Living Under Threat of a Demolition Order

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Disclaimer

My fieldwork was conducted while I was a volunteer Ecumenical Accompanier serving on the World Council of Churches’ *Ecumenical Accompaniment Programme in Palestine and Israel*. The views contained here are personal and do not necessarily reflect those of the organisers.

\[\footnote{1\text{ Hereafter, EAPPI.}}\]
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<tr>
<th>Acronyms</th>
<th>Description</th>
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<tbody>
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<td>API</td>
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<td>World Bank</td>
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<td>WHO</td>
<td>World Health Organization</td>
</tr>
</tbody>
</table>
Table of Contents

Acknowledgments............................................................................................................II
Disclaimer.........................................................................................................................III
Acronyms .........................................................................................................................IV

1 INTRODUCTION .............................................................................................................1
  1.1 Susiya – a Small Palestinian village ........................................................................1
  1.2 Current Situation on the Ground ...........................................................................2
  1.3 Aim and Research Objectives................................................................................3
  1.4 Scope and Timeframe of the Study .......................................................................4
  1.5 Legal Sources and Methodology ..........................................................................5
      1.5.1 Sources of Domestic Law ...........................................................................5
      1.5.2 Sources of International Law .................................................................5
      1.5.3 Methodology ............................................................................................7
  1.6 The Oslo Accords – Road Map Towards a Two-State Solution .........................8
      1.6.1 The New Map............................................................................................8
      1.6.2 Political and Jurisdictional Consequences ..............................................9

2 THE WEST BANK AND INTERNATIONAL LAW .........................................................10
  2.1 International Humanitarian Law .........................................................................11
      2.1.1 The Belligerent Occupation of the West Bank .......................................11
      2.1.2 The Time Frame .......................................................................................12
  2.2 International Human Rights Law .........................................................................12
      2.2.1 Extraterritorial Application ....................................................................13
  2.3 Concluding Remarks ............................................................................................15

3 THE WEST BANK AND ISRAEL'S HIGH COURT OF JUSTICE .................................16
  3.1 The Legislative Power of the Military Commander .............................................17
  3.2 Towards Acknowledged Applicability of the Hague Regulations and the IV Geneva
      Convention ............................................................................................................17
  3.3 The HCJ's Jurisprudence .....................................................................................19
      3.3.1 Settlements ...............................................................................................19
      3.3.2 The HCJ’s Interpretation of “local population” and “security needs”.......21
      3.3.3 The “Proportionality” Test .......................................................................23
      3.3.4 Concluding Remarks .................................................................................24
4 ISRAELI REGULATIONS AND PRACTICE OF HOUSE DEMOLITIONS, AND ITS EFFECTS

4.1 The Ottoman Land Code

4.1.1 Change in Practice: Land Registration and “the 50 percent rule”

4.2 Jordanian Planning Law

4.2.1 Planning Committees

4.3 Changes by Military Order-418

4.3.1 Concluding Remarks

4.4 The Effects of the Reformed Jordanian Planning Law by Military Order-418

4.4.1 State Land

4.4.2 Demolition Orders and House Demolitions

4.4.3 Settlements and Outposts

4.5 The Humanitarian Impact of the ICA’s Planning Policy

5 THE LAWFULNESS OF THE ISRAELI APPROACH UNDER INTERNATIONAL HUMANITARIAN LAW

5.1 Article 43 of the Hague Regulations

5.2 The Obligation to Restore and Ensure Public Order and Civil Life

5.2.1 Do Changes Implemented by Military Order-418 Meet the Needs of the Local Population?

5.2.2 Concluding Remarks

5.3 The Obligation to Respect the “laws in force” “unless absolutely prevented”

5.3.1 Extended Interpretation of Article 43

5.3.2 Prolonged Occupation

5.3.3 Were Changes Implemented by Military Order-418 of Military Necessity?

5.3.4 Concluding Remarks

6 REFERENCES

6.1 Appendix: Links to the Domestic Laws
1 Introduction

1.1 Susiya – a Small Palestinian village

The story of Susiya is a story of demolitions and forced displacement. The village has its roots back to the early 1800. The families in Susiya lived in peace for many years, but after the Israeli settlement of Susia was established in 1983, everything changed. Between 1986 and 2001, the villagers were expelled three times even though all the legal land documents were in place. They moved to different areas on their land and rebuilt their village.

The villagers filed their first petition in 2001, following the third expulsion. The High Court of Justice\(^8\) approved the petition and they were able to return and the Israeli Civil Administration\(^9\) were ordered to halt the demolitions. Later, the village submitted an outline plan\(^10\) to the Subcommittee for Planning and Licensing in 2012, but it was rejected the following year. Without this master plan, it is impossible to get building permits and to be connected to the water and electricity systems. All the structures in the current village are built without building permits and 82 demolition orders have been issued, which covers almost all the structures in the village, including solar panels and wells.\(^11\) The HCJ ruled in May 2015 that the village should be demolished. The villagers managed to get the attention of the entire world that summer. Pictures of Susiya were in newspapers worldwide and internationals including delegations from the United Nations\(^12\) and the European Union\(^13\) visited the small village on the southern West Bank. Some of the non-governmental organisations\(^14\) operating in the area stationed their volunteers in Susiya on a permanent basis.\(^15\)

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\(^7\) Rabbis for Human Rights (2013). Nasser Nawaje and his family in private conversations and public talks give information about the village.

\(^8\) Hereafter HCJ. The Supreme Court of Israel sits as the High Court of Justice which acts as a court of first and last instance, and the court makes judgments “in matters in which it considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal”. Cf. Israel Ministry of Foreign Affairs (The court System).

\(^9\) Hereafter, ICA. Its responsibility is to implement the Israeli government’s policy in the occupied territories.

\(^10\) Also called a master plan.

\(^11\) OCHA demolition-system database.

\(^12\) Hereafter, UN.

\(^13\) Hereafter, EU.

\(^14\) Hereafter, NGO.

\(^15\) NGOs present were EAPPI, Christian Peacemaker Team and Operation Dove.
The villagers filed a petition to the HCJ, and after several hearings with the Israel Defence Force\textsuperscript{16} and ICA, the Defence Minister were granted by the Court to submit his positions concerning the proceedings.\textsuperscript{17} The State has requested a postponement until 15 November and the go-ahead to demolish 30 per cent of the village.\textsuperscript{18}

The question is whether this in line with the law of occupation and the protection of civilians that these provisions were intended to protect. Israel has received warnings from the United States,\textsuperscript{19} EU and Great Britain not to demolish Susiya. Moreover, according to Haaretz, the USA warned that a harsh response would follow if the village were demolished.\textsuperscript{20}

1.2 Current Situation on the Ground
The West Bank is currently in its fiftieth year of occupation by Israel. The Military Commander\textsuperscript{21} and the IDF are still controlling security of the rural areas and the zones surrounding towns and cities. Information from the media has it that settlements are increasing in number and the West Bank is gradually being zoned into increasingly less land for Palestinian use.\textsuperscript{22} Demolition of homes is accelerating. Bedouins living in the firing zones are facing forced displacement.\textsuperscript{23} A wall is being erected in Beit-Jala near Bethlehem, and hundreds of old olive trees have been uprooted.\textsuperscript{24}

Due to the deteriorating situation and an increased chance that the two-state solution will become an impossible option, France launched an Initiative for Peace.\textsuperscript{21} The Israeli government refuses to recognise the pre-1967 borders that the Palestinian Liberation Organization\textsuperscript{22} consider the territory of the State of Palestine. Israel has rejected the initiative and the prospect of negotiations in 2016 is highly uncertain.\textsuperscript{23}

\textsuperscript{16} Hereafter IDF.
\textsuperscript{17} Rabbis for Human Rights (18.08.16).
\textsuperscript{18} Ibid, and Berger (18.08.16).
\textsuperscript{19} Hereafter, USA.
\textsuperscript{20} Ravid et al. (10.08.16) and (10.08.16 no. 2).
\textsuperscript{21} The authority of the Palestinian territories was given to the Israeli Military Commander (MC) after the war in 1967.
\textsuperscript{22} Moore (15.09.16).
\textsuperscript{23} Hass (02.11.16).
\textsuperscript{24} B’Tselem (10.02.16).
\textsuperscript{21} France Government (03.06.16).
\textsuperscript{22} Hereafter, PLO.
\textsuperscript{23} France felt compelled (03.06.16).
The Palestinian politician Haneen Zoabi articulates that Israel wants to have control of Area C, which are the rural parts of the West Bank. She believes that the demolitions and expulsions are part of a larger project involving the construction of settlements at the expense of the Palestinians; that is, Israel is colonising the West Bank.\textsuperscript{28} The Israeli government has on several occasions hinted of a possible annexation of the West Bank.\textsuperscript{29} The government wishes to apply Israeli law in the settlements by introducing a “civil law” bill.\textsuperscript{30} Even though any speculations about the annexation of the settlements has been rejected, similar bills have been introduced in the Israeli Parliament, the Knesset.\textsuperscript{31} The Palestinians interpret the current situation to be a confirmation of both the colonial and annexation approach.

The UN Secretary-General has expressed his concern about developments during recent years. “The creation of new facts on the ground through demolitions and settlement building raises questions about whether Israel’s ultimate goal is, in fact, to drive Palestinians out of certain parts of the West Bank, thereby undermining any prospect of transition to a viable Palestinian state.”\textsuperscript{28}

1.3 Aim and Research Objectives
The aim of this thesis is to examine the extent to which provisions extending protection to the Palestinian population under international humanitarian law are violated by the Israeli Civil Administration’s practice of destroying Palestinian property in Area C of the West Bank.

A combination of judicial analysis and qualitative research of \textit{facta probantia} has been applied.

To achieve this aim, I have reviewed
- relevant international treaties and customary law as well as applicable domestic law, from the Jordanian period and pertinent amendments by the Israeli Military Order
- jurisprudence of the Israeli Supreme Court sitting as the High Court of Justice
- relevant legal documents and secondary literature
- OCHA’s online databases on demolition orders and executed demolitions in Area C

\textsuperscript{28} Private Interview with the Palestinian politician Haneen Zoabi in South Hebron Hills 25 July 2015. Zoabi is a member of Israel’s parliament, the Knesset, representing the Balad party on an Arab party’s list.

\textsuperscript{29} Ahren (18.11.15).

\textsuperscript{30} Lis (02.05.16), Lieber (15.05.16).

\textsuperscript{31} Lis (02.05.16), \textit{MK’s to submit bill} (26.05.14), and Ahren (08.06.16).

\textsuperscript{28} Security Council on the situation in the Middle East, 18.04.2016. Cf. UN OCHA (04.07.16).
The effects of demolition orders and demolitions have been documented by pictures and interviews during qualitative fieldwork.

1.4 Scope and Timeframe of the Study
This study seeks to determine which international provisions apply to protect the Palestinians rights to housing and farming. The study will first look at which provisions of international law that are applicable to the Palestinians living in areas C of the West Bank (Chapter 2). It will also analyse the differences between the approach adopted by the ICJ on the one hand, and by the Israeli Supreme Court on the other (Chapter 3). I will then present domestic provisions applicable to land and planning, the Israeli legal provisions and practices of house demolitions (Chapter 4), and finally evaluate to what extent these regulations and practices are violations of the international law applicable to Israel for its activities in area C of the West Bank (Chapter 5).

Confiscation of private land will be reviewed briefly. Beyond the scope of this study are the putative demolitions related to terrorism, since these demolitions are based on retribution for acts committed or suspicion of such.  

