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Legitimising the Illegitimate?

The Israeli High Court of Justice
and the Occupied Palestinian Territory

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TABLE OF CONTENTS

I. Introduction	9
II. The Legal Framework in the OPT	11
i. International Legal Framework	11
ii. The Extra-territorial Application of Israeli Law to the OPT	16
III. The Israeli High Court of Justice	19
i. Jurisdiction.....	19
ii. Justiciability	20
iii. The Application of International Law	22
iv. Two Peoples, Two Laws	24
iv. The Use of Secret Evidence	25
v. A Consistent Court	27
IV. Jurisprudence on the Gaza Strip and the Wall	31
i. The Blockade of the Gaza Strip	31
ii. The Annexation Wall	36
V. Problems and Challenges	44
i. Positive Results and Pyrrhic Victories	45
ii. Potential Action	49
iii. Conclusion	51

The acceptability of the use of discretion by a law-applying institution such as the Israeli High Court of Justice is based on the assumption that its preferences and moral sensibilities are broadly reflective of the preferences and sensibilities of the community in which it exercises its jurisdiction. When jurisdiction is exercised in conditions of occupation, however, such consensus cannot be easily presumed. On the contrary, recourse to moral pathos by an institution of the occupying power will appear to normalize its jurisdiction and add an element of hypocrisy to the felt illegitimacy of its possessing jurisdiction in the first place. Moreover, it will undermine the moral and political significance of the fact of the occupation, even diminishing the urgency of bringing it to an end.

- Martii Koskenniemi¹

HCI jurisprudence has become the ultimate rubber stamp for Israeli policies in the OPT, legitimising Israel's illegal actions through the veneer of "legal" judgments.

- Al-Haq²

¹ Martii Koskenniemi, "Occupied Zone – 'A Zone of Reasonableness'?" (2008) 41 *Israel Law Review* 13.

² Al-Haq Press Release, "Sacrificing Justice for Politics: Four Years on, Israel's High Court Continues to Disregard the International Court of Justice's Advisory Opinion," 9 July 2008.

I. Introduction

As the Israeli occupation of the Occupied Palestinian Territory (OPT) continues well into its fifth decade, the reality of life on the ground is as difficult, perhaps, as it has ever been. The Gaza Strip suffers from collective punishment, a worsening humanitarian crisis in the wake of the devastating effects of ‘Operation Cast Lead’ and the ongoing siege of the territory. In the West Bank, illegal settlement construction continues under the mask of ‘natural growth’; the effects of the Annexation Wall and Israel’s land confiscation policies are pervasive; while house demolitions, evictions and residency revocations have intensified against Palestinians in East Jerusalem.

Since the extension of the jurisdiction of the Israeli High Court of Justice (HCJ) to encompass the OPT very early on in the occupation, Palestinians have been petitioning the Court regularly, with generally little positive effect. They persist in doing so with the hope, if no longer the expectation, that applicable provisions of international humanitarian and human rights law, and the protections therein, would be considered. Studies, analyses and commentaries have consistently exposed the HCJ’s often perverse application of international legal standards.¹ The HCJ, however, plays a central role in the occupation by providing moral weight and legal justification to oppressive and illegal Israeli policies in the OPT, while masquerading behind a superficial façade of humanitarian and human rights law.

¹ For background see, for example, Raja Shehadeh, *Occupier’s Law: Israel and the West Bank* (Institute for Palestine Studies, Washington DC, 1985); David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002); Nizar Ayoub, *The Israeli High Court of Justice and the Palestinian Intifada: A stamp of approval for Israeli violations in the Occupied Territories* (Al-Haq, Ramallah, 2004).

For many years, human rights lawyers in the OPT and Israel have been asking themselves if continuing to petition the Court is a viable form of resistance against the occupation, or an adequate way of ensuring the protection of the rights of the occupied population. Given the lack of any meaningful amelioration of the human rights situation in the OPT, and recent HCJ decisions relating to the Gaza Strip and the Annexation Wall, this question has taken on a new urgency.

This short study seeks to tackle broadly the issues and concerns facing all those charged with legally protecting the rights of Palestinians. First, it outlines both the legal landscape of the OPT in which the HCJ operates and the international legal standards applicable to the OPT. It then surveys the nature and effect of some of the Court's jurisprudence throughout the period of the occupation under a series of headings, before focusing specifically on some important decisions that have been handed down since Al-Haq's last study of the Court was published in 2004. From this analysis it becomes apparent that more often than not, in matters relating to the OPT, the Court misconstrues norms and provisions of international law essential to the protection of the Palestinian civilian population or simply fails to address them. Instead, it tends to endorse the position of the Israeli military and government authorities through flawed and often politically subservient legal reasoning. The study concludes by exploring the parameters of the problems and questions facing the human rights community today in relation to the HCJ and our own potential compromises with an occupation we otherwise strive to fight.

II. The Legal Framework in the OPT

i. International Legal Framework

International Humanitarian Law

As the Occupying Power in the West Bank and Gaza Strip, Israel's obligations under international humanitarian law are set out primarily in the Regulations Annexed to the Hague Regulations,² and the Fourth Geneva Convention.³

While Israel has accepted the applicability of the Hague Regulations on the basis of their customary nature,⁴ the applicability of the Fourth Geneva Convention to the OPT is contested. Despite having ratified the Geneva Conventions in 1951, Israel refuses to recognise their *de jure* applicability, on the grounds that the West Bank and Gaza Strip were not the sovereign territory of a High Contracting Party to the

² Today these rules are considered to be "rules recognized by all civilized nations" and to be "declaratory of the norms and customs of war". See *France et al. v Goering et al.* (1947) *Trial of Major War Criminals before the International Military Tribunal at Nuremberg*, and the Advisory Opinion of the International Court of Justice (ICJ) in *The Legality of Threat or Use of Nuclear Weapons Case*, (1996) ICJ Reports, paragraph 75. These rules and principles are applicable to all States regardless of their ratification of relevant treaties.

³ Israel has occupied the West Bank (including East Jerusalem) and the Gaza Strip since the 1967 Six-Day War. In international humanitarian law, the test for the beginning and end of occupation is often referred to as effective control, which Israel exercises over both the West Bank and the Gaza Strip. As Article 42 of the Hague Regulations stipulates, a "territory is considered occupied when it is actually placed under the authority of the hostile army," and the occupation extends "to the territory where such authority has been established and can be exercised." Despite Israeli arguments to the contrary, the reality on the ground following the signing of the Oslo Accords, and then Israel's "withdrawal" from the Gaza Strip, confirmed that neither the Accords nor the "withdrawal" affected Israel's legal status as an Occupying Power in the West Bank and the Gaza Strip, or released it of its legal obligations towards its Palestinian civilian population and of providing for their general welfare. Under international humanitarian law, an Occupying Power is legally required to ensure, amongst other things, that the occupied civilian population has access to food, water, medical supplies, and all other goods and services that are essential for its survival. See Articles 55 and 56 of the Fourth Geneva Convention.

⁴ In the judgment of *Hilu v The Government of Israel, et al.*, HCJ 302/72 and 306/72, the Israeli High Court of Justice maintained that customary international law is considered to be part of Israeli internal law without the need for any special legislation, unless contradictory to another provision in internal law.

Conventions.⁵ Having shortly after the 1967 war expressed willingness to apply the Fourth Geneva Convention through the promulgation of a military proclamation to that effect, the proclamation was soon thereafter amended to exclude the Convention.⁶

From then on, Israel claimed its status in the OPT to be that of an “administrator,” leaving it unaccountable under the Fourth Geneva Convention.⁷ In this regard it has declared that it will only abide by the “humanitarian provisions” of the Convention, although it has refused to specify which provisions it regards as humanitarian.⁸

This position stands in defiance of international consensus. Since 1967, the majority of the international legal community has repeatedly reiterated that as the Occupying Power in the OPT, Israel cannot evade the obligations it undertook as a High Contracting Party to the Geneva Conventions. Repeated resolutions by the United Nations Security Council (SC),⁹ the General Assembly (GA),¹⁰

5 One of the arguments advanced by Israel against the applicability of the Geneva Conventions is that such recognition would be interpreted as recognition of formal Jordanian and Egyptian sovereignty over the West Bank and Gaza Strip respectively. For an elaboration of Israel's official position as developed by Israel's Attorney-General Meir Shamgar, see Meir Shamgar, “The Observance of International Law in the Administered Territory” (1971) 1 *Israel Yearbook of Human Rights* 262.

