
Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?

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Abstract

Two recent International Court of Justice decisions determine that international human rights law (IHRL) applies in occupied territories, in addition to international humanitarian law (IHL). These decisions reinforce the convergence of these two bodies of law. Advocates of the application of IHRL in occupied territories argue that it serves the interests of a population living under occupation. However, experience shows that, in these circumstances, IHRL can be used to actually undermine the protection of rights and legitimize their violation. The decisions of Israel's High Court of Justice illustrate how the introduction of rights analysis into the context of occupation abstracts and extrapolates from this context, placing both occupiers and occupied on a purportedly equal plane. This move upsets the built-in balance of IHL, which ensures special protection to people living under occupation, and widens the justification for limiting their rights beyond the scope of a strict interpretation of IHL. The different meanings ascribed to proportionality in these two bodies of law are conflated, further

* Tel-Aviv University, Faculty of Law. I am grateful to Keren Michaeli for her comments on an earlier version of this article. Earlier versions of this article were presented during May 2006 at the following conferences: 'Occupations and Withdrawals: Japan, Europe, Palestine, Iraq' (University of Glasgow); 'Workshop on Critical Approaches to International Law' (Birkbeck Law School, London); 'Biennial Conference of the European Society of International Law' (Paris); 'Conference on International Humanitarian Law and International Human Rights Law: Exploring Parallel Application' (Hebrew University, Jerusalem). I am grateful to the participants in these conferences for their insightful comments, and especially to Ahmed Amara, Orna Ben-Naftali, Françoise Hampson, Noam Lubell, Layla Margalit, and Marco Sasoli. Special thanks go to Yuval Shany for his illuminating suggestions and to Nimrod Karin and Assaf Even-Chen for their comprehensive research work, and to Hedi Viterbo for his assistance in completing the research for this article. I am also very grateful to Batya Stein, who edited this article. Finally, thanks go to the Cegla Center for Interdisciplinary Research of the Law for its support of this study. Email: agross@post.tau.ac.il.

contributing to this imbalance. The attempt to bring the ‘rule’ of rights into the ‘exception’ of the occupation, rather than alleviating the conditions of people living under occupation may render rights part of the occupation structure.

1 Introduction: ‘Righting’ the Law of Occupation

Two recent decisions of the International Court of Justice (ICJ) determined explicitly that international human rights law (IHRL) applies in occupied territories. In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹ and in its judgment in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*,² the ICJ examined the actions of occupying armies not only through the lens of international humanitarian law (IHL) but also through that of IHRL.

Both decisions relied on the ICJ’s previous determination in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.³ This opinion held that the protection of the International Covenant on Civil and Political Rights (ICCPR) does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated in times of national emergency.⁴

In the *Wall* and *Armed Activities* decisions, the ICJ expanded this determination to human rights conventions in general, and developed the rule on the application of human rights norms in times of war to the context of belligerent occupation.

The determinations of the ICJ in the *Wall* and *Armed Activities* decisions are a significant step in what has been described as the ‘convergence’ of IHRL and IHL.⁵ The cornerstone for this paradigm is said to have been laid in the 1968 Teheran International Conference on Human Rights,⁶ convened only one year after the Israeli occupation of the Occupied Palestinian Territory (OPT).⁷ Subsequent developments in international

¹ *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, available at www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (hereinafter *Wall*).

² *Case Concerning Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda* (2005), available at www.icj-cij.org/icjwww/idocket/ico/icoframe.htm (hereinafter *Armed Activities*).

³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 [1996] ICJ Rep 226 (hereinafter *Nuclear Weapons*).

⁴ *Ibid.*, at para. 25. For a discussion, see Stephens, ‘Human Rights and Armed Conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case’, 4 *Yale Hum Rts & Development LJ* (2001) 1.

⁵ For a discussion of ‘convergence’ preceding the recent ICJ decisions see T. Meron, *Human Rights in Internal Strife: Their International Protection* (1987), at 3–28. For an early formulation of the convergence thesis see Meron, ‘Human Rights in Time of Peace and in Time of Armed Strife: Selected Problems’, in T. Buergenthal (ed.), *Contemporary Issues in International Law* (1984), at 1.

⁶ See Ben-Naftali and Shany, ‘Living in Denial: The Application of Human Rights in the Occupied Territories’, 37 *Israel Law Review* (2003–2004) 17, at 41–45; Doswald-Beck and Vite, ‘International Humanitarian Law and Human Rights Law’, 293 *International Review of the Red Cross* (1993) 112.

⁷ Draper suggests that this timing may be connected to the 1967 Israeli occupation of the OPT. In his view, then, the merger of IHRL and IHL was driven by politically motivated states that wished to criticize Israel’s activities. See Draper, ‘Humanitarian Law and Human Rights’ [1979] *Acta Juridica* 193.

law led to this convergence process,⁸ which Theodor Meron described as part of the “humanization” of humanitarian law.⁹ Ruti Teitel argues that the dramatic expansion in the reach of humanitarian law through its merger with international human rights law to create ‘Humanity’s Law’ marks the most prominent change in the international legal system.¹⁰

From a broader perspective, this could be considered as a convergence between the laws of peace and the laws of war.¹¹ To the extent that contemporary international law strives to think of peace as the ‘norm’ and of war as the ‘exception’, this development could represent a convergence of the norm and the exception, perhaps typical of an era where the exception becomes the norm.¹² The *Wall* and *Armed Activities* decisions, which continue the ICJ’s previous determination in the *Nuclear Weapons* opinion, are significant not only because they stamp this ‘convergence’ process with the ICJ’s seal of approval but also because they explicitly concretize the convergence by stating that human rights norms apply in occupied territories and will be the standard for judging the actions of occupying powers. The result may be described as a ‘righting’¹³ of

⁸ Ben-Naftali and Shany, *supra* note 6, at 41–58. For a discussion of IHL and IHRL as originating in different philosophies but nevertheless converging see Doswald-Beck and Vite, *supra* note 6. On the ‘distinct but related’ role of these two bodies of law see Gasser, ‘International Humanitarian Law and Human Rights Law in Non-International Armed Conflict’, 45 *German Yearbook of International Law* (2002) 149; R. Provost, *International Human Rights and Humanitarian Law* (2002). See also Doswald-Beck, ‘Human Rights and Humanitarian Law: Are There Some Individuals Bereft of All Legal Protection?’, 98 *ASIL Proceedings* (2004) 353; Schindler, ‘Human Rights and Humanitarian Law: Interrelationship of the Laws’, 31 *American University L Rev* (1981–1982) 935. For a discussion of the ‘merger’ between IHL and IHRL and its implication for the law of occupation see Frowein, ‘The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation’, 28 *Israel Yearbook on Human Rights* (1998) 1. On the context of occupation and for an overview of literature, case law, and practice see also Ben-Naftali and Shany, *supra* note 6; Quigley, ‘The Relation Between Human Rights Law and the Law of Belligerent Occupation: Does Occupied Population Have a Right to Freedom of Assembly and Expression?’, 12 *British Columbia Int’l & Comp LJ* (1989) 1. On the applicability of human rights in occupation see also Roberts, ‘Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967’, 84 *AJIL* (1990) 44, at 70–74; E. Cohen, *Human Rights in the Israeli-Occupied Territories* (1985); Benvenisti, ‘The Applicability of Human Rights Conventions to Israel and to the Occupied Territories’, 26 *Israel L Rev* (1992) 24. On the ‘convergence’ and its connection to developments in international criminal law and the establishment of the International Criminal Court see Benison, ‘War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court’, 88 *Georgetown LJ* (1999) 141.

⁹ See Meron, ‘The Humanization of Humanitarian Law’, 94 *AJIL* (2000) 239, where he describes and analyses these developments in IHL in detail. See also T. Meron, *The Humanization of International Law* (2006).

¹⁰ Teitel, ‘Humanity’s Law: Rule of Law for the New Global Politics’, 35 *Cornell Int’l LJ* (2001–2002) 359. Teitel’s emphasis seems to be on IHL’s influence on IHRL rather than the opposite.

¹¹ Schindler, *supra* note 8, at 941–942; Ben-Naftali, ‘The Extraterritorial Application of Human Rights to Occupied Territories’, 100 *ASIL Proceedings* (2006) 90.

¹² See the discussion in *infra* notes 153–161 and their accompanying text.

¹³ I borrow the term ‘righting’ from Knop, ‘The “Righting” of Recognition: Recognition of States in Eastern Europe and the Soviet Union’, in Y. Le Bouthillier, D.M. McRae and D. Pharand (eds), *Selected Papers in International Law: Contribution of the Canadian Council on International Law* (1999), at 261.

the law of occupation.¹⁴ Parallel developments are also evident in other courts and tribunals, including the Israeli High Court of Justice (HCJ), which uses human rights analysis when discussing cases from the OPT.

The convergence process or thesis, however, has been questioned in the international law literature, and the ICJ's determinations on this matter in the *Wall* remain controversial.¹⁵

This article will not rehash the ongoing debate as to whether human rights norms should apply in times of war in general and in situations of belligerent occupation in particular. The competing sides in this debate have tried to argue that their respective position is both the *lege ferenda* (the correct normative perspective) and the *lege lata* (a correct interpretation of the law¹⁶ as it stands). Since arguments on both the winning and the losing sides in this debate have been rigorously formulated,¹⁷ this article will not engage in normative or interpretive questions concerning the position of international law on this matter. Suffice it to say that the current direction of international law is to apply human rights norms to situations of armed conflict in general and to situations of belligerent occupation in particular, as evident in the interpretation of human rights treaties, in the decisions of treaty bodies, and in the rulings of the courts that interpreted them, including the European Court of Human Rights (ECtHR).¹⁸ The two recent ICJ decisions, then, have marked the victory of the convergence thesis.

This article will offer a critical reading of this development and argue that the merging of IHRL into IHL, rather than expanding human protection may serve to undermine

¹⁴ Although a distinction may be drawn between the convergence approach and one that views the two bodies of law as mutually complementary, my perspective considers the development whereby the two bodies of law are co-applied, either as 'converging' or as 'complementary'. For such a distinction see Quenivet, 'The ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: The Relationship between Human Rights and International Humanitarian Law', 18 Aug. 2004, available at <http://www.ruhr-uni-bochum.de/ifhv/publications/bofaxe/x283E.pdf>.

¹⁵ See *supra* note 8 and *infra* note 22.

¹⁶ Including the interpretation of human rights treaties and of decisions interpreting these treaties.

¹⁷ See the sources cited in *supra* note 8 and *infra* note 22 and also the following: Quigley, 'David v. Goliath: Humanitarian and Human Rights Law in Light of the Palestinian Right of Self-determination and Right to Recapture Territory Taken by Force', 21 *NYU J Int'l L & Pol* (1988–1989) 489, at 499–503; Bennoune, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003', 11 *U California Davis J Int'l L & Pol'y* (2004) 171. See also F. Coomans and M.T. Kamminga, *Extraterritorial Application of Human Rights Treaties* (2004). D. Kretzmer suggests that, in addition to the 'traditional' or 'purist' position and the 'universal' human rights position, a third approach is also possible. This approach, which he supports, distinguishes between different situations in armed conflict, supporting reliance on IHL in certain situations and on IHRL in others. His suggestion is that IHL should apply in the 'battlefield proper', but as soon as actual hostilities are over and circumstances shift to situations of 'effective control' (such as occupation), IHRL will supplement IHL. See the presentation to the conference on 'The Law of Armed Conflict: Problems and Prospects', Chatham House, 18–19 Apr. 2005, by Kretzmer, 'The Law of Armed Conflict: Problems and Prospects', 18–19 Apr. 2005, available at <http://www.chathamhouse.org.uk/pdf/research/il/ILParmedconflict.pdf>.

¹⁸ For a discussion of recent European cases on human rights in armed conflict see Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *EJIL* (2005) 741; Heintze, 'The European Court of Human Rights and the Implementation of Human Rights Standards During Armed Conflicts', 45 *German Yearbook of International Law* (2002) 60.

it as well as to legitimize violations of the rights of people living under occupation. My arguments rest on the fact that the introduction of a rights 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. This move upsets the balance of IHL, which ensures special protection to people living under occupation, and widens the justification for limiting their rights beyond the scope allowed in a strict IHL analysis. In turn, the rights of citizens from the occupying power are often subsumed under security considerations, leading to a security imbalance that enables broad violations of the rights of people living under occupation. Conflating the different meaning ascribed to proportionality in IHL and IHRL also contributes to this imbalance.