The Oslo Accords of 1993 made significant changes in the existing legal landscape of the West Bank. The Palestinian Authorities were established and were granted governmental powers. However, the territory was divided into three administrative areas, A, B and C, with a distinct distribution of administrative and legislative power between the two parties. Due to this agreement, the PA were granted no power in Area C in matters regarding military protection and land regulation. Infrastructure such as roads, electricity cables or wires, water pipes, and building permits for different categories of structures, were placed under the authority of the ICA.

Approximately 300,000 Palestinians live in small and medium-sized residential areas administered by the ICA. The fieldwork was performed in the South Hebron Hills, a district mostly within Area C.

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34 See chapter 1.6.
35 Hereafter, PA
36 Kadman (2013).
This study focuses on the period from 1995 to September 2016, during which time the Oslo Accords have been in force.

1.5 Legal Sources and Methodology

1.5.1 Sources of Domestic Law
The Palestinian Territories have been subject to several regimes and state powers. The Ottoman Empire conquered Palestine in 1516, corresponding to the territories we know today as Israel Palestine. They ruled until the area was set under the British Mandate after the First World War. The British Mandate ended in 1948 when Jordan annexed the West Bank. The West Bank was under Jordanian law until the war in 1967 when Israel declared the Palestinian Territories to be under their control.

During these changes in jurisdictions, new laws have been added, but older laws were rarely repealed. For this reason, valid legislation exists today that can be traced back to the Ottoman Empire in the 17th century. The Jordanian legislation applicable at the time of occupation still applies on the West Bank. This mixture of different statutes, including international laws, are a challenge for the PA and the MC. The rural areas of the West Bank are under Israeli military control, and the applicable legislation has been changed through amendments by military orders.

Sources of domestic law applicable to land and property that have been consulted are the Ottoman Land Code of 1858, the Jordanian Towns, villages and building planning law no. 79 of 1966, and the Israeli Military Order concerning Towns, Villages and Building Planning Law of 1971.

1.5.2 Sources of International Law
Provisions that are recognised as customary international law, are directly applicable in domestic courts, hence it applies to a State without any legal acts. The Statutes for the International

33 Hereafter, Jordanian Planning Law.
38 Hereafter Military Order-418 (MO-418). To govern the West Bank, the MC changes the legislation by issuing military orders.
39 Trials of the major war criminals before the international military tribunal, Nuremberg, vol. XX11, page 497. Cf. Gasser et al. (2013) page 265. See also Nuclear Weapons opinion paragraph 75.
Court of Justice of 26 June 1945\textsuperscript{40} are recognised as customary international law, and are therefore applicable to states and non-states.\textsuperscript{41}

The sources relevant for international disputes are determined by Article 38(1) ICJ Statute. Article 38(1) determines that international conventions recognised by the parties, international customs and general principals shall apply, cf. Article 38 (1) (a-c). As listed in Article 38 (1) (d), judicial decisions and high ranked teachings in general terms, are viewed as good sources. However, the ICJ’s judgements are only binding to the parties involved in the actual case.\textsuperscript{42}

The sources of international humanitarian law\textsuperscript{43} applicable to situations of military occupation are the Regulations Respecting the Laws and Customs of War on Land, which is an annex to the IV Convention Respecting the Laws and Customs of War on Land of 18 October 1907,\textsuperscript{44} the IV Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949,\textsuperscript{45} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977,\textsuperscript{46} and customary international law.

The thesis relies on IHL provisions concerning the law in force at the time of the occupation,\textsuperscript{47} property,\textsuperscript{48} and land\textsuperscript{49}. Sources of domestic law from the time before and during the Israeli occupation, judgements by the Israeli High Court of Justice and the International Court of Justice\textsuperscript{50} have been consulted.\textsuperscript{51}

\textsuperscript{40} Hereafter, ICJ Statute.
\textsuperscript{41} Article 34 ICJ Statute determines that, as the general rule, only states are members to the Statutes. Members of the UN are members of the ICJ Statute, cf. ICJ “jurisdiction”.
\textsuperscript{42} Article 59.
\textsuperscript{43} Hereafter IHL.
\textsuperscript{44} Hereafter Hague Regulations.
\textsuperscript{45} Hereafter IVGC.
\textsuperscript{46} Hereafter AP1.
\textsuperscript{47} Article 43 Hague Regulations and Article 64 IVGC.
\textsuperscript{48} Article 23(g), 46 Hague Regulations, Article 53 IVGC, Article 54 (2) AP1.
\textsuperscript{49} Article 23(g), 46 Hague Regulations.
\textsuperscript{50} Hereafter, ICJ.
\textsuperscript{51} Translated documents.
1.5.3 Methodology

The Vienna Convention on the law of Treaties of 23 May 1968\textsuperscript{52} applies to interpretation of the treaties. Most of its provisions are recognised as customary law. When the interpretation of a treaty is disputed, Articles 31-33 determines which rules shall apply. The general rule is that the interpretation must be in good faith and in accordance with the ordinary meaning of the treaty.\textsuperscript{53}

The ICJ’s interpretation should be given high judicial weight in domestic and international courts when international treaties are reviewed. Knowledge and jurisprudence of effected states also carry weight, particularly when the Hague Regulations are to be interpreted. The Treaty is old and was not intended for long-term occupation of territory. The High Courts of Justice in Israel and the USA have experience with IHL cases. The Israeli HCJ’s jurisprudence is especially a source for understanding IHL treaties due to almost 50 years of judging cases concerning occupation disputes. By using sources such as judicial decisions, interpretation may change over time, which again may result in more dynamic interpretation of the treaties. This is not usual, however, in cases of military occupation. A dynamic approach is recognised to some extent by the ICJ when parties to the treaty had the intention of evaluative interpretation.\textsuperscript{54} However, the treaties will always be given highest weight.

With the objective to answer the research question, I have studied the ICA’s practice of issuing administrative demolition orders, demolitions themselves and the effects entailed because of the changes made by the Military Order-418. The \textit{de facto} observations of administrative changes have been subsumed against applicable provisions of IHL and reviewed against the jurisprudence of Israel’s High Court of Justice.

The thesis has reviewed the extent to which these material legal provisions comply with obligations under the IHL. Additionally, the empirical data are based on desk review of available resources and databases\textsuperscript{51} considering practice and effects of the Jordanian land and planning law’s revisions.

The fieldwork was conducted during a three-month period from mid-July to October 2015. The aim was to get first-hand knowledge about the effects of the ICA practice with respect to daily

\textsuperscript{52} Hereafter, Vienna Convention.

\textsuperscript{53} Article 31(1).

\textsuperscript{54} Helmersen (2013).

\textsuperscript{51} The UN demolition-order database is a collection of data provided by the ICA, the UN demolition-system database is protected with password available at request. The figures in Chapter 4 are based on data provided from these databases.
life. I visited more than 20 communities in the South Hebron Hills. The topics discussed were demolition orders and demolitions, living conditions in general, and the need for humanitarian and legal aid.

1.6 The Oslo Accords – Road Map Towards a Two-State Solution

The Oslo Accords is a peace agreement between Israel’s Government and the PLO. The initial achievable goal was to give the Palestinians self-governance to Jericho and Gaza. This was done by establishing the PA. The issues excluded from the agreement were related to borders, Jerusalem, Palestinian refugees and settlements. It was a step-by-step process that included several signed agreements, and the foundation of the negotiations was PLO’s recognition of Israel and Israel’s recognition of the PLO. The Oslo I agreement had a timeline of five years towards peace and a two-State solution, and was signed in Oslo in August 1993.

1.6.1 The New Map

In an interview, Prime Minister Rabin stated that the principle of the agreement was that the Palestinians should be in charge of “their affairs” and that the settlers would be Israel’s responsibility. Two years later Prime Minister Rabin presented before the Knesset the interim agreement and the division of the areas at the West Bank. The civil and security responsibilities for both parties were reviewed. From being totally controlled by the IDF, the West Bank was proposed to be put under the control of both the IDF and the new established PA.

Area A consists of the largest Palestinian cities and municipal areas. The PA was given full military and civil control in Area A. Control of Area B, which consists of approximately 450 town and villages, was shared by Palestinian civil administration and IDF. Finally, Area C was placed entirely under Israeli military control and ICA regarding land and building issues.

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52 Israel Ministry of Foreign Affairs (02.05.94).
54 Israel Ministry of Foreign Affairs (1993).
55 Also called the Oslo II.
The cities and towns in Areas A and B are like enclaves surrounded mostly by uncultivated Area C state-owned land. In addition to the Palestinian’s small and middle-sized residential areas, all the settlements are situated in Area C. Even though the Oslo Accords were supposed to be temporary, the West Bank is still regulated in Area A, B and C. Twenty-three years later, 18 per cent of the land is allocated in Area A, 22 per cent in Area B and 60 per cent in Area C.\textsuperscript{57}

\begin{figure}[h]
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\includegraphics[width=\textwidth]{Figure_1.png}
\caption{The West Bank.\textsuperscript{58}}
\end{figure}

The geographical situation in Area C has undergone major changes during the past 20 years, and the land recognized as Palestinian has decreased due to a favoured policy of building more settlements. As the settlements increase in number, Palestinian freedom of movement becomes more and more restricted. The PA has no power in the areas surrounding the settlements; therefore, the PA’s power over civilian affairs in Area C is reduced.

\subsection*{1.6.2 Political and Jurisdictional Consequences}

The Oslo Accords transferred governmental and legal power from Israel to the Palestinians and their representatives. Through this transfer, the Palestinian Territories on the West Bank became autonomous in the most densely populated cities and surrounding districts. For the first time since the occupation, the Palestinians were able to have their own government and their own police force. The Palestinians legal authority was given jurisdiction over territory, functions and personal matters within the framework of the agreement. Israeli citizens, including settlements and foreign citizens, were excluded from the jurisdiction.\textsuperscript{59} The agreement had a five-year time limit towards full transfer of power from the Israeli Army to the PA. However, after a change in government in 1996, the climate for fulfilling the accords was altered. One effect of the new government was the expansion of settlements in Area C. The Palestinian’s loss of trust cumulated in a new intifada in 2001 and the negotiations broke down. However, the agreement is still valid 23 years after it was signed, and the IDF continues to control Area C.

\textsuperscript{57} BT’selem (18.05.14).
\textsuperscript{58} Ibid.
\textsuperscript{59} Israel Ministry of Foreign Affairs (02.05.94).
2 The West Bank and International Law

This chapter reviews the applicability of IHL and international human rights law during bellicerent military occupation of the West Bank. The long duration of the occupation and extra-territorial application of IHRL will be addressed.

The International Court of Justice, which is the highest judicial body of the UN, acts as a world court. The judgments are of international matters, based on common treaties. Articles 34 and 35(1) of the ICJ Statute decides that the Court has jurisdiction only in cases referred to it by States that are party to the statute. However, non-party States may submit a case if they accept particular or general conditions determined by the Security Council.

Palestine was recognised in 2012 as an UN non-member observer state by the General Assembly. This change in status invoked the possibility for Palestine to be a party to UN treaties. In 2015, Palestine became a party to the Rome Statute of the International Criminal Court. By this change in status, Some scholars suggest that Palestine was also enabled to ratify the ICJ Statutes.

However, prior to this moment, Palestine was deprived of this opportunity. And in its place, the General Assembly of the UN requested in 2004 that the ICJ issued an advisory opinion on the conflict between Israel and the Occupied Palestinian Territories. The questions were related to the legality of the barrier erected on the Palestinian side of the Green Line. The purpose was to regulate the entrance of Palestinians from the West Bank to Israel. However, the barrier deviates from the Green Line in several places. The enclaves or “encircled communities” created by the barrier have reduced the Palestinians’ freedom of movement and prevented them from using their land. In the ICJ’s advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, issues concerning the legality of the wall were addressed. In addition, the Court made general comments regarding the applicability

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64 Hereafter, IHRL.
65 Hereafter, ICJ.
66 UN (1946).
67 ICC (07.01.15).
68 Akande (03.12.12).
69 Article 65 ICJ Statute.
71 Ibid paragraph 84.
72 Hereafter, Wall opinion.
of international law in occupied territories. The advisory opinions are not legally binding on the States involved. Despite this, the interpretations represent the highest authority of international law.

