and till 1990s however, the Israeli unilateral act of annexing the territory had little implications for the ability of Palestinians with 'West Bank' IDs to continue to physically access the eastern part of the city for work, education, health care or the maintenance of family and cultural ties. This allowed EJ to maintain its position as a gravitational centre for Palestinians throughout the 'West Bank'.[143]

Major changes took place following the outbreak of the First *Intifada* (1987-1993), after which Israeli began to "severe East Jerusalem from its social, political, and economic hinterland in the West Bank."[144] It also resulted in the implementation of more stringent movement restrictions on Palestinians with 'West Bank' IDs wishing to access the city. In 1993, Israeli authorities began demanding that those Palestinians wishing to access EJ obtain special permits from the Israeli Civil Administration (CA). This entailed going through an application process that was time consuming and bureaucratic, with permits usually issued for specific

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[141] 100 homes were demolished and 300 persons displaced. Figures are for 2013. From 2009-2013, the year 2013 saw the highest number of structures demolished and people displaced in EJ. See UN OCHA-oPt, "Humanitarian Monthly Report: November 2013," online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2013_12_16_english.pdf>.

[142] Palestinians that were deemed to live within the newly-defined municipal borders and who had Israeli residency status were denoted by blue IDs, while West Bank Palestinians outside the municipal boundaries were carry 'West Bank' (green) IDs. See *Al-Haq*, "Building Walls, Breaking Communities: The Impact of the Annexation on East Jerusalem Palestinians," Report (October 2005), online: *Al-Haq* <http://www.alhaq.org/publications/publications-index/item/building-walls-breaking-communities-the-impact-of-the-annexation-wall-on-east-jerusalem-palestinians>.

[143] UNCTAD, "The Palestinian Economy in East Jerusalem," *supra* note 39. This is particularly the case for the close by villages and cities such as Ramallah and Bethlehem that are not far from the JMB. See *Al-Haq*, "Building Walls, Breaking Communities," *ibid*.

[144] Menachem Klein, "Jerusalem as an Israeli Problem," *supra* note 43 at. 65.

reasons.[145] Many permits were denied for security reasons, the most specific reasons for the denial of permits being rarely given to the applicant.[146]

Despite these difficulties, many Palestinians with 'West Bank' IDs continued to make their way into the city, often illegally, in order to access social services and employment opportunities[147] or to pray at Jerusalem's Muslim and Christian places of worship. With the beginning of the Second *Intifada* (2000), their ability to access EJ was further restricted, particularly by setting up additional military checkpoints on the major access routes from the 'West Bank' to Jerusalem and into Israel proper.[148] This also significantly curtailed their ability to access those aforementioned places of worship.[149]

The next section explains why the human rights community is convinced that the construction of the Wall is the latest Israeli government-led measure seeking to consolidate physical and demographic control of the large areas of the West Bank including EJ.[150] It also provides an overview of the severe socio-economic impact that the route has had for the nearby Palestinian communities. The impact varies depending on whether the route of the Wall runs inside the JM, along the JMB or inside the 'West Bank', or has affected Palestinians with Jerusalem IDs, with 'West Bank' IDs or with both. The section also provides a description of this impact depending on its location and the population group it has affected.

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[145] If obtained, the permits specify the length of stay, the duration of the permit, and sometimes the specific checkpoint that the person can cross. OCHA-oPt, "The Humanitarian Impact of the Barrier," *supra* note 63.

[146] Although an individual whose application has been denied can challenge the decision in court, it is a costly and time consuming process. *Ibid*.

[147] It also resulted in many 'West Bank' Palestinians seeking to enter EJ 'illegally' for work, nurturing social and family ties and access to social services. See *Al-Haq,* "Building Walls," *supra* note 142.

[148] OCHA: oPt, "The Humanitarian Impact of the West Bank Barrier," *supra* note 63.

[149] Traditionally, only men over the age of 45-50 are allowed to enter EJ for prayers without a valid permit. Christian Palestinians, many residing in the Bethlehem urban area of the West Bank, also require seasonal permits to access Jerusalem for the celebration of religious holidays. OCHA-oPt, "Shrinking Space: Urban Contraction, Rural Fragmentation in the Bethlehem Governorate" Special Focus (May 2009), online: OCHA-oPt <https://www.ochaopt.org/documents/ocha_opt_bethlehem_shrinking_space_may_2009_english.pdf>.

[150] ICG, "The Jerusalem Powder Keg" (2 August 2005), Middle East Report No. 44, online: ICG <http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Israel%20Palestine/The%20Jerusalem%20Powder%20Keg>.

3. The Route of the Wall in and around Jerusalem: Security or Political Considerations?

3.1. Overview

In June 2002, the Israeli government approved the first stage of the Wall, which included the first two sections of this structure north and south of Jerusalem. This was followed by a decision of the Israeli Political-Security Cabinet in 2003, to approve the Wall's route along the eastern JMB[151] (as part of phase three and four of the construction).[152] In 2005, and following a number of HCJ landmark Wall related rulings (such as the *Beit Sourik* judgment), the government approved an entirely new route for the structure. However, while it made significant changes to this route in various areas, it remained largely the same in the Jerusalem area.[153]

Much of the route of the Wall runs along the JMB, as opposed to the Green Line. However, in some segments in and around the Jerusalem area, the route makes an important deviation in two ways: (i) The first one is by deviating from the JMB in some areas, thereby leaving EJ Palestinian neighborhoods which are officially part of the JM, outside the Wall (or as the Court refers to it, on the 'Palestinian side' of the Wall). However, where the route runs inside the JM or along the JMB, Israeli authorities have considered the Wall to be physically located on Israeli sovereign territory. Therefore, in order to requisition land for the Wall's construction, government authorities have invoked the *Emergency Land Regulation Law (5710-1949)*.[154] This law enables relevant authorities to make land requisitions if it "is

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[151] *B'Tselem* and *Bimkom*, "Under the Guise of Security: Routing the Separation Barrier to enable the Expansion of Israeli Settlements in the West Bank," Report (December, 2005), online: *B'Tselem* <https://www.btselem.org/download/200512_under_the_guise_of_security_eng.pdf>.

[152] This is with the exception of the section near the Israeli West Bank settlement of Ma'aleh Adumim. See Annex II: Settlements and the Route of the Wall in the Jerusalem Area, including annexed East Jerusalem of this research.

[153] With the exception of adding an additional 40 km to surround the settlement of *Ma'aleh Adumim*. *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 151.

[154] (HCJ 1300/06) [2006] *Rabhi Abu Ziad et al v. Government of Israel et al,* unofficial English translation by Avichay Sharon (April 2014), on file with author, at 2 [*Abu Ziad* Judgment]. The petition was dismissed by the HCJ. See also (HCJ 7136/09) [2011] *Qawasmeh Iado et al v. Ministry of Defense et al*, unofficial English translation by Avichay Sharon (May 2013), on file with author [*Iado* Judgment]. The petition was dismissed by the HCJ. See also (HCJ 1073/04) [2006] *Omar Salameh et al v IDF Commander of Central Command*, unofficial English translation by Avichay Sharon (May 2014), on file with author, at paras 1-4 [*Salameh* Judgment]. The petition was dismissed by the HCJ. For an English version of the law, see *Emergency Land*

necessary for the Defense of the state, public security [...] or essential public services."[155] Individuals affected by the requisition have the opportunity to challenge the order by appearing in front of specific appeals committees, established and provided for by the *Emergency Land Regulation Law*.[156]

The second (ii) way is that elsewhere; the Wall's route makes incursions inside the 'West Bank', beyond the JMB, in order to include Israeli settlements inside the Wall (on the 'Israeli side'). Similarly to segments of the Wall constructed elsewhere in the 'West Bank', here the land is requisitioned by the Israeli Military Commander (MC), by way of an Israeli Military Order (MO).[157] In line with the process in place in other areas throughout the 'West Bank', affected individuals have the opportunity to appeal the land requisition order before specific appeals committees established as part of the Israeli CA.[158]

Not too long after the Wall's route was determined, the Israeli and international human rights community expressed concerns that the Wall intended to consolidate Israel's physical and demographic control of EJ and the adjacent settlement blocs. The following sub-sections explain briefly how the route of the Wall has deviated from the JMB and the implications it has in terms of consolidating Israeli government control over a greater JM.

3.2. Cementing Physical Control of Greater Jerusalem

The route of the Wall suggests that government authorities are seeking to redraw the size of the JM that it considers part and parcel of sovereign Israeli territory and thus ensure that within this municipality, a Jewish majority prevails. This becomes evident when examining the route of the Wall: In some areas it runs along the JMB to consolidate control over the parts

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Requisition (Regulation) Law, (5710-1949), online: Israel Law Resource Center <http://www.israellawresourcecenter.org/emergencyregs/fulltext/emergencylandreglaw.htm> [*Emergency Land Regulation Law*].

[155] *Emergency Land Regulation Law*, *ibid* at article 3(b).

[156] According to the law, "[a] person who considers himself aggrieved by an order of a competent authority, may appeal to an appeal committee within fourteen days from the day on which the order was served," appointed by the Ministry of Justice. *Ibid* at articles 16 and 17.

[157] See Chapter II section 2.

[158] In the case of the appeals committee established as part of the Israeli CA, it deals with challenges to decisions to requisition land by way of a MO (i.e. 'West Bank').

of EJ that had been formally declared part of the municipality. In other areas, it runs inside the JMB thereby excluding neighborhoods of EJ with predominantly large EJ Palestinian populations so that they remain outside the Wall. Elsewhere, it makes incursions inside the 'West Bank' beyond the JMB, to include a large number of 'West Bank' Israeli settlements inside the Wall.

3.2.1. Running the Route along the JMB: Consolidating EJ's *De Jure* Annexation

In some areas, the decision of Israeli authorities to run the Wall along the JMB has been driven by a desire to consolidate control over the parts of EJ that have already been *de jure* annexed by Israel and in which it continues to build and expand Israeli settlements. This has had a significant impact on the EJ Palestinian communities living in the area. Both the contribution of the Wall and its impact on these communities are described below.

3.2.1.1. The Wall's Contribution

By running the Wall's route along the JMB, Israeli authorities have ensured the inclusion of all 12 Israeli settlements built in EJ on the 'Israeli side' of the Wall, together with their estimated 192,918 settlers.[159]

The next sub-section describes the impact this has had for nearby Palestinian communities.

3.2.1.2. Consequences and Impact on Nearby Palestinian Communities

One consequence of the route of the Wall is this: Thousands of Palestinians with 'West Bank' IDs, who reside in communities that are part of the JM but were never granted Jerusalem IDs, have also been included on the 'Israeli side' of the Wall. The village of Walajeh is a case in point and is the focus of one of the petitions discussed below. Although beyond the Green Line, a third of its area had been annexed by Israel to form part of the JM. However, the majority of its Palestinian residents (an estimated 2,500 persons) were not granted Jerusalem

[159] Figure for the year 2012. *B'Tselem*, "The Separation Barrier-Statistics" (updated May, 2015), online: *B'Tselem* <http://www.btselem.org/separation_barrier/statistics>. See also OCHA-oPt, "Seven Years after the Advisory Opinion of the International Court of Justice," July 2011), online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_barrier_update_july_2011_english.pdf>.

IDs.[160] With the construction of the Wall along the JMB, these residents have been cut off from the rest of the 'West Bank' and have since faced severe daily challenges in accessing social services, employment, etc., therein. At the same time, by virtue of holding 'West Bank' ID, they are denied the right to move freely in the JM unless they carry Israeli-issued valid permits to do so.

Another example is the community of Al Nu'man in the Bethlehem Governorate ('West Bank').[161] Surrounded by the Wall on three sides, an Israeli military checkpoint was set up in 2006 at the entrance of the village. Residents were also required to register their names whenever they entered and left the village. Since then, many have experienced regular delays at the checkpoint.[162] Moreover, Palestinians with 'West Bank' IDs are only allowed to cross the checkpoints on foot; are restricted from bringing in basic products, farming equipment and livestock, and can only access social services (such as schools and clinics) available on the 'Palestinian side' of the Wall.[163]

3.2.2. Running the Wall inside the 'West Bank' beyond the JMB: Consolidating the *de facto* Annexation of the 'West Bank' Settlement Blocs in the Jerusalem Area

In other areas around Jerusalem, the Wall has made incursions beyond Israel-annexed EJ (which forms part of the Israeli self-declared JMB). The next sections describe the Wall's impacts in terms of physically integrating parts of the West Bank that are located on the 'Israeli side' of the Wall.

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[160] Not even those who at the time have lived in the annexed part of the village. Only a minority has the Jerusalem IDs, obtained through marriage and family unification in the days when that was still possible. *Ir Amim*, "Walajeh-A Village under Siege" (November, 2010), online: *Ir Amim* <http://www.ir-amim.org.il/sites/default/files/Walajeh.pdf>. For the location of the village in relation to the route of the Wall, type 'al-Walajah' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[161] Furthermore, the JM has refused to provide essential services. See OCHA-oPt, "Shrinking Space," *supra* note 146.

[162] *Ibid*.

[163] This is despite the fact that the community has no shops, schools, mosques or health facilities. *B'Tselem*, "Nu'man, East Jerusalem-Life under Threat and Expulsion," Status Report (September, 2003), online: *B'Tselem* <http://www.btselem.org/download/200309_numan_east_jerusalem_eng.pdf>. For a location of the village, type 'Khallet a-Nu'man' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

3.2.2.1. The Wall's Contribution

In some areas, the Wall's route makes incursions inside the 'West Bank', primarily to include on the 'Israeli side', some of the largest Israeli 'West Bank' settlement blocs which surround annexed EJ, yet are located outside the JMB. In this regard, policy makers and rights organizations point out that, by making these incursions, the Wall seeks to undermine any possibility of seceding control over EJ to the Palestinians as part of a future peace settlement.[164] They also allege that it threatens the territorial contiguity of any future state that the Palestinians seek to establish in the West Bank.[165]

To the east, where the route of the Wall deviates 14 km from the Green Line, this will comprise the Adumim settlement bloc, where an estimated 53 km² of 'West Bank' territory surrounding the settlement of Ma'aleh Adumim will be enclosed by the Wall. The structure will also enclose on the "Israeli side' of the structure, the controversial E-1 plan,[166] whose northern and southern edges of the plan largely correspond to the route planned for the Wall.

According to Israeli human rights organizations and UN agencies monitoring the Wall's route in the area, if construction plans go ahead as planned, they would complete the isolation of EJ from the rest of the 'West Bank'. It would also undermine the territorial contiguity between the north and south of the 'West Bank'. This would greatly impede the establishment of a future Palestinian state, one that enjoys territorial contiguity.[167] Nevertheless, despite these concerns, the Court has dismissed previous petitions that have challenged earlier versions of

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[164] *Ir Amim*, "Beyond the Wall," *supra* note 42 at 2. As a former UN Special Rapporteur for Human Rights in the Occupied Palestinian Territory pointed out, while every credible vision of a two state solution assumes that EJ will serve as the capital of a future Palestinian State. See Richard Falk, "No Peace without Rights: Why International Law Matters," (2012-2013) 21 Transnat'L and Contem Probs 31.

[165] ICG, "The Jerusalem the Powder Keg," *supra* note150 at 12.

[166] Approved in the 1990s, it covers 12 000 dunums of land inside the 'West Bank', in the area between annexed EJ and that settlement, the majority of the area of land lying inside the 'West Bank', has been declared as 'state land' and has been made part of the jurisdiction of the Ma'ale Adumim settlement. *B'Tselem*, "The E1 Plan and its Implications for Human Rights in the West Bank" (updated 27 November 2013), online: *B'Tselem* <http://www.btselem.org/settlements/20121202_e1_human_rights_ramifications>. See also *Peace Now*, "What is E-1" (May 2005), online: *Peace Now* <http://peacenow.org.il/eng/content/what-e-1>. For the geographic location of the E1 Plan, type 'Ma'ale Adumim' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[167] *B'Tselem*, "The E1 Plan," *ibid*.

the E1 plan on the ground that it raises issues of a political nature and, therefore, are non-justiciable.[168]

In the northeast, the Wall's route - which intrudes 10 km from the Green Line into the 'West Bank' – it encircles the Giv'at Ze'ev settlement bloc, cutting off approximately 34 km² of land from the Jerusalem and the Ramallah governorates to isolate it on the 'Israeli side' of the Wall. Finally, in the southwest, the route will enclose approximately 64 km² of some of the most fertile 'West Bank' land (particularly of the Bethlehem governorate), and deviates about 10 km from the Green Line, to include the Gush Etzion settlement bloc.[169]

In addition on the 'Israeli side', the Wall's route includes some of the major roads, highways, and even railroads which settlers and other Israeli travelers use daily to commute to and/from the JM and Israel proper to their settlements.[170] Since many of these settlements were already functionally, economically and socially integrated with the JM prior to the Wall's construction, the structure would merely solidify the territorial contiguity of these settlements with the former.[171]

As with segments of the Wall elsewhere in the 'West Bank', its route around Jerusalem leaves 'West Bank' land - including Palestinian privately owned land - on the 'Israeli side' of the

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[168] In one petition, the decision of the High Planning Committee for 'Judea and Samaria' of the CA to expand the zoning and building plan by 1,200 dunums was challenged. Palestinian petitioners argued that the goal behind the authorities' decision is to expand *de facto* the Jerusalem metropolis. They also alleged that it "serves political interests of the government [...] by ignoring and erasing on the ground the boundaries and legal distinction between the city of Jerusalem and Judea and Samaria." In dismissing the petition, Chief Justice Metza argued the petition raises political matters more than legal one, "because the decision contested were taken based and following directives of the executive branch." He also noted that since the fate of these settlements will be determined in negotiations between Israel and the Palestinians, the Court will not intervene. See also *Iado* Judgment, *supra* note 154 at 3. It was also stated that the land is 'state land', that most of the land had already been added to the settlement jurisdiction boundaries in 1991, and that the building plan, while creating an urban continuum between the settlement and the larger Jerusalem area, does not change in any way, the JMB. The petition allegedly also raised issues of public policy. *Ibid*.

[169] OCHA-oPt, "Seven Years after the Advisory Opinion," *supra* note 159.

[170] Many of these roads are 'by-pass' roads, on which Palestinians are not allowed to travel. See UN OCHA-oPt, "The Humanitarian Impact of the West Bank Barrier," s*upra* note 63. See also *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 151. See also *Al-Haq*, "Building Walls," *supra* note 142.

[171] Because of relatively lower housing costs and the benefits provided by the State, these settlements were considered as the residential suburbs of the city. With the Wall's construction, they will become *de facto* part of the city. Francesco Chiodelli, "Re-shaping Jerusalem," *supra* note 34. See also *Ir Amim*, and *Yachad*: "Frequently Asked Questions about Jerusalem," *supra* note 41.

Wall. Here again, human rights NGOs have argued that the objective of the Wall is not to secure a buffer zone for security reasons, but to provide Israeli settlements in the area with open space that would accommodate their future expansion eastward.[172] One of these settlements is Neve Ya'akov, located in the northeast corner of Jerusalem,[173] where the desire to expand the settlement to the east (beyond the JMB) was a decisive factor in determining the route of the Wall in the area.

The next sub-section examines the impact that the above-described route of the Wall has had for Palestinian communities.

3.2.2.2. Consequences for Nearby Palestinian Communities

One of the consequences of the route of the Wall has been the inclusion of medium and small sized Palestinian communities into enclaves between the Wall and the JMB, often surrounded by the Wall from more than one side. This has prevented residents (the majority of whom are Palestinians with 'West Bank' IDs) from accessing Jerusalem. It has also made it difficult for them to move freely from those enclaves towards other areas of the 'West Bank'. Those wishing to do so must travel long distances and are required to access specifically designated gates in the Wall, where they undergo protracted security checks. Others must cross through physical checkpoints at the entrance of their communities every time they wish to exit or enter them, thereby disrupting every aspect of their daily lives.[174]

One example is the 'West Bank' village of Al-Ram, whose residents have been completely cut off from Jerusalem, and whose village has been deprived of space for urban development on the south-east.[175] Another example is Bir Nabala. Situated northwest of Jerusalem, the Wall's route has trapped an estimated 15,000 Palestinians in five villages, encompassing an area of

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[172] *B'Tselem* and *Bimkom,* "Under the Guise of Security," *supra* note 151. See also *Al-Haq*, "Building Walls" *supra* note 142.

[173] For location of the settlement, type 'Neve Ya'akov' search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[174] *Bimkom*, "Between Fences: The Enclaves Created by the Separation Barrier" Abstract in English (October, 2006), online: *Bimkom*<http://bimkom.org/eng/wp-content/uploads/Between-Fences.pdf>.

[175] See Case Study: 'Ne'eve Ya'akov' in *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 151 at 45. The route of the Wall in the area and its implications was the subject of the petition *Al-Ram Local Village Council* Judgment, *supra* note 1.

270 acres, completely surrounded by that structure from all sides. Residents wishing to leave and enter the enclave towards other parts of the 'West Bank' can only do so by travelling in designated tunnels. The enforced disconnection of these villages from Jerusalem has "lead to the atrophy of the villages in the enclaves possibly resulting in their disintegration."[176]

Other internal enclaves include Al-Ezariyah and Sawahreh Al Sharqiyeh.[177] Prior to the Wall's construction, these and other localities represented flourishing commercial centers in the area, and depended on the influx of Palestinians with Jerusalem IDs who were able to move freely across the JMB into the 'West Bank'. However with the construction of the Wall and the difficulties which many Palestinians with Jerusalem IDs are facing in their efforts to commute to/from the JM to the 'West Bank', many shops have closed and unemployment has soared thus marking a clear impoverishment of the area.[178] Palestinians seeking to access EJ from those enclaves have also had to make long detours to reach social service points in the area. For example, in the case of the village of Abu Dis (at a distance of only 5 km from the old city of Jerusalem) what once took a 10 minute journey to reach the hospitals in EJ, "now takes at least one hour and often longer when there are queues and delays at the checkpoints."[179]

Similarly (northwest of Jerusalem), the Wall's construction has included the entire village of Al-Nabi Sammuel inside the structure.[180] To the east and west, the Wall surrounds the village,

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[176] The 5 villages are Bir Nabala, Al Judeira, Beit Hanina al Balad and Qalandia. *Ibid*. For location, type 'Bir Nabala' into search engine of interactive map, online: *B'Tselem* < http://www.btselem.org/map>.

[177] *Bimkom*, "Between Fences," *supra* note 174.

[178] UN OCHA-oPt, "The Humanitarian Impact of the West Bank Barrier," *supra* note 63.

[179] There are no major hospitals in Abu Dis for emergency services, obstetrics and surgery. The only other alternative for 'West Bank' Palestinian patients who are refused entry into Jerusalem is to seek treatment at a hospital in Bethlehem, which entails crossing another checkpoint (Container/Wadi El Nar) and a 45-minute drive on a very difficult road. This has resulted in a sharp decline in number of Palestinians using health and other facilities. *Ibid* at 25.

[180] This village includes the proclaimed burial site of the Prophet Samuel, and is home to approximately 200 Palestinians (the majority of whom carry 'West Bank' IDs). In the 1971 most of the village was destroyed by Israeli bulldozers, except for about 10 houses on the outskirts of the village which is all that remains of it. See Moriel Rothman, "Living inside an Invisible Cage: Welcome to Nabi Samuel" (18 May, 2014), online: *+972 Magazine* <http://972mag.com/living-inside-an-invisible-cage-welcome-to-nabi-samuel/91020>. In 1995, Israeli military authorities declared the area where the village is located a national park, using that explanation to deny residents the right to build, renovate, and conduct business or plant. In 2013, Israel military authorities submitted a plan for the development of the "Nabi Samwil National Park," without allegedly consulting with the residents. HRW, "Israel: Military Chocking Palestinian Village, Planning Tourist Site" (4 February 2014), online: HRW <http://www.hrw.org/news/2014/02/04/israel-military-choking-palestinian-

while in the north it is blocked by a highway, which is a major 'by-pass' road connecting the nearby Israeli settlement of Pisgat Ze'ev and other settlements with Jerusalem and with the coastal cities of Israel proper.[181] Since the Wall's construction began, its Palestinian residents have faced severe limitations on their ability to build on and farm their land;[182] they have been prohibited from accessing Jerusalem "a distance of only a few hundred meters from their home."[183] Those wishing to access major 'West Bank' population centres (such as Bir Naballa and Ramallah), have to go through the Al-Jib Wall checkpoint, where they have to endure long waiting hours, thereby prolonging their daily commute to jobs, schools and medical centres in nearby villages.[184] The checkpoint is one example of a 'list checkpoint': a terminology which refers to checkpoints where only those people and vehicles of residents 'registered' as living in the village are permitted to pass through it:

> The lists are updated infrequently, which causes great difficulties in the case of changes of residency. For instance, new brides from other villages who marry men from Nabi Samwil may be unregistered for months (at least) which makes it impossible for them to pass through the checkpoint, and there is no other way for them to access the village. On the other hand, relatives who have moved to the villages on the West Bank side of the wall cannot visit the village.[185]

In 2006, Israeli authorities declared that they will be building 'fabric of life' roads for the purpose of minimizing the harm on residents, primarily by connecting the villages trapped in

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village-planning-tourist-site>. For a location of the village, type 'a-Nabi Samwil' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[181] See (HCJ 426/2005) [2006] *Biddu Village et al v. Government of Israel et al*, unofficial English translation by Avichay Sharon (October 2014), on file with author [*Biddu Village Council* Judgment].

[182] HRW, "Israel: Military Chocking Palestinian Village," *supra* note 180.

[183] Amira Hass, "Holiday Marred for Hundreds of Palestinians outside Jerusalem as Israeli Army Limits Entry into Villages," *Haaretz* (15 October 2013). And while there is seemingly unrestricted passage to the settlement of Ramot Alon (inside the JMB), Palestinians with 'West Bank' IDs who are caught venturing into it without valid permits are likely to face a fine or be sentenced to prison time. Moriel Rothman, "Living inside an Invisible Cage," *supra* note 180.

[184] Amira Hass, "The Civil Administration is Preventing the Transfer of Water Tanks to Two Isolated Palestinian Communities in the West Bank," *Haaretz* (14 October 2013).

[185] Email response to questions from Michaela Rahat, volunteer activist with *Machsom Watch:* Women against the Occupation and for Human Rights (22 March 2015), on file with author, [*Rahat* Written Response]. The organization is a volunteer activist of Israeli female peace activists who since 2001 monitor and report on the operation of the checkpoints, the Wall and its agricultural gates. See online: *Machsom Watch* <http://www.machsomwatch.org/>.

those enclaves with the rest of the 'West Bank'. However, no such roads connecting Nabi Samwil have been constructed.[186]

The next section is concerned with the alleged demographic effects of the Wall and how it has complimented existing Israeli demography related policies.

3.3. The Wall: A Demographically Driven Measure?

As this research highlights, Palestinians petitioners have been concerned that one of the Wall's objective is to contribute to two kinds of demographic changes in the Jerusalem area. The first one is to exclude a number of Palestinian neighborhoods and their residents that remain part and parcel of the JM to remain outside the Wall (on the 'Palestinian side'). The second one is to include a significant number of the Israeli settlement population residing in major Israeli settlements in the 'West Bank' to remain inside the Wall (on the 'Israeli side'). The Wall's alleged contribution to a new demographic reality is discussed in the sub-sections below.

3.3.1. Where the Wall runs inside the JM short of the JMB: Excluding EJ Palestinian Neighborhoods and their Residents which are officially Part of the JM

3.3.1.1. The Wall's Contribution

Where the Wall's route runs inside the JM, it has resulted in the exclusion of an estimated eight EJ Palestinian neighborhoods, on the 'Palestinian side'. Unofficial estimates point to around 60,000 Palestinians (the majority of who hold Jerusalem IDs) residing in those densely populated neighborhoods which, to date; remain part of the jurisdiction of the JM.[187]

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[186] Residents seeking to bring in commercial goods beyond limited quantities of food or household items. Amira Hass, "Holiday Marred for Hundreds of Palestinians," *supra* note 184.

[187] Official government figures regarding the total number of Palestinian Jerusalemites living within the JMB yet on the 'Palestinian side' of the Wall are lacking. A figure given by *Hagihon*, the Jerusalem water company, cites an estimated 60,000-80,000 people living in the Shuafat Refugee Camp area. Local residents have told an Israeli human rights organization that these numbers seem adequate. Residents of Kufr 'Aqab estimate that there are between 50, 000-80, 000 residents living in this area. ACRI, "Shadow Report: ICCPR Implementation in East Jerusalem" (August, 2014) at pp.8-9, online: OHCHR <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fISR%2f18195andLang=en> [ACRI Shadow Report 2014].

According to Israeli authorities, the primary reason for the diversion from the JMB is the illegal presence of many Palestinians with 'West Bank' IDs living in those neighborhoods.[188] However, criticism by Israeli human rights NGOs paints a very different picture: one where the objective for cutting into the JMB seeks to achieve "a substantial reduction, *de facto*, in the number of Palestinian residents in the city,"[189] thereby betraying political considerations of a demographic nature.[190]

The next sub-section describes the impact that this had for Palestinian communities.

3.3.1.2. Consequences for Nearby Palestinian Communities

The impact of the Wall's route has particularly affected the daily lives of the Palestinians with Jerusalem IDs and their ability to maintain the JM as their 'centre of life'. Because of the route of the structure, thousands have found themselves living on the 'Palestinian side' of the Wall.[191] This has required them to go through checkpoints and gates in the Wall on a daily basis to access employment on the 'Israeli side' of the Wall and obtain other social benefits that they are entitled to as 'Israeli residents'.[192]

One Palestinian EJ neighborhood facing such reality is Kufr 'Aqab, located in the most northern part of Jerusalem (at the point closest to Ramallah). Cut off from the rest of the JM by the Wall, its residents, the majority of whom are Palestinians with Jerusalem IDs – must go through the traffic heavy Qalandiya/Atarot checkpoint[193] every time they want to enter the rest

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[188] (AC 405/04, 72/04, 73/04) Residents *of Shuafat Village and Others v. Certified Authority – Ministry of Security*, cited in *Ir Amim,* "Beyond the Wall," *supra* note 42.

[189] *Ibid*.

[190] See *Ir Amim*, "Jerusalem Neighbourhood Profile: Shuafat Refugee Camp," Report (September 2006), online: *Ir Amim* <http://www.ir-amim.org.il/en/report/jerusalem-neighborhood-profile-shuafat-refugee-camp>.

[191] Thus, despite the fact that their *de jure* status as 'Israeli residents' has not been altered by the Wall's route, *de facto* speaking, they have found themselves outside of the city. *Ir Amim*, "Beyond the Wall," *supra* note 42. See also Marie-Hélène, "Etude de la stratégie israélienne d'appropriation territoriale de Jérusalem: le cas du mur entourent Jérusalem est," Mémoire, Université du Québec a Montréal, Montréal, Québec (Aout 2011)

[192] UN OCHA-oPt, "Preliminary Analysis: The Humanitarian Implications of the February 2005 West Bank Barrier Route," (February, 2005) at 2, online: OCHA-oPt, <http://www.ochaopt.org/documents/barrierprojections_feb05_en.pdf>.

[193] The checkpoint is central for residents from the Palestinian city of Ramallah and the northern areas of the 'West Bank', as well as for Palestinian Jerusalem residents who must cross it to pass between the city itself and the neighborhoods of EJ neighborhoods that are located within the JMB but on the 'Palestinian side' of

of the municipality on the 'Israeli side' of the Wall. Despite Israeli government assurances that it would facilitate the access of petitioners, to prevent their quality of life from being undermined,[194] they have since the Wall's construction, experienced regularly delays at Wall gates and checkpoints which suffer from the lack of clear and consistent crossing times and opening hours:[195]

> Waiting for hours on the way to a checkpoint and inside a checkpoint is one of the most striking results of the barrier and its checkpoints. ACRI's researcher was at Qalandiya Checkpoint on 24 August 2014 and reported that it took car drivers more than an hour to pass through the checkpoint, including the traffic jams to and from. This figure is consistent with about a dozen visits by our field researcher to Qalandiya throughout 2014, and consistent with accounts of the residents of Kufr 'Aqab who pass through the checkpoint daily on their way to work, studies, family visits, etc. During a High Court hearing, the State had assured the judges that passing with a vehicle through Qalandiya would take no longer than 15 minutes at most.[196]

Frequently, only two of the five pedestrian lanes are made operational, including during the busiest hours of the day.[197] This has detrimentally affected all areas of life, particularly health[198] and education.[199]

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the Wall. ACRI Shadow Report 2014, *supra* note 187. For a location of the area, type 'Kafr 'Aqab' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[194] These assurances were made, for example, in *Al-Ram Local Village Council* judgment, *supra* note 1 at paras 31-39. See also ACRI Shadow Report 2014, *ibid* at 10-11.

[195] This is "adding another challenge to navigating their daily lives, beyond the primary insult of having to cross a checkpoint to access their city." *Ir Amim* Response 2014, *supra* note 27 at 18.

[196] These include yelling at Palestinians and insulting them, as well as punishing those who talk back or who make allegations against the soldiers by having them wait longer and subjecting them to lengthier examinations. Children report that soldiers in Shuafat and Sawahreh sometimes ask to look through their schoolbags and require that the children empty them when being examined. In Shuafat, parents complained that Arab-speaking soldiers made sexual comments to their daughters as they passed through. All of this is documented in ACRI Shadow Report 2014, *supra* note 187 at 11.

[197] Lanes are often closed without prior notice, resulting in unexpected pressure on remaining lanes. See *Ir Amim* Response 2014, *supra* note 27. The special land set up to allow faster passage of Palestinians with Jerusalem IDs, is often closed off entirely. Another 'humanitarian lane' for the ill and the disabled is often closed during times when it is meant to be open. See ACRI Shadow Report 2014, *supra* note 187.

[198] Emergency medical vehicle allowed to pass through a checkpoint are likely caught up in heavy traffic, with no alternative route to take. Thus, many EJ Palestinians have reduced the treatments they seek on the 'Israeli side' of the Wall even though they are services to which they are entitled as permanent 'Israeli' residents. See *ACRI* Shadow Report 2014, *ibid.*

[199] Thus, where the journey from home to school on the other side of the Wall was once short, it can now take up to two hours each way, in order to reach their schools on the other side of the Wall via the Wall checkpoints. See UN OCHA-oPt, "The Humanitarian Impact of the West Bank Barrier," *supra* note 63.

A second example is the densely populated Shu'afat ridge, situated between Jerusalem and the 'West Bank' city of Ramallah, and which is home to tens of thousands of Palestinians.[200] Many of those Palestinians are either Israeli citizens or carry Jerusalem IDs.[201] Palestinians with Jerusalem IDs must pass daily through the Shu'afat camp/Anata checkpoint:[202]

> Throughout the day and night, including rush hour, only 2 of the vehicular lanes are open; As such, every morning, between 8:00 and 8:45 AM, traffic jams from the exit of the neighborhoods toward Jerusalem cause delays of up to half an hour. In the direction toward the neighborhoods, only one of the lanes is open, and it is often blocked by traffic police who stop and check vehicles from within the lane itself [...] On Fridays, Saturdays and holidays, partial staffing of the checkpoint creates added pressure.[203]

At other smaller checkpoints, such as the Sawahreh Al Sharqiyeh (highlighted in some petitions), its residents must be registered with the military authorities if they want to cross that checkpoint:

> Anyone not registered, including visiting family members, cannot pass through...[G]aining new permits to pass through a checkpoint can take months if not longer [...]The result is that in these instances and others, long detours and winding roads that can take an hour or longer are used instead of the checkpoint situated only minutes away from one's home.[204]

Yet despite these difficulties, Israeli authorities have sought to reassure Palestinians with Jerusalem IDs that the Wall's construction "does not change their status as 'Israeli permanent

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[200] This ridge is comprised of the Shuafat refugee camp, (established 1956-1966 to house Palestinian refugees from the 1948 War and the only Palestinian refugee camp located inside the JMB), as well as the three Palestinian EJ neighborhoods of Ras Khamis, Ras Shehada, and Dahiyat al-Salaam. It is located on approximately 1.5 km² of land on the north-east boundary of Jerusalem, south of the Israeli settlement of Pisgat Ze'ev ('West Bank') and east of the Israeli settlement French Hill (inside JM). See *Ir Amim*, "Jerusalem Neighbourhood Profile: Shuafat Refugee Camp," *supra* note 190.

[201] They add up to a few more thousand Palestinians with 'West Bank' IDs. See *B'Tselem*, "A Wall in Jerusalem: Obstacles to Human Rights in the Holy City," Report (2006), online: *B'Tselem* <http://www.btselem.org/download/200607_a_wall_in_jerusalem.pdf>. For location of the Shu'afat ridge, type 'Ras Khamis' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map?title=Ras%20Khamis>.