6 Article 35 of Military Proclamation No. 3 of 7 June 1967 stated that: “the military court [...] must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail.” In October 1967, this article was deleted by Military Order No. 144. See Raja Shehadeh, “The Legislative Stages of the Israeli Military Occupation” in Emma Playfair (ed.), *International Law and the Administration of Occupied Territory* (Clarendon Press, Oxford, 1992).

7 Although initially Israel's voting on UN General Assembly resolutions reflected the view that the applicability of the Convention was an open question, it began from 1977 onwards to vote against its *de jure* applicability. See Adam Roberts, “Prolonged Military Occupation: The Israeli Occupied Territories 1967-1988” in Emma Playfair (ed.), *International Law and the Administration of Occupied Territory* (Clarendon Press, Oxford, 1992).

8 Most recently, in *Yesh Din et al. v Commander of the IDF Forces in the West Bank et al.*, HCJ 2690/09, judgment of 23 March 2010, paragraph 6.

9 SC Resolution 1544 of May 2004 reiterates “the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949”.

10 See, for example, GA Resolutions 56/60 of December 2001 and Resolution 58/97 of December 2003.

and statements issued by governments and institutions worldwide, including the International Committee of the Red Cross (ICRC), have all affirmed the *de jure* applicability of the Fourth Geneva Convention to the OPT, and have called upon Israel as an Occupying Power to abide by its terms. This position was confirmed by the International Court of Justice (ICJ) in its July 2004 Advisory Opinion on the Legality of Israel's Annexation Wall in the West Bank, which emphasised that "civilians who find themselves in whatever way in the hands of the occupying power" must remain protected persons,¹¹ "regardless of changes to the status of the occupied territory as is shown by Article 47 of the Convention."¹²

International Human Rights Law

Customary human rights norms are applicable in all situations, including during times of war. Most of the Universal Declaration of Human Rights (UDHR),¹³ in addition to provisions of international human rights conventions, particularly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), reflect customary international law, and are thus applicable to Israel even

11 Article 4 of the Fourth Geneva Convention defines protected persons as "those civilians who, at any given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals."

12 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), paragraph 95. Article 47 stipulates that protected persons in occupied territory "shall not be deprived in any case or in any manner whatsoever of the benefits of the present Convention [...] by any agreement concluded between the authorities of the occupied territory and the Occupying Power." According to the ICRC Commentary, this provision was intended to reaffirm the general rule expressed in Article 7 of the same Convention which states that: "no special agreement shall adversely affect the situation of protected persons [...] nor restrict the rights which it confers upon them." See Jean Pictet (ed.), *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958) 247.

13 Adopted without a dissenting vote by the GA in 1948, there is no doubt that the UDHR has been considered the cornerstone of UN human rights activities. Although not a legally enforceable document, several authors have argued that it has become binding either by way of custom or general principles of law. See, for example, Malcolm Shaw, *International Law* (Cambridge University Press, Fifth Edition, 2003).

in the absence of a binding treaty.¹⁴ Furthermore, they apply not only to persons living under the jurisdiction of their own national authority, but also to persons living in territories under belligerent occupation. Finally, obligations derived from the principles and rules concerning the basic rights of the human person are *erga omnes* obligations, owed towards the international community as a whole. It is widely understood that the human rights provisions of the UN Charter embody customary law, and are therefore to be universally applicable (such as the prohibition against torture, certain basic due process guarantees and the principle of non-discrimination), and consequently encompass not only persons living under the jurisdiction of their own national authorities, but also “persons living in territories under belligerent occupation.”¹⁵

However, despite acceding to all the core UN international human rights instruments,¹⁶ since Israel’s occupation of the West Bank and the Gaza Strip in 1967, Israeli government statements have rejected the applicability of human rights treaties to the OPT on the grounds that the relationship between occupier and occupied is fundamentally different from that between a government and its people during peacetime. In its submissions and responses to the UN’s treaty-monitoring bodies, Israel persists in advancing the position that these instruments do not apply.¹⁷

14 Israel ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 3 January 1992.

15 UN GA Official Records, 25th Session, “Respect for Human Rights in Armed Conflict: Report of the Secretary-General”, UN Document A/8052, 18 September 1970, Annex 1: “General Norms Concerning Respect for Human Rights in their Applicability to Armed Conflicts.” See also, General Comment No. 31, ICCPR, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004.

16 Israel also ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on 2 February 1979; the Convention on the Rights of the Child (CRC) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 3 October 1991; and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) on 2 November 1991.

17 When preparing its report to the UN Human Rights Committee, Israel took the position that “the Covenant and similar instruments do not apply directly to the current situation.” See UN Doc. CCPR/C/SR.1675

The signing of the Oslo Interim Agreement between Israel and the Palestinian Liberation Organisation (PLO) in 1995 (Oslo II), providing for the preparatory transfer of a total of 14 civil spheres to the Palestinian Authority, has been used by Israel as a further ground to deny its responsibility under international human rights law.

These arguments have been rejected by the international legal community, and Israel's position has been repeatedly condemned by the Human Rights Committee, which has affirmed the application of the Covenant in the OPT.¹⁸ The majority of the international human rights conventions to which Israel is a party explicitly stipulate that the obligations apply not only to the territorial area of a specific state, but to all persons brought under the jurisdiction or effective control of that state.¹⁹ Israel is therefore bound to apply to the OPT conventions it is party to regarding, *inter alia*, the prevention of racial discrimination,²⁰ the prevention of torture,²¹ the rights of the child²² and the protection of fundamental civil and political rights.²³

paragraph 21. Similarly, in both its initial report to the Committee on Economic, Social and Cultural Rights in 1998 and in a further report in 2001, Israel argued that "the Palestinian population are not subject to its sovereign territory and jurisdiction" and were therefore excluded from both the report and the protection of the Covenant (UN Doc. E/C.12/1/Add.27). See also, Linda Bevis, *The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories* (Al-Haq, Ramallah, 2003). The Israeli government's position remains that neither Covenant applies in the OPT, see most recently, the transcript from the Human Rights Committee consideration of Israel's report during its Ninety-Ninth Session, 14 July 2010, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10208&LangID=E>.

18 The Committee has expressed its view in paragraph 5 of its concluding observations on Israel's most recent report to the Committee (CCPR/C/ISR/CO/3); in paragraph 11 of its concluding observations on Israel's second periodic report (CCPR/CO/78/ISR); and in paragraph 10 of its concluding observations on Israel's initial report (CCPR/C/79/Add.93).

19 Fons Coomans, Menno T. Kamminga, (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2004), 50-51.

20 ICERD, Article 6.

21 CAT, Article 2(1).

22 CRC, Article 2.

23 ICCPR, Article 2(1).

The applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of international human rights law. This is reinforced by the spirit and intent of international human rights law, which tolerates no lacunae in its protective umbrella. Declarations, reports and resolutions by various UN bodies, including the SC and the GA,²⁴ have all affirmed that fundamental human rights, as accepted in international law and laid down in international instruments, can be invoked to “complete in certain respects and lend support to the international instruments especially those applicable in conditions of armed conflict.”²⁵ Equally, the ICJ has repeatedly stated that an Occupying Power remains responsible for fulfilling its obligations stemming from human rights conventions in occupied territory.²⁶ Finally, the ICRC has confirmed that the two branches of law are complementary.²⁷

ii. The Extra-territorial Application of Israeli Law to the OPT

In stark contrast to Article 43 of the Hague Regulations, which provides that an Occupying Power must uphold the existing law in occupied territory as far as possible, Israel has afforded

24 On 25 June 1993, the Vienna Declaration and Programme of Action of the World Conference on Human Rights affirmed the universality of all human rights and fundamental freedoms, and called upon states and all parties to armed conflicts to observe not just international humanitarian law, but also “other rules and principles of international law, as well as minimum standards for protection of human rights as laid down in international conventions”. In 1970, the UN GA adopted Resolution 2675 which affirmed certain basic principles for the protection of civilians in armed conflict and affirmed that “fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.” As early as 1968, the GA established a committee to monitor human rights in the OPT stating that it was based on the World Conference on Human Rights in Teheran’s call for Israel to respect and implement the UDHR in addition to the Geneva Conventions in the OPT. See, UN GA Resolution 2443 (XXIII). Similarly, in the case of the SC, as early as 1967, it reiterated that “essential and inalienable human rights should be respected even during the vicissitudes of war.” See, SC Resolution 237/1967.