2.1 International Humanitarian Law

IHL regulates the conduct during times of armed conflict. It determines the parties’ duties towards the treatment of the enemy’s civilians and combatants. Treaties applicable during occupation are the Hague Regulations, the IVGC and AP1. International customary law is also applicable (in addition to general principles of international law).

The Hague Regulations determine the conduct of hostilities, while the IVGC focuses on the protection of the victims of war.

2.1.1 The Belligerent Occupation of the West Bank

According to Article 42 of the Hague Regulations, the law of belligerent occupation is applicable when a territory is under effective control by a foreign army. The ICJ concluded in the Wall opinion that the Palestinian Territories are under occupation, since it is under the effective control of the Israel defence force.73 Eleven years after the Wall opinion, 128 states, have stated that the Palestinian Territories are without a doubt under occupation.70

Obligations towards IHL are primarily applicable to the parties to the conflict as treaty and customary law. However, these rules may also bind third parties. The provisions in the Hague Regulations75 and the Geneva Conventions are recognized as customary international law.76 The applicability of the Hague Regulations have never been disputed by Israel. It is of significant legal importance that the IVGC has the status as customary law since a few states including Israel have not implemented the Geneva Conventions into national legislation. Provisions in AP1 applicable during occupation are also recognized as customary international law. The purpose of these treaties is to regulate the conduct of the hostile parties and to protect the civilians and objects during belligerent occupation.

73 Wall opinion (2004) paragraph 78.
75 Nuclear Weapons opinion (1996) paragraph 75.
76 O’Connell (2013) page 27. All states have ratified the Conventions.
In the *Wall* opinion, the ICJ stated that the IVGC is “applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties”. The ICJ further found that the Convention is applicable in the Palestinian Territories because the territory prior to the conflict lay to the east of the Green Line and was therefore under Jordanian jurisdiction.\(^7\)

### 2.1.2 The Time Frame

The Hague Regulations have no provisions determining the duration of the occupation and the ICJ has stated that the Occupying Power has obligations under the convention during the “relevant time”, meaning until the end of the occupation.\(^8\)

The application of the IVGC is more complicated due to Article 6, which has a “one-year” rule of the convention’s applicability. However, the Occupying Power is bound by a number of the provisions “for the duration of the occupation”. The provisions applicable with respect to property, i.e. Articles 27 and 53, do not cease after one year. The HCJ has never claimed the “one-year” rule for the purpose of reducing its responsibility.\(^9\)

### 2.2 International Human Rights Law

Human rights are judicial commitments that limit the exercise of power by States towards persons under their control and jurisdiction. The right to non-discrimination, to be treated with dignity, and the right to health and private property are examples of these rights.

Human rights were designed for peacetime and the content of some of these rights are altered in times of armed conflict. Nevertheless, the obligation to observe the treaties does not cease. The states have an obligation to fulfil or maintain the essential rights protected by the human rights conventions. The Committee on Economic, Social and Cultural Rights\(^8\) has confirmed that parties to the convention have a “core obligation” to fulfil a minimum of its obligations to each right protected by the convention, e.g., essential healthcare, foodstuff, and basic housing.

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\(^7\) *Wall* opinion (2004) paragraph 101.


\(^9\) Roberts (1990).

\(^8\) Hereafter CESCR.
These obligations have been given status as non-derogable, and a State cannot under any circumstances “justify its non-compliance with the core obligations”.  

The ICJ has addressed in several judgments that human rights cannot be derogated from during armed conflict. In two advisory opinions, it has discussed the applicability of human rights conventions; in the Nuclear Weapons opinion, the Court states, “The protection offered by IC-CPR does not cease in the times of war”.  

This statement is given a more general context in the Wall opinion, when the Court considers that “protection offered by human rights conventions does not cease in the case of armed conflict”. Some of these rights, such as the right to healthcare, education and protection from destruction of property are also protected by the Geneva Conventions, and the Court recognizes that IHL is considered to be lex specialis in relation to IHRL during times of armed conflict.

2.2.1 Extraterritorial Application

International courts and UN human rights bodies have addressed to what extent human rights treaties are applicable extraterritorially in occupied territories. In the Wall opinion, the ICJ issued general comments regarding the applicability of three UN conventions in occupied territories including the West Bank. The conventions reviewed are ratified by Israel. By interpreting the scope of application in Article 2 International Covenant on Civil and Political Rights, the Court concludes that the covenant is “applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory”. The Convention on the Rights of the Child contains a provision similar to the scope of application in Article 2 ICCPR. The conclusion made by the Court is that the convention is applicable within the occupied Palestinian Territory.

The Court further finds that the International Covenant on Economic, Social and Cultural Rights of 1966, which guarantees rights that are of a territorial nature such as the right to education, enjoyment of just work and adequate standard of living, cannot be excluded in territories where

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81 UN CESRC (1998), General Comment no 3 (1990) and, no 14 (2000).
83 Wall opinion (2004), paragraph 106.
84 Ibid paragraph 105.
85 Hereafter, ICCPR.
86 Wall opinion (2004) paragraph 111.
87 Hereafter, CRC.
89 Hereafter, ICESCR.
States exercise their territorial jurisdiction. Israel therefore, in the ICJ’s opinion, is bound by the provisions of the ICESCR and prohibited to undermine the PA exercise of such rights.\textsuperscript{90}

These pronouncements made in the \textit{Wall} opinion, are repeated in the \textit{Congo v. Uganda} case\textsuperscript{91} and in the \textit{Georgia v. Russia} case\textsuperscript{92}. Another statement from the \textit{Wall} opinion, which is followed up in the \textit{Congo v. Uganda} case are reparations to individuals because of violations against human rights and humanitarian law. According to Zyberi, the reparation principle towards individuals, with the obligation to return private property, had never been used in ICS’s case law until it was applied in the \textit{Wall} opinion and \textit{Congo v. Uganda} case.\textsuperscript{93} Even though the court’s decisions are only binding for the parties in the particular case, the Court’s view in these cases shows a trend towards extraterritorial application of human right treaties.

Similar judgements are also found in cases heard by the European Court of Human Rights. In several cases, the Court has dealt with questions related to obligations towards states’ jurisdiction, when operating extraterritorially. In the \textit{Al-Skeini} case, the Court’s view is that a State’s jurisdiction is limited to the State’s own territory, however, this limitation ceases “as a consequence of lawful or unlawful military action” which leads to an effective control of that area.\textsuperscript{94} The UN Committee for ICESCR confirmed in its Concluding Observations that Israel was obliged to apply the Covenant to all territories “under its effective control”.\textsuperscript{95} The Committee has pointed at the necessity to facilitate health services, water and goods without discrimination, to everyone “within the jurisdiction of the State party”.\textsuperscript{96}

\begin{itemize}
\item \textsuperscript{90} \textit{Wall} opinion (2004) paragraph 112.
\item \textsuperscript{91} \textit{Congo v. Uganda} case (2005) paragraph 345(3) The court states that the Republic of Uganda “failed to take measures to put an end to such conflict; as well as by its failure, as an Occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law”.
\item \textsuperscript{92} \textit{Georgia v. Russia} federation (2011). Paragraph 109: “there is no restriction of a general nature in CERD relating to its territorial application” and paragraph 149: both parties had ”the obligation to comply with the obligations under [CERD]”.
\item \textsuperscript{93} Zyberi (2011).
\item \textsuperscript{94} \textit{Al-Skeini and other v. the United Kingdom} case. (2011) paragraph 138.
\item \textsuperscript{95} UN CESCR (1998).
\item \textsuperscript{96} UN CESCR (2000).
\end{itemize}
2.3 Concluding Remarks

The ICJ’s opinion that Israel is an Occupying Power and that IHL applies in the occupied territories are opinions that are broadly supported by the international majority. According to the ICJ, the duration of the occupation has no impact on the application of the provisions. Hence, Israel may improve the protection of the Palestinians, as its enemy’s population, but not to reduce its own committed duties. Israel’s HCJ formulates this in the following way that changes that benefit the Palestinian population are not in conflict with IHL.

Human rights are not a mirror-opposite of humanitarian law, but are also applicable in times of war and during belligerent occupation.93 The Supreme Court of Israel recognizes that principles of human rights may apply under conditions where there is no protection under the provisions of IHL. President Justice Barak states, “where there is a lacuna, it can be filled by the means of international human rights law”.94 However, Barak maintains that IHL is always lex specialis to IHRL and. In the Mara’abe case, he goes further and assumes that conventions related to IHRL apply in the occupied territories. However, until the Wall opinion, the Court had never decided on the matter.95

93 Extraterritorial application might be unclear in certain circumstances, but occupation is not one of them. Cf. Lubell (2012).
95 Mara’abe case (2005) paragraph 27.
3 The West Bank and Israel’s High Court of Justice

The HCJ reviews petitions from Palestinians living in the West Bank; hence, the Court has great power to enforce the IDF’s policy and its conduct in the territory. Israeli settlers living on the West Bank have influenced the HCJ’s interpretation of IHL.

The HCJ’s approach to the settlements are briefly reviewed, followed by some of the HCJ’s arguments and interpretations that directly affect the Palestinians life.

The Supreme Court of Israel, which sits as the High Court of Justice, makes judgements regarding administrative issues.\textsuperscript{100} When the first Palestinian petitions were reviewed by the HCJ, the Court’s jurisdiction in terms of its enforceability in domestic courts was not questioned.\textsuperscript{101} In the Electricity Corporation case, the Court refers simply to “the previous matters” that had been decided by the Court. But in the Rafiah Approach case, Justice Landau addresses the unspoken when, referring to the Courts law, he assumes without ruling on the matter, that the jurisdiction exists on the personal level against functionaries in the military government who belong to the executive branch of the state, as “persons fulfilling public duties according to law”, and they may thereby be reviewed by the Court.\textsuperscript{102} The Christian Society case\textsuperscript{103} was the first case reported reviewed by the Court, and since then, the HCJ has reviewed and ruled on “[t]housands of judgements” related to IDF’s enforcement of power in the OPT.\textsuperscript{104}

The purpose of the HCJ is to evaluate the legality of the Military Administration’s decisions and not to judge its correctness.\textsuperscript{105} Justice Barak articulates the Court’s role in the Ajuri case when he states, “Our task is safeguarding the boundaries and ensuring the conditions limiting the discretion of the military commander”.\textsuperscript{106} The Knesset, Israel’s legislator, could have stopped the HCJ from reviewing the military actions, but instead of interfering, no objections

\begin{thebibliography}{9}
\bibitem{100} The High Court of Justice acts as a court of first and last instance, and the court makes judgments “in matters in which it considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal”. Cf. Israel Ministry of Foreign Affairs (The court System).
\bibitem{101} Kretzmer (2002) page 20.
\bibitem{103} Christian Society case (1972), cf. ibid.
\bibitem{104} Torture case (2005), paragraph 52.
\bibitem{105} Kretzmer (2002) page 25.
\bibitem{106} Ajuri case (2002) paragraph 375.
\end{thebibliography}
were raised. According to Israel’s Attorney General Shamgar, the policy was that external control over the IDF’s actions might encourage the military to maintain the law and not to act arbitrarily.\footnote{Shamgar “legal Concepts”. Cf. Kretzmer (2002) page 20.}