[202] ACRI, Shadow Report 2014, *supra* note 187. For the location of the area and checkpoint vis-à-vis Jerusalem, type 'Anata' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[203] The checkpoint is open 24 hours/day and includes three lanes to Jerusalem and two additional lanes in the opposite direction. There is also one passageway for pedestrians crossing to Jerusalem and a turnstile through which pedestrians can return to the aforementioned neighborhoods. *Ir Amim* Response 2014, *supra* note 27 at 18-19.

[204] ACRI Shadow Report 2014, *supra* note 187 at 11-12.

residents'.[205] In a government decision (2005), they also promised to invest in heavy financial and other resources at the municipal level to ensure that the ordinary life of the residents of these communities continues. This included setting up offices of service provision at the checkpoints themselves and building more schools. However "[t]he majority of sections included in the decision had not been implemented to this day, more than [nine] 9 years after the decision was passed."[206]

One of the primary concerns of EJ Palestinians is that the Wall's construction and its route, which promotes their physical separation from the city, would on the long run result in their loss of their 'Israeli residency' status. These fears have been compounded by recent developments, such as the marked neglect and/or halt of basic services provided by the JM to the Palestinian EJ neighborhoods remaining on the 'Palestinian side' of the Wall.[207] In addition, the absence of Israeli police presence in many Palestinian EJ neighborhoods that end up on the 'Palestinian side' of the Wall has also led to thriving crime, as well as drugs and

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[205] Israeli Ministry of Justice (MoJ), The Department for International Agreements and International Litigation, "Reference to the B'Tselem Draft Report Regarding Restrictions on Movement," Ref. 287 (5 August, 2007) (English version)," at 21, online: MoJ <http://index.justice.gov.il/Units/InternationalAgreements/InternationalRelations/ResponsesToReports/English%20version%20-%20Report%20Regarding%20Restrictions%20on%20Movement.pdf >.

[206] Government of Israel decision no. 3873 concerning the "Jerusalem Envelope" and the impact of the Wall on residents in Jerusalem passed on 10 July 2005: cited in ACRI Shadow Report 2014, *supra* note 187 at 10.

[207] Such as sewage and drainage services, classrooms in official schools, and provision of health care sanitation, access to water and road repairs ACRI Shadow Report 2014, *ibid*. See also *Ir Amim* Response 2014, *supra* note 27; UN OCHA-oPt, "Weekly Report" (20-26 May, 2014), at 3, online: OCHA-oPt <http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_report_2014_5_30_english.pdf>. In March 2014, ACRI filed a petition to the HCJ against the Israeli Government Water and Sewage Authority; and the Minister for National Infrastructure, Energy and Water Resources, on behalf of four of the Palestinian residents of the EJ neighborhoods that remain on 'Palestinian side' of the Wall because of the lack of running water for weeks (in addition to other low quality or non-existent social services). See ACRI, "ACRI Petitions High Court: Restore Water to East Jerusalem" (25 March, 2014), online: ACRI <http://www.acri.org.il/en/2014/03/25/ej-water-petition/>. Israeli planning authorities have never conducted urban planning for the neighborhoods of Ras Khamis, Ras Shahada, Dahiyat al-Salaam, and the Shu'afat refugee camp, located in north-east Jerusalem and within the city's MB for 48 years. In the absence of municipal plans, residents cannot obtain building permits – a necessary step to connect their properties to the water system. Expert opinion has shown that the neighborhoods' residents consume only half the amount defined by the World Health Organization as satisfying the basic right to water. On 2 July 2015, the HCJ ruled that the government's National Security Council should investigate and work to mitigate the water crisis in EJ, which has been perennially neglected by both municipal and national water authorities. See ACRI "Water Crisis in East Jerusalem" (updated January, 2015), online: <http://www.acri.org.il/en/2015/01/18/ej-water-2015/>.

arms trade in some of these communities.[208] It has also augmented the worries of those Palestinians that their continued residence in those neighborhoods (on the 'Palestinian side' of the Wall) will jeopardize their ability to continue receiving social benefits.[209]

Many are also apprehensive that because of their physical separation from the rest of the JM, the daily difficulty they are encountering in commuting through the gates and checkpoints in the Wall and the abdication of the JM from providing social services in the area all represents early warning signs of an Israel's intention to redraw in the future the JMB, so that it matches the route of the Wall. They also worry that this move will be accompanied by the eventual revocation of the 'Israeli residence' status of those who amongst them (because of the Wall's route in the area) find themselves living on the 'Palestinian side' of the structure.[210]

3.3.2. Where the Wall Runs Along the JMB: Excluding Palestinians with Jerusalem IDs Living in 'West Bank' Neighborhoods of the City

In other areas, the route of the Wall has run along the JMB. This has had the effect of breaking up neighborhoods that have expanded across that boundary into the 'West Bank'. The next sub-section examines in more detail the physical implications of that route.

3.3.2.1. The Wall's Contribution

Where Israeli government authorities decided to place the route of the Wall along the JMB (as opposed to the Green Line), this resulted in the physical separation of many Palestinian

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[208] In the Shu'afat ridge for example, a drug dealing focal point operates next to the Wall, "clearly visible to both [the Israeli] soldiers and students of the nearby municipal school." *Ir Amim* Response 2014, *supra* note 27 at 20.

[209] This was reported by residents of the Shu'afat ridge. *Ibid.*

[210] *Iado* Judgment, *supra* note 154 at para 4. As a result, some suburbs of EJ on the 'Palestinian side' of the Wall have witnessed a strong trend of Palestinians with Jerusalem IDs moving back into the JM suburbs on the 'Israeli side' of the structure. See *B'Tselem*, "The Separation Barrier Surrounding Al-Ram," (updated 1 January 2015), online: *B'Tselem* <http://www.btselem.org/separation_barrier/a-ram>. It is expected that this migration will have a negative impact on Palestinian EJ neighborhoods on the 'Israeli side' of the Wall, which already suffer from a housing crisis, insufficient public services, and growing poverty. Francesco Chiodelli, "Re-shaping Jerusalem," *supra* note 34. For a location of the area, type 'Dahiyat al-Bareed' or 'a-Ram' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>. During a recent security cabinet meeting in response to the escalation of violence inside Jerusalem, Israeli Prime Minister Netanyahu was reported to have raised the possibility of revoking the thousands of Palestinian EJ residents living on the 'Palestinian side' of the Wall. See Barak Ravid, "Netanyahu Mulls Revoking Residency of Palestinians beyond E. Jerusalem Separation Barrier," *Haaretz* (25 October 2015).

neighborhoods from each other, depending on whether their neighborhood is officially part of the jurisdiction of the JM or not.[211] The impact has been particularly severe for Palestinians with Jerusalem IDs residing in the 'West Bank' neighborhoods/suburbs of EJ.[212]

Here, it must be recalled that despite Israel's unilateral annexation of this city, the built up area of the EJ the Palestinian neighborhoods of the JM had since 1967 spread geographically beyond the JMB into the 'West Bank', thereby forming an urban continuum with the former.[213] One example of such 'West Bank' village is Al-Ram, northeast of Jerusalem (just outside the JMB), which has been surrounded by the Wall from three sides, cutting it off from the JM. Stretching between the residential houses, the Wall has included portions of the neighborhood of Dahiyet Al-Bareed, south of Al-Ram, as part of the JM on the 'Israeli side', while the rest of the neighborhood has, as a result of the route of the Wall has remained on the 'Palestinian side' of the structure.[214]

A second example is the village of Anata. Located in the 'West Bank', it forms one urban continuum with the Palestinian EJ neighborhood of Dahiyat Al-Salam (which is part of the JM). A third example is the town of Abu Dis. Considered before 1967 to be part of the Jerusalem district, only a segment of it was included by Israeli authorities within the JMB,

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[211] Despite the strong claims that some of these neighborhoods have made that they are part of EJ. Again, the village of Sheikh Saed serves as a good illustration. Israeli authorities decided to construct a section of the Wall in the Jerusalem area (1.3 km long) inside the JM, thereby cutting off the village from the rest of Jerusalem. When its residents appealed the land confiscation orders to the appeals committee, the committee concluded that even though Sheikh Saed is, officially speaking, outside the JMB, it has been *de facto* recognized as part of Jabal Al Mukabir. Consequently, routing the Wall along the JMB, the committee explained, has completely disregarded the urban reality and 'fabric of life' of its residents. It hence had ruled that the land confiscation order is invalid on grounds that it was disproportionate. Government authorities, however, appealed the decision of the committee to the HCJ. See (HCJ 7337/05) [2010] *Mohamed Naif Shakir et al v. IDF Commander of Judea and Samaria*, unofficial English translation by Avichay Sharon (May 2014), on file with author at 2-3 [*Shakir* Judgment]. The petition was dismissed by the HCJ. For a location of the village, type 'a-Sheikh Sa'ed' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[212] Such as the areas of Dahiyat Al-Barid, Al-Ram, Bir Nabala, and Beit Hanina. Many Palestinians view these neighborhoods as part and parcel of metropolis of EJ.

[213] "Over the years, villages that were outside the eastern city in 1967 turned into suburbs contiguous to the city. East Jerusalem became a metropolis, and the line drawn by Israel in 1967 became a virtual border." See Menachem Klein, "Old and New Walls in Jerusalem," *supra* 116 at 63.

[214] *B'Tselem,* "The Separation Barrier Surrounding Al-Ram," *supra* note 210. For location type 'Dahiyat al-Bareed' into the search engine of Interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

while the remaining parts were labeled as constituting part of the 'West Bank'.[215] However, with one continuous urban fabric of Palestinian neighborhoods connecting the walls of the Old City of Jerusalem to Abu Dis, an estimated one third of its tens of thousands of Palestinian residents (who carry Jerusalem IDs) have chosen to reside in this area. One reason is the severe housing shortage facing them inside the parts of EJ that are officially part of the JM.

A fourth example is the village of Sheikh Saed which, by virtue of the Wall's route, has remained on the 'Palestinian side' of the structure.[216] Its inhabitants predominantly carry Jerusalem IDs.[217] Over the years, the village had formed one contiguous urban area with the EJ neighborhood of Jabal Al Mukabir (which is part of the JM). Given that the latter constitutes the main source for services and employment for the village residents,[218] the Wall's route in the area has exacerbated the physical hardship that they encounter in their efforts to reach Jabal Al Mukabir.[219]

Here again, the thousands of Palestinians with Jerusalem IDs living in these suburbs have found themselves facing a daily reality of having to traverse checkpoints and gates in the Wall in order to access the JM (on the 'Israeli side' of the Wall). Coupled with the increased time needed to reach the city from the suburbs and the uncertainties surrounding the ability of its residents to commute through these checkpoints, the Wall's route has undermined their ability

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[215] *B'Tselem*, "A Wall in Jerusalem," *supra* note 201. The majority of the village's land lies in Area C and is considered to be 'state land'. Over the years, much of it has been confiscated to build nearby settlements. See "Anata," online: Grassroots Jerusalem <http://www.grassrootsalquds.net/community/anata>.

[216] *Iado* Judgment, *supra* note 154.

[217] Unlike Jabal El Mukabir, Sheik Saed was never annexed by Israel in 1967 and, therefore, remained part of the 'West Bank'. See *B'Tselem*, "5 May 2010: Higher Court of Justice approves Separation Barrier near Sheikh Sae'd in Jerusalem Area, Seriously Infringing the Village's Human Rights" (5 May 2010), online: *B'Tselem* <http://www.btselem.org/separation_barrier/20100505_sheikh_saed_ruling>. Thus, when Israel annexed part of the 'West Bank' and incorporated it in to the jurisdictional area of the JM, the MB ran through the area, including parts inside the JM (such as Jabal Al Mukabir and Sawahreh Al-Gharbiyeh). Its Palestinian inhabitants were granted Jerusalem IDs. Other parts, such as the majority of Sheikh Saed and Sawahreh Al Sharquiyeh, were not incorporated into the JM. However, a few houses in the northwest corner of the village lie inside that municipality. *B'Tselem*, "Facing the Abyss: The Isolation of Sheikh Saad Village-Before and After the Separation Barrier," Report (February, 2004), online: *B'Tselem* <http://www.btselem.org/publications/summaries/200402_sheikh_saed>.

[218] *B'Tselem*, "Facing the Abyss," *ibid*. Most of its residents work in Jerusalem. *B'Tselem*, "5 May 2010: High Court of Justice Approves Separation Barrier" *ibid*.

[219] *B'Tselem*, "A Wall in Jerusalem," *supra* note 201 at14, one example is the Maher neighborhood in the *Salameh* judgment, *supra* note 154.

of Palestinians with Jerusalem IDs to access employment, education and other social benefits and has augmented their concern about their future ties with their city.[220]

3.4. The Physical Isolation of EJ from the Rest of the 'West Bank'

One argument that has been made by the international and Israeli human rights community is that the route of the Wall seeks also to physically isolate EJ from the rest of the 'West Bank'. The next sub-sections explore how the route purports to achieve this.

3.4.1. Where the Route of the Wall in the Jerusalem Area runs along the JMB or inside the JM: Severing the Access by Palestinians with 'West Bank' IDs to EJ

3.4.1.1. The Wall's Contribution

Back in 2008, Israeli scholar Klein pointed out that "despite Israel's concerted efforts [...] East Jerusalem remains the east-looking metropolitan center of the West Bank."[221] The construction of the Wall is the latest in Israeli efforts seeking to physically change this reality.[222]

In the case of Palestinians with 'West Bank' IDs, those residing in 'West Bank' communities in close proximity to the JMB are the ones most affected by the Wall's construction.[223] Many of these neighborhoods have for decades existed as one urban continuum with the EJ Palestinian neighborhoods of the JM.[224] With a population of more than 100,000, its residents have relied heavily on EJ for services, employment opportunities and social ties.[225]

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[220] See Francesco Chiodelli, "Res-shaping Jerusalem," *supra* note 34.

[221] Menachem Klein, "Jerusalem as an Israeli Problem," *supra* note 43 at 55.

[222] *Bimkom*, "Between Fences," *supra* note 174.

[223] *Report of the UN Special Rapporteur of the Commission on Human Rights John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967* ECOSOC E/CN.4/2005/29, (7 December, 2004) 3 at 34, online: UN <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/166/92/PDF/G0416692.pdf> [UN Special Rapporteur Report 2004].

[224] Such as Al-Ram; Dahiyet Al Bareed, Hizma, Anata, Al Ezariyah and Abu Dis, Sheikh Saad and Sawahreh Al Sharkiyyeh.

[225] OCHA-oPt, "East Jerusalem: Key Humanitarian Concerns," *supra* note 115.

Upon planning and constructing the Wall, government authorities have argued that the interest of the Palestinian local population would be taken into account.[226] However, critics have pointed out that the Wall's route and its associated regime of movement restrictions (gates, checkpoints, permit regime) have largely failed to do so.[227] Of the 16 functioning Wall crossing points/checkpoints, only four are accessible to 'West Bank' Palestinians entering EJ.[228] An additional six are only made available for Israeli citizens (including Israeli 'West Bank' settlers), to Palestinians with Jerusalem IDs and to non-Israelis (example: tourists) with valid visas. Palestinians with 'West Bank' IDs have to go through checkpoints that consist of large terminal like structures, and undergo elaborate security checks and procedures, every time they wish to access Jerusalem to and from the 'West Bank' which has resulted in long waiting hours.[229]

What is the impact that this has had for Palestinian communities?

3.4.1.2. Consequences for Nearby Palestinian Communities

One example is once again the village of Sheikh Saed, from which one of the petitions originates. Up and till 2002, village residents were able to enter and leave Jerusalem and the 'West Bank' through a road running through Jabal Al Mukabir. In September 2002, this road was blocked by the Israeli military authorities with concrete blocks.[230] Those who have managed to receive valid permits to enter 'Israel' have been required to access Jerusalem through another Wall checkpoint instead (the Olive checkpoint), which in turn requires them to commute along a difficult road.[231]

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[226] *Bimkom*, "Between Fences," *supra* note 174.

[227] OCHA-oPt, "East Jerusalem: Key Humanitarian Concerns," *supra* note 115.

[228] Provided they carry valid permits. UN OCHA-oPt, "The Humanitarian Impact of the Barrier," update, (July, 2013), online: OCHA-oPt <http://unispal.un.org/pdfs/OCHA_Wall-HumImpact.pdf> [OCHA-oPt, Humanitarian Impact 2013].

[229] *B'Tselem*, "Ground to a Halt: Denial of Palestinians' Freedom of Movement in the West Bank," Report, (August, 2007) at 7-9, online: *B'Tselem* <http://www.btselem.org/sites/default/files2/publication/200708_ground_to_a_halt_eng.pdf>.

[230] *B'Tselem*. "Security Forces Tighten Siege on Sheikh Sa'ed Village" (28 June, 2006), online: *B'Tselem* <http://www.btselem.org/separation_barrier/20060628_sheikh_saed>.

[231] In an interim ruling in July 2006 regarding a petition challenging the route of the Wall in the area, the HCJ allowed the government to establish a 'temporary' Wall in the area, which has compounded the ability of its Palestinian residents to move in and out and to reach Jerusalem. See *B'Tselem*, "Facing the Abyss," *supra*

The next section concentrates on the actual petitions that have been filed to challenge these measures.

4. The Legality of the Route of the Wall in and around Jerusalem: A Summary of Petitions

This section examines in more depth the petitions filed by Palestinians. It is important to realize that all the arguments that have been raised both by petitioners and by respondents were made in an effort to justify their position around one essential element: the legality/illegality of the route of the Wall and, consequently, whether the decision of government and/or military authorities to requisition the land for the construction of sections of the Wall was legal. It must also be recalled that, depending on where the route of the Wall runs, land was either requisitioned under domestic Israeli law, namely the *Emergency Land Regulation Law*, or by way of an Israeli MO. This depended on whether the route of the Wall was to run along the JMB or inside the JM – in which case the former is the main source for the confiscation order – or whether it was to run inside the 'West Bank' beyond annexed EJ – in which case, it is requisitioned by way of the latter.

4.1. Procedural Issues

As a general rule, the Court does not adjudicate matters if a claimant had recourse to alternative forms of judicial or quasi-judicial remedy.[232] Guided by Israeli administrative law, the Court does not generally replace the discretion of an appeals committee when it reviews the legality of the decision to requisition land by way of a MO (with its own).[233] This applies equally to petitions that have challenged the decisions of the appeals committee established under the *Emergency Land Regulation Law (5710-1949)*.

In the *Abu Ziad* case for example, some land was confiscated under the *Emergency Land Law*, in order to route the Wall inside the JM. Other land parcels were requisitioned by way of an

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note 217. See also *B'Tselem*, "5 May 2010: High Court of Justice approves Separation Barrier," *supra* note 217.

[232] *Salameh* Judgment, *supra* note 154 at paras 6-18.

[233] Eyal Benvenisti, *The International Law of Belligerent Occupation*, *supra* note 4.

Israeli MO for the construction of other segments of the Wall in this area that deviated from the JMB into the 'West Bank'. Here, the Court noted that even though the petition appeared to challenge the land requisition for constructing the Wall's 'West Bank' segments, it had become evident during the proceedings that what the petition really sought to overturn, was the land confiscation order that were made under the *Emergency Land Regulation Law*. The justices held this because it was essentially the route of the parts of the Wall that ran inside the JM or along the JMB which stood in the way of including the petitioners on the 'Israeli side' of the Wall.[234] Moreover, since the petitioners' appeal of the land confiscation order was still pending in front of the appeals committee (at the time that the HCJ was adjudicating the petition), the justices then concluded that the Court was not the appropriate forum for deciding the petition and dismissed it.[235]

In other petitions, where Palestinians had challenged the legality of confiscating land under the *Emergency Land Law,* the Court ruled that it enjoyed concurrent jurisdiction with the relevant administrative appeals bodies to adjudicate claims challenging the authorities' exercise of their power to confiscate a given piece of land. The Court also ruled that it enjoyed discretion in deciding whether or not it will adjudicate the matter itself.[236] According to the Court, since it can exercise its discretion to intervene when 'considerations of justice' warrant intervention, it had decided to adjudicate a number of petitions. This remained the case even where other judicial or quasi-judicial bodies, such as the aforementioned appeals committees, had exercised their competence to review the legality of the confiscation order.

For example in the *Shakir* judgment, the respondents had argued that the HCJ was not entitled to review the decision of the appeals committee. In rejecting this contention, the Court

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[234] Here it must be recalled that the route of the Wall chosen by Israeli authorities, had left the petitioners outside the Wall on the 'Palestinian side'. See *Abu Ziad* Judgment, s*upra* note 154 at 3.

[235] Under these circumstances the court found that there are no grounds for judicial intervention in regards to the 'West Bank' land confiscation orders. Yet, the court mentioned that this does not express any position it may have on the matter still being heard by the appeals committee. *Ibid* at 3.

[236] The Court relied on Article 15(c) of the *Basic Law: Judiciary* which states that "[t]he Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court." For the law see *Knesset*, Basic Law: *Judiciary*, online: *Knesset* <https://www.knesset.gov.il/laws/special/eng/basic8_eng.htm>. It also explains that "[the mere fact that a special tribunal, such as the appeals committee, was granted jurisdiction over matters such as the one before the court here does not negate the jurisdiction of the HCJ." *Salameh* Judgment, *supra* note 154 at paras 6-18.

explained that while in principle a decision of an appeals committee cannot be appealed before another administrative judicial forum or before a labor division court, nothing prevents the HCJ from reviewing the decision of that committee if the latter had erred in its legal conclusions.[237] In another case, *Salameh*, the Court determined that the focus of the petition was on two issues: (a) the land confiscation order, delivered under the *Emergency Land Regulation Law*, and (b) the access arrangements that had been put in place by the government authorities for the affected residents to move in/out of the JM areas that had remained on the 'Israeli side' of the Wall. In this regard, the justices explained that a determination of the legality of the land confiscation order was bound to be influenced by the determination of the extent to which the impact of the access/crossing arrangement put in place by government authorities was proportionate. Hence, the Court held that it had a wider jurisdiction than the appeals committees to review both issues and decided to examine the aforementioned petition.[238]

4.2. The Legal Arguments and Counter Arguments

The next section first describes the arguments of the petitioners, followed by the main points that were underscored by the respondents.

4.2.1. The Petitioners' Arguments

It remains true that Palestinians on both sides of the Wall have for decades lived as part of an intertwined community. Hence, if there is any common denominator between the concerns raised by Palestinian East Jerusalemites or by Palestinian 'West Bankers' it is that the Wall has seriously undermined the 'fabric life' of both population groups in human rights and humanitarian terms. Therefore, it is not surprising that the alleged disproportionate impact of the Wall has been their more immediate point of concern, an impact which (they argue) cannot be justified by the alleged security objectives and needs of government authorities.

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[237] As opposed to factual findings. Hence the Court pointed out that it accepts the factual findings of the appeals committee, which has had a chance to interview many witnesses. However it would still apply the legal framework to the route of the Wall in order to determine whether or not it must challenge the legal conclusions reached by the Committee. *Shakir* Judgment, *supra* note 211 at paras 15-35.

[238] This was the conclusion of the Court even though it concurred with the State that there was a subjective and objective delay in submitting the petition. See *Salameh* Judgment, *supra* note 154 at paras 6-18.

The Wall and its associated regime (of permits, checkpoints, etc.) have sought to consolidate Israeli control over EJ, and separate it physically and demographically from the rest of the 'West Bank'. A by-product of this has been the enforcement of the legal distinctions that authorities have set up since 1967, between Palestinians who are considered 'Israeli permanent residents' and/or live inside the JM and those who are not.

The 'domestic' legal status of petitioners has also shaped the consequences that the Wall's construction has had for individuals based on the population group to which they belong. Hence, to better understand the arguments made by the petitioners, these arguments have been grouped together in two categories: those raised by Palestinians with Jerusalem IDs (i.e. who are considered by government authorities to be 'Israeli' permanent residents) and those raised by Palestinian who reside in the Jerusalem area but do not have Jerusalem IDs (West Bank' Palestinians).

4.2.1.1. Points raised by Palestinian Petitioners carrying Jerusalem IDs

Palestinians with Jerusalem IDs have challenged the route of the Wall on several grounds. On a more principled level, some have questioned the authority of the government to build the Wall in the Jerusalem area in the first place, alleging that political considerations and not legitimate security concerns were the driving force behind it, thereby rendering this construction illegal under international law.

One of these political considerations highlighted by petitioners is the desire to consolidate the political objective of cementing Israel's *de jure* annexation of EJ. This was the situation in the *Al-Ram Local Council* case.[239] In this case, petitioners argued that by running the route of some segments of the Wall along the JMB, authorities were seeking to consolidate Israel's physical control of the annexed territory in violation of international law.[240]

Another set of political considerations that petitioners claimed were driving the government decision to build the Wall along the designated route where demographic in nature. They

[239] *Al-Ram Village Council* Judgment, *supra* note 1. The Court examined in this case jointly the three petitions (HCJ 5488/04), (HCJ 6080/04) and (HCJ 3648/05).

[240] I.e. despite the illegality of the acquisition of territory by force. *Ibid* at paras 23-30.

argued it included the desire to exclude as many Palestinians as possible from being included inside the Wall. Again, this was a point raised by petitioners in the *Al-Ram Local Council* case. Here, petitioners argued that the route of the Wall left an estimated 60,000 residents – the majority of whom are Palestinians with Jerusalem IDs – on the 'Palestinian side' of the Wall.[241] Consequently, despite the government's self-declared policy of having the Wall's route run along the JMB, petitioners claimed that the authorities have not followed through with their commitments. They also argued that these authorities were using the Wall as a tool for making 'border' adjustments to include as few Palestinians as possible on its 'sovereign' territory.[242]

This was also the position of petitioners in the *Abu Ziad* case. Here petitioners who resided in the Sheikh Saed village, but whose places of residence were excluded by the route of the Wall to remain on the 'Palestinian side' of the structure.[243] The refusal of government authorities to route the Wall along the JMB so as to include them inside the Wall was motivated by 'demographic considerations'.[244]

In another case, *Ras Khamis Residents Committee*,[245] Palestinian residents of the EJ neighborhood of the Shu'afat ridge[246] submitted a petition to the HCJ demanding that the route of the Wall, which separated them from the rest of the city, be moved further east of the JMB, so that they could remain on the 'Israeli side' of the Wall.[247] By separating the ridge from the nearby Israeli settlements of Pisgat Zeev, the French Hill and Ramat Shlomo, the route of the Wall, also surrounded the ridge from three directions (north, west and south). This left the ridge and its residents on the 'Palestinian side' while the aforementioned settlements were

[241] *Ibid* at 4.

[242] *Iado* Judgment, *supra* note 154 at para 4.

[243] *Abu Ziad* Judgment, *supra* note 154 at 2.

[244] To support their argument, they pointed out that elsewhere the route of the Wall made incursions (beyond the JMB) to include the Anglican Church and its land on the 'Israeli side' of the Wall. This, they stressed, underscored a desire to annex the land belonging to the Church and which is made up of an 'open space' on which no Palestinians resided. *Ibid* at 1-2.

[245] (HCJ 6193/05) [2008] *Ras Khamis Residents Committee v. the Authorized Administrator under the Land Emergency Law,* unofficial English translation by Avichay Sharon (April 2014), on file with author [*Ras Khamis Residents Committee* Judgment]. The petition was dismissed by the HCJ.

[246] Consisting of the neighborhoods of Ras Khamis, the Shu'afat Refugee Camp and the Dahiyet Al-Salaam neighborhood of Anata.

[247] *Ibid* at 1.

included on the 'Israeli side'.[248] Petitioners also argued that the real motive behind the route is to *de facto* cut off the Palestinian residents in those neighborhoods from the JM as a way of maintaining a Jewish majority in the city.[249]

Similar points were also advanced by Palestinians with Jerusalem IDs in petitions that challenged the decision of the Israeli government not to include their 'West Bank' neighborhoods of Jerusalem on the 'Israeli side'. Again in the *Al-Ram Local Village Council* case, petitioners for example argued that their neighborhoods were part and parcel of EJ. In their view, the desire of the respondents to exclude them was also motivated by demographic considerations. This takes place in complete disregard for the geopolitical reality of the West Bank and the 'fabric of life' of the EJ Palestinian communities that had emerged on both sides of the municipal divide.[250]

A second set of arguments that were raised by the petitioners in the cases examined here is that, even if the route of the Wall can be justified on security grounds, it is unlawful because of the disproportionate harm on the residents in the area and on their ability to enjoy some of their Israeli constitutionally protected rights.[251]

In the case of Palestinians with Jerusalem IDs, petitioners have pointed out that the disproportionate impact of the route of the Wall in the Jerusalem area is particularly evident in two situations. The first is how Palestinian neighborhoods of EJ, which constitute an official part of the JM, have been left on the 'Palestinian side' of the Wall.[252] Their exclusion is the result of the decision by Israeli authorities to route the Wall in that area along the JMB or west of it. One petition which highlighted this resulting disproportionate impact is the *Abu El Tir*

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[248] *Ibid* at paras 1-7.

[249] *Ibid* at paras 8-10.

[250] As the Court itself pointed out, this petition differed from other petitions that have challenged the route of the Wall in that it primarily focused on the impact of its route on the 'fabric of life' of the residents and did not deal with petitioners being separated from their agricultural lands. See *Al-Ram Local Village Council* Judgment *supra* note 1 at paras 23-30.

[251] Most notably, the right to freedom of movement, property rights and religious rights. *Salameh* Judgment, *supra* note 154 at paras 6-18. See also *ibid* at 8.

[252] Thereby undermining their ability to exercise some of their most fundamental rights, such as freedom of movement and right to property. *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 8-10.

petition.[253] In this case, Palestinians with Jerusalem IDs, from the villages of Zur Baher and Um Tuba, (both of which are officially part of the JM),[254] contested the route of the Wall in the area because it separated them from residential buildings and other property that they own a few meters beyond the JMB, on the 'Palestinian side' of the Wall.[255]

This was also the situation in the *Abu Ziad*, *Iado* and *Salameh* cases, where petitioners had found themselves on the 'Palestinian side' of the Wall even though they resided in areas that were officially part of the JM.[256] The harm they suffered to their property rights was two-fold, they claimed: (a) it resulted in the confiscation of their land (under the *Emergency Land Regulation Law*) for the purpose of constructing the Wall; and (b) by leaving their property outside the Wall, the route contributed to a sharp drop in the value of their property.[257]

The second situation where the disproportionate impact was also alleged by Palestinians with Jerusalem IDs was when Israeli authorities decided to route the Wall along the JMB, thereby excluding 'West Bank' suburbs and neighborhoods of EJ on the 'Palestinian side' of the structure. This argument was made in the *Al-Ram Local Village Council* case. By placing the western section of the Wall's current route along the JMB, petitioners claimed that the route had effectively split through the traditional road that Palestinians with Jerusalem IDs use to access the JM (route 60). Addressing the decision of the government to re-direct all the commute to and from the JM through the Qalandia checkpoint, petitioners argued that this checkpoint would not be capable of effectively addressing the large influx of individuals who

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[253] (HCJ 940/04) [2004] *Abdel Rahman Abu El Tir et al v. IDF Commander in Judea and Samaria*, unofficial English translation by Avichay Sharon (April 2004), on file with author [*Abu El Tir* Judgment]. The petition was dismissed by the HCJ.

[254] Zur Baher and Umm Tuba are the Palestinian neighborhoods in southeast Jerusalem, and two of the largest in all of annexed EJ. See *Bimkom*, "Survey of Palestinian Neighbourhoods in East Jerusalem: Sur Baher" at 1, online: *Bimkom* <http://bimkom.org/eng/wp-content/uploads/3.4_sur-baher-w.pdf>. It is located within the vicinity of the Israeli settlements of Har Homa and Talpiot East (both located in EJ). For a location of the village and settlements, type 'Zur Baher' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[255] *Abu El Tir* Judgment, *supra* note 253 at 1.

[256] *Abu Ziad* Judgment, *supra* note 154 at 2. See also *Iado* Judgment, *supra* note 154 at para 4.

[257] They demanded, therefore, that the route of the structure be modified so that they could be included on the 'Israeli side'. *Abu Ziad* Judgment, *ibid* at 2.

need to travel to/from Jerusalem on a daily basis for work, education, religious, social and other reasons.[258]

In the same case, the route of the southern section of the Wall, which made incursions inside the 'West Bank' beyond the JMB, was also challenged for its disproportionate impact. After reiterating that the route is not consistent with the *Beit Sourik* and *Ma'ara'be* judgments, petitioners explained that this section, which ran through the Dahiyet El Bareed neighborhood of the village (splitting it on each side of the Wall), effectively meant that those Palestinians with Jerusalem IDs who found themselves on the 'Palestinian side' of the Wall had no access to essential social services available on the 'Israeli side'.[259]

In the *Shakir* case, Palestinians from the 'West Bank' village of Sheikh Saed had been separated from Jerusalem by the Wall. With an estimated half of its residents carrying Jerusalem IDs, petitioners argued that the decision of government authorities to construct a road that would improve the connection of their village towards the east (i.e. West Bank), in the direction of Sawahreh Al Sharqiyeh,[260] constitutes an effort by those authorities to disconnect the village from its traditional reliance on the nearby EJ neighborhood of Jabal Al Mukabir (on the 'Israeli side') and to create a false perception of a separate 'center of life' for the Sheikh Saed residents away from Jerusalem.[261]

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[258] Palestinians with Jerusalem IDs would be able to access the checkpoint in their vehicles (following security checks), while Palestinians with 'West Bank' IDs who have valid permits to enter EJ can only do so by foot. Going through the congested Qalandia checkpoint would significantly increase the time that it takes to commute. Hence in light of the poor track record with crossing the Wall gates, they argued that the solution offered by the respondents was impractical. They also submitted affidavits supporting the contention that the waiting time at the crossing is significant. See *Al-Ram Local Village Council* Judgment, *supra* note 1 at 4 and 8.

[259] This was the petition 3648/05 which the HCJ examined jointly with the other *Al-Ram Village Council* petitions (HCJ5488/04), challenging the western sections, and (HCJ 6080/04), challenging the southern sections. Although, initially, authorities sought to keep the whole of the Dahiyet El Bareed neighborhood on the 'Palestinian side', they decided against this move. The main element that allegedly filtered into their decision is that many Palestinians with Jerusalem IDs relied on the school in the part of the neighborhood that was eventually included on that "Israeli side' of the Wall. While this resulted in enclaving the homes of individual families, respondents argued that the harm caused to the school children had the school remained on the 'Palestinian side' of the Wall would have been greater than the harm that is currently being inflicted on the confined families. *Ibid* at 4.

[260] *Shakir* Judgment, *supra* note 211 at 2.

[261] *Ibid* at paras 1-9. Here it is also worth mentioning that an appeals committee upheld the petition of the residents (against the land requisition order). It explained that the decision of the military authorities to pave the road would still fall short of addressing the violations to the rights of the residents of Sheik Saed in a

Here, it is noteworthy that several petitions have also expressed concern that the decision to leave them on the 'Palestinian side' of the Wall, even though they carry Jerusalem IDs, would on the long run undermine their ability to receive the municipal services that they are entitled to as 'Israeli' residents.[262] In this regard, the Wall's route has physically separated them from the city. Often the only way for them to commute to/from the JM that remains on the 'Israeli side' is to take a long detour around the 'West Bank', and to cross into the city through one of the designated checkpoints inside the Wall.[263] This, they argued, has made the task of demonstrating to Israeli authorities that Jerusalem remains their 'center of life' very demanding. Consequently, many fear that failure to commute to/from those areas would increase the risk of getting stripped of their 'Israeli' residency rights in the future.[264]

In court, petitioners and their counsel have also proposed alternative routes to the Wall. The first alternative that has been highlighted is one that ensures that they remain on the 'Israeli side' of the structure.[265] Some even argued that they have historically been considered part of Jerusalem.[266]

Secondly, they proposed that government authorities make available Wall crossing arrangements in the vicinity of their homes or that they improve the operation of existing crossings, so as to reduce the daily hardship resulting from their commute to/from Jerusalem.

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manner that would render the route of the Wall proportionate. This is because their overall services and family ties are located in Jerusalem. It also reiterated the concern of the appellants that the route had resulted in prolonged travel time for the residents, and that it disconnected them from Jabal Mukabir. *Ibid* at 3.

[262] Such as in the case of Palestinians with Jerusalem IDs who live in the Abu Ma'er neighborhood of EJ. In this case, petitioners challenged the decision of the Israeli authorities to route segments of the Wall on land inside the JM, thereby leaving the parts of the neighborhood where the petitioners lived, which constituted officially part of the JM on the 'Palestinian side' of the Wall. See *Salameh* Judgment, *supra* note 154 at 1.