25 UN GA Official Records, 25th Session, “Respect for Human Rights in Armed Conflict: Report of the Secretary-General”, UN Document A/8052, 18 September 1970.

26 See *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), paragraph 25; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports (2005), paragraph 175; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), paragraphs 102-113.

27 Louise Doswald-Beck, “International Humanitarian Law and Human Rights Law”, *International Review of the Red Cross* 293 (April 1993). Marco Sassoli, Antoine Bouvier, *How Does Law Protect in War?* Vol. I (ICRC, Geneva, 2005) 342-344.

itself a wide berth to fundamentally transform the legal landscape in the OPT. Paying little heed to the governing international legal frameworks described above, the Israel authorities vested legislative powers for most of the OPT in the relevant Military Commander upon commencement of the occupation in 1967. In occupied East Jerusalem, the law in force pre-1967 was annulled and replaced with Israeli civil law, while the Military Commander assumed legislative powers in the rest of the West Bank and the Gaza Strip, and proceeded to implement a matrix of military proclamations, regulations, orders, and decrees. Palestinians (but not Israeli settlers) are prosecuted under such legislation by the Israeli military courts in the OPT, this being a topic that lies beyond the scope of this paper.²⁸

Israeli civil law, justiciable before the HCJ, is also channelled extra-territorially into the OPT, however, through a combination of territorial and personal bases – through the application of Israeli civil legislation to settlement areas in the OPT, and the personal application of Israeli civil legislation (including Israel's constitutional Basic Laws) to Israeli settlers.²⁹

28 For more on the military court system see, for example, Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (University of California Press, Berkeley, 2005). Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Tel Aviv, 2007). Paul Hunt, *Justice? The Military Court System in the Israeli-Occupied Territories* (Al-Haq, Ramallah, 1987).

29 The Court has even applied the Basic Laws to the Israeli army and the actions of individual soldiers, see *Jam'iat Iskan Al-Ma'aloun v Commander of the IDF Forces in the Area of Judea and Samaria*, HCJ 393/82, judgment of 28 December 1983, paragraph 33. Aside from upholding the legality of Israel's settlement policy in the OPT and deferring to the state's narrow application of the Fourth Geneva Convention to the occupied territory, the Court has also applied the provisions of the Fourth Geneva Convention applicable to protected persons in occupied territory to settlers. See, for example, *Mayor of Jayyus et al. v Commander of the Armed Forces in the West Bank et al.*, HCJ 11344/03, judgment of 9 September 2009, paragraph 32.

III. The Israeli High Court of Justice

i. *Jurisdiction*

Sitting within this broad legal context is the HCJ, which falls under the auspices of the Supreme Court of Israel. This institution fulfils a dual function: as the Supreme Court it acts as a court of appeal from the decisions of lower courts, while as the High Court of Justice it operates as a court of first and last instance in petitions for the review of the legality or constitutionality of the actions of the government and its agents, including the military. Since the beginning of the occupation in 1967, Israel has systematically limited the jurisdiction and powers of Palestinian courts in the OPT, while extending the jurisdiction of the Israeli HCJ to include the OPT.³⁰ Initially this jurisdiction was policy-based and as such was not an attributable legal right. In 1967, Israel's Attorney General, Meir Shamgar,³¹ decided not to object to the Court's jurisdiction over Palestinians from the OPT, citing the desire to exercise external control over the military so as to prevent arbitrary behaviour and ensure compliance with the rule of law.³² Subsequent case law decided that this jurisdiction was rooted in legislation since members of the military are part of the executive branch as "persons fulfilling public duties according to law," and thus are subject to judicial review under Section 7(b)(2) of the Courts Law 1957.³³

³⁰ See David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002) 19-21. The jurisdictional reach of the Military Courts has considerably expanded over the years to include even the most remote civil cases from within the areas assigned to the Palestinian Authority under the Oslo Accords. See Sharon Weill, "The judicial arm of the occupation: the Israeli military courts in the occupied territories" (2007) 89 *International Review of the Red Cross* 866.

³¹ Shamgar was Attorney General in 1967 and later became President of the Israeli Supreme Court.

³² Due to the policy of acceptance of the jurisdiction of Palestinians from the OPT the Court never had to rule on the question of standing, any objection to standing would have been perceived to run contrary to the policy of accepting the jurisdiction.

³³ The competence of the Supreme Court, sitting as a High Court of Justice, to review governmental action is defined in Sections 15 (c) and (d) of the Basic Law: Judicature.

The extension of the Court's jurisdiction, however, stands in stark contradiction to Article 43 of the Hague Regulations,³⁴ which limits the extent to which the Occupying Power can change the judicial system in the occupied territory to penal codes for emergency and security reasons, a limitation which Israel has utterly exceeded within the OPT. Despite the questionable nature of the HCJ's jurisdiction in the OPT, it has carved out a broad position for itself as the "gatekeeper of Israeli democracy" in dealing with petitions from the inhabitants of the OPT against the Israeli government.

ii. *Justiciability*

In addition to expanding its jurisdiction, the Court has taken on this role through a distorted conception of the principle of justiciability. This is a self-regulating limitation imposing constraints on courts' decision-making parameters by restricting them from judicially reviewing issues that are considered purely political, and therefore the sole remit of the government. This doctrine provides courts with a degree of discretion, as the definition and character of a purely political issue is inherently fluid. Typically, courts refuse justiciability on 'separation of powers' grounds, also known as the 'political question' doctrine, where the petition is questioning a government policy and as such is deemed to be beyond the remit of the Court's competence. The 'political question' doctrine, however, has been manipulated and selectively applied by the HCJ as an avoidance technique to sidestep ruling on contentious and illegal government policies. Perhaps the most telling example of this is the HCJ's refusal to rule on the legality of Israeli settlements in occupied territory (which are irrefutably illegal under international

³⁴ This power of extending jurisdiction should be considered in light of Article 54 of the Fourth Geneva Convention regarding interference with the judiciary within the OPT and Articles 64-78 regarding the penal code.

humanitarian law), by creating a distinction between the property rights of an individual, which it deems justiciable, and the legality of Israel's settlement project in the OPT, which it deems to be a political question for government, and therefore not justiciable before the Court.³⁵

Israel's policy of settlement and expansion in the West Bank, including East Jerusalem, is of course pivotal to the conflict, and underpins a huge amount of the human rights violations perpetrated in the name of the occupation. Refusal to address such a central issue, and one that is clearly addressed by international humanitarian law,³⁶ is manifest evidence of the HCJ's tendency to refrain from challenging government policy. In this sense the question of justiciability is indicative of the HCJ's role in the OPT: by imposing limits on itself through a narrow conception of its own ability to judicially review government actions, the Court is rendered ineffective and incapable of providing any real remedies for Palestinian petitioners.

³⁵ See *Bargil v The Government of Israel*, HCJ 4481/91.

³⁶ In order to prevent colonisation of occupied territories, Article 49(6) of the Fourth Geneva Convention prohibits an Occupying Power from transferring its own civilians into the territory it occupies. The applicability of this provision to Israel's settlement policies in the OPT is supported by repeated SC and GA resolutions, as well as the opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

iii. *The Application of International Law and Deference to the Israeli Government and Military*

When it comes to the application of international humanitarian law and international human rights law in decisions involving the OPT, the HCJ's jurisprudence is "intriguing and defies easy classification."³⁷ According to Ben-Naftali and Shany, the Court resorts to one of the following options: unequivocally espousing the position of the military; citing international humanitarian law but not international human rights law; referencing human rights without specifying whether the source is international human rights law, Israeli administrative or constitutional law; or referencing international human rights law only in order to show that it is irrelevant.³⁸ Its jurisprudence up to date has quite resolutely managed to leave unresolved even the question of the applicability and enforceability of the Fourth Geneva Convention.³⁹

Although the HCJ has in the past stated that Israel has been holding the OPT in belligerent occupation since 1967,⁴⁰ and maintains this position regarding part of the West Bank (excluding East Jerusalem), it nevertheless chooses to endorse the official position of the government against the applicability of the Convention. To

³⁷ Orna Ben-Naftali and Yuval Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories" (2003-2004) 37 *Israel Law Review* 17, 87.

³⁸ *Ibid.* 91.

³⁹ The age old debate on the application of the Convention re-emerged in the case of *Yesh Din et al. v Commander of the IDF Forces in the West Bank et al.*, HCJ 2690/09, judgment of 28 March 2010, where the Court recalled its position on its *sui generis*, piecemeal application of the Convention's provisions and rejected their customary nature. Michael Sfard, "The Human Rights Lawyer's Existential Dilemma", book review of David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2005) 38 *Israel Law Review* 154, 185. For discussion of the Israeli government's position, see Nissim Bar-Yaacov, "The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip" (1990) 24 *Israel Law Review* 3-4, 485.