3.1 The Legislative Power of the Military Commander

The MC issued a proclamation shortly after Israel won the 1967 war. The MC stated, "Any power of government, legislation, appointment or administration with respect to primary the Region or its inhabitants shall henceforth be vested in me alone and shall be exercised only by me or by a person appointed by me to that end or acting on my behalf".\footnote{Shamgar, editor: Military Government in the Territories, page 450. Cf. Kretzmer (2002) page 27.} This statement is in agreement with Article 43 of the Hague Regulations that stipulates that the Occupying Power shall manage the governmental power including legislation in the occupied territory. Hence, the MC has his authority from the law of belligerent occupation, the Jordanian law applicable at the time of occupation and legislation promulgated by the MC.\footnote{Gaza Coast case (2005), cf. Deirat-Refaiya case (2015) paragraph 16.} According to the HCJ, the MC is obliged to act responsibly and proportionate pursuant to the principles of Israeli administrative law.\footnote{Mara’abe case (2005) paragraph 14.}

Since this statement, a substantial number of military orders have been promulgated. The orders have been used extensively in many areas such as security, administrative affairs, monetary and taxis, and Israeli settlements.\footnote{Kretzmer (2002) page 27.}

3.2 Towards Acknowledged Applicability of the Hague Regulations and the IV Geneva Convention

The Israeli Supreme Court Justice Witkon has stated “It is a mistake to think (as I read recently in a newspaper) that the Geneva Convention does not apply to Judea and Samaria. It applies even though it is not ‘justiciable’ in this court.”\footnote{Justice Witkon in the Elon More case. (1978). This is the only judicial statement that rejects the government’s view on the applicability of the IVGC. Cf. Kretzmer (2002) page 39.}
Cases earlier reviewed by the HCJ have created jurisprudence to applicable laws within the Court’s jurisdiction in the “areas of military government”. International law in general, was the only law addressed by the Court when the Palestinians petitioned the first cases. Over time, the Court has relied on military orders, Jordanian law and Israel’s administrative law, all of which had to be in accordance with international law. The Court relies on Israeli domestic law, when settler’s security and settlements are an issue.

Even though the official Israeli opinion was that the Hague Regulations were applicable due to their status as customary international law, the Court’s reluctance to take a stand on its applicability continued for several years. On the other hand, Israel did not recognise the IVGC as customary law. Hence, the convention was not applicable in domestic courts. Another reason why the Convention was not recognised was the dispute concerning the occupation itself. Common Article 2(2) of the IVGC determines that the conventions are applicable to “occupation of the territory of a High Contracting Party”. Israel did not recognise the West Bank as part of Jordan, hence the IVGC was not applicable. The official status was that the Convention was de jure rejected, but that the humanitarian provisions were de facto applicable and would be complied by the IDF.

The Hague Regulations were finally addressed in two settlement cases: the Beth El- and the Elon More Case. After these and following decisions it was clear that the Court de jure ruled by the law of occupation as determined by the Hague Regulations. In 1983, Justice Barak ruled once and for all, that the legal regime in the Palestinian Territories was the law of belligerent occupation.

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113 During the first years of occupation the HCJ did not use the same expression as the Government. Cf. Kretzmer (2002) page 35.


115 Jordanian Planning Law, cf. ibid.


118 The Constitutional system in Israel is duality-based, hence it is necessary that the convention is translated into domestic law by the Parliament before, which has never been done. Cf. Kretzmer (2002) page 31.


Towards the millennium, the Court developed, often as an *obiter dicta*, “a tendency to consult and analyse relevant clauses of the [IV Geneva] Convention” in an attempt to show that it would have yielded the same results.  

Gradually there is a shift towards a direct inclusion of the IVGC. The final confirmation of its *de jure* applicability and its judicial review by the HCJ’s were invoked by Israel in 2004, in the *Beit Sourik* case, when the State used the convention as legal authorisation to build the wall. This confirmation came 36 years after Israel was called upon to implement the Convention as a respect towards the Palestinian population and its territories. However, during the subsequent years, the HCJ has never positively confirmed that the Convention applies.

### 3.3 The HCJ’s Jurisprudence

“The law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian consideration on the other”.

A substantial number of Palestinian petitions before the HCJ are directly or indirectly related to the settlements. The increasing number of Israeli settlers in Area C challenge the protection given to the Palestinians by IHL. One reason for the petitions are the unjust consequences manifested when the settler’s rights are protected by the IDF at the expense of the Palestinians. Another reason is that the Israeli settlers and the Palestinians are governed by two legal domestic systems, which leads to discrimination. One example of laws that discriminate against the Palestinians is the planning law system.

### 3.3.1 Settlements

The criticism of Israel’s settlement policy in area C is founded on Article 49(6) of the IVGC, which prohibits the occupant from deporting or transferring “its own civilian population” to the occupied territories. The expressions “deports” and “transfer” cannot be understood in the same context as the previous paragraphs in this article which determines deportation of the occupied territories.

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125 Benvenisti (2012) page 209. See *Beit Sourik* case paragraph 14, 15 and 32.


127 *Yesh Din case* (2010) “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”. Cf. Kretzmer (2012).


129 B’Tselem (23.11.15).
It is internationally acknowledged that this provision prohibits Governments from promoting and establishing civilian settlements of its own citizens.\footnote{ICRC comments to IVGC.} Even after the \textit{de jure} applicability of the IVGC, the HCJ has never ruled on the legality of the settlements itself.\footnote{Kretzmer (2002) page 77.} Instead, it uses provisions concerning property, which prohibit confiscation of private land, unless it is a means of military security.\footnote{Ibid page 99.} It also avoids discussions involving state land on which most of the settlements are situated.\footnote{Article 46 and 52 Hague Regulations.} In one of the earliest petitions regarding settlements where private land had been seized, the petition was denied. The HCJ accepted the army’s argument that constructing the Beit-El settlement was based on “military necessity” and that the settlement had a security function.\footnote{56 Hague Regulations imposes restriction on the army to use public land only for its usufruct.}

The first case in which the HCJ ruled against a settlement was in the \textit{Elon Moreh} case. The Court found it unjustifiable by military necessity to confiscate private land. Following this case, there was an increase in classification of vast tracts of land as state land and later petitions are based on this change in land classification and matters concerning the planning policy.\footnote{Beth-El case (1979) paragraph 119 b-c, cf. \textit{Elon Moreh} case (1979) page 24. As reviewed in chapter four, Article 43 Hague Regulations protects against changes with duration beyond the occupation, even if the changes are due to military necessity.}

The HCJ’s decisions concerning settlements have been highly criticised by the UN and the Security Council stated as early as 1979 that the IVGC is applicable to the Palestinian Territories and that the establishment settlements “have no legal validity”.\footnote{UN (1979).} According to Kretzmer, the Court has legitimised “the Government’s actions that are highly questionable, not only on political grounds, but on legal grounds as well”.\footnote{Kretzmer (2002) page 99.}
3.3.2 The HCJ’s Interpretation of “local population” and “security needs”

“The obligation and rights of a military administration are defined, on one hand, by its own military needs and, on the other, by the need to ensure, to the extent possible, the normal daily life of the local population”\(^{(139)}\)

The concern for the local population is addressed in several of the HCJ’s cases, and it is usually linked to security issues of the military administration. In the *Beit Sourik* case, which concerns the legality of parts of the wall’s routing, Justice Barak states, “The law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to protect the security of his country and her citizens”. The expressions that are used in the judgments he refers to are, for example, “military needs”, “normal daily life of the local population”, “the well being of the area”, “proper balance between those considerations”, and “the needs of the ruling army”. The entire statement envelope and refers to the Hague Regulation and the IVGC.\(^{(140)}\)

The Court’s apparent approach towards the balance between security needs and welfare of the population is in alignment with the intentions of IHL; however, some interpretations by the HCJ catapult the result of the judgements in a direction that is not acknowledged by the ICJ. The HCJ has developed a security approach that combines the army’s need with the Occupying Power’s duties. It also uses a strategy where the protection of the Occupying Power’s citizens is a military need.\(^{(141)}\) In addition, the civilians might be used for military purposes. The Beth-El settlement, was acknowledged to be situated in a strategic position. Since the settlement was fulfilling a military need in the area, building on private Palestinian land was justified.\(^{(142)}\)

One case from 2005 where the Israeli settlers and security issues were addresses is the *Mara’abe case*. In this case, the Court acknowledges that Israeli settlers are not included in the term “protected persons”\(^{(143)}\) of the IVGC, however, the MC is authorised to protect the Israeli population.\(^{(144)}\) They argue that the MC has an obligation to restore “public order and safety” cf. Article 43 of the Hague Regulations, this obligation, is to the Court’s opinion, a general authority.\(^{(145)}\) The obligation is towards any person in the occupied territory, including Israeli settlers and not

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\(^{(140)}\) *Beit Sourik* case (2004) paragraph 34.

\(^{(141)}\) Kretzmer (2012).


\(^{(143)}\) Cf. Article 4 IVGC.

\(^{(144)}\) *Mara’abe* case (2005) paragraph 18.

only towards the “protected people”. This view is part of the HCJ’s general opinion regarding how to protect the Israeli settlers and to give them security for their lives. Justice Barak states further that this protection towards any person is “called for, in the light of the dignity of every human individual”. As Israeli citizens, it is their constitutional rights to be protected even when they are located in the occupied territory. The settlers shall enjoy the same human rights as the people living in Israel, but the level of enjoyment may be different, since Israeli law does not apply. According to Kretzmer has the term “public order and safety” cf. Article 43 of the Hague Regulations been given a wide and dynamic interpretation.

By referring to human rights, the HCJ uses a second approach to include Israeli settlers in the term “local population”. In the Mara’abe case, when the HCJ discusses the erection of the wall, it is assumed without any discussion that human rights are applicable in the occupied territory. Without stating clearly that IHRL is applicable, several judgements have relied on human rights treaties in recent years. One of these judgements is the Torture case, which dealt with Israel’s “targeted killing” policy aimed at Palestinian terrorists. The Court states that the dispute is of an international nature and that both IHL and IHRL are applicable.

In 2012, Gross conducted an analysis of the negative implication for the Palestinian population when human rights are introduced. His argument is based on the fact “that the introduction of a right analysis into the context of occupation abstracts and extrapolates from the context of occupation and puts all involved persons – the citizens of the occupying state and the people living under occupation – on a supposedly equal plane”.

One example from this analysis is the Hass case. In this case, the settlers’ right to free movement to a sacred place for worship was set against the Palestinians’ property rights. The IDF planned to widen the route to increase the protection of settlers who were walking to some religious caves. It was therefore deemed necessary to seize land and demolish Palestinian buildings of archaeological value. The Court states, “The concern for human rights lies at the

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146 Ibid.
147 Ibid paragraph 19.
148 Ibid paragraphs 21 and 22.
149 Kretzmer (2012).
150 Ibid.
152 Gross (2012).
heart of the humanitarian considerations that the area commander must consider”. The Court relied on earlier cases and states that “local population” includes both Israeli and Arab residents, and that the duty of the MC is to maintain constitutional human rights both to Jews and Arabs. After acknowledging the Palestinians’ right to property, the Court pits the rights against each other – the Palestinian’s right to property against the settler’s right to freedom of religion and security.

This balancing act, according to Gross, is “an imbalance, since it places the burden of the settlers’ security on the people living under occupation”. This unbalance is also clearly shown in the Mara’abe case, when the court states that human rights such as the right to freedom of movement are not absolute, and it can be restricted due to security reasons or “the rights and freedoms of others”.

3.3.3 The “Proportionality” Test

The HCJ’s requirements to balance the need for security towards the interest of the local population, is done by a “proportionality” test. In the Beit Sourik case, the HCJ refers to this test as a fundamental principal in international law and, as applied to Israeli administrative law, as a central standard. To be legal, the realization of the governmental objective must be in proper proportion of the means used by the administrative body.