[263] *Abu Ziad* Judgment, *supra* note 154 at 2. *Iado* Judgment, *supra* note 154 at para 4.

[264] *Abu Ziad* Judgment *ibid* at 2. See also *Al-Ram Local Village Council* Judgment, *supra* note 1 at 8; *Iado* Judgment, *ibid* at para 4.

[265] See also *Salameh* Judgment, *supra* note 154 at para 3; *Iado* Judgment, *ibid* at para 4; *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 8-10; *Al-Ram Local Village Council* Judgment, *ibid* at paras 23-30.

[266] For example, in the *Shakir* case, government authorities had appealed to the HCJ the decision of an appeals Committee to invalidate the MO confiscating land for the construction of the Wall in the area on the ground that the segment was not proportionate. Here, it is worth highlighting that the committee had accepted the petitioners' argument that a more proportionate route for the segment of the Wall should be adopted, even if this would end up leaving the village on the 'Israeli side' of the Wall. This would allow Sheik Saed to maintain its connection to Jabal Mukabir and the rest of Jerusalem while still achieving the desired security objective. See S*hakir* Judgment, *supra* note 211 at 3.

For example, in the *Iado* judgment, petitioners demanded that a Wall gate closer to their homes be made available, one that they can access by foot or in their vehicles.[267] In the *Salameh* judgment, petitioners proposed that at the very least, the opening time of the Wall gates near their homes be extended to 24 hours/day.[268]

Petitions have also been filed by Palestinians with 'West Bank' IDs which are very similar to the kind of petitions filed by Palestinians with Jerusalem IDs to challenge the legality of the construction of the Wall elsewhere in the 'West Bank'.[269] The next sub-section summarizes the main points raised by the petitioners.

4.2.1.2. Issues Raised by Palestinian Petitioners carrying 'West Bank' IDs

Palestinians with 'West Bank' IDs have also attempted to challenge the argument of Israeli military authorities that the Wall's route in their area has been spearheaded by primarily security considerations. This was the situation in the *Al-Eizariyah Village Council* case.[270] In this case, they argued that by including parts of their land on the 'Israeli side', authorities were seeking to annex land that belongs to the village, with the Israeli settlement of Ma'ale Adumim,[271] thereby underscoring that security-based objectives, were not the primary consideration.[272]

Similarly in the *Beit Sahour Municipality* case,[273] Palestinian petitioners from the village of

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[267] The closest crossing was the Olive crossing (980m from their homes), and which they were only allowed to access on foot. Up and till the time of the proceedings, the closest crossing through which they had been able to access the Wall in their vehicles required them to make a 10 km long detour (Al Zaim crossing). See *Iado* Judgment, *supra* note 154 at paras 1- 4. For location of crossing, type 'a-Za'ayem' into search engine of interactive map, online: *B'Tselem* < http://www.btselem.org/map>.

[268] Government authorities had decided to place a gate near the houses of the neighborhood, through which Palestinians with Israeli residence IDs can cross into the other side of the Wall. *Salameh* Judgment, *supra* note 154 at para 3.

[269] Chapter I section 3.3.

[270] *Al-Eizariyah Village Council* Judgment, *supra* note 30.

[271] For the location of the village, type 'al-'Eizariyah' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[272] The petitioners invoked in this regard the ICJ *Wall* Advisory Opinion, *supra* note 45. See *Al-Eizariyah Village Council* Judgment, *supra* note 30 at paras 5-6.

[273] (HCJ 3937/07) [2010] *Beit Sahour Municipality et al v. Prime Minister et al*, unofficial English translation by Avichay Sharon (February 2014), on file with author [*Beit Sahour Municipality* Judgment]. The petition was dismissed by the HCJ.

Beit Sahour in the 'West Bank'[274] challenged the decision of military authorities to confiscate privately owned land for the construction of a section of the Wall that had left some of the village's land and the nearby Israeli settlement of Har Homa on the 'Israeli side' of the Wall.[275] Here as well, petitioners argued that the MC's decision was based on political considerations of annexing the land that has been trapped in the Seam Zone, thus allowing for the expansion of the aforementioned settlement.[276]

In a third case, *Halawa*, the route of the Wall in the area had resulted in the inclusion of a hill belonging to the residents of the town of Anata on the 'Israeli side'. Petitioners challenged the allegations by military authorities that this was necessary to secure the protection of the residents of the nearby settlements of Pisgat Ze'ev and of Israeli travelers on highway 45 which connected that settlement to the JM.[277]

In a fourth case, *Walajeh Village Council*,[278] Palestinian petitioners from Al-Waljeh village south of the JMB,[279] filed a petition to challenge a land requisition order for the construction of the last section of the southern segment of the Wall in the area. Surrounding the village from

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[274] Beit Sahour is a Palestinian city in Bethlehem Governorate located at 1.5 km (horizontal distance) east of Bethlehem City. It is estimated that a little over 1,000 dunums of the village land was included in the JMB, when the municipality was expanded by Israel. See the Applied Research Institute-Jerusalem (ARIJ), "Beit Sahour City Profile," online: ARIJ <http://vprofile.ARIJ.org/bethlehem/pdfs/VP/Beit%20Sahour_cp_en.pdf>. For location, type 'Beit Sahur' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[275] 70 dunums were confiscated for the Wall's construction, while 96 dunums of land remained on the 'Israeli side' of the Wall. *Beit Sahour Municipality* Judgment, *supra* note 273 at paras 1-3.

[276] The term is interchangeably used by the Court in its judgment to refer to the 'Israeli side' of the Wall. *Ibid* at para 4.

[277] Highway 45, also known as the eastern ring road between Anatot and Azaim is a 3 km-long 'by-pass' road located at the intersection of the Gi'vaat Zeev settlement. Palestinians are partially prohibited from traveling on it. See *Ma'an* Development Center, "Apartheid Roads: Promoting Settlements Punishing Palestinians," Report (December 2008) at 15, online: OCHA-Opt <http://www.ochaopt.org/documents/opt_prot_maan_apartheid_roads_dec_2008.pdf>. See also (HCJ 6451/04) [2006] *Mahmoud Halawa et al v. Prime Minister et al*, unofficial English translation by Avichay Sharon (February, 2014), on file with author, at para 5 [*Halawa* Judgment]. The petition was dismissed by the HCJ.

[278] (HCJ 9516/10*)* [2011] *Walajeh Village et al v. Military Commander of the West Bank,* unofficial English translation by Avichay Sharon (March, 2013), on file with author [*Walajeh Village Council* Judgment]. The petition was dismissed by the HCJ.

[279] Parts of the village are inside the JMB and parts are outside it. *Ibid* at 2.

three directions, the route of the Wall included the Israeli settlements of Har Gilo[280] and the Gush Etzion bloc on the 'Israeli side', in contrast to the village which was effectively kept on the 'Palestinian side' of the Wall.[281]

Similar to petitions filed by Palestinians with Jerusalem IDs, the majority of 'West Bank' Palestinians have challenged the disproportionate harm to them and their rights. For example, in terms of property rights, it was alleged that the Wall resulted in the requisition and damage to some of their privately owned lands. In the *Walajeh Village Council* case, petitioners argued that dozens of dunums of cultivated lands would be damaged and trees uprooted. They also underscored that the Wall's construction along the chosen route would cause severe damage to an old cemetery and a natural spring in the area.[282] In another case, *Al-Ram Local Village Council*, the fact that the route of the Wall ran between houses, splitting the 'West Bank' neighborhood of Dahiyet El Bareed into two areas (one on each side of the Wall), had resulted in the drop of their property value and the closure of hundreds of shops.[283]

In addition, they highlighted that the Wall's route separated them from land and other property (to remain inside the Seam Zone). For example, in the *Al-Eizariyah Village Council* case, petitioners showed that the route had left a hill inside on the 'Israeli side' of the Wall. Other than confiscating land for the actual construction of the structure, its route also separated them from an additional 1,000 dunums of land that constituted an important source of their livelihood.[284] Similar harm to property rights was also alleged in the *Beit Sahour* Municipality

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[280] The settlement was established in 1972 and is 1.8 km from the Green Line. Much of the annexed Al-Walajeh land was requisitioned by Israeli MOs for the purpose of constructing this settlement. See *B'Tselem* "14 November 2010: Separation Barrier Strangles al-Walajah," online: *B'Tselem* <http://www.btselem.org/separation_barrier/20101114_al_walajah_separation_barrier>. See also *Peace Now*, "Har Gilo," online: *Peace Now* <http://peacenow.org.il/eng/content/har-gilo>, and type 'Har Gilo' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[281] A fenced road in the direction of Har Gilo, which remains off limits to Palestinians, closes off the fourth side. See Karin Laub, "Security Wall to Encircle Palestinian Village Walajeh," *Jerusalem Post* (13 July 2010).

[282] *Walajeh Village Council* Judgment, *supra* note 278 at para 4.

[283] Located just outside the JMB, the village, until the construction of the Wall, had been a busy commercial center. See *B'Tselem,* "The Separation Barrier surrounding a-Ram," *supra* note 210. Schools which relied on children of Palestinians with Jerusalem IDs also reported lower registration. See *Al-Ram Local Village Council* Judgment, *supra* note 1 at 8.

[284] In one case, petitioners alleged that an estimated out 2,000 dunums of land were confiscated for the construction of the Wall in this area. See Al-*Eizariyah Village Council* case, *supra* note 30 at paras 5-6. Petitioners also argued that including the hill on the 'Israeli side' of the Wall deprives them of physical space

case,[285] with farmers highlighting that they were experiencing difficulties in reaching this land and in cultivating it.[286] In the *Halawa* case, Palestinians also argued that the route not only left the nearby Pisgat Zeev and Anatot Almon settlements on the 'Israeli side' but also included a hilltop with an old cemetery (of religious value to the residents) that is used as a cemetery.[287]

In the *Al-Ram Local Village Council* case, petitioners argued that the decision of authorities to include the land surrounding the village on the 'Israeli side' was motivated by a desire to provide the nearby Israeli settlement of Neeve Yacov with land reserves for its own expansion.[288] Petitioners also claimed that the Wall's route undermined their 'fabric of life' particularly because of the movement restrictions it imposed on those residents wishing to access the JM.[289]

Elsewhere, the main argument has been that the Wall's route has disconnected them from 'West Bank' urban centers on which they depend for vital social services. In the *Al-Ram Local Village Council* case, petitioners also challenged the functioning of the alternative roads that had been constructed by military authorities.[290] In the *Walajeh Village Council* case, they

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to expand eastwards. It is also worth mentioning that the building plan which residents had deposited with the Central Planning Board of the CA to allow them to receive approval for expanding their village was rejected. The reasons furnished for this rejection is that it was not based on a realistic assessment of the topographic conditions and socio-economic reality. *Ibid* at 2. For more information on discrimination in building and planning see Chapter II off this research, section 5.3.2.

[285] *Beit Sahour Municipality* Judgment, *supra* note 273 at para 4.

[286] In addition, they alleged that farmer will encounter difficulties accessing the Seam Zone with their farming equipment and that the Wall precented their village from expanding. See *Walajeh Village Council* Judgment, *supra* note 278 at paras 6-17. For more information on Seam Zone procedures, see Chapter II section 2.3.

[287] Petitioners argued that the cemetery which dates back to the Byzantine era has been used for decades by the residents of Anata to bury their dead. Consequently, by separating it from the petitioners who were forced to remain on the 'Palestinian side'of the Wall, this according to the latter, has violated their property rights and religious rights. See *Halawa* Judgment, *supra* note 277 at 2.

[288] *Al-Ram Local Village Council* case, *supra* note 1 at 5. According to the petitioners, the Wall's route around the settlement of Neve Ya'akov (keeping the settlement on the 'Israeli side') clearly annexes into Jerusalem 1800 dunums of land situated between it and JMB. A study by two Israeli human right organizations points out that authorities intend to build the Geva neighborhood as a contiguous area to the settlement. This has made the urban development of Al-Ram (towards its western border) impossible. The village's expansion into other directions is not possible due to topography or the presence of major routes (route 45). See *B'Tselem* and *Bimkom*, "Under the Guise of Security," *supra* note 151.

[289] *Abu El Tir* Judgment, *supra* note 253 at 2-3.

[290] While military authorities had maintained that these roads were constructed to facilitate the travel and link between Al-Ram and the 'West Bank' city of Ramallah, petitioners complained that the frequent 'flying' checkpoints that were put in place by military authorities along these roads, significantly increased travel time. See *Al-Ram Local Village Council* Judgment, *supra* note 1 at 8. Up and till now, Al-Ram residents can

argued that by surrounding them from three sides, the Wall isolated them and restricted their ability to reach the 'West Bank' governorate of Bethlehem, which serves as their natural urban hinterland.[291]

In addition, petitions identified alternative routes for the Wall which, if adopted by Israeli authorities, would mitigate the harmful impact of the Wall.[292] This was the situation in the *Abu Ziad* case, where they demanded that the Wall's route be moved several hundred meters so that they can be included on the 'Israeli side'. In addition, they challenged the notion that doing so would result in additional security risks.[293] A similar argument was adopted in the *Halawa* case, where the counsel for the petitioners argued that an alternative route to the Wall could leave the contested hill outside the structure (i.e. on the same side as the petitioners), without undermining the declared security objective of the government.[294]

In the *Al-Ram Local Village Council* case, petitioners and their counsel also relied on the input (as *amicus curiae*) of the *Council for Peace and Security* (CPS), which argued that the route as determined by the respondents (particularly in its western section) was not the most optimal route from a security point of view.[295]

In other petitions, they demanded that the contested section of Wall be re-routed to include

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go through an opening in the Wall. However, when it will be closed up by military authorities, residents will have to travel more than 20 km via the 'West Bank' city of Ramallah to make the same journey in order to reach those villages. *B'Tselem,* "The Separation Barrier surrounding a-Ram," *supra* note 210.

[291] The Wall completely disconnected the village from surrounding 'West Bank' villages, with which it enjoys important social and family ties, while seeking to connect it by a single road to Beit Jala in the 'West Bank'. See *Ir Amim,* "Walajeh-A Village under Siege," *supra* note 160.

[292] According to petitioners, these routes would separate them from less land that the original route would require less land to be requisitioned for the construction of the actual Wall and would include their community inside the Wall.

[293] *Abu Ziad* Judgment, *supra* note 154 at 2.

[294] This could be achieved if the route encircles a different hill north of one other nearby settlement in the area, close to the settlement of Givat Almon. Petitioners argued that adopting this alternative route would not hamper the ability of government authorities to provide for the security of the residents of the settlement of Pisgat Ze'ev and of Israeli travelers on the main roads in the area. See *Halawa* Judgment, *supra* note 277 at 2.

[295] In this regard, it was argued that rather than running through Palestinian neighborhoods of Jerusalem and separating them from each other, the route of the Wall should seek to separate Palestinian neighborhoods of EJ from the Jewish 'neighborhoods' (i.e. settlements). It was also argued that the larger distance between the route of the Wall and the line of houses should be maintained vis-à-vis the Palestinian neighborhoods, not the Jewish 'ones' (as the current route of the Wall is doing) as a way of contributing to the security of the Israeli military forces that are operating in that area. See *Al-Ram Local Village Council* Judgment; *supra* note 1 at 5 and 14.

them on the 'Israeli side'. This was the situation in the *Walajeh Village Council* case, where petitioners proposed that the route be placed along the JMB (as opposed to inside the 'West Bank') and argued that doing so would not undermine the attainment of the declared security objectives of the respondents.[296] In one other case, *Shakir*, petitioners highlighted that most of the village's Palestinians with 'West Bank' IDs had valid permits to enter Jerusalem. Therefore, including their village on the 'Israeli side' of the structure would not result in disproportionate harm to them.[297]

That there are alternative security-based physical measures that can be resorted to – other than the construction of the Wall, to counter alleged security threats was also put forward in other petitions. For example, in the Al-*Eizariyah Village Council* case, Palestinians proposed that military authorities put in place smaller concrete barriers or that the route of the Wall be moved closer along routes 1 and 417 (which connect Jerusalem, Ma'ale Adumim and the Dead Sea), as this would result in the confiscation of smaller areas of land from them.[298]

Palestinians have also challenged security-based measures that are associated with the Wall. For example, in the *Anata Boys High-School* case, the high school parents' board and individual Palestinian petitioners from the village of Anata, located north-east of Jerusalem, challenged the decision of the military authorities to place a cement barrier inside the yard of a

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[296] These objectives consisted of separating between Jerusalem and the rest of the 'West Bank' and safeguarding the Israeli settler population from the residents of Jerusalem can also be achieved by placing the route of the Wall on the JMB. See *Walajeh Village Council*, *supra* note 278 at paras 6-17.

[297] Traditionally, Israeli authorities had argued that including Palestinian with 'West Bank' IDs on the 'Israeli side' would result in more harm to them because they would have to traverse checkpoints to access the 'West Bank' on the 'Palestinian side' of the structure and are not allowed to move freely on the 'Israeli side' because they do not have valid Israeli issued permits to do so. See section 4.2.2 of this chapter. However, petitioners argued that quite on the contrary, including them on the 'Israeli side' would allow them to continue enjoying a direct link with Jerusalem. See *Shakir* Judgment, *supra* note 211 at paras 12-14. Furthermore, they referred to the conclusions of the appeals committee that had invalidated the decision to confiscate land for the Wall's construction. In this conclusion, it was explained that if the objective is to restrict the entry of the village's residents who carry 'West Bank' IDs and who did not have a permit to enter Jerusalem, this could be achieved by substituting the Wall segments in the area with a smaller fence or barrier. At the same time, the committee held that it did not have the legal authority to invalidate a decision by the government to build on 'Israeli territory' and to re-route the route to pass inside the 'West Bank' instead. *Ibid* at 3.

[298] Road 1 connects Jerusalem to the Dead Sea area in the West Bank, while road 417 constitutes an important access road to the Ma'aleh Adumim settlement. The protection of these roads had been underscored by Israeli authorities as the primary reason for the route of the Wall. See *Al-Eizariyah Village Council* Judgment, *supra* note 30 at 1 and 3.

boys school, which is located inside the JMB.[299] In this regard, petitioners underscored that the cement barrier is part of the Wall in the Jerusalem area which military authorities were building and therefore, constituted a deviation from the route of the latter and the land confiscation order issued for that purpose.[300]

What follow are the main arguments by the respondents.

4.2.2. The Position of the Respondents

As they did in response to petitions that have challenged the construction of the Wall in the 'West Bank', government authorities have argued that the Wall's construction in and around *Jerusalem* is a legitimate 'self-defense' measure,[301] one that is driven by security/topographic considerations, as a way of preventing the infiltration by Palestinian West Bank 'terrorists' into Israel. [302] They also claimed that "[t]he fence *aims to separate between Jerusalem and the West Bank* [emphasis added] in order to provide security for Israeli citizens and the residents of Jerusalem."[303]

Another element that they underscored is that the Wall's construction along the route they have chosen was necessary not only to ensure the safety of its military forces patrolling the structure, but also to guarantee the security of the residents of Israeli settlements and that of Israeli travelers on roads connecting parts of Jerusalem with the settlements located in the 'West Bank'.[304]

For example, in the *Halawa* judgment, it was argued that including the hill on the 'Israeli side' of the Wall is necessary to protect the residents of the settlement of Pisgat Ze'ev and Israeli travelers on road 45 from possible gunfire and to offer a vantage point for detecting any

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[299] (HCJ 10043/05) [2005] *Anata Boys High-School Parents Board et al, v. Minister of Defense et al*, unofficial English translation by Avichay Sharon, (April 2014), on file with author at 1 [*Anata Boys High School* Judgment]. The petition was dismissed by the HCJ.

[300] *Ibid* at 2.

[301] *Al-Ram Local Village Council*, Judgment, *supra* note 1 at paras 31-39.

[302] *Ibid* at paras 1-22. See also *Shakir* Judgment, *supra* note 211 at paras 1-9; *Beit Sahour Municipality* Judgment, *supra* note 273 at paras 5-6.

[303] *Walajeh Village Council* Judgment, *supra* note 278 at 1. See also *Iado* Judgment, *supra* note 154 at para 5.

[304] *Al-Eizariyah Village Council* Judgment, *supra* note 30 at para 7.

infiltrators into Jerusalem.[305] In another case, *Beit Sahour Municipality*, they explained that the Wall's route was influenced by the desire to prevent shooting into the Har Homa settlement and to provide, topographically speaking, a sufficient range from the settlement's houses, one that would grant the military time respond to infiltration attempts.[306] In a third case, *Walajeh Village Council*, respondents revealed during the proceedings that one of the reasons for choosing the route of the Wall challenged by petitioners was to safeguard the nearby Jerusalem light rail and its travelers.[307]

While government authorities certainly reiterated that the security of Israelis is the primary reason influencing the route of the Wall in the area, it was not necessarily presented as the sole consideration. For example, in the *Al-Ezariyah Village Council* case, they did not rule out that providing space for the expansion of the settlement was a secondary consideration.[308] Similarly, in the *Al- Ram Local Village Council* case, they acknowledged that the route allegedly "supports diplomatic political state interests."[309]

Efforts were also made by the respondents to highlight the security-based justifications for implementing measures associated with the Wall. For example, in the case of the *Anata Boys High School* case, they maintained that the small cement wall that had been put in place was not part of the Wall in the Jerusalem area, but was a temporary measure designed to protect Israeli military forces and workers constructing the Wall in the vicinity of the school from stone throwing by Palestinian students.[310]

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[305] *Halawa* Judgment, *supra* note 277 at paras 6-8.

[306] *Beit Sahour Municipality* Judgment, *supra* note 273 at paras 5-6.

[307] The government relied on this argument to reject the alternative route proposed by the petitioners asking for the Wall to run along the JMB, saying this would reduce the distance between the Wall and the railway. See *Walajeh Village Council* Judgment, *supra* note 278 at paras 6-17.

[308] *Ibid* at para 7.

[309] This referred to the decision of not routing the Wall in a way that would separate between Palestinian neighborhoods and Jewish settlements in EJ as the CPS had suggested. According to them, this would effectively leave large areas of annexed EJ on the 'Palestinian side' of the Wall, which would have "far reaching diplomatic consequences." See *Al-Ram Local Village Council* Judgment, *supra* note 1 at 9.

[310] Initially respondents stated that they would dismantle this barrier once the construction of the Wall or the stone throwing by the school's students had come to an end. Subsequently however, they pointed out that an estimated 30 meters of the school yard lies on 'state land' (on which the school has 'trespassed'). Hence, they argued that once the Wall in the Jerusalem area had been completed, the 'temporary' barrier will be dismantled and another smaller wall will be built on that part of the yard. This barrier would separate between the school and the Wall. See *Anata Boys High School* Judgment, *supra* note 299 at 1-2.

In addition, government authorities emphasized that the starting point for the route is the principle that all of Jerusalem is part of the State's territory. Thus the route of the fence, they underscored, was chosen based on the route of the JMB which separates Jerusalem from the 'West Bank'.[311] Only if there was a pressing security/topographic consideration, or a desire to minimize the harm inflicted on local residents, did the Wall's route diverge from that border.[312]

Where petitioners had challenged the decision of authorities to route the Wall along the JMB, thereby leaving 'West Bank' neighborhoods of EJ on the 'Palestinian side' of the Wall, government authorities said that, in absence of these two aforementioned elements (topography/security or the interest of the local residents), accommodating the request of some petitioners to be included on the 'Israeli side' would require them to route the Wall inside the 'West Bank'. This would amount to forcing them to build inside the occupied territory, as opposed to on Israeli sovereign territory. In the absence of legitimate security considerations, this results in the violation of both Israeli domestic law and of the law of belligerent occupation.[313]

Where petitions challenged the legality of the route of certain Wall segments that run inside the 'West Bank', respondents maintained that this was absolutely essential for security/military and/or topographic considerations.[314] This also accounted for why, in some instances, the route of the Wall had resulted in the inclusion of 'West Bank' Palestinian population centres inside the Seam Zone, or in particularly harsh realities for individual petitioners. While acknowledging that these consequences were severe, respondents nevertheless argued that they were proportionate.[315]

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[311] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 31-39.

[312] For example, in the *Al-Ram Village Council* case, they argued that humanitarian considerations of wanting to leave the school inside the Wall are what ultimately prompted them to leave parts of Dahiyet Al Bareed inside the Wall. *Ibid* at 9.

[313] *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 14-25; *Shakir* Judgment *supra* note 211 at paras 10-11.

[314] *Beit Sahour* Municipality Judgment, *supra* note 273 at paras 5-6. See also *Walajeh Village* Council Judgment, *supra* note 278 at paras 6-17.

[315] The southern section of the Wall which cut through the neighborhood had resulted in some houses getting sealed by the concrete Wall outside their windows. Respondents also promised to build individual access roads for those families. *Al-Ram Local Village Council* Judgment, *supra* note 1 at 4 and 9. *Beit Sahour*

The same security-based arguments were adopted by government authorities in petitions that left EJ neighborhoods that are officially part of the JM on the 'Palestinian side' together with their residents (mostly Palestinians with Jerusalem IDs).[316] For example, in the *Ras Khamis Residents Committee* case, government authorities argued that the decision to leave the Shu'afat ridge on that side of the Wall was taken in response to security considerations, namely because the ridge has represented an ongoing source of infiltrators from the 'West Bank' into Jerusalem.[317] In this regard, they also sought to provide the Court with assurances that, leaving those areas and their residents outside the wall will have no impact on the status of these neighborhoods as part of the JM or on the ability of Palestinians with Jerusalem IDs to retain their 'Israeli permanent residency' and/or to access social services provided by the Israeli JM.[318] In addition, they committed themselves to providing social service points at designated checkpoints/gates in the Wall as a way of demonstrating an effort to reduce the disproportionate impact of the Wall's route on the lives of the inhabitants.

In some instances, certain Palestinian neighborhoods that are officially part of the JM are also home to Palestinians with 'West Bank' IDs. Consequently, government authorities have argued in court that deviating from the JMB, was necessary to avoid trapping large numbers of those Palestinians in a Seam Zone-like situation. Such a situation would mean that its 'West Bank' Palestinian residents would not be able to access the JM (for lack of valid permits), and would not be able to reach their destinations in the 'West Bank' without passing through a Wall gate and having to succumb to the requirements of the Zone's permit regime.[319] This was the situation in the *Ras Khamis Residents Committee* case, where they pointed out that adopting the alternative route proposed by petitioners would mean that military authorities would have to put in place a checkpoint in the area to control the movement of people in and

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Municipality Judgment, *supra* note 273 at 3. The Court has referred to these areas interchangeably either as the Seam Zone or as the 'Israeli side' of the Wall.

[316] *Salameh* Judgment, *supra* note 154 at paras 4-5.

[317] *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 11-13.

[318] They highlighted that routing the Wall along the JMB would be problematic from a military/security perspective *Salameh* Judgment, *supra* note 154 at paras 4-5.

[319] From the Court's reasoning in other Wall related case law, the respondents were aware that the HCJ was keen to avoid this situation because "[w]ithout a doubt creating such a seam zone would result in serious harm to the 'fabric of life' of the residents and such a situation should be avoided as much as possible." *Ras Khamis Residents Committee*, *supra* note 245 at para 14-25.

out of Jerusalem (particularly in light of the fact that some of the residents of the Shu'afat ridge were 'West Bank' Palestinians) and that, doing so, would disrupt the 'fabric of life' of residents in a much more significant way.[320]

In other case, such as *Shakir*, the respondents maintained that they cannot fulfill the petitioners' request of running the Wall inside the 'West Bank' to include the Sheikh Saed village on the 'Israeli side' of the Wall. This would not be possible because it would result in forcing its residents to live in the Seam Zone, with all its associated movement restrictions that it would entail.[321] Where petitioners had proposed alternative routes to the original Wall route, government representatives rejected those claims on the ground that these alternative routes would not be feasible from a topographic/security point of view.[322]

In terms of the proportionality of the harm, respondents maintained that they have exerted a sincere effort to balance the different considerations and to reduce the harm of the Wall on the Palestinian communities on either side of the structure in two major ways. (a) The first way is that by modifying the original route of some of the contested segments. For example, in the *Abu Tir* case, the original route of the Wall had left most of the lands of Sur Baher on the 'Israeli side' of the Wall. Subsequently, government authorities declared in court that following extensive negotiations with the residents, they had re-routed some sections of the

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[320] *Ibid* at paras 11-13.

[321] *Shakir* Judgment, *supra* note 211 at paras 10-11. Government authorities also referred to the judgment of the HCJ in the *Al-Ram Local Village* case, where the fact that the route proposed by the respondents did not confine Palestinians into a Seam Zone like situation was viewed favorably by the Court as one element that rendered this route proportionate. See *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60.

[322] Arguments presented include the idea that adopting the alternative routes would endanger the military forces manning the Wall because it would reduce the 'buffer zone', thereby turning military forces into an easy target for gunfire. They also argued that the alternative routes proposed by petitioners would run through heavily dense neighborhoods, or deny military forces the vantage point that would be necessary in order to monitor any movement in the nearby area. See *Abu El Tir* Judgment, *supra* note 253 at paras 7-9, *ibid*. See also *Abu Ziad* Judgment, *supra* note 154 at 2. See also *Salameh* Judgment, *supra* note 154 at paras 4-5; *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 11-13 and *Iado* Judgment, *supra* note 154 at para 5. Another argument made was that re-routing the Wall to separate between Palestinian neighborhoods and 'Jewish neighborhoods of EJ' (i.e. settlements) would create tension and reduce the buffer zone that they consider necessary around the latter. *Al-Ram Local Village Council* Judgment, *supra* note 1 at 9. See also *Beit Sahour Municipalit*y Judgment, *supra* note 273 at 3; and *Walajeh Village Council* Judgment, *supra* note 278 at 4.

Wall in the area a few hundred meters (to the east) in order to maintain some of the buildings of and land belonging to the petitioners on the 'Israeli side' of the Wall.[323]

This is not to say, of course, that the respondents have always agreed to modify the geographic route of the Wall to accommodate the petitioners' requests. Where they had refused to modify the route of the Wall, they emphasized that great care was exercised to ensure that the harm inflicted on the property of the petitioners is as small as possible. For example, in the *Al-Eizariyah Village Council* case, respondents emphasized that the route of the Wall ran as close as possible to the roads which it was seeking to protect, thereby confiscating only what was strictly necessary in terms of the petitioners' land for this purpose.[324] In the *Halawa* and the *Walajeh Village Council* case, they stressed that they will ensure that no damage to the property of the petitioners will ensue, should it remain on the 'Israeli side' of the Wall, or that they would leave the property on the 'Palestinian side' of the structure.[325]

In other instances, respondents sought to refute the allegations made by petitioners that the harm was indeed substantial[326] or emphasized that most of the land requisitioned inside the 'West Bank' amounted to 'state land' (as opposed to privately owned land)[327] or rocky/uncultivated land.[328] But for other petitions, including the *Abu El Tir* case, they alleged

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[323] Respondents highlighted that they considered making this amendment for humanitarian reasons. The current route therefore, they argued, reflects a proper balance between the security needs and the interests of the local residents on the other. The respondents argued that shortly after the agreement regarding the new route had been reached, the petition had been filed by some of the residents. See *Abu El Tir* Judgment; *supra* note 253 at 2-3.

[324] *Al-Eizariyah Village Council* Judgment, *supra* note 30 at para 7.

[325] In the *Halawa* case for example, petitioners argued that the Wall would be constructed around the hill where the cemetery was located (and not on top of it), as a way of preserving the site. *Halawa* Judgment, *supra* note 277 at paras 6-8. In the other case, they have highlighted in Court that, following extensive consultations with bodies such as the Israeli Nature and Parks Authority, they would leave the natural spring on the 'Palestinian side' of the Wall. In addition, they declared that the structure will be erected at a distance of 30-40 metres from the old cemetery that will remain on the 'Israeli side', even though this route was not the most optimal one from a security perspective. See *Walajeh Village Council* Judgment, *supra* note 278 at para 5.

[326] In the *Halawa* case, respondents argued that the cemetery on the hill kept inside the Wall was not an 'active' cemetery. *Halawa* Judgment, *supra* note 277 at 3.

[327] In one case, the respondents alleged that most of the land that was to remain inside the Wall was not cultivated and, therefore, not a significant source of livelihood for the petitioners as the latter had claimed. *Al-Eizariyah Village Council* Judgment, *supra* note 30 at para 7.

[328] *Beit Sahour Municipalit*y Judgment, *supra* note 273 at 3. In another case, they noted that the land of the village included in the 'Seam Zone; was not as substantial as petitioners had claimed and that it was largely

that changing the route of the Wall in its southern end (as requested by the petitioners) to ensure that their property would remain on the 'Israeli side' of the Wall, would in fact cause substantial harm to other Palestinian residents in the area, or would require sealing off an important road servicing to other 'West Bank' Palestinian residents in the area. [329]

The second (b) manner in which military authorities have sought to convince the Court that they have indeed struck a balance between security needs and the human rights of the 'local population' relates to the nature of the crossing arrangements that had been put in place. On the substantive level, for example, two arguments were made. (1) Firstly, that they have put in place arrangements which would minimize the harm incurred by the petitioners as a result of the movement restrictions (to/from Jerusalem) associated with the Wall. This was the situation in the *Abu Ziad* case, where government representatives argued that a gate in the Wall would be made available at a distance of only a few kilometers from the petitioners' area of residence,[330] and that it would be open for crossing 24 hours/day.[331] In another case, *Salameh*, the respondents declared during court proceedings that they would extend the opening hours of the Wall gate (in line with the request of the petitioners) to allow the access of Palestinians with Jerusalem IDs on foot 24h/day. At a later stage, they also declared their readiness to allow vehicles to cross through the same gate during the daytime.[332] Similarly, in the *Iado* judgment, the respondents stated (again during the court proceedings) that they would consider allowing some petitioners to access the *Sawahreh* crossing in their vehicles.[333] As for

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uncultivated. They also noted that 86 trees would be uprooted, "which is a low number." *Walajeh Village Council* Judgment, *supra* note 278 at 5.

[329] *Abu El Tir* Judgment, *supra* note 253 at paras 7-9. Here, it is worth mentioning that some Palestinian landowners joined as respondents, arguing that changing the route of the Wall to accommodate the petitioners' demands would result in moving the route of the Wall through land that belongs to them and isolate parts of it on both sides of the Wall. *Ibid* at 2. The concern that routing the Wall differently would result in harm to property of other individuals was also voiced by the government in other cases. For example, see *Beit Sahour Municipalit*y Judgment, *supra* note 273 at 2.

[330] In the *Abu Ziad* case, the respondents argued that the Olives crossing in the Wall was only 4 km away from the petitioners. *Abu Ziad* Judgment, *supra* note 154 at 3. In the *Halwa* judgment, they argued that petitioners would be able to access the hill left inside the Wall with the cemetery through the Hizma crossing, located only 2.5 km north of the hill. See *Halawa* Judgment, *supra* note 277 at paras 6-8.

[331] *Ras Khamis Residents Committee* Judgment, supra note 245 at paras 11-13.

[332] Until the first hour after sunset. Initially, respondents had sought to argue that allowing vehicles to cross the gate is not sound from a security perspective, as it would allegedly put the lives of the military forces guarding the Wall at risk. *Salameh* Judgment, *supra* note 154 at paras 4-5 and at paras 6-18.

[333] As opposed to only on foot. *Iado* Judgment, *supra* note 154 at para 5.

the request by the petitioners to operate Wall crossings closer to their homes or to allow them to access those crossings by vehicles, they would not be able to respond favorably to these requests out of concern for the security of their forces.[334]

(2) Secondly, in the case of petitions filed by Palestinians with 'West Bank' IDs, the government also committed itself to granting permits to the petitioners for access to their properties that has remained on the 'Israeli side' of the Wall[335] and they would ensure the petitioners' access through gates in the Wall to the Seam Zone.[336] Where petitioners had alleged that the route of the Wall undermined their ability to reach other parts of the 'West Bank', the respondents declared in court that they are ready to authorize the construction of roads which, in turn, would improve their connectivity to other parts of the 'West Bank'.[337] In petitions by Palestinians who carry Jerusalem IDs, government authorities stated that crossing the Wall at checkpoints is a much easier endeavor for those Palestinians (since they do not require permits). They also committed themselves to allowing them to continue doing so unhindered.[338] In other petitions, the respondents asked the justices to dismiss petitions claiming that the route of the Wall undermined their right to movement and access to Jerusalem on procedural grounds.[339]

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[334] *Ibid*.

