

The law of belligerent occupation in the Supreme Court of Israel

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Abstract

Since the 1967 War, in the course of which Israel occupied the West Bank and Gaza, the Supreme Court of Israel has considered thousands of petitions relating to acts of the military and other authorities in those territories (OT). This article reviews the contribution to the law of belligerent occupation of the Court's jurisprudence in these cases. After discussing issues of jurisdiction and the applicable norms, the article reviews the way in which the Court has interpreted military needs, the welfare of the local population, changes in the local law, and use of resources; the attitude of the Court to the long-term nature of the occupation and the existence of Israeli settlements, settlers, and commuters in the OT; the introduction of a three-pronged test of proportionality in assessing military necessity; and hostilities in occupied territories. In the final section, I draw some general conclusions on the Court's contribution to the law of occupation.

Keywords: law of belligerent occupation, Supreme Court of Israel, occupied territories, applicable law, military needs, public welfare, Israeli settlements, proportionality, military necessity, public order and safety.

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The term 'occupied territories' has become associated in contemporary international relations with Israel's continued occupation of the West Bank and Gaza

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(the OT). This is probably the longest occupation in modern international relations, and it holds a central place in all literature on the law of belligerent occupation since the early 1970s.¹ This article is concerned with the approach of the judicial branch of the Occupying Power towards that occupation – an approach that may be examined on at least two levels. The first level relates to how the Supreme Court of Israel has handled a situation in which there is a clear disparity between politics and law, and a tension between state perceptions of security and individual rights. This aspect of the Court's jurisprudence has been discussed elsewhere and shall not be discussed at length here.² A second level of discussion relates to the way in which the Supreme Court has interpreted and applied the international law of belligerent occupation. This is the central focus of this article.

The first part of the article is devoted to a brief discussion of the domestic legal and political context and the unique features of the occupation, an appreciation of which is essential in order to understand the Court's jurisprudence on belligerent occupation. In the second part, I review the Court's approach to interpretation of the Hague Regulations Concerning the Laws and Customs of War on Land, 1907 (the Hague Regulations) and the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949 (Fourth Geneva Convention). More specifically, I dwell on how the Court has understood military needs, its interpretation of Article 43 of the Hague Regulations, and its approach to the long-term nature of the occupation and the establishment of settlements in the OT by the Occupying Power. Over the last decade, the notion of proportionality has played a major role in the way that the Court has reviewed the actions of the military authorities. This notion is discussed in the third part. In the fourth part, I examine the Court's decisions on hostilities in occupied territory. I end the article with some concluding comments.

Legal and political background

Jurisdiction of the Court

The West Bank and Gaza were occupied by Israel in the course of the 1967 War between Israel and the surrounding Arab states. Some time after the war ended, Palestinian residents of the OT petitioned the Supreme Court of Israel, sitting as a High Court of Justice (HCJ) that reviews administrative action, in attempts to challenge acts of the military in those territories. At the time, the Attorney General

1 See, e.g., Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967', in *American Journal of International Law*, Vol. 84, No. 1, 1990, pp. 44–103; Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993; Yoram Dinstein, *The Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009.

2 See David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University New York Press, New York, 2002; 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 University Press, Oxford, 2011, pp. 129–200.

of Israel, who represents the government in all court actions, was Meir Shamgar, who had been IDF (Israeli Defence Forces) Advocate General in 1967 and was later to become a judge of the Supreme Court, and eventually its president. Attorney General Shamgar could have contested the Court's jurisdiction to deal with petitions submitted by Palestinian residents of the OT on the grounds that they were submitted by enemy aliens or that they related to acts performed outside Israel's sovereign territory. However, he decided not to do so. In the first few petitions that came before the Court in the early 1970s, the Court accepted government acquiescence as sufficient basis for its jurisdiction.³ This approach implied that, were the government to change its policy, the Court might have to concede that it had acted without jurisdiction. As more and more cases began to reach the Court it therefore became untenable as a basis for the Court's jurisdiction. Consequently, the Court held that the HCJ's statutory power to issue orders against all 'bodies which perform public functions under law',⁴ rather than government acquiescence, was the real legal basis for its jurisdiction.⁵ The notion of jurisdiction based on the Court's legislative authority to issue orders against all persons performing public functions under law has since been taken to imply that the writ of the Court extends to reviewing the legality of all acts and decisions of governmental authorities, including the IDF, wherever they may be performed.⁶

Since 1967 the HCJ has heard thousands of petitions relating to acts in the OT. While many petitions have been settled out of court, the Court has handed down judgments in hundreds of cases, thus creating a large body of law relating to the OT.

Applicable law

In a military order promulgated by the military commanders of the various fronts when the IDF forces entered the OT in 1967, military tribunals were established to try local residents accused of security offences. That military order stated expressly that the military courts were to apply the provisions of the Fourth Geneva Convention, thus reflecting the view of army lawyers that all the territories were subject to the law of belligerent occupation.⁷ However, soon after the 1967 War

3 See HCJ 256/72, *Electricity Company for Jerusalem District v. Minister of Defence et al.*, 27(1) PD, p. 124, (1972) (hereafter *Hebron Electricity* case), in which the Court mentioned (at p. 136) that it was following the line taken in the first reported judgment relating to the OT: HCJ 337/71, *Christian Society for the Holy Places v. Minister of Defence*, 26(1) PD, p. 574 (1971). For a review of the Court's jurisdiction in petitions relating to the OT, see Eli Nathan, 'The power of supervision of the High Court of Justice over military government', in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967-1980: The Legal Aspects*, Harry Sacher Institute for Legislative Research and Comparative Law, Jerusalem, 1982, pp. 170-103.

4 Article 7(b) of Courts Law, 1957. In 1980 this provision became Article 15(d)(2) of the Basic Law: Judiciary. It now has constitutional status.

5 HCJ 393/82, *Jami'at Ascan et al., v. IDF Commander in Judea and Samaria et al.*, 37(4) PD, p. 785 (1983).

6 See HCJ 102/82, *Tzemel et al., v. Minister of Defence et al.*, 37(3) PD, p. 365 (1983) at para. 11, affirming that the Court had the competence to examine actions of the IDF in Lebanon during the 1982-1983 Lebanon War.

7 Security Provisions Order (West Bank), 1967, Art. 35, in 1 *Proclamations, Orders and Appointments of West Bank Command* 5.

ended, voices were heard both in political quarters and among a number of academic lawyers in Israel that the West Bank and the Gaza Strip, both of which had been part of British Mandatory Palestine, should not be regarded as occupied territories.⁸ Under the influence of these voices, a few months after the war ended the military commanders made an amendment to the military order, deleting the provision that mentioned the Fourth Geneva Convention.⁹ The Government of Israel adopted the position that the status of the West Bank and Gaza was unclear and that in all events it was questionable whether the Fourth Geneva Convention applied there.¹⁰ At the same time the government declared that the IDF would respect the humanitarian provisions of the Convention.¹¹

In the first petitions challenging acts of the military authorities in the OT, the petitioners based their arguments on the norms of belligerent occupation, as expressed in the Hague Regulations and the Fourth Geneva Convention.¹² When the Court required them to reply to these petitions, the authorities were forced to take a position on whether these norms were indeed applicable. They initially attempted to hedge their bets by arguing that, even though it was not clear whether the territories were indeed occupied, in practice the military authorities complied with the norms of belligerent occupation and were therefore prepared for their actions to be assessed under these norms.¹³ After a short time this caveat fell away and, alongside the rules of administrative law that apply to actions of all branches of the Israeli executive, the framework of belligerent occupation became the standard legal regime for assessing actions of the authorities in the OT.¹⁴

The *de facto* acceptance by the authorities that the applicable law in the OT was the law of belligerent occupation freed the Court from having to decide what the constituent elements of occupation are. The Court did, however, relate to these

8 See Yehuda Z. Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', in *Israel Law Review*, Vol. 3, 1968, pp. 279–301. The territories occupied in 1967 included Northern Sinai, which was returned to Egypt under the peace agreement with that country, and the Golan, part of which is still occupied by Israel. The claims regarding the status of the West Bank and Gaza did not relate to those territories. For a summary of the various arguments that were raised to cast doubt on the status of the West Bank and Gaza as occupied territories, see D. Kretzmer, above note 2, pp. 32–34; Behnam Dayanim, 'The Israeli Supreme Court and the Deportations of Palestinians: The Interaction of Law and Legitimacy', in *Stanford Journal of International Law*, Vol. 30, 1994, pp. 143–150.

9 Security Provisions Order (West Bank), (Amendment No. 9), (Order No. 144), 22 October 1967, in 8 *Proclamations, Orders and Appointments of West Bank Command* 303.

10 See Meir Shamgar, 'The Observance of International Law in the Administered Territories', in *Israel Yearbook on Human Rights*, Vol. 1, 1971, pp. 262–277; D. Kretzmer, above note 2, pp. 33–34.

11 M. Shamgar, above note 10. For a review of the government's position on the application of GC IV, see Nissim Bar-Yaacov, 'The applicability of the laws of war to Judea and Samaria (the West Bank) and to the Gaza Strip (in response to Prof. R. Lapidot)', in *Israel Law Review*, Vol. 24, 1990, pp. 485–506.

12 *Christian Society* case, above note 3; *Hebron Electricity* case, above note 3; H CJ 302/72, *Hilu v. Government of Israel*, 27(2) PD, p. 169, 1972; H CJ 606/78, *Ayyub v. Minister of Defence*, 33(2) PD, p. 113, 1978 (hereafter *Beth El* case).