⁴⁰ See, for example, *Beit Sourik Village Council v The Government of Israel*, HCJ 2056/04.

do so, it has argued that even though Israel signed and ratified the Convention, it was not bound by it, because it “generates new norms whose application in Israel demands an act of legislation.”⁴¹ One result of this position is that the Court is authorised to examine the activities of Israeli military authorities in light of the provisions of the Fourth Geneva Convention only where the State Attorney agrees to their application, thereby rendering the position taken by the Court without substantial legal significance.⁴²

Meanwhile, when it does refer to international humanitarian law, the Court’s interpretations of the provisions in the Convention are relative and often inconsonant with their language or the interpretations of them accepted and applied by other states. This is not a Court that is interested in the “delicate yet fascinating problem of coordinating between [these] overlapping international regimes,”⁴³ but rather has “accepted too easily, without full scrutiny of all relevant issues, the position of the Israeli Government [and] served as a buffer to soften the apparent conflict between international legal provisions, on the one hand, and Israeli policy and practices, on the other.”⁴⁴

Finally, it is worth noting that in its deference to the executive branch of government, the Court is complicit in critically

41 See *Teachers’ Housing Cooperative Society v Military Commander*, HCJ 393/82.

42 This usually takes place only in cases in which the state is convinced that the interpretation by the Court of a specific provision covers the specific action that is the subject of the petition. Although the Court has argued that the state customarily allows such examination, it is not granted automatically. See Mazen Qudry, “The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel” in Emma Playfair (ed.), *International Law and the Administration of Occupied Territory* (Clarendon Press, Oxford, 1992). Paper originally presented at a conference hosted by Al-Haq in Jerusalem in January 1988.

43 Orna Ben-Naftali and Yuval Shany, “Living in Denial: The Application of Human Rights in the Occupied Territories” (2003-2004) 37 *Israel Law Review* 17, 22.

44 Adam Roberts, “Prolonged Military Occupation: The Israeli Occupied Territories 1967-1988” in Emma Playfair (ed.), *International Law and the Administration of Occupied Territory* (Clarendon Press, Oxford, 1992) 94-95.

undermining the separation of powers and the system of checks and balances, considered integral to a democracy. Instead of applying established international legal standards and embodying the role of an independent and impartial judiciary, the court has consistently chosen to support the political motivations of the Israeli government. This practice has led to its judicial legitimisation of the annexation of land, including valuable natural resources, the protection of illegal settlements and the forcing of demographic changes on Palestinian territory that has been targeted for the expansion of Israel as a Jewish State.

iv. *Two Peoples, Two Laws*

As noted above, Israel has created two parallel legal systems in the OPT for the two different groups residing there: military courts enforcing military law against Palestinians, while Israeli civilian courts apply civil and criminal law to Israeli settlers in the OPT. This forms the basis for a strong argument of discrimination in that Palestinians are subject to different standards of evidence and procedure than those applied to settlers, and ultimately receive harsher penalties.⁴⁵ However, there is also discrimination evident in the HCJ's own treatment of the two groups, in granting constitutional rights to Israeli settlers, but not to Palestinians. In the *Gaza Disengagement* case, the Court held that Israeli settlers being evacuated from the Gaza Strip possessed constitutional property rights under Israel's Basic Laws and were thus entitled to compensation for their eviction. In contrast, in cases such as the *Family Unification* case, the HCJ has ruled that Israel's Basic Laws are not applicable to OPT Palestinians.⁴⁶

⁴⁵ For further detail see *Occupation, Apartheid, Colonialism? A re-assessment of Israel's practices in the occupied Palestinian territories under international law* (Human Sciences Resource Council, Cape Town, 2009) 105-118, at www.hsrb.ac.za/Document-3227.phtml.

⁴⁶ See *Adalah et al., v Minister of Interior et al.*, HCJ 7052/03, judgment of 14 May 2006.

V. *The Use of Secret Evidence*

One of the starkest manners through which the HCJ's subservience to the will of the Israeli military establishment manifests itself is through the Court's acceptance of "secret" evidence provided by Israel's military or intelligence agencies.⁴⁷ The HCJ has repeatedly refused to overturn arbitrary and indefinite travel bans imposed on human rights defenders such as Al-Haq General Director Shawan Jabarin, on the sole basis of alleged evidence presented to the Court by the military and intelligence agencies behind closed doors.⁴⁸ This is just one example of the many types of 'security' cases that are decided by the Court with reference to evidence that the individual concerned, his counsel, trial observers and members of the general public are not privy to.

The secret evidence procedure adopted by the HCJ in such cases raises serious questions about basic due process principles and fair trial standards in the Israeli court system. Indeed, the use of secret evidence has long been challenged in the jurisprudence of modern democracies as inimical to the pursuit of justice. In 1950, renowned US Supreme Court Justice Robert H. Jackson adjudged that "[t]he plea that evidence of guilt must be secret is abhorrent to free men."⁴⁹

Although the right of all persons to a fair trial is guaranteed under international humanitarian and human rights law, with General

⁴⁷ Such as the General Security Service (GSS), officially known in English as the Israel Security Agency (ISA) and commonly referred to as the *Shabak* or *Shin Bet*; as well as the Directorate of Military Intelligence, which is the intelligence section of the Israeli army, often abbreviated to *Aman*.

⁴⁸ See, for example, *Jabarin v Commander of Israeli Military Forces in West Bank*, HCJ 5182/07, judgment of 22 June 2007; HCJ 5022/08, judgment of 7 July 2008; HCJ 1520/09, judgment of 10 March 2009. In many cases, the decision to prohibit travel is arbitrary and not based on sufficient factual and legal claims.

⁴⁹ *U.S. ex rel. Knauff v Shaughnessy* (1950) 338 U.S. 537, 551.

Comment No. 32 of the UN Human Rights Committee specifically stating that parties must “be given the opportunity to contest all the arguments and evidence adduced by the other party,”⁵⁰ the use of secret evidence has gained some support in recent years from the administrations of increasingly repressive major powers in the so-called “global war on terror.” It is in the context of this rhetoric that Israel and the HCJ have sought to dilute the obligations incumbent upon them. Regarding secret evidence, however, a major blow to the legitimacy of its use in the context of the “war on terror” was dealt by a landmark UK House of Lords judgment in October 2007, where it was held that control orders based solely on secret evidence violate the right to a fair trial, even when issues of national security are at stake.⁵¹ In this regard, the words of Lord Brown are directly relevant: “a suspect’s entitlement to an essentially fair hearing [...] [is] not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control.”⁵²

The European Court of Human Rights has also confirmed that “both [the] prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party [...] prosecution authorities [must] disclose to the defence all material evidence in their possession for or against the accused.”⁵³

⁵⁰ UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 2007.

⁵¹ *Secretary of State for the Home Department v MB* (2007) UKHL 46.

⁵² *Ibid.*

⁵³ *V. v Finland*, ECHR 40412/98, judgment of 24 July 2007, paragraph 74.

In March 2009, the HCJ took its secret evidence policy a step further, beyond the ambit of purely ‘security’-related cases to a constitutional matter before the Court. A panel of nine judges took the unprecedented decision to allow Israel’s General Security Service (GSS) to present secret evidence relating to the constitutionality of a law being challenged by three human rights organisations as violating Israel’s Basic Laws. The organisations ultimately withdrew their petition in protest against the dangerous precedent set by the Court choosing to base its judicial review of legislation on information withheld from the public and the petitioners themselves.⁵⁴

vi. *A Consistent Court*

The pattern of legal manipulation and deference to Israeli policies has been consistently exhibited by the HCJ since the beginning of the occupation. It has also been the subject of numerous studies and writings. For its 1988 conference on the use of international law in administration of the OPT, Al-Haq examined HCJ jurisprudence from the beginning of the occupation until the late 1980’s and concluded that “practically speaking, the dominant tendency in Israeli Supreme Court rulings is one of non-application of international law.”⁵⁵ When it did examine Israeli administrative actions in light of provisions of international law, the Court interpreted specific provisions specifically to suit the requirements of the occupation authorities.⁵⁶

⁵⁴ *The Public Committee Against Torture in Israel et al. v Minister of Justice, et al.*, HCJ 2028/08.