Section 2, which follows this introduction, considers determinations in recent ICJ decisions on the application of IHRL in the context of occupation. Section 3 offers a structural analysis of the role that human rights discourse plays in the legal analysis of belligerent occupation and explains why turning to human rights analysis in this context may harm rather than help the rights of people living under occupation. This argument is substantiated in Section 4 by considering the practice of the Israeli HCJ, which has an extensive record of cases involving occupied territories. Section 5 places this analysis within the broader framework of international law, including decisions of the ICJ and the ECtHR, and looks into the role that human rights, humanitarian law, and the doctrine of proportionality plays in the context of occupation. The discussion concludes with an exploration of the complex rule/exception relationship entailed by the application of IHRL in circumstances of occupation.

2 Applying IHRL in Occupation: The Determinations of the ICJ

In the *Wall* decision, the ICJ held that ‘the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation’.¹⁹ Moreover, the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC) extend also to individuals outside a state’s territory but are subject to that state’s jurisdiction. Thus, the ICJ found that all three conventions are applicable within the Occupied Palestinian Territory (OPT).²⁰

Concerning the relationship between IHRL and IHL, the ICJ in the *Wall* Opinion made the following determination, which was cited with approval in its *Armed Conflict* judgment:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put

¹⁹ *Wall*, *supra* note 1, at para. 106.

²⁰ *Ibid.*, at paras 107–114.

to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.²¹

Based on these principles, the ICJ found in the *Wall* decision that Israel's construction of the wall in the OPT violated certain provisions of ICCPR, the ICESR and the CRC.²² In the *Armed Activities* judgment, the ICJ determined that Uganda was the occupying power in the Ituri district in the Democratic Republic of the Congo (DRC) and that the Uganda Peoples' Defense Forces (UPDF), whose actions it held were attributable to Uganda, violated norms enshrined in the ICCPR, the CRC and its Optional Protocol on the Involvement of Children in Armed Conflict, and the African Charter on Human and People's Rights, besides IHL.²³ These actions included torture and other forms of inhumane treatment of the civilian population, destroying villages and civilian buildings, failing to distinguish civilian from military targets, failing to protect the civilian population in its fight with other combatants, inciting ethnic conflict, and involvement in the training of child soldiers.²⁴

Moreover, the ICJ determined in this decision that the duty to secure respect for the applicable rules of IHRL as well as IHL was part of Uganda's duty as the occupying power in Ituri, according to Article 43 of the Hague Regulations of 1907.²⁵ Article 43, granting the commander the authority to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country',²⁶ is considered the basic norm of the law of occupation.²⁷

²¹ *Ibid.*, at para. 106, cited in *Armed Activities*, *supra* note 2, at para. 216. The last sentence in the quoted passage, referring to the *lex specialis* doctrine, was omitted when quoted in *Armed Conflict*. For a discussion of problems in the application of *lex specialis* in this context see Bianchi, 'Dismantling the Wall: The ICJ's Advisory Opinion and Its Likely Impact on International Law', 47 *German Yearbook of International Law* (2004) 343, at 369–378.

²² *Wall*, *supra* note 1, at paras 122–142. For an evaluation of the ICJ's position that supports its determination in principle but also offers critiques see Ben-Naftali and Shany, *supra* note 6, at 109–118. For an opposite view see Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL* (2005) 119.

²³ *Armed Activities*, *supra* note 2, at paras 217–220.

²⁴ *Ibid.*, at para. 211.

²⁵ *Ibid.*, at para. 178. This decision is also significant because it involves a situation of occupation that did not share what has been called 'the unusual circumstances of Israel's prolonged occupation'. Dennis suggested that the ICJ's determination on this matter in *Wall* may be attributed to this feature of the Israeli occupation, and that it remains unclear whether the opinion could be read as generally endorsing the view that the obligations assumed by states under IHRL apply extraterritorially in situations of armed conflict and military occupation: Dennis, *supra* note 22, at 122. By repeating the same determination in the *Armed Activities* case, *supra* note 2, the ICJ clarified its position on this point and implicitly rejected Dennis' suggestion for a possible narrow reading of its determination on this matter in *Wall*, *supra* note 1.

²⁶ The language of the official French version of Art. 43 of the Hague Regulations refers to '*l'ordre et la vie publique*', and thus the term 'civil life' is more accurate and appropriate than the term 'safety' used in the English version. See Benvenisti, *The International Law of Occupation* (1993, paperback edn., 2004), at 7, n. 1, and the references therein.

²⁷ *Ibid.*, at 7–31.

3 Why ‘Righting’ the Law of Occupation May Be Bad for People Living under Occupation

To understand how the process of ‘righting’ the law of occupation in general and invoking IHRL in particular may serve to limit the rights and entitlements of people under occupation, recall that the currently prevalent human rights analysis justifies limiting rights in the name of security as long as the limits are proportional. It also allows limiting rights in the name of the rights of others. Given this context, the following features of rights analysis may cause the failure of human rights analysis in the context of occupation:

- 1 Rights discourse is by nature abstract, and looks at individual cases without context. Conceptualizing issues within an occupation context as a question of rights may thus result in a distorted discourse that looks at the conflict as one of rights between specific individuals, or between individuals and governments, obscuring the occupation context and ‘privatizing’ political issues.²⁸ IHRL differs in this matter from IHL, which singles out people living under occupation as ‘protected persons’.²⁹ By contrast, IHRL places everyone on a supposedly equal plane although, given the difference between occupiers and occupied, this equalization is artificial.
- 2 In an analysis merging IHL and IHRL, the rights of people living under occupation are often conceived as ‘rights’ whereas the rights of citizens from the occupying power are conceived as ‘security interests’, sometimes even when the same right (for instance, freedom of movement) is at stake, and often merged or used interchangeably with the security considerations of the occupying army. When the analysis is limited to IHL, the rights of citizens from the occupying power are conceived as part of the ‘security’ considerations. When IHRL analysis is added, those rights are sometimes considered independently, and sometimes incorporated into the security considerations. Because proportionality analysis justifies limiting rights in the name of security as long as those limits are proportional, and because courts tend to defer to security arguments, the occupiers’ rights often prevail over those of the occupied.
- 3 In the context of the Israeli occupation, the security of Jewish settlers in the OPT entails an additional burden that justifies limiting the protected persons’ rights. This burden could be framed as a security interest, or as a right of the settlers, or as both. All these three formats are problematic from the perspective of international law. Making the burden of the settlers’ security a legitimate security concern

²⁸ Compare with Kennedy’s argument that to maintain the claim to universality and neutrality, human rights pay little attention to background conditions that will determine the meaning of a right in particular contexts, rendering the even-handed pursuit of ‘rights’ vulnerable to distorted outcomes: see David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004), at 12. The critique of rights as abstract relies on Hegelian and Marxist thought, and was developed in the literature of critical legal studies: see Tushnet, ‘An Essay on Rights’, 62 *Texas L Rev* (1984) 1363; Duncan Kennedy, *A Critique of Adjudication* (1997), at 299–388.

²⁹ Art. 4 of the Fourth Geneva Convention.

of the military commander places an unwarranted additional burden on the people under occupation and thus distorts IHL.³⁰ Claiming that ensuring the settlers' security protects their human rights is a typical dimension of 'righting' the law of occupation, and illustrates how this process undermines the rights of the occupied. Conceptualizing the settlers' security as *both* 'security' and 'rights' indicates the convergence of IHL and IHRL analysis. In any event, this burden is not anticipated in international law and distorts rights analysis, not only because the settlers' rights are often conceived of as part of security arguments to which courts tend to defer, but also because of the structural inequality between the status of the settlers and that of the protected persons. The rights of the occupied are sometimes limited not only to protect the settler's rights, but also out of a desire to 'balance' them with the rights of Israelis living within Israel proper.

- 4 Rights analysis is usually best at identifying and treating individual localized violations, which are deemed the exception in a regime where democracy and human rights are the norm. In the context of occupation, where the norm is the denial of rights and the lack of democracy, rights analysis may distort the picture by pointing to rights denial as the exception rather than the norm. Rights analysis is weak at creating structural changes.³¹ The result, even if the rights of the people living under occupation prevail in specific cases, may often be the legitimation of rights' denial rather than the opposite: cases where individuals win rights' victories may create the myth of a 'benign occupation' that protects human rights even though they are mostly denied.
- 5 Human rights analysis may invoke proportionality when considering the limitation of rights in the name of security, and this can indeed be a valuable tool when the people affected by this limitation of rights belong to the collective whose security is invoked. In circumstances of occupation, however, the rights of people under occupation are limited to protect the security interests of others, i.e., the citizens of the occupying state. In the context of the OPT, these interests include both the security of Israelis living in Israel proper and the security of the Jewish settlers and of the West Bank settlements. The simultaneous application of IHR and IHRL thus mixes the two different contexts of proportionality. The first context is that of the human rights law normally found within an accountable democracy. In this case, when individuals' rights are limited in the name of public interest, proportionality analysis is used as a tool for assessing whether the effects of the limitation on a member of the public is proportional to the public interest at stake. The second context is that of humanitarian law, when proportionality analysis focuses on the effects of an attack against a legitimate target on *surrounding people and objects* to assess whether these effects are proportional to the

³⁰ See Gross, 'The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation', 19 *Leiden J Int'l L* (2006) 393, at 418.

³¹ In Kennedy's words, human rights remedies treat the symptoms rather than the illness, and this allows the illness not only to fester but to seem like health itself: David Kennedy, *supra* note 28, at 25. Similarly, the tendency in human rights is to treat 'only the tip of the icebergs': *ibid.*, at 32.

objectives of military necessity at stake.³² Proportionality in human rights analysis is thus different from proportionality in IHL analysis, but their convergence could justify excessive violations of the rights of people living under occupation. Their rights can now be limited both for ‘public interest’ or the rights of others *and* for military necessity; both when the consequences affect individuals against whom actions are taken *and* when they affect surrounding people and objects. Often, the concept of either public interest or the rights of others is broader than that of military necessity, expanding the possibilities for limiting the humanitarian standards applicable to protected persons beyond what is envisaged in IHL in general and in the law of occupation in particular, as will be shown below concerning HCJ decisions. The concept of military necessity, however, may sometimes allow restrictions on rights beyond the public interest.³³ The result of the merger can thus provide more rather than less justifications for limiting rights.

Some of these problems have their parallel within IHL, and one may argue with some merit that introducing human rights analysis into a situation of occupation does not lead to problems significantly different from those resulting from the application of IHL. But IHL assumes a situation of armed conflict and has special rules for belligerent occupation. The distinction in the Fourth Geneva Convention between ‘protected persons’ and others is worth noting: citizens of the occupying power are not in this category and IHL can thus avoid the artificial equalization of different individuals in a situation of occupation that IHRL, with its universal applicability, cannot. Moreover, insofar as some of the issues described affect IHL analysis as well they also reflect, at least to some extent, the convergence and mutual influence of these two bodies of international law, thereby attesting to problems not only in the application of IHRL in occupation but to the current state of IHL.³⁴ The following discussion illustrates this process through the practice of the Israeli HCJ.

4 The Emperor’s New Clothes? Applying Human Rights in the Occupied Palestinian Territory

A Between Ma’arab and Ma’arabe: The HCJ’s Practice in the Application of Human Rights in Occupation

This discussion of the limits and risks entailed in the application of human rights in the context of occupation is pertinent not only because of recent ICJ decisions, but also because of the HCJ’s increasing recourse to human rights norms when dealing with

³² On the different contexts of proportionality and their merger by the HCJ see Gross, *supra* note 30, at 405–410. On the different meanings of proportionality in IHRL and IHL see Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’, 87 *Int’l Rev of the Red Cross* (2005) 737, at 745–746; Habenpflug, ‘Comment’, 45 *German Yearbook of International Law* (2002) 80–81.

³³ On public interest and military necessity as two concepts that differ in ways capable of making one broader than the other see *ibid.*

³⁴ See my discussion in Gross, *supra* note 30. For a relevant critique of current IHL see also David Kennedy, *supra* note 28, at 235–357.

OPT cases. Note that the HCJ uses human rights norms while sidestepping some of the controversial questions concerning the application of IHRL in the context of belligerent occupation. Although the Israeli government's official position rejected the application of IHRL in the OPT,³⁵ the HCJ took a different position in some of its judgments. The HCJ ruling best known for its determination that IHRL applies in the OPT is *Ma'arab*.³⁶ In this ruling, the HCJ scrutinized the military order on arrests in the OPT according to both IHL and IHRL, and determined that the rule allowing the Israeli army to arrest Palestinians for 12 or 18 days before they are brought before a judge violates international law. Article 9(1) of the ICCPR, which guarantees the right to liberty and security of the person and to freedom from arbitrary arrest or detention, and especially Article 9(3) of the same convention, which determines that anyone arrested or detained on a criminal charge shall be brought 'promptly' before a judge or another officer authorized to exercise judicial power, played a central role in the HCJ's reasoning. The HCJ also took note of provisions in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ratified by the United Nations General Assembly in 1988, of the interpretation adopted by the United Nations Human Rights Committee, and of the interpretation of a similar provision in the European Convention of Human Rights (ECHR) adopted in the ECtHR. Besides these sources, the HCJ also cited Articles 43 and 78 of the Fourth Geneva Convention (Article 43 demands that a protected person who has been interned shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative tribunal),³⁷ but regarded them as applying only to administrative arrest, and thus not to an arrest conducted for the purpose of investigation and possible prosecution of the sort considered in this case.