13 D. Kretzmer, above note 2, pp. 35–40.

14 See H CJ 1661/05, *Gaza Beach Regional Council et al., v. Knesset of Israel et al.*, 59(2) PD, p. 481, 2005, p. 514, where the Court stated that the framework of belligerent occupation has always been accepted by the Court and by all governments that have held office in Israel since 1967. The petitioners – Israeli settlers who were required to leave their homes under a law giving effect to the disengagement plan from Gaza – argued that Gaza (before the disengagement) was not subject to a regime of belligerent occupation. The Court dismissed the argument out of hand (*ibid.*, paras. 76–77).

questions during the Israeli presence in Lebanon in 1982.¹⁵ It later also discussed whether Israel remains an Occupying Power in Gaza after removal of its forces and settlements there.¹⁶ These questions have been discussed at length elsewhere and shall therefore not be addressed here.¹⁷

In its Advisory Opinion on the *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice (ICJ) opined that, alongside the law of belligerent occupation, the human rights treaties to which Israel is a party apply to Israel's actions in the OT.¹⁸ This has also been the consistent position of the treaty bodies that monitor implementation of those treaties.¹⁹ The Government of Israel has never accepted this position. The HCJ has refrained from ruling on the formal applicability of human rights treaties, but in many judgments relating to the OT written in recent years it has relied on provisions in these treaties.²⁰ In most cases it has justified this position by stating that the cited norms are also part of the law of belligerent occupation or of Israeli law that binds the authorities.²¹

Domestic enforcement of international norms

Although the accepted legal regime in the OT is one of belligerent occupation, application of the norms of this regime by the HCJ must be seen in light of the status of international law before the domestic courts of Israel. Israel follows the English approach, under which norms of customary international law will be enforced by the domestic courts as long as they are not incompatible with

- 15 See, e.g., *Tzemel case*, above note 6, pp. 371–374; HCJ 574/82 *Al Nawar v. Minister of Defence et al.*, 39(3) PD, p. 449, 1985, pp. 458–459.
- 16 HCJ 9132/07, *Jaber Al-Bassiouni Ahmed et al., v. Prime Minister et al.*, Judgment, 30 January 2008, available at: http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf (last visited 22 May 2012).
- 17 See, e.g., Yuval Shany, 'The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v. The Prime Minister of Israel*', in *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 101–116; Shane Darcy and John Reynolds, 'An enduring occupation: the status of the Gaza Strip from the perspective of international humanitarian law', in *Journal of Conflict & Security Law*, Vol. 15, No. 2, 2010, pp. 211–243.
- 18 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136, paras. 102–114.
- 19 See, e.g. Human Rights Committee, *Concluding Observations on Third Report of Israel* (29 July 2010), 3 September 2010, UN Doc. CCPR/C/ISR/CO/3, para. 5, available at: <http://unispal.un.org/UNISPAL.NSF/0/51410EBD25FCE78F85257770007194A8> (last visited 22 May 2012).
- 20 HCJ 1890/03, *Bethlehem Municipality et al., v. Ministry of Defence et al.*, 59(4) PD, p. 736, 2005 (hereafter *Rachel Tomb case*); HCJ 7957/04, *Zaharan Yunis Muhammad Mara'abe et al., v. The Prime Minister et al.*, 60(2) PD, p. 477, 2005 (hereafter *Alphei Menashe case*); HCJ 10356/02, *Yoav Hess et al., v. The Commander of IDF Forces in the Judea and Samaria et al.*, 58(3) PD, p. 443, 2004; HCJ 7015/02, *Kipah Mahmud Ahmed Ajuri et al., v. IDF Commander in the West Bank et al.*, 56(6) PD, p. 352, 2002; HCJ 769/02, *The Public Committee against Torture in Israel et al., v. The Government of Israel et al.*, Judgment, 14 December 2006 (hereafter *Targeted Killings case*), available at: http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf (last visited 22 May 2012); HCJ 281/11, *Head of Beit Icsa Local Council et al., v. Minister of Defence et al.*, Judgment, 6 September 2011, available in Hebrew at: <http://elyon1.court.gov.il/files/11/810/002/m12/11002810.m12.pdf> (last visited 22 May 2012).
- 21 See, e.g., HCJ 3239/02, *Marab et al., v. IDF Commander in the West Bank et al.*, Judgment, 28 July 2002, English translation available at: http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.htm (last visited 4 January 2012); *Hess case*, above note 20.

primary legislation, while the provisions in international conventions that bind the state will not be enforced by the courts unless they have become part of customary law or have been adopted by parliamentary legislation. The courts must interpret legislation according to the presumption of compatibility with Israel's international obligations, but in the case of a clear clash between primary legislation and a norm of customary or conventional international law, the legislation prevails.²²

When the Court first related to the Hague Regulations and the Fourth Geneva Convention it lumped both these instruments together as treaty law.²³ However, it later admitted that it had been mistaken and that all the provisions of the Hague Regulations are part of customary law.²⁴ On the other hand, the Court held that the provisions of the Fourth Geneva Convention are not necessarily all part of such law.²⁵ This ruling is significant, since, although Israel ratified all four Geneva Conventions in 1951, the Conventions have never been incorporated in domestic law.

Despite the above ruling and the fact that the government has questioned the formal application of the Fourth Geneva Convention in the West Bank and Gaza, in recent years the HCJ has been quite ready to rely on the Convention. Sometimes it has done so after government counsel declared that the authorities' action was compatible with provisions of the Convention.²⁶ At other times the Court has simply relied on provisions of the Fourth Geneva Convention without any explanation.²⁷ In many cases, the Court has latched onto the government undertaking to abide by the humanitarian provisions of the Convention as the basis for relying on its provisions, without formally ruling whether the Convention applies or may be enforced by domestic courts.²⁸ In the *Alphei Menashe* case,²⁹ the Court mentioned that it was aware that the International Court of Justice had opined that the Fourth Geneva Convention applies in the OT and that this was not dependent on the government's undertaking to apply the humanitarian provisions. Nevertheless, the Court stated that, as it was accepted by the government that the

22 In HCJ 253/88, *Sajedia v. Minister of Defence*, 42(3) PD, p. 801, 1988, pp. 815–817, 829, the Court applied this principle to a clash between an Israeli statute and Article 76 of GC IV, which states that protected persons accused of offences shall be detained in the occupied country. For discussion of the status of international law in the domestic courts of Israel, see David Kretzmer, 'Israel', in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge University Press, Cambridge, 2009, pp. 273–325.

23 *Christian Society* case, above note 3; *Hilu* case, above note 12.

24 *Beth El* case, above note 12, p. 120.

25 *Ibid.*; HCJ 390/79, *Dweikat et al., v. Government of Israel et al.*, 34(1) PD, p. 1, 1979 (hereafter *Elon Moreh* case); *Jami'at Ascan* case, above note 5.

26 See, e.g., *Ajuri* case, above note 20, p. 364; HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel et al.*, 48(5) PD, p. 807, 2004, p. 827.

27 See, e.g., HCJ 5591/02, *Yassin et al., v. Commander of Ketziot Detention Facility et al.*, 57(1) PD p. 403, 2002, p. 413.

28 See, e.g., *Hess* case, above note 20, para. 8; HCJ 3103/06, *Shlomo Valero v. State of Israel*, Judgment, 6 February 2011, para. 33, available in Hebrew at: <http://elyon1.court.gov.il/files/06/030/031r13/06031030.r13.pdf> (last visited 22 May 2012).

29 *Alphei Menashe* case, above note 20, p. 523.

humanitarian norms of the Convention were applicable, it saw no need to rule on this question.

In conclusion, without ever ruling positively that the Fourth Geneva Convention applies in the OT or that all its provisions are part of customary law, relating to provisions of Fourth Geneva Convention has become part of the Court's standard practice.³⁰

Politics and law

Israel is one of the few Occupying Powers that have formally recognized application of the norms of belligerent occupation in the territory that it occupies. Despite this recognition, politics have often had more influence on the ground than the formal legal framework of occupation law. Hence, many of the policies and actions of the different governments that have been in power since 1967 have not been compatible with norms of the international law of belligerent occupation. The most blatant of these policies has been the establishment of Israeli settlements in the OT. It has been the consistent position of the international community that establishment of such settlements by the Government of Israel is incompatible with Israel's obligation under Article 49, paragraph 6 of the Fourth Geneva Convention not to transfer part of its civilian population into the OT.³¹ This position was confirmed by the ICJ in its Advisory Opinion on *Legal Consequences of the Construction of a Wall*.³²

Given the clear disparity between international law and the establishment of settlements for Israeli citizens in the OT, one would have expected some jurisprudence of the HCJ on this issue. However, the only substantive decisions are those that relate to requisition of private land for settlements. The Court held that if the authorities could show that a settlement was established at a strategic position and that its aim was enhancing defence of the state, requisition of the land could be justified as being for military needs.³³ On the other hand, if the motivation for establishment was political, rather than security, requisition of the private land would be unlawful.³⁴

30 In HCJ 2690/09, *Yesh Din et al., v. Commander of IDF Forces in the Judea and Samaria et al.*, Judgment of 28 March 2010, available in Hebrew at: <http://elyon1.court.gov.il/files/09/900/026/n05/09026900.n05.pdf> (last visited 22 May 2012), the petitioners argued that all provisions of GC IV are now regarded as part of customary law. The Court declined to rule on the argument but said that it would continue its practice of respecting the customary provisions of the Convention as part of the applicable law.

31 See, e.g., UNSC Resolution 446, 22 March 1979, UN Doc. S/RES/446 (1979); UNSC Resolution 452, 20 July 1979, UN Doc. S/RES/452 (1979); and UNSC Resolution 465, 1 March 1980, UN Doc. S/RES/465 (1980). The prohibition in GC IV, Art. 49, para. 6, on transfer of civilians of the Occupying Power into the occupied territory is not the only legal basis for the argument that establishment of settlements in the OT is unlawful. For a concise presentation of the other arguments, see Program on Humanitarian Policy and Conflict Research, 'Policy brief: the legal status of Israeli settlements under IHL', available at: <http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=773> (last visited 22 May 2012).

32 ICJ, *Wall* case, above note 18, para. 120.

33 *Beth El* case, above note 20; HCJ 258/79, *Amira et al., v. Minister of Defence et al.*, 34(1) PD, p. 90, 1979.

34 *Elon Moreh* case, above note 25.

The Court has done its utmost to avoid having to rule on the general legality of establishing settlements for nationals of the Occupying Power in occupied territory. It ruled that the prohibition in Article 49, paragraph 6 of the Fourth Geneva Convention on transfer of the civilian population of the Occupying Power into occupied territory is not part of customary law that will be enforced by the Court;³⁵ it refused to rule on use of public land for settlements on grounds of lack of standing;³⁶ and it held that a petition challenging the entire settlement policy on various legal grounds was non-justiciable.³⁷ On the other hand, the Court has ruled on more than one occasion that the settlements may remain where they are only as long as Israel retains control over the area, and that a political decision to withdraw from territory will justify dismantling the settlements and requiring the settlers to relocate in Israel.³⁸

Avoiding ruling on the lawfulness of the settlements has no doubt enabled the Court to avoid a head-on clash with the government and a large segment of public opinion. Understandable as this may be on the political level, as will be shown below in the discussion of the Court's decisions on the separation barrier, the Court's refusal to rule on this question has somewhat compromised its position.