⁵⁵ Mazen Qupty, “The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice of Israel” in Emma Playfair (ed.), *International Law and the Administration of Occupied Territory* (Clarendon Press, Oxford, 1992) 87-88.

⁵⁶ *Ibid* 88.

In 2002, Professor David Kretzmer published his in-depth study on HCJ jurisprudence, *The Occupation of Justice*, exposing the Court's methodologies:

In almost every legal crossroad, in almost every point where the court had to interpret international law, to establish the boundaries of authority, to declare the legality of a policy [...] [it] has chosen the path which strengthened the powers of the military commander, broadened the borders of his authority and legitimized his [...] decisions. [It] dismissed legally well-established petitions in the cost of breaking basic tenants of legal interpretation and it even sacrificed the consistency of its own decisions when it had to.⁵⁷

In 2004, Al-Haq published a study focusing specifically on the HCJ's approach to issues arising during the second *intifada*, which had brought new extremes in the violation of human rights and humanitarian law in the OPT. The cases examined, which covered a wide sampling of subjects brought before the Court by the occupied population, again proved "that the policy adopted by the Israeli HCJ is one of hands-off respect for the Israeli occupying forces and disrespect for the individual and collective rights of Palestinians living in the OPT."⁵⁸ At best, the court dealt with applicable provisions of international law in a "selective and nominal manner," but "its statements contradicted international law in the majority of its decisions and insisted that the OPT were 'part of the land of Israel,'

⁵⁷ David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002).

⁵⁸ Nizar Ayoub, *The Israeli High Court of Justice and the Palestinian Intifada: A Stamp of Approval for Israeli Violations in the Occupied Territories* (Al-Haq, Ramallah, 2004) 111.

and that the nature of Israel was both 'Jewish and democratic.'"⁵⁹

In this period, the HCJ's approach to established legal standards was seen to be "far from independent and impartial, [to] weaken the legal foundation of its decisions, and undermine its credibility."⁶⁰ Moreover, it was clear that resorting to the HCJ had not stopped the laundry list of violations and assaults against Palestinians. Given the lack of other options, however, Al-Haq found that:

[D]espite the Court's publicised failure to play a neutral and impartial role in recognising the individual and collective rights of the occupied population, there is an increase in the number of petitions submitted to this Court by Palestinians – both individual and institutions.⁶¹

In the six years that have passed since this finding was made, the trend has continued, with floods of petitions being brought before the Court by Palestinians and those seeking to defend Palestinian rights against intensified measures of repression implemented by the occupying authorities. In line with the deterioration of the human rights situation, the HCJ's general approach of deferring to the military and 'defence' establishment has continued, with a review of its OPT-related jurisprudence suggesting that decisions have become even less objective and founded in law since the appointment of Justice Dorit Beinisch to the position of President of the Supreme Court in 2006. Notably, in recent years the HCJ has stood behind two new cornerstones of the Israeli oppression of the

⁵⁹ *Ibid* 112.

⁶⁰ *Ibid* 112-113.

⁶¹ *Ibid* 113.

Palestinian people: the strangling blockade of the Gaza Strip on the basis of its designation as a “hostile territory” rather than occupied territory, and the construction of the Annexation Wall (the Wall) in the West Bank. The brief analyses of these cases that follows serve to demonstrate the urgency with which human rights defenders in the OPT must now address the long-standing problem of the HCJ as a rubber stamp for illegal Israeli policies.

IV. Jurisprudence on the Gaza Strip and the Wall

i. *The Blockade of the Gaza Strip*

Since its unilateral ‘disengagement’ from the Gaza Strip in 2005, Israel has sought to relinquish any obligations it has to the territory under the laws of belligerent occupation, including the basic maintenance of the welfare of the civilian population, and to achieve a legal justification for the overt and indiscriminate punishment of that civilian population. It paved the way for the realisation of this goal with the declaration, in September 2007, of the Gaza Strip as a “hostile territory”,⁶² a term without basis in international humanitarian law. The declaration expressly purported to provide a basis for Israel to impose additional sanctions “in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity.”⁶³ The declaration also provided for further restrictions to be placed on the movement of people to and from the Gaza Strip.

The legality of this tactic was challenged in a petition filed on 28 October 2007 by ten Palestinian and Israeli human rights organisations seeking an injunction against Israel, which had begun disrupting the supply of electricity and fuel to the occupied Gaza Strip.⁶⁴

Although the HCJ’s rulings in the *Gaza Fuel and Electricity* case contained very little discussion of the legal issues at stake, the HCJ went against the near-unanimous position of the international legal

⁶² Israel Ministry of Foreign Affairs, Press Release of 19 September 2007: *Security Cabinet declares Gaza hostile territory*, at <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

⁶³ *Ibid.*

⁶⁴ *Jaber al-Bassiouni Ahmed v Prime Minister*, HCJ 9132/07, judgments of 29 November 2007 and 30 January 2008 (known as the *Gaza Fuel and Electricity* case).

and political community and held that the Gaza Strip was no longer occupied. It thus concluded that the legal framework applicable was that of the less restrictive obligations on a party to an armed conflict, rather than the duties that bind an Occupying Power under the law of belligerent occupation:

In this regard, we note that since September 2005 Israel no longer has effective control over what takes place within the territory of the Gaza Strip [...]. Under these circumstances, the State of Israel bears no general obligation to concern itself with the welfare of the residents of the Strip or to maintain public order within the Gaza Strip, according to the international law of occupation.⁶⁵

In a superficial interpretation of the ‘effective control’ test established under international law to determine the existence of a situation of occupation,⁶⁶ the Court said that because “Israeli soldiers are not present in that area on an ongoing basis and do not direct what goes on there,” Israel is not in ‘effective control’ of the Gaza Strip.

The reality is that the physical disengagement of illegal settlements and military bases did not result in Israel ceasing to have ‘effective control’ over the Strip. In reaffirming the occupation of the Gaza Strip, Professor John Dugard, then UN Special Rapporteur on the situation of human rights in the occupied Palestinian territory, described how technological advancements have enabled the Israeli

⁶⁵ *Ibid* judgment of 30 January 2008, paragraph 12.

⁶⁶ See Article 42 of the Hague Regulations.

occupation of the Gaza Strip without a permanent military presence.⁶⁷ Israel's 'effective control' is established through its control of the perimeter of the Gaza Strip, including complete control over the six crossings into the territory and complete control over the air and sea space; its capacity to undertake regular large scale military incursions⁶⁸ and its ability to "at any time they desired assume physical control of any part of the country."⁶⁹ It is, after all, Israel's effective control of the Gaza Strip that has enabled it to establish its blockade of goods and services and restrict the movement of people.

By ignoring all the relevant legal standards and denying the existence of the ongoing occupation, the HCJ provided a mask of legitimacy for the Israeli government absolving itself of a wide range of responsibilities under the Fourth Geneva Convention that provide vital protections for the occupied population in the Gaza Strip.⁷⁰

⁶⁸ Israeli military incursions in the Gaza Strip have continued regularly since 2005, most notably in the form of the 'Operation Cast Lead' offensive in 2008-2009.

⁶⁹ This is the test of occupation set down by the International Military Tribunal in its post-Second World War Trials at Nuremberg. See *United States of America v Wilhelm List et al.*, judgment of 19 February 1948, Case No. 7, XI *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 757, 1243.

⁷⁰ The rights that would have been engaged if the HCJ had correctly applied the 'effective control' test and deemed that the Gaza Strip was still occupied, include but are not limited to the designation of residents of the Gaza Strip as protected persons under Article 4 of the Fourth Geneva Convention, the respect of protected persons under Article 27 of the Fourth Geneva, and the prohibition of the destruction of property as per Article 53 of the Fourth Geneva Convention. Also engaged is the duty to ensure the availability of food and medical supplies under Article 55(1) of the Fourth Geneva Convention and the duty to ensure the maintenance of hospitals and utility services under Article 56(1) of the Fourth Geneva Convention. More extensive obligations are provided under Part III of the Fourth Geneva Convention. Regarding Israel's military objectives, the principles of military necessity, distinction and proportionality are engaged. And the implementation of the blockade on goods and utilities on the Gaza Strip causes indiscriminate hardship for the entire population, amounting, as recently affirmed also by the ICRC, to a clear violation of Article 33 of the Fourth Geneva Convention, which unconditionally prohibits reprisals and collective punishment.