Not only did the HCJ rely on the ICCPR as the main source for its *Ma'arab* ruling, but it also addressed the question of its applicability in occupied territories. While stopping short of an elaborate discussion, the HCJ did note that the balance between individual liberty and public security must be preserved in arrests conducted for investigation purposes both within and outside the state, between detainees in areas under belligerent occupation and the occupying state, in peacetime and in war. The rule in Article 9(1) of the ICCPR thus applies in all these situations.³⁸

In two other cases, which scrutinized conditions in arrest facilities established by Israel after the outbreak of the second Intifada,³⁹ the HCJ also relied on the ICCPR as

³⁵ The position of the Israeli government is discussed in detail in Ben-Naftali and Shany, *supra* note 6, at 25–40, and criticized in *ibid.*, at 40–100. Although most of the debate pertains to questions of principle about the relationship between IHL and IHRL, it also addresses the question of Israel's effective control of the OPT, or at least parts thereof, following the establishment of the Palestinian Authority.

³⁶ HCJ 3239/02, *Ma'arab v. The IDF Commander in Judea and Samaria*, 57(2) PD 349 (hereinafter *Ma'arab*), an English translation of which is available at http://elyon1.court.gov.il/files_eng/02/390/032/a04/02032390.a04.pdf.

³⁷ *Ibid.*, at paras 19–36.

³⁸ *Ibid.*, at para. 19.

³⁹ HCJ 3278/02, *Hanoked: Center for the Defense of the Individual v. IDF Commander in the West Bank*, 57(1) PD 385, at paras 23–25 (hereinafter *Hanoked*); HCJ 5591/02, *Yasin v. Commander of Military Camp Ktziot*, 57(1) PD 403, at paras 11–12, an English translation of which is available at http://elyon1.court.gov.il/files_eng/02/910/055/a03/02055910.a03.pdf (hereinafter *Yasin*). The second of these cases dealt with an arrest facility established within Israel and not in the OPT, and thus is not directly relevant to the current discussion.

well as on the Fourth Geneva Convention. In one case, involving a facility located in the OPT, the HCJ ruling noted that Israel is a party to the convention and that the relevant Article 10 of the ICCPR also reflects customary norms, but did not discuss its applicability in the OPT.⁴⁰ In both cases, the HCJ rejected the petitions after noting that changes had been made in the scrutinized facilities while the cases had been pending, but mentioned that more changes were still required.

Whereas the HCJ relied on the ICCPR in these cases, in others it took note of the controversy concerning its application in the OPT. In one case, the HCJ cited relevant provisions of the ICCPR, but then noted that it need not consider whether the convention applies in the OPT since the military commander's duty to exercise his discretion reasonably included taking the rights and interests of the local population into account.⁴¹ In *Ma'arabe*, where the HCJ discussed sections of the West Bank wall and addressed the ICJ's *Wall* Opinion, it took note of the ICJ's determination that the ICCPR and other human rights treaties apply in an area under belligerent occupation. The HCJ noted, however, that although it had left the question open in its previous decisions, 'the Court was willing, without deciding on the matter, to rely upon the international conventions', and would do the same in this case:

Indeed we need not, in the framework of the petition before us, take a position regarding the force of the international conventions on human rights in the area. Nor shall we examine the interrelationship between international humanitarian law and international law on human rights . . . However, we shall assume – without deciding the matter – that the international conventions on human rights apply in the area.

According to the HCJ, within his authority under the law of belligerent occupation, the military commander must take into account security considerations, including the security of all those present in the area on the one hand, and, on the other, he must consider the human rights of the local Arab Palestinian population.⁴²

While the 2004 ICJ ruling in the *Wall* affirmed the 2003 HCJ *Ma'arab* decision that IHRL applies in the OPT, the HCJ retreated from this position in the *Ma'arabe* ruling issued in September 2005 and adopted an agnostic stance concerning the application of IHRL. At the same time, however, the HCJ stated that this was not a crucial issue, given that, in any event, the military commander is obliged to respect the human

⁴⁰ *Hamoked*, *supra* note 39, at para. 24.

⁴¹ HCJ 1890/03, *City of Bethlehem v. The State of Israel—Ministry of Defence*, 59(4) PD 736, at para. 15 (hereinafter *City of Bethlehem*). In the past, the HCJ did adopt an approach implying that IHRL did not apply in the OPT. In HCJ 629/82, *Moustafa v. The Military Commander for Judea and Samaria*, 37(1) PD 158, the Palestinian petitioners invoked, *inter alia*, the Universal Declaration of Human Rights (UDHR) against orders to deport them. The HCJ held that the UDHR does not apply in areas under belligerent occupation administered as such as a result of war and for as long as the war situation continues (para. 5). In earlier cases that had addressed the applicability of the ICCPR in the OPT, petitions were rejected or left the question open. These rulings, however, did not include an exhaustive discussion of the matter and were issued *before* Israel became a party to the ICCPR in 1991. See HCJ 13/86, *Adel Ahmed Shain v. The IDF Commander in the Judea and Samaria area*, 41(1) PD 197; HCJ 87/95, *Gamal Ahmmed G'aber Argub v. IDF Commander in Judea and Samaria*, 42(1) PD 353, at para. 7.

⁴² HCJ 7957/04, *Mara'abe v. The Prime Minister of Israel* (not yet published), an English translation of which is available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

rights of the local population. This position thus assumes a balance of rights and security inherent in IHL. The implication of this merger of IHL analysis and rights analysis is discussed below.

Perhaps as a further reflection of this agnostic position, in other cases that the HCJ also analysed from a rights perspective it did not rely directly on IHRL but on a determination that the military commander in the occupied territory must guard the rights of Israeli residents of the OPT as well as those of the Palestinian residents.⁴³ Thus, in one case, the HCJ held that the military commander has a duty to respect the ‘constitutional rights’ of the local population.⁴⁴ In cases involving the rights of Israeli settlers, the HCJ anchored the protection of their rights in the Basic Law: Human Dignity and Liberty, holding that Israeli citizens in the OPT are entitled *in personam* to the protection of this Basic Law.⁴⁵ The HCJ left open the application of the constitutional protection of this Basic Law to Palestinians in the OPT.⁴⁶ Nevertheless, it held that the actions of the Israeli military commander will be examined by the constitutional norms that obligate him as an official of the Israeli government, and as part of his obligations to the welfare of the local population.⁴⁷ The HCJ also cited the Basic Laws when declaring the central place of rights, while addressing the rights of both Palestinians and Israelis in the OPT.⁴⁸ In other cases, mostly dealing with the wall, it generally cited to the rights of the local Palestinian population recognized in international law without detailing their source.⁴⁹ The HCJ returned to explicitly citing IHRL as relevant and applicable when it examined the legality of Israel’s policy of so-called ‘targeted killings’, aimed at individuals in the OPT held to be responsible for terrorist acts. When detailing the normative framework relevant to this question, the HCJ noted that the armed conflict between Israel and terrorist groups in the OPT is governed by the law of international armed conflict. IHL, including in this case the law of belligerent occupation, is the *lex specialis* applicable to such a situation. When IHL is ‘lacking’, noted the HCJ, citing to the *Wall* and *Armed Conflict* decisions of the ICJ, it can be complemented by IHRL.⁵⁰ The HCJ did not elaborate when IHL would be considered ‘lacking’ in a way that warranted turning to IHRL, and it did not turn to IHRL in this case.

⁴³ HCJ 10356/02, *Hass v. Commander of the IDF forces in the West Bank*, 58(3) PD 443. An English translation is available at http://elyon1.court.gov.il/files_eng/02/970/104/r15/02104970.r15.pdf (hereinafter *Hass*).

⁴⁴ HCJ 7862/04, *Zohariya Hassan Mourshad Bin Hussein Abu Daher v. IDF Commander in Judea and Samaria* (not yet published), at para. 7.

⁴⁵ HCJ 1661/05, *Regional Council Gaza Beach v. the Knesset* (hereinafter *Regional Council Gaza Beach*) (not yet published), at paras 78–80.

⁴⁶ *Ibid.*; *Hamoked*, *supra* note 39, at para. 23; HCJ 8276/05, *Adalah v. Minister of Defence* (not yet published), at paras 22–23.

⁴⁷ *Hass*, *supra* note 43, at paras 8, 14.

⁴⁸ HCJ 9593/04, *Rashad Murar, Head of the Yanun Village Council v. IDF Commander in Judea and Samaria* (hereinafter *Rahad Murar*) (not yet published), at para. 14.

⁴⁹ See the cases cited in *infra* note 98.

⁵⁰ HCJ 769/02, *The Public Committee Against Torture v. The Government of Israel* (not yet published), at para. 18. An English translation is available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

In sum, human rights analysis plays an important role in the HCJ's judicial review of the situation in the OPT. The HCJ may variously rely for its analysis on specific treaty provisions, especially the ICCPR, or on the military commander's general obligation to respect human rights. Especially when dealing with the rights of Israelis, Israeli Basic Laws also play a role. Although the HCJ's approach emerges as inconsistent,⁵¹ these developments attest to a 'righting' of the legal rules concerning the occupation, which can be attributed both to the 'righting' of Israeli law⁵² (Israel ratified the ICPPR and other major human rights treaties in 1991,⁵³ and legislated its constitutional Basic Law: Human Dignity and Liberty in 1992⁵⁴) and to the international development of 'convergence' discussed above.

B The Role of Rights in the HCJ Occupation Cases

The following discussion will look at several HCJ rulings based on a human rights analysis that relied on one of the methods or sources noted above, illustrating the involvement of the factors described in Section 3. Some of the cases discussed included specific reference to IHRL, and those that did not still attest to the implications of using rights analysis within an occupation context.

Cases were divided into three categories: (a) cases dealing with conflicting rights of Palestinians and Israelis; (b) cases involving Palestinians' rights to due process; (c) other cases involving rights of Palestinians *vis-à-vis* the military government, where the HCJ invoked human rights norms. Although this discussion hardly exhausts the scope of the HCJ's involvement in litigation dealing with the OPT, it does encompass the major cases in which human rights discourse and norms were a significant element of its rulings.

1 Cases Dealing with Conflicting Rights of Palestinians and Israelis

This group of cases best illustrates the argument about the failure of human rights norms formulated in this article, and some of the most notable cases involve the city of Hebron. Hebron is home to about 150,000 Palestinians, of whom about 35,000 live in the H-2 area where about 500 Israeli Jews have also settled.⁵⁵ In addition, about 6,700 Jewish settlers live in the adjacent settlement of Kiryat Arba.⁵⁶

⁵¹ For a discussion of the case law of the HCJ and the various approaches taken by it to the question of the applicability of human rights in the OPT see Ben-Naftali and Shany, *supra* note 6, at 87–96.

⁵² For a discussion of the increasing recourse of Israeli law to IHRL law see Barak-Erez, 'The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue', 2 *I-CON* (2004) 611. Specifically on the OPT see 618–623.

⁵³ Ben-Naftali and Shany, *supra* note 6, at 25.

⁵⁴ On the legislation of the Basic Law see Gross, 'The Politics of Rights in Israeli Constitutional Law', 3 *Israel Studies* (1998) 80.

⁵⁵ B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories, Hebron, Area H-2: Settlements Cause Mass Departure of Palestinians, 2003, available at <http://www.btselem.org/english/publications/Index.asp?YF=2003&image.x=10&image.y=4>.

⁵⁶ See <http://www.btselem.org/english/statistics/Index.asp>.

In *Hass*,⁵⁷ the HCJ dealt with a petition challenging the Israeli army's land seizures and the destruction of several structures in Hebron for the purpose of widening the road that Kiryat Arba's Jewish settlers use in order to access the Cave of the Patriarchs in Hebron. The military commander decided on the seizure after several attacks against the settlers and against members of the security forces guarding them, where several soldiers were killed. After the petition was submitted and after the HCJ asked the military commander to examine alternative options for achieving its security goals, the army revised its original plan in a way that reduced the number of buildings to be demolished and also made other changes.⁵⁸ Nevertheless, and since the army insisted on the need to seize and destroy structures, the decision to take these measures remained pending before the HCJ.