35 *Beth El* case, above note 20, p. 121; *Elon Moreh* case, above note 25, pp. 14–15.

36 H CJ 277/84, *Ayreib v. Appeals Committee et al.*, 40(2) PD, p. 57, 1986. In this case, a Palestinian resident of the West Bank challenged a decision to declare land as government land, arguing that the land belonged to him. After his claim was rejected by the Appeals Committee that was established by a military order to hear appeals against such declarations, he petitioned the HCJ. The petitioner argued, *inter alia*, that the real intention behind declaring the land to be government land was to facilitate establishment of a settlement there, and that this was unlawful under Article 55 of the Hague Regulations, which deals with use of public land by an Occupying Power. The Court held that, if the land was indeed government land, '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' (*ibid.*, para. 9). This narrow view of the demand for standing in order to challenge the legality of government action has long been abandoned by the Supreme Court in its general jurisprudence: see, e.g., H CJ 910/86, *Ressler v. Minister of Defence*, 42(2) PD, p. 441, 1986. While most of the decisions liberalizing the rules on standing were delivered after the *Ayreib* decision, it is nevertheless difficult to accept that the narrow, formalistic, approach to standing in that decision reflected the general trend of the Court on the issue of standing at the time. In H CJ 3125/98, *I'ad v. IDF Commander in Judea and Samaria*, 58(1) PD, p. 913, 1998, the petitioners challenged a plan for the West Bank that would extend the area of an Israeli settlement. The Court interpreted the *Ayreib* judgment as implying that, as the Palestinian petitioners could not show how use of state lands covered by the plan affected their interests, there was no basis for their argument that in adopting the plan the authorities had exceeded their powers under international law (*ibid.*, p. 916).

37 H CJ 4481/91, *Bargil et al., v. Government of Israel et al.*, 47(4) PD, p. 210, 1993. Chief Justice Shamgar held that the dominant nature of the issue of settlements was political, rather than legal, and that the Court should therefore leave the matter in the hands of the other branches of government. Justice Goldberg referred to the negotiations that were going on at the time between Israel and the Palestinian Liberation Organization, in which the settlements were a major issue of contention. He held that, since the case did not involve the claim of a specific private individual that his rights had been violated, it was one of those rare cases in which the Court should refrain from a judicial ruling that could be interpreted as interference in important political processes. See also *I'ad* case, above note 36. In H CJ 4400/92, *Kiryat Arba Local Council v. Government of Israel*, 48(5) PD, p. 587, 1992, the Court followed the same line when it rejected a petition by Israeli settlers challenging a government decision to freeze all building of settlements.

38 *Beth El* case, above note 12; *Kiryat Arba* case, above note 37; *Gaza Beach* case, above note 14.

The jurisprudence of belligerent occupation

Judging the contribution of the HCJ to development of the law of occupation is not an easy task. In many of its decisions the Court has preferred to rely on rules of Israeli administrative law, rather than on the international law of belligerent occupation. In others, the Court has concentrated on the specific facts, rather than on the legal principles involved. Finally, in many cases the Court has done its best to avoid ruling on the compatibility of actions or policies with international humanitarian law, either by relying on the distinction between customary and conventional law mentioned above, or by glossing over the issue. In this article I shall concentrate on those issues in which Court has taken a position on the law applicable in occupied territories.

Interpreting the law: general approach

In the *Afu* case,³⁹ which dealt with deportation of protected persons on security grounds, the petitioners argued that Article 49, paragraph 1 of the Fourth Geneva Convention prohibits all deportations of protected persons from occupied territory and that this prohibition knows no exceptions. In replying to this argument, Chief Justice Shamgar opined that the provision in Article 49, paragraph 1 could be interpreted in two different ways. In such a case, he held, the Court should adopt the interpretation that is least restrictive of the state's sovereignty. In the case in question this meant adopting an interpretation that allows the state to deport protected persons on security grounds.⁴⁰ The principle of interpretation cited and implemented by Chief Justice Shamgar is not mentioned in the Vienna Convention on the Law of Treaties. It is totally out of tune with fundamental principles in interpretation of international conventions that deal with human rights or humanitarian law, whose very object is to grant protection to individuals against abuse of state power. It is also totally inconsistent with the general jurisprudence of the Supreme Court, which holds that legislation should be interpreted so as to protect the fundamental rights of the individual.⁴¹ While the HCJ has never cited or repeated Chief Justice Shamgar's statement, in practice that statement largely reflects the way in which the Court has interpreted protective provisions in the Fourth Geneva Convention and Hague Regulations. In cases relating to Article 49, paragraph 1 of the Fourth Geneva Convention,⁴² the majority on the Court have adopted an interpretation that flies in the face of its clear meaning, on the basis of the questionable assumption that the absolute prohibition on deportation of

39 HCJ 785/87, *Afu et al., v. Commander of IDF Forces in the Judea and Samaria et al.*, 42(2) PD, p. 4, 1988, p. 17.

40 For criticism of the interpretation adopted by the Court, see D. Kretzmer, above note 2, pp. 48–52; Yoram Dinstein, 'Deportations from Occupied Territories', in *Tel Aviv University Law Review*, Vol. 13, 1988, pp. 403–416.

41 The leading case is HCJ 73, 87/53, *Kol Ha'am v. Minister of Interior*, 7 PD, p. 871, 1953.

42 Article 49, para. 1 of GC IV states: 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive'.

protected persons in that provision had been introduced into the Convention to deal with deportations of the type carried out by the Nazis.⁴³ In the *Ajuri* case,⁴⁴ the Court adopted what it termed a ‘dynamic interpretation’ of Article 78 of the Fourth Geneva Convention, when it held that ‘assigned residence’ for imperative reasons of security could include transferring a West Bank resident to Gaza (before the disengagement).⁴⁵

In a recent case, petitioners challenged the legality of holding prisoners from the OT in prisons in Israel, arguing that this is incompatible with Article 76 of the Fourth Geneva Convention.⁴⁶ In her judgment in the case, Chief Justice Beinisch stated that in interpreting the Fourth Geneva Convention heed must be paid to the special circumstances and characteristics of the occupation, and especially ‘the long period of the occupation, in the geographic conditions and the possibility of maintaining contact between Israel and the area’.⁴⁷ She ruled that this required giving special weight to protected persons, and particularly to the rights of detainees. What is important is protection of their *substantive* rights, rather than a literal interpretation of the Fourth Geneva Convention. Thus, if the authorities could guarantee better conditions to detainees by holding them in Israel, rather than in the OT as required under Article 76 of the Convention, they were conforming with ‘the substantive provisions of the Geneva Convention relating to conditions of detention’.⁴⁸ The *rhetoric* in this judgment would seem to imply that, by holding that the Convention should be interpreted for the benefit of the protected persons, the Court was departing from the approach described above that prefers state interests to the rights of individuals, and was holding that the Convention should be interpreted for the benefit of the protected persons. However, the rhetoric was employed in the concrete case so as to justify the authorities’ refusal to comply with the strict requirements of the Fourth Geneva Convention. The decision therefore appears to be consistent with the general approach of the Court mentioned above, which favours the interpretation that supports the government’s position.

Military needs and public welfare

It is accepted jurisprudence of the Court that in exercising his powers in occupied territory the military commander must consider two factors: ensuring his military or security needs in the area and ensuring the welfare of the local population.⁴⁹ How has the Court understood the term ‘military or security needs’?

43 The cases are discussed in D. Kretzmer, above note 2, pp. 43–52.

44 *Ajuri* case, above note 20.

45 For a critical analysis of this case see O. Ben-Naftali, above note 2, pp. 164–171.

46 Article 76, para 1, GCIV provides: ‘Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein...’.

47 *Yesh Din* case, above note 30, para. 7.

48 *Ibid.*, para. 11.

49 *Jami’at Ascan* case, above note 5; *Beit Sourik* case, above note 26, para. 34, in which the Court refers to the many judgments in which it has emphasized this crucial principle of its jurisprudence on belligerent occupation.

The *Beth El* case⁵⁰ concerned requisition of private land for establishment of a settlement in a strategic position. Relying on the wording of Article 52 of the Hague Regulations that permits requisition of property ‘for the needs of the army of occupation’, the petitioners argued that this term has a restricted meaning that is limited to the logistical requirements of the army of occupation and does not include the wider security interests of the Occupying Power. In rejecting this argument, Justice Witkon held that in a situation of belligerency the Occupying Power has the responsibility to enforce public order and security in the occupied territory, and it must also deal with dangers from that territory towards the occupied territory itself and towards the territory of the Occupying Power.⁵¹ In his concurring judgment, Justice Landau expressly referred to the wording of Article 52 of the Hague Regulations.⁵² After citing various sources which accept that immovable property may be requisitioned for wider military needs, Justice Landau saw fit to add that the main task of the commander in occupied territory is ensuring public order and safety, under Article 43 of the Hague Regulations. He added that ‘anything needed in order to achieve this aim is anyhow needed for the purposes of the occupying army, in the meaning of article 52’.⁵³ Thus, establishment of a civilian settlement in a strategic position, which, the authorities argued, would facilitate defence of the area, was a military need that could justify requisition of private land.

In a later case, the Court rejected an attempt to further widen the term ‘security military needs’, by including an ideological, political view of the long-term interests of the state.⁵⁴ This led Justice Barak to state in a leading judgment:

Both considerations [of the military commander] are directed towards the [occupied] area itself. The commander is not allowed to consider the national, economic or social interests of his own state, to the extent that they do not have implications for his security interests in the area or the interests of the local population. Even military needs are his military needs in the area, and not national security interests in the wide sense. An area subject to belligerent occupation is not a field open to economic or other exploitation.⁵⁵

Despite this dictum, which would seem to imply a narrow interpretation of the term ‘military needs’, the wide view presented by the Court in the *Beth El* case – according to which protecting the security interests of the Occupying Power and its citizens is

50 *Beth El* case, above note 12.

51 *Ibid.*, pp. 117–118.

52 While the authorities themselves relied on Article 52 of the Hague Regulations as the basis for the order requisitioning land, Justice Landau pointed out that it is not clear that this provision relates to immovable property (*ibid.*, pp. 129–131). Be this as it may, the Court accepted that under customary international law the Occupying Power has the authority to requisition land for the needs of the army of occupation. On this issue, see Y. Dinstein, above note 1, pp. 226–230.

53 *Beth El* case, above note 12, p. 131. Justice Landau repeated this approach in the *Elon Moreh* case, above note 25, p. 16.