In the Beit Sourik case, the petition pertained to the trajectory of the separation fence. The first question the Court had to figure out was if the route was well founded and the security reason legitimate. The next question was to investigate if there was a less invasive route that might provide the same security; if so, the less invasive route had to be chosen. The third question was whether the negative implication imposed on the local population was proportionate to the increased security achieved by the specific route of the separation fence. In this case, the proportional test failed, and the route of the wall had to be rerouted.

Kleinman has questioned that the HCJ in recent decisions has failed to evaluate the conflicting rights’ comparative values before balancing them in the proportional test. Through a review of

154 Ibid paragraph 8.
155 Ibid paragraph 14.
156 Gross (2012).
three HCJ cases, he argues that without a proper evaluation of the competing rights or explanation of the HCJ’s decisions, certain human rights were set up against each other, and set before security needs. It is difficult for the public to understand why one right is chosen before another when the rights are not properly weighed against each other and the Court does not explain their decisions.

Questions about the use of the test are also raised by Kretzmer; his concern, however, is about the increased power of the MC. He argues that the proportionality test is used as a tool to protect the army’s security interest. He states that there is a tendency that the Court “ignore[s] or glosses over issues of legal authority in favour of judging governmental action in terms of proportionality” resulting in a ruling with less impact against the excessive authority on the part of the MC. Other possibilities that should be addressed are the possibility that the MC may be given authority to introduce changes in the legislation or the institutions and thereby may diminish the Palestinians’ legal rights beyond the protection of international law. Palestinians’ rights may also be diminished when their rights are weighed up against the Israeli settlers’ rights.

3.3.4 Concluding Remarks

By including human rights as applicable law on the West Bank, and by broadening the application of the category of “local population” to include Israeli citizens, the Court is ignoring the illegality of the settlements, and thereby including the Israeli settlers in the frame of protection given by the Hague Regulations. This strategy interrupts the balance set by humanitarian law. As a result, the Occupying Power’s restraining influence on IHL is weakened. The Palestinians are left less protected than intended by international law.

The way the HCJ interprets the provisions to include Israeli citizens is in contradiction to the generally shared understanding of the scope of application of IHL and IHRL. The persons who are protected by IHL are the inhabitants of the occupier’s enemy population in the occupied territory. The provisions were not intended to protect nationals of the Occupying Power living

160 Haas case (2004); The protection of a Palestinian archaeological building v. Settlers religious worship.
163 Kretzmer (2012).
164 Ibid.
in the enemy’s territory.\textsuperscript{166} By this interpretation, the intentions determined in the Vienna Convention is breached since the ordinary meaning of the IHL is not respected. However, the MC is not prohibited from protecting its own citizens. But to use them as a tool to undermine the Palestinians’ rights is contradictory to the intention of the conventions.

IHL is lex superior to IHRL in cases where IHL provides the strongest rights protection; hence, the Occupying Power has no legitimate justification to set the local populations’ rights up against each other. In other words, the only “local population” protected by international law on the West Bank are the Palestinians, not the Israeli settlers.

\textsuperscript{166} Gasser et al. (2013) page 266.
4 Israeli Regulations and Practice of House Demolitions, and its Effects

Legislation from the Ottoman Period, the British Mandate and the Jordanian Period were the domestic laws applicable on the West Bank at the time of the occupation. These laws are applicable during the occupation; hence, they are still enforceable in the territory.

Firstly, a few provisions that regulate land ownership and determine the administration of the Planning Law such as building permit will be reviewed. Changes made to these provisions by the MC either by new interpretation or by revisions will then be addressed. Finally, the ICA’s planning policy and how it manifests in Area C and the Hebron district will reviewed.

4.1 The Ottoman Land Code

Parts of the land legislation in force today are based on the Ottoman Land Code of 1858. The primary purpose of this code was to increase land control and income taxes. A land register was implemented and required all landowners and landholders to register their land.

The Ottoman Land Code strictly regulates the land’s location to the nearest village or town, and whether the land is suitable for cultivation or not. The land was divided into five different categories depending on its proximity to the nearest village or town, its qualities, and ownership. Individuals were permitted to cultivate State-owned arable “miri”-land in proximity to the village. Non-cultivated “mewat”-land more than 2.5 km away from the village was classified as State land. “Mewat”-land could be changed to “miri”-land by cultivation.

Article 78 determines that a landholder can acquire land rights either by getting a “kushan” (title deed) or cultivating “miri”-land for ten years without any disputes initiated by the State, in addition to proving legal source of possession such as inheritance or receipt from a title-holder. If land rights were acquired, it was prohibited to stop cultivating “miri”-land for more

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166 Land Code Article 78 : “A person who possessed miri or waqf (muqafa) land and cultivated it for ten consecutive years without dispute, has a prescriptive right to the land. Whether he had a title deed (kushan) or not – the land is not considered abandoned (mahlul) and he is given a title deed free of charge. If the possessor
than three years unless the landholder had a “kushan”. The penalty was either to pay a fine or the State would withdraw the individual’s right to cultivate the land.  

The “miri”-landholder's rights increased during the British Mandate and resembled full ownership. A new land registration process of communion areas concerning use and ownership was put into force. The registration continued during the Jordanian rule and by 1967 was approximately thirty per cent of the land registered, mainly in the northern part of the West Bank and Ramallah district.

4.1.1 Change in Practice: Land Registration and “the 50 percent rule”

The Jordanian registration process and zoning of Palestinian settlements were stopped after the occupation. However, a new registration procedure, known as “first registration” was established. This process was complex, expensive and based on the initiative of the landowner. It was designed for registration of small lots only, and it was not a good substitute for the land settlements where large areas could be registered. The price and the complexity excluded the local population because of lack of knowledge about the registration process and unaffordable fees.

During the early 1960’s, the Israeli government began to claim ownership over “miri”-land that was under the possession of Palestinian landholders, by using Land Code article 78. The cultivation requirements were changed from “reasonable cultivation”, which was the practice during the British Mandate, to the “50 per cent rule”. The new practice demanded that at least 50 per cent of the miri-land had to be cultivated, no exceptions were given for areas not suitable for cultivation.

admits that the land was abandoned (mahlul) and he held it without permission – even though he held it for a few years, he will be offered the land upon payment of its tapou [gross] value, and if he does not so desire, the land will be sold at public auction.” Cf. Shalev (2012) page 25.

The kushan exemption was amended in 1913 and thereby changed the individual status from landholder to landowner. Cf. Norwegian Refugee Council (2012) page 28-29.


Norwegian Refugee Council (2012) page 34.

Shalev (2012) page 31-34.

Ibid page 31-34. Whole paragraph.

Forman (2009). Whole paragraph.
The right-wing Government started to use “the 50 percent rule” on the West Bank in the 1980s.\textsuperscript{177} By using Land Code Article 78 the MC changed the land’s status from privately owned to state land with the intent to use this land for new settlements. This transfer of one legal system to another is described by Formann as “diffusion. By using an established Israeli binding judicial doctrine from the 1960s, the Government gained the support of the HCJ’s old practice when the Court judged Palestinian petitions.\textsuperscript{178}

4.2 Jordanian Planning Law\textsuperscript{179}

The Jordanian Planning Law that determines regulations for planning and building, is an hierarchical institution of committees and plans. The committees constitute power on three levels; local, region and national with the Higher Planning Council as the most important of these.

4.2.1 Planning Committees

The Local Planning Committees\textsuperscript{177} constitute power on the local level. The areas of power (not exhaustive) are to prepare Outline and Detailed Plans, approve subdivision schemes (parcelation plans) and issue work-stoppage orders and building permits. The City or Town Councils are members of the committee. In more rural areas, the members are represented by the central and local Government.

The District Planning Committees\textsuperscript{181} constitute power on the regional level of each administrative district. The areas of authority (not exhaustive) are to approve Detail Plans, issue work stoppage-orders and building permits, be an appellant body and mediator between the LPC and HPC. The members include delegates of the Jordanian Government and one from the LPC.

The Higher Planning Council\textsuperscript{182} constitutes power on the National level. The areas of authority are to approve Regional and Outline Plans and regulations, make recommendations to the Interior Minister and be an appellate authority. Among the members are delegates from the Jordanian Government.

\textsuperscript{177} IDF MAG Corps (Declaration of land).
\textsuperscript{178} Forman (2009).
\textsuperscript{179} This section is based on information from Shalev et al. (2008) page 35-45, 55-58 and Norwegian Refugee Council (2012) page 49-55.
\textsuperscript{177} Jordanian Planning Law Article 9. Hereafter LPC.
\textsuperscript{181} Ibid Article 8. Hereafter DPC.
\textsuperscript{182} Ibid Article 6. Hereafter HPC.
Outline Plan

These plans cover community areas such as cities and large towns. There is an update requirement every ten years. The detail of regulation is to define land zoning, regulate different land use such as residential, commercial, agriculture, land for public use, roads and infrastructure.

4.3 Changes by Military Order-418

The Military Order-418 and its revisions have imposed administrative changes in the Jordanian Planning Law. The structure of the committees was changed, and areas of authority were allocated. Changes to the existing planning law that worsened the Palestinians’ chances of being granted building permits are reviewed below.

The Village Planning Committees were established and given power in the rural areas, which now are Area C, and the LPCs were cancelled. The Palestinians had representatives in these committees until 1995 when the MC appointed all the members. Currently the committees do not function. The Special Local Planning Committees were established to work on new constructions at the local level in areas without city or town councils, for example the establishment of Israeli settlements. The MC appoints the members.

The DPCs were cancelled and all their powers were transferred to the HPC, which was given full power concerning all schemes and licences; hence its authority was expanded. Power, however, is limited by the obligation to act within the “purpose of the planning and construction” using relevant and involuntarily justifications.

Subcommittees were established in 2009; the seven different committees constitute power on different administrative areas such as planning and licensing, roads and transportation, settlements, objections and inspections. The Planning and Licensing Subcommittee have authority in areas not covered by the other subcommittees or regions authorised by the HPC. They also function as an appellate body concerning building permits. The Inspection Subcommittee

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184 This section is based on information from Shalev et al. (2008) page 35-45 and Norwegian Refugee Council (2012) page 54-58.
185 MO-418 Article 2(4) and 4A.
186 Document is from 2012.
187 MO-418 Article 2A.
188 Ibid Article 2(2).
190 Ibid Article 7A.
is responsible for illegal constructions. The MC appoints the members; there are delegates from the ICA and the military, but no Palestinians are represented.\textsuperscript{191}

A new \textbf{Special Outline plan}, also known as \textbf{a Master Plan}, was introduced in 1987 and the \textbf{Outline Plan} was cancelled. The new plan only covers Palestinian villages and small community areas; Israeli settlements are not included. The plans are of a standard format without adjustments, for comparison, each settlement has a unique plan. The village areas are restricted, which results in high population density. The plan defines land zoning, differentiated residential areas and roads. There is a low level of detail, and the lots are unmarked.

\textbf{4.3.1 Concluding Remarks}

Military Order-418 made drastic changes in the legal planning system by the time of occupation. It was transformed into a system, not in alignment with the Jordanian Planning Law. The changes transferred all the power to the HPC and ICA. The new committees were not given an independent role since the MC appoints all members, leaving the Council in charge of all planning and building matters in Area C. By dismantling the hierarchical structure and removing the possibility of Palestinian representation in the different committees, the Occupying Power has violated the Jordanian Planning Law.

\textsuperscript{191} Ibid.
4.4 The Effects of the Reformed Jordanian Planning Law by Military Order-418

The planning committees have refused nearly 95 per cent of all Palestinian building applications. Moreover, there seems to be a negative trend towards an even stricter policy; in the period 2010-2014 only 1.5 per cent of the applications were approved, i.e. 33 out of 2020. The planning system therefore forces the Palestinians to build without a permit. The ICA deems any structure erected without a building permit to be an illegal structure.