In many ways, *Hass* illustrates the legal working of the occupation. The HCJ noted that the houses the army set out to destroy were 'deserted', a fact that supposedly alleviates the gravity of the rights violations. For their part, the petitioners argued that the purported security reasons were a cover for a political motive: creating territorial continuity between Kiryat Arba and Hebron to enable the eventual expansion of Jewish settlement in the area. They also challenged the army's security arguments by pointing out that the area in question had already been declared a closed military zone and had been abandoned by its residents,⁵⁹ possibly explaining why the buildings in question were found to be deserted.

The petitioners' arguments rested both on applicable norms of IHL (The Hague Convention on the Law and Customs of War, 1907, and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949) and on rights guaranteed within Israeli constitutional law.⁶⁰ The HCJ examined the issue based on these sources, following its previous determination that the military commander's actions are subject not only to the rules of international law but also to Israeli public law, by which he is bound as an agent of the Israeli government.⁶¹ It determined that the Hague Convention authorizes the military commander to act both to guarantee the legitimate security interest of the holder of the territory, and also to secure the needs of the local population in an area under belligerent occupation. 'The local population for this purpose', held the HCJ, 'includes the Arab and the Israeli residents as one'. The first of these needs is military and the second is civil-humanitarian. In the context of civil-humanitarian needs, held the HCJ, the military commander is in charge of maintaining the residents' rights, and especially their constitutional human rights. 'The concern for human rights is thus in the center of the humanitarian considerations that the commander must weigh, in accordance with Regulation 43 of the Hague Convention.'⁶² More specifically, the HCJ cited to the rules of international

⁵⁷ *Hass*, *supra* note 43.

⁵⁸ *Ibid.*, at para. 5.

⁵⁹ *Ibid.*, at para. 3.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, at para. 8.

⁶² *Ibid.*

law prohibiting the seizure or destruction of civilian property unless ‘imperatively demanded by the necessities of war’⁶³ or ‘rendered absolutely necessary by military operations.’⁶⁴ The HCJ noted that any violation of civilian property thus needs to balance military needs against damage to the property owner. It further noted that, in addition to the rules of international law, the Israeli law binding on the military commander requires him not to violate the property of residents in the area unless for a purpose within his authority and as required by critical necessity. Both according to international law and to Israeli public law, such authority must be exercised for a proper purpose, in reasonableness and proportionality, while carefully weighing the necessity of the purpose to be reached and the nature and dimension of the violation involved.⁶⁵ The HCJ determined that the security arguments adduced by the military commander had not been successfully refuted by the petitioners, and proceeded to examine the balance he had struck between the exercise of the Jewish settlers’ right to pray in a holy place within relative security and the private property rights of the Palestinian residents. Disregarding the question of the legality of the settlers’ residence, which the HCJ said was not before it,⁶⁶ it held that the very fact of their residence gives rise to the military commander’s duty to maintain their security and their human rights as part of the humanitarian dimension of the military force in belligerent occupation. This includes all aspects of life, including the constitutional human rights of the area’s residents, both Jews and Arabs. These rights include freedom of movement, freedom of religion, and property rights. Sometimes the protection will require balancing conflicting human rights.⁶⁷ Given the strong constitutional status of freedom of movement and of the right to approach holy places, which in this case are connected as they pertain to the right of Jewish worshipers to reach the Cave of the Patriarchs on the Jewish Sabbath and on Jewish holidays, violating the right to private property is reasonable and proportional. This conclusion was supported by the determination that if the military commander had refrained from violating the property rights, the result would have been the prevention of essential security measures for the worshipers and, possibly, the total denial of their rights to pray in the Cave on the Jewish Sabbath and on Jewish holidays, i.e., of their freedom of religion and movement.⁶⁸

⁶³ Art. 23(g) of the Hague Regulations. The HCJ also cited Art. 52 of the Hague Regulations, which determines that requisition in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.

⁶⁴ Art. 53 of the Fourth Geneva Convention. This provision deals only with destruction and not with seizure as such.

⁶⁵ *Hass*, *supra* note 43, at para. 9.

⁶⁶ Note that the legality of the Jewish settlement in Hebron had already come before the HCJ. In 1994, the HCJ rejected a petition demanding the evacuation of the settlers, holding that the Jewish settlement in Hebron is a controversial political question. See HCJ 1798/94, *Dahle v. IDF Commander in Judea and Samaria* (not yet published). This decision is in line with the continued refusal of the HCJ to engage in the matter of the settlements’ legality. See Gross, *supra* note 30, at 414–415; D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002), at 75–99.

⁶⁷ *Hass*, *supra* note 43, at para. 14.

⁶⁸ *Ibid.*, at paras 15–21.

Although *Hass* did not rely on IHRL as such, it adduced three sources for inserting rights analysis into the question at stake: (1) a consideration of the duty to maintain human rights as part of the military commander's humanitarian duties under Article 43; (2) a commitment of the military commander as an agent of the Israeli government who is bound by Israeli public law; (3) 'constitutional rights' proclaimed without any specific elaboration of their source, but probably as a derivative of the previous source, i.e., the application of the constitutional rights recognized in Israeli constitutional law. In any event, this decision is part of the 'righting' of the law of occupation and the blending of IHL and human rights law. Consider first that, early in the judgment, the HCJ pointed to the Hague Regulations and the Fourth Geneva Convention and noted that they respectively prohibit the destruction of civil property unless it is 'imperatively demanded by the necessities of war' or 'absolutely necessary by military operations'. Those are IHL norms that, in this case, include a strong, albeit not absolute, prohibition of such destruction. Without disregarding the importance of the settlers' religious rights, it is doubtful that securing their access to the Cave of the Patriarchs falls in the category of imperative military necessity.

Unto these IHL norms that purportedly apply in times of occupation, however, the HCJ transplants⁶⁹ human rights norms. After implying that the violation of property is *also* possible for the proper protection of the human rights of others, the HCJ shifts the terms of the discourse. From a balance between security and the rights of the local population as envisaged in IHL (vertical balancing), the HCJ moves to a horizontal balancing between the rights of different individuals, whose rights it holds the military commander is arguably supposed to protect under his obligations deriving from Article 43. This form of analysis makes this an abstract rights case, stripped from the occupation context. The result of this balancing act is almost predetermined: freedom of religion and personal security, which is part of 'security' as an overarching concept, must trump the 'poor relation' in this analysis – the right to private property that, although the HCJ stops short of stating so explicitly, may be lower in the hierarchy of rights. Framing the damage caused to the Palestinian residents of Hebron as one of damage to private property may, in this and in many other cases, diminish the meaning of the military commander's acts and their possible effects on the residents' lives and security. Whatever the case, this supposed balancing act is in fact an imbalance, since it places the burden of the settlers' security on the people living under occupation, conceptualizes the need for balance between the rights involved as if they were the rights of equal parties, and allocates the rights to be balanced in a way that pre-determines the results.⁷⁰

⁶⁹ The term is borrowed from A. Watson, *Legal Transplants: An Approach to Comparative Law* (1993).

⁷⁰ On the (im)balance of security see Gross, *supra* note 30, at 418; Ben-Naftali, Gross and Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', 24 *Berkeley J Int'l L* (2005) 551, at 590–592, 603–605. In any balancing attempt, much depends on the choices made in the balancing process. As Tushnet has shown, balancing is responsible for much of the indeterminacy of rights analysis, as a balancer can choose the necessary measure of value, the necessary consequences, and the necessary level of generality, and thus deny the claim that a right has been violated. A court can also choose any of many generally protected interests and balance them as it chooses: see Tushnet, *supra* note 28, at 1371–1375.

Scrutinizing the military commander's decisions in terms of reasonableness and proportionality further illustrates this imbalance: in situations of belligerent occupation, and specifically in the context of this occupation, we may assume that the military commander will give preference to the interests of his fellow citizens. Practice has shown that the Israeli army destroys Palestinian property for the sake of the settlers' security and not vice-versa: the settlers' interests are conceived as 'security' interests, justifying the limitation of Palestinians' rights. Settlers' rights are interchangeably discussed as their human rights and as the military commander's supposedly legitimate security considerations. This framing of the question makes the answer predictable. Instead of showing suspicion toward the military commander's decisions, the HCJ legitimizes them under a doctrine that merges administrative and international law transplanted from other contexts.

Proportionality is a valuable tool because it allows us to weigh conflicting considerations through a means-ends test. It is a consideration to be used with caution, however, because it shifts the human rights discourse to an analysis consistently focused on their infringement and on the extent to which violations are still 'proportional'. The use of this administrative principle as part of a rights analysis in the context of a military occupation is particularly problematic. When used within human rights analysis to review administrative action, the principle of proportionality assumes an accountable democratic government committed to the collective good of its citizens, occasionally forced to violate the rights of whole or part of the population in order to attain legitimate ends. The benefits to the population are then weighed against the infringement of their rights, the point being that the benefits accrue to a collective of whom the population whose rights were violated is a part. But it is questionable whether this logic can apply when the government is a military occupation promoting the collective security interests of its *own* citizens while violating the rights of the people it occupies. Even more questionable is the applicability of this principle to Israel's military occupation: the establishment of settlements that channelled land, water, and rule of law resources to their own inhabitants at the expense and dispossession of the Palestinian residents⁷¹ makes the use of a proportionality perspective a dubious proposition indeed.

The notion of proportionality in administrative law developed as part of the idea of a free democracy, when the state's very attempt to maximize freedom can have the opposite effect of minimizing the freedom of the citizens. In this equation, the rule of proportionality is that one should only interfere with individual rights if and insofar as it is necessary to satisfy a compelling public interest.⁷² Transplanting this notion

⁷¹ On these policies as creating a breach of trust by the military commander see Ben-Naftali, Gross and Michaeli, *supra* note 70, at 579–592.

⁷² N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (1996), at 40–43. Emiliou points to this rationale for proportionality in his discussion of the principle as developed in German public law. On proportionality as a tool for judicial review in constitutional democracies, as a form of judicial review that relies on this principle to tell judges when the *elected representatives* of the people and their officials are acting properly and when they are not, see D. Beatty, *The Ultimate Rule of Law* (2004), at 159–161.

to the context of the occupation as a tool for the horizontal balance of rights is thus improper, especially given the features of this occupation. A proper proportionality analysis in this case would have been limited to the question of whether the military commander weighed the balance between legitimate security needs within IHL and the rights of the local population, as envisaged in the relevant provisions of The Hague and Geneva conventions. In IHL, proportionality is measured, in Rosalyn Higgins' words, 'in respect of the object legitimately to be achieved'.⁷³ Thus, it is clear that '[n]o conduct that fails to meet the specific requirements of the substantive *jus in bello* can be justified on grounds that it is still "proportionate"'.⁷⁴ Indeed, proportionality is a limiting element upon otherwise *permitted* harm.⁷⁵ As noted, the joint application of IHR and IHRL thus mixes the two different contexts of proportionality: that of human rights law, which normally exists in the context of an accountable democracy and assesses the effect of an action on an *individual* when a government pursues a general public interest, and that of humanitarian law, where proportionality analysis focuses on effects upon *surrounding people and objects* when a legitimate target is attacked in pursuit of military necessity.⁷⁶ The result may be a legitimization, through the idea of proportionality, of the illegitimate.

The horizontal balance assumed in *Hass* is removed not only from the situation of occupation but also from the structural inequality between the two populations,⁷⁷ and is particularly blind to the illegality of the settlements. Although the HCJ holds that the question of the settlements' legality is irrelevant, this determination fails to notice that the entire structure developed by the Court, whereby the military commander's duties include protection of the settlers' rights (and in this case at the expense of the local residents' rights) upends the meaning of Article 43 upon which it relies. The rationale of Article 43 is that the military commander should preserve existing laws 'unless absolutely prevented', that his duty is of temporary duration, and his role is to manage the territory in a manner that protects civil life, exercising authority as a trustee of the sovereign.⁷⁸ Article 43, then, does not confer sovereign powers on the occupant; rather, it limits the occupant's authority to the maintenance of public order and civil life.⁷⁹ A reading of Article 43 that allows limiting the rights of the occupant for the sake of the settlers' rights takes the law of occupation intended to prevent the military commander from changing the nature of the territory under occupation and turns it on its head. The settlements were built in violation of Article 49(6) of the Fourth Geneva Convention, which prohibits occupants from transferring part of

⁷³ R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 232 (emphasis in the original).

⁷⁴ *Ibid.*, at 234.

⁷⁵ *Ibid.*, at 232. The discussion in the last two paragraphs is based on my discussion in Gross, *supra* note 30, at 406–409.

⁷⁶ *Supra* notes 32–33 and the accompanying text.