In narrowing the legal framework to exclude obligations under the laws of belligerent occupation, the Court then restricted its analysis to the question of whether there was a “humanitarian crisis” that would be exacerbated by the reduction in fuel supplies to the Gaza Strip. Even this analysis was fraught with problems and inconsistencies and, perhaps unsurprisingly, the Court held that the reduction in the supply of fuel did not result in a humanitarian crisis. It reached this conclusion despite the fact that the respondents presented no legal sources or analysis explaining or justifying their program of fuel reduction. Instead, the Court relied on and accepted without question vague, hearsay statements from Israeli officials contending that there was no humanitarian crisis, that the fuel supply would be adequate so long as it was appropriately redistributed internally, and that officials were monitoring the situation. Meanwhile, the Court ignored the petitioners’ presentation of affidavits and international reports, including statistics and information from UN agencies, verifying the existence of a proliferating humanitarian crisis throughout the Gaza Strip. It also ignored the existence of Israel’s economic sanctions on the Gaza Strip, which amount to collective punishment prohibited under international humanitarian law.

The ruling of the HCJ served to endorse the attempts by Israel’s political and military leadership to circumvent and obscure their obligations under law, a position the Israeli government can cling to with its newly-minted judicial stamp of approval.

Since this judgment was handed down the situation in the Gaza Strip has been further exacerbated, not least as a direct consequence of the destruction wrought during the Israeli military offensive code-named ‘Operation Cast Lead’ and the continuance of

the blockade in its aftermath. Various facets of the siege that have been challenged before the HCJ have been upheld by the Court.

The blanket nature of Israel's closure policy vis-à-vis Gaza's borders was brought into focus in a petition filed by the Foreign Press Association against the military authorities. In this case, the HCJ approved the closure policy in affirming that even accredited foreign correspondents would not be allowed to enter the Gaza Strip to report on the Israeli military incursions there.⁷¹

In addressing a claim brought by Physicians for Human Rights, the HCJ held that the targeting of medical facilities and personnel by Israeli forces in the Gaza Strip, and the prevention of evacuation of wounded personnel were not in violation of the rules of humanitarian law prohibiting such practices.⁷² This decision was based on acceptance of unconfirmed suspicions presented by the Israeli authorities that Palestinian armed groups were utilising medical facilities in the conduct of hostilities.

In December 2009, the HCJ handed down its judgment in response to petitions concerning the rights of family members from the Gaza Strip to visit their relatives incarcerated in prisons in Israel.⁷³ Pursuant to the aforementioned 'hostile territory' declaration, an absolute ban on family visits has been in place since 2007. In their adjudication, the judges deferred to the executive branch on the basis that in relation to a 'political' directive such as this, "the government is granted broad latitude of judgment, and in general,

⁷¹ *Foreign Press Association v GOC Southern Command et al.*, HCJ 9910/08, judgment of 2 January 2009.

⁷² *Physicians for Human Rights et al. v Prime Minister et al.*, HCJ 201/09, 248/09, judgment of 19 January 2009.

⁷³ *Anbar et al. v. GOC Southern Command et al.*, HCJ 5268/08; joined with *Adalah et al. v the Defense Minister et al.*, HCJ 5399/08, judgment of 9 December 2009.

the court does not tend to intervene” in such matters.⁷⁴ The Court failed to address the fundamental issue that under international humanitarian law prisoners from an occupied territory must be detained in their own territory.⁷⁵ Instead, it reaffirmed the finding in the *Gaza Fuel and Electricity* case that the Gaza Strip is no longer occupied territory, but at the same time found no need to attempt to provide a legal basis for Israel to arrest individuals in a territory over which it has no jurisdiction, and to incarcerate them in Israel. The HCJ refused to engage in any analysis of the substantive legal issues regarding the sweeping nature of the ban. It failed to address: the possibility that it amounts to collective punishment prohibited under Article 33 of the Fourth Geneva Convention; the contention that the family members must at the least be granted the right to an individual review; and that the rights of prisoners to family life and to dignity must be taken into account in assessing the legality of the policy. Instead, the Court simply declared the ban on family visits to be a policy legitimately implemented at the government’s discretion.

ii. *The Annexation Wall*

On 9 July 2004, the International Court of Justice issued its Advisory Opinion on the legality of Israel’s Annexation Wall in the West Bank.⁷⁶ The impetus for this Advisory Opinion came from a request by the GA on 8 December 2003. The Advisory Opinion reaffirmed Israel’s status as an Occupying Power in the West Bank;⁷⁷ the illegality of the acquisition

⁷⁴ *Ibid* paragraph 4.

⁷⁵ Under Article 76 of the Fourth Geneva Convention: “Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.”

⁷⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004).

⁷⁷ *Ibid* paragraph 78.

of territory by force;⁷⁸ the Palestinian right to self-determination;⁷⁹ the illegality of Israeli settlements in the OPT;⁸⁰ the applicability of the Hague Regulations and the Fourth Geneva Convention;⁸¹ the applicability of international human rights law;⁸² and it concluded that the course chosen for the construction of the Wall inside the West Bank was illegal and could not be justified by military exigencies or the requirements of national security or public order.⁸³

Israel, for its part, has acted in direct violation of the Advisory Opinion. Over the past six years, the construction of the Annexation Wall has continued, as has the expansion of illegal Israeli settlements in the West Bank (including East Jerusalem) and the associated violations of international human rights and humanitarian law. Once again, the HCJ has played a central role in this process by using legal reasoning that distorts or simply ignores well-established norms of international law and flouts the findings of the ICJ in order to justify Israeli practices.

Only nine days before the ICJ delivered its Advisory Opinion, the HCJ attempted to pre-empt it by determining, in the *Beit Sourik* case, that the construction of the Wall in the OPT was lawful. It further condoned other violations of international law, including those emanating from the Wall's associated regime, the presence of settlements and the routing of the Wall to ensure their safety. Despite the Advisory Opinion that followed, the HCJ reaffirmed its

⁷⁸ See Security Council Resolutions 242(1967), 298(1971), 478(1980).

⁷⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paragraph 122.

⁸⁰ *Ibid* paragraph 134.

⁸¹ *Ibid* paragraph 101.

⁸² *Ibid* paragraphs 106-113 and 134.

⁸³ *Ibid* paragraph 137.

position in 2005 in the *Ma'arabe* case, and directly dismissed the ICJ's authoritative findings.

A brief look at these two cases demonstrates the extent to which this legal perversion has reached.

***Beit Sourik*⁸⁴**

The petition in this case concerned the seizure of land from villages to the northwest of Jerusalem by Israel for the purpose of erecting the Annexation Wall.

Early in the decision, the Court stated that the dispute concerned the route of the Wall rather than the legality of the Wall itself, resulting in the premature dismissal of the petitioner's arguments without providing a full legal justification.⁸⁵ It reached this conclusion by using a dichotomous approach, first considering the legal authority to construct the Wall within a very narrow legal framework, and then considering the legality of the route.⁸⁶

The issue of the legality of the Wall was dealt with in brief by addressing three questions. First, the Court focused on whether the purpose of the Wall was for security or political reasons. In concluding that the purpose of the Wall was for security reasons, the HCJ described the function of the military commander as being to balance the rights of the local inhabitants with the military needs of the state.⁸⁷ Within the "delicate nature" of this balance "there is no

⁸⁴ *Beit Sourik Village Council v The Government of Israel et al.*, HCJ 2056/04, judgment of 30 June 2004.

⁸⁵ *Ibid* paragraph 7.

⁸⁶ *Ibid* paragraph 25.

⁸⁷ *Ibid* paragraph 27.

room for an additional system of [political] considerations.”⁸⁸ Using this logic, the Court was able to simply defer to the respondents assertion that the purpose of the Wall was for security without considering any of the violations cited by the petitioners.⁸⁹

The second question before the Court concerned the administrative procedure for the orders of seizure of land and appeal system, in which the Court found no defects. No thorough explanation of this conclusion was provided.

The third question regarded the issue of the legality under international law of the seizure of land for security reasons. There was no consideration of the parameters of the needs of the army or the absolute necessity requirements contained in Article 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention, respectively. The narrowing of the question to the legality of land seizure within the context of security, as opposed to the legality of the Wall, provided the Court with an avenue to limit the rights considered to be property rights only. It then comfortably recognised that the State must consider the needs of the local population but that the “infringement of property rights is insufficient, in and of itself, to take away the authority to build [the Wall].”⁹⁰ By creating this fictional legal divide, the Court could declare the Wall legal, whilst reverting to the consideration of the broader list of violated rights when it dealt with the question of the legality of the Wall’s route.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* For discussion of the ways by which land has been unlawfully appropriated for the construction of settlements, and the Court’s contribution to this process, B’tselem and Bimkom, *Under the Guise of Security: Routing the Separation Barrier to Enable the Expansion of Israeli Settlements in the West Bank*, 2005, at http://www.btselem.org/Download/200512_Under_the_Guise_of_Security_Eng.pdf

⁹⁰ *Ibid.* paragraph 32.