54 *Elon Moreh* case, above note 25.

55 *Jami'at Ascan* case, above note 5, para. 13.

a legitimate military need – reflects the approach of the Court.⁵⁶ In effect the Court has followed Justice Landau's approach, which ties the needs of the army of occupation to the duties of the Occupying Power under Article 43 of the Hague Regulations. These duties have become a central theme in the Court's jurisprudence.

Article 43 of the Hague Regulations

Article 43 of the Hague Regulations prescribes the fundamental obligations of an Occupying Power. It may therefore be regarded as the 'mini-constitution' of an occupation regime.⁵⁷ This article provides:

The 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.

This provision deals with two issues: first, the obligation of the Occupying Power to restore and ensure public order and safety; and second, its obligation to respect the laws in force in the country 'unless absolutely prevented'. In the Brussels Project of 1874 and the Oxford Manual of 1880 these two issues appeared in two separate provisions.⁵⁸ However, in the final draft of the Hague Regulations they were combined in Article 43. The Supreme Court has drawn a close connection between the two parts, by tying the issue of changes in the law to the obligation of the Occupying Power to restore and ensure public order and safety. I shall, however, treat the issues separately.

Restoring and ensuring 'public order and safety'

In the *Christian Society* case,⁵⁹ the first published decision dealing with the OT, Justice Sussman pointed out that the original French version of the Hague Regulations refers to '*l'ordre et la vie publique*', which obviously has a much wider

56 See, e.g., HCJ 202/81, *Tabeeb et al., v. Minister of Defence et al.*, 36(2) PD, p. 622, 1981 (expropriation of land for construction of a road to circumvent a town); HCJ 1987/90, *Shadid v. IDF Commander in Judea and Samaria* (unreported judgment of 15 July 1990) (requisition of land for branch of the civil administration); HCJ 8286/00, *Association for Civil Rights in Israel v. IDF Commander in Judea and Samaria* (unreported judgment of 13 December 2000) (seizure of four schools to serve as military outposts during the first *intifada*); HCJ 401/88, *Rian et al., v. IDF Commander in Judea and Samaria* (unreported judgment of 24 July 1988) (requisition of a private apartment and roof of a building for a temporary military lookout).

57 See E. Benvenisti, above note 1, p. 9. In HCJ 2164/09, *Yesh Din v. Commander of IDF Forces in Judea and Samaria et al.*, Judgment, 26 December 2011 (hereafter *Quarries* case), available in Hebrew at: <http://elyon2.court.gov.il/files/09/640/021/N14/09021640.N14.htm> (last visited 22 May 2012), para. 8, the Court stated: 'As is well known, Article 43 has been recognized in our jurisprudence as a quasi-constitutional framework provision that sets out the general framework for the way the duties and powers of the military commander must be exercised in occupied territory'.

58 *Project of an International Declaration Concerning the Laws and Customs of War*, Brussels, 27 August 1874, Articles 2 and 3; *The Laws of War on Land*, Oxford, 9 September 1880, Articles 43 and 44.

59 *Christian Society* case, above note 3, p. 581.

meaning than the term ‘public order and safety’.⁶⁰ It includes all aspects of public or civil life. As explained in a subsequent judgment of the HCJ, the term ‘public life’ includes ‘conducting a proper administration on all its branches accepted nowadays in a well-functioning country, including security, health, education, welfare and also, inter alia, quality of life and transportation...’.⁶¹ The Court held that the notions of ‘proper administration’ cannot be gauged by the *laissez-faire* concepts of government that were prevalent when the Hague Regulations were adopted. They are those that are suited to ‘a modern and civilized state at the end of the twentieth century’.⁶²

What interests are involved in assessing the welfare of the local Palestinian population? Generally the Court regards only their narrow economic and material welfare, and ignores issues connected with their political interests in avoiding major changes that further the integration of the West Bank with Israel. Thus, for example, in the *Hebron Electricity* case, the HCJ accepted that attaching the West Bank city of Hebron to the Israeli national electricity grid was for the good of the local population since it would guarantee a reliable source of electricity.⁶³ Only in one case, which also dealt with supply of electricity, did the Court take an entirely different approach. Relying on Article 43, the HCJ held that the decision of the military commander to place supply of electricity to most of the West Bank in the hands of the Israel Electricity Company rather than the local Palestinian company was unlawful. It explained that, given the importance of electricity, placing the supply of electricity in the hands of a supplier from outside the OT ‘has implications that go beyond the economic and technical aspects of the matter’.⁶⁴ This decision was a voice in the wilderness.

Examining the Court’s attitude to the duty to ensure ‘public order and public life’ has been complicated by two phenomena: the long-term nature of the occupation and the presence in the OT of Israeli settlers and other Israelis who travel through the area.

Long-term occupation

In the *Elon Moreh* case, Justice Landau held that

no military government may create in its area facts for its military purposes that are intended from the very start to exist even after the termination of the military rule in that area, when the fate of the territory after termination of the military rule is unknown.⁶⁵

60 See Y. Dinstein, above note 1, p. 89.

61 *Tabeeb* case, above note 56, p. 629.

62 *Jami’at Ascan* case, above note 5, p. 800.

63 *Hebron Electricity* case, above note 3.

64 HCJ 351/80, *Electricity Company for Jerusalem District v. Minister of Energy and Infrastructure*, 35(2) PD, p. 673, 1981, p. 692. For discussion of the difference in the judicial approach between the two electricity supply cases, see D. Kretzmer, above note 2, pp. 64–68.

65 *Elon Moreh* case, above note 25, p. 22.

This case involved requisition of private land for settlement of Israeli nationals. But what of projects whose ostensible object is to benefit the local population? May the military commander decide on long-term projects that will exist even after termination of the occupation?

Justice Barak addressed these questions in the *Jami'at Ascan* case,⁶⁶ referred to above, which concerned expropriation of land for the building of a major highway on the West Bank. The Court held that, in considering long-term projects, two conflicting interests were involved: on the one hand, the duty of the military commander to act as a proper government that looks after the interests of the local population; and, on the other hand, the restraints on an Occupying Power as a temporary regime that does not exercise sovereign power but derives its authority from the laws of armed conflict. Applying its theory that the military government must view its governmental powers as those that are suited to 'a modern and civilized state at the end of the twentieth century',⁶⁷ the Court held that, in a long-term occupation, investments and projects which have implications that will be felt even when the occupation comes to an end are legitimate, provided that they are planned for the benefit of the local population and do not introduce changes into the basic institutions of the occupied territory. On the basis of this principle, the Court held that building the highway was legitimate since evidence had been produced that it would serve the needs of the local Palestinian population.

The approach presented by Justice Barak was followed in subsequent cases. The theory is that, while the purpose of wielding governmental powers – benefit of the local population – does not change over time, the way that power is implemented must take account of changing conditions and circumstances. Justice Barak repeated this view in a judgment delivered twenty years after his original decision:

True, the belligerent occupation of the area has gone on for many years. This fact affects the scope of the commander's authority... The passage of time, however, cannot expand the authority of the military commander and allow him to take into account considerations beyond proper administration of the area under belligerent occupation.⁶⁸

In a more recent case, the Court explained its position as follows: '... the belligerent occupation of the area by Israel has special characteristics, the main one being the period of time of the occupation which demands fitting the laws to reality on the ground...'.⁶⁹ In that case, the issue was whether it was lawful for the military authorities to grant licences to Israeli companies to open and operate stone quarries in the West Bank.⁷⁰ The petitioner, an Israeli non-governmental organization,

66 *Jami'at Ascan* case, above note 5.

67 *Ibid.*, p. 800.

68 *Beit Sourik* case, above note 26, pp. 829–830.

69 *Quarries* case, above note 57, para. 10.

70 The issue of quarries had been discussed in a previous case: HCJ 9717/03, *Naale v. Supreme Planning Council in Judea and Samaria*, 58(6) PD, p. 97, 2004. The petitions in this case were submitted by residents of Israeli settlements. While their concern was the pollution caused by a planned quarry in their

argued that the policy was incompatible with the Occupying Power's obligation under Article 55 of the Hague Regulations to manage public property as a usufruct. Furthermore, as the vast majority of stone that is quarried is used in Israel, rather than by Palestinians in the OT, permitting operation of the quarries could not be regarded as having been done for the welfare of the local population.⁷¹

The authorities were obviously embarrassed by the petition. While they defended their policy in court on the grounds that 'reasonable' use of quarries that did not lead to significant depletion of the area's resources was permissible, they also declared that no new licences would be granted to Israeli companies to open quarries in the West Bank.

The Court held that the petition could have been rejected without going into the matter on the merits. In the first place, the issue of stone quarries was a political issue that had been dealt with in the negotiations between Israel and the Palestinian Liberation Organization and was subject of a provision in the Oslo Agreements. Since no individuals had argued that their rights were violated by operation of the quarries, the matter should be regarded as a political matter that was non-justiciable. Furthermore, the petition was general in its nature and had not presented an adequate factual basis for a judicial decision. Finally, the delay in submitting the petition and the effect that that delay had on the rights of third parties (the companies that had invested in developing the quarries) meant that the petition should be rejected on grounds of laches (undue delay in submitting the petition, which constitutes accepted grounds for rejection of a petition to the HCJ).

Despite its view that the petition should be rejected on the above grounds, the Court proceeded to examine the issue on the merits. It began by trying to show that there were differences of opinion among experts on the interpretation of Article 55 of the Hague Regulations and more specifically on whether an Occupying Power may allow opening and operation of *new* mines or quarries in occupied territories. Having raised this question, the Court ruled in favour of the authorities' position that the quarries were lawful. It based its position on a number of grounds. First, since the quantity of stone that was quarried did not substantially deplete the quarry potential of the area,⁷² the Court held that using such stone could be regarded as enjoying the fruits of the quarries, rather than exploiting their capital.⁷³ The Court decided that, in these circumstances, the real question was whether such action was compatible with the obligation of the Occupying Power under Article 43

area, they argued that permitting operation of the quarry was incompatible with Article 55 of the Hague Regulations. In a brief opinion, the Court held that even if the quarry would be exploiting natural resources this was permissible if it would benefit the local population, among whom Israeli settlers were to be included. Furthermore, the length of the occupation meant that the Occupying Power should be allowed to make changes that would have a long-term effect. As the authorities had shown that some of the stone to be quarried would serve the needs of people in the West Bank, the Court held that allowing opening of the quarry was not incompatible with Article 55 of the Hague Regulations.