⁷⁷ On the different legal regimes that apply to the two populations see Ben-Naftali, Gross and Michaeli, *supra* note 70, at 583–588.

⁷⁸ Under contemporary international law, and in view of the principle of self-determination, sovereignty is vested in the population under occupation: *ibid.*, at 554.

⁷⁹ *Ibid.*, at 570–575.

their own civilian population into the territory under occupation.⁸⁰ The military commander was the one who formally erected the settlements and, as the HCJ held in a ruling on the Gaza withdrawal,⁸¹ has the authority to dismantle them. In this context, it is important to note that, although the HCJ did not cite IHRL directly in this case, the right to freedom of movement as articulated in Article 12 of the ICCPR is granted to '[e]veryone lawfully within the territory of a State' and applies only 'within that territory'. This definition of the right, had it not been ignored, may have negated its applicability to the settlers in this case,⁸² given the actual illegality of the settlements. Thus, even in a specific context where IHRL restricts the universality of the right, the HCJ chose to ignore this.

A reading of *Hass* thus shows how the HCJ 'righting' of the case distorts IHL, which prohibits settlement activity as well as the destruction of the local residents' civilian property. IHL prohibits the transfer of civilian population from the occupying country to the territory under occupation and protects the rights of people under occupation, defined as 'protected persons' in the Geneva Convention. Transplanting a rights analysis onto this situation puts the settlers (who reside in the occupied territory illegally) and the local residents on a supposedly equal, and thus false, par. The HCJ analysis in this case leaps back and forth between the two branches of the law in a way that ultimately allows broader violation of the residents' rights than IHL allows.

Consider now that, in the *Armed Activities* judgment, the ICJ held that the duty to secure respect for the applicable rules of IHRL as well as IHL was part of Uganda's duty as the occupying power in Ituri, according to Article 43 of the Hague Regulations of 1907.⁸³ Since IHRL must apply universally, this determination of the ICJ 'righting' the law of occupation may be read as parallel to the position taken by the HCJ in *Hass* that, by determining that the military commander's duty is to guarantee the human rights of all the area's residents, loses the balance struck in IHL.

Protecting human rights for all and the universality of human rights are noble and attractive goals. As *Hass* illustrates, however, the price of attaining them is abstraction and imbalance rather than a balance of rights and, ultimately, a possibly unwarranted consequence, the ICJ's determination serves to justify *greater* restrictions of the rights of people living under occupation.

Theodor Meron has indicated how human rights doctrine allowed for a flexible definition of 'protected persons' in the jurisprudence of the ICTY.⁸⁴ This flexibility is indeed welcome when it allows a transcending of formal tests for the examination of substance. In an occupation context, however, neglecting the 'protected persons' rubric as the central category for universally applicable human right norms, may mean lessening rather than strengthening the protections envisaged in IHL.

⁸⁰ For an elaborate discussion of the application of this prohibition to the settlements see *ibid.*, at 581–582.

⁸¹ *Regional Council Gaza Beach*, *supra* note 45.

⁸² I am grateful to Ahmed Amara for this point.

⁸³ *Supra* note 25 and the accompanying text.

⁸⁴ Meron, *supra* note 9, at 256–261.

Eleven months after *Hass*, the HCJ repeated the same rationale in *Bethlehem*,⁸⁵ where it held that seizing land near Bethlehem to pave a bypass road for Jews coming from Jerusalem to Rachel's Tomb in Bethlehem and building walls to protect this road were legal actions. The HCJ determined that the case raised questions about the conflict between the right of Jews to approach Rachel's tomb and the rights of the Palestinian local population to freedom of movement and property.⁸⁶ Again, the HCJ found that the military commander's authority to seize land is grounded in the Hague and Geneva conventions, but that this authority must be exercised within reasonableness and proportionality.⁸⁷ It also determined that the case required a balancing act between freedom of religion on the one hand, and rights to property and freedom of movement on the other.⁸⁸ In this case, the HCJ addressed the various rights as recognized and grounded in Israeli law but, unlike its determination in *Hass*, it also turned explicitly to IHRL and noted that freedom of movement is also recognized in international law, including Article 12 of the ICCPR.⁸⁹

Bethlehem is one instance where the HCJ adopted an agnostic position, and determined that it did not need to decide whether and to what extent Israeli constitutional principles and international human rights treaties apply in the OPT. It could confine itself to holding that, as part of the military commander's duty to exercise his authority with reasonableness, he also had to take into consideration the interest and needs of the local population, including the need to minimize the violation of their freedom of movement.⁹⁰ In this case too, then, the HCJ engaged in horizontal balancing between rights, and held that the military commander had struck a reasonable balance.⁹¹

The *Bethlehem* case thus resembles *Hass* in many respects, although it does not necessarily concern settlers but worshippers wishing to reach Rachel's Tomb from Jerusalem. (The worshippers could be from East Jerusalem, which was occupied by Israel in 1967, or from West Jerusalem, which is within Israel proper.) Like *Hass*, however, this decision also illustrates the discourse that develops when rights analysis is transplanted onto IHL analysis in an occupation context. As in *Hass*, in *Bethlehem* too, negotiations held in the shadow of the HCJ did lead to results that were less injurious to the local population than the original orders issued by the army. And yet, the final legal result allowed limitations to be placed on the Palestinians' rights through recourse to a rights analysis. Both cases did involve an important interest that may be worth protecting: the worshippers' desire to pray in holy sites. Whether

⁸⁵ *City of Bethlehem*, *supra* note 41.

⁸⁶ *Ibid.*, at para. 7.

⁸⁷ *Ibid.*, at para. 8.

⁸⁸ *Ibid.*, at para. 11.

⁸⁹ The HCJ's specific reference to IHRL was limited to the right of freedom of movement, and did not extend to other rights discussed in this case. The HCJ cited Art. 12 of the ICCPR as well as Art. 13 of the ECHR, and also mentioned Art. 2 of the Fourth Protocol to the ECHR. It also mentioned that the right is also probably recognized in customary international law: *Bethlehem*, *supra* note 41, at para. 15.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, at paras 18–21.

the means allowed by the HCJ for the purpose of securing this interest are legitimate in the context of occupation, however, is highly questionable. My reading of these cases, then, illustrates how turning to rights analysis provides the reasoning for the results reached in these cases.

Given that a strict IHL analysis would have required military necessity of the sort that did not exist in either of these two cases, the HCJ should arguably have adhered to this analysis if only because the relevant provisions of IHL could be read – in the spirit of the ICJ’s determination on this matter in the *Wall* decision – as determining the *lex specialis* in this matter, which supersedes the IHRL analysis offered by the HCJ. As shown below, however, even when supposedly applying IHL analysis, the HCJ often integrates the rights of Israeli settlers into the military commander’s legitimate security needs.

Another case that involved ‘balancing’ the rights of Palestinians and Israelis dealt with a Palestinian plantation within the OPT located close to the private home of Israel’s Minister of Defence, Shaul Mofaz, within Israel proper. Whereas *Hass* involved rights of Palestinians versus rights of settlers, and *Bethlehem* involved rights of Palestinians versus rights of Israelis seeking to worship in the OPT, this case involved rights of Palestinians in the OPT versus rights of Israelis within Israel proper. The Israeli security services determined that the dense foliage of the trees in this plantation created a serious security problem for the protection of Minister Mofaz and his family, and ordered the trees to be cut. The HCJ considered the case as one requiring a balance between the right of the Mofaz family to live securely in their home and the right of the tree owners to protection of their property, and held that the first of these rights was more important than the second. But the HCJ held that it was not convinced that cutting the trees to their trunks would be necessary, and ordered that the army should first clean the area and thin out the branches without damaging the trunks. Should this arrangement prove insufficient to provide the required security, the military commander could approach the HCJ again on this matter.⁹²

Another pertinent case is one of the major HCJ rulings on the building of the wall. In *Ma’arabe*,⁹³ the HCJ determined that building the wall in the OPT is legal even when its route is set for the protection of settlers living in Israeli settlements in the OPT. The HCJ accepted the petition based on the determination that the violation of Palestinian rights in this case was not proportional. Anchoring its answer in both international and Israeli law, the Court held that Israelis living in the occupied area are not ‘protected persons’ per the meaning of this term in Article 4 of the Fourth Geneva Convention, but the military commander is authorized to protect their lives and defend their safety. The troubling aspect of the *Ma’arabe* judgment is that it is not limited to a determination that the military commander is authorized to protect the lives and security of Israeli Jews residing in the West Bank, but rather

⁹² HCJ 7862/04, *Abu Daher v. IDF Commander in Judea and Samaria* (not yet published).

⁹³ *Ma’arabe*, *supra* note 42.

leaps from the protection of the lives of the settlers, to the protection of illegal settlements.⁹⁴

The HCJ determination was based upon Article 43, which it read as requiring the military commander to secure the safety of any person present in the territory under belligerent occupation, and also upon the Israeli Basic Law: Human Dignity and Liberty, which the HCJ applied to the Israeli settlers. While leaving open the question of the application of IHRL in the OPT, the HCJ held that the security of the settlers should be considered by the military commander and could be a factor against which the rights of the local population should be balanced.⁹⁵ Thus, while *Ma'arabe* frames the question as one of vertical rather than horizontal balancing, i.e., as a balance between the rights of the local population and security needs weighed by the military commander, the latter are defined in a way that includes the rights of the settlers. This case, then, illustrates the merging of these two forms of analysis. Defining the rights of the settlers as security interests is another facet of the security imbalance.⁹⁶ The HCJ's intervention in this matter is the exception rather than the rule. In some cases involving the separation wall and contrary to its usual stand, the HCJ did enter into the security arguments adduced by the military commander, probably as a result of internal and external pressures concerning the wall and its route, including the Advisory Proceeding process and the decision at the Hague.⁹⁷ In several other cases, however, which also involve the separation wall, the HCJ used the normative framework it had set up in *Ma'arabe* to rule against Palestinian rights. For example, in one case, Palestinian petitioners argued against the construction of a fence and a 'special security zone' built around a Jewish settlement in northern Samaria. The erection of the fence required the seizure of Palestinian agricultural land and the uprooting of olive trees. Based on *Ma'arabe*, the HCJ held that the construction of a wall in the occupied territory for the purpose of securing the life and security of Israelis living there is within the military commander's authority. Thus, held the HCJ, the military commander must take into account security considerations, together with the rights of the local Palestinian population anchored in IHL and the human rights of the Israelis living in the area anchored in Israeli law. This triad of considerations, regularly cited by the HCJ in cases involving the wall, replaces the dual structure (rights of the local population versus security) envisaged in international law. The HCJ, which distinguished between the different sources of the various parties' rights, held in this and in several other cases that the balance that was struck was proportionate and rejected the petition. Notably, in some of the other cases, the HCJ cited to the rights of the local

⁹⁴ See Gross, *supra* note 30, at 415–418.

⁹⁵ *Ma'arabe*, *supra* note 42, at paras 25–29.

⁹⁶ See Gross, *supra* note 30, at 418.

⁹⁷ See *ibid.*, at 430–435.

Palestinian population recognized in international law without limiting the scope of these rights to IHL.⁹⁸

An exception to the pattern described in this section is a case where the HCJ accepted a Palestinian petition invoking human rights where the violation of Palestinian rights had reached an absurd extreme: the Israeli army forbade Palestinians to work their lands in order to protect *them* from settlers' attacks.⁹⁹ The Supreme Court described this as a very serious violation of the most basic rights of Palestinians in the OPT,¹⁰⁰ and considered that this policy violated notions of justice.¹⁰¹ It held that this policy was illegal, citing the rights to freedom of movement and property protected in both Israeli and international law.¹⁰² This part of the HCJ decision invoked human rights law, but did not involve any clash between the Palestinians' and the settlers' rights. In the same case, however, the HCJ upheld a decision to prevent Palestinians from approaching agricultural lands when the purpose of this measure was to protect settlers living in adjoining Jewish settlements. Although the HCJ emphasized the need to minimize reliance on this policy, it still allowed the rights of Palestinians to be limited in order to protect settlers,¹⁰³ addressing the matter interchangeably as a security issue and as a question bearing on the settlers' rights.