[335] *Halawa* Judgment, *supra* note 277 at paras 6-8.

[336] For example, in the *Walajeh Village Council* case, military authorities declared in court that they would make available to petitioners a sub-terrain passage in order to access the old cemetery left inside the Wall. They also announced that they will allow petitioners access their land inside the Seam Zone through gates in the Wall, provided they prove ownership of this land. See *Walajeh Village Council* Judgment, *supra* note 278 at para 5. In the *Halawa* Judgment, the respondents committed themselves to issue permits so that the petitioners can access the Wall to their property through the Hizma checkpoint. See *Halawa* Judgment, *supra* note 277 at paras 6-8.

[337] For example, in one case, this road began at Bir Nabala, going north through Qalandia to Ramallah, crossing underground from road *45*. See *Al-Ram Local Village Council* Judgment, *supra* note 1 at 4-5.

[338] *Walajeh Village Council* Judgment, *supra* note 278 at 6.

[339] In some cases, government representatives have sought to accuse the petitioners of violating the statute of limitations, because the former had either not joined the earlier negotiations regarding the original route. *Abu El Tir* Judgment, *supra* note 253 at 3. In other cases, it argued that petitioners had not acted in a timely manner to file their petitions, after the land confiscation or land requisition order has been made. See *Abu Ziad* Judgment, *supra* note 154 at 2 and *Beit Sahour Municipality supra* note 272 at paras 5-6. In other petitions, respondents have also emphasized that had not exhausted the relevant appeals procedures available to them under the aforementioned *Emergency Land Regulation Law*, *supra* note 154. See *Abu Ziad* Judgment, *supra* note 154 at 2; *Salameh* Judgment, *supra* note 154 at paras 4-5. In one other petition, they argued that there was extreme delay in submitting the response. *Iado* Judgment, *supra* note 154 at para 5.

The next section examines the HCJ's position regarding those petitions. As will become evident, the manner in which the Court has adjudicated the conflicting issues has been heavily influenced by the route of the Wall: i.e. if it is running inside the JM and along the JMB or inside the 'West Bank'. Primarily, this is because the legal framework identified by the Court as relevant in each petition depends on where the route of the segments of the Wall that were being that contested were physically located.

4.3. The HCJ's Adjudication of Petitions Challenging the Legality of the Wall in the Jerusalem Area

4.3.1. Introduction

In referring to EJ, the Court has consistently regarded EJ as a territory that is separate and distinct from the 'West Bank'. In some judgments however, the Court has not pronounced itself explicitly on whether or not it considers EJ part of Israeli territory or as part of the occupied territory.[340] In other judgments, the Court refers to it interchangeably as 'Jerusalem', 'Israel' or 'Israeli territory'.[341] For example, in the *Halawa* judgment, when explaining the primary reason for the route of the Wall in the area, the justices identified the objective as the need to prevent "terrorists from infiltrating Israel (especially Jerusalem) from Judea and Samaria."[342] In the *Al-Ram Village Council* case, Justice Barak offered a clearer position when he stated that:

> As far as the general argument regarding the annexation of East Jerusalem, it is enough to mention that according to Israeli law the application of Israeli Law and Administration on the whole of Jerusalem has been grounded in a Basic Law, primarily legislation and appropriate administrative orders.

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[340] In one judgment, the Court simply stated that "[t]he routes of the fence passes along the Jerusalem municipal line and thus constitutes a physical barrier between Israeli territory and the West Bank." *Shakir* Judgment, *supra* note 211 at paras 15-35. In another case, the Court stated that "[t]he separation fence in that section passes partly in Judea and Samaria and partly in Jerusalem." See *Abu Ziad* Judgment, *supra* note 154 at 1.

[341] "The fence as a security measure achieves its security purpose by creating a barrier that prevents terrorists from entering Judea and Samaria [...] into Israel. [...]. [T]he route of the fence is therefore adjusted to the security purpose of preventing terrorists from Judea and Samaria from entering Jerusalem [...]." See *Ras Khamis Judgment*, *supra* note 245 at paras14-25.

[342] *Halawa* Judgment, *supra* note 277 at paras 9-18. In one other case, the Court quotes the respondents' description that the 'fence' has been built "entirely on Israeli territory." *Ibid* at paras 14-25.

> *Therefore, Jerusalem according to the borders which have been defined by the State is part of the territory of the State of Israel* [emphasis added].[343]

However, the Court's efforts to draw a distinction between Jerusalem (which it considers part of Israel proper), and 'Judea and Samaria' (which it acknowledges is occupied territory) becomes evident when examining the legal framework that the Court applies to its analysis of the Wall's route: both in terms of its reasonableness and the proportionality of the harm inflicted on the surrounding communities. Again, the aforementioned *Al-Ram Local Village Council* case offers a good illustration. In this case, the south and south east sections of the Wall that were the subject of the petition were identified by the Court as segments that run inside the 'West Bank'. By contrast, the justices determined that the route of the Wall's western sections runs inside the JM. In light of this, the justices explained that "the Court will, therefore, divide its examination according to sections in Israel and the sections in the [occupied territories] OT."[344]

In addition to the physical location of the Wall's route, one other element influencing the Court's choice regarding the applicable legal framework is the category of individuals affected by the route. Thus in the aforementioned case, the Court underscores that "the authorities must account for and consider the effects of the fence on rights and needs of all [those] who will be affected by it."[345] These are: (1) the rights of Israelis living in Israel, Israeli settlers in the 'West Bank', and Palestinians with Jerusalem IDs, whose rights are deemed by the Court to be constitutionally protected; and (2) the rights of Palestinians with 'West Bank' IDs who are recognized by the Court to constitute 'protected persons' under the Fourth Geneva Convention.[346] According to the Court, the consideration to the rights afforded to the members of each of these groups is different because "the normative regimes for these groups are different."[347] Practically speaking however, the Court relies in the end, in both situations heavily on the proportionality sub-tests as used in Israeli administrative law to determine the legality of the Wall's route.

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[343] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60.

[344] *Ibid* at paras 40-60.

[345] *Ibid* at paras 40-60.

[346] *Ibid* at paras 40-60. *Salameh* Judgment, *supra* note 154 at paras 6-18.

[347] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60.

The next section examines how the Court has analyzed the legality of the sections of the Wall running inside the JM or along the JMB. It demonstrates that the Court essentially adopts a domestic legal framework for this purpose.

4.3.2. Adjudicating the Legality of the Wall in the Jerusalem Area running inside the JM or along the JMB

4.3.2.1. The Applicable Legal Framework

Where the route runs along the JMB or inside the JM, the justices have considered it to run "entirely on Israeli territory."[348] Once this was established, the Court concluded that the scope of authority and discretion of the government in building the Wall must be determined "in light of the principles and rules governing Israeli law,"[349] most notably, Israeli administrative and constitutional law state that:

> As for the discretion of the state in determining the route of the fence in Israel it must follow the fundamental principles of Israeli Law. Under judicial review the court asks whether the decision of the route is consistent with the principles of reasonableness and proportionality [...]. When the fence entails necessary infringement of individual rights the infringement must meet the conditions set out in the limitation provision in the Basic Laws relating to human rights.[350]

The Court also identified the provision of Israeli domestic law that are relevant to the decision by Israeli authorities of confiscating the land for the Wall's construction. These include provisions from the *British Defense Regulations of 1945*,[351] which, to date have remained part of local laws that are in effect in Israel.[352]

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[348] *Ras Khamis* Judgment, *supra* note 245 at paras 14-25.

[349] *Ibid* at paras 14-25.

[350] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60. The court reiterated the same principle in the *Shakir Judgment*, *supra* note 211 at paras 15-35.

[351] These regulations were first enacted by the British authorities during their mandate of Palestine (1922-1947). Uri Shoham, "The Principle of Legality and the Israeli Military Government in the Territories" (1996) 153 Mil L Rev, 245.

[352] Emanuel Gross, "Democracy in the War against Terrorism: The Israeli Experience," (2002) 35 Loy LA L Rev 1161. They remain in effect unless they get repealed or suspended. See Meir Shamgar, "The Observance of International Law in the Administered Territories," (1971) 1 Isr LR 262.

According to the justices, additional normative frameworks such as the law of belligerent occupation may also be deemed relevant. This is the case where the route of the Wall affected Palestinians with 'West Bank' IDs.[353] For example, in the *Salameh* judgment, the justices noted that Palestinians [with 'West Bank' IDs] living on the 'Palestinian side' of the Wall were also significantly impacted by its route (despite it running inside the JM). Therefore, it is crucial to evaluate the impact of the Wall's route on the rights of those Palestinians who are protected under the international law of belligerent occupation. In this regard, it is important to note that the manner in which the Court has articulated the issue, clearly indicates that it does not consider Palestinians with Jerusalem IDs to be part of the 'protected persons' category, as per the Fourth Geneva Convention.[354]

Once the Court established that the domestic legal framework or blueprint would guide its deliberations for the legality of the route (for the segments of the Wall built inside the JM or along the JMB), the Court proceeded to examining the orders authorizing the confiscation of land under Israeli domestic law, for the purpose of the Wall's construction.

This element is discussed in the next subsection.

4.3.2.2. Does the Government have the Authority to Confiscate Land under the *Emergency Land Regulation Law*?

In cases where the Court decided to proceed with examining the legality of the land confiscation order, under the aforementioned *Emergency Land Regulation Law*, the justices have generally upheld the government's authority to do so for the purpose of building the Wall. In addition, they have held that it was within the discretion of the administrator because the Wall's construction fulfilled the purpose as outlined in the *Emergency Land Regulation Law*. Having established that the government had the authority under domestic law to proceed with the land confiscation, the Court moved on to examining whether this order satisfies the

[353] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60.

[354] *Ibid* at paras. 40-60. See also *Salameh* Judgment, *supra* note 154 at paras 6-18.

limitation clause in the Basic Law: *Human Dignity and Liberty*. This issue is reviewed in the next sub-section.[355]

4.3.2.3. The Legality of the Route of the Wall: The Court's Examination of Substantive Issues

4.3.2.3.1. The Authority to Build and Route the Wall inside the JMB

Petitioners had argued that Israeli authorities had no right to establish parts of the Wall along a specific route inside annexed EJ (because it remains occupied territory under international law), but the justices dismissed this argument. They held that "Jerusalem, according to the borders which have been defined by the state, is part of the territory of the State of Israel."[356] Subsequently, the justices examined the question of whether or not government authorities had properly exercised their discretion when building the Wall along the particular route they had chosen.

Where the Wall's route ran inside the JM or along the JMB, allegedly affecting the rights of Palestinians with Jerusalem IDs, the Court noted that by virtue of being 'Israeli' permanent residents, any infringements on their constitutionally protected rights must, accordingly, meet the requirements of the limitations clause in the Basic Law: *Human Dignity and Liberty*.[357] One element that made such a conclusion possible is that the Court does not consider EJ Palestinians to be 'protected persons' under the Fourth Geneva Convention.[358] Thus in examining whether or not the route's assumed violation of these individuals' constitutional

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[355] *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 14-25.

[356] *Al-Ram Local Village Council* Judgment, *supra* note 1 at 13. At the same time, the Court was careful to point out that despite the arguments made by petitioners regarding the annexation of EJ, this did not imply that they had contested the authority of the respondents to "erect a fence on Israeli territory according to domestic law." Instead, they were challenging the notion that EJ constitutes part and parcel of Israeli domestic territory to begin with. *Ibid* at paras 40-60.

[357] *Ibid* at paras 40-60.

[358] "The majority of the petitioners are not residents of the occupied territory but Palestinians with Jerusalem residency, so they are *not protected persons* [emphasis added]." *Ibid* at para 1-22.

rights was consistent with the limitation provisions of the Israeli *Basic Law: Human Dignity and Liberty*, [359] the Court explained that:

> Where the fence brings with it violation of individual rights, it must satisfy the limitations statute articulated in the Basic Laws, be based on express legal authority, for a proper purpose and consistent with the principles of reasonableness and proportionality. When deciding on the route of the fence the state must balance between the security considerations and objectives and the considerations regarding the protection of human rights which will be violated by the route of the fence.[360]

In an effort to submit this question to judicial scrutiny, the justices then moved on to a discussion of whether the part of the Wall's route running inside the JM or along the JMB fulfilled a proper purpose as provided for under the *Emergency Land Regulation Law*.

4.3.2.3.2. Does the Wall's Construction fulfill a Proper Purpose?

In some petitions, Palestinians had claimed that the military and government authorities had lacked the authority to build the sections of the Wall along the proposed route on the ground that it was motivated by illegal political considerations, and not by legitimate security reasons. However, the Court has usually been quick in rejecting those arguments explaining that:

> The mere fact that in light of the circumstances the route of the fence separates between Jewish and Arab neighborhoods does not on its own constitute or give rise to the claim that the route was not based on security reasons but illegitimate ones. In general, it is quite evident that the working assumption for all the sections of the fence around Jerusalem is not based on demographic considerations of dividing between Arab-majority neighborhoods and Jewish majority neighborhoods. The basic principles guiding the decision that have to do with the route of the fence around Jerusalem is the attempt to establish a barrier between Judea and Samaria in the east and Jerusalem, including its Jewish and Arab neighborhoods, to the west.[361]

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[359] *Knesset*, Basic Law: *Human Dignity and Liberty* (1992), online: *Knesset* <https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm>.

[360] *Ras Khamis Local Residents Committee* Judgment, *supra* note 245 at paras 14-25. See also *Salameh* Judgment, *supra* note 154 at paras 6-18, and *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60.

[361] Hence the justices also underscored their belief that the petitioners did not have substantive factual basis or evidence to prove that the respondents had "illegitimate purposes and interests in mind when choosing the route." See *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 14-25. See also *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60.

It also concurred with the respondents' position that, as a matter of policy, the route in the area tries to follow the JMB and only diverges from it for security and/or topographic considerations:

> When that is not possible for either practical or security reasons they diverged from this general policy. This conclusion is drawn from the respondent's response in this petition and also from previous petitions brought before this court in regards to the route of the fence around Jerusalem. Yet, clearly the route of the fence and the municipality borders do not always go together and in some cases some lands extending beyond those borders were taken and in others Jerusalem territory was excluded.[362]

Since the Court deemed the construction of the Wall, in and around Jerusalem, to constitute a legitimate security tool for preventing infiltration from the 'West Bank' into Israel more generally, and into Jerusalem in particular, the confiscation of the land was generally deemed to fulfill one of the legitimate purposes expressly provided by the *Emergency Land Regulation Law*. These include security reasons or consideration for 'public safety,[363] as stipulated by article 3(b) of that law.[364]

Subsequently, the justices moved on to an examination of whether the authority was exercised reasonably and proportionally or not.

4.3.2.3.3. Is the Construction of the Wall Proportional?

When it comes to assessing the government's discretion in exercising its authority for the route of the Wall under Israeli law, "the proportionality test is at the center."[365] This test is very similar (if not identical) to the proportionality test employed by the Court to examine the legality of the Wall's route inside the 'West Bank'. In fact, the justices attached similar importance to the two tests, in that where part of this route ran inside the JM or along the JMB (and other parts routed inside the 'West Bank'), it could be concluded that:

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[362] *Ras Khamis Residents Committee* Judgment, *ibid* at paras 14-25.

[363] *Ibid* at para 14-25. See also *Salameh* Judgment, *supra* note 154 at paras 6-18.

[364] *Shakir* Judgment, *supra* note 211 at paras 15-35.

[365] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60.

> [...] In examining the legality of the A-Ram fence the court will not necessarily distinguish between the sections in OT [occupied territory] and in Jerusalem but will hold all of the sections to the same strict test similar to that which is used for examining breach of Basic Laws.[366]

Subsequently, the Court established that it would assess the proportionality of the Wall's route by resorting to the well-established three-pronged proportionality doctrine used in Israeli administrative law. Examining whether the route of the Wall fulfilled the first proportionality sub-test (rational link), the HCJ held that this was indeed the case because the Wall's route sought to prevent infiltration into Israel (including Jerusalem) in response to a real security threat and, therefore, ensures "a separation between terror and Israel."[367] The Court upheld this conclusion, even where the route of the Wall had deviated from the JM in some areas to exclude EJ Palestinian neighborhoods on the 'Palestinian side' of the Wall. To support its conclusion, the justices expressed their satisfaction that the evidence presented by government authorities demonstrated a real need for the Wall in the area.

In another case, the *Ras Khamis Residents Committee* judgment, the Court upheld the respondent's argument that leaving the Shu'afat refugee camp (that is part of the JM) outside the Wall was necessary given the existence of what respondents had described as a 'terrorist infrastructure' in the camp. Another reason justifying the decision was the presence of thousands of Palestinians with 'West Bank' IDs residing in the area illegally, a situation calling for required measures to be adopted by government authorities that would "enable supervision and control over the entry into Israel."[368]

In the case of the second proportionality sub-test (minimal impairment), the Court explained that two elements need to be considered here. (i) The first is the proportionality of the actual (physical) route of the Wall. (ii) The second one is the proportionality of the access regime, which authorities had put in place to allegedly reduce the harsh impact of that route on the freedom of movement of Palestinians with Jerusalem IDs and other Israeli citizens (in

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[366] *Ibid*.

[367] *Ibid*. See also *Shakir* Judgment, *supra* note 211 at paras 15-35.

[368] *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 14-25.

reference to the Arab Palestinian citizens of Israel) living in communities on both sides of the structure.

For the first element, the Court acknowledged, on the one hand, that an alternative route as proposed by petitioners would indeed reduce the harm incurred by them. On the other hand, the Court still upheld the respondents' argument that this alternative route would undermine efforts to attain the declared security objectives.[369]

This was the situation in the *Al-Ram Local Village Council* judgment. Here, the justices first agreed that the alternative route of the Wall in the area, proposed by the CPS, would reduce the distance or buffer zone between 'Israeli 'neighborhoods' (i.e. settlements) and Palestinian EJ neighbourhoods,[370] and lessen the harmful consequences of the Wall's construction for the petitioners. Still they were not convinced that such a route would achieve the security objectives identified by the respondents. Furthermore, they pointed out that adopting the alternative route suggested by the petitioners may result in more harm to other residents (mostly Israelis or 'Israeli' permanent residents trying to access Jerusalem).[371] This was also the Court's position in petitions that challenged the deviation of the Wall's route from the JMB and its exclusion of Palestinian neighborhoods of the JM.[372] The justices noted that the petitioners had not succeeded in submitting evidence that is sufficiently convincing to challenge the security assessment provided by the government.[373]

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[369] *Iado* Judgment, *supra* note 154 at paras 6-7. See also *Salameh* Judgment, *supra* note 154 at paras 6-18. *Ras Khamis Residents Committee* Judgment, *ibid* at paras 14-25.

[370] The CPS proposed a route which sought to separate 'Jewish' and Arab neighborhoods from each other (all Israeli ones on the 'Israeli side' of the Wall', all Arab ones on the 'Palestinian side'), and to maintain a larger distance between the Wall and the Palestinian neighborhoods. However, the Court recalled the respondents' position that from a security perspective, it would be better if the route of the Wall maintained an open space between the Jewish 'neighborhoods' of EJ (settlements) and the Wall and did not seek to completely separate neighborhoods based on whether they are 'Arab' or 'Jewish'. *Al-Ram Local Village Council* Judgment, *supra* note 1 at 15.

[371] Here, the Court was referring especially to the proposal by petitioners challenging the route of the southern section of the Wall in the Dahiyet Al Bareed neighborhood. This proposal demanded that all of the neighborhood remain on the 'Palestinian side' of the Wall. Government authorities had changed the route in response to requests by Christian religious institutions. *Ibid* at paras 23-30.

[372] In the *Salameh* judgment for example, the Court accepted the position of authorities that the topographic considerations make it difficult to route the Wall along the JMB. *Salameh* Judgment, *supra* note 154 at paras 6-18.

[373] *Iado* Judgment, *supra* note 154 at paras 8-13. *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 14-25.

Thus in petitions in which Palestinians demanded that the Wall be re-routed along the JMB (so that their neighborhoods are included on the 'Israeli side' of the Wall), the Court rejected the feasibility of this proposal. One main reason is that the Court had accepted the respondents' position that doing so would result in including a substantial number of Palestinians with 'West Bank' IDs on the 'Israeli side' of the Wall. This was the situation in the *Salameh* judgment, where the justices underlined that such a situation would be unacceptable and should be avoided whenever possible because it would leave Palestinians in a Seam Zone like situation (i.e. between the Wall and the JM), unable to enjoy unrestricted movement in the direction of either the JM or the 'West Bank'.[374]

A similar conclusion was reached by the Court in the *Ras Khamis Residents Committee* judgment. Here, the justices concurred with the respondents' position that moving the Wall's route closer to the JMB would not be feasible for two reasons: (i) it would, once again, compromise the buffer zone deemed necessary to provide the military forces with enough time to respond to any infiltration' attempts and (ii) adopting the alternative route would require the construction of checkpoint at the entrance of the Shu'afat refugee camp (home to the petitioners) in order to screen travelers in the direction of the JM. This, in the Court's view, would result in far more harm to the residents and would require the confiscation of lands inside the 'West Bank' for reasons not absolutely justified for military/security reasons.[375]

In a second case, the *Shakir* judgment, the residents of the Sheikh Saed village demanded that the Wall in the area be re-routed so that, instead of running inside the JM, it would run inside the 'West Bank' as a way of including them on the 'Israeli side' of the Wall. This would be necessary, they argued, so that they may be able to maintain their historic attachment to the EJ neighborhood of Jabal Mukabir (the latter is part of the JM). In dismissing the petition, Chief Justice Beinisch explained that:

> The state further argued, *and I find this argument to be especially significant* [emphasis added], that if the [Appeals] committee's decision [of invalidating

[374] This is because they would still need Israeli issued valid permits to enter Jerusalem across the JMB and would have to cross through Wall gates to access the 'West Bank'. See *Salameh* Judgment, *supra* note 154 at paras 6-18.

[375] *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 14-24.

> the route of the Wall inside Jerusalem] were to stand it would entail even greater harm to the residents of the neighborhood since it would mean that they would find themselves enclaved between fences both on the east and the west- in a seam zone regime. The result of such a determination would mean that the Sheikh Saed residents would live under the seam zone regime surrounded by fences under a movement restrictions which would require permits and passing through crossings and checkpoints every time they left the neighborhood- both in the direction of the West Bank and Jerusalem.[376]

In that judgment, the Court also addressed the appeal committee's decision to invalidate the land confiscation order for the construction of the Wall inside the JM on the ground that an alternative route, one that includes the village of Sheikh Saed inside the Wall, would be more proportionate. Here, the Court was quick to invalidate the committee's decision, agreeing with authorities that to do so, would amount to re-routing the Wall inside the 'West Bank' to include the village. This would amount to forcing government authorities to build the Wall inside the occupied territory (or 'Area'), as opposed to Israeli territory. Moreover, in the absence of security reasons justifying such a move, they appeared to share the respondents' position that this would violate both Israeli and public international law. As the justices then explained, "seemingly, this reason alone would be enough to lead to the conclusion that the security fence should not be built on an alternative route."[377]

When considering the proportionality of the Wall's route, the Court has also traditionally taken into account a second element. This consists of the measures that the government committed itself to implementing in order to improve the ability of both Palestinians with Jerusalem IDs, and those with 'West Bank' IDs (carrying valid permits to access the JM), to commute through the Wall to/from Jerusalem or to/from their areas of residence to other parts of the 'West Bank'. These commitments include making improvements to the existing crossing arrangements, or putting in place new measures, instead of re-routing the Wall in the area. The value accorded by the Court to the promises by government authorities has been so significant that in cases in which this promise was made, it was concluded that they render the route of the Wall's impact more proportional.[378]

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[376] *Shakir* Judgment, *supra* note 211 at paras 15-35.

[377] *Ibid* at paras 15-35.

[378] *Ibid* at paras 15-35.

For example, in the *Ras Khamis Residents Committee* judgment, the Court, on one hand, appears to acknowledge that the current route of the Wall significantly undermined the ability of Palestinians with Jerusalem IDs (left on the 'Palestinian side' of the Wall) to access social services inside the JM stating specifically that:

> The fence burdens the residents of Shuafat ridge neighborhoods, including permanent residents, in going to and from work, accessing daily services, education and social and also municipality services which are located, for the most part, in the other parts of Jerusalem and not inside the neighborhoods. The fence will make all travels to schools, health clinics and hospitals and other facilities longer and burdensome. The court does not take these burdens and inconveniences lightly. The fence will impact significantly the reality of permanent residents living in the Shuafat ridge neighborhoods and make daily routine activities more difficult.[379]

Concerning the second element (the proportionality of the access regime) the justices expressed their satisfaction with government commitments that were made in Court that an additional crossing in the western section of the Wall would be built and made functional.[380] They also took into account the pledge by government and military authorities to provide governmental, municipal and postal services at a designated Wall crossing/gate, as a way of ensuring that the residents with Jerusalem IDs would not be prevented from accessing them in the future.[381] The respondents' assurances as to the smooth operation of the crossings were an important element rendering the route of the Wall proportional. In another case, the *Salameh* case, the Court highlighted the willingness of the respondents to allow vehicles to cross through a given Wall gate (during daytime), even though passage through these gates had originally been reserved for the exclusive use of pedestrian Palestinians with Jerusalem IDs.[382]

Similarly, in the *Al-Ram Local Village Council* judgment, the Court took note of the government's assurances that it would streamline the movement of people across the Qalandia

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[379] *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 14-25.

[380] The promise by government authorities was in response to the judgment rendered by the appeal's committee which had examined and upholding the legality of the land confiscation order. In its decision it has made the proportionality of the Wall's route conditional upon the expansion by Israeli authorities of a checkpoint in the western section of the contested route, in order to accommodate a more efficient influx of people to/from the neighborhood to the JM. *Ibid* at paras 14-25.

[381] *Ibid* at paras 14-25.

[382] *Salameh* Judgment, *supra* note 154 at paras 6-18. See also *Iado* Judgment, *supra* note 154 at paras 6-7.

checkpoint, to reduce waiting time and delays, and that it would provide social services at the checkpoint for Palestinians with Jerusalem IDs remaining on the 'Palestinian side' of the Wall. By doing so, the respondents fulfilled their obligation of minimizing the overall harm incurred by the petitioners.[383] Should these arrangements turn out to be unsatisfactory, the justices pointed out that the petitioners would be able to "return to this court."[384]

Where the respondents had noted that they would not be able to operationalize a Wall crossing closer to the homes of petitioners, or that only pedestrians would be allowed to access a certain crossing, the justices have also tended to accept the security justifications for the respondents' decision.[385] In light of these two elements, the Court has generally concluded that, despite the burden incurred by Palestinian commuters as a result of long detours, movement restrictions and crossing arrangements, the Wall's route fulfilled the second proportionality sub-test (least harmful measure).[386]

Moving on to the assessment of the third requirement that must be fulfilled by the measure to meet the conditions set out by the third proportionality sub-test (narrow proportionality),[387] the justices acknowledged that the harm rendered to the petitioners and their rights due to the Wall's route in the area has been significant. At the same time, they concluded that it is not so severe as to render the route of the challenged segment of the Wall disproportionate. This, they argued, is because, "one must not forget that the fence achieves an extremely important security purpose of preventing terrorists from freely crossing into Israel"[388] and to achieve the high benefit of protecting the lives of Israeli citizens and residents of Jerusalem from "terror."[389] Simultaneously, the justices were also careful to point out that reaching this conclusion hinged on the respondent's ability to implement the measures they had committed

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[383] *Al-Ram Local Village Council* Judgment*, supra* note 1 at paras 40-60.

[384] *Ibid* at paras 40-60.

[385] In one case, the respondents had suggested that allowing petitioners to cross the crossing in their vehicles would increase the changes of smuggling, and of targeting the security forces manning them. See *Iado* Judgment, *supra* note 154 at paras 6-7.

[386] *Ibid* at paras 6-7.

[387] I.e. examining whether the harm caused to the residents of the affected neighborhoods "stands in reasonable ratio compared to the security benefit gained by the route." *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 14-25.

[388] *Ibid* at paras 14-25.

[389] *Salameh* Judgment, *supra* note 154 at paras 6-18; *Al-Ram Local Village Council supra* note 1 at 17.

themselves to as a way of ameliorating the experience of commuting through the Wall crossings for the Palestinians.[390]

In making this assessment, the Court underscored that a distinction must be drawn between the manner in which the Wall's route affects the right to movement of Palestinians with Jerusalem IDs on one hand, and that of Palestinians with 'West Bank' IDs on the other hand. This was the case because the members of the latter population group did not enjoy a right to enter or reside on 'Israeli' territory (including the JM) unless they had received valid permits issued by the CA to enter Jerusalem. Hence, two consequences flow from this: Firstly, that the extent of harm to the rights of 'West Bank' Palestinians is not the same as that of Palestinians with Jerusalem IDs. This is because only the latter are entitled to enter Jerusalem (without restrictions) and to receive its services (by virtue of being considered 'Israeli' residents).

Secondly, the Court points out that, in the case of Palestinians with 'West Bank' IDs residing 'illegally' inside the JM (such as in the case of the Shu'afat ridge), the security assessment by government authorities indicates that the probability for persons to conduct 'terrorist attacks' is allegedly much higher amongst those Palestinians. Consequently, while those 'illegal' residents will no doubt be harmed by the route of a 'physical barrier' (the Wall) restricting their movements into Jerusalem, it is a proportionate harm.[391]

4.3.2.4. Analysis

An assessment of the HCJ's judicial decisions discussed here displays a number of trends which, when viewed together, have made the task of challenging the legality of the construction of the Wall in the Jerusalem area or its security rationale a daunting task indeed for petitioners.

The first one, is the Court's views regarding the government's declared position that EJ is part and parcel of Israeli territory. Although the justices fall short of stating explicitly that EJ has been *de jure* annexed, the terminology that they employed and how they chose to refer to it,

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[390] *Iado* Judgment, *supra* note 154 at paras 6-7.

[391] "[I]n light of the security risk and the fact that right is restricted to start with even before the fence." See *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras 14-25.

suggests that, for all practical purposes, they do consider EJ to be part of Israel or at the very least have taken it for granted. Although the Court's position on this matter had been the subject of much debate (at least during the early days of the occupation), following the promulgation of the Basic Law: *Jerusalem*, the Court's judgments have reflected a more straightforward position not challenging the executive on this point.

The second trend is the HCJ continued reliance on domestic provisions and sources of Israeli domestic law for adjudicating the legality of land confiscation orders for the Wall's construction and for assessing the reasonability and proportionality of its route, specifically, of those segments that are inside the JM or along the JMB.

A third trend is the absence of any reference by the Court to the principles of public international law more generally, or to the principles of the law of belligerent occupation and international human rights law in particular, when examining the legality of the Wall's route inside or along the JMB. This stands in contrast to cases where the Court refers to the rights of Palestinians with 'West Bank' IDs (who have been affected by the route of the Wall inside the JM or along the JMB) as 'protected persons'. It is also a clear demonstration of the Court's acceptance of the notion that EJ is not occupied. The Court's point of departure ensures that any discussion regarding the authority of the government to build the Wall or to determine its route (inside the JM or along the JMB) is addressed within the confines of Israeli constitutional and administrative law.

When assessing the legality of the construction through a domestic prism, the issue for the Court is not that of determining whether or not the government had the authority to construct the Wall inside EJ, or whether the objectives amount to lawful considerations (under international law). Rather, the focus of its adjudication is on examining whether the Wall's construction meets the requirements of the limitation's clause under the Israeli Basic Law*: Human Dignity and Liberty*. Viewing the conflicting interests through the lens of domestic law, it is not surprising that the Court refers to the Israeli settlements in EJ as 'neighborhoods' of the JM, despite their illegality under international law. Entrenching the discussion in a domestic legal framework also allows the Court to avoid addressing the question of the status of settlements under the Fourth Geneva Convention.

A fourth trend that emerges is that the government's decision to build the Wall in Jerusalem is framed by the justices as a lawful security measure, built by Israel on its 'own' territory, to counter serious security threats' emanating from 'Judea and Samaria'. As with judgments discussed elsewhere in this research, the Court displays great deference to the security-based assessment of government authorities, both in terms of the reasonableness of the Wall's construction in the first place and its specific route.

This, in turn, has important implications for the outcome of the constitutional balancing that the Court undertakes. In a domestic setting, a government enjoys a wider discretion in implementing measures on its own territory. This would explain why the Court did not pay much attention to claims raised by petitioners that political considerations may also be influencing the decision to build the Wall.[392] After all, if a sovereign state cannot implement politically motivated measures on its own territory where else would it be able to do so? As long as the security reasons for the construction of the Wall fulfill the requirements stipulated for by the provisions of domestic law (*Emergency Land Regulations* and the Basic Law: *Human Dignity and Liberty*), its route has been deemed by the Court to be proportional; as far as the justices are concerned, the 'domestic' RoL requirements have been fulfilled.

Had the Court considered EJ to be occupied territory, this would not have been possible. Under the law of belligerent occupation, an occupying power's ability to implement certain measures in the occupied territory which result in restricting some of the most fundamental rights of the occupied population (such as freedom of movement) must meet stringent conditions.[393] Israeli authorities would have had to demonstrate, for example, that measures implemented in the occupied territory were in response to legitimate security/military needs or for the benefit of the 'local population'.[394] They would also have had to demonstrate that the

[392] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60.

[393] This also explains why in the Wall related judgments concerning the legality of the structure inside the 'West Bank', the justices have sought to highlight that security considerations are the only or primary consideration spearheading this measure.

[394] For a discussion of this requirement, see Chapter II section 1.

construction of the Wall does not seek to entrench the wider political or economic interests of the occupier in the occupied territory.[395]

Fifthly, in a setting of regular formal sovereignty (i.e. within a country's own territory), the debate regarding the legality of a certain measure is different than in an occupied territory. It becomes one that concerns itself with the margin of appreciation that should be afforded to national authorities, the particular nature of the interference that they seek to implement for the alleged purpose of protecting national security and the extent to which it interferes with the rights of the affected individuals, who are predominantly citizens or 'permanent residents' of the State. In short, "the issue becomes a factual context for balancing everybody's rights which the turn to proportionality by the High Court achieves."[396] This wider margin of appreciation is enthusiastically granted by the Court to government authorities as it accepts the assurances of the latter that it would implement measures to reduce the hardships of access for the affected Palestinians with Jerusalem IDs. Not questioning those commitments, allows the Court in turn to rule that the Wall's impact was indeed proportionate.[397] This takes place even though, to date, some of these promised measures have not been implemented, and while the effectiveness of other measures continues to be disputed by the domestic and international human rights community.

Sixthly, the Court's approach strips the petitions of their political context. Reading the decisions, it is easy to forget that EJ is and remains an occupied territory under international law or that it has been annexed in violation of international law. It is even easier to lose sight of the fact that Palestinians with Jerusalem IDs are still, from the perspective of international law, considered 'protected persons' under the Fourth Geneva Convention. This negates the

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[395] Such as consolidating the *de jure* annexation of parts of the occupied territory. This is because occupation is supposed to be temporary in nature. For more information, see Chapter II section 1.

[396] Martti Koskenniemi, "Occupied Zone," *supra* note 12 at 38. Although the scholar was making this argument with respect to the Court's adjudication of Wall related case law as they pertain to the 'West Bank' and the authority of the MC under international law, his analysis offers useful points of departure for analyzing the Court's adjudication of the Wall in and around Jerusalem using Israeli law.

[397] For example, in a recent shadow report prepared by one Israeli organization for the UN Committee HRC concerning the implementation by the Government of Israel of its obligations under the International Covenant on Civil and Political Rights (ICCPR), it was highlighted that the service center and administrative office - including Social Security and MoI offices and a branch of the Israeli Post Office - which the government had promised in the *Ras Khamis* Judgment have remained un built. See *Ir Amim* Response 2014, *supra* note 27.

duty of the occupying power under the international law of belligerent occupation to safeguard some of their most fundamental rights and to ensure that they "[...] shall be treated [...] by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."[398]

Instead, the context that emerges from reading the Court's reasoning is one of a domestic court seeking to manage competing interests that may well arise in the context of domestic or even municipal politics, and to examine petitions which challenge the distribution of resources to one social group or the other. The discussion that appears to be taking place is one that focuses on how best to manage the access of the petitioners to social services, which traditionally have been tied to their ability to demonstrate their continued residence in 'Israel' and to prove that Jerusalem is their 'center of life'. At best, within the parameters of such a domestic human rights discourse employed by the Court, any determination that the national government has fallen short of its obligations would (at best) rise to the level of discrimination.