71 According to figures submitted to the Court by the authorities, 94% of the stone from the quarries operated by Israeli companies was for use in Israel. *Quarries* case, above note 57, para. 1.

72 According to an estimate submitted by the authorities, even if the Israeli quarries were to continue to operate on the same scale for the next thirty years they would only exploit 0.5% of the quarrying potential on the West Bank: *ibid.*, para. 1.

73 *Ibid.*, para. 11.

of the Hague Regulations. According to the jurisprudence of the Court discussed above, this meant asking whether action was for the welfare of the local population. In giving a positive answer to this question, the Court mentioned a number of factors: some of the quarried stone was used by local Palestinians, the quarry companies paid royalties to the civil administration of the West Bank which were used for furthering local projects, a fair number of local Palestinians were employed in the quarries, and development of the quarries contributed to modernization in the area. In light of these factors, the Court stated that it could not accept the petitioner's view that operation of the quarries by Israeli companies had no relation to the welfare of the local population, 'especially in light of the common economic interests of the Israeli and Palestinian side and the lengthy nature of the occupation'.⁷⁴ The Court also took into account the declaration by the government, submitted in response to the petition, that it would not permit opening of any new quarries by Israeli companies.

The Court's judgment in this case raises many questions. In the first place, why should the extent of the stone quarried, in relation to the quarrying potential, be relevant in deciding whether the issue is one of enjoying the fruits of public property or depleting its capital? Non-renewable natural resources can hardly be regarded as fruits of property. Second, by examining the unintended effects of economic activity, rather than the ostensible purpose of the action by the military commander, the Court departed from the position that it had previously taken on this issue. The 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. Finally, even if one were to accept that opening new quarries would contribute significantly to the local economy, there is no reason why the commander should have allowed Israeli companies, rather than companies belonging to local Palestinian residents, to operate the quarries. All the benefits to the local population (employment, providing some stone for the local construction industry, modernization) could have been achieved by licensing Palestinian companies to operate the quarries.

Settlements, settlers, and Israeli commuters

The main context in which the HCJ has tried to fit the laws to the reality on the ground has been the question of settlements, and more specifically their effect on the interests of 'protected persons'. Under Article 4, paragraph 1 of the Fourth Geneva Convention, this term includes all persons who find themselves in the hands of the Occupying Power, with the exception of its own nationals.⁷⁵

When first considering who was included in the local population, the HCJ ignored the notion of 'protected persons'. Hence, when judging the welfare of the

⁷⁴ *Ibid.*, para. 13.

⁷⁵ Article 4, para. 1, of GC IV states: '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'.

local population in the *Hebron Electricity* case, the Court declared that ‘for this purpose the residents of Kiryat Arba [an Israeli settlement constructed on the outskirts of Hebron] must be regarded as having been added to the local public, and they are also entitled to a regular supply of electricity’.⁷⁶ This approach was retained by the Court in later years, even when it mentioned the Occupying Power’s duty towards protected persons.⁷⁷

In many cases, the authorities argued that a decision or action being challenged, which seemingly served the interests of settlers or other Israeli nationals, was in fact for the benefit of the local Palestinian population. The Court was reluctant to question whether this was indeed the case.⁷⁸ It consistently held that the fact that an action by the military commander, such as the building of a new highway, would *also* benefit settlers or Israelis travelling through the area, did not make the action unlawful, provided that the aim was to benefit the local Palestinian population.⁷⁹ In many of the cases it seemed that, even if it could be argued that the local Palestinian population would benefit from the challenged action, this was certainly not its main or dominant aim. In a recent case, which dealt with expropriation of private property of Palestinians for the building of a railway line that would join Tel Aviv and Jerusalem, the Court left open the question whether, in order for such expropriation to be lawful, benefit of the local population must be its *dominant* aim, rather than one of its side effects.⁸⁰ The Court’s decisions in the *Quarry* cases discussed above⁸¹ would seem to imply that, even if benefit of the local population is a side effect of an action, rather than one of its direct (not to say dominant) aims, the action could be lawful.

As the settler population grew, and especially after the first *intifada* started in 1987, with the consequent heightened tension between Palestinians and Israelis on the West Bank, it was inevitable that there would be a clear clash of interests between the Palestinian and settler populations. How did the Court deal with this?

The case that was to set the tone on this question related to the Beit Hadassah building in the centre of Hebron. After the government allowed Israeli nationals to occupy the upper floors of this building, the military commander constructed a fence around the building that severely restricted access of customers to Palestinian stores on the ground floor of the building. When this act was challenged in court, the commander claimed that the fence was essential to protect the security of the settlers in the building. In considering this claim, the Court saw the matter as self-evident that the authority of the commander to protect security is ‘extremely wide, and includes everybody who is in the area, whether he is one of its

76 *Hebron Electricity* case, above note 3, p. 138.

77 *Hess* case, above note 20, p. 455; HCJ 9717/03, *Naale* case, above note 70, p. 104.

78 See, e.g., *Tabeeb* case, above note 56.

79 *Jami’at Ascan* case, above note 5, p. 811; *Head of Beit Icsa Local Council* case, above note 20.

80 *Head of Beit Icsa Local Council* case, above note 20, para. 27. The Court refused to rule on the merits in this case, as it held that the petition should be rejected on the grounds of laches (i.e. undue delay in submitting the petition).

81 See above note 70 and text accompanying notes 69–74.

permanent residents or one of its new residents'.⁸² This was to become the pervasive theme of the Court in dealing with clashes between the interests of both settlers and Israelis visiting the OT and those of protected persons in the area.⁸³

The security of the settler population became a major question when the HCJ considered the legality of sections of the separation barrier that was built largely on the West Bank, and that was the subject of the Advisory Opinion of the ICJ in *Legal Consequences of the Construction of a Wall*.⁸⁴ In its Advisory Opinion, the ICJ opined that, since the settlements on the West Bank were established in violation of international law, determining the route of the barrier in order to include the settlements on the western side of the barrier was unlawful. The applied assumption was that the object of fixing the barrier with the settlements in mind was to annex those settlements in Israel.⁸⁵ The HCJ disagreed. It held that it had been proven that the route was determined by security needs, rather than political considerations.⁸⁶ However, the real question was the security of whom? Are the security interests of nationals of the Occupying Power who reside in the occupied territory included in the security interests that the commander has the duty and power to ensure?

As explained above, the HCJ refrained from ruling on the legality of constructing settlements in the OT. While it did not expressly grant legal imprimatur to the settlements, its very refusal to rule on the issue was certainly perceived as legitimization by omission. Consequently, when the separation barrier cases reached the HCJ it was in no position to reverse its position and rule, thirty-five years after the occupation had begun, that settlements established by the government were all unlawful. On the other hand, it was not about to cross spears with the ICJ and rule that the settlements were lawful. It got around this difficulty by ruling that the legality of the settlements was irrelevant in deciding whether the commander could consider the security of the settlers when using his powers to ensure public order. According to the Court's view, the obligation of the commander, under Article 43 of the Hague Regulations, to maintain public order included his duty to protect the lives of all persons in the occupied territory, whether there by right or not. This view first appears in the Court's judgment in the *Alpehi Menashe* case,⁸⁷ in which the Court gave detailed consideration to the Advisory

82 HCJ 72/86, *Zalum v. Military Commander*, 41(1) PD, p. 528, 1987, p. 532. It must be pointed out that, in this case, the petitioners' counsel apparently did not argue that the commander may not consider the security of persons other than protected persons. Rather she argued that the real reasons for constructing the fence were to force the Palestinian storekeepers to leave their stores, rather than security.

83 See, e.g., HCJ 4363/02, *Zinbakh v. IDF Commander in Gaza*, Judgment, 28 May 2002, available in Hebrew at: <http://elyon1.court.gov.il/files/02/630/043/A02/02043630.a02.pdf> (visited 22 May 2012); HCJ 4219/02, *Gusin v. IDF Commander in Gaza*, 56(4) PD, p. 408, 2002, at p. 611. In both these cases, the Court rejected the argument that protection of the security of persons in Israeli settlements was not a legitimate security interest. The grounds given by the Court were that under the Oslo Agreements the status of the settlements was to be decided in the final stage agreements, and that until that time the commander was duty-bound to protect the security of all persons in the occupied territory.

84 *Legal Consequences of Construction of the Wall*, above note 18.

85 For discussion of the reasons for tying the legality of the barrier's route to the location of settlements, see David Kretzmer, 'The advisory opinion: the light treatment of international humanitarian law', in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 88–102.

86 *Beit Sourik* case, above note 26; *Alpehi Menashe* case, above note 20.

87 *Alpehi Menashe* case, above note 20, p. 498.

Opinion of the ICJ. It has since become standard fare in the Court's separation barrier decisions.⁸⁸

The *Abu Safiyeh* case concerned an order by the military commander on the West Bank prohibiting use of a highway – Highway 443 – by Palestinian vehicles.⁸⁹ In a previous case in which expropriation of land for part of this highway was under review, the Court had accepted that the object of building the highway was to benefit the local Palestinian population.⁹⁰ The order prohibiting use of the highway by Palestinian vehicles was imposed after a number of drive-by attacks and shootings on Israeli vehicles on the road, some of which ended in death and injury of Israeli drivers and passengers. After dragging its feet on the issue for some time, the HCJ ruled that in totally excluding Palestinian vehicles from use of the road the commander had exceeded his authority. It also held that, in any event, even if the commander had the authority to exclude Palestinian vehicles, his decision to place an absolute ban on use of the highway by such vehicles failed to meet demands of proportionality.⁹¹ One might have thought that, since the road had ostensibly been built for the good of the local Palestinian population, and that ensuring the welfare of that population must guide the commander in his decisions, the Court would have ruled that the commander was duty-bound to allow all Palestinian vehicles to use the highway, and, if possible, to make the necessary security arrangements that would also allow Israeli vehicles to travel on it. The Court did nothing of the sort. It merely declared that the order placing an absolute prohibition on use of the highway by Palestinian vehicles was unlawful and was therefore invalid. It left it to the military commander to make a new order that would provide security to Israeli drivers who used the highway.⁹² The implied assumption was that Israeli vehicles could continue to use the highway and that limited provision would be made to allow some Palestinian vehicles to use the highway. Fundamentally, then,

88 See, e.g., HCJ 3680/05, *Tene Local Committee v. Prime Minister of Israel* (2006), para. 8, available in Hebrew at: <http://elyon1.court.gov.il/files/05/800/036/A13/05036800.a13.htm> (last visited 22 May 2012); HCJ 11651/05, *Beit Aryeh Local Council v. Minister of Defence* (2006), para. 8, available in Hebrew at: <http://elyon1.court.gov.il/files/05/510/116/A05/05116510.a05.htm> (last visited 22 May 2012); HCJ 2577/04, *Al Hawaji et al., v. Prime Minister et al.* (2007), para. 31, available in Hebrew at: <http://elyon1.court.gov.il/files/04/770/025/N56/04025770.n56.htm> (last visited 22 May 2012). In all these decisions, the Court repeated that 'the authority of the military commander to construct the separation barrier includes his authority to construct a barrier to protect the lives and security of Israelis who reside in Israeli settlements in the area of Judea and Samaria, even though the Israelis residing in the area are not protected persons, as this term is defined in article 4 of the Fourth Geneva Convention' (*Tene Local Committee* case, para. 8).