The cases discussed above, based on a rights analysis, should be read together with other cases that do not include an explicit rights analysis but that justify limitation of Palestinian rights by invoking the security of Israelis in general and of the settlers in

⁹⁸ HCJ 11395/05, *Mayor of Sebastia v. State of Israel* (not yet published). In other cases concerning the wall, the HCJ repeated the determination that the military commander should balance the rights of the local Palestinian population, the rights of the Israeli settlers, and the security interests, and rejected petitions by Palestinians affected by the wall. See HCJ 1348/05, *Dr Shatia, Mayor of Salfit v. State of Israel* (not yet published) where the HCJ rejected a petition by Palestinians concerning the construction of the wall in the Ariel area. The ruling held that the building does violate the rights of Palestinians, but this violation is justified as it represents a proportionate balance between these three interests. The same logic was followed in HCJ 5624/06, *Municipality of Beit Omar v. The Military Commander in the West Bank* (not yet published); HCJ 3758/04, *Agraiev v. Government of Israel* (not yet published); HCJ 6027/04, *Radad, Head of Village Council of Alzawia v. Minister of Defense* (not yet published); HCJ 4290/05, *Local Council of Bir Naballah v. Government of Israel* (not yet published); HCJ 5488/04, *Local Council Elram v. Government of Israel* (not yet published). The last two cases involved sections of the wall built in the Jerusalem area intended to protect the city of Jerusalem that, according to Israeli domestic law, is wholly included within Israel proper. These cases, then, involve the rights of Israelis living within Israel itself and not only settlers. An exception to this pattern, different from the one discussed in the text, is a case in which the HCJ accepted a petition of Palestinian residents opposing the building of a concrete railing alongside a road in order to protect settlers who use it. After examining the case based on the same triad of considerations, the HCJ held that the military commander could have achieved the same security purposes resorting to less restrictive measures: see HCJ 1748/06, *Mayor of Daharia v. IDF Commander in the West Bank* (not yet published). In other cases, the HCJ rejected the petitions of settlements that protested at being left outside the wall using the same normative framework, again holding that the military commander balanced the various interests in proportionate fashion. See HCJ 3680/05, *Committee of Tene v. Prime Minister of Israel* (not yet published); HCJ 399/06, *Susia v. Government of Israel* (not yet published).

⁹⁹ *Rashad Murar*, *supra* note 48.

¹⁰⁰ *Ibid.*, at para. 11.

¹⁰¹ *Ibid.*, at para. 25.

¹⁰² *Ibid.*, at paras 14, 24–28.

¹⁰³ *Ibid.*, at para. 21.

particular. Like *Hass*, many of these cases concern Hebron. One such case is *Chlabi*, involving two Palestinians who were prevented from returning to homes they had abandoned after suffering harassment from neighbouring Jewish settlers. The house of one petitioner was in an area right outside Hebron, where the Jewish settlement of Kiryat Arba was later built. A barbed wire fence was built around her house in 1987, preventing the family's access. A gate was later installed, to which they were given a key, but the army later replaced the lock and refused to give her the keys. In a brief judgment, the HCJ ruled that the arrangement suggested by the army, stating that the gate would be opened within minutes after previous coordination by phone, was satisfactory and required from a security perspective, dismissing the petitioner's fears that opening the gate each time would turn into a protracted affair. In rejecting the petition, the HCJ accepted the paradigm that Palestinian rights can be restricted to protect the settlers, that only settlers can invoke 'security' arguments and that an arrangement requiring a person to coordinate every entry to her home with the occupying army, all to protect the security of settlements whose legality is never questioned, is acceptable.¹⁰⁴

This case joins two cases, from 1987¹⁰⁵ and 2005¹⁰⁶ respectively, where the HCJ held that protecting Jewish settlers in Hebron may justify first restriction of access (1987) and later the total closing (2005) of stores owned by Palestinians at the foot of the 'Hadassah House' occupied by settlers in Hebron. In a 2006 case that somewhat resembles *Hass*, the HCJ upheld a decision of the military commander to place see-through bullet-proof panels on the windows of the Cave of the Patriarchs. While Palestinian and Muslim groups in Hebron argued that this action violates the sanctity of the place and thus their freedom of religion, the HCJ held that the measure was within the military commander's authority and duty to secure the *rights of all* present in the territory, and represented a reasonable balance between freedom of religion on the one hand and *security* concerns on the other.¹⁰⁷ In all three cases, the HCJ held that the military commander is entrusted to guarantee the settlers' security, and that violating Palestinian rights is therefore justified for this purpose.¹⁰⁸

¹⁰⁴ HCJ 4547/03, *Chlabi v. The Prime Minister* (not yet published). Some of the facts in this case are not detailed in the HCJ's verdict but in the petition itself. Significantly, the HCJ did not mention in its decision that, while the petitioners had been outside the house they could not enter, their house was set on fire and destroyed. The one page ruling in the Chalbi case, unlike some of the HCJ's major decisions that did accept petitions submitted by Palestinian petitioners, does not appear in an English translation on the HCJ's website and was not the subject of extensive discussions in international law journals. Nevertheless, it is as much a part of the occupation's legal structure as the better known decisions that have been the subject of extensive attention.

¹⁰⁵ HCJ 72/86, *Zalun v. Military Commander for Judea and Samaria*, 41(1) PD 528. For a discussion of this case and its significance see Kretzmer, *supra* note 66, at 117–118.

¹⁰⁶ HCJ 7007/03, *Kwwasme v. IDF Commander for Judea and Samaria* (not yet published).

¹⁰⁷ HCJ 4661/06, *The Committee for the Development of Hebron v. The State of Israel* (not yet published).

¹⁰⁸ See also HCJ 3435/05, *Saleh Fares Elnatahsha, Director of the Wakf in Hebron v. IDF Commander for Judea and Samaria* (not yet published), where the HCJ upheld the seizure of land for the construction of an 'emergency route' within Hebron. See also HCJ 3435/05, *Salah Fares Al-Natasha, Director of the Wakf in Hebron v. IDF Commander in Judea and Samaria* (not yet published), where the HCJ, based on a similar rationale, upheld the military commander's seizure of Palestinian land in Hebron that he argued was needed to build an emergency road from Tel-Roumeida (a neighbourhood in Hebron housing 70 Israeli settlers) to other areas in the city of Hebron.

Cases from other parts of the OPT adopted the same pattern. In *Gosin*,¹⁰⁹ the HCJ upheld the destruction of buildings used as a factory, because of shooting incidents from the area where the buildings were located aimed at a road apparently connecting settlements. The factories produced cooking gas, and the petitioners argued that the military commander's order reflected preference for the settlements over the local residents' need for the gas. They also argued that the military commander cannot issue a destruction order based on his authority within Regulation 23(g) of the Hague Regulations, when he himself had violated international law by allowing the establishment of settlements in violation of the Fourth Geneva Convention. The HCJ recognized that the property rights of the petitioner had been violated, but determined that the destruction had been demanded by the necessities of war, as required by the Hague regulations. It further held that the future of the settlements would be determined in a peace agreement and, until then, it was the military commander's duty to protect both the Jewish and Arab population in the area under his control.

Gosin shows how the settlements' infrastructure is a higher priority than the local one. Whereas *Hass* and *Bethlehem* deal with the right of Jews to access holy places, the issue at stake in *Gosin* is strictly freedom of movement between the settlements themselves, which is not analysed through human rights norms but only through IHL. It thus serves to illustrate that, as far as results are concerned, the risks involved in turning to IHRL pointed out in this article are also present in the supposedly strict IHL analysis as applied by the HCJ, which ignores the illegality of the settlements and thereby upsets the balance struck within IHL. This line of analysis follows a 1972 HCJ decision, where it held that meeting the settlers' needs is within the military commander's obligations according to Article 43.¹¹⁰ This view is highly problematic given the illegality of the settlements and, as David Kretzmer noted in his commentary on that decision, its implications are far-reaching. This ruling broadens the meaning of civil life to include all interests of the local population and includes Israeli settlers within this category, thereby weakening the restraining influence on the occupying power intended in Article 43.¹¹¹

The problems identified in cases such as *Hass* date back to this determination. But with the 'righting' of the law of occupation, as shown, this determination has been expanded to include a duty to protect the human rights of the entire population of the occupied territory, including the settlers. As illustrated by cases that do not involve rights analysis, interpreting Article 43 as granting the military commander the authority – and imposing the duty – to provide for the settlers is sufficient to upset the balance struck in IHL to the detriment of the local population. Hence, the convergence of human rights law and IHL should not be considered a *sine qua non* in decisions such as *Hass* or *Bethlehem*. Rather, this convergence undermines the distinctions made within IHL, conferring upon decisions that justify the denial of rights

¹⁰⁹ HCJ 4219/02, *Gosin v. The Military Commander in the Gaza Strip*, 56(4) PD 608. I am grateful to Yossi Wolfson for pointing out the significance of this case to my argument.

¹¹⁰ HCJ 256/72, *Electricity Company for Jerusalem Ltd v. Minister of Defense*, 27(1) PD 124.

¹¹¹ Kretzmer, *supra* note 66, at 64–65.

the legitimacy of rights. It also frustrates the expectation that incorporating a human rights analysis into the equation will ensure the local Palestinian population better protection. The introduction of IHRL may maintain the existing (im)balance of security, whereby the rights of settlers, conceived as security, usually trump the rights of the local population. The new framing of those conflicts in human rights terms may turn IHRL into the emperor's new clothes of the law of occupation.

2 Cases Involving Due Process Rights of Palestinians

Contrary to the cases discussed in the previous section, in one significant case IHRL norms did play a role in expanding the rights of the local population. As mentioned, *Ma'arab* is the HCJ case regarding the OPT which relies most extensively, expressly, and directly on IHRL, with a positive determination about its application in the context of occupation. At a later stage, the HCJ replaced this determination with an agnostic position.¹¹² The HCJ found that the provisions allowing the arrest of Palestinians for 12 or 18 days before bringing them before a judicial authority violate international law, and especially the ICCPR.¹¹³ This case is notable for the HCJ's rather rare intervention in decisions of the military commander but, like the cases discussed in the previous section, it continues a pattern that had existed before the 'righting' of the law of occupation: the HCJ's infrequent intervention in decisions concerning the OPT have usually been restricted to issues of procedural rights and due process.¹¹⁴ Hence, although the turn to IHRL in *Ma'arab* can be viewed as a significant expansion of the sources for Palestinians' rights, it should be read within the HCJ's general willingness to intervene in matters of this kind. Clearly, the liberty of the person and the prevention of prolonged non-supervised detention are important human rights issues, but all the HCJ required here is the preservation of due process, ensuring that a judicial authority would decide on the matter of the arrest.¹¹⁵ The mere fact of earlier judicial review might contribute to the protection of liberty, but the question of whether earlier scrutiny of arrests by military judges, as required in this decision, increases the liberty of the person or gives due process approval to extensive arrests by the Israeli army remains open.

The two other cases involving due process rights where the HCJ turned to IHRL law involved the conditions in the Ofer and Ketziot facilities, where Israel detained Palestinians from the OPT.¹¹⁶ Ketziot is located in Israel proper and the application of IHRL in occupied territories is thus not directly relevant, but the analysis in both cases was similar. When scrutinizing conditions in these arrest facilities, which Israel

¹¹² See *supra* notes 36–50 and accompanying text.

¹¹³ See *supra* notes 36–38 and accompanying text.

¹¹⁴ See Shamir, 'Landmark Cases and the Reproduction of Legitimacy', 24(3) *Law & Society Rev* (1990) 781.

¹¹⁵ Compare this with decisions in the context of home demolitions, where the HCJ was willing to intervene on the subject of giving a right to appeal to people whose homes were about to be demolished: HCJ 358/88, *ACRI v. Central Command*, 43(2) PD 529. Concerning home demolitions per se, however, the HCJ usually declined to intervene.

¹¹⁶ See *supra* notes 39–40 and accompanying text.

established after the outbreak of the second Intifada, the HCJ relied on the ICCPR and cited Article 10, which determines that all persons deprived of liberty 'shall be treated with humanity and with respect for the inherent dignity of the human person'. It also relied on the Fourth Geneva Convention, without any discussion of its applicability.¹¹⁷ These cases are somewhat peculiar, since the HCJ rejected both these petitions after noting that changes had been made in the conditions prevailing in the scrutinized facilities while the cases had been pending, but mentioning that further changes were still required. The HCJ did indeed contribute to improved conditions in the facilities under its supervision while the cases were pending. And yet, the question of why the court rejected these petitions rather than accept them to issue an explicit order demanding changes in the settings it still found faulty has not been answered. These cases, then, should be read as part of the HCJ's tendency to be more receptive to petitions of Palestinians from the OPT when they raise issues of procedural matters and due process rights.

The cases discussed in this section do not involve limiting the rights of Palestinians for the sake of protecting the rights of Israelis, be they settlers or others. We can then hypothesize that, in such cases, the 'righting' of the law of occupation may not have the detrimental effect found in cases discussed in the previous section. When evaluating the application of IHRL in a situation of occupation, this distinction concerning its possible effects should be borne in mind.