Moreover, this approach ignores the political dimension that is common to these petitions, in terms of an occupying power and an occupied population. Needless to say, it also views the Wall's construction in isolation from other policies that have been implemented by the government in relation to EJ, which have been criticized for promoting a particular Israeli political and demographic agenda that is detrimental to the rights of the occupied Palestinian population. In this regard, the justices skillfully avoid granting any consideration to this criticism by focusing their analysis at the effect of the Wall at the micro-level. For example, it dissects the Wall's route depending on where it runs (JM v. 'West Bank'), who it affects (Palestinians with Jerusalem IDs v. Palestinians with 'West Bank' IDs); how access to and from the JM on the 'Israeli side' of the Wall can be improved as well as how the services that are provided by the JM at a particular checkpoint or Wall gate can be ameliorated. In short, the bigger picture of ongoing occupation gets lost in the details. Needless to say the notion that certain illegal acts committed by the occupying power inside an occupied territory could

[398] See also Article 27 of the Fourth Geneva Convention, *supra* note 12.

amount under international law to war crimes, thereby invoking individual criminal responsibility and an obligation of reparation by the violating State, becomes irrelevant.[399]

It is also worth recalling that where the route of the Wall has, in some areas, run inside the JM, and in some other parts in areas of the 'West Bank" the Court has decided to analyze the Wall's route in terms of the proportionality doctrine and its three sub-tests, as applied within the framework of Israeli administrative law and to invoke references to Israeli constitutional law. On a more positive note, one could argue that the Court's decision to judge the route of the Wall in its entirety by standards of Israeli constitutional and administrative law reflects a desire to improve the protection afforded to the affected Palestinian communities under domestic law. This would not be the first time the Court has chosen to address the rights of Palestinians, even those with 'West Bank' IDs, as rights that are constitutionally protected. However, it has already been demonstrated elsewhere in this research that such an approach dilutes the protection afforded to Palestinians under international law and consequently is ill-suited to a situation of occupation. This conclusion remains relevant to the situation of Palestinians with 'West Bank' IDs affected by the Wall in the Jerusalem area.

The next section examines the Court's judicial interpretation of the legality of the Wall's route, in situations where the challenged route has made incursions into the 'West Bank'.

4.3.3. Adjudicating the Legality of the Route of the Wall in the Jerusalem Area Deviating from the JMB into the 'West Bank'

4.3.3.1. The Applicable Legal Framework

In some parts, the route of the Wall in the Jerusalem area has made incursions into the occupied 'West Bank'. The manner in which the Court examines the legality of the

[399] ICRC, "Rule 156: Definition of War Crimes" in JM Henckaerts and Louise Doswald-Beck, eds, *Customary International Humanitarian Law* (Cambridge University Press: 2005) at 462-463, online: ICRC <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule156>. See also an interview with Charles Shamas by author via skype (21 November 2014, Ramallah) [*Shamas* Interview]. This is in addition to the actual action of the transfer by the occupying power of its own civilians into occupied territory, which is deemed to be a war crime. See Article 35 of *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UNGAOR, 56th Sess, Supp No. 10, UN Doc (A/56/10) with Commentaries, online: UN <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

construction and route of the Wall in petitions which challenge those segments reflects very much the same approach it adopted when examining the legality of the Wall segments (as discussed in Chapter I).

Since the HCJ acknowledges that this is indeed occupied territory, the Court's point of departure here changes or, as a matter of fact, reverts back to an approach that is based on international law. In fact, upon examining the relevant petitions challenging the decision of the MC to route the Wall inside that territory, the justices have explicitly reiterated the relevance of the legal framework which the Court had established in the *Beit Sourik* and *Ma'arabe* judgments, as well as other landmark 'West Bank' Wall related judgments.[400]

The next sub-section discusses a petition that was filed by residents of nine Palestinian Village Councils challenging this route northwest of Jerusalem. The petition was submitted to challenge the new route resulting from modifications by Israeli authorities in compliance with the *Beit Sourik* ruling. The overview also shows how the approach that the Court adopts varies depending on whether it views the territory as occupied or not, as well as on whether the affected population are 'Israeli' permanent residents and/or citizens or not.

Preliminary, to avoid confusion, an important point must be made. While the *Biddu Village Council* judgment will be reviewed in this chapter, when analyzing the success rate of petitions submitted to the Court at the end of this research (i.e. in the general conclusion), it will be put in the group of HCJ judgments under the first normative framework: occupation is temporary (Chapter I) (not under the third normative framework discussed here: occupation does not bestow sovereignty). The next section summarizes the facts of this petition and the Court's main findings.

[400] *Al-Eizariyah Village Council* Judgment, *supra* note 30 at paras 8-17; *Halawa* Judgment, *supra* note 277 at paras 9-18. See also *Al-Ram Local Village Council* Judgment, *supra* note 1 at 12.

4.3.3.1.1. The Biddu Village Council Case

4.3.3.1.1.1. The Facts of the Case

Following the *Beit Sourik* judgment, Israeli authorities decided to modify the route of the 26-km long section of the Wall in the area. The decision was challenged by both Palestinian and Israeli petitioners. In the case of the former, Palestinians argued that the modified route still caused harm to their property rights, as well as to their ability to commute to EJ and to other parts of the 'West Bank,' [401] on which they rely for daily public services.[402] They also alleged that the Wall's route, which left a major road (road 436) servicing near the Israeli settlement of Pisgat Ze'ev and others on the 'Israeli side' of the Wall, should be re-routed even more closely to the Green Line, because of its disproportionately harmful impact on their 'fabric of life'.[403]

In the case of the latter, the Israeli settlement council of Har Adar and residents of the Israeli town of Mevasseret Tzion (inside Israel proper) had also challenged the newly modified route.[404] This is because the route edged closer to their line of houses and left strategic hilltops overlooking major roads on the 'Palestinian side' of the Wall. This, they argued, undermined the MC's ability to protect them against any security threats.[405] They also objected to the decision of the MC to leave land that was part of the settlement's jurisdiction on the 'Palestinian side' of the structure.[406]

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[401] (HCJ 426/2005) was a principled petition filed by five Palestinian village councils against the legality of constructing the Wall as a whole on this route. Four other petitions (HCJ 2223/05), (8264/05), (8266/05) and (8265/05) were submitted by individual Palestinians whose private property has been affected by this route. See *Biddu Village Council* Judgment, *supra* note 181 at paras 6-7. For the location of the village relative to the Wall and adjacent Israeli settlements, type 'Bidu' into search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[402] The residents of the village argued that sections 6 and 7 of the contested route particularly disconnected them from the major West Bank Palestinian towns of Ramallah and Bir Nabala from EJ. *Biddu Village Council* Judgment *ibid* at paras 6-7.

[403] Particularly on the 'fabric of life' of the residents of Al-Nabi Samuel. See *ibid* at paras 6-7.

[404] (HCJ 2056/04) [2004] *Beit Sourik Village Council v. Government of Israel* (2005) 35 Isr LR 83 [*Beit Sourik*, Judgment]. The petition was upheld partially by the HCJ.

[405] They mainly highlighted that this was the result of excluding hilltop 847 overlooking road 1 which connects Jerusalem with the coastal line of cities in Israel. *Biddu Village Council*, Judgment, *supra* note 181 at paras 6-7.

[406] This amounted to approximately 120 dunums, which were intended to develop an industrial plant. Those were petitions (HCJ 1767/05) and (HCJ 11409/05) See (HCJ 426/2005). *Ibid* at 4.

The respondents, for their part, reiterated the security-based rationale of the Wall.[407] Where the route intruded inside 'West Bank' territory and thus trapped Palestinian communities in a Seam Zone, they argued that this was necessary for protecting the Israeli settlements around Jerusalem.[408] In explaining why they deem the harm resulting from the Wall to be proportionate,[409] the respondents pointed out a number of elements. One of these elements is that they have decided to modify the route even further in some areas so that some of the petitioners and their villages would remain on the 'Palestinian side' of the Wall. The also decided to construct a new 'fabric of life' road, as a way of ensuring that petitioners access major nearby 'West Bank' towns relatively unhindered.[410] They also explained that reverting to the original route of the Wall would entail a disproportionate harm to the lands of other Palestinian villages. As for leaving the hilltop on the 'Palestinian side' of the Wall, they claimed that any security threats would be effectively addressed by other means.[411] Finally, regarding the complaint by the Israeli petitioners that some of the land constituting part of the settlement jurisdiction needed for its expansion would be left on the 'Palestinian side' of the Wall, they argued that this does not constitute a legitimate consideration that can guide the Wall's route in the area.[412]

4.3.3.1.1.2. The Court's Judgment

In the judgment, the Court reiterated the idea that the objective behind the Wall's construction is to protect Israeli settlers; hence, it constitutes a legitimate response to pressing security needs. This, according to the Court, authorizes the MC under the law of belligerent

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[407] Of protecting Israelis in Israel proper and the settlements, including commuters on the roads to and from those settlements, such as travelers on road 436 which leads to the settlement of Givat Zeev. *Ibid* at paras 8-9.

[408] This, they argued was also the case of the residents of the village of Al-Nabi Samuel. *Ibid* at paras 8-9.

[409] Addressing the particular situation of Al-Nabi Samuel, they argued that since it is located on a hilltop which overlooks road 436 and the northern houses in the EJ settlement of Ramot Alon, including it on the 'Israeli side' of the Wall constitutes "an essential security need." *Ibid* at paras 8-9. For a location of the settlement, type 'Ramot Alon' into the search engine of interactive map, online: *B'Tselem* <http://www.btselem.org/map>.

[410] The road would help connect their village via the main wall crossing in the area (Al-Jib crossing) to other 'West Bank' cities such as Ramallah and Bir Naballah. *Ibid* at paras 8-9.

[411] *Ibid* at paras 8-9.

[412] *Ibid* at paras 8-9.

occupation, to requisition land for its construction.[413] In determining whether the route chosen by the MC has adequately balanced between the different considerations that can lawfully guide his actions in the occupied territory, the Court once again insisted on the importance of resorting to the proportionality doctrine.[414] It also reiterated that "the commander, indeed, is the one that determines where on the ridge or on the plains the fence should pass."[415] After listing the factors that have led it to conclude that the challenged sections of the 'fence' are proportional in their effect on the petitioners,[416] the Court upheld the respondents' argument that there was no alternative route capable of achieving the same security objective.[417]

Subsequently, the Court addressed the concerns of the Israeli petitioners. While acknowledging that the added security value provided by the Wall's modified route is inferior to the added security value provided by the structure's original route in the area, it expressed confidence in the ability of the MC to protect Israeli petitioners through other means. They also endorsed the respondents' position that amending the route of the Wall would entail harm (that is more severe in nature) to other communities. The Court then concluded that a proper balance has been struck between the conflicting considerations, and dismissed the petition.[418]

The next section examines the Court's approach to petitions challenging those segments of the Wall's route around Jerusalem that have dipped into the 'West Bank'.

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[413] The Court also reiterated that the legal framework applicable to this case was laid out in previous Wall related case law such as the Beit *Sourik* and *Ma'arabe* judgments. *Ibid* at paras10-15.

[414] In this regard, the Court had reiterated that the MC must essentially strike a balance between three main considerations: (i) the security of the State and its forces; (ii) the human rights of the local Palestinian population as recognized under international law; and (iii) the human rights of the Israeli residents as grounded in Israeli constitutional law. *Ibid* at paras 10-15.

[415] That is "his expertise and we, ourselves, examine if the harm it causes the local residents is proportional." *Ibid* at paras10-15.

[416] These elements are: that the land confiscated for the Wall's construction and the land which has been trapped in the Seam Zone was significantly reduced after authorities had re-routed the Wall in light of the *Beit Sourik* ruling; that agricultural gates would be put into place to enable Palestinians to access their property remaining in that zone; that compensation would be offered to the affected landowners; that a 'fabric of life' road would be constructed and that movement restrictions that had been imposed on the Bir Nabala residents would be eased. *Ibid* at paras 10-15.

[417] It also noted that those who still feel harmed by the permit system and access through the Wall gates will have the opportunity to re-petition the Court. *Ibid* at paras10-15.

[418] If in the future, military authorities conclude that this route fails to provide the needed level of security, it will be re-examined. *Ibid* at paras10-15.

4.3.3.2. The Court's Adjudication of Petitions Challenging the Route of the Wall in the Jerusalem Area running inside the 'West Bank'

4.3.3.2.1. The Authority of the MC to Build the Wall inside the 'West Bank'

Where the route of the Wall made incursions into the 'West Bank', the Court confirmed that the MC is entitled to requisition land for this purpose if it is in response to genuine security/military considerations.[419] In this regard, the justices have generally reiterated that "similar to the findings in Beit Sourik, [...] the decision to construct the fence in this area was taken in light of the harsh terror reality that has struck Israel since September 20000,"[420] as a way to prevent the infiltration by Palestinians into 'Israel' (including EJ),[421] and to protect Israeli settlers and commuters. For example, in the *Beit Sahour Municipality* judgment, the Court explained that the Wall's deviation from the Green Line is necessary "since Har Homa is located at the southern edge of Jerusalem, only few hundred meters from the [Jerusalem] municipal border, it is, therefore, necessary to construct the fence in this section; a certain minimal distance from the municipal line in order to secure the residents."[422]

The justices again emphasized that expansive deference will be granted to the expertise of military authorities[423] and that the safety of the Israeli settler population and of Israeli travelers is part of the MC legitimate security-based considerations under international law, even if they are not considered 'protected persons'. For example, in the *Halawa* judgment, the Court

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[419] *Ibid* at paras10-15. It can not do so in order to establish a political border or to annex land belonging to petitioners in the Seam Zone to Israel proper *Al-Eizariyah Village Council* Judgment, *supra* note 27 at paras 8-17. The Court again cited article 52 of the Hague Regulations, *supra* note 8 and article 53 of the Fourth Geneva Conventions, *supra* note 12 as the relevant provisions of the law of belligerent occupation authorizing the MC to do so. See *Halawa* Judgment, *supra* note 277 at paras 9-18; *Abu El Tir* Judgment, *supra* note 253 at paras 10-21. See also *Al-Ram Local Village Council* Judgment, *supra* note 1 at 12.

[420] Consequently, they argued that there was no reason for them to conclude that the considerations behind the construction of the Wall in the Jerusalem area were anything other than legitimate security/military considerations. *Al-Eizariyah Village Council* Judgment, *supra* note 30 at paras 8-17.

[421] *Halawa* Judgment, *supra* note 277 at 3-4.

[422] Here, the Court also stressed the fact that the route of the Wall does not change the municipal boundaries between Jerusalem and Beit Sahour. See *Beit Sahour Municipality* Judgment, *supra* note 273 at para 7-18.

[423] "[S]ince they are officially responsible for such matters." *Ras Khamis Residents Committee* Judgment, *supra* note 245 at paras14-25. "This is a principle that has been recognized long ago in precedent as the Court gives great weight to the expert opinion of the Commander being the authority and responsible for security matters." *Al-Ram Local Village Council* Judgment, *supra* note 1 at 12. See also *Iado* Judgment, *supra* note 154 at paras 6-7.

endorsed the respondents' position that the MC enjoyed this authority because the Wall bolstered the security of the Israeli settlement of Pisgat Ze'ev and of Israeli travelers on road 45.[424] Finally, the justices also held that the MC had the authority to establish security-based measures that have been put in place in association with the Wall,[425] and to requisition land for this purpose.

Once this was established, the justices then examined the question of whether the MC had properly exercised his discretion to route the Wall along the particular route that he had chosen.

4.3.3.2.2. The Discretion of the MC

4.3.3.2.2.1. Balancing Different Considerations

The HCJ justices stated that their own role is limited to that of establishing "whether or not the conditions which determine the scope of the MC's authority and discretion were not breached."[426] In exercising this authority, the Court recalled that the MC must balance between the following considerations: (1) security and the need to maintain order in the area under his control, including the security of the armed forces; (2) the wellbeing of the local 'Arab population',[427] who are considered 'protected persons',[428] and (3) the security and the human rights of Israeli citizens,[429] which under both international and Israeli domestic law the MC is obliged to protect.[430]

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[424] *Halawa* Judgment, *supra* note 275 at paras 9-18. *Al-Ram Local Village* Council Judgment, *supra* note 1 at 3; *Al Ezariyah Local Village Council* Judgment, *supra* note 30 at 2. See also *Iado* Judgment, *supra* note 154 at paras 8-17.

[425] Thus in the *Anata Boys High-School* judgment, the Court expressed its satisfaction that the cement wall built by government authorities on the school yard is a temporary security measure whose sole purpose is to protect the individuals working on the Wall in and around Jerusalem and subsequently dismissed the petition. See *Anata Boys High School* Judgment, *supra* note 299 at 2.

[426] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60.

[427] *Abu El Tir* Judgment, *supra* note 253 at paras 10-21; *Al-Eizariyah Village Council* Judgment, *supra* note 30 at para 17.

[428] *Al-Ram Local Village Council* Judgment, *supra* note 1 at 12-13.

[429] *Al-Eizariyah Village Council* Judgment, *supra* note 30 at paras -17; *Halawa* Judgment, *supra* note 277 at paras 9-18.

[430] *Al-Ram Local Village Council* Judgment, *supra* note 1 at 12-13.

Addressing the third consideration, the Court explains that although it has traditionally been invoked in relation to Israeli settlers, it is also relevant in situations where the rights and interests of the Arab citizens of Israel or 'Israeli' permanent residents are at stake.[431] At the same time, the Court pointed out that the rights of both Palestinians with 'West Bank' IDs and those of the 'Israelis' were not absolute. Therefore, in order to determine whether the route chosen by the government authorities fell within the 'range of proportionality', the proportionality doctrine with its three sub-tests must be invoked.[432] This test is discussed below.

4.3.3.2.2.2. The Proportionality Doctrine: From the General to the Specific

In the case of the first sub-test (rational link), the Court has generally upheld the conclusion that the route of the Wall advances security objectives in the area.[433] According to the justices, since the Wall separates between the 'West Bank' and Israel, it is synonymous with creating "a barrier between terror and Israelis."[434] The Court then rejected the allegation by petitioners that the Wall in and around Jerusalem had been built to secure political objectives as opposed to legitimate security-based considerations.[435] Underscoring that the structure replaces military offensive operations to prevent this infiltration into 'Israel' from the 'West Bank',[436] it then concludes that the Wall fulfills the requirements of the first sub-test.[437]

In regard to the second proportionality sub-test (the least harmful test), the Court explained that, while there is:

> No doubt that this route would be less harmful towards the petitioners [...] the question is whether or not it would still be an effective means to achieve the objectives. The Court must examine whether or not the alternative proposed [by the petitioners] is capable of achieving the same degree of effectiveness.

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[431] *Ibid* at 12-13.

[432] *Ibid* at 13. *Abu El Tir* Judgment, *supra* note 253 at paras 10-21; *Al-Eizariyah Village Council* Judgment, s*upra* note 30 at paras -17, and *Halawa* Judgment, *supra* note 277 at paras 9-18.

[433] *Al-Eizariyah Village Council* Judgment, *supra* note 30 at paras -17.

[434] *Halawa* Judgment, *supra* note 277 at paras 9-18.

[435] *Al-Ram Local Village Council* Judgment, *supra* note 1 at paras 40-60.

[436] *Ibid* at 14 and 15.

[437] *Beit Sahour Municipality* Judgment, *supra* note 273 at paras 7-18.

> This is not a mathematical examination but a question of whether or not the alternative would serve the same essential function.[438]

Here too, to establish whether the conditions of the second sub-test were met, two elements needed to be considered: (1) the geographic route of the wall and (2) the permit and movement regime in place.[439] In examining which physical route of the Wall is the least harmful yet still achieves the desirable security-based objectives, the justices generally deferred to the MC's assessment that the alternative routes (proposed by petitioners) would not fulfill those objectives.[440] It also pointed out that it cannot prefer the security analysis of experts supporting the position of the petitioners over that of the MC who is responsible for the security in the area.[441]

As for the movement and permit regime, the justices noted that the measures put in place by the respondents or which they committed themselves to implementing would ameliorate the impact of the Wall on the petitioners' rights. This was the situation in the *Halawa* judgment where the Court explained that since a Wall gate was made available to petitioners at 2.5 km distance from their houses and was rendered operational 24 hours/day, the harm suffered by the petitioners was significantly reduced. Hence, the Wall's route fulfilled the second sub-test.[442]

In another case, *Shakir*, the justices rejected the argument of the petitioners that the decision of military authorities to construct a 'fabric of life' road would connect their villages eastward to the rest of the 'West Bank' at the expense of the historic links that Sheikh Said enjoyed with

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[438] *Ibid* at 5.

[439] *Halawa* Judgment, *supra* note 277 at paras 9-18.

[440] Including that of protecting residents of Israeli Settlements. *Ibid* at paras 9-18. *Al-Eizariyah Village Council* Judgment, *supra* note 30 at para 17; *Beit Sahour Municipality* Judgment, *supra* note 273 at paras 7-18.

[441] The Court also stressed that the petitioners did not succeed in meeting the burden of rebutting the MC's security related expert opinion. *Halawa* Judgment, *supra* note 275 at paras 9-18. See also *Beit Sahour Municipality* Judgment, *ibid* at paras 7-18; *Walajeh Village Council* Judgment, *supra* note 278 at 5.

[442] The Court however noted that the petitioners have not raised the demand for a gate in the Wall closer to them, and that in any case respondents had stated that doing so would not be feasible from a security-based perspective. Therefore, the justices decided that they will not form an opinion on the matter, and that in any case; this will not undermine the findings that the Wall meets the second proportionality sub-test. *Halawa* Judgment, *ibid* at paras 9-18. See also *Abu El Tir* Judgment, s*upra* note 253 at 8. Elsewhere, the Court took note of the fact that respondents had promised to make two Wall gates operational for crossing of petitioners which would allow petitioners to also secure the access of tractors and other agricultural vehicles, See *Walajeh Village Council* Judgment, *ibid* at 6.

EJ. After underscoring the authority of the MC to plan and build roads in the occupied territory if these roads served the interest of the 'local population',[443] the justices rejected that this road would create a new/different reality for the social, family or other links with Jerusalem.[444] Similarly in the *Iado* judgment, the promises by military authorities that they would allow petititioners to be added to a list of individuals who can use the Sawahreh crossing to enable them to access with their vehicles was considered by the Court as "a reasonable and effective solution"[445] that would help minimize the harm incurred by the residents. The Court then concluded that the measures fulfilled the second proportionality sub-test.

In the case of the third proportionality sub-test (proportionality in the narrow sense), the Court emphasizes once again that the Wall constitutes an essential element in the overall Israeli fight against Palestinian attacks and in saving lives. Hence, its added benefit is great.[446] Moreover, it rejected alternative routes proposed by petitioners on the ground that, if adopted, it would decrease the accrued security benefits.[447]

In reaching the conclusion that the challenged route fulfilled the third sub-test, the Court again took into consideration a number of elements which contributed towards a substantial reduction of the harm resulting from the Wall's route. In the *Halawa* judgment, for example, the Court explained what these elements were. (1) The first is that, by surrounding the hill allegedly belonging to petitioners, the Wall's route prevented any damage to the graves on top of it. (2) Secondly, the route did not enclave cultivated land or interfere with any sources of livelihood. (3) Thirdly, it did not trap people in the Seam Zone or cut off residents from access

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[443] The court cited in particular the HCJ 393/82) [1983] *Jam'iat Iskan case, al-Ma'almoun al-Tha'auniya al-Mahduda al-Masuliya, Cooperative Association Legally registered at the Judea and Samaria Area Headquarters v. Commander of IDF Forces in the Area of Judea and Samaria et al*, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/items/160_eng.pdf>. For more information on this case see Chapter II section 1.3. The case was cited in the *Shakir* Judgment, *supra* note 211 at paras 15-35.

[444] According to the justices, the road is geared towards improving access to the 'West Bank' by reducing the petitioners' commuting time. This leads the justices to conclude that the road has been built for the benefit of the neighborhood. See *Shakir* Judgment, *ibid* at paras 15-35.

[445] *Iado* Judgment, *supra* note 154 at 5.

[446] *Al-Eizariyah Village Council* Judgment, *supra* note 30 at paras 8 -17; *Halawa* Judgment, *supra* note 277 at paras 9-18; *Beit Sahour Municipality* Judgment, *supra* note 273 at paras 7-18; *Walajeh Village Council* Judgment, *supra* note 278 at 5; *Shakir* Judgment, *supra* note 211 at paras 15-35.

[447] Halawa Judgment, *ibid* at paras 9-18; *Al-Eizariyah Village Council* Judgment, *ibid* at paras. 8-17.

to daily services.[448] (4) The Court also upheld the argument of the respondents that adopting an alternative route for the Wall in the area would result in the violation of rights of other local Palestinian residents and, therefore, would not minimize the overall harm caused to the local Palestinian residents in the area.[449]

Similarly, in the *Al-Eizariyah Village Council* judgment, the justices noted that leaving the hills on the 'Palestinian side' of the Wall would reduce the harm incurred by the Palestinian petitioners (with 'West Bank' IDs)[450] and that this was sufficient to render the route of the Wall proportionate under the third sub-test.[451] In reaching this conclusion, the Court accepted the guarantees made by the respondents that most of the land requisitioned for the Wall's construction is 'state land' or uncultivated and that accordingly, the harm resulting from the Wall's route was not as significant as petitioners claimed.[452] Other elements which the Court took into account before deciding that there was no ground to intervene in the decision of the MC are as follows: (i) including the hill inside the Wall did not undermine access of the petitioners to routes that connect between the villages and any other villages/cities in the area; (ii) that no residents will be trapped in the Seam Zone; and (iii) that the route would not cut off petitioners from essential services, or sources of livelihood.[453]

In the *Beit Sahour Municipality* judgment, after acknowledging that the Wall and its access regime has disrupted the petitioners' daily lives, the justices pointed out that the promise by respondents to put in place a seasonal agricultural gate allows the former to access their land inside the Seam Zone. In addition, since the Wall did not undermine their access of Palestinian cities to ther parts of the 'West Bank', its impact was deemed proportional.[454]

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[448] The justices also took into account the assurances by the government that it would compensate the petitioners with an alternative plot of land elsewhere. *Halawa* Judgment, *ibid* at paras 9-18.

[449] This is because the settlement of Givat Almon is too far north east. *Ibid* at paras 9-18.

[450] Addressing the allegation by petitioners that their village is denied space for its expansion, the justices noted that "the possible harm to [the village's] future expansion this is merely a potential future concern that has not yet materialized." See *Al-Eizariyah Village Council* Judgment, *supra* note 30 at paras 8-17.

[451] *Ibid* at paras 8-17.

[452] *Ibid* at paras 8-17. *Walajeh Village Council* Judgment, *supra* note 278 at 5.

[453] *Al-Eizariyah Village Council* Judgment *ibid* at paras 8-17.

[454] Such as nearby Bethlehem. *Beit Sahour Municipality* Judgment, *supra* note 273 at paras 7-18.

In another judgment, *Shakir*, the Court noted that its decision regarding the proportionality of the Wall was contingent upon the respondents making the necessary adjustments and arrangements for the operation of a permanent Wall gate at the entrance of the petitioners' neighborhood and upon them making sure that it is operational for those with Jerusalem IDs or valid entry permits to access it 24 hours/day.[455]

4.3.4. Assessment

The Court's judicial approach to petitions that have challenged the Wall inside the 'West Bank' has been discussed in depth elsewhere in this research.[456] All of the elements that have traditionally characterized the HCJ's approach in those petitions have in fact, remained relevant to the Court's analysis of the legality for the sections of the Wall, which have deviated from the JMB into the 'West Bank'. These elements include: (a) the irrelevance of the legality/illegality of the settlements under international law to an assessment of the legality of the Wall's construction along the route chosen by government authorities, (b) the idea that the MC is responsible for the security of the Israeli settlers, even if they are not 'protected persons' and (c) the proposition that the Wall's route in the settlements' vicinity, which has included them on the 'Israeli side' is a lawful security response. (d) The Court also endorsed (except when clear and unambiguous evidence had arisen) the security assessments of the MC as to which route best achieves this objective and maintained its heavy reliance on the proportionality doctrine in order to regulate the impact of the Wall in the area, not the very authority of the MC to construct it.

However, the fact that the HCJ does not deem EJ to constitute part of that occupied territory has predetermined the outcome of the Court's judicial reasoning into whether the harm resulting from the 'West Bank' sections of the Jerusalem Wall on nearby 'West Bank' Palestinian communities was proportionate. Unlike its approach on segments of the Wall that run inside the JM or along the JMB, the Court's point of departure is that the 'West Bank' is an occupied territory that, accordingly, is regulated by the principles of the law of belligerent occupation. Hence, there is once again extensive reference and discussion of provisions to the

[455] *Shakir* Judgment, *supra* note 211 at paras 15-35.

[456] See Chapter I.

Hague Regulations and to the Fourth Geneva Convention. Reference to Israeli constitutional law only takes place to the extent that it underscores the rights protection afforded under the Basic Law: *Human Dignity and Liberty* to Israeli citizens (Israeli settlers, Arab Palestinian Citizens of Israel) and to 'Israeli' permanent residents (Palestinians with Jerusalem IDs) who are living beyond the Green Line.

For example, when discussing the proportionality of the impact of the Wall's route, the justices endorsed the efforts of the government to improve the access of Palestinians with 'West Bank' IDs to other parts of that 'Area' even if this would practically speaking, amount to re-orienting their communities away from their traditional reliance on Palestinian neighborhoods of EJ. Without going into much detail as to why it rejected the petitioners' claims that these measures (such as constructing 'by pass' roads or installing Wall gates that facilitate their access to the 'West Bank' but not to Jerusalem) seek to consolidate objectives other than ameliorating the petitioners' 'fabric of life', the Court dismisses those allegations. In this regard, the Court's consideration of EJ as part of Israeli 'sovereign' territory also explains why it refuses to consider Palestinians with 'West Bank' IDs, to enjoy an inherent right of access to EJ, or right to free movement between it and the rest of the West Bank.'[457]

Unlike Palestinians with Jerusalem IDs, 'West Bank' Palestinians are not deemed to have a right to the conferment of government services and other economic rights.[458] This also explains how the Court was able to reach the conclusion that the measures implemented by the military authorities to reduce the harsh impact of the Wall was sufficiently addressed by facilitating the access of members of the affected communities to other parts of the 'West Bank'. Needless to say, the Court's formalistic approach does not take into account the bigger

[457] *Ras Khamis Residents Committee* Judgment, *supra* note 245 at 8.

[458] In the 1970s, the Court was asked to rule on a petition in which a former resident of the Old City of Jerusalem and a Jordanian citizen challenged the decision of a corporation constructing residential buildings in the Jewish Quarter to publish an offer to lease them only to citizens and residents of Israel and to new immigrants, alleging that this constitutes discrimination on ground of nationality and religion, The Court dismissed it saying that there was nothing wrong in discriminating between citizens and non-citizens with regards to how government assets and other economic rights are conferred. See (HCJ 114/78) *Burken v. Corporation for Reconstruction and Development of the Jewish Quarter in the Old City of Jerusalem LTD* (1980) 20 Isr YB Hum Rts 374.

picture, one in which the social and economic fabric of the Palestinian communities on both sides of the JMB are linked.

5. Concluding Observations

The manner in which the HCJ has adjudicated the legality of the Wall in and around Jerusalem has offered Palestinian petitioners a venue for challenging some of the disproportionate impacts of its construction. This has primarily been achieved through the Court's heavy reliance on the proportionality doctrine and its three sub-tests. At the level of individual petitions, the fact that the legality of a given measure is being reviewed by the Court has forced the respondents in several petitions to make changes to the route of the Wall, as a way of reducing their harmful measures on the Palestinians. No doubt, any form of diminishing the debilitating impact of that structure is a welcome development.

However, a number of elements explain why the Court's ability to provide a venue for effective remedy remains limited. To begin with, the steps that government authorities have taken to *de jure* annex parts of the occupied territory (i.e. EJ), has considerably reduced the Court's maneuvering space. Secondly, the nature of the Israeli legal system has allowed the justices to avoid dealing with the illegality of the annexation under international law. Thirdly, the Court's own sensitivity to the domestic backlash that it could face at the Israeli domestic level (both from other branches of government and Jewish Israeli public opinion), should it choose to question Israel's control or right to EJ, may be a less obvious but equally important factor.

Fourthly, the Court's inability and/or unwillingness to question the security-based assessment of government authorities (unless unequivocal evidence requires this), has diluted the justices' capacity to question and to challenge the idea that those measures had indeed been implemented in response to genuine security considerations. In this regard, the Court's ability to act as a safety valve against abuses by military authorities is already far from perfect. This is especially the case given the limited capacity of the Court to question the security-based assessment of these authorities. Arguably, when it comes to scrutinizing the measures implemented by them in a territory which they consider part of the 'sovereign' territory, the

Court's ability to prevent political considerations from influencing those measures, is diminished further. This approach while leading to improvements at the micro-level does little to change the impact of a government security-based policy at the macro-level policies.

While part of this is due to institutional constraints, it is also due to the legal framework the Court has deemed relevant to its adjudication of competing interests. By grounding its analysis in Israel constitutional and administrative law, and by avoiding the invocation of principles of international law when examining segments of the Wall that have been built inside the JM, the Court has skillfully predetermined the outcome of its adjudication: one that evades any necessity to address the continued status of EJ as an occupied territory, or the legality of its annexation. This approach has also allowed the justices to address the claims against the Wall's route and its impact as an issue of mundane government and to reduce the conversation to nothing more than the management of complex social issues amongst antagonistic groups.[459] The lack of reference to the law of belligerent occupation when discussing the impact of the Wall on Palestinians with Jerusalem IDs means that the rights which they are afforded as 'protected persons' are not just diluted (as is the case with the rights of Palestinians with 'West Bank' IDs), they do not exist altogether. Consequently, the larger picture that has emerged is one in which the heavy price extracted from Palestinian communities on both sides of the Wall in social, human rights, and humanitarian terms has essentially been upheld as lawful. As for the segments of the Wall that run inside the 'West Bank', including around Jerusalem, the Court's approach to the interpretation of international law and Israeli administrative law is essentially the same as the one that it has adopted in Wall related petitions more generally.[460]

Some scholars, however, have argued that if the contribution of the Wall's route towards the two sets of considerations (physical control and demographic objective of securing a Jewish majority) is viewed in tandem, the emerging picture is that of an effort by government authorities to create a greater 'Israeli Jewish Metropolitan Jerusalem' and to substitute the

[459] Martti Koskenniemi, "Occupied Zone," *supra* note 12.
[460] See Chapter I.

Green Line for the Wall's route as its new municipal border.[461] When decisions regarding the route of the Wall inside the JM are analyzed together with decisions regarding the Wall's route inside the 'West Bank', it has been argued that the Court has legalized (knowingly or unknowingly), the government's efforts to re-configure the territory and demographic make-up of the JM. This is because its judicial approach has not been able to challenge the *de facto* annexation of areas around Jerusalem where the largest settlement blocs are located[462] or the *de jure* annexation of EJ. Seen as the latest in a series of measure which seek to consolidate social and demographic relations of the Israeli settler population with Jerusalem, and to redefine those relations for 'West Bank' Palestinians away from the city, the Wall has no doubt fractured the relation of EJ with the rest of the occupied territory, and strengthened Israel's control of it.[463] The Court has not challenged this. Arguably, the only thing that still needs to be done in order to formalize the status of the borders of the JM that are being redrawn by Israeli authorities, is for these authorities to issue an executive decision or legal enactment to endorse the contours of the metropolitan Jerusalem that is being consolidated.[464]

The HCJ appears to have internalized the reasoning of government authorities that the Wall's main function is to separate between the 'West Bank' (as the alleged source of terrorism) and Israel (which it does not challenge, includes EJ). The judges are also aware of the consensus amongst the Israeli public, stating that the larger Israeli settlement blocs around Jerusalem must remain part of Israel in any final status settlement with the Palestinians or as part of a unilateral Israeli decision to delineate its borders'.[465] The interpretation by the Court of

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[461] Anne B. Shlay and Gillad Rosen, "Making Place: The Shifting Green Line and the Development of "Greater Metropolitan Jerusalem," (2010) 9:4 City and Community 358.

[462] The extension of the protective functions of Israeli law to them, (via the MC), coupled with the extension of Israeli jurisdiction *in personam*, blurs the formal status of these settlements, and undermines the distinction between sovereignty and occupation. Martti Koskenniemi, "Occupied Zone," *supra* note 12

[463] Youssef Courbage, "Les enjeux démographiques, " *supra* note 103. See also Sylvaine Bulle, "Une urbanité dans l'epreuve: le mur de séparation a Jérusalem et ses bordures- eléments pour une analyse des actions situées en milieu problématique" (Septembre 2008) Revue Asylon (s) No. 5.