4.4.1 State Land

After the Elon Moreh case where the HCJ ruled that Palestinians’ private land cannot be used for settlements, Israel has ratified substantial state land using the “50 percent rule”. According to OCHA, declaration of state land is a sign for settlement expansion. There has been an increase of ratification during recent years, with a total of 62,000 dunums in 2015, where half of the areas are located in the firing zones.

![Figure 2: Ratification of yearly State land, measured in dunums](image)

4.4.2 Demolition Orders and House Demolitions

Since 1988 approximately 15,000 demolition orders have been issued and 3,230 demolitions executed. The only way to repeal the order is to appeal to the planning committees. An appeal can be submitted when a building permit is denied and when a demolition order has been issued. The demolition process is put on hold during the appeal period. If the appeal is rejected, it is possible to petition the HCJ. This is an expensive process, however, including fees to the HCJ and lawyers and it can hardly be achieved without aid from a human rights organisation.

193 UN OCHA (demolition-order database).
194 The transfer to “state land” is based on Article 78 of the Ottoman land Code. Cf. UN OCHA (04.07.16). See also chapter 4.2.1.1.
195 Data provided by the ICA. Cf. UN OCHA (04.07.16). 1 dunum = 1.000 square-metres.
196 UN OCHA (demolition-order database) and (demolition-system database).
Figure 3 shows demolition orders accumulated from 1988-1994 and from 1995-2014. The data is not correlated against demographic data such as movements or change in population. However, it is reasonable to stipulate an increase in demolition orders since the beginning of the Oslo Accords in 1995.

**Figure 3:** Demolition orders issued in Area C.
1: Hebron District
2: South Hebron Hills (part of the Hebron District). 198

In 1995, 50 orders were issued in the Hebron district, while 298 were issued in 2014. Since one demolition order can include several structures, the correct number of demolitions is higher than the numbers indicated.

![Graph showing demolition orders](image)

**Figure 4A:** Annually issued demolition orders.  **4B:** Annual demolition incidents. 199

The demolitions vary over time, with peaks in 2001, 2011 and 2016. By the end of August 2016, there have been 147 incidents resulting in 654 destroyed structures. This is a large increase from 2015, when 453 structures were demolished. 200

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198 Figures 3-5 are based on data provided to by the ICA. Cf. UN OCHA (demolition-order database).
199 UN OCHA (demolition-order database). Photo: Private.
200 UN OCHA (demolition-system database).
In the Herbon district, 5,300 people have been affected and 1,150 were displaced. According to EU, 170 EU-funded structures with a value of € 300,000 have been demolished since 2009 and 600 additional structures are in danger of being demolished.\footnote{Lieber (12.08.16).}

Demolitions in the Hebron district amount to a few per cent less than Area C in total, and demolition orders in process are six per cent higher.

**Figure 5:** Hebron 1995-2014. Demolition orders distributed by implementation status. Issued demolition orders number 4,369.\footnote{UN OCHA (demolition-order database). The meaning of "In Process" is unclear.}

### 4.4.3 Settlements and Outposts\footnote{An outpost is an illegal and unauthorised community of mostly caravans.}

The Israeli settlers experience demolitions of illegally erected structures and between 1995 to 2014, 6,925 demolition orders were issued and 1,350 demolitions executed. Approximately 20 per cent of the demolition orders have been executed; this is similar to the demolition incidents of Palestinian structures. However, the number of demolished incidents of Palestinian property amounts to 2,784.\footnote{UN OCHA demolition-order database. The whole paragraph.}

The demolitions are mostly of outposts, and the Israelis are often compensated and given a new location, a treatment that is rarely encountered by the Palestinians.\footnote{UN OCHA (2015).} The HCJ decided that the illegal outpost of Amona, which is built on private Palestinian land should be removed by 25 December 2016. However, structures built on state land have been excepted from demolition.\footnote{Amona case (2016) cf. Yesh Din (25.11.08) and NGO: Government started process (12.08.16).} The HCJ rejected a State petition and confirmed the demolition of the outpost.\footnote{Pulwer (14.11.16).}

\begin{figure}
\centering
\includegraphics[width=0.5\textwidth]{fig5.png}
\caption{Hebron 1995-2014. Demolition orders distributed by implementation status. Issued demolition orders number 4,369.}
\end{figure}
4.5 The Humanitarian Impact of the ICA’s Planning Policy

The planning policy in area C is undemocratic; the lack of elections precludes the Palestinians’ chance to influence the ICA’s policy. In addition, the principle of separation of power has been dismantled since the legislator, executive and judicial powers (except the HCJ) are under the MC.

The Palestinians own 30 per cent of area C. However, the ICA has planned for Palestinian development by drafting master plans on 1.5 percent of the entire Area C.\textsuperscript{205} Only areas with a master plan are granted building permits; hence, the restriction of Palestinian development forces them to build, according to the ICA, illegally. According to Khamaisi, there is a “near-freeze” on almost all plans and proposals submitted to the ICA by Palestinian villages. Only three of the proposals he has drafted have been approved.\textsuperscript{209} The restriction policy on movements, construction of houses and buildings and access to land has led to low productivity and investments in the private sector, resulting in high unemployment and loss in revenue.\textsuperscript{210} The human rights officer at the UN Hamed Qawasmeh,\textsuperscript{211} expresses great concern about the effects caused by demolition orders and executed demolitions. The heightened speed of demolition in South Hebron Hills is worrisome. According to Qawasmeh, the fear of demolition is preventing the owners from investing in their homes, forcing them to live in small tent-like structures or simple “huts”. The demolitions are normally not violent, but verbal abuse such as yelling and screaming are a common response. Seeing the bulldozers destroying their homes and the verbal drama that plays out has a negative effect on the young children, and the parents feel helpless. The men tell Qawasmeh about the family’s problems, and they often ask for help to rebuild their home and ask for legal assistance.

In addition to demolitions of dwellings and shelters, pipelines, solar panels, and roads are also demolished. Even schools have received work-stoppage or demolition orders. “Soldiers armed with guns disrupted the education and scared the pupils” Nawaje states, and according to him, the pupils’ learning capacity is disrupted by the fear of soldiers.\textsuperscript{212} The World Health Organization has assessed the psychological impact of the restrictions and uncertainties the Palestinians are facing in their daily life. The report confirms Qawasmeh’s observations and concerns

\textsuperscript{205} Kadman (2013) page 14-15.
\textsuperscript{209} Khamaisi (2011).
\textsuperscript{210} Niksic (2014). See also UN (2016).
\textsuperscript{211} Information given in a personal interview 03 August 2016.
\textsuperscript{212} Headmaster Mohammed Nawaje at Shi’b al Butum primary school, in private conversation after an episode where soldiers accompanied the ICA delivering a work-stoppage order. (05 Sept 2015).
that the threat of house demolitions creates insecure living.\textsuperscript{213} Many report the feeling of “entrapment and disempowerment”. Mental health problems such as anxiety, hopelessness, aggression and violence are more common on the West Bank than in neighbouring states such as Lebanon and Israel.\textsuperscript{214}

\begin{flushright}
\footnotesize\textsuperscript{213} Goyet (2015) page 11-12. \\
\footnotesize\textsuperscript{214} Ibid.
\end{flushright}
5 The Lawfulness of the Israeli Approach under International Humanitarian Law

Israel was at the time of the occupation bound by the Hague Regulations and the IVGC as *de jure* due to its status as customary international law. The following relies on the Hague Regulations as the main legal source, since they were the only parts of international occupation law recognised by Israel, and as *de jure* by the military and the HCJ. However, the provisions laid down in the Hague Regulations should be read and interpreted in compliance with the IVGC, AP1 and customary law.

The law of belligerent occupation was intended by the drafters to protect the civilians from harmful conduct by the Occupying Power. Provisions that determine the Occupying Power’s rights and duties will be reviewed against the civilian’s property rights during belligerent occupation. Israel’s implementation of these provisions will be reviewed. The question is if changes made to the planning law have led Israel to violate the protections bestowed upon Palestinians under international law.

5.1 Article 43 of the Hague Regulations

The cardinal rule of the law of occupation is Article 43 of the Hague Regulations. Through this article, the occupant has been given the right to take over the power in the occupied State and to fulfil a set of obligations.

“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, the public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”

Article 43 of the Hague Regulations

The occupied State is protected by general international law that prohibits a transfer of sovereignty from the occupied State to the Occupying Power, even though its power is temporarily put out of force.\(^\text{215}\) The internationally accepted conservationist principle further protects against changes which leave the territory *status quo*.\(^\text{216}\) However, some changes might be necessary due to the particular situation. The reasons will be discussed below.


\(^{216}\) Fox (2012).
The occupant’s administration is given both restrictions and rights pertaining to how to use its powers, and Article 43 of the Hague Regulations is often referred to as the Occupying Power's “mini-constitution”. While fulfilling the obligations laid down in this provision, the laws of the occupied territory shall be respected and, as far as possible, may not be altered.

5.2 The Obligation to Restore and Ensure Public Order and Civil Life

The drafters' intention was to protect the civilians towards a lower level of functional civil life including “social functions, ordinary transactions which constitute daily life”. Hence, the term "civil life" is closer to the purpose of IHL than "safety", which leads to a narrower interpretation. The Occupying Power must make sure that the government is functionally operable and Article 27(4) of the IVGC stipulates that "the Parties to the conflict may take such measures of control and security regarding protected persons as may be necessary as a result of the war". Pursuant to the purpose laid down in Article 43 of the Hague Regulations together with Article 27(4), the Occupying Power has been given “empowerment to do what is necessary to carry out the allotted tasks of maintaining law and order in the occupied territory.”

The administrative responsibility for building houses and other structures, planning and facilitating infrastructures such as roads, water and electricity are tasks that are included in the phrase “civil life”.

The provisions stipulating the rights of the population are lex specialis to Article 43 and are obligations the Occupying Power has to follow to maintain or restore the life of the local population. Examples of these provisions are; respect for the family and private property, taxis, and protection and use of public property in the Hague Regulations. The IVGC regulates child protection and welfare, labour, property, food, medical aid and public health. The civil defence and relief of the civil population are protected by the AP1.

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217 In the English translation is the term "safety" used, but many scholars prefer to use the French expression “la vie publique”– which means civil life and has a broader application. HCJ also endorses this translation cf. Jam’at Ascan case no2 (1983) paragraph 18.


221 Sassoli (2005).

222 Articles 46, 48, 53-56 Hague Regulations.

223 Articles 50–62 IVGC.

224 Articles 63 and 64 (3) and 69 AP1.
Article 43 does not expect the Occupying Power to fulfil all the obligations laid down in these conventions. The phrases that determine the frame of the effort – "all measures in his power" and "as far as possible" – focus on the means and not the results of the actions taken. There are, however, provisions in the IVGC that limit the means the Occupying Power may use; examples are prohibition of house demolitions, collective punishment and deportation of its civilians to the occupied Territory.225

The HCJ states in the Jami’at Ascan case that the Hague Regulations “revolve around two axes”, which is to ensure the security needs and the needs of the civilians.226 These two axes have to be balanced within the borders of customary international law. When interpreting Article 43, the Court states that the authority to restore and ensure "public order and safety" is twofold. Any interruptions must be restored before continued order and safety can be guaranteed. The term "safety" has a broader meaning and includes a variety of "civilian’ issues such as the economy, society, education, welfare, hygiene, health, transportation and other such matters to which human life in modern society connects".227 According to the Court, it is pertinent to distinguish between short and long-term military administration. Hence, the legislation means in the long-term that the government may be more comprehensive compared to short-term government, but in both cases, power is limited by the rule of law. This reasoning leads to the conclusion that the Occupying Power must ensure "growth, change and development" in all areas of civilian issues.228 The condition for these long-term changes, which may prevail longer than the occupation, is that the changes have to be for the “purpose of the local population”.229

5.2.1 Do Changes Implemented by Military Order-418 Meet the Needs of the Local Population?

The Israeli planning regime and practice have led to an increase in illegal constructions, which have triggered a large number of work-stoppage orders, demolition orders and demolitions. According to the human rights organization B’Tselem, Military Order-418 is harmful to the local population, and the conduct of Israel “negatively affects the lives and wellbeing of the

225 Articles 53, 33 and 49(6).
227 Ibid paragraph 18.
228 Ibid paragraph 26.
229 Ibid paragraph 31.
West Bank residents and causes them to live under difficult conditions and with perpetual uncertainty about their future". The military administration does not agree, and in their opinion, their decisions represent an “absence of harm to the Palestinian population”.