89 HCJ 2150/07, *Ali Hussein Mahmoud Abu Safiyeh, Beit Sira Village Council Head, et al., v. Minister of Defence et al.*, Judgment, 29 December 2009, available at: http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf (last visited 22 May 2012).

90 *Jami'at Ascan* case, above note 5.

91 *Abu Safiyeh* case, above note 89.

92 *Ibid.*, para. 39. The Court suspended the declaration that the prohibition on use of the highway by Palestinian vehicles was invalid for a period of five months, in order to allow the commander to make new arrangements. Because of strict security checks at road-blocks, the new order promulgated by the military commander following the Court's judgment still resulted in severe restrictions on use of the highway by Palestinian vehicles. See B'Tselem (The Israeli Information Center for Human Rights in the Occupied Territories), 'Route 443 – West Bank road for Israelis only', available at: http://www.btselem.org/freedom_of_movement/road_443 (last visited 22 May 2012).

the Court tacitly accepted that the main interest to be ensured in use of the highway would be the interest in freedom of movement of Israeli vehicles.

In the *Hess* case, the Court repeated its view that Israeli settlers are included in the local population whose welfare must be promoted by the military commander.⁹³ That case related to a decision by the military commander to requisition private property alongside the path that settlers and other visitors took on their way to worship at the Cave of the Patriarchs in Hebron, in order to increase protection of the worshippers. While the Court referred to the duty of the military commander under Article 43 of the Hague Regulations to ensure the welfare of protected persons, most of its judgment is devoted to balancing the ‘constitutional rights’ to freedom of religion and property. In upholding the requisition of property, no special weight was attached to the duty of the commander to protect the rights of protected persons.⁹⁴

In summary, the Court has taken a wide view of the term ‘public safety and public life’ mentioned in Article 43 of the Hague Regulations, which incorporates all actions required by a government in a well-ordered society in the contemporary world. By adopting what it has termed a ‘dynamic’ interpretation of the norms of belligerent occupation so as to take consideration of the political reality of the long-term occupation, the Court has somewhat undermined the core meaning of these norms. By including the security of Israeli nationals who have either settled in the OT or travel through the area as a protected interest, and at the same time neither giving priority to the duty of the commander under the Fourth Geneva Convention to ensure the interests of protected persons, nor demanding that the welfare of the local population be the dominant aim, the Court has weakened the legal protection afforded under international law to protected persons.⁹⁵

Changes in the law

The *Christian Society*⁹⁶ case concerned a military order that introduced changes in the local labour law in order to facilitate settlement of labour disputes by compulsory arbitration. The question was whether this change was compatible with the Occupying Power’s duty under Article 43 of the Hague Regulations to respect the local law unless absolutely prevented from doing so.

The Court was divided on the approach to examining the term ‘absolutely prevented’. The majority tied the term to the obligation of the Occupying Power to restore and ensure ‘public order and public life’ and adopted the position that any changes in law whose purpose was to fulfil this obligation could be regarded as

93 *Hess* case, above note 20.

94 See also *Rachel Tomb* case, above note 20.

95 For development of the argument that, in applying universal standards to all persons in the occupied territories, the Court has weakened the special protection that an Occupying Power is supposed to extend to protected persons, see Aeyal M. Gross, ‘Human proportions: are human rights the emperor’s new clothes of the international law of occupation?’, in *European Journal of International Law*, Vol. 18, No. 1, 2007, pp. 1–35.

96 *Christian Society* case, above note 3.

absolutely necessary. The minority judge pointed out that Article 43 speaks of the duty to restore and ensure. He held that one can only restore what existed before and ensuring measures must not change the nature of public order and civil life that existed before. Furthermore, the minority judge added that, since compulsory arbitration is not part of Israeli law, the Occupying Power could not argue that it had no choice but to institute it in the occupied territory. He was thus arguing for a test that has some support in the literature: while the mere fact that certain legislation exists in the occupying state cannot mean that the commander is empowered to introduce such legislation in the occupied territory, the fact that legislation does not exist in the occupying state may be a factor in constraining introduction of such legislation in the occupied territory.⁹⁷

The minority view that legislative changes should be gauged by the duty to 'restore' what existed before the occupation began could not have provided a workable yardstick when the occupation dragged on. It never gained support in the Court, and the majority view has prevailed. Thus legislative changes needed to protect security or to further public welfare will not be illegitimate on the grounds that the commander was absolutely prevented from instituting them.⁹⁸

The approach of the Court to legislative changes may be termed the 'benevolent occupier' approach.⁹⁹ Under the guise of changes needed for the benefit of the local population, it has opened the path for wide-scale changes in the law on the West Bank (and in Gaza, before withdrawal of Israeli forces and settlements from that area). When challenged in court, the authorities only have to make out a case that legislative changes were needed for the good of the local population in the wide sense discussed above.

The best example was the *Abu Itta* case, decided in the 1980s.¹⁰⁰ Following legislation that introduced value added tax (VAT) in Israel, the military commanders of the West Bank and Gaza promulgated military orders instituting the same tax in those territories. When the authorities began to enforce the tax, Palestinian merchants petitioned the Court, challenging its imposition. After reviewing a wide range of authorities, Justice Shamgar reached the conclusion that there is no rigid rule against instituting a new type of tax in occupied territory. He held that, as with all other military legislation, legislation introducing a new tax must be gauged according to the principles in Article 43 of the Hague Regulations. At the time that the tax was imposed there were open borders between Israel and the OT. Unless VAT similar to the tax imposed in Israel had been imposed in the OT, the government would have had to restrict the flow of goods and services between Israel and the OT, and this would have had a deleterious effect on the local population in the OT. Furthermore, economic hardship in the OT would have caused discontent and this could have led to security problems. Thus imposition of

97 See Y. Dinstein, above note 1, p. 122, and the authorities cited there.

98 HCJ 69/81, *Abu Itta* et al., v. *IDF Commander in Judea and Samaria* et al., 37(2) PD, p. 197, 1983 (hereafter VAT case).

99 See D. Kretzmer, above note 2, pp. 64–72.

100 VAT case, above note 98.

the new tax could be justified both as a measure imposed for the benefit of the local population and for military needs.

In effect then, despite the strong language of Article 43, which speaks of the Occupying Power being ‘absolutely prevented’ from changing the local law, the Supreme Court has held that the only issue is whether the purpose of the change was a legitimate one: protection of security or furthering the welfare of the local population. The Court has never ruled on legislation that was obviously introduced solely to protect the interests of Israeli settlers.

Notwithstanding its wide approach on the power of the military commander to change local law, the Court has on occasion been prepared to interfere in the contents of legislation on the grounds that the commander has not struck a proper balance between security needs and the welfare of the local population. When lawyers on the West Bank demanded establishment of a bar association under Jordanian law, the military commander amended the law so as to allow appointment of the council members rather than their election. While the Court accepted that there were valid security reasons for limits on the independence of the bar association, it held that the commander has not given adequate weight to finding a balance between security and that independence. It therefore ordered the commander to consider amending the military order so as to allow for limited autonomy for the bar.¹⁰¹

Military necessity and its constraints: proportionality

In many cases the law of belligerent occupation allows the Occupying Power to restrict certain rights of protected persons on such grounds as ‘the needs of the occupying army’, ‘imperative reasons of security’, or ‘imperative military reasons’.¹⁰² In the initial period after the occupation began, the Court was reluctant to interfere with the military commander’s assessment that military necessity required a certain measure. It did indeed require the authorities to show the Court the evidence upon which such an assessment was made, but, provided that the authorities showed that their decision was based on a rational assessment of military necessity, the Court refused to interfere in the commander’s discretion.¹⁰³ In recent years, the Court has instituted an approach to military necessity based on the three-pronged proportionality test developed in German public law.¹⁰⁴ This test of proportionality

101 HCJ 507/85, *Tamimi et al., v. Minister of Defence et al.*, 41(4) PD, p. 57, 1987.

102 See, e.g., Hague Regulations, Art. 52 (requisitions in kind and services not to be demanded ‘except for the needs of the army of occupation’); GC IV, Art. 27, para. 4 (permitting ‘such measures of control and security in regard to protected persons as may be necessary as a result of the war’); GC IV, Art. 49, para. 2 (total or partial evacuation of a given area permitted where ‘imperative military reasons so demand’); GC IV, Art. 53 (destruction of property forbidden except when ‘rendered absolutely necessary by military operations’); GC IV, Art. 78 (internment or assigned residence of protected persons where the Occupying Power ‘considers it necessary, for imperative reasons of security’).

103 See, e.g., *Hilu* case, above note 12; *Beth El* case, above note 12, pp. 125–126.

104 In German law, the notion is called *Verhältnismäßigkeit*. Originally employed in administrative law, it involves examining three questions: whether there is a rational connection between the administrative act

has little, if anything, in common with the proportionality principle as it is understood in *ius in bello*.¹⁰⁵ It should be recalled, however, that the latter principle is only relevant in the conduct of hostilities, and has no place in the exercise of the powers of a military commander in occupied territory. The function of these powers is to allow the military commander to fulfil his duties to ensure public order and civil life under Article 43 of the Hague Regulations, and to protect the security interests of the occupying army. It is in this context that the Court's test of proportionality must be viewed.