[464] "Le tracé de la frontière à venir peut évoluer au cours de futures négociations, l'impact de la clôture/du mur, lui, pèsera largement sur les argumentations en ceci qu'il a redéfini la configuration territoriale des réalités politiques," See David Newman, "La frontière israël-palestine" (2004) 4/No.9 Outre Terre, 131 at 28.

[465] See Cédric Auzat, "D'un mur a l'autre: la séparation vue par les israéliens (2002-2010)" (Hiver 2010) 4 Politique Etrangère 743.

international law and domestic law has provided the legal endorsement for the emerging situation and the preferences of the Israeli general public.

In the meantime, Israeli organizations documenting the impact of the Wall have warned that the structure's very presence in the Jerusalem area is likely to be a contributing factor to more social, economic and political discontent and resentment emerging amongst EJ Palestinians.[466] By compounding the violations of the rights of the Palestinian residents of EJ, it is argued that the Wall is reducing "the stake of [Palestinian] residents in a stable Jerusalem."[467] Slowly but surely, the Wall and its associated policies in the Jerusalem area have increased the risks of turning Jerusalem (once more) into a 'powder keg', thereby undermining the very purpose for which it was allegedly built: enhancing Israeli security.[468]

[466] Israel Kimhi, "Introduction" in Israel Kimhi, eds, *The Security Fence around Jerusalem: Implications for the City and its Residents* (Jerusalem Institute for Israel Studies (JIIS), 2006) 9 at 10, online: JIIS <http://www.jiis.org/.upload/the%20security%20fence%20around%20jerusalem.pdf>.

[467] *Ir Amim*, "Beyond the Wall," *supra* note 42 at 13.

[468] ICG "The Jerusalem Powder Keg" *supra* note 150. See also *Ir Amim* and *Yachad*, "Frequently Asked Questions about Jerusalem," *supra* note 41.

General Conclusion

> *[...] it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.*[1]
>
> —Preamble of the Universal Declaration of Human Rights—

1. Overview

This research has examined the judgments which the Israeli High Court of Justice (HCJ) has rendered from 2000-2014 in petitions filed by Palestinians from the occupied West Bank, including East Jerusalem (EJ). The study has particularly focused on analyzing those petitions that have challenged the legality of security-based measures implemented by Israeli government and military authorities to allegedly protect Israeli settlements and settlers. The objective has been twofold: (1) to determine the extent to which the HCJ's adjudication has provided petitioners with a venue for effective remedy at the domestic level. (2) to evaluate the consequences its judicial reasoning and interpretation of the relevant principles and rules of international law have had for what some Israeli scholars have identified as the three normative principles underlying the law of belligerent occupation and which are: (a) that occupation is temporary; (b) that it is a form of 'trust'; and (c) that it does not bestow sovereignty.

For this purpose, the research examined 40 decisions that were rendered by the HCJ following the outbreak of the Second *Intifada* (Uprising) in 2000. In this regard, the main findings of the research has been that, if one excludes out-of-court settlements, the HCJ's adjudication of those petitions has provided an unsatisfactory domestic judicial venue for Palestinian petitioners to effectively challenge alleged violations of their rights. As the research has underscored, these rights are rights that are first and foremost protected under international law.

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[1] Preamble III of the *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (12 December 1948) *reprinted in* (Supp. 1949) 43 AJIL 127.

The outbreak of the Second *Intifada* has been perceived by Israel's executive branch as marking the beginning of intense security risks. The event has also been used to justify a large spectrum of measures against the Palestinian civilian population on security grounds. A review of the petitions that were filed to challenge the measures that were specifically implemented for the alleged protection of Israeli settlements and settlers, highlights that they can be categorized into the following broad categories: The first category includes measures that were justified as 'temporary' responses to genuine security concerns, such as the construction of the Wall inside the West Bank, the creation of the Seam Zone and imposition of an associated permit regime therein, and the creation of Special Security Zones (SSZs) around settlements. Petitioners challenging their legality under international law, as well as the documentation by the international and local human rights community have challenged the assumption that these measures conform to the rules and principles of the international law of belligerent occupation. Their primary objection is that they have resulted in an indefinite (as opposed to temporary) control of certain areas of the West Bank (such as the Seam Zone) thereby promoting a situation of *de facto* annexation of areas of the West Bank in contravention of this body of law. Consequently they contend that these measures have undermined an important normative requirement of the law of belligerent occupation, namely that an occupation is temporary in nature (first normative principle).

The second category of security based measures refers to policies that Israeli government and military authorities have implemented to ensure the safe commute by Israelis, including Israeli settlers to and from Israeli proper and the settlements and sites of worship in the West Bank. It also includes the promulgation of military orders to partially or completely restrict the access of Palestinians and their vehicles on roads that are used by Israeli travelers ('by pass' roads). In this regard, the petitioners' primary argument has been that the declared objective of these measures, namely the protection of Israeli citizens, does not constitute a legitimate consideration that can lawfully guide the Military Commander (MC) in his efforts to maintain law and order in the occupied territory under article 43 of the Hague Regulations. According to critics, if viewed in tandem with other Israeli led policies that have been implemented since 1967, these measures have entrenched the existence of two separate and unequal systems of rights and of access to the resources of the occupied territory. Hence, they undermine the duty

of the Occupying Power to treat the occupied territory as a 'form of trust' that is to be managed primarily in the interest of the 'local population' (second normative principle).

The third category of security based measures examined by this research is the construction of the Wall in and around EJ, and which has *been de jure* annexed by Israeli government authorities in the 1980s. Again, the construction of the Wall in this area has been justified by Israeli authorities on the need to effectively protect the citizens and the 'sovereign' territory of the State of Israel, which according to Israeli government authorities, includes the former. However, Palestinian petitioners, carrying either West Bank or EJ (Identity Cards) IDs, have maintained that the real objective behind the Wall's construction, as evidenced by the route of the structure in the area, is threefold: (i) to consolidate Israel *de jure* control of annexed EJ; (ii) to contribute to the *de facto* control of the largest Israeli West Bank settlement blocks around the city and (iii) and to ensure a demographic balance in favor of an Israeli-Jewish majority in the 'redrawn' boundaries of the Israeli self declared Jerusalem Municipality Border (JMB). Hence, the main concern that has been expressed by those who have documented the Wall's impact, is that the route of the structure and harsh repercussions on the fundamental human rights of nearby Palestinian communities, have undermined the prohibition on Israel, the Occupant, to act as a 'sovereign' in the occupied territory (third normative principle).

The HCJ has been at the center of a debate as to whether or not the highest judicial court of the occupying power (i.e. the enemy), which considers itself a democracy, is capable of providing a venue for effective legal remedy to the Palestinian petitioners. The particular context of the Israel-oPt conflict provides an interesting case study for analyzing the challenges of adjudicating human rights and security issues not only in situation of occupation, but also in a situation where a significant part of the population of the Occupant resides in the occupied territory, in contravention to well established principles of international law. It is also a situation in which the Occupant has underscored the pressing nature of its security concerns. It is hoped that by focusing on this particular aspect of the Israel-oPt case study, the present research helps to shed light on why the domestic court of an Occupying Power is unwilling and/or unable to provide effective judicial remedy to the occupied population at the domestic level. Unlike previous research that has been conducted, the study focuses exclusively on

security measures that were allegedly taken for the protection of settlements and settlers. The research also purports to provide new primary material in the form of judgments that have (to the knowledge of the researcher) not been translated into English, and to compliment the findings with interviews that were conducted with Israeli lawyers who have regularly petitioned the Court on behalf of Palestinians.

Broadly speaking, the findings have demonstrated some of the advantages of petitioning the Court. Since Palestinians of the occupied West Bank are not citizens of Israel, their views do not have any weight in public policy formulation by virtue of their inability to vote. This is despite the fact that the actions of the executive have affected every facet of their lives for the past 49 years. Consequently, and rather ironically, the HCJ is the only branch of government where those Palestinians still have a voice at the domestic Israeli level.[2]

Much of the existing literature has described the Court has an 'activist' court that has upheld the protection of human rights, including in times of intense security threats, as an important pre-requisite of the domestic rule of law (RoL). It has also been commended for its contribution to the promotion of an international RoL: one in which the laws of 'humanity', consisting of the rules and principles of international humanitarian law (IHL)[3] and of international human rights (IHR law) regulate the authority and conduct of states against individuals and entities within their jurisdiction, and ensure accountability for serious violations of human rights.

Today, the Court exists as the only domestic court of an occupying power to have provided judicial oversight over alleged violations of international law by the military forces in an occupied territory. Moreover, existing literature on the HCJ and the occupied territory has often commended its justices for their extensive reference to and application of international law, including the law of belligerent occupation, when reviewing the actions of Israeli government and military authorities. No doubt, this has had the effect of mitigating the impact

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[2] Interview of Israeli Attorney Michael Sfard, by Avichay Sharon on behalf of author (10 July 2014, Jerusalem), [*Sfard* First Interview]. Another lawyer said it gives voice to critical Israeli resistance. Interview with Attorney *Netta Amar-Shiff* by Avichay Sharon, (24 August 2014, Jerusalem) on file with author [*Amar-Shiff* Interview]

[3] It must be recalled that the international law of belligerent occupation is part of IHL.

of some of the more severe aspects of the security based restrictions and policies imposed on the Palestinians.[4]

However the research underscores a different conclusion: one that demonstrates that the Court has not been unable to provide Palestinians with more than sporadic opportunities of protection at the domestic level for their internationally protected rights.[5] By situating the discussion within a broader theoretical framework, namely that of the contribution of domestic courts to both the domestic and the international RoL, the research seeks to explain why the HCJ's adjudication of these petitions, while offering an opportunity to promote some of the substantial and procedural aspects of the domestic RoL, has done little to promote the international RoL.

The next section will summarize the main findings of the research. It identifies them in relation to the specific research objectives that were pursued throughout the study.

2. The Main Findings

2.1. The HCJ's Position vis-à-vis the Applicability of the Major Instruments of the Law of Belligerent Occupation and of IHR law that have been Signed and Ratified by Israel.

The findings indicate that the Court has substantially invoked rules and principles of 'humanity law' to frame some of the broader aspects of its judicial reasoning. For example, the HCJ has consistently reiterated important principles and rules of the international law of belligerent occupation, such as that Hague Regulations (1907) are reflective of customary international law and that therefore, they are applicable to the occupied West Bank. In addition, and despite the Court's own refusal to rule on the *de jure* applicability of the Fourth

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[4] "And in most cases we got something, not everything." Interview with Israeli lawyer by Avichay Sharon (23 July 2014) [Anonymous Lawyer *A-04* Interview].

[5] If it wasn't for the settlements, "we would have only excesses of the army in controlling attacks against the military', which is a completely different matter and perhaps the Court could have been more effective in saying that some things are beyond what is effective or permissible for the military government and what they can or cannot do." Interview with Palestinian lawyer Raja Shehadeh, (2 October 2014, Ramallah) by author via skype [*Shehadeh* Interview].

Geneva Convention Relative to the Protection of Civilians (1949), it has invoked that Convention as a reference point for adjudicating the legality of many of the Israeli security-based measures that were challenged by Palestinians. Moreover, it has been argued that regardless of whether or not the main IHL and IHR law treaties have been deemed *de jure* applicable by the HCJ to the occupied territory, the very fact that the Court has consistently invoked many of their provisions, suggests that for all practical effects and purposes it considers the rights enshrined in the provisions of the major treaties as relevant.

However, as the study demonstrates, one feature of the Court's approach is that it has not challenged the adamant refusal by Israeli government authorities to recognize the *de jure* applicability of major IHR and IHL conventions and treaties to the occupied Palestinian territory (oPt). For instance, the HCJ has consistently refrained from ruling on the *de jure* applicability of the Fourth Geneva Convention (which Israel considers to be non-applicable). It has also abstained from ruling on the extra-territorial *de jure* applicability of IHR law to that territory (again in line with the position of successive Israeli governments). In other instances, particularly when examining petitions challenging the legality of sections of the Wall that run inside the Israeli-self declared JMB (which includes annexed EJ) the justices have abstained from invoking the 'humanitarian' provisions of the Fourth Geneva Convention. Where the Court does refer to the Fourth Geneva Convention and to IHR treaties and conventions, it appears as if the weight granted to them by the Court is that of a source of persuasive authority as opposed to a source of positive legal obligations.[6]

The research findings underscore that the Court's approach, of paying 'lip service' to the relevance of the international human rights and humanitarian conventions, but not challenging the government on its refusal to uphold their *de jure* applicability to the oPt, has undermined the purpose and object of these treaties: to safeguard rights and ensure humane treatment to civilians in all circumstances (including in times of occupation). In a situation of occupation, by very fact that the occupied population finds itself in the hands of a foreign power and that it does not enjoy the privileges and civil and political rights granted to the Occupant's citizens,

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[6] Jutta Brunee and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Int'l Law 3 at 19.

the main normative source for the rights of the occupied population is international 'humanity' law. Hence, the need to safeguard the normative source of the rights that they enjoy is all the more crucial.

Arguably, the nature of Israel's dualistic legal system (in relation to constitutive treaty law), allows domestic systems to pick and choose the bits of international law they wish to receive into their domestic law through legislative implementation."[7] However, Palestinians are not part of the constituency that can influence legislative efforts to promote and ensure the adoption of implementing legislation to begin with. This only underscores the responsibility that the domestic court—the HCJ—shoulders. An assertive court would seek to bolster its power and authority to interpret and apply not only national law but also international law. The Court may very well be an 'activist' court when it comes to promoting the human rights of Israeli citizens in Israel proper, but it is very doubtful it has adopted the same stance vis-à-vis the rights of the occupied population.

The research sought to demonstrate how the Court has repeatedly forfeited the opportunity to challenge government authorities on the crucial question of the *de jure* applicability of relevant conventions, most notably the Fourth Geneva Convention. Moreover, it has attempted to furnish examples of instances where the Court's position has contributed to the lack of clarity and consistency regarding the rules that Israel has committed itself to upholding when it signed and ratified those treaties.[8] At best, the Court's inaction has encouraged government authorities to have a 'pick and choose' attitude towards the applicability of provisions of international human rights and humanitarian conventions to the territory it has occupied over a prolonged period of time. This has fundamentally altered what the judicial decisions of a domestic court can hope to achieve when invoking international law.

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[7] Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship between International and Domestic Law" (2008) 53 McGill LJ 573 at 581-582.

[8] Nissim Bar-Yaacov, "The Applicability of the Law of War to Judea and Samaria (the West Bank) and to the Gaza Strip" (1990) 24 Isr LR 485. It must be recalled that under the Fourth Geneva Convention, states have a

2.2. The Court's Specific Techniques and Methods of Interpretation

2.2.1. The Meaning and Content afforded by the HCJ to Legal Rules, Principles and Notions of the International Law of Belligerent Occupation

On one hand, the Court has reiterated that by definition, an occupation is a temporary state of affairs.[9] It has also reiterated that for actions of the MC in the occupied territory to be lawful under international law, they must be guided by lawful considerations (in conformity with article 43 of the Hague Regulations), such as the need to maintain the security of its military forces, or to preserve and promote the interests and human rights of the 'local population').[10] It has also underscored the notion that the Palestinians (with the exception of those carrying EJ IDs) are 'protected persons' under the Fourth Geneva Convention.[11]

However, a closer examination indicates that when reviewing the actions of the Israeli authorities, the Court has not ensured the faithful application of the relevant provisions of the law of occupation.[12] One particular way in which this becomes evident, is the meaning that it has granted to important principle and rules of the law of belligerent occupation. One example is the Court's elaboration of what constitute legitimate considerations that can lawfully guide the actions of the MC under article 43 of the Hague Regulations. Here, the analysis of the case law indicates that the Court has consistently expanded the scope of legitimate considerations of the MC to include the security and wellbeing of Israeli citizens, both those residing in Israel proper and in the occupied territory. This in turn has allowed Israeli authorities to circumvent many of the restrictions on the scope of their powers that are spelled out by the rules and principles of the international law of belligerent occupation. It has also granted a stamp of judicial approval to a wide range of restrictions of the rights of the occupied population in a manner that calls into question the position by Israeli authorities that they are only driven by

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9 Chapter I.

10 Chapter II.

11 Chapter III.

12 Tristan Ferraro, "Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities" (2008) 41:1 Isr LR 331. For a list of the judgments analyzed see Annex III.: Table of HCJ Judgments (2000-2014) Analyzed per Normative Principle.

legitimate security concerns and are not intended to achieve political objectives.[13]

The concern about the extent to which security based policies were spearheaded by legitimate considerations under international law comes to the forefront when analyzing the categories of measures that had been mentioned at the onset. In the case of the construction of the Wall (analyzed in Chapter I) one objection that has been highlighted is that while it is perfectly legitimate for a state to take actions in defense of its own citizens, these measures must be implemented inside its own territory. Measures implemented for the security of its military forces in the occupied territory must also be implemented in a manner that conforms to other principles of international law such, as those of proportionality and military necessity.

Another important example relates to the manner in which the Court has expanded the notion of 'local population'. In this regard, and as Chapter II highlights, the judges have maintained that the Israeli settler population constitutes part of the 'local population' whose security and interests can be legitimately take into consideration under article 43 of the Hague Regulations. While a State has an undisputed duty to protect its own citizens, this cannot be invoked to alter the fundamental objective of IHL treaties or to take limitless action in the occupied territory. [14] Throughout the research, the findings underline how the relaxed meaning granted by the HCJ to the concept of 'local population' has bestowed legitimacy upon actions by the MC that have effected far-reaching and long term changes in the occupied territory, beyond what is permissible under that body of law, many for the primary benefit of the Israel settler population.

Even if one assumes that the law of belligerent occupation has not provided clear cut answers to some of the challenges arising from the long term nature of the Israeli occupation, the Court's interpretation of IHL relevant rules and principles has sought to fill any alleged gaps in that body of law in a manner that has favored the interests of the government authorities and their citizens, at the expense of the Palestinian occupied population. One particular example is

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[13] David Kretzmer, "The Law of Belligerent Occupation as a System of Control: Dressing up Exploitation in Respectable Garb" in Daniel Bar-Tal and Itzhak Schnell, eds, *The Impacts of Lasting Occupation: Lessons from Israeli Society* (New York: Oxford University Press, 2013) 31.

[14] Robin Geiss, "The Principle of Proportionality: Force Protection as a Military Advantage" (2012) 45 Isr LR 71 at 84.

that the Court has not questioned whether the objective of a given measure (construction of 'fabric of life' roads) genuinely advances the interests of the Palestinians.

A third example of how the Court's interpretation of certain notions has undermined the purpose of the law of belligerent occupation is its interpretation of the notion of 'protected persons'. Arguably, this is one of the core concepts of the Fourth Geneva Convention.[15] Chapter III sought to furnish examples from the case law where the Court has conceded that Palestinians with Bank IDs qualify as 'protected persons', only to exclude Palestinians with EJ IDs from that definition. By choosing to emphasize instead the status afforded to them under Israeli domestic law as 'permanent' residents of Jerusalem, the Court has denied EJ Palestinians some of the most fundamental rights that they are afforded under the Fourth Geneva Convention (particularly under articles 27 and 47). Although the Court seeks to regulate the impact that the security based measures has had on them, by enshrining the balancing of competing interests in a constitutional law framework (discussed in the next section) the research sought to explain how this frames the conflict of interest (which the judges seek to adjudicate) at best as a clash of interests between different social groups. It also does little to question the legality of the Israeli security based measures under international law. Such an approach not only distorts the interpretation of international legal principles, but also circumvents the possibility of establishing that serious violations of international law may have been committed by Israeli authorities.

The next section discusses the research findings in relation to the Court's efforts to balance between the competing rights and interests by invoking the proportionality analysis that is grounded in Israeli administrative and constitutional law.

2.2.2. The Balancing Exercise adopted by the Court

One element that has significantly influenced the Court's adjudicative efforts has been the manner in which the judges have balanced between the following rights and interests: those of Israeli military authorities and/or Israeli settlers on the one hand, and those of the Palestinian

[15] Article 4 of the *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949)*, 75:973 UNT 287 (entered into force 21 October 1950) [Fourth Geneva Convention].

inhabitants of the occupied territory on the other hand. In this regard, the research confirms that the manner in which the HCJ justices have made use of the proportionality doctrine and its three sub-tests, has played an incremental role in shaping the content and outcome of the judgments that were rendered.

In the case of the first group of judicial decisions relating to the legality of the construction of the Wall, the Seam Zone and the SSZs in the occupied West Bank (other than EJ), the Court has generally imported the proportionality doctrine from Israeli administrative law. This it deemed necessary, to guide its assessment of whether the MC's determination of the route of the Wall's different segments in the 'West Bank' (i.e. excluding EJ) was proportional in its impact on the lives of nearby Palestinian communities, and whether the requisition of land was lawful.

Concerning the second group of petitions relating to the legality of measures restricting the movement and access of Palestinians for the alleged sake of guaranteeing the security of Israeli settlers and settlements, the HCJ has sometimes evaluated the legality of the measures through Israeli administrative law. In other instances, it has affected a constitutional balance between the rights of the Palestinians and those of Israeli settlers. Here, it must be recalled that while the Court has explained that several rights which the Palestinian population enjoys, are constitutionally protected (such as freedom of movement), to date, it has refused to rule on the *de jure* applicability of the Basic Law: *Human Dignity and Liberty* to them.

In the third group of cases, relating to the legality of constructing the Wall in and around EJ, the Court has oscillated between grounding the proportionality based analysis in administrative law or in constitutional law, depending on whether the sections of the Wall examined, run inside the JMB or inside the 'West Bank', and whether the rights which may be infringed are rights of Palestinians with Jerusalem IDs or Palestinians with 'West Bank' IDs.

On a positive note the above emphasizes that similar to any domestic court, the HCJ has in its balancing exercise, sought to remain faithful to the values of its own domestic legal system, and to ensure that Israeli actions in the occupied West Bank fulfill certain minimal levels and aspects of the domestic RoL. In fact the Court's approach can be viewed as that of a sliding

scale: in constitutional balancing more substantive aspects of the domestic RoL are taken into consideration; in balancing that is grounded in administrative law, more procedural aspects of that RoL are considered by the Court. Given the great importance that Israeli authorities have traditionally attached to portraying their military rule in the occupied territory as one that adheres to fundamental notions of the domestic RoL in its formal aspect,[16] this is understandable.[17]

The findings also underscore how the proportionality analyses and its three sub-tests, has allowed the Court to uphold certain petitions filed by Palestinians, on the ground that certain measures have had a disproportionate impact, either under the second or third sub-tests, or both. Thus, by invoking the Israeli administrative or constitutional law-based definition of proportionality, the Court has been able to regulate some of the harsher impacts of certain government led policies on the Palestinians.[18]

A review of the grounds on which the analyzed judgments were either upheld or dismissed, confirms the important role that the proportionality analysis has played. From all of the judgments examined nine (9) petitions have been upheld by the Court. Out of those, seven (7) have been upheld because the challenged measure did not meet one or more of the proportionality sub-tests. This represents four (4) out of the five (5) petitions that were upheld in relation to the first normative framework (occupation is temporary).[19] The one other petition

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[16] I.e. it seeks to ensure that actions are guided by a legal formal rule in the form of a military order, a domestic statute etc.).

[17] *Amar-Shiff* Interview, *supra* note 2. According to Attorney Sfard, this is why it has invested a lot of energy "into making sure that they have legal formal backing for many of its policies and practices in the occupied territory. This explains why there are military orders regulating everything." He also opined that Israeli authorities are only fulfilling the requirement of the RoL in the sense that "the only thing that the government is allowed to do, is what is entrusted to it by law." See *Sfard* Second Interview, *supra* note 2.

[18] "The jurisprudence of the Supreme Court all these years may be seen as an exercise in judicial acrobatics, simultaneously regulating and legitimizing the occupation." Guy Harpaz and Yuval Shany,"The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law" (2010) 43 Isr LR 514 at 515.

[19] (HCJ 2056/04) [2004] *Beit Sourik Village Council v. Government of Israel*, (2005) 35 Isr LR 83 [*Beit Sourik*, Judgment]; the petition was upheld partially by the HCJ. See also (HCJ 7957/04) [2004] *Mara'abe et al v. Prime Minister of Israel* (2005) 2 Isr LR106 [*Mara'abe* Judgment]. The petition was upheld partially by the HCJ. See also (HCJ 8414/05) [2007] *Ahmed Issa Abdallah Yassin v. Government of Israel,* online: HCJ <http://elyon1.court.gov.il/files_eng/05/140/084/n25/05084140.n25.pdf>. (HCJ 2577/04) [2007] *Taha El Khawaja et al v. Prime Minister et al*, unofficial English translation by Avichay Sharon (2013), on file with author.

that was upheld on grounds other than proportionality, involved the Court making an *order nissi* (regarding the construction of a section of the Wall) permanent, because the government had failed to disclose information regarding the consideration of future building plans of a settlement in determining the route of the Wall in the area.[20] In the case of four (4) petitions upheld under the second normative framework (occupation is a form of 'trust'), three (3) were upheld on the ground of lack of proportionality.[21] Interestingly, the fourth one was upheld on the ground of a lack of authority and a lack of proportionality.[22] None of the petitions discussed in relation to the third normative framework (occupation does not bestow sovereignty) were upheld.

However, even if one readily assumes for a moment that the judges invoked the proportionality doctrine in order to improve the level of protections afforded to Palestinians under Israeli law, the research explains why such an approach is ill-suited to a situation of occupation. In this regard, it is no accident that the notion of the domestic RoL has often been highlighted as a feature of democratic systems of government (and vice versa). In other words, it is most effective in promoting the rights of citizens (i.e. Israeli citizens), as opposed to the Palestinians, whom the Court has denied a clear authoritative source for their rights under international or domestic law. In this regard, the research sought to demonstrate how embedding the conversation into a domestic legal framework, one that relies on the balancing exercise, is likely to render the rights or interests of the Palestinians as a secondary consideration when balanced against the rights afforded to the Israeli settlers, or against the security considerations of Israeli government and/or military authorities. In relation to this, the study has sought to provide examples of how the invocation of the three sub-tests has in

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[20] (HCJ 2732/05) [2006] *Abdel Al-Teif Hussein Head of Azzun Municipality Council et al v. Government of Israel*, unofficial English translation by Avichay Sharon (January 2013), on file with author [*Tzufin* Judgment].

[21] (HCJ 1748/ 06) [2006] *Mayor of Ad-Dhahiriya v. IDF Commander in West Bank.* (2006) 2 Isr LR 603; (HCJ 3969/06) [2009] *Dir Samit Village Council et al v. Military Commander*, unofficial English translation, online: H*amoked* <http://www.hamoked.org/files/2011/1294_eng.pdf> [*Dir Samit Village* Council Judgment]; (HCJ 9593/04) [2004] *Rashad Morar et al v. IDF Commander in Judaea and Samaria al*, (2006) 2 Isr LR 56 [*Morar* Judgment].

[22] (HCJ 2150/07) [2009] *Abu Safiyeh et al v. Minister of Defense et al* at para 39, unofficial English translation, online: *Hamoked* <http://www.hamoked.org/files/2011/8865_eng.pdf> [*Abu Safiyeh* Judgment].

effect, watered down the effectiveness of this exercise when adjudicating suited petitions by Palestinians from the oPt:

(1) The First sub-test ('rational means' test): When determining whether the means chosen by the administrative body rationally lead to the realization of the purpose, the judges have shied away from determining whether the connection between the means and the objective is also a fair one (i.e. suited to achieving the objective).[23] Moreover, they have not required Israeli authorities to demonstrate that the measures they have chosen to implement, do indeed promote the very core of the declared objective (i.e. security), as opposed to only certain peripheral aspects of it.[24] It is not difficult to see how the Court's approach has contributed to the 'unassailable' nature of the security based measures purported by authorities, thereby making it very difficult for petitioners to challenge them. Moreover, the ability of the first sub-test to provide benchmarks by which to judge the legality of a given security based measure, is further weakened by the fact that the judges rarely question the legitimate nature of the government's alleged security based objectives, or whether the security based measures seek to fulfill a legitimate purpose as prescribed by law. This in turn, also explains why the judges have rarely declared any security based measures to fall short of fulfilling the first proportionality sub-test.[25] Arguably, the approach by the Court has also confined the impact that resorting to the two subsequent sub-tests hopes to achieve, to that of scrutinizing the relationship between the means and the ends.[26]

(2) The Second sub-test ('least injurious means' test): One element that has undermined the

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[23] Mordechai Kemnitzer, "Constitutional Proportionality: (Appropriate Guidelines)," in Gideon Sapir, Daphne Barak-Erez and Aharon Barak, eds, *Israeli Constitutional Law in the Making* (Portland: Hart Publishing Ltd. Portland 2013) 225.

[24] To date, the view expressed in the Court's rulings is that it suffices that there is an appropriate degree of probability that the act which infringes on a protected right or interest makes a reasonable contribution to the attainment of the objective. However, there is no requirement for a definite contribution to the promotion of the entire goal. *Ibid*.

[25] The former represents the sub-test that touches most closely on the MC's determination that the measure was a legitimate response to the need of protecting Israeli nationals (either in Israel proper or in the occupied West Bank). See Aeyal Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?" (2007) 18:1 EJIL 1.

[26] Sujit Choudry, "Proportionality: Comparative Perspectives on Israeli Debates," in Gideon Sapir, Daphne Barak-Erez and Aharon Barak, eds, *Israeli Constitutional Law in the Making* (Portland: Hart Publishing Ltd. Portland 2013) 255.

usefulness of this sub-test, as resorted to by the Court, is the requirement that any alternative least harmful measure proposed by the petitioners must realize the declared objective in a manner that is exactly the same to that realized by the security based measure put in place by military authorities. By insisting that any less harmful measures must have an identical effect to that of the measure that is being challenged, the judges have weakened the second sub-test. They have also effectively narrowed the spectrum of measures proposed by the petitioners and their counsel that can be entertained as perfectly legitimate alternatives to those proposed by the government, and whether or not they are capable of achieving the declared security goal.[27]

(3) The Third sub-test ('proportionality in the narrow sense' test): This sub-test requires that the degree of the expected benefit from the measure that has been chosen by Israeli authorities exceeds the damage caused by the limitation to the rights. Arguably, this sub-test offers very little guidance on what this actually means, and hence, grants the Court's judges a broad discretion in determining the significance that should be accorded to the competing values.[28]

In the case of the proportionality analysis that is grounded in Israeli constitutional law, the research underscores that the following elements have undermined what this particular balancing approach could hope to achieve: (i) The first element, is that the Israeli basic laws, most notably the Basic Law: *Human Dignity and Liberty*, were deemed to apply *in personae* to Israeli settlers, but not to Palestinians living in the same territory (ii) The second element, is that when the constitutional right of Israeli settlers to 'safety of life' are balanced against the 'constitutional rights' of the Palestinians (such as freedom of movement), and given the nature of the values that are at stake, the Court's tendency has been to grant the right of the Israelis to physical safety and integrity a higher constitutional value than the rights of the Palestinians that are being restricted.[29]

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[27] Mordechai Kemnitzer, "Constitutional Proportionality," *supra* note 21.

[28] *Ibid.*

[29] By contrast "no one would dream of imposing any restriction, including the right to vote, on the Israeli settlers who live in the same occupied territory, outside their country's sovereign borders." Sarit Michaeli, "Transparent Ballot: No Vote for Palestinians in West Bank," *YNet* News (13 March, 2015). The author is a spokesperson for the Israeli human rights organization *B'Tselem*.

This approach places both the occupier and the occupied on a purportedly equal plane, in a manner that distorts the real imbalance of power between the two population groups, an imbalance that has been brought about by the situation of occupation. As the research has demonstrated, this is because the Court's proportionality analysis wipes out the exceptional nature of the occupation itself:[30] it ignores the political context in which the balancing takes place and puts the occupier and occupied on an equal footing in terms of the rights they are afforded. Implicitly, it also ignores that fact that the main source of the protection of the rights of the Palestinians is the law of belligerent occupation and IHR law. Consequently, the Court's approach, of grounding its adjudication in Israeli domestic law, coupled with its approach of refusing to rule on the *de jure* applicability of the basic laws, the Fourth Geneva Convention and major IHR law treaties, has ensured that the fundamental rights of the Palestinians have no clear domestic or international source for grounding positive obligations by the State towards them.

Even when the judges have upheld certain petitions on the basis that the challenged security based measure failed to fulfill one or more of the proportionality sub-tests, these instances still represent a relatively small number of petitions to have been upheld by the Court. One reason for this outcome is that the justices have traditionally accepted promises by the military or government authorities (some made in court) that they would be amending the security-based measures in question, so as to alleviate their otherwise disproportionate impact on the Palestinians' 'fabric of life' and rights. This has diminished the maneuvering space available to the petitioners to challenge the legality of those measures, even if only on the ground of the lack of proportionality. Nowhere was this clearer than in the case of petitions examined by the Court with regards to the Wall in the Jerusalem area (in relation to the third normative framework). This sheds light on how the proportionality analysis, if adopted by the Court only after the legitimacy of the action of the executive is presumed, has sometimes created an

[30] Martti Koskenniemi, "Occupied Zone - 'A Zone of Reasonableness'?" (October 2008) 12:8 Isr LR 13. This is because, "if it's for the Military Commander to balance these interests, then it might as well be the sovereign in the territory," *ibid* at 36.

additional barrier to any efforts of vindicating the individual rights of the petitioners.[31]

Furthermore, the judges have often adopted a compartmentalized approach. For example, they have preferred to review the legality of the Wall in a section-by-section approach; to analyze the impact of movement restrictions for Palestinians in a checkpoints-by-checkpoint fashion, and to examine the consequences of the Wall in Jerusalem for access by Palestinian East Jerusalemites on a gate-by-gate basis. One major consequence has been that the judges' role has been confined to that of regulating the impact of the occupation and its multi-faceted security-based measures, and of fine-tuning the procedural aspects of the functioning of the Israeli military in the occupied territory. It does little however to allow judicial review to act as a safety valve, one that would ensure that the measures implemented by government and military authorities are not unlawful under international law. It has also effectively limited the scope of what Palestinian petitioners and their attorneys can realistically hope to achieve, either in terms of demanding restitution, or in requesting that the challenged measure be discontinued altogether.[32] At best, the Court's adjudication has provided individual petitioners with relief, most notably in the form of compensation or in demanding slight amendments to the manner in which the policy is implemented on the ground.

The end result is this: rather than upholding the substantive rights of the Palestinians as afforded by international law, the Court's approach has, despite certain inconsistencies,[33] at best promoted some aspects of the formal and substantive domestic RoL. By contrast, the Court has enjoyed limited success in upholding and promoting the international RoL.

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[31] Iain Scobbie, "'The Last Refuge of the Tyrant?' Judicial Deference to Executive Actions in Time of Terror" in Andrea Bianchi and Alexis Keller, eds, *Counterterrorism: Democracy's Challenge*, (Portland: Hart Publishing, Portland, 2008) 277.

[32] The duty of restitution and of reparation was underscored by the International Court of Justice in its Wall Advisory Opinion. Since the Court determined that the construction of the Wall by Israel is contrary to international law, it found that "Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith al1 legislative and regulatory acts relating thereto." See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 at paras 163, 3(B) [ICJ *Wall* Advisory Opinion].

[33] Nevertheless, the Court in some cases has paid less attention to ensuring that measures implemented by Israeli government and military authorities fulfill substantive aspects of the RoL. Examples include Israel's declaration of 'state land' in the West Bank; the imposition of the 'permit regime' in the Seam Zone, and the creation of a dual legal regime in the occupied territories: one that applies to Israeli settlers and one to the Palestinians.

2.2.3. The Margin of Appreciation afforded to the Executive Branch

One other element that has significantly influenced the outcome of the HCJ's adjudication is the Court's position regarding the security-based assessment of government authorities. Since measures highlighted here were ostensibly taken for security reasons, like other domestic courts, the HCJ has tended to accept at face value the security-based justifications and assessments provided by government authorities. In this regard, the research findings underscore two observations: The first is in relation to what constitutes a legitimate security threat or consideration of the MC. Given that the justices would only question these justifications when evidence (presented in court) suggested beyond a reasonable doubt that political considerations and not security were at play, judges have generally upheld the good faith nature of those arguments. Other factors making the task of petitioners and their counsel an almost impossible task, is that when they sought to bolster their position by resorting to the security-based assessment of former Israeli military officers, as a way of challenging the security based assessment of the formal Israeli military establishment, the Court has usually deferred to the opinion of the latter. This only confirms why "the chance of getting remedy [in those cases] is a chance of a miracle."[34] It also underscores what was previously mentioned, namely the difficulty of challenging the security based measure on the ground that it does not fulfill the first proportionality sub-test.