After concluding that the Wall in itself was lawful, the Court then considered the legality of the route. In this analysis, the Court cited a much broader list of legal sources, including articles of both the Hague Regulations and the Fourth Geneva Convention and a plethora of academic references, which were all notably absent in the consideration of the legality of the Wall. The Court applied the proportionality test to the individual factual scenarios of each petition and outlined a detailed description of the inflicted injuries given by the petitioners, which this time were not restricted to property violations. In the majority of the petitions the Court held that: “[t]he rights guaranteed them by the Hague Regulations and the Fourth Geneva Convention are violated”⁹¹ and that “[t]he humanitarian provisions of the Hague Regulations and of the Fourth Geneva Convention are not satisfied.”⁹² The content or scope of these humanitarian provisions was not specified by the Court.

While the Court’s in-depth analysis of the second question might give the impression of a more rights-oriented decision, given that the outcome favoured the petitioners, the overall effect of the decision was disastrous. The Court managed to appease the government by approving their general policy and to placate the petitioners by conceding to them a minor victory. This mirage of a balanced and fair approach unfortunately confers legitimacy upon a Court that in this case, as in so many others, struck a decisive blow to the prospects of peace, the defence of the rights of the Palestinian community at large and the legitimacy of the law by ‘legalising’ the Annexation Wall.

⁹¹ *Ibid* paragraph 67.

⁹² *Ibid* paragraph 76.

***Mara'abe*⁹³**

This petition concerned the section of the Wall that surrounds Qalqiliya, isolating five Palestinian villages on its Israeli-facing side, and came the year after the ICJ issued its Advisory Opinion. Given this timing, the petitioners asked the Court to justify its assessment of the legality of the Wall in *Beit Sourik* within this newly clarified international legal framework.

It became apparent early in the decision that the ICJ's findings would not be implemented since before any decisions were made on the merits of the case the HCJ listed four crucial issues that it refused to determine. These limitations on the legal framework were: first, the non-applicability of the Fourth Geneva Convention; second, the applicability of Article 23(g) of the Hague Regulations; third, that the contentious issue of the legality of the settlements did not merit consideration and fourth, in the consideration of the application of international human rights in the OPT, the HCJ held that the human rights of the Palestinian population are derived only from international humanitarian law and specifically Article 46 of the Hague Regulations and Article 27 of the Fourth Geneva Convention, a position in keeping with domestic jurisprudence.⁹⁴ It held that while there was an assumption that the international conventions on human rights did apply, the Court would not consider the interrelationship between international humanitarian law and international human rights law.⁹⁵

These limitations on the legal context of the case allowed the

⁹³ *Mara'abe et al v Prime Minister of Israel et al.*, HCJ 7957/04, judgment of 15 September 2005.

⁹⁴ *Ibid* paragraph 26.

⁹⁵ *Ibid* paragraph 27.

Court to pare down the rationale of the ICJ in a selective manner and to such an extent that it came to the absurd conclusion that both *Beit Sourik* and the Advisory Opinion used the same basic normative framework.⁹⁶

The HCJ's starting point, therefore, was to claim that both courts applied a common legal framework, irrespective of all the issues it refused to consider. This enabled it to decide that the crux of the distinction between it and the ICJ lied in factual differences rather than differing legal interpretations. It then went further, stating that both courts used the same rationale because the ICJ had held that the infringements of the rights of Palestinian residents would not violate international law if the harm was caused as a result of military necessity, national security requirements or public order.⁹⁷ Of course, this is a seriously flawed interpretation of the ICJ's opinion, which clearly stated that the extreme infringements of Palestinian rights caused by the Annexation Wall "cannot be justified by military exigencies or by the requirement of national security or public order."⁹⁸

This undue reliance on the factual differences in the information each court was privy to would have been irrelevant if the HCJ had used the entire spectrum of the legal framework laid out by the ICJ.

The distinction drawn on the factual basis allowed the HCJ to disregard the conclusions of the ICJ Advisory Opinion on the legality of the Wall and return to the proportionality test as set out in *Beit Sourik*. In its application of the proportionality test the HCJ again provided the petitioners with a minor victory regarding the

⁹⁶ *Ibid* paragraph 57.

⁹⁷ *Ibid* paragraph 57.

⁹⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paragraph 137.

re-routing of the Wall while determining that the Wall itself was legal. Dozens of petitions have been filed before the HCJ against the lawfulness of the Wall and its route, with little positive outcome for Palestinian plaintiffs. The HCJ has not considered veering from its point of departure regarding the *prima facie* legality of the Wall, and at best has followed the *Beit Sourik* formula in ordering a minor adjustment to the route of the Wall.⁹⁹ Such orders have often not been enforced against the military authorities.

⁹⁹ See, for example, *Yassin et al. v The Government of Israel et al.*, HCJ 8414-05, judgment of 4 September 2007.

V. Problems and Challenges

The preceding analysis demonstrates the HCJ's increasingly detrimental role in the occupation by conferring 'legality' upon illegal Israeli practices, and serving to further the oppression of the Palestinian population in the OPT. Unfortunately, it should be noted that recent political activity within Israel, along with the departure of the Court's former President, Justice Aaron Barak, may be making what is left of the HCJ's independence even more tenuous. Kretzmer has cited the potential for the Knesset (the Israeli parliament) to seek to limit the jurisdiction of the HCJ should it rule contrary to government policy or display too much judicial activism, which would be an obvious restraint on the judiciary.¹⁰⁰ Recent history has validated these fears: in 2008, Justice Minister Daniel Friedmann ushered a bill through the Knesset to limit the Court's authority to exercise judicial review, its jurisdiction and the procedure for appointing the judiciary.¹⁰¹ At the same time it has become clear that the HCJ is moving even further away from applying standards of international law. Amazingly, the future of the HCJ with regards to the OPT seems even bleaker than its past.

Thus, the human rights community in the OPT and Israel is faced with a myriad of problems and challenges in relation to the Court. Study after study has proven that the HCJ is simply not a viable option for balanced and positive solutions, and instead appears to have "served as a buffer to soften the conflict between international legal provisions, on the one hand, and Israeli policy and practices,

¹⁰⁰ David Kretzmer notes that "even though legislative power in the Occupied Territories is concentrated in the hands of military commanders, the *Knesset*, Israel's legislature, could redefine the Court's jurisdiction so as to exclude or limit review over decisions relating to the Territories." David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002) 21.

¹⁰¹ See Barak Ravid, "Government approves Friedmann's bill to limit power of Supreme Court," *Ha'aretz*, 7 September 2008.

on the other.”¹⁰² The human rights community charged with protecting the rights of all Palestinians is implicated in a number of ways by its continued involvement with this Court. Some hard questions must be asked. The most fundamental, and perhaps most important, is whether continued involvement with the HCJ simply assists in strengthening the occupation, and on a broad community level, works against the human rights causes being fought for. In answering this question, numerous issues, problems, concerns and options arise, some of which will be explored here.

i. *Positive Results and Pyrrhic Victories*

Minor successes for Palestinian petitioners, such as the re-routing of the Wall in the abovementioned cases, are part of the qualified positive effects the HCJ has on the population of the OPT. In addition to these victories, it may be argued that the Court’s sometime allusion to the increased protections under human rights norms thereby expands what Kretzmer calls the “shadow of the court” effect – a self-censorship process among military officials and their legal counsel who fear the Court’s criticism, given its moral power and influence in Israeli society and, to a lesser degree, abroad.¹⁰³ Indeed, it appears that there may be some decisions, policies and actions that would be taken by the Israeli government or military, but for the presence of the Court.

Kretzmer also notes that the Court may have a positive effect in the area of procedural rights, and cites decisions forcing the military to hold hearings before harsh measures such as house demolitions

¹⁰² Adam Roberts, “Prolonged Military Occupation: The Israeli Occupied Territories 1967-1988” in Emma Playfair (ed.), *International Law and the Administration of Occupied Territory* (Clarendon Press, Oxford, 1992), 76.