In the *Beit Sourik* case, the Court opined that the three-pronged test of proportionality has become a general test both in domestic law and international law in general, and in the law of belligerent occupation in particular.¹⁰⁶ This case involved a challenge to the legality of one part of the separation barrier or wall that was being constructed in the West Bank. The Court held that, since it had been proved that the object of the barrier was security, the military commander had the power in principle to requisition land required for its construction. However, in examining whether use of that power in a concrete case was 'necessary for security', the commander's decision was to be judged on the basis of the test of proportionality. This meant examining three criteria: whether there was a rational connection between requisitioning the land and the legitimate purpose (security); whether the route chosen was the least invasive way of achieving this purpose; and whether the security benefit of the particular route chosen outweighed the damage caused to the persons affected by that route. This final criterion implied that, if there were an alternative route that could provide security protection, the marginal security advantages of the chosen route had to be weighed against the marginal benefits to the petitioners of the alternative route. In this particular case the Court held that there was a clear rational connection between protecting security and building the barrier on the chosen route, and that the commander had shown why, in his estimation, that route was optimal from the point of view of security. However, on the basis of evidence submitted by the petitioners, the Court held that there was an alternative route that would in the commander's view be less advantageous from a security point of view, but would involve considerably less

and its legitimate purpose; whether it is the least invasive way of achieving that purpose; and whether the benefit outweighs the harm caused to the interests of others. The notion was adopted by the Canadian Supreme Court as a test for examining whether restrictions on liberties protected under the Canadian Charter are necessary in a free and democratic society and is now widely used in Israeli jurisprudence for examining the legality of governmental action and of restrictions on protected liberties. For a full exposition of the development of the term and its use in comparative constitutional law, see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, Cambridge, 2011.

105 The classic definition of proportionality in *ius in bello* appears in Article 51, para. 5 of the First Additional Protocol to the Geneva Conventions, according to which an attack will be regarded as indiscriminate if it 'may be expected to 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'. According to the ICRC Study on Customary International Law, this principle is a norm of customary international law in both international and non-international armed conflicts: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC/Cambridge University Press, Cambridge, 2005, p. 46.

106 *Beit Sourik* case, above note 26, para. 36.

damage to the petitioners. Failure to choose this route meant that the commander's decision failed to meet the proportionality test.¹⁰⁷ In another case, the Court held that the route chosen failed the proportionality test because the commander had not examined alternative routes that might have been less harmful to the rights of the petitioners.¹⁰⁸

Following the *Beit Sourik* decision, the three-pronged proportionality test became the standard test for examining other sections of the separation barrier, and the HCJ now regards this test as a general principle that constrains all decisions that rely on military necessity.¹⁰⁹ Ostensibly, the Court's jurisprudence on this issue makes a significant contribution to the limitations on the power of the military in occupied territory. Clear criteria are set for assessing military necessity and balancing it with competing interests. The commander does not have the final word on the issue of military necessity since his decision is open to review by a judicial body. But, as in most other cases, the devil is in the details here. Like the case of considering 'public order and civil life', the question is first and foremost which interests are considered in carrying out the balancing under the various prongs of the test. Which security interests are involved? And what kind of alternatives are to be considered when examining whether the measure chosen is the least invasive measure to protect security? As we have seen above, the Court has held that security involves not only the security of the military forces and of the Occupying Power, but also that of both Israeli nationals who live in settlements in the OT and Israeli commuters who travel through the area. Even if settlers are living in settlements whose construction involved a violation of international law, in considering less invasive ways of protecting their security no consideration is given to requiring them to leave the area. Nor is consideration given to stopping use by nationals of the Occupying Power of a highway built, according to the declaration of the authorities themselves, for the benefit of the local Palestinian population. It has been argued that the way in which the Court has employed the proportionality test has in fact weakened the protection of the rights of protected persons in occupied territory.¹¹⁰

Use of the proportionality test must also be seen against the background of the tendency of the Court to prefer interpretations of the law that allow the authorities some degree of discretion to those that mandate or prohibit certain acts. In the *Abu Safiyeh* case,¹¹¹ mentioned above, the Court ruled that the commander did not have the authority to exclude Palestinian vehicles from a highway that was ostensibly built for the benefit of the local population. Had it stood on its own, this

107 *Ibid.*, paras. 84–85.

108 *Alpei Menashe* case, above note 20, pp. 553–554. In HCJ 9593/04, *Moraar v. IDF Commander in Judea and Samaria*, 2006 *Dinim* (38), p. 345, the Court referred to the first prong of the proportionality test, namely the requirement for a rational connection between the measure and its security purpose. The Court held that a measure that is arbitrary, unfair, or illogical does not meet this requirement. Thus, imposing restrictions on the movement of Palestinians in order to protect them from potential violence by settlers was not a proportionate measure.

109 *Abu Safiyeh* case, above note 89.

110 Guy Harpaz and Yuval Shany, 'The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law', in *Israel Law Review*, Vol. 43, 2010, pp. 514–550.

111 *Abu Safiyeh* case, above note 89.

would have been a powerful statement. However, the Court saw fit to provide an alternative explanation for the illegality of the commander's decision: it did not meet the test of proportionality. As has been shown by others, the approach to proportionality adopted in this case largely undermined the protection afforded to the local population for whose benefit the highway had ostensibly been constructed.¹¹²

One of the problematical consequences arising from the dominant place that the three-pronged proportionality test now plays in jurisprudence of the Supreme Court in general, and in its jurisprudence regarding the law of occupation in particular, is the Court's tendency to ignore or gloss over issues of legal authority in favour of judging governmental action in terms of proportionality. This may be discerned in two cases mentioned above. In the *Quarries case*,¹¹³ the issue was the legal authority of the military commander to permit Israeli companies to open and operate new quarries from which they would extract stone, a non-renewable natural resource. While not mentioning the proportionality test by name, the Court held that, since the amount of stone quarried, in relation to the quarrying potential on the West Bank, was small, the quarrying should be regarded as use of fruits rather than depletion of capital resources. But, as noted above, if the commander may not permit new quarries, the issue of degree (or proportionality) is irrelevant. Similarly, in the *Abu Safiyeh* case the Court held that the commander lacked the legal authority to exclude Palestinian vehicles from using Highway 443.¹¹⁴ Again, as noted above, by introducing the proportionality test as alternative grounds for overruling the commander's decision, the Court weakened the impact of its ruling that the commander had exceeded his authority.¹¹⁵

One comes across a similar situation in the first case in which the Court employed the proportionality test in examining a decision of a military commander in the OT. The case related to the punitive demolition of a house after one of its residents had been involved in a terrorist attack.¹¹⁶ While the Court had on previous occasions refused to interfere with similar decisions of the military commander,¹¹⁷ in two dissenting opinions one justice on the Court had opined that demolishing a house in which persons not belonging to the nuclear family of the culprit lived would be a form of collective punishment.¹¹⁸ As such it would exceed the legal authority of the military commander. In the case under consideration, the Court accepted that the commander could not demolish a house if it would mean

112 See G. Harpaz and Y. Shany, above note 110. The writers argue that by including the interests of Israeli commuters on the road when assessing the proportionality of the commander's decision to prohibit use of the road by Palestinian vehicles the Court expanded the powers of a military commander in occupied territory.

113 *Quarries case*, above note 57.

114 *Abu Safiyeh case*, above note 89.

115 See G. Harpaz and Y. Shany, above note 110.

116 HCJ 5510/92, *Turkmahn v. Minister of Defence*, 48(1) PD, p. 217, 1992.

117 See D. Kretzmer, above note 2, pp. 145–163.

118 See the dissenting opinions of Justice Cheshin in HCJ 5359/91, *Khisrahn v. IDF Commander in Judea and Samaria*, 46(2) PD, p. 150, 1992; HCJ 2722/92, *Alamarin v. IDF Commander in Gaza*, 46(3) PD, p. 693.

destroying the home of families other than the nuclear family of the bomber.¹¹⁹ But, rather than basing this on lack of legal authority, the Court preferred to hold that such a decision would not meet the demands of proportionality.

In conclusion, in adopting the three-pronged test of proportionality in order to assess military necessity the Court has introduced a novel notion into international humanitarian law. While this notion allows for judicial supervision of the way in which military commanders use their discretion in occupied territory, and in the Israeli case has on occasion been employed in order to restrain use of such discretion, the notion may be overused and abused. The Court may employ the notion where it would be more appropriate to examine questions of legal authority. It may also widen the interests to be considered in assessing proportionality, thereby also widening the powers of the commander in occupied territory.

Hostilities in occupied territories

The Occupying Power has the duty to ensure public order in the occupied territory. In doing so it must exercise 'policing powers'. Its rules of engagement must be consistent with such powers and with the relationship between a government and a civilian population.¹²⁰ What is the situation if hostilities break out in the occupied territory between organized armed groups and the forces of the Occupying Power? Which rules apply to the conduct of the Occupying Power in dealing with such hostilities – those of 'policing' or 'law enforcement', or those relating to conduct of hostilities in armed conflict?

Opinions are divided on these questions. Some seem to think that in occupied territory only the policing rules of ensuring public order can apply, and that existence of armed hostilities in the area can have no influence on the applicable legal regime. Thus, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall*, the ICJ failed to address the question of whether there were hostilities on the West Bank, and if so whether these hostilities could be relevant in deciding which legal norms applied.¹²¹ Consequently, it opined that Article 23 of the Hague Regulations, which appears in the section of those regulations relating to hostilities, was inapplicable in deciding on the legality of seizing property.¹²² Others clearly distinguish between the rules that apply in the law enforcement (policing) functions of the Occupying Power and those that apply to active hostilities.¹²³

Soon after violence broke out in the OT in September 2000, the Judge Advocate of the IDF declared that the situation in the OT was now one of 'armed

119 *Turkmahn* case, above note 116.

120 See Kenneth Watkin, 'Maintaining Law and Order during Occupation: Breaking the Normative Chains', in *Israel Law Review*, Vol. 41, 2008, pp. 175–200.

121 See D. Kretzmer, above note 85.

122 *Legal Consequences of the Construction of the Wall*, above note 18, para. 124.

123 See K. Watkin, above note 120; Y. Dinstein, above note 1, pp. 99–101.

conflict short of war'.¹²⁴ The idea was that, given the scope and intensity of violence, the situation was now one of active hostilities in an armed conflict, rather than 'mere' occupation. This approach was adopted by the Government of Israel in its submissions to the Mitchell Commission, which was established to look into the causes of the violence.¹²⁵ The Supreme Court accepted the classification of the situation in the OT as one of active hostilities.¹²⁶ In doing so it relied on one of the criteria used to assess whether an internal armed conflict exists, namely the scope and degree of armed violence involved.¹²⁷ The Court has never examined the second criterion for making such an assessment – the degree of organization behind the armed violence.