The tendency described above has also impacted the Court's point of departure in other ways. For example, it explains why the justices have not challenged the view held by government authorities that the situation in the West Bank is that of 'an armed conflict short of war'. The position has not been challenged, even though the level of hostilities/security threat emanating from the occupied territories has ebbed and flowed throughout the years. Not questioning that assumption, indicates that the Court has internalized the idea that the security threat is intense and ongoing, and that the IHL rules governing the conduct of hostilities also apply. Although none of these rules have been directly invoked by the Court in the petitions examined here, this qualification of the conflict has been underscored by the Court when outlining the relevant

[34] Interview of Israeli Attorney Michael Sfard, by author via skype, (21 October 2014, Tel Aviv) [*Sfard* Second Interview].

legal framework, most notably in relation to the Wall's construction in the West Bank. It also explains why the Court has not challenged the position of military authorities that the security based measures are necessary from a 'military point of view'. Given that the country considers itself 'at war'; this makes any efforts by the domestic court to be more of an 'activist' court on issues of human rights and security more challenging.

The margin of appreciation afforded to the executive branch, also explains to a great extent, the manner in which the Court has approached the MC's considerations under article 43 of the Hague Regulations. In the majority of cases, the justices have not questioned the notion that the policies implemented by military authorities were necessary responses to genuine security concerns or that they were taken for security reasons or for the benefit of the 'local population' even when strong indications to the contrary where present, .

2.2.4. Other Grounds/Techniques of Judicial Interpretation Invoked by the HCJ

One of the findings of the study is that the HCJ has conveniently invoked legal doctrines to evade formulating a position regarding fundamental principles of international law. A particularly noteworthy example is the Court's invocation of the non-justiciability of the issue of settlements. To date, the Court has avoided the need to consider the legality of Israel's settlement policy by stipulating that it amounts to a political question that is non-justiciable.[35] While lawyers interviewed for this research agree that the institutional constraints facing the HCJ cannot be taken lightly, [36] the majority have underscored that the Court could have done more in terms of underlining the prohibition of settlement activity under international law,[37]

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[35] As one scholar, "[f]or obvious reasons, a decision on the legality of the settlements would have put the Israeli Supreme Court in an extremely difficult situation. Acknowledging the legality of the settlements does not seem to satisfy the relevant provisions of international law. At the same time, denying their legality would invite confrontation with the Israeli government as well as with significant segments of the Israeli polity." See Daphne Barak-Erez,"Israel: The Security Barrier-Between International Law, Constitutional Law and Domestic Judicial Review" (July, 2006) 4:3 Int J Constitutional Law 540 at 548.

[36] "After all, the HCJ is part of the Israeli political system and of the State and does not have the political power to provide more than that." *Sfard* First Interview, *supra* note 2.

[37] *Amar-Shiff* Interview, supra note 2. Given the near unanimous position that this provision reflects customary international law, the Court could have done so on its own accord, without having to urge *Knesset* to issue an implementing legislation. *Attorney A-04* Interview, *supra* note 4.

particularly during the early years of the occupation.[38] Moreover, they regret that the Court has forfeited an important opportunity "to maintain the relevance of IHL on this issue."[39]

It is widely accepted that the principle of military necessity cannot be invoked to put aside any rule of IHL, unless these rules expressly refer to the circumstances that preclude wrongfulness.[40] The rule pertaining to the prohibition on the transfer by the Occupying Power of its own civilian population into the occupied territory does not offer any exemptions. Hence, it remains doubtful how actions such as the requisitioning of land for the construction of the Wall, or the establishment of the SSZs, the purpose of which includes the protection of Israeli settlers in the West Bank, can be justified as complying with the requirements of this principle.

By ignoring the legality of the settlements and focusing on the notion that the MC is responsible for the security of settlers (under article 43 of the Hague Regulations), the Court conveniently changed the departing point for its own analysis. Had the Court upheld first and foremost that this transfer is a violation of international law it could have potentially concluded that all the legislative and administrative actions implemented by military and government authorities towards maintaining this transfer would also be unlawful. One area where this could have had significant repercussions is in the Court's judicial interpretation of what is lawfully permitted as a response by the MC to the security needs of the Israeli settlers in the occupied territory. Instead of authorizing more security-based measures to protect them inside the West Bank, the HCJ would find it necessary to order the MC to remove them (as a

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[38] According to Attorney Shehadeh, had the Court adopted a firm stance regarding the prohibition on settlement activity in the early days of the occupation, when the Israeli public was less favorable to the settlement enterprise, it "would have really saved the country." However, he also acknowledges that "then the government might not have listened to it, and it would have been ineffective, and I think the Court [judges] argue often, maybe not in decisions but when they are lecturing when they retire, that in order to be effective, the Court has to be attentive to what is possible and feasible and doable and to reflect sort of the will of the people. But is this a way a Court should function? I think not. It does not absolve the Court from its responsibility to apply international law in a manner that does not undermine the very principles on which it rests." *Shehadeh* Interview, *supra* note 5.

[39] Attorney *Sfard*, Second Interview, *supra* note 34. Had the Court taken a different position, "this would have a dramatic effect. There is no doubt that the HCJ enjoys a unique status and its word is determinative in the sense that the state cannot simply ignore the court." Interview with Attorney Nasrat Dakwar by Avichay Sharon, translated into English (7 July 2014, Jerusalem) [*Dakwar* Interview].

[40] Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Cheltenham: Edward Elgar Publishing 2014).

security response). Similarily, the Court would have found it difficult to refrain from questioning the *de facto* operation of two separate and unequal legal regimes in the occupied territory: one for settlers and one for Palestinians, or the unequal access of these two population groups to resources and infrastructure, on the ground that this is necessary for imperative security reasons.

Another example is the manner in which the Court addressed the status of EJ, the annexation of which is illegal under international law. In this regard, the Court has implicitly relied on the common law doctrine that when there is a clash between a domestic legislation and provisions of customary law, the former prevails. This has consolidated domestic legitimacy of the annexation of EJ. Although the reasons offered by the Court for not challenging this annexation may be perfectly sound from a legal domestic' perspective, it confirms that the HCJ is not the best venue for challenging the government's actions that have been implemented in violation of customary international law. The end result is that the occupied population has little chances of achieving effective remedy for violations of their fundamental rights through the High Court or activating the scope of protection that is afforded to them as 'protected persons'.

This has created an additional barrier to the vindication of the individual rights of the Palestinians,[41] and has granted Israeli authorities the formal tools to legalize its control over the parts of the territory that they have *de jure* annexed.[42] This confirms that although the political question doctrine allows judges to avoid the greater evil of misapplying the law,[43] it remains doubtful whether invoking the political question doctrine is the lesser of two evils in this particular situation.

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[41] Iain Scobbie, "'The Last Refuge of the Tyrant?," *supra* note 29.

[42] Gad Barzilai, "Between the Rule of Law and the Laws of the Ruler: The Supreme Court in Israeli Legal Culture" (June 1997) 49: 152 Int'l Soc Sci J 193. See also David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002).

[43] Eyal Benvenisti, "Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on The Activities of National Courts and the International Relations of their State," (1994) 5 EJIL 423.

2.3. The Success Rate of the Petitions

In terms of the success rate of the petitions that were reviewed for purpose of this research, of the total number of petitions filed by Palestinians that have been analyzed (40 petitions) the Court has rejected/dismissed a total of 31, i.e. an estimated 77.5 % of all petitions. The statistics vary significantly from one category of security based measure to the other. The research had highlighted that each category of security based measures raised concerns that they were undermining one specific normative principle of the law of belligerent occupation (more than the remaining two). Hence, the following section seeks to highlight the main findings with regard to the impact of the HCJ's adjudication for these normative principles.

3. The Impact the HCJ's adjudication has had for the Three Normative Principles of the Law of Belligerent Occupation

If the success rate of the success of petitions is viewed per normative principle, the findings are equally informative. In the case of petitions discussed in relation to the legality of the Wall inside the West Bank (with the exception of EJ), the Seam Zone and the SSZs and their implications for the first normative principle (that occupation is temporary), from the 19 judicial decisions that have been analyzed, the Court has upheld the petitions only in five (5) cases and dismissed the remaining 14. This means that only an estimated 26 % of the petitions discussed here were upheld.

In the case of petitions challenging the legality of security-based measures, most notably movement restrictions, or land requisition orders, implemented for the alleged purpose of protecting Israeli settlers in the West Bank and the implications for the second normative framework (that occupation is a form of 'trust'), from a total of nine (9) judicial decisions examined, the Court upheld the petition only in four cases, while the remaining five (5) were dismissed. This represents a 44.4 % success rate for petitioners and their counsels. At the same time, it is important to point out that this percentage represents the highest success rate of petitions filed against security-based measures. Where this was possible, it was because the petitioners were able to demonstrate that these measures were sweeping in their restriction on the movement of Palestinians (ex: complete travel ban on Palestinians on some roads).

Consequently, it was possible to convince the Court that those measures cannot be justified in the name of security, and that their impact on the rights of the Palestinians is disproportionate.

As for petitions challenging the legality of the construction of the Wall in and around Jerusalem and its implication for the third normative framework (that occupation does not bestow sovereignty), the research underscores that the HCJ has not upheld any of the 12 petitions (0 % success rate). This suggests a disturbing conclusion: that the adjudication by the HCJ of petitions challenging security-based measures in occupied territory that had been *de jure* annexed by the occupant, has very slim chances of providing effective remedy to the occupied civilian population

These figures confirm what the analysis has sought to highlight throughout the research, namely that when adjudicating the legality of security based measures involving settlements and settlers, the Court has undermined all three principles of the international law of belligerent occupation.[44] It has blurred the divide (that exists in international law) between occupation and sovereignty and has allowed the prevalence of a hierarchy of rights that is institutionalized and legalized based on national origin and geographic location.[45] This has been largely the result of the Court's refusal to question the legality (under international law) of Israeli measures that have consolidated (a) the *de jure* annexation of EJ; (b) the *de facto* control of other parts of the West Bank (most notably the Seam Zone); (c) the extension of *in personae* jurisdiction by Israel over more than half a million Israeli settlers in the occupied territory and (d) the implementation of policies, the majority under the pretext of security, that have brought about long-term changes that alter the physical and legal status of the occupied territory in a manner that is contrary to the interests of the occupied population.

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[44] "Evidence beyond reasonable doubt that its policies and actions violate all three pillars, especially when it comes to the colonization of the West Bank: all aim at creating permanent, not temporary domination, breach fundamental pillars/rules of usufruct and advances step by step to narrow the gap between an occupier and a sovereign. The main thing that creates all of this is the settlements. Not only having your own nationals/community [but also] imposing your own laws and creating settlements that by definition are not temporary. The demographic change and the immense way in which the territory is changed (handled and built) and [the] refusal to advance to an end of the occupation shows all pillars are under attack." *Sfard* First Interview, *supra* note 2.

[45] Oren Yiftachel, "Neither Two States nor One: The Disengagement and "Creeping Apartheid" in Israel/Palestine" (2005) 8:3 The Arab World Geographer 125.

Implicitly, the findings also underscore how the weak performance by the Court on upholding the substantive aspects of the international RoL, inevitably raises serious questions as for the state of the domestic RoL in the occupied territory: for it is difficult to comprehend how the existence of two separate and unequal legal systems applying in relation to populations which live in one and the same territory (the occupied territory) can be reconciled with the former notion. According to Kretzmer, this state of affairs may be the result of the Court's attempts to embark on reconciling aspects of a "schizophrenic legal system."[46] Since the legal system that applies in Israel is liberal in character, one in which the substantive aspects of the RoL and democratic values are strong, the Court has sought to extend this system to the citizens of the State in the West Bank (the Israeli settlers) as a way of effectively shielding them from the hardship of living under a military government. By contrast, the occupied Palestinians of the West Bank continue to be controlled by the government through a legal regime that has no connection to democratic values (nor was it meant to), and is a regime that was meant to be of a temporary, rather than indefinite nature.[47]

The Court has sought to reconcile these two aspects whilst simultaneously refraining from challenging many tenants of the Israeli official position regarding both the applicability and interpretation of relevant treaties of international law. The end result is that it has weakened the ability of the law of belligerent occupation to properly perform its functions. The point of departure of the current study is that the ability of the rules and principles to remain faithful to their purpose is if judicial review keeps the normative framework intact. This, it has been argued, is because they reflect the careful equilibrium between competing values such as military necessity and humanity on which this body of law is based.

The Court has not succeeded at this. In fact, one can conclude that the HCJ's interpretation has distorted the logic on which the law of belligerent occupation is built, namely that the occupant is not entitled to benefit from its occupation. It is also contended here that the Court's approach, both in terms of not challenging the legality of those measures, and of focusing its efforts on regulating the impact of the measures on the micro-level but not on the

[46] David Kretzmer, "The Law of Belligerent Occupation as a System of Control," *supra* note 13 at 52.
[47] *Ibid.*

macro-level has compromised the Palestinians' access and use of the land on which they are entitled to exercise their internationally recognized right to self-determination. At the very least, the Court's approach has helped to promote the legal in-determinacy that is characterizing the actions of Israeli military and government authorities in the occupied territory. It also has contributed to the maintenance of the conditions upon which the legal dominance over the Palestinians and the indefinite control over the occupied territory depends.

In the meantime, instead of choosing to end the occupation or to *de jure* annex the whole of the occupied West Bank, Israeli authorities have maintained the *status* quo. This has provided them with a convenient opportunity to reap all the benefits that come from the 'indeterminate' nature of this occupation:

> Israel acts in the territory as a sovereign insofar as it settles its citizens there and extends to them its laws on a personal and on a mixed personal/territorial bases, yet insofar as the territory has not been formally annexed and insofar as this exercise of sovereignty falls short of giving the Palestinian residents citizenship rights, Israel is not acting as a sovereign. In this manner, Israel enjoys both the powers of an occupant and of a sovereign in the [occupied Palestinian territory] oPt, while Palestinians enjoy neither the rights of an occupied people nor the rights of citizenship. This indeterminacy allows Israel to avoid accountability in the international community for having illegally annexed the territories, while pursuing the policies of "greater Israel" in the West Bank without jeopardizing its Jewish majority.[48]

In other words, Israeli authorities have over the years forged a dichotomy between the legal status of the territory, which for all practical purposes is not regarded by those authorities as occupied, and between the status of its Palestinian residents, who continue to be subject to the rules of a military occupation. Within this context, the concern is that the law of belligerent occupation has been used by Israeli authorities, not so much to restrict the conduct of the occupying power, but to justify serious infringements on those right, and to provide "[...] a convenient legal system of control over a population that has no political rights in the state that controls them."[49] Of equal concern, is the role that the Court has played in maintaining this legal indeterminacy, and the 'indefinite' legal limbo faced by the Palestinians.

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[48] Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley J Int'l L 551 at 610-611.

[49] David Kretzmer, "The Law of Belligerent Occupation as a System of Control," *supra* note 13.

4. Suggestion for Further Research

One could argue that the state of affairs described above is a natural and logical outcome of the fact that the HCJ is the domestic court of the occupying power itself. Consequently, the Court's interpretation of security-based measures, similar to that of any domestic court, remains heavily (and perhaps understandably so) influenced by the Court's concern for maintaining its independence, including apprehension over its standing and credibility amongst the Israeli general public.

However, regardless of whether or not this is the case, one question that forces itself is whether these developments require us to re-think the legal-ramifications of both ongoing settlement activities and domestic judicial review by the HCJ for the law of belligerent occupation.[50] If the situation is recognized as one that has undermined all three normative principles of this body of law, the question that begets asking is whether this has not in fact turned Israel's control of the West Bank into a situation that can no longer be qualified as an occupation as defined under by that body of law.

In addition, there is a need to determine whether the prolonged nature of the occupation has consequences for the extent to which IHL should remain the *lex specialis*, through which the legality of the actions of the MC is determined, and the extent to which IHR law should or should not be invoked,[51] as a way of providing the civilian population with the protection that they are afforded under international law.

To better embark on such a determination, it is argued here that several elements need to be examined and which to date, have not been sufficiently addressed in the scholarly literature. The first one is to determine what elements would allow for qualifying Israeli measures as

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[50] Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation," *supra* note 48; John Dugard and John Reynolds, "Apartheid, International Law and the Occupied Palestinian Territory" (2013) 24:3 EJIL 867.

[51] This is because IHL allows the occupying power to have a very large measure of authority, especially regarding its own security and the maintenance of public order. Thus, while this may be acceptable in times of war, it is doubtful whether or not this can be acceptable 'indefinitely' in situations where an end to the occupation is not in sight. See Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967" (January 1990) 84:1 AJIL 44 at 96-97. Orna Ben-Naftali and Keren Michaeli, "'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Policy of Targeted Killings" (2003) 36 Cornell Int'l LJ 233.

leading to a situation of *de facto* annexation. While this terminology has turned into a common feature of the human rights discourse,[52] and the legal analysis regarding Israel and the oPt, it has not benefited from an in-depth definition by authoritative bodies such as the ICJ.[53] Hence, it is proposed here that steps should be taken to advance the discussion on what developments and benchmarks allow a situation to qualify, legally speaking, as *de facto* annexation.

Similarly, the academic and civil society discourse has in the past suggested that Israeli alleged policies of discrimination and unequal treatment (in the law) of Israeli settlers and Palestinians in the oPt amount to the crime of apartheid.[54] Hence, a second area that could benefit from more research is whether or not the construction of settlements and their associated policies do indeed fulfill the legal requirements/criteria that would establish the perpetration of this crime,[55] and what consequences, if any, this has for the qualification of Israel's control over the West Bank and any responsibility that arises from alleged violations of international law.

Thirdly, while this research did not focus on the Court's adjudication of 'unauthorized outposts', further research could compare the findings of the present study to the manner in which the HCJ has adjudicated petitions challenging the legality of these outposts. A preliminary review of the most important HCJ decisions rendered with regards to them, points out that a number of favorable decisions have been handed down by the Court since 2000. It

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[52] For examples, see the Israeli Committee against House Demolitions (ICAHD) "Annexation (De Facto)-Israeli Settlements and Settlement Blocs," online: ICAHD http://icahd.org/get-the-facts/matrix-control/annexation-de-facto-israeli-settlements-and-settlement-blocs/>.

[53] The ICJ alluded to *de facto* annexation when discussing the implications that the construction of the Wall and its associated regime had in the oPt, noting that they may "create a "fait accompli" on the ground that could well become permanent." ICJ *Wall* Advisory Opinion, *supra* note 30 at para 121. However it did not elaborate any further.

[54] Virginia Tilley (ed) "Occupation, Colonialism, Apartheid?: A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law," Human Sciences Research Council of South Africa, (Cape Town: 2009), online: *Al-Haq* <http://www.alhaq.org/attachments/article/236/Occupation_Colonialism_Apartheid-FullStudy.pdf.>. See also Russell Tribunal on Palestine: "Findings of the Final Session of the Russell Tribunal on Palestine," Brussels (16-17 March 2013), online: Russell Tribunal on Palestine <http://www.russelltribunalonpalestine.com/en/full-findings-of-the-final-session-en>.

[55] For a discussion, see also Paul Eden, "The Practice of Apartheid as a War Crime: A Critical Analysis" (December 2013) 16 YB Int'l Human L 89.

also indicates that the Court has not shied away from upholding the illegality of those outposts, or from ordering government authorities in several cases to evacuate them.[56]

Arguably, it is precisely because the construction of these outposts violates first and foremost Israeli administrative laws,[57] planning regulations and requirements, or Israeli protected constitutional rights (ex: Palestinian right to private property)[58] that the Court has felt more empowered to rule in favor of the petitioners. Another reason which potentially explains the Court's more robust approach towards government authorities, is that there is no security dimension to petitions that have challenged those outposts, and that they are deemed to revolve around a purely 'domestic' issue (ex: does it fulfill Israeli planning requirements). This can also be ascertained from the fact that the HCJ judgments are strongly grounded in 'domestic' law and do not make references to international law.

Hence, further research could explore the differences and similarities that exist in the Court's approach. Examining the HCJ's role on the subject of 'unauthorized outposts' is pertinent, given the more recent efforts by Israeli government authorities to stall on the evacuation of outposts and to adopt (tacitly) the recommendations by the Levy Commission[59] of taking steps

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[56] (HCJ 6357/05) [2006] *Peace Now v. Minister of Defense*, unofficial English translation by Avichay Sharon, (July, 2014), on file with author; (HCJ 8815/10) [2011] *Attalah Ibrahim Bisharat et al v. Settlement Sub-Committee at the High Planning Council et al*, unofficial English translation by Avichay Sharon (August, 2014), on file with author; (HCJ 9051/05) [2014] *Peace Now et al v. Minister of Defense et al*, unofficial English Translation by Avichay Sharon (August, 2014), on file with author); (HCJ 9060/08) [2011] *Abdel Ghani Khaled et al v. Minister of Defense et al*, unofficial English translation by Avichay Sharon (August, 2014), on file with author.

[57] Ministry of Foreign Affairs (MoFA), "Summary of the Opinion concerning Unauthorized Outposts-Talya Sasson Adv.," (10 March, 2005), online: MoFA <http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/summary%20of%20opinion%20concerning%20unauthorized%20outposts%20-%20talya%20sason%20adv.aspx>.

[58] In one of its most renown judicial decisions, concerning a petition submitted against the requisitioning of Palestinian privately owned land for the purpose of constructing the Israeli settlement of *Elon Moreh*, the HCJ ruled that such requisitioning (a procedure which the government up and till then had used for the establishment of civilian settlements) could only be considered lawful if the establishment of that settlement did not serve a clear security interest. (HCJ 390/79) [1979] '*Azat Muhammad Mustafa Dweikat et al v. Government of Israel et al.* For an overview of the case, see *B'Tselem*, "Seizure for Military Needs and the Elon Moreh Ruling" (13 March, 2013), online: *B'Tselem* <http://www.btselem.org/settlements/seizure_of_land_for_military_purposes>.

[59] Although the recommendations of this Commission have to date not been adopted, some of them are being implemented. See Volunteers for Human Rights (*Yesh Din*), "From Occupation to Annexation: The Silent Adoption of the Levy Repot on Retro-Active Authorization of Illegal Construction in the West Bank," Position Paper (February 2016), online: <https://s3-eu-west-1.amazonaws.com/files.yesh-

to retroactively legalize all construction of these outposts,[60] including those built on Palestinian privately owned land.[61] These developments indicate that the next legal battle will be with regards to 'unauthorized outposts' and that the Court will once again (willingly or unwillingly) find itself occupying center stage.

5. Final Remarks

The current research findings have highlighted why the decision to petition HCJ, have posed moral dilemmas for human rights lawyers and members of Palestinian civil society. As Attorney Sfard explained, this is because going to court and 'winning a case' might make:

> It possible for the farmers to pass through the military fences, securing their livelihood but enabling the racial-separation system to operate neatly [...] to boycott the occupier's court and justice, [would result in] barring the legitimization of what the petitioners and their lawyer believe to be a blatant abuse of human rights and dignity? The price of the former option is that of legitimating ethnic discrimination, whereas the later bars the possibility of easing human suffering [...] The two contradicting roles of the Court in shaping the occupation [...] strengthening military power on the one hand and creating self-restraint among officials, on the other hand, are the products of legal cases ending in military victory or in petitioner success. The human rights lawyer asks for more restraint, the military - for more power. In some sense, the two pull in contradicting directions. In other senses, they both contribute to the *workability* of the Israeli domination and thus to the *durability* of the occupation.[62]

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din.org/%D7%9E%D7%9B%D7%99%D7%91%D7%95%D7%A9+%D7%9C%D7%A1%D7%99%D7%A4%D7%95%D7%97/From+Occupation+to+Annexation+English+Yesh+Din.pdf>.

[60] For example, it recommended that legislation should be amended to allow Israelis to purchase land in the occupied West Bank directly, and that if construction takes place within the bounds of an existing or future settlement, it should not require government or ministerial decision. It also recommended the creation of special courts to adjudicate land disputes in the West Bank. See Article 1(b) of the "The Levy Commission, "Report on the Legal Status of Building in Judea and Samaria" Conclusions and Recommendations, Jerusalem 9 July 2012" (Autumn 2012) 42: 1 J Palest. Stud 179 at 180. In 2012, Israeli government authorities announced that they seek to 'retroactively' legalize some of those outposts. See *Peace Now*. "The Government Announces the Intention to Legalize Outposts" (October, 2011), online: *Peace Now* <http://peacenow.org.il/eng/OutpostsAprovals>.

[61] According to a study by the Israeli right wing organization *Regavim,* an estimated 2,026 structures in the 'West Bank' have been built on Palestinian privately owned land. The *Knesset* is deliberating whether to pass legislation aimed at expropriating privately owned land from Palestinians in exchange for reparations. See Chaim Levinson, "2,026 Settlement Homes Built on Private Palestinian land, Right Wing Study Finds," *Haatetz* (3 May, 2015).

[62] Michael Sfard, `The Human Rights Lawyer`s Existential Dilemma`, (2005) 3:3 Isr LR 154 at 67.

In describing a second disadvantage, one other Israeli lawyer noted that even though the litigation cannot stop settlement activity, judicial access also allows one to pay "lip service to Israeli human rights and democracy."[63] A third explained that "when sometimes you win, it [also] gives the appearance of a fair trial and a fair judicial review."[64]

Asked whether the disadvantages outweigh the advantages to such an extent that requires Palestinians to stop litigating in front of the HCJ, many of the lawyers interviewed expressed the opinion that the decision must ultimately be taken by the Palestinians themselves at the national level.[65]

In the meantime, it has often been pointed out that the extensive government sponsored settlement activity in the occupied West Bank,[66] is eliminating the opportunity to bring an end to the Israeli-Palestinian conflict, based on the internationally endorsed two state formula.[67]

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[63] *Amar-Shiff* Interview, *supra* note 2.

[64] Attorney *A-04* Interview, *supra* note 4.

[65] "It is up to us, litigating in front of the court to understand and to evaluate the advantages and to make a considered decision when it would be wise or not and basically the decision must be of the Palestinians" Interview Attorney *A-04*, *ibid*. Another lawyer stated that the decision of whether to go to Court or not, should be made very carefully and on a case-by-case basis: Petitioning the Court must be conducted on issues of principles. Where the upholiding of a government policy by the Court is likely to have wider negative consequences for the Palestinians, it should be avoided as much as possible. Cases where some benefits might be reaped for individual petitioners are a better option. "The One who decides this is the Palestinian who comes to us. If he thinks that appealing the High Court could save his house (and give his children a roof over their heads) for one extra year, and since no one is going to help him if his house is demolished, neither Israel, you, I or the Palestinian Authority [PA] can make take this decision on his behalf." Interview with Palestinian-Israeli Attorney *Quamar Mishriqi* by Avichay Sharon on behalf of author (26 June, 2014, Jerusalem) [*Mishriqi* Interview].

[66] According to data by the Israeli Central Bureau of Statistics, the number of housing starts in 'West Bank' settlements more than doubled in 2013, thereby representing a ten year high. An estimated 64 % of the housing consists of public housing units, which reflects the significant efforts by the Israeli government to build in the West Bank. Chaim Levinson, "Settlement Construction more than Doubled in 2013," *Haaretz* (3 March 2014).

[67] According to a recent poll conducted by a Palestinian research center amongst Palestinians of the West Bank and Gaza Strip "[o]nly 48 % support and 51 % oppose the two-state solution. Three months ago [a poll had revealed that] 51 % supported and 48 % opposed this solution." 65 % believes that the two-state solution is no longer practical because of settlement expansion while 32 % say it is still practical. See Palestinian Center for Policy Survey and Research (PSR), "Palestinian Public Opinion Poll No. 57," Press Release (21 September, 2015), online: PSR <http://www.pcpsr.org/en/node/619>. In 2013, a significant percentage (30 %) expressed support in 2013 for a one state-solution. See Aaron Kalman, "Survey: Most Israelis, Palestinians Support Two States," *Times of Israel* (3 July 2013). For a view that the settlements have not undermined the 'two state solution' see Colonel (Res.), Shaul Arieli, "Why Settlements have not killed the Two State Solution," Expert Opinion (January 2013), online: Britain Israel Communications and Research Center <http://static.bicom.org.uk/wp-content/uploads/2013/01/121207-Arieli-Settlements-VIII.pdf>.

However, it is argued here that this depiction does not reflect the full picture because it does not take into account that:

> The Israeli decision maker – from left or right – is actually faced with three options: Annexing the West Bank; withdrawing from it, or maintaining the current situation (military occupation under which a privileged Jewish population is living alongside a Palestinian majority with no civil rights). Within this framework, and especially right now, maintaining the status quo is probably the most rational option for Israelis.[68]

Given the unlikelihood that the Israeli settlement policy will end anytime soon, a number of ongoing developments are likely to have implications for any efforts by Palestinians or by the international and human rights community to establish accountability for violations resulting from this ongoing policy. One of those developments is the decision in January 2015 by the Prosecutor of the International Criminal Court (ICC) to conduct preliminary investigations into the situation of Palestine.[69] In this regard, it has also been argued that the litigation of settlement related policies and measures in front of the HCJ has served a significant (and much welcomed) purpose: that of highlighting the limits of what can be achieved through the jurisprudence of this domestic Court and that "there is an absence of a judicial remedy to what is clearly an international wrong."[70]

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[68] Noam Sheizaf, "One or Two States? The Status Quo is Israel's Rational Choice" (25 March, 2015), online: *+972 Magazine* <http://972mag.com/one-or-two-states-the-status-quo-is-israels-rational-third-choice/39169>.

[69] This follows the Government of Palestine's accession to the Rome Statute on 2 January 2015 and the declaration it had lodged under article 12(3) of the Rome Statute in which it accepted the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014." However, a preliminary examination is not an investigation but a process by which the Court considers available information regarding a given situation to determine on whether there is a reasonable basis to proceed. It is a matter of policy and practice for the Office of the Prosecutor to conduct such examinations. International Criminal Court (ICC), "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine," Press Release (16 January 2015), online: ICC <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx>. See also Aeyal Gross, "ICC Prosecutor: Low Ranking Israeli Soldiers, as well as Palestinians could be Prosecuted for War Crimes," *Haaretz* (1 May, 2015). See also Alain Pellet, "Pour le cour pénale internationale, quand même! quelques remarques sur sa compétence et sa saisine," 5 L'Observateur des Nations Unies (Automne-Hiver, 1998) 143.

[70] "The principle of complementarity has to be addressed [...] so it is useful to litigate for that purpose but not to litigate on the assumption that the Court can somehow be made to do more than it can or is willing to do." Interview with Charles Shamas with author via skype (21 November 2014, Ramallah) [*Shamas* Interview]. "Eventually the research will establish that the HCJ is not the most appropriate forum to exhaust local remedies...we can build international cases for the ICC. All these research which would not be done without the local litigation. But we don't see it (the Israelis) but the Palestinians see it and so support going to Israeli courts to support exhausting local remedies and shame the court eventually." *Amar-Shiff* Interview, *supra*

The second development is the recent decision by the UN Human Rights Council to flesh out the implications of the *Guiding Principles on Business and Human Rights* in the context of Israel settlements.[71] This was followed in March 2016 by the passing of a resolution requesting the UN Office of the High Commissioner for Human Rights to draw up a list of all Israeli and international firms operating directly or indirectly in the West Bank (including EJ).[72] This follows an earlier decision by the European Commission (EC) to adopt guidelines requiring products from Israeli settlements that are imported by the 28 member States of the European Union (EU) to clearly label settlements as the place of origin for these products.[73]

The third development refers to the efforts Palestinians and their supporters to activate other political and legal non-violent avenues at the non-governmental and civil society level worldwide to counter the settlement enterprise. One of these is the move by international civil society, trade unions, and university student and teaching associations to support the call of their Palestinian counterpart for the international boycott of Israel and its settlements and their products.[74]

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note 2. According to a public opinion poll conducted by a Palestinian research center in the West Bank and Gaza Strip, 88 % of those surveyed, demand that the PA refers a case to the ICC regarding Israel's policy of building settlements. See PSR, "Palestinian Public Opinion Poll No. 57," *supra* note 67.

[71] UN Human Rights (HR) Council, Working Group on the Issue of Human rights and Transnational Corporations and other Business Enterprises, *Statement on the Implications of the Guiding Principles on Business and Human Rights in the context of Israeli Settlements in the Occupied Palestinian Territory*, (6 June, 2014), online: UN Office of the High Commissioner for Human Rights (OHCHR) <http://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf>.

[72] UN Human Rights Council (HR Council), *Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, 31st Sess No.7, UN Doc A/HRC/31/L.39 (22 March 2016) at para. 17, online: <http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/31/L.39>. 32 Votes were cast in favor and 15 abstained. None were cast against. See also Barak Ravid and Jack Khoury, "UN Human Rights Council Votes to Form 'Blacklist' of Companies Operating in Israeli Settlements," *Haaretz* (24 March 2016).

[73] Amongst other things, the guidelines state that the EU does not recognize Israeli sovereignty beyond the Green Line, regardless of the status of those territories according to Israeli domestic law. Regulations stipulate that where certain Israeli settlement products entering the EU had not been clearly labeled, retail chains can demand such information from Israeli suppliers or from EU importers. EU member states are also required to levy sanctions against those who do not label those products. See Barak Ravid, "European Commission Adopts Guidelines for Labeling Products from Israeli Settlements," *Haaretz* (11 November 2015). See also Barak Ravid, "EU's New Policy on Israeli Settlements," *Haatetz* (16 July, 2013).

[74] In 2005, Palestinian civil society issued an international call "to launch broad boycotts, implement divestment initiatives, and to demand sanctions against Israel, until Palestinian rights are recognized in full compliance with international law." Today, this is one of the objectives of the Boycott-Divestment and Sanctions movement (BDS). See Official Website, online: BDS <http://www.bdsmovement.net/>. In 2011, the *Knesset* passed the *Law for Prevention of Damage to State of Israel through Boycott* (thereafter *Anti-Boycott* Law),

Regardless of the legitimacy of these developments, they highlight the need to give more 'teeth' to the enforcement mechanisms of 'humanity' law. While the international community has made great advances in putting in place legal measures (both preventive and repressive) to promote the accountability of state and non-state actors for serious violations of human rights, the lack of political will to follow through with the activation of these measures, remains a significant impediment to the respect for the rules of IHL and of IHR law.[75] At the same time, it has been argued that "domestic courts remain the best, though likely also the most delicate, avenue for pursuing effective and lasting enforcement of IHL."[76] The present study has highlighted why this remains an unfulfilled reality with respect to the HCJ and the oPt on petitions challenging the security based measures taken for the benefit of Israeli settlements and settlers.

In the meantime, the need for accountability in the form of an effective judicial remedy remains vital, both for the alleged victims alleging the violation of their rights, and for deterring and preventing future violations of international law.[77] It is also crucial for maintaining the interest of the Palestinians in pursuing peaceful means of resisting the Israeli

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and which allows for the filing of civil lawsuits (for compensation) against Israelis who call for a boycott of the State of Israel, "or an area under its control, in such a way that may cause economic, cultural, or academic damage." It also allows the Israeli government to strip Israeli NGOs advocating for such a boycott of their tax-exempt status, potentially forcing them to shut down. For an unofficial English translation of the law, see online: Association for Civil Rights (ACRI)-Israel, online: ACRI <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf>. On 15 April 2015, the HCJ upheld the legality of the Law by a vote of 5-4. Although recognizing that the *Anti-Boycott Law* impinges on the freedom of expression, the justices concluded that it advances a worthy cause, and that therefore, the harm done to freedom of expression is proportionate. For an English summary see *Adalah*, "Israeli Supreme Court upholds the Law Prohibiting Calls for Boycott against Israel and the settlements in the West Bank," (15 April, 2015), online: *Adalah* <http://www.adalah.org/en/content/view/8525>. Israeli government authorities consider the BDS movement, to be the new face of 'Anti-Semitism'. See Herb Keinon, "Netanyahu: BDS Advocates are Classical Anti-Semites in Modern Garb," *Jerusalem Post* (17 February, 2014).

[75] "The principal cause of suffering in armed conflicts remains the inability to respect the law in force, whether for lack of means or political will, rather than the deficiency or absence of rules." Steps have been recommended to better respond to the protection need of victims of conflict and to improve monitoring and compliance with IHL See ICRC, *Strengthening Legal Protection for Victims of Armed Conflict*, 31st International Conference of the Red Cross and Red Crescent, 28 November-1 December 2011 (Geneva: October 2011) at 10, online: ICRC <https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-5-1-1-report-strength-ihl-en.pdf>.