3 Other Cases Involving Rights of Palestinians vis-à-vis the Military Government

Most of the cases in which the HCJ turns to IHRL specifically, or to a more general rights analysis when handling cases regarding the OPT were covered in the two categories discussed above. Occasionally, however, the HCJ has invoked human rights in other contexts without relying specifically on IHRL. These cases are few and far between and it is hard to draw general conclusions from them, but they deserve brief mention in order to illustrate the diverse forms that the 'righting' of the law of occupation may take.

The right to equality was cited, without any specific source,¹¹⁸ in a case where the HCJ mandated the Israeli Ministry of Defence to issue gas masks to Palestinians living in the OPT after the ministry had issued such masks before the first Iraq war to Israelis who resided there.¹¹⁹ Another instance of mentioning rights without a specific source is the HCJ's reliance on the right to freedom of association when it accepted a petition against regulations issued by the Israeli army on the establishment of a lawyers' association in the OPT.¹²⁰ In yet another case, the HCJ considered – and upheld – a decision

¹¹⁷ *Hamoked*, *supra* note 39, at paras 23–25; *Yasin*, *supra* note 39, at paras 11–12.

¹¹⁸ The announcement of rights without a textual source is not strange to the Israeli constitutional system, which until 1992 had developed without constitutional texts on human rights and, even today, includes only two partial and limited Basic Laws on human rights. Much of Israel's rights law, then, developed through case law. See Gross, *supra* note 54; Barak-Erez, 'From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective', 26 *Columbia Human Rights L Rev* (1995) 309.

¹¹⁹ HCJ 168/91, *Miladi Morcus v. Minister of Defence*, 45(1) PD 467.

¹²⁰ HCJ 507/85, *Bahig Tamimi v. Minister of Defence*, 41(4) PD 57.

to refuse the registration of a lawyer in the OPT because he had previously been convicted in a military court. The HCJ invoked the right to freedom of occupation, which it said is protected both by Israeli case law and by the Basic Law: Freedom of Occupation. The HCJ again noted in this judgment that, although Israeli law does not apply in the OPT, the military commander's activities are scrutinized according to this law.¹²¹

5 Human Rights and Humanitarian Law: Between War and Peace, Between Rule and Exception

Advocates of IHRL application in occupied territories argue that this issue gets to the very essence of the universality of human rights. Implementing IHRL may redefine the precise scope of an occupying power's human rights obligations under international law, serving as a yardstick for the lawfulness of various concrete measures affecting human well-being.¹²² In the context of the Israeli occupation, they argue that clarifying the law on this matter may encourage the HCJ to take a more active approach toward protecting human rights in the OPT, advancing the welfare of the people as well as a legal culture of compliance.¹²³ The expectation of these advocates is that it would be a measure consonant with the interests of the civilian population living in an occupied territory.¹²⁴ The application of human rights treaties in occupied territories is expected to increase the well-being of the occupied community.¹²⁵ Presumably these assumptions are the basis for decisions in UN treaty bodies stating that IHRL obligations apply in the OPT.¹²⁶ As shown, however, experience teaches that there is nothing new under the sun: in most cases, introducing human rights analysis into cases from the OPT did not generate a jurisprudence granting better protection to people under occupation. Rather, it legitimized the violation of their rights invoking the human rights of Israelis, be they settlers or Israeli citizens in general.

As noted, the abstraction and universality that characterize the structure of human rights law invite this result. My argument here is not essentialist, however, and these are not necessary outcomes. Similar results would probably have been reached

¹²¹ HCJ 3940/92, *Ghasan Mohamed Hasin Gerar v. Military Commander for Judea and Samaria*, 47(3) PD 298, at para. 5.

¹²² Ben-Naftali and Shany, *supra* note 6, at 22.

¹²³ *Ibid.*, at 23.

¹²⁴ Cohen, *supra* note 8, at p. xvii.

¹²⁵ Benvenisti, *supra* note 8, at 31–32.

¹²⁶ See, e.g., Concluding Observations of the Human Rights Committee (HRC): Israel, of 5 Aug. 2003, at para. 11, UN Doc. CCPR/CO/78/ISR (2003), where the HRC noted that 'in the current circumstances, the provisions of the Covenant [the ICCPR] apply to the benefit of the population of the Occupied Territories'. For a comprehensive reference to similar decisions by other treaty bodies see Ben-Naftali and Shany, *supra* note 6, at 20–21. See also the relevant HRC's General Comment: General Comment 15 on The Position of Aliens under the Covenant (11/04/86); General Comment 29 on States of Emergency, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004); and Sections 10 and 11 of General Comment 31 on the *Nature of the General Legal Obligation on States Parties to the Covenant* in *ibid.*

without recourse to human rights analysis, given the HCJ's (mistaken) determination that providing for the settlers and the settlements is part of the military commander's legitimate concerns, security and others. Indeed, many of the problems identified will also emerge through IHL analysis, with its emphasis on proportionality, and especially given the HCJ's analysis that security considerations can include the security of the settlers and the settlements. This critique does not imply that the settlers are not entitled to the protection of the law; rather, it points out that a determination that providing for the settlers can justify limitation on the rights of Palestinians distorts international law.¹²⁷ IHL analysis also poses problems concerning the application of proportionality between the rights of Palestinians and the security of Israelis. The 'righting' of the law of occupation often changes this structure of analysis to one of horizontal balancing between Palestinians' rights v. settlers' rights. There are differences between those two forms of analysis but also similarities, giving rise to similar problems.¹²⁸ The structure of human rights analysis not only leads to the results described, however, but also validates them with the seal of human rights. Moreover, had IHL been applied properly, it may have led to results more protective of the local population than IHRL analysis. The few times human rights law served to improve the rights of people under occupation are mostly limited to issues of judicial and due process rights, an area where the HCJ was always more willing to intervene to the benefit of the local Palestinian population.

The analysis has so far been limited to decisions issued by the HCJ. It could be argued that the application of IHRL to situations of occupation in general, and to the Israeli occupation of the OPT in particular, may be more effective if applied by international courts and treaty bodies. These might avoid the HCJ's failures, which attest to its frequent tendency to defer to Israeli security forces. Although this may be a valid point, we should recall that the implication of 'righting' the law of occupation on the jurisprudence of national courts is a primary concern in a legal realist evaluation of this development: usually, local courts' decisions are enforced more directly and effectively than those of international courts and treaty bodies. The high level of compliance with the ECtHR's jurisprudence is an exception, but even the ECtHR is claimed to be least effective in situations involving systematic human rights violations,¹²⁹ such as occupation or armed conflict. Moreover, it has been argued that given the different doctrines developed by the ECtHR, when it attempts to apply human rights law in these situations, it is incapable of delivering on its promises. State infringement of rights is thus granted legitimation and states are not limited by meaningful constraints.¹³⁰

¹²⁷ For a detailed discussion of the distinction between protection of the settlers' lives and permission to violate Palestinian rights to protect settlements see Gross, *supra* note 30, at 415–418.

¹²⁸ For a discussion of how some of the problems addressed in this article manifest themselves in IHL analysis see *ibid.* For a discussion of the limits of humanitarian law, including of the role of proportionality, see David Kennedy, *supra* note 28, at 235–357.

¹²⁹ O. Gross, "'Once More Unto the Breach': The Systematic Failure of Applying the European Convention of Human Rights to Entrenched Emergencies', 23 *Yale J Int'l L* (1998) 437.

¹³⁰ Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights', 26 *Michigan J Int'l Law* (2005) 739, at 782–783.

Nevertheless, it is true that a distinction may be drawn between the practice of domestic courts and that of international courts. Although the ICJ's reasoning on the application of IHRL as well as IHL in the *Wall* Advisory Opinion is far from satisfactory,¹³¹ its decision in this case as well as in the *Armed Activities* case aimed to restrain occupying armies through the application of human rights. The same is true of the ECtHR decisions. Significantly, in *Lozidiou*,¹³² the European Court held for an applicant whose rights to home and property were denied as a result of the occupation of the northern part of Cyprus. While referring to the need to rehouse displaced Turkish Cypriot refugees, the ECtHR noted that it had not received an explanation on how this need could justify the complete negation of the applicant's property rights.¹³³ The situation in *Lozidiou* cannot be compared to those discussed in this article, partly because the petitioner was not living in the occupied territory at the time of the proceedings. The ECtHR also refrained from referring to IHL and based its decision entirely on European human rights law.¹³⁴

A broader scope of issues concerning northern Cyprus, including the recognition that the rights of Greek Cypriots living in northern Cyprus had been breached, was addressed from a human rights perspective in *Cyprus v. Turkey*.¹³⁵ Despite the ECtHR's limited influence in situations of systematic violations, turning to human rights law did help in these cases to address violations resulting from continuing occupation. In the conflict in Chechnya, although not a situation of occupation, the ECtHR's jurisprudence contributed to the establishment of human rights norms at a time of armed conflict, especially internal.¹³⁶ For a case involving a domestic court, consider the *Al-Skieni* case, in which the UK's Court of Appeals allowed entry, albeit limited, to petitions that would allow review of UK military actions as an occupying force in Iraq based on standards set in the ECHR.¹³⁷

¹³¹ See Gross, *supra* note 30, at 399–402.

¹³² App. no. 15318/89, *Lozidiou v. Turkey*, ECHR 1996–VI, (1997) 23 EHHR 513.

¹³³ *Ibid.*, at para. 64.

¹³⁴ For a discussion of the relevance and possible application of IHL to this case see Heintze, *supra* note 18, at 65–70.

¹³⁵ App. no. 25781/94, *Cyprus v. Turkey*, ECHR 2001–IV, (2002) 35 EHHR 30. See also App. no. 46374/99, *Xenides-Arestis v. Turkey*, ECHR (2005), available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=xenides-arestis&sessionId=10178507&skin=hudoc-en>.

¹³⁶ See App. no. 57942/00, *Khashiyev and another v. Russia*, (2006) 42 EHRR 20; App. no. 57947/00, *Isayeva and others v. Russia*, (2005) 41 EHHR 39, App. no. 57950/00, *Isayeva v. Russia*, (2005) 41 EHHR 38. On the Chechnya cases see Abresch, *supra* note 18. Abresch argues that the ECtHR's use of human rights law in this context may prove to be the most promising basis for the international community to supervise and respond to violent interactions between the state and its citizens (*ibid.*, at 743). In this context, see also ECtHR cases concerning human rights violations in Turkey's internal strife. On these cases see Doswald-Beck, *supra* note 8. More generally, decisions of the HRC on the extraterritorial application of IHRL contributed to set standards that put human rights obligations on states without regard to the territory in which the violation takes place. See e.g., *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, UN Doc. Supp. No. 40 (A/36/40), at 176 (1981), available at <http://www1.umn.edu/humanrts/undocs/session36/12-52.htm>.

¹³⁷ *Al-Skeini v. Secretary of State for Defence and the Redress Trust* [2004] EWHC 2911 (Admin), [2004] 2 WLR 1401, [2005] UKHRR 427 (appeal pending).

Beyond the context of domestic versus international courts, the failures of human rights analysis discussed in this article could be viewed as limited to Israeli occupation and its special features, especially that of the settlements. This occupation appears more like a *de facto* annexation than occupation as anticipated in international law, and includes a structured inequality between settlers and the occupied population, which some argue resembles apartheid or a colonial regime.¹³⁸ Presumably, examining the application of IHRL within this distortion of the ‘classic’ occupation model results in a biased outcome. But questions about balancing the rights of occupiers and occupied detached from the structure of IHL with its distinction between protected persons and others, may also arise in other contexts. In some of the cases discussed above, the Israeli HCJ referred not only to the rights of settlers but also to the rights of Israelis living in Israel as a consideration against which the rights of Palestinians can be ‘balanced’.

Beyond the problems resulting from the transplant of IHRL unto IHL in the context of occupation that could serve to dilute restrictions that are stronger in IHL,¹³⁹ one should also consider how the introduction of IHRL into situations of armed conflict could dilute prohibitions established in IHRL. In the *Nuclear Weapons Advisory Opinion*, the ICJ determined that Article 6 of the ICCPR guaranteeing everyone’s right to life and holding that ‘[n]o one shall be arbitrarily deprived of his life’ applied to the question before it concerning the *Legality of the Threat or Use of Nuclear Weapons*. The reason is that the protection of the ICCPR does not cease in times of war, unless under the derogation mechanism provided within the ICCPR, from which the right to life is excluded.

The ICJ therefore held:

In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

The ICJ’s ultimate conclusion, which was also based on a discussion of IHL, was that international law does not include a general prohibition on the threat or use of nuclear weapons. In this decision, then, the merging of the two branches of the law did not serve to expand the protection of the human person by holding that IHL should be read in light of the principle established in Article 6 of the ICCPR, but rather the opposite: the protection of human life in Article 6 was subordinated to the rules of the law of war. The result is an erosion of the protection of IHRL.¹⁴⁰

¹³⁸ Ben-Naftali, Gross and Michaeli, *supra* note 70, at 581–588.