In the *Alpehi Menashe* case,¹²⁸ the Court noted that in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall* the ICJ opined that Article 23(g) of the Hague Regulations was not applicable, since it appears in the section dealing with 'hostilities'. The Court took issue with this view on two grounds: first, the view held by some experts that the scope of Article 23(g) can be widened so as to include occupied territory; and second, that the situation in occupied territory is not static: 'Periods of tranquillity and calm transform into dynamic periods of combat'.¹²⁹ The Court emphasized that the rules applying to such combat will be the rules applying to hostilities in armed conflict.¹³⁰ Having said this, the Court did not expressly rule that the law that applied to seizure of property for construction of the separation barrier was the law of hostilities, 'since the general authority granted the military commander pursuant to Regulations 43 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention are sufficient, as far as construction of the fence goes'.¹³¹

The potential clash between norms relating to conduct of hostilities and those relating to control of occupied territories has engaged the Supreme Court on a number of occasions.¹³² In these cases, that Court has attempted to maintain the principle that, even when hostilities are taking place, the military commander retains his obligation to ensure the welfare of the local civilian population.¹³³ In the

124 See Giora Eiland, 'The IDF in the second *intifada*: conclusions and lessons', in *Strategic Update*, Vol. 13, No. 3, 2010, pp. 27–37, available at: [http://www.inss.org.il/upload/\(FILE\)1289896504.pdf](http://www.inss.org.il/upload/(FILE)1289896504.pdf). In blue and hyperlinked (last visited 2 July 2012). It has never been clear why the words 'short of war' were added. The idea was probably to make clear that the armed conflict was not one of an international character.

125 See Report of the Sharm el-Sheikh Fact-finding Committee (the Mitchell Report), citing statements submitted by the Government of Israel, available at: http://www.mideastweb.org/mitchell_report.htm (last visited 22 May 2012).

126 *Ajuri* case, above note 20, pp. 358–359; *Targeted Killings* case, above note 20.

127 *Ajuri* case, above note 20. The Court listed the number of attacks on Israel and Israeli nationals, and the number of casualties that had been caused since violence started in October 2000.

128 *Alpehi Menashe* case, above note 20.

129 *Ibid.*, para. 17.

130 *Ibid.*

131 *Ibid.*

132 For a principled discussion of this issue, see K. Watkin, above note 120.

133 The main judgment on this question was handed down in HCJ 4764/04, *Physicians for Human Rights v. Commander of the IDF in the Gaza Strip*, Judgment, 30 May 2004, English translation available at: <http://62.90.71.124/eng/verdict/framesetSrch.html> (last visited 22 May 2012). For a detailed review of the

Marab case,¹³⁴ the Court reviewed the issue of detention during hostilities. It held that, even though it is not possible to conduct judicial review of such detention in the area of the hostilities themselves, once the detainees have been removed from that area the legality of their detention should be subject to judicial review and the detainees should have the right to consult a lawyer.

Following complaints by non-governmental organizations regarding use of Palestinians as ‘human shields’ during the 2002 IDF ‘Defensive Shield’ campaign on the West Bank, the IDF issued orders totally prohibiting use of Palestinian residents as human shields or hostages. However, the orders still allowed military commanders to enlist the assistance of Palestinian residents who agreed to do so to warn neighbours that an IDF force had come to arrest them, provided that the commander assessed that no danger to the life or body of the residents was involved.¹³⁵ The authorities argued that this practice reduced the number of casualties among Palestinians.¹³⁶ Nevertheless, the Court held that for a number of reasons the practice was unlawful: from the principle in Article 51 of the Fourth Geneva Convention prohibiting enlistment of protected persons to serve in the armed forces of the Occupying Power the Court deduced that it was also prohibited to enlist their help; the Occupying Power has a duty to keep the local population away from military operations; it was doubtful, given the disparity in power relations, whether real consent of the Palestinian residents could be obtained; and finally, it was impossible to know in advance whether the life of the Palestinian resident would be endangered.¹³⁷ This is one of the few cases in which the HCJ has ruled that a practice which the authorities claimed justified on security grounds was incompatible with IHL. It is also one of the few decisions in which the Court has prohibited a practice entirely, rather than leaving discretion to the authorities that it should be exercised in a proportionate manner.

The parallel application of norms relating to belligerent occupation and those relating to conduct of hostilities has also been relevant when dealing with the question of targeted killing of suspected terrorists. When, if at all, a state may use lethal force against a suspected terrorist who is not at the time engaged in violent activities has been the subject of much academic discussion since the 11 September 2001 terrorist attacks on the United States.¹³⁸ While the HCJ was at first reluctant to deal with the issue,¹³⁹ in 2006 it delivered a reasoned judgment devoted

cases, see David Kretzmer, ‘The Supreme Court of Israel: Judicial Review During Armed Conflict’, in *German Yearbook of International Law*, Vol. 47, 2004, pp. 392–456.

134 *Marab* case, above note 21.

135 H CJ 3799/02, *Adalah* et al., v. *Officer Commanding IDF Central Command* et al., 60(3) PD, p. 67, 2006.

136 *Ibid.*, para. 3.

137 *Ibid.*, para. 24.

138 For the most comprehensive discussion of this topic, see Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008. See also David Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence?’, in *European Journal of International Law*, Vol. 16, No. 2, 2005, pp. 171–212; 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’, in *Cornell International Law Journal*, Vol. 36, 2003, pp. 233–292.

139 See H CJ 5872/01, *Barakeh* v. *Prime Minister*, 56(3) PD, p. 1, 2002, in which the Court dismissed a petition relating to the issue as non-justiciable.

to it.¹⁴⁰ The Court's judgment has been discussed, analysed, and criticized elsewhere,¹⁴¹ and I shall therefore confine my remarks to the matter under discussion here.

The Court assessed the legality of targeting specific individuals under the norms relating to conduct of hostilities. It held that members of armed Palestinian groups are civilians who may only be attacked when taking a direct part in hostilities. Having set this legal framework, and adopting a wide interpretation both of 'direct participation in hostilities' and of the time-frame in which a person may be said to be taking direct part in hostilities, the Court laid down certain constraints on the use of lethal force against such persons. The first constraint is that force may not be used if other less harmful means can be employed. While it has been questioned whether such a condition exists in the law of armed conflict,¹⁴² the Court based its view on the notion of proportionality, which it regards as an overriding principle that applies to all uses of governmental power. It admitted that the feasibility of alternative means of neutralizing the threat – namely arrest and detention – does not exist in many combat situations. But it saw fit to add that it is

a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities (see §5 of the Fourth Geneva Convention).¹⁴³

It is not at all clear to the present writer what the relevance of Article 5 of the Fourth Geneva Convention is to the issue under consideration. Be that as it may, the Court reveals here the potential conflict between a regime of belligerent occupation and one of conduct of hostilities in an armed conflict. The defining feature of occupied territory is that it is under the effective control of the army of the Occupying Power. The fact that hostilities are taking place that meet the level and scope of armed violence and organization for them to be regarded as an armed conflict rather than riots or disturbances does not of itself mean that the Occupying Power has lost its effective control over the area. It retains its duties as an Occupying Power.¹⁴⁴ The members of armed groups fighting against it have a dual status: on the one hand, they are protected persons; on the other hand, they are either civilians taking direct part in hostilities or 'non-privileged combatants'. It seems to me that,

140 *Targeted Killings* case, above note 20.

141 For discussion of various aspects of the Court's decision, see the articles in the *Journal of International Criminal Justice*, Vol. 5, No. 2, 2007: Roy S. Schondorf, 'The *Targeted Killings* Judgment: A Preliminary Assessment', pp. 301–309; Amichai Cohen and Yuval Shany, 'A Development of Modest Proportions: The Application of the Principle of Proportionality in the *Targeted Killings Case*', in *Journal of International Criminal Justice*, Vol. 5, No. 2, 2007, pp. 310–321; Orna Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law', pp. 322–331; William J. Fenrick, 'The *Targeted Killings* Judgment and the Scope of Direct Participation in Hostilities', pp. 332–338; Antonio Cassese, 'On Some Merits of the Israeli Judgment on Targeted Killings', pp. 339–345. See also O. Ben-Naftali, above note 2, pp. 171–177.

142 *Targeted Killings* case, above note 20.

143 *Ibid.*, para. 40.

144 See Y. Dinstein, above note 1, p. 100.

even if it may be doubted whether the balance demanded by the Court applies in all situations of armed conflict,¹⁴⁵ in situations of belligerent occupation it does provide a way of reducing the tension between the two functions of the Occupying Power's military.

Concluding comments

The Israeli occupation has gone on for a long time – far too long, in fact, for it to be regarded as a normal situation of occupation.¹⁴⁶ It would be naïve to think that a domestic court could deal with such an anomalous situation as if it were an outside, neutral, observer that is oblivious to the political realities in its own country. While commentators may be highly critical, and justifiably so, of the approach of the HCJ on many questions, including, of course, its refusal to rule on the legality of Israeli settlements, it should be appreciated that in Israel itself the Court has been under attack. Its willingness to review all actions of the military authorities – and occasionally to interfere with security decisions – has not been well received in many quarters and has affected the legitimacy of the Court in the eyes of large sections of the Israeli public.

In stressing the centrality of Article 43 of the Hague Regulations, in ruling that military commanders must find a balance between military needs and the welfare of the local population, and in subjecting this balance to the test of proportionality, the Court has helped to develop the law of belligerent occupation. Without belittling this contribution, it seems to me that the Court's real contribution to occupation law lies not on the substantive level but in its very willingness to subject acts of the military authorities in occupied territory to judicial review in real time. Such review has been a welcome innovation. It has had a restraining effect on the acts of the authorities that cannot be judged solely by looking at the Court's jurisprudence. In many cases, the threat of judicial review, submission of a petition, or remarks of the judges during the hearings have led the authorities to reconsider their position and back down, wholly or partially.¹⁴⁷ Alongside this significant restraining influence of judicial review, requiring the military authorities to defend their actions in court on the basis of the norms of the international law of belligerent occupation, and discussing these norms in a judicial forum, may well be the Court's main contribution to law in a situation of belligerent occupation.

145 See A. Cohen and Y. Shany, above note 141.

146 See O. Ben-Naftali, above note 2.

147 See D. Kretzmer, above note 2, pp. 189–191.