The petitioners in the Deirat-Refaiya case state that changes made to the Jordanian Planning Law have had severe effects on the local Palestinian population. They argue that it is the responsibility of the MC to make sure that the planning system is working for the best interests of the Palestinians. This implies, in their opinion, that new buildings must be constructed for both private use and public welfare such as houses, hospitals and schools.

The view that property not used for military purposes shall be protected is deeply rooted in international law. The Hague Regulations state

“It is especially forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessity of war”

Article 23 (g) of the Hague Regulations

Article 23 (g) belongs to the section in the Hague Regulations named “Hostilities”. The provision is therefore applicable to hostilities in general, including belligerent occupation. Property in general is protected by this provision from arbitrary use and destruction by the combatants of a belligerent occupant. The common interpretation of this provision is that private and non-private, mobile and non-mobile properties are protected. Article 46 states that private property must be respected.

“Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
Private property cannot be confiscated.”

Article 46 of the Hague Regulations

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This provision does not have any exception for military necessity; hence, it must be respected under all circumstances. Article 46 specifically forbids confiscation of private property including land; hence, it cannot be temporarily or permanently removed from the owner. The protection of property is also regulated and reinforced in the IVGC, which determines

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“Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”
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Article 53 of the IVGC

Article 53 of the IVGC protects only during occupation and is not applicable during combat in the enemy’s territory. This provision specifies the older regulation of the Hague Regulations by prohibiting the Occupant from destroying all property privately, collectively or State-owned. “Real” property must be interpreted as immobile property such as land, homes or buildings, and “personal” property can be read as all other items owned by the subject such as private persons.

These two provisions therefore protect against destruction and/or seizure of private enemy property “not protected by some definite law of war” unless it can be justified by military necessity. It is in the hands of the Occupying Power to assess whether destruction of a home, is of military necessity and the International Committee of the Red Cross urges that the occupying authorities must “try to keep a sense of proportion in comparing the military advantages to be gained with the damage done.” Demolitions based on lack of building permit can only rarely be justified by military necessity.

It is recognized by this convention, in Article 147, that actions not justified by military necessity and which are illegal pursuant to this provision might be seen as a grave breach when such destruction and appropriation are extensive. The ICJ has power to rule in these matters and in the Wall opinion, the Court stated that it was not convinced that destruction was carried out strictly out of military necessity.

234 Hereafter, ICRC
235 ICRC comment to Article 53.
AP1 is applicable in times of hostilities. In this treaty, “civilian objects” are defined by exclusion, and according to Article 52 (1), all objects that are not considered to be military objects by definition are “civilian objects”.

“Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.”

Article 54 of the AP1

Article 54 of the AP1 was intended to be a supplement to Article 53 of the IVGC; hence, it is applicable during belligerent occupation. This provision is more detailed than the provisions in the two previous conventions and enforces strong limits to the conduct of the military. By forbidding starvation of the local population, a new approach is introduced that increases the level of protection for the civilians.

Parts of this provision prohibiting destruction of objects “indispensable to the survival” are recognized as customary law, hence applicable to Israel, which has not ratified the protocol.

The provision stipulates that the welfare of the civilian population shall be protected by all means. This may be achieved by protecting the objects that are “indispensable” to survival. It is forbidden to destroy or remove these items. It is also forbidden to do this as an attempt to make the inhabitants move. The objects specifically mentioned such as foodstuffs and agriculture areas including water installations are not intended to be exhaustive. According to Oeter, this list must be seen as a clarification of the core of the protected objects. Beyond these basics means, the specific situation and circumstances must be individually assessed. It can hardly,

237 ICRC comment to article 54 AP1.
238 Article 54 (1) and (2), Cassese (1984), Dupuis et al. (1987) and ICRC’s comment to article 54. Rule 54 of ICRC Customary Law states “Attacking, destroying or rendering useless object indispensable to survival of the civilian population are prohibited”.
239 Article 54 (2).
under any circumstances, be argued that clothes and dwelling are not necessary for survival and will also, without doubt, be protected.\textsuperscript{240}

The only reason any action targeting the civilian’s property is permitted is if it is “required by imperative military necessity”,\textsuperscript{241} but risks of starvation or forced movement are prohibited even in cases of necessity\textsuperscript{242} even when the proportionality test is assessed\textsuperscript{243}.

Israel states in the Manual on the laws of war (1998), “it is prohibited to attack targets essential to the continued survival of the civilian population”. In addition, it is prohibited to attack targets that are “vital to the continuation of the civil population’s survival” and “intentional attacks on food products, farmland, sanitation facilities etc., at such a level as would lead to the starvation of the civilian population” are also prohibited.\textsuperscript{244}

Article 54 of the AP1 is recognised as \textit{lex specialis} compared to the provisions in the Hague Regulations and the IVGC. Damaging wells, foodstuff shelters and dwellings, even if they are built without a building permit, is a breach of this provision if it will cause starvation or movement.\textsuperscript{245} This broadens protection of the civilians and their possessions and places tightened restrictions on military conduct.

\subsection{5.2.2 Concluding Remarks}

It is the Occupying Power’s duty to “restore and ensure” the needs of the enemy’s friendly civilians. It is likewise a duty to make sure that the civil life in the territory is maintained. Several provisions in the Hague Regulations and the IVGC including AP1 protect the occupied population’s property. The Occupying Power cannot seize land unless it is a military necessity and it can under no circumstances be confiscated. Land might be expropriated to maintain public order and safety. Structures cannot be demolished unless it is a military necessity; however, it is prohibited under any circumstances to destroy dwellings and structures critical for survival. Structures cannot be confiscated under any circumstances.

\begin{footnotesize}\begin{align*}
\text{\textsuperscript{240}} & \text{Oeter (2013) page 209.} \\
\text{\textsuperscript{241}} & \text{Article 54 (5).} \\
\text{\textsuperscript{242}} & \text{Article 54 (3-b).} \\
\text{\textsuperscript{243}} & \text{Benvenisti (2011).} \\
\text{\textsuperscript{244}} & \text{ICRC (Practice relating to Rule 54).} \\
\text{\textsuperscript{245}} & \text{Benvenisti (2011).}
\end{align*}\end{footnotesize}
When the IDF demolishes a dwelling, foodstuff shelter, well or solar panel, this is a breach of AP1. When private land is expropriated to secure the settlements, Article 43 of the Hague Regulations is violated. When private land is declared as state land, Article 46 of the Hague Regulations is breached.

5.3 The Obligation to Respect the “laws in force” “unless absolutely prevented”

The final part of Article 43 states that the "laws in force" in the occupied territory must be respected “unless absolutely prevented”. The term “laws in force” has been interpreted to include, in addition to local laws and administrative regulations, executive orders and the Court's jurisprudence. The Planning Committees administration and practice must therefore be respected.

When the Hague Regulations were drafted, the main conception was that there was no need for the Occupying Power to intervene with the local populations. The governmental and public activities and legislation were to be separate. This laissez-faire attitude focused mainly on military security and on restoring pre-occupation order.

The question is, in what situations does the Occupying Power have a duty to respect the law in the occupied State “unless absolutely prevented”? The Hague Convention committee implicitly recognised that this expression gave the Occupying Power rights to legislate and make changes that are not in conformity with the laws already in force. In Benvenisti’s opinion, this expression is only meaningful “when it is linked to the consideration that the occupants are entitled or required to weigh while contemplating the desirability of change vis-à-vis the interest in stability and respect for the status quo”. According to Dinstein, the term “absolutely prevented” has been interpreted as a “necessity” and never been used literally. Hence, “when a necessity arises, the Occupying Power is allowed to suspend or modify the existing legal system”. Other suggestions such as “sufficient justification” and the use of a “reasonableness”-test have also been promoted to legitimate legislation changes.

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246 Sassoli (2005).
247 Benvenisti (2012) page 70.
249 Ibid.
5.3.1 Extended Interpretation of Article 43

Article 64 of the IVGC is viewed as a "modest modification" of Article 43.\textsuperscript{252} For the interpretation of "necessity", the obligation laid down in Article 43 should be read in context with Article 64 of the IVGC.

The main difference between these conventions is the change of focus from the Occupying Power to the rights of the local population. The preparatory works explain that "the principle aim of the [Geneva Convention] was the protection of the civilian population". It was, therefore, essential to protect those rights laid down in the Hague Regulations.\textsuperscript{253} In Benvenisti’s opinion it is however “impossible to deny that Article 64 introduces innovative elements into the law of occupation to enable the occupant to achieve the aims of the IV Geneva Convention, and thus represents a departure from Article 43, rather than a more precise and detailed expression of it”\textsuperscript{254}

\begin{quote}
“The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”
\end{quote}

Article 64(2) of the IVGC

Article 64(2) of the IVGC addresses Governmental duties and non-penal legislation and stipulates that legislative changes must be “essential” for the admissible purpose. Hence, as a consequence of the principle of \textit{lex posterior}, the expression “essential” can be read as an interpretation of “unless absolutely prevented” or “necessity”.\textsuperscript{255} It further follows from 64(2) that the legislation modified must be within the limits of obligations laid down in the IVGC. Sassoli sees this as a consequence of \textit{lex specialis}\textsuperscript{256} and states that the “term “unless absolutely prevented” refers not only to cases of material but also of legal necessity”.

\begin{flushright}
\textsuperscript{252} Stated by A. Roberts. Other scholars mentioned are M. Sassòli, H-P Gasser, R Koln and S Vité, cf Benvenisti (2012) page 95-96.
\textsuperscript{253} ICRC (1949) page 671. The provision is referred to as Article 55.
\textsuperscript{254} Benvenisti (2012) page 102.
\textsuperscript{255} Sassoli (2005).
\textsuperscript{256} Ibid. According to Sassoli, 64 IVGC is \textit{lex specialis} on changes affecting courts, judges and public officials.
\end{flushright}
According to Benvenisti, Article 64 of the IVGC gives the Occupying Power full authority over the occupied State’s legislation – penal and non-penal. However, the legislative authority granted to the military administration must be in alignment with IHRL. This might widen the scope of application of new legislation, but at the same time limits the enforcement of new law making as well as the suspension of current legislation. Sassoli claims that local laws contradictory to human rights are the only laws that may be suspended. These interpretations might lead to an increase in the power of the military administration compared to the meaning of this convention. The preparatory works state that the only changes that can be made to the legislation by the Occupying Power are domestic legislation that violates the principles of the "Universal Declaration of the Rights of man". Hence, changes made to local laws may be within the Occupying Power's rights when the amendments repeal violations of human rights. The changes made to the occupied legislation, will then be essential for "effective and humane" management.