¹³⁹ See *supra* notes 55–103 and the accompanying text.

¹⁴⁰ For a critique of the ICJ’s position on this point see Gowlland-Debbas, ‘The Right to Life and Genocide: The Court and an International Public Policy in International Law’, in L. Boisson de Chazournes and P. Sands (eds), *The International Court of Justice and Nuclear Weapons* (1999), at 315–337. Gowlland-Debbas argues that relegating the interpretation of the term arbitrary at times of armed conflict exclusively to humanitarian law is a setback to a tendency that sees human rights law as relevant to the laws of war: *ibid.*, at 330.

This approach is not the only one possible, and the ECtHR case law in the Chechnya cases can be read as representing a more mixed view, applying human rights law in a way that may be seen as broadening rather than narrowing the prohibition on killings in wartime.¹⁴¹ The question of what is the subordinate set of norms is critical and the courts' choices about how, if at all, to turn to the *lex specialis* doctrine is, of course, a determining factor. In the *Nuclear Weapons* Advisory Opinion, the ICJ subordinated the human right to life to IHL's permission to take human life in war. By contrast, in the Chechnya cases, the ECtHR relied on the provision of the ECHR prohibiting deprivation of human life, unless it results from a use of force that is no more than absolutely necessary for a set of enumerated purposes.¹⁴² Although some of these cases may be read as having integrated IHL analysis,¹⁴³ the ECtHR turned to a rule that (like the right to life proclaimed in Article 6 of the ICCPR) grants stronger protection to human life than IHL proper, as the latter allows the killing of combatants during armed conflict subject to rules, most notably those of distinction.¹⁴⁴ In this case, then, human rights law imposes a stricter prohibition by requiring absolute necessity as a condition for violating these rights, whereas IHL allows broad violations of the right to life. The implications are a function of a decision about how to co-apply the norms, and about what is background and what foreground. Contrast this with the question of property discussed above, where IHL places a stricter limit on the destruction of civilian property and requires proof of absolute military need, whereas IHRL allows limiting this right through balancing and proportionality with less strict restrictions.¹⁴⁵ This contrast may not be merely fortuitous. IHL developed in a war context and, therefore, assumes mutual killings are part of the situation within which it operates so that, concerning this right, IHRL protections will be stronger. This discussion thus illustrates that the convergence of IHL and IHRL may entail mutual influences that do not necessarily broaden the person's protection. The context of occupation explored in this article creates unique problems, and other contexts may have other specific difficulties. Even if the ECtHR stopped short of explicit references to IHL, in some of its cases dealing with the situation in Southeast Turkey it indirectly imported IHL analysis into the framework of the human rights analysis in a way that expanded the protection of individuals' right to life.¹⁴⁶ The co-application of the two bodies of law, then, can have multifaceted implications.

Some of the problems entailed in the application of IHRL, such as that of abstracting from background conditions,¹⁴⁷ may be true of rights analysis in general. In an

¹⁴¹ See the cases cited in *supra* note 136 and the accompanying text, and Abresch, *supra* note 18. See also the ECtHR discussion of the right to life in the context of armed clashes in Turkey in App. no. 23818/94, *Ergi v. Turkey* ECHR 1998–IV, at paras 79–81.

¹⁴² Art. 2(2) ECHR.

¹⁴³ See, e.g., *Isayeva*, *supra* note 136, at paras 154–200.

¹⁴⁴ See Abresch, *supra* note 18, at 757–760.

¹⁴⁵ See *supra* notes 62–70 and the accompanying text.

¹⁴⁶ *Ergi v. Turkey*, *supra* note 140; App. no. 21593/93, *Gulec v. Turkey*, ECHR 1998–IV, (1999) 28 EHHR 121. For a discussion see Heintze, *supra* note 18, at 71–77.

¹⁴⁷ See *supra* notes 28–29 and the accompanying text.

occupation context, however, a tension prevails between the universal aspiration of human rights to apply to everyone in all situations, and the fact that human rights discourse is built upon the model of a relationship between an accountable state and its citizens. Draper points out that society and government-governed relationships collapse in occupation situations, making the attempt to conflate IHL and IHRL insupportable in theory and inadequate in practice, and leading to potential harm to both bodies of law.¹⁴⁸ But government-governed relationships exist during occupation as well, although they assume a different nature because the ruled have not given their consent and the ruler is not accountable. Transplanting human rights to a situation of occupation may thus blur its inherently undemocratic rights-denying nature, and confer upon it the perceived legitimacy of an accountable regime. In the *Wall* opinion, for instance, when examining the actions of Israel under IHRL, the ICJ turned to the ICESCR's provisions stating that rights set out in the convention should be limited only 'for the purpose of promoting the general welfare in a democratic society'¹⁴⁹ and noted that the restriction of rights enumerated in the convention resulting from the construction of the wall failed to meet this condition.¹⁵⁰ The inadequacy of the democracy discourse here is telling: merging a democracy discourse into a non-democratic situation characterizes the 'righting' of the law of occupation.

The tension between the fear of legitimacy and the utopian wish to extend the entitlements of people living under occupation is at the heart of the dilemma posed by co-application. As shown at least by the practice of the Israeli HCJ described in this article, however, transplanting IHRL to the context of occupation often fails to meet either one of these ends: it does not deliver the utopian aspirations *and* it legitimizes these failures by stamping them with the seal of human rights analysis.

In his discussion of whether international human rights are 'part of the problem', David Kennedy notes that toting up the costs and benefits is not simple since the 'human rights' effect is hard to isolate when used alongside other languages. Whatever the assessment of the human rights vocabulary, it must be weighed against the costs and benefits of other emancipatory vocabularies.¹⁵¹ These observations about international human rights in general are also true of my examination of the role of human rights in the context of occupation. Kennedy suggests that human rights can serve as denial, apology, legitimation, normalization, and routinization of the very harms they seek to condemn,¹⁵² and this article shows that the occupation context magnifies these risks. True, rights can serve as legitimizing tools not only in the context discussed in this article but, as shown above, human rights within an occupation context legitimize a situation that represents their very denial.

¹⁴⁸ Draper, *supra* note 7, at 204–206. On the question whether the absence of a democratic system involving a relationship between 'citizens' and 'government' makes human rights law inappropriate to situations of occupation see Roberts, *supra* note 8, at 72.

¹⁴⁹ Art. 4 ICESCR.

¹⁵⁰ *Wall*, *supra* note 1, at para. 136.

¹⁵¹ Kennedy, *supra* note 28, at 5.

¹⁵² *Ibid.*, at 33.

From this perspective, the study of human rights in occupation leads to the awareness that their application creates a double bind. Denying the full scope of human rights to people under occupation would be another instance of the problematic linkage between rights and the nation state, a linkage that leaves stateless people 'rightless'.¹⁵³ Moreover, it would undermine the idea of the universality of rights, which is at the heart of IHRL. The wish to grant the full scope of IHRL to people living under occupation may thus be seen, in Hannah Arendt's terms, as a recognition of the 'right to have rights'.¹⁵⁴ It can be considered an attempt to return the 'rule' (of rights) into the 'exception' (of an occupation situation), saving the people affected from abandonment.¹⁵⁵ The structure of 'ban' is especially apparent in the Israeli position stating that neither IHRL nor the Fourth Geneva Convention, which is the core of IHL, apply *de jure* to the Palestinian residents of the OPT.¹⁵⁶

Not only have the rule and the exception changed places in the context of the Israeli occupation of the OPT, in the sense that this long-term occupation has become an indefinite situation,¹⁵⁷ but its 'righting' has proved that recognizing the right to have rights may not necessarily alleviate the conditions of the people under occupation. This is the double bind apparent here: introducing rights into an occupation situation supposedly rescues the people under occupation from the abandonment of exception. But rights are introduced into this situation with their abstractions and indeterminacy.¹⁵⁸ Moreover, when an exception is no longer an exception,¹⁵⁹ reintroducing rights into the occupation makes them part of the occupation structure and of its regulation. Whether or not we accept Agamben's broader argument, noted above, about the state of exception having become the rule in our times, the convergence of IHL and IHRL may be seen as a blending, if not a reversal, of the purported exception and the rule. Indeed, the merging of IHL and IHRL into what she calls the 'new humanitarianism' is, in Ruti Teitel's words, 'the rule of law for contemporary political circumstances of heightened political disorder'.¹⁶⁰

Reversing the rule–exception relationship, however, may operate as a legitimizing device that allows discussion of specific human rights violations invoking security or the

¹⁵³ See H. Arendt, *The Origins of Totalitarianism* (1968), at 267–302.

¹⁵⁴ *Ibid.*, at 296–298.

¹⁵⁵ Following Schmitt's discussion of the state of exception, the contemporary discussion of exception as a relation of ban is detailed in the work of G. Agamben. See C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1988); G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1999). On the relation of exception as a relation of abandonment, see *ibid.*, at 28–29. See also G. Agamben, *State of Exception* (2005). Reading a situation of occupation as one of exception or ban does not mean there are no legal rules regulating the lives of people living under occupation. Indeed, there are many such rules. It does imply, however, that human rights rules meant to protect the people from the absolute power of the sovereign (or, in this case, of the occupying military) do not apply. This is the result of the linkage of rights to citizenship, discussed by Arendt and Agamben.

¹⁵⁶ On the Israeli position see Ben-Naftali and Shany, *supra* note 6, at 100–101.

¹⁵⁷ Ben-Naftali, Gross and Michaeli, *supra* note 70, at 592–608.

¹⁵⁸ On the indeterminacy of rights see Tushnet, *supra* note 28, at 1371–1383.

¹⁵⁹ Ben-Naftali, Gross and Michaeli, *supra* note 70.

¹⁶⁰ Teitel, *supra* note 10, at 371.

rights of others as if they were the exception, thus blurring a reality where violations have become the rule.¹⁶¹ In the Israeli context, how is rights analysis at all possible in a situation that has structural inequality between Jewish settlers and Palestinians at its core?

This article takes the position that people living under occupation should be entitled to the full scope of rights enumerated in international law. My position is not to insist on the exclusivity of IHL or to argue that introducing IHRL into the context of occupation will always be necessarily detrimental to the rights of people under occupation. I am not staking an essentialist argument. The HCJ could have ruled differently on some of the cases discussed, and it could be argued that it was simply wrong and issued decisions that are bad law. This argument is particularly relevant concerning some of its decisions where, had the HCJ taken the *lex specialis* doctrine seriously and given preference to restrictions embedded in IHL, it may have reached different results. My analysis, however, is a legal realist one, looking at the consequences of norms rather than at their internal logic. Logically, it seems right that IHRL should apply in an occupation context as well, but as Oliver Wendell Holmes teaches, the life of the law has not been logic but rather experience.¹⁶² The purpose of my analysis is thus to show the risks and double bind entailed in the transplant of a human rights analysis to a situation of belligerent occupation, pointing out that this analysis might obscure rather than challenge the violation of rights inherent in the structure of the occupation itself and allow for more rather than less restrictions in the rights of people living under occupation.

Some may argue that the difficulties entailed by the co-application of IHL and IHRL in occupation indicate a need for developing workable modalities for co-application.¹⁶³ Some may suggest that the courts should apply the most protective norm rather than using the *lex specialis* doctrine. But this again begs the question: most protective of whom? A human rights analysis that considers all persons on a universal basis does not leave room for applying the norm that is most protective of the people living under occupation.

Hence, although the difficulties discussed in this paper could perhaps have been avoided or narrowed, my position is that the double-edged nature of rights¹⁶⁴ in general, and the transplantation to the occupation context in particular, threaten such a project with the risk of constant frustration. Contrary to the bulk of cases discussed in this article, applying human rights in an occupation situation may sometimes be helpful. A judicial approach more sensitive to the protective purposes of IHL and IHRL and to the *lex specialis* doctrine may ensure different results. And yet, given that the problems entailed are a by-product of the rights and occupation structures per se as well as of their intersection, I doubt that a modality able to elude the risks of transplanting IHRL to this context is possible.

¹⁶¹ Ben-Naftali, Gross and Michaeli, *supra* note 70, at 607–608.

¹⁶² O. Wendell Holmes, *The Common Law* (1881), at 1.

¹⁶³ For an argument of this type see Ben-Naftali, *supra* note 11. See also Lubell's elaboration of the problems entailed in the application of human rights law to armed conflict and his discussion of the need to address these challenges: Lubell, *supra* note 32.

¹⁶⁴ On rights as a double-edge sword see Horowitz, 'Rights', 23 *Harvard Civil Rights Civil Liberties L Rev* (1988) 393.