[76] Sharon Weill, "Building Respect for IHL through National Courts" (2014) 96:895/896 Int'l Rev Red Cross 859.

[77] UN Office for the Coordination of Humanitarian Assistance (OCHA), "2015 Humanitarian Needs Overview: Occupied Palestinian Territory" (November, 2014), online: Relief Web <http://reliefweb.int/sites/reliefweb.int/files/resources/hno2015_factsheet_final_november_2014.pdf>.

occupation,[78] and for preserving the legitimacy of international law in the eyes of those whose rights it seeks to protect, and those whose power it seeks to curb. When people lose faith in the enforcement of the law as a way of protecting rights, they often take it into their own hand. This is true of both the victims and of the perpetrators of human rights violations. The international community of States and their domestic courts have a responsibility to ensure that this does not take place. As the 'gatekeeper' at the interface between international and national law in a situation of occupation, the HCJ carries a primary responsibility to open the doors more widely: for the sake of promoting the international RoL, for the sake of Palestinian and Israeli future generations.

[78] Ziad Medoukh, "La resistance pour la non-violence en Palestine: une stratégie efficace a soutenir," *Grotius,* (5 Juillet, 2013).

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INTERVIEWS

Amar-Shiff, Netta

(24 August 2014, Jerusalem)

Attorney *A-04*

(23 July 2014, Jerusalem)

Dakwar, Nasrat

(07 July 2014, Jerusalem)

Mishriqi, Quamar

(26 June 2014, Jerusalem)

Sfard, Michael

(10 July 2014, Tel Aviv)

(21 October 2014, Tel Aviv) via Skype

Shamas, Charles

(21 November 2014) via Skype

Shehateh, Raja

(02 October 2014) via Skype

WRITTEN RESPONSES

Attorney *A03-B*

(10 July 2014)

Etkes, Dror

(01 February 2015)

Mishriqi, Quamar

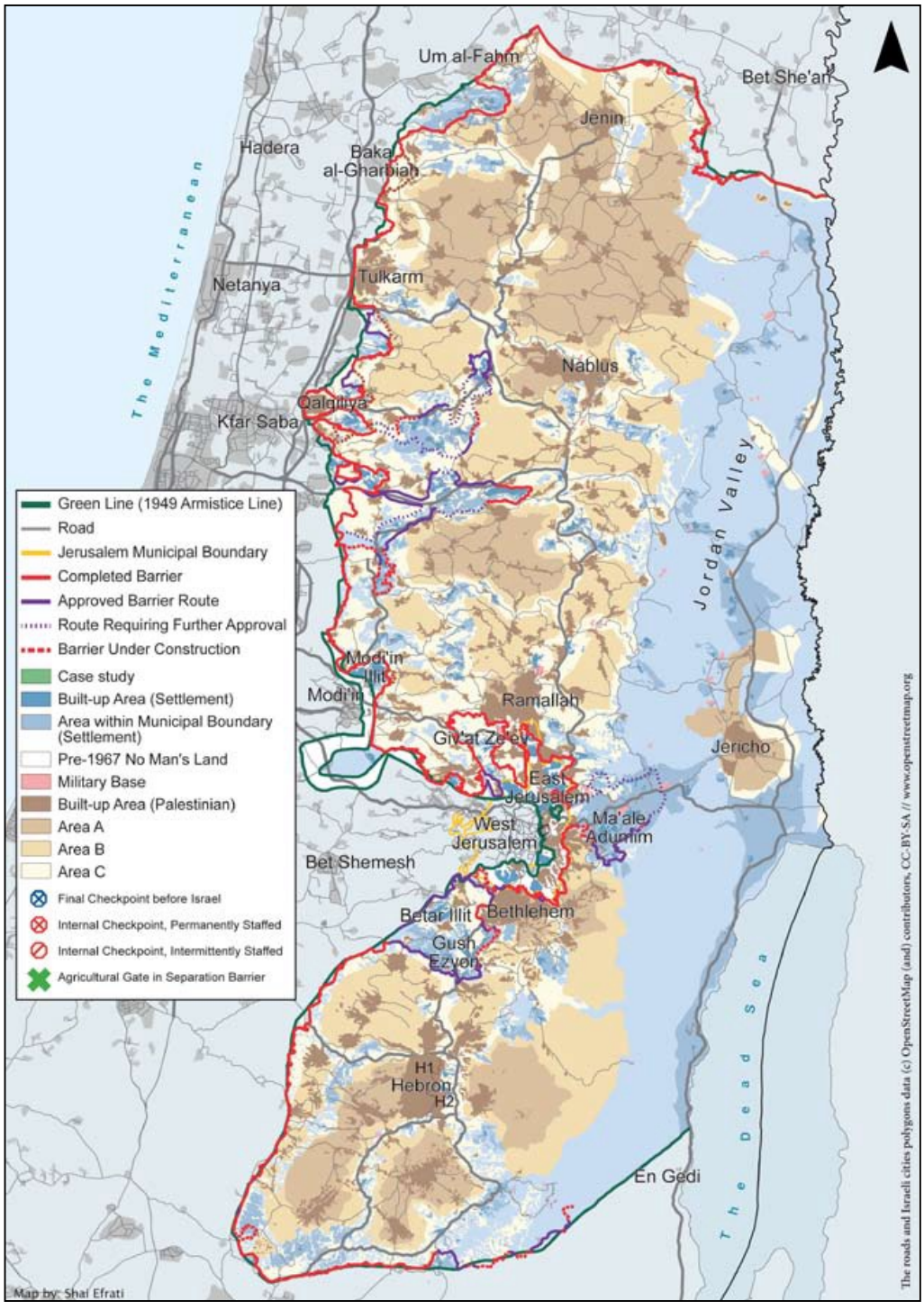
(13 September 2015)

Rahat, Michaela

(22 March 2015)

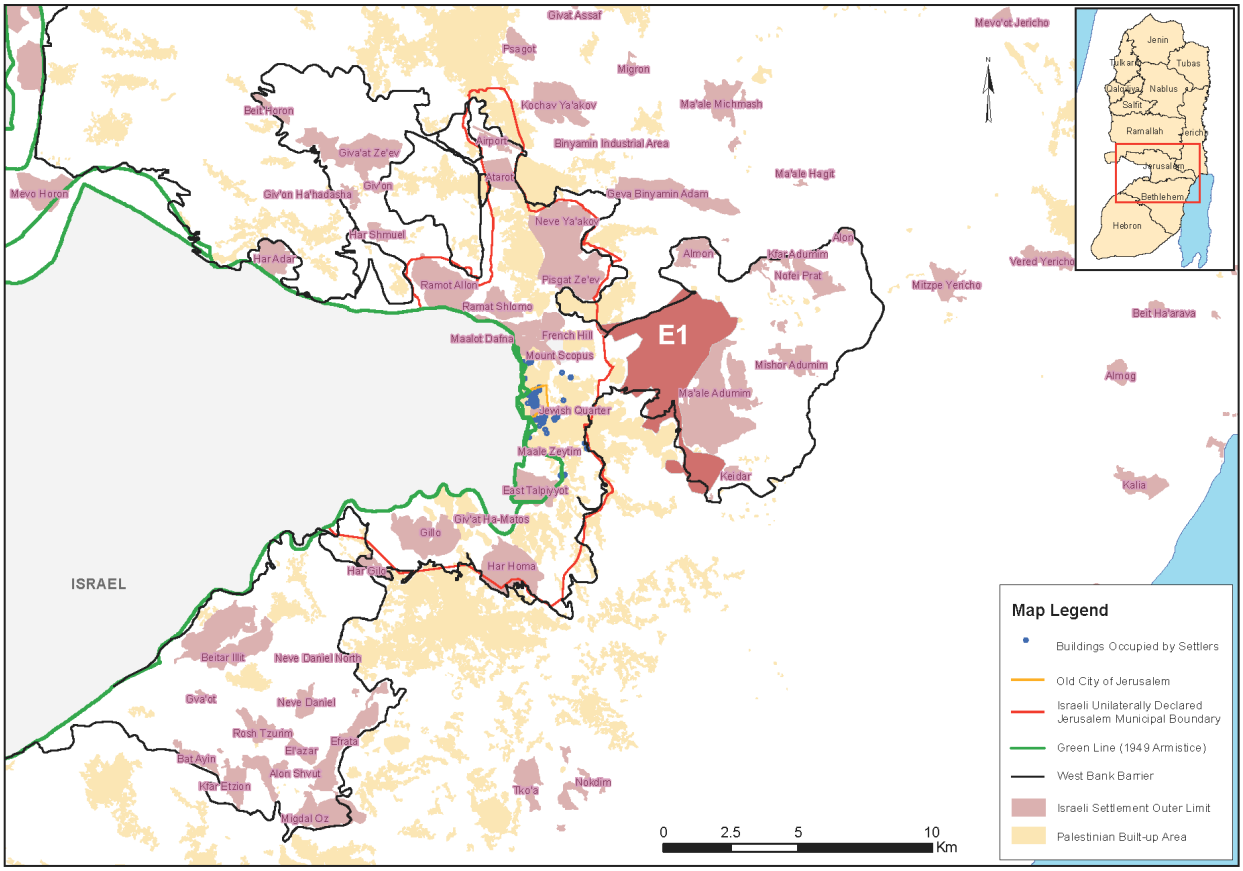
ANNEXES

Annex I: Map depicting the Route of the Wall on the Green Line and inside the Occupied West Bank



Source: The Israeli Center for Human Rights in the Occupied Territories (B'Tselem), 2012

Annex II: Settlements and the Route of the Wall in the Jerusalem Area, including Annexed East Jerusalem



Source: UN Office for the Coordination of Humanitarian Assistance in the Occupied Palestinian Territory (OCHA-oPt), December 2012

Annex III: Table of HCJ Judgments (2000-2014) Analyzed per Normative Principle

Table of HCJ Judgments (2000-2014) Analyzed per Normative Principle

The First Normative Principle: Occupation is Temporary: The Wall in the 'West Bank', the Seam Zone and the Creation of Special Security Zones (Chapter I)

#	Case Number	Petitioner/s	Respondent/s	Short Reference	Date of Filing Petition	Date of Verdict	Key Issues	Outcome of Petition	HCJ Judges ***Presiding Judge in Bold***	Source
1	**HCJ 9961/03** HCJ 639/04	***Hamoked et al*** *ACRI*	***Government of Israel et al*** *Commander of the IDF Forces in the Judge & Samaria Area*	***Seam Zone* Jugement**	**2003-06-11**	**2011-05-04**	**Petition** directed against the legality of declaring a Seam Zone and imposing a permit regime for Palestinians to enter or leave the Zone.	**Dismissed**	**Beinisch** Rivilin Procaccia	**Unofficial** English Translation online: *Hamoked* <http://www.hamoked.org/files/2011/112050_eng.pdf>
2	**HCJ 11344/03** HCJ 10905/05 HCJ 11765/05	***Faiz Salim et al*** *Mayor of Gayous et al* *Head of Hirbat G'barah village council*	***Military Commander of Judea and Samaria*** *Prime Minister et al* *Ibid*	***Salim* Judgment**	**2003-12-28**	**2009-09-09**	**Petition** directed by Palestinian 'West Bank' villages challenging the Wall's route which separates them from land that remains on the 'Israeli' side of the Wall and its effects on rights like their freedom of movement.	**Dismissed**	**Beinisch** Procaccia Levy	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author

	HCJ 8109/07	*Kochav Yair Council*	*Jayus Council et al*							
3	**HCJ 2056/04**	***Beit Sourik Village Council***	***Government of Israel et al***	***Beit Sourik*** **Judgment**	**2004-02-26**	**2004-06-30**	**Petition** directed against the authority of the MC to construct the Wall along the route specified in the 'West Bank' Beit Sourik area, northwest of Jerusalem including the MO to requisition the land for this purpose.	**Upheld** partially	**Barak** Mazza Cheshin	**Official** English Translation, online: HCJ <http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf>
4	**HCJ 2577/04**	***Taha El Khawaja et al***	***Prime Minister et al***	***Ni'ilin*** **Judgment**	**2004-03-14**	**2007-0719**	**Petition** directed against the MO to requisition land belonging to the village of Ni'ilin for the construction of the Wall. This would leave the settlements *of* Modi'in Illit & Hasmoneam on the 'Israeli' side of Wall.	**Upheld**	**Beinisch** Procaccia Rivlin	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
5	**HCJ 4825/04** HCJ 4938/04	***Muhammad Khaled Alian et al*** *Shukba Village Council*	***Prime Minister et al*** *Government of Israel et al*	***Alian*** **Judgment**	**2004-05-23**	**2006-03-16**	**Petitions** directed by residents of the 'West Bank' villages of Budrus & Shukba both in close proximity to the Green Line.	**Dismissed**	**Barak** Cheshin Beinisch Procaccia Levy Grunis Naor Chayut Adiel	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
6	**HCJ 6027/04**	***Taleb Radad***	***Minister of Defense et al***	***Radad*** **Judgment**	**2004-06-25**	**2006-08-17**	**Petition** directed against the route of the Wall and requisition of land of	**Dismissed**	**Barak** Beinisch Rivilin	**Unofficial** English Translation from Hebrew

							the village of Al Zawiyeh north of the West Bank. This would leave the settlement of Elkana on the 'Israeli' side of the Wall.			by Avichay Sharon. On file with author
7	**HCJ 7957/04**	***Zahran Younis Mara'abe et al***	***Prime Minister of Israel et al***	***Mara'abe* Judgment**	**2004-08-31**	**2005-09-15**	**Petition** directed against the route of the Wall that would create an enclave of Palestinian villages located in the Qalqilya district north of the 'West Bank'. This would leave the settlement of Alfei Menashe on the 'Israeli' side of the Wall.	**Upheld** Partially	**Barak** Cheshin Beinisch Procacci Levy Grunis Naor Jubran Hayut	**Official** English Translation online: HCJ <http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf>
8	**HCJ 2732/05**	***Abed Al-Teif Hssein Head of 'Azzun Municipality Council et al***	***Government of Israel et al***	***Tzufin* Judgment**	**2005-03-20**	**2006-06-15**	**Petition** directed by residents of the town of Azzun in the Qalqilya district, north of the 'West Bank' against the route of the Wall & against MOs to requisition land for Wall construction. This would leave the Zufin settlement on the 'Israeli' side of the Wall.	**Upheld**	**Barak** Beinisch Procaccia	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
9	**HCJ 2942/05** HCJ	***Nafez Mansour et al*** *Achsan Abed*	***State of Israel et al*** *Ibid*	***Ariel Bloc* Jugement**	**2005-03-24**	**2006-10-126**	**Petitions** directed against the legality of establishing a SSZ that would encircle the Immanuel and Ginot Shomron	**Dismissed**	**Barak** Beinisch Procaccia	**Unofficial** English Translation from Hebrew by Avichay Sharon. On

	4050/05, HCJ 3877/06	*Al-Teif Hussein et al* *Sami Issa Attaf et al*	 *Ibid*				settlements and separate the petitioners from their land. The fence of the SSZ will become part of the Wall being constructed in the area.			file with author
10	**HCJ 426/05** HCJ 1767/05; HCJ 2223/05; HCJ 8264/05; HCJ 8265/05; HCJ 8266/05; HCJ 11409/05	***Biddu Village et al*** *Har Adar Local Council et al* *Yussef Qandil et al* *Ahmed Khadour et al* *Saqer Abdallah et al* *Ahmed J'amal et al* *Danny Azrieli*	***Government of Israel et al*** *Minister of Defense* *The MC of the Judea & Samaria Area* *Ibid* *Ibid* *Ibid* *State of Israel*	***Biddu Village Council* Judgment**	**2005 -01-13** (first petition)	**2006-09-10**	**Petitions** directed by 'West Bank' village councils against Wall's route north-west of Jerusalem. Five of the petitions were filed by Palestinian local councils and residents alleging that the route violates their human rights and 'fabric of life' and should be moved closer to Green Line. Two petitions filed by local settlement council of Har Adar and residents demanding that the route of the Wall be moved further away from them on grounds that it doesn't respond to their security needs.	**Dismissed**	**Barak** Beinisch Rivilin	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
11	**HCJ 5139/05**	***Falah Mitzah Ahmed Shaib, Head of Beit Lid Village***	***State of Israel et al***	***Shaib* Judgment**	**2005-05-29**	**2007-02-22**	**Petition** directed by residents of the Beit Lid Village in the Tulkarem district of	**Dismissed**	**Beinisch** Rivlin Levy	**Unofficial** English Translation from Hebrew

		Council et al					'West Bank' against a MO declaring some of the village land close to the Israeli settlements of Enav & Avne Hefetz settlement to be a closed SSZ.			by Avichay Sharon. On file with author
12	**HCJ 8414/05**	***Ahmed Issa Abdallah Yassin B'ilin Village Council Chairman***	***Government of Israel et al***	***B'ilin* Judgment**	**2005-05-09**	**2007-02-18**	**Petition** directed against route of the Wall on privately owned land belonging to the village of Bi'lin in the central 'West Bank' west of Ramallah. This would ensure that the Modi'in Illit settlement bloc remains on the 'Israeli' side of the Wall.	**Upheld**	**Beinisch** Rivlin Procaccia	**Official** English Translation, online: HCJ <http://elyon1.court.gov.il/files_eng/05/140/084/n25/05084140.n25.pdf>
13	**HCJ 11651/05** HCJ 1198/06	***Bet Arye Local Council*** *Aboud Village Council et al*	***Minister of Israel et al*** *Government of Israel et al*	***Bet Arye Judgment***	**2006-03-02**	**2006-05-21**	**Petitions** directed against the route of the Wall 11651. It was filed by residents of Bet Arye settlement arguing that the route violates their rights. Petition 1998/06 was filed by the Palestinians of the 'West Bank' Aboud village in the Ramallah Governorate, arguing that the same route violates their rights.	**Dismissed**	**Barak** Rivlin Procaccia	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author

14	**HCJ 5624/06**	***Beit Ummar Municipality et al***	***Military Commander of the West Bank et al***	***Beit Ummar Municipality* Judgment**	**2006-04-07**	**2006-07-31**	**Petition** directed against the legality of declaring land around settlement of Carmei Tsur belonging to Palestinians from the villages of Beit Ummar and Halhoul in the Hebron Governorate to be SSZ.	**Dismissed**	**Barak** Beinisch Rivlin	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
15	**HCJ 10309/06** HCJ 10714/06	***Alfei Menashe Local Council*** *Yassin Yuness Mohamad Mara'abe, Head of Rass Al-Tira vVllage*	***Government of Israel et al***	***Alfei Menashe Local Council* Judgment**	**2006-12-13**	**2007-08-29**	**Petition**s directed against the amended route of the Wall by Israeli authorities in light of the Mara'abe Judgment (HCJ 7957/04). The new route was challenged by the Israeli local council of the settlement of Alfei Menashe . The route was also challenged by the village representative arguing that the route after it was amended continues to be disproportionate.	**Dismissed**	**Beinisch** Rivlin Procaccia	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
16	**HCJ 11395/06**	***Mayor of Sebastia et al***	***State of Israel et al***	***Sebastia Judgment***	**2005-12-11**	**2006-05-30**	**Petition** directed against the declaration of Palestinian land surrounding the settlement of Shavei Shomron (east of Tulkarem) as a SSZ, closed to Palestinian access.	**Dismissed**	**Barak** Beinisch Procaccia	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author

17	**HCJ 834/07**	***Mahmoud Muhamed Takatka et al***	***Government of Israel et al***	***Takatka* Judgment**	**2007-01-25**	**2007-02-08**	**Petition** directed by the land owners from the village of El Salmona in the Bethlehem district against the requisition order for the construction of the Wall to include on the 'Israeli' side the settlement of *Efrat*.	**Dismissed**	**Beinisch** Procaccia Chayut	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
18	**HCJ 1882/08**	***Adbel Rahman Shaib Naser et al***	***Government of Israel et al***	***Umm Saffa* Judgment**	**2008-02-27**	**2010-08-27**	Petition directed against land requisition orders by the MC for the construction of the Wall on land of Um Saffa village in the Ramallah district. This would include on the 'Israeli' side of the Wall, the settlements of Kfar Haoranim and Kfar Rut.	**Dismissed**	**Beinisch** Rivilin Arbel	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
19	**HCJ 2645/04** HCJ 1213/06	***Head of Dir Qadis Village Council et al*** *Tzifche International Inc. & Quiryat Seffer Diyur*	***Minister of Defense et al*** *Ibid*	***First Dir Qadis Village Council* Judgment**	**2004-03-16**	**2007-04-25**	Petition filed by petitioners from the village of Dir Qadis against requisitioning of land for Wall's construction and which separated them from some of their land. The two other petitions submitted by settlers and Israeli real estate companies to object to the new	**Dismissed**	**Beinisch** Proccacia Rivlin	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author

	HCJ 1780/06	*Modi'in Inc. et al*	*Ibid*				route of the Wall in light of the *Beit Sourik* Ruling claiming they had purchased the land.			

The Second Normative Principle: Occupation is a Form of 'Trust': Movement Restrictions or Land Requisition for Sake of Improved Access & Enhanced Security for Israeli Settlers (Chapter II)

#	Case Number	Petitioner/s	Respondent/s	Short Reference	Date of Filing Petition	Date of Verdict	Key Issues	Outcome of Petition	HCJ Judges *Presiding Judge in Bold*	Source
1	**HCJ 10356/02** HCJ 10497/02	***Yoav Haas et al*** *The Hebron Rehabilitation Committee et al*	***IDF Commander in the West Bank et al*** *Ibid*	***Haas* Judgment**	**2012-12-06**	**2004-04-03**	**Petitions** directed against MO to requisition land belonging to Palestinians and to demolish some buildings to widen a route that is used by Jewish worshippers commuting to the Cave of the Patriarchs (Hebron) including from Kiryat Arba settlement.	**Dismissed**	**Barak** Cheshin Procaccia	**Unofficial** English Translation online: *Hamoked* <http://www.hamoked.org/items/8240_eng.pdf>
2	**HCJ 1890/03**	***Bethlehem Municipality et al***	***State of Israel* et al**	***Bethlehem Municipality* Judgment**	**2004-02-24**	**2005-03-02**	**Petition** directed against the legality of a land requisition order for the purpose of constructing a by-pass safe road for Jewish worshippers going to the Rachel's Tomb in Bethlehem.	**Dismissed**	**Beinisch** Rivlin, Hayut	**Official** English Translation online: HCJ <http://elyon1.court.gov.il/files_eng/03/900/018/n24/03018900.n24.pdf>
3	**HCJ 9593/04**	***Rashad Morar et al***	***IDF Commander in Judaea & Samaria et al.***	***Morar* Judgment**	**2004-10-24**	**2006-06-26**	**Petition** by Palestinians from Yanun village near the 'West Bank' city of Nablus, directed against the legality of	**Upheld**	**Beinisch** Rivlin Jubran	**Official** English Translation reprinted in Israel Law Reports

							the decision of the MC to restrict their access to their farmlands that are located nearby Israeli settlement.			<http://www.hamoked.org/files/2010/6974_eng.pdf>
4	**HCJ 11235/04** HCJ 6869/05 HCJ 7044/06	***Hebron Municipality et al*** *The Hebron Development Committee et al* *Hebron Municipality et al*	***State of Israel et al*** *Ministry of Defense* *Military Commander of Judea & Samaria*	***Hebron Municipality* Judgment**	**2004-12-09**	**2011-06-06**	**Petitions** directed against the legality of the decision of the MC to impose movement restrictions on Palestinians in the H2 area of the city of Hebron 'West Bank'.	**Dismissed**	**Beinisch** Rivlin Meltzer	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
5	**HCJ 1748/06** HCJ 1845/06 HCJ 1856/06	***Mayor of Ad Dhahiriya et al*** *Khalil Mahmoud Younis et al* *As-Samu Municipality*	***IDF Commander in West Bank et al*** *Ibid* *Ibid*	***Mayor of Ad-Dhairiya* Judgment**	**2006-02-23**	**2006-12-14**	**Petitions** directed against the building of a concrete barrier along route 317 in the South Hebron Hills which would restrict critical movement of Palestinian villagers.	**Upheld**	**Barak** Beinisch Rivlin	**Official** English Translation published in Israel Law Reports <http://elyon1.court.gov.il/files_eng/06/480/017/a20/06017480.a20.pdf>
6	**HCJ 3969/06**	***Dir Samit Village Council et al***	***Military Commander et al***	***Dir Samit* Village Judgment**	**2006-05-11**	**2009-10-22**	**Petition** directed against movement restrictions imposed on Palestinians prohibiting them	**Upheld** (partially)	**Beinisch** Rivlin Procaccia	**Unofficial** English Translation by *Hamoked*, online:

							from using certain sections of road 3265. The road is located close to the settlement of Negohot and an 'unauthorized outpost'.			<http://www.hamoked.org/Document.aspx?dID=Documents1294>
7	**HCJ 2150/07**	***Abu Safiyeh et al***	***Minister of Defense et al***	***Abu Safiyeh* Judgment**	**2007-08-28**	**2009-12-29**	**Petition** directed against the legality of the decision of the MC to impose a complete prohibition on Palestinian traffic on road 443 which Israelis use to commute to/from Israel proper and West Bank settlements.	**Upheld**	**Beinisch** Levy Vogelman	**Official** English Translation, online: HCJ <http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf>
8	**HCJ 281/11**	***Head of Beit Iksa Council et al***	***Minister of Defense et al***	***Beit Iksa* Judgment**	**2011-01-11**	**2011-06-09**	**Petition** directed against confiscation of land for the purpose of building access and emergency routes connected to the construction of a fast train between Tel Aviv and Jerusalem on land of the village of Beit Iksa in the West Bank.	**Dismissed**	**Jubran** Vogelman Chayut	**Unofficial** English Translation, online: *Hamoke*d <http://www.hamoked.org/files/2012/115140_eng.pdf>
9	**HCJ 5098/11**	***Head of Dir Qadis Village Council et al***	***Minister of Defense et al***	***Second Dir Qadis Village Council* Judgment**	**2011-07-07**	**2011-10-05**	**Petition** directed against construction of a road for nearby Israeli settlement of Nili on land of Dir Qadis village, for 'security' reasons.	**Dismissed**	**Grunis** Arbel Hendel	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file

The Third Normative Principle: Occupation does not bestow Sovereignty - The Wall in the Jerusalem Area, including in and around Israeli Annexed East Jerusalem (Chapter III)

#	Case Number	Petitioner/s	Respondent/s	Short Reference	Date of Filing Petition	Date of Verdict	Key Issues	Outcome of Petition	HCJ Judges *Presiding Judge in Bold*	Source
1	**HCJ 940/04**	***Abdel Rahman Abu El Tir et al***	***IDF Commander in Judea and Samaria***	***Abu El Tir* Judgment**	**2004-01-29**	**2004-11-24**	**Petition** directed by Tzur Baher residents, which is part of the JM. Challenges legality of Wall's route which will separate them from property they own a few meters beyond the JMB inside 'West Bank'.	**Dismissed**	**Procaccia,** Naor, Chayut	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
2	**HCJ 1073/04**	***Omar Salameh et al***	***IDF Commander of Central Command***	***Salameh* Judgment**	**2004-02-03**	**2006-08-06**	**Petition** directed against Wall's route in the neighborhood. Abu Dis. It is located on the JMB but mostly on 'West Bank' side of the structure. Petitioners demanded that the route is changed to include them on 'Israeli' side.	**Dismissed**	**Barak** Beinisch Levy	**Unofficial** English Translation from Hebrew By Avichay Sharon. On file with author
3	**HCJ 5488/04**	***Al-Ram Local Council et al***	***Government of Israel et al***	***Al-Ram Local Council* Judgment**	**2004-06-10**	**2006-12-13**	**Petitions** directed against Wall's route in Al-Ram north of Jerusalem, most of it outside the JMB. area.	**Dismissed** with one judge dissenting	**Barak,** Beinisch, Procaccia. Levy Grunis, Naor	**Unofficial** Translation from Hebrew By Avichay Sharon. On file with author

	HCJ 6080/04 HCJ 3648/05	*Dr. Ahmad Bader Maslemani et al* *Maliha T'amer et al*	*Ibid* *Ibid*				Petitioners in 5488 and 6080 want the decision to construct Wall to be annulled. Petitioners in 3648 demand that Wall's route runs along the JMB.		Chayut	
4	**HCJ 6451/04**	***Mahmoud Halawa et al***	***Prime Minister et al***	***Halawa* Judgment**	**2004-07-07**	**2006-06-18**	**Petition** directed against Wall's route around Anata which is a 'West Bank' village on the north-east outskirts of Jerusalem. The Wall separates them from a hill that remains on 'Israeli' side.	**Dismissed**	**Barak** Beinisch Procaccia	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
5	**HCJ 6193/05**	***Ras Khamis Residents Committee***	***Authorized Administrator under the Land Emergency Law***	***Ras Khamis Residents Committee* Judgment**	**2005-06-27**	**2008-11-25**	**Petition** directed by residents of the Shu'fat Ridge demanding Wall's route run along the JMB to remain on the 'Israeli' side. The ridge located in the north-east edge of Jerusalem, inside the JM.	**Dismissed**	**Beinsich** Levy Grunis	Unofficial English Translation from Hebrew by Avichay Sharon. On file with author
6	**HCJ 7337/05** HCJ	***Mohamed Naif Shakr et al*** *The State of*	***IDF Commander of Judea and Samaria et al*** *Sheikh Saed*	***Shakir* Judgment**	**2005-07-31**	**2010-03-15**	**Petition** directed against Wall's route around EJ village of Sheikh Saed & land requisition to construction of 'bypass' road. The village is east of Jerusalem in the 'West Bank'.	**Dismissed**	**Beinisch** Rivilin Levy	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author

	4343/06	*Israel*	*Neighbourhood Committee et al*							
7	**HCJ 11205/05**	***Ezariyah Village Council et al***	***Government of Israel et al***	***Al-Ezariyah Village Council*** **Judgment**	**2005-12-04**	**2006-05-23**	**Petition** directed against land requisition for construction of Jerusalem Wall running inside 'West Bank. Al-Ezariyah is located between JMB and 'West Bank' settlement of Ma'aleh Adumim.'. The route separates petitioners from land to remain on 'Israeli side'.	**Dismissed**	**Barak** Rivlin Jubran	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
8	**HCJ 10043/05**	***Anata Boys High-School Parents Board et al***	***Minister of Defense et al***	***Anata Boys High School*** **Judgment**	**2005-10-27**	**2005-12-14**	**Petition** demands injunction to remove concrete barrier placed in the yard of the Boys School in the village of Anata north east of Jerusalem, mostly inside 'West Bank'. Barrier is part of the Wall between village & settlement of Pisgat Zeev.	**Dismissed**	**Barak** Beinisch Proccacia	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
9	**HCJ 1300/06**	***Rabhi Abu Ziad et al***	***Government of Israel et al***	***Abu Ziad*** **Judgment**	**2006-02-09**	**2006-06-18**	**Petition** directed against Wall's route so their homes are included on the 'Israeli' side . Al-Sheikh Saed is south-east of Jerusalem. Part of it inside the JM and part of it in 'West Bank'.	**Dismissed**	**Barak** Beinisch Proccacia	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author

10	**HCJ 3937/07**	***Beit Sahour Municipality et al***	***Prime Minister et al***	***Beit Sahour Muncipality*** **Judgment**	**2007-05-06**	**2010-01-04**	**Petition** directed against Wall's route. Demanded that it runs along the JMB; to be separated from less land to remain on 'Israeli' side. Beit Sahour is a 'West Bank' village south east of Jerusalem.	**Dismissed**	**Beinisch** Levy Grunis	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
11	**HCJ 7136/09**	***Qawasmeh Iado et al***	***Ministry of Defense et al***	***Iado*** **Judgment**	**2009-07-09**	**2011-08-22**	**Petition** demands Wall's route be moved so they remain on 'Israeli' side. Route cuts through the Al- Sheik Saed village part that is within the JM, leaving it on 'Palestinian' side of the Wall.	**Dismissed**	**Beinisch** Grunis Vogelman	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author
12	**HCJ 9516/10**	***Walajeh Village et al***	***Military Commander of the West Bank et al***	***Walajeh Village Council*** **Jugement**	**2010-12-23**	**2011-08-22**	**Petition** directed against Wall's route inside the 'West Bank' separating them from Jerusalem on which they depend for livelihood. Walajeh is located south of Jerusalem part inside the JMB. Also separates them from cemetery.	**Dismissed**	**Beinisch** Grunis Vogelman	**Unofficial** English Translation from Hebrew by Avichay Sharon. On file with author

Certificate of Ethics Approval Number CPER-13-128-P

Université de Montréal

N° de certificat
CPER-13-128-P

Comité plurifacultaire d'éthique de la recherche

CERTIFICAT D'APPROBATION ÉTHIQUE

Le Comité plurifacultaire d'éthique de la recherche (CPER), selon les procédures en vigueur, en vertu des documents qui lui ont été fournis, a examiné le projet de recherche suivant et conclu qu'il respecte les règles d'éthique énoncées dans la Politique sur la recherche avec des êtres humains *de l'Université de Montréal.*

Projet	
Titre du projet	**What 'Security', Whose 'Rights' and Which 'Law'? The Israeli High Court of Justice (HCJ) and the Israeli Settlements in the Occupied West Bank**
Étudiante requérant	**Al-Salem Rouba** [redacted] Candidate au doctorat, Faculté de droit Université de Montréal
Financement	
Organisme	Non financé
Programme	--
Titre de l'octroi si différent	--
Numéro d'octroi	--
Chercheur principal	--
No de compte	--
Approbation reconnue	
Approbation émise par	non
Certificat:	s.o.

MODALITÉS D'APPLICATION

Tout changement anticipé au protocole de recherche doit être communiqué au CPER qui en évaluera l'impact au chapitre de l'éthique.

Toute interruption prématurée du projet ou tout incident grave doit être immédiatement signalé au CPER.

Selon les règles universitaires en vigueur, un suivi annuel est minimalement exigé pour maintenir la validité de la présente approbation éthique, et ce, jusqu'à la fin du projet. Le questionnaire de suivi est disponible sur la page web du CPER.

[redacted]

Pierre Lapointe, Président
Comité plurifacultaire d'éthique de la recherche
Université de Montréal

8 janvier 2014
Date de délivrance

1 février 2015
Date de fin de validité

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Annex IV: Ethics Committee Certificate

Acknowledgment of Ethics Approval

Université de Montréal

Comité plurifacultaire d'éthique de la recherche

8 janvier 2014

Madame Al-Salem Rouba
Candidate au doctorat
Faculté de droit

OBJET: Reconnaissance d'une approbation éthique

Mme Al-Salem Rouba,

Le *Comité plurifacultaire d'éthique de la recherche (CPER)* a étudié le projet de recherche intitulé « What 'Security', Whose 'Rights' and Which 'Law'? The Israeli High Court of Justice (HCJ) and the Israeli Settlements in the Occupied West Bank » et a délivré le certificat d'éthique demandé suite à la satisfaction des exigences précédemment émises. Vous trouverez ci-joint une copie numérisée de votre certificat; copie également envoyée à votre directeur/directrice de recherche et à la technicienne en gestion de dossiers étudiants (TGDE) de votre département.

Notez qu'il y apparaît une mention relative à un suivi annuel et que le certificat comporte une date de fin de validité. En effet, afin de répondre aux exigences éthiques en vigueur au Canada et à l'Université de Montréal, nous devons exercer un suivi annuel auprès des chercheurs et étudiants-chercheurs.

De manière à rendre ce processus le plus simple possible et afin d'en tirer pour tous le plus grand profit, nous avons élaboré un court questionnaire qui vous permettra à la fois de satisfaire aux exigences du suivi et de nous faire part de vos commentaires et de vos besoins en matière d'éthique en cours de recherche. Ce questionnaire de suivi devra être rempli annuellement jusqu'à la fin du projet et pourra nous être retourné par courriel. La validité de l'approbation éthique est conditionnelle à ce suivi. Sur réception du dernier rapport de suivi en fin de projet, votre dossier sera clos.

Il est entendu que cela ne modifie en rien l'obligation pour le chercheur, tel qu'indiqué sur le certificat d'éthique, de signaler au CPER tout incident grave dès qu'il survient ou de lui faire part de tout changement anticipé au protocole de recherche.

Nous vous prions d'agréer, Madame, l'expression de nos sentiments les meilleurs,

[redacted]

Pierre Lapointe, Président
Comité plurifacultaire d'éthique de la recherche (CPER)
Université de Montréal
PL/RS/rs
c.c. Gestion des certificats, BRDV
Stéphane Beaulac, professeur titulaire, Faculté de droit
Anne-Marie La Rosa, Professeure associée, Faculté de droit
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