5.3.2 Prolonged Occupation

One question that can be asked is whether there are any differences in the legislative enforcement during short-term versus prolonged occupation. The Hague Regulations were written at a time when there was no experience with a continued occupation. Hence, the primary focus was on short-term occupation. Neither the IVGC, nor the API have made any significant attempts at addressing this issue. Koutroulis states, "there is no distinct legal regime regulating prolonged occupation", and in his opinion, the analysis should start at the same point as for short-term occupation. However, the legal administration of a short-term occupation may be very different from administering prolonged occupation. Because of this, the provision must be interpreted with this in mind.

One important question that has been raised is whether the Occupying Power is responsible for maintaining and enhancing civil life in the occupied territory. One of the best ways to support civil life is to "maintain the orderly government" as stated in Article 64 (2). For long-term occupations, many political questions emerge regarding administrative issues, for example,

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257 Benvenisti (2012). This view is supported by, for example, drafters of the Geneva Convention, the US Army, Canadian and British military. Page 102 and 104.
258 Sassoli (2005).
259 ICRC (1949) page 671.
260 Fox (2012).
262 Koutroulis (2012).
maintenance and development of infrastructures, planning and building, education and healthcare, and decisions must be made at one point. These issues cannot be handled properly unless there is a functional government. The law of occupation cannot be used to leave a “whole population in legal and political limbo”. Dinstein argues that the military administration must be given more flexibility in legislative application and thereby be able to implement, new technology to avoid "grievous social woes" during times of prolonged occupation.

As reviewed earlier, the legislative changes have to be within the frame of the applicable conventions. According to Fox, these changes made by the Occupying Power, cannot facilitate legal or administrative reforms with longer durability than the occupation if they are not based on military or governmental needs. Furthermore, Roberts makes a comparison pertaining to a "peacetime occupation" where "the rights of the occupants are vastly curtailed". Benvenisti follows up the reduced power of the occupant. He argues that "it is not the occupant which is entitled to assume the duty to update the law”. In addition, he suggests that the indigenous community of the ousted government should be encouraged to participate in updating the law in matters concerning the safety of the local population and that powers regarding administration should be delegated to the locally elected officials from the Occupying Power.

Several decisions by the HCJ are based on the principle that the investments made on the West Bank will have a positive impact beyond the time of occupation, and they are legitimate when the plan is to benefit the local population and no changes to the basic institutions are made. In the fifth year of the occupation, Justice Sussmann states, “a prolonged military occupation brings in its wake social, economic and commercial changes which oblige him to adapt the law to the changing needs of the population”. Justice Barak argues that the military administration has the authority to apply “all measures necessary to ensure growth, changes and development”. By using this approach, the Court legitimizes changes on the West Bank such as expropriation of land for constructing highways and allowing Israeli settlers to open new quarries.

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264 Dinstein (2009) page 120.
265 Fox (2012).
270 See Jami’at Ascan case (1983) construction of highway. Yesh Din case (2011) stone quarry. Pursuant to Article 55 of the Hague Regulations, the occupant is permitted to use the land’s usufruct, but the provision protects
In a few cases, the HCJ has ruled against changes in the administrative acts. In 1978 in the *Elon Moreh* case and three years later in *Electricity Company of East Jerusalem* (no. 2) case, the Court did not find that the security needs were the primary concern for the change. In the *Elon Moreh* case, Justice Landau ruled that the settlement was illegal because the conditions in Article 52 of the Hague Regulations were not met. In the latter case, the Court saw the military government as temporary, even though it had been in place for 14 years, and stated that Article 43 of the Hague Regulations must be respected.

The Court’s argument in 2011 that it had to take the period into account and that the laws had to fit the reality on the ground, is an indication of the development of the HCJ’s jurisprudence.

5.3.3 Were Changes Implemented by Military Order-418 of Military Necessity?

According to Cohen, the HCJ has taken a less restrictive interpretation of Article 43 of the Hague Regulations when it comes to the IDF’s needs for changing the law. It is within the legal jurisdiction of the Occupying Power to change the local laws by amendments, suspensions or abolishing them. Nevertheless, these changes must be based on military necessity or humanitarian reasons, anchored in Article 43 of the Hague Regulations. The expression “laws in force” is interpreted to include local Jordanian administration, such as planning institutions; they cannot be abolished. Dinstein is of the opinion that changes made to the institutions cannot “deprive the civilian population in the occupied territory of any benefits bestowed on them by the law of belligerent occupation.” The interpretation of the law and administrative practice are

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272 Art. 52. “Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far is possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.”


274 *Yesh Din* case (2011) paragraph 10.


277 Dinstein (2009) page 123.
also protected, and the Occupying Power has an obligation to continue the same practice unless it is a military necessity to do otherwise.\textsuperscript{278}

The question concerning changes to the Jordanian law by military orders was addressed in one of the early cases reviewed by the HCJ. The Court were divided in interpreting the term “absolutely prevented”, the majority’s opinion was that “military necessity” was fulfilled if the obligation to restore and ensure “public order and public life” was accomplished by changing the law. This view has been adopted by the HCJ in later judgments.\textsuperscript{279}

The \textit{Deirat-Rafaiya} case\textsuperscript{280} raises questions regarding the legality of removing local Palestinian representatives from the Planning Committees and structural changes made to these committees. It is recognised by the petitioners that some changes had to be made to the planning institutions due to the involvement of the Jordanian Government representatives. However, they argue that the changes made were far from matters of military necessity. The petitioners state, “A temporary failure to function does not constitute a compelling need to make the far-reaching change of dismantling the entire hierarchical planning apparatus on the West Bank”.\textsuperscript{281}

According to Khamaisi, a deep distrust has been rooted in the Palestinians towards the Planning Institutions and the ICA. The ICA fails to recognize the villages and their needs, resulting in increased planning failure and demolitions. In an attempt to improve their situation, the villages have prepared plans with the assistance of professionals. Unfortunately, this approach met with failure.\textsuperscript{282}

Listed below are some observations that Khamaisi finds destructive for the growth and development of urban centres and villages in Area C. i) The Planning committees have no Palestinian representatives. ii) There are two different active planning systems, one for the Palestinians and one for the Israeli settlers. There is discrimination in favour of the settlers, who have a more active and functional planning system. iii) Political considerations may triumph over planning

\textsuperscript{278} Sassoli (2004).
\textsuperscript{280} Deirat-Rafaiya case (2015). The petitioners in this case are the village council of Deirat-Rafaiya and four NGOs.
\textsuperscript{281} Deirat- Rafaiya case (2015), petition page 17.
\textsuperscript{282} Khamaisi (2001). Professor Khamaisi is in charge of making Outline and Detail Plans for several Palestinian Villages in Area C including South Hebron Hills. He makes these plans on behalf of the Village Councils, because the Civil Administration fails to recognize the villages and their needs, resulting in increased planning failure and demolitions.
considerations. iv) The Palestinians are not properly informed about obstacles that may delay or obstruct the plan. v) The effort put down when making the plans has very little to no effect on the outcome. vi) Many villages are not recognized by the administration; hence they do not fully prepare the plans for granting permits. vii) The Palestinians’ needs are overlooked.

There are several statements in this judgement emphasising that the Palestinians need to be heard and be part of the planning process, however, the Court did not dispute the planning institutions’ structure. Instead it ruled that the procedure put into force in September 2014 was to be fully implemented and evaluated after three years. It was recommended that “a respectable advisory forum of village heads” would be included in issues related to relevant administrative problems. According to the petitioners’ legal consular, Shaheen, has the procedure not been implemented and no improvements are observed.

The Military Authorities state that the Jordanian Planning Law determines that structures erected without a building permit shall be demolished and the destructions are thereby legitimised by the requirement to leave the law in force “unless absolutely prevented”. They further argue that it is their duty to maintain public order and safety and the administration of demolitions is a part of that duty. A third argument is that the demolitions are in accordance with the decisions made by the planning committees that were established after the Oslo Accords.

The HCJ refuses to intervene when Israel declares private land as state land by using Article 78 of the Ottoman Land Code and the “fifty percent rule”. In 1981, the Court stated that “when a dispute arises over the question of whether a given parcel of land is public property or private property, the accepted rule is that the property should be considered public property until the question of ownership is finally decided.” Because of the Court’s reluctance to intervene on these petitions, only a few cases concerning state land have been subject to rulings. However, the HCJ has ruled on several petitions concerning ownership of private land, applications for building permits and the administration of the planning system by the ICA.

284 The Procedure includes participation of the Palestinian population in the planning process prior to the decision making process. The goal is to balance between the security needs and the interests of the Palestinians. Deirat-Rafaiya case (2015) paragraph 26.
285 Ibid paragraph 27.
286 Phone conversation 09 November 2016.
289 Shalev (2012). The whole paragraph.
5.3.4 Concluding Remarks

It is the Occupying Power's duty and responsibility to assess the "necessity" of legislation in each situation, while fulfilling the obligations of Article 43 of the Hague Regulations. There is, however, a delicate balance between military security and the interest of the civilian population.

If the military administration is given too much leeway, there is a real chance that military security will triumph over the needs of the civilians.

Examples of changes that are recognised as fulfilling the "necessity" obligation are listed. The Occupying Power may i) only legislate for the time of the occupation, ii) legislate to ensure its security, iii) legislate to maintain public order, iv) legislate to meet the needs of the local population, v) legislate when there are inconsistencies with the Geneva Convention and IHL or non-derogable human rights and vi) legislate in accordance with UN security council resolution authorisation.  

By making the concern for the “local population” a condition for changing the legislation, the HCJ has developed a “benevolent occupier” approach, where the Palestinians’ political interests are ignored. By this method, the military has taken the opportunity to make extensive changes, and the Court has rarely questioned the military's arguments. The HCJ usually accepts the purported security arguments, leaving the other axe, military necessity, almost untouched. Another approach to limiting the Palestinians’ rights is to include the Israeli settlers as part of the “local population”. An imbalance is created when these two groups’ interests are set up against each other.

The HCJ acknowledges that changes made to the law cannot persist after the time of the occupation, unless they are for the good of the people. The negative long-term consequences resulting from the reformed Ottoman Land Code and planning system in Area C implemented by Military Order-418, will last much longer than the occupation. The situation of a prolonged occupation does not change the applicability of the time-limited condition, and the MC must operate within this norm. Nor is there any evidence that the changes may be founded on “military necessity”. Even though the MC could justify that changes made to the planning system were of military necessity, the MC cannot stop the development of the local populations’ communities. Lack of building permits cannot justify demolitions based on military necessity or on the obligation to maintain public order and civil life due to illegal constructions. Building

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293 See chapter 3.3.2.
homes and other structures needed for normal households and farming is certainly a part of what we consider to be daily life. By interrupting normal development, the MC does not fulfil his obligation towards the occupied population.

The Oslo Accords gave all powers concerning planning in Area C to the ICA. However, the authority has to be within the legal frame of international law and illegal practice before the agreement could not be conferred.\textsuperscript{296} The Oslo Accords cannot be used as a legitimate reason to cancel the Local Planning Committees and replace them with Village Planning Committees, which removed all Palestinian representatives from the committees.

IHL lacks an enforcement mechanism that is effective in restraining Israel’s conduct in the occupied Palestine. However, international pressure as we have seen it exerted in Susiya does have an effect. The best way to protect the Palestinians’ property rights is for the international community to continue its pressure on the Israeli Government to reverse its planning policy and stop the demolitions of structures crucial for their survival. The long duration of this occupation does not change the effects imposed on the civilians. These effects are the very harms that the IHL intends to prevent. Whether the negative effects have manifested itself within the past six months or over a period of 50 years is irrelevant. Breaches of these provisions are still a violation of the law of occupation.

\textsuperscript{296} Sassòli (2011).
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6.1 Appendix: Links to the Domestic Laws

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Not officially translated document. (Translated by F. Ongley of the Receiver General's Office in British Cyprus)

Towns, Villages and Building Planning Law no. 79

Order concerning Towns, Villages and Building Planning Law
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