¹⁰³ David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002) 164.

or deportations are implemented. The HCJ has not been consistent in this regard, however, with its approval of hearings only after the deportation of 415 Hamas activists from the Gaza Strip standing out as just one example.¹⁰⁴

Moreover, even the minor ‘victories’ cannot be viewed in simple positive terms. In such cases it is not obvious that the supposed ‘beneficiaries’ in fact gain more than the authorities. There is a strong counter-argument suggesting that benefits - progress in the ‘shadow of the court’, or procedural rights cases where petitioners get some of what they ask for, and therefore keep coming back – do not provide anything close to a full protection of rights. Instead, they serve a legitimising purpose, and perhaps provide “the oxygen that enables the occupation to operate.”¹⁰⁵ As Aeyal Gross puts it, “cases where individuals win rights victories may create the myth of a ‘benign occupation’ that protects human rights even though they are mostly denied.”¹⁰⁶

By participating in Court proceedings and thereby justifying its existence from the Palestinian side, are human rights organisations, lawyers and Palestinian plaintiffs complicit in this legitimisation, and in making the occupation more palatable to Israelis and the world? The existence of the Court, and Palestinian petitions to it, inherently promote the idea that the occupied population has a legitimate recourse to justice, thereby allowing Israelis and third parties to transfer moral responsibility for what happens in the OPT onto Israel’s ‘fair and democratic’ justice system. Indeed, this

¹⁰⁴ See *Association for Civil Rights in Israel v Minister of Defence*, HCJ 5973/92.

¹⁰⁵ Michael Sfard, “The Price of Internal Legal Opposition to Human Rights Abuses” (2009) 1 *Journal of Human Rights Practice* 37, 45.

¹⁰⁶ Aeyal Gross, “Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation” (2007) 18 *European Journal of International Law* 1, 8.

was proffered early in the occupation as the very reason for the Israeli authorities not to object to the jurisdiction of the HCJ over Palestinians in the OPT. Says Kretzmer, “[i]t is fair to assume [...] that petitions to the Supreme Court of Israel by residents of the Occupied Territories would imply the recognition of Israel by the petitioners, as well as political legitimization of Israeli rule over the Territories.”¹⁰⁷ It appears that for many outside observers, the judicial system within Israel is still perceived as providing Palestinians with a real means of gaining justice in a court that fairly applies the rule of law.

Dilemmas also arise in the context of the parameters of argument dictated by the Court. The selective application of international legal standards forces human rights lawyers to argue on the restricted terms allowed by the HCJ. In the Wall cases, for example, they are now barred from arguing against the basic question of the Wall’s legality – an argument that would be supported by the ICJ’s Advisory Opinion – and are left instead to debate only minor amendments to the route of the Wall. Similarly, the question of East Jerusalem being part of the OPT and thus subject to the laws of occupation, taken as a given by the international legal community, is not even entertained by the Court, which considers it part of Israel’s sovereign territory and thus subject to Israeli municipal law. Indeed, most of the norms of international law that are accepted and confirmed as applicable to the OPT, by the ICJ and a majority of international actors, is material *non grata* for human rights lawyers arguing in front of the Israeli Court. The resulting dearth of available legal arguments translates directly into the extremely limited protections offered to the Palestinian individuals and communities being represented. Related to this is the issue of justiciability referred to in section III.ii

¹⁰⁷ David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002) 20.

above, and the tight limits imposed by the Court on the parameters of what cases may even be brought before the Court.

Of course, for the individuals involved, the “minor” victories, whatever they are, can and often do make enormous differences in their lives. The ‘individual vs. collective’ debate – where a victory for an individual or group of individuals must be weighed against the detriments of a legal decision to the larger population – continues to rage within the human rights community, and rightly so. It is often dangerous to sacrifice short-term good for longer-term benefit, because that longer-term benefit cannot often be guaranteed. Many human rights violations have been allowed to be committed throughout history on the basis of this logic. In this case, however, after decades of consistently harmful jurisprudence, when it appears virtually guaranteed that this broader harm will continue, and that small gains will simply smooth over the larger crimes of the occupation, we must at least ask ourselves if that is a price we are still willing to pay for the sake of occasional, small, short-term individual victories.

Before moving on to further complications and challenges, it must be noted that there is another concern accompanying these victories, which is the reality of the enforcement of the Court’s decisions. Many of the Court orders are not actually implemented, but remain empty promises. The substantial number of cases where the Israeli military has failed or refused to abide by the Court’s decisions must be factored into any consideration of the Court’s ‘positive effect’. While the question of enforcement is beyond the scope of this paper, it is essential to bear in mind this reality when ascertaining whether the HCJ is a useful forum for any redress at all.

ii. *Potential Action*

There are a number of potential strategies that could be adopted by the human rights community in the OPT, Israel and internationally in response to the HCJ's continued role as a rubber stamp for illegal Israeli policies. Given their sway within Israel, and the appearance of legitimacy they would add to any action taken against their own Court, the voice of Israeli human rights organisations is crucial. Any strategy pursued must comprise certain common aims, including highlighting, both in Israel and abroad, the disastrous nature of the HCJ jurisprudence relating to the OPT. The omissions and misapplication of law within the HCJ jurisprudence must be highlighted, and the Court's decisions must be used to act as a public record of the violations and as a basis for advocacy work to bring them to a halt.

With the bigger picture in mind, any strategy must be partially directed at putting an end to the HCJ's role as a tool of the occupation. Potential courses of action include, but are not limited to:

- The human rights legal community continuing as before, hoping to gain minor victories while seeking parallel redress in international judicial and political fora.
- The mounting, with consensus in the human rights community, of a comprehensive or partial boycott against the HCJ. This principled stance would have to be weighed against the losses suffered by Palestinians. In order to both justify these immediate sacrifices and increase any potential effectiveness of a boycott, the latter should be accompanied by a coordinated and sustained advocacy campaign. While there may be an argument that a comprehensive boycott would be unfeasible, a partial boycott might better allow for individual relief to be sought where and when it may help, while at the same

time refraining from allowing the Court the opportunity to rule on fundamental legal issues regarding Israeli policies in the OPT. This can serve to discredit the Court and highlight its role to date in effectively fortifying the occupation's illegal policies.

- Palestinians continuing to petition the Court, while at the same time the human rights community launches an advocacy campaign against the Court, and seeks to raise awareness and exert pressure by organising independent international expert observers to monitor hearings. This avoids the short-term sacrifices, but is not as strong a statement.
- The legal community flooding the Court with petitions in the hope of obstructing its functioning and resources. This too would likely only be effective if accompanied by a coordinated advocacy campaign.
- Petitioners not taking cases unless the case itself was accompanied by a parallel advocacy campaign. Given constraints on resources, and the difficulty of coordinating on a case-by-case basis, this potentially effective strategy necessarily requires a cautionary approach.

iii. *Conclusion*

Hope that the HCJ will suddenly change course and become a fair and balanced source of legal redress for Palestinians places the human rights community in danger of compromising its own commitment to protecting Palestinian rights. Engaging in activism against the Court that is most relevant and important to its cause may at first seem anathema to a movement grounded in international law and justice. However, while logic and international legal standards would dictate a completely different Court, with completely different outcomes, experience and history say otherwise – and as Oliver Wendell Holmes Jr. observed, the life of the law has never been logic but rather experience. As such, after four decades of the HCJ's complicity with the oppression of the Palestinian people, even as legal advocates it is time to adopt a broader perspective and to engage with a new legal and tactical realism.

This means that human rights defenders and their allies are now engaged in a bigger and more complicated fight than simply attempting to invoke international law in traditional legal settings. Instead, they must work diligently to regain the objectivity and fairness of international law, and to ensure that this law is then applied properly to the OPT. The further the HCJ moves away from these fundamental principles, the less relevant international law becomes. Not taking up this fight, therefore, may be an implicit acceptance of the marginalisation of the human rights community's own role. That community must charge itself with preserving the role of international law within the OPT. Without such vigilance, as the Palestinian experience within the OPT has shown:



The language of law can easily become a language of right and wrong, of moralistic reproach, of the clothing of interest in the garments of rectitude, of the concealment of factual changes with legal fictions, of refined scholasticism in the face of urgent practical problems, and of the facile application of general rules without a deep understanding of situations that are unique.¹⁰⁸

¹⁰⁸ Adam Roberts, "Prolonged Military Occupation: The Israeli Occupied Territories 1967-1988" in Emma Playfair (ed.), *International Law and the Administration of Occupied Territory* (Clarendon Press, Oxford, 1992) 45.