NO PLACE FOR PALESTINIANS: THE ISRAELI HIGH COURT OF JUSTICE FADES OUT OF THE GLOBAL COMMUNITY OF COURTS — THE FARCICAL TRAGEDY OF THE 2022 JUDGMENT ON MASAFER YATTA

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ABSTRACT

In a recent decision the Israeli High Court of Justice, the highest instance in the Israeli judicial system, authorized the forcible transfer of some 1,000 Palestinians from a West Bank community. Much like a biopsy sample, the article draws on its microanalysis of this individual case to expose a malady afflicting the body politic and entire corpus of judicial decisions concerning Israel's conduct in the occupied Palestinian territory. This malady's symptoms are increasingly evident across the global legal order. The proposition advanced in this article is three-fold: first, from the perspective of international legal doctrine, the judgment lacks any foundation, bringing about tragic consequences for the affected communities while offering a farcically inadequate account of international law. Second, the measures employed to displace the community are but an example of myriad legal technologies developed by the Israeli authorities and facilitated by Israeli courts that have fragmented the occupied territory into numerous zones, relegating Palestinians to a "no-place" while Jewish settlers take over their land. Third, while the judiciary has always been complicit in this process, the Israeli High Court of Justice's farcical treatment of international law in the case is indicative of change in its approach to international law. The Israeli court, however, is not alone in signaling disengagement from

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international law: the withering away of the "global community of courts" is a phenomenon of the times we live in, suggesting both that the cost attached to blatant violations of international law may be minimal and that we are moving from a rule of law to a rule by law paradigm.

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1. INTRODUCTION

"You may have noticed that I am not all there myself."[1]

The night of the 4th of May 2022 was celebrated by most people living between the Mediterranean and the Jordan river: it marked the eve of Israel's 74th Independence Day and the end of Ramadan, the Muslim holy month of fasting (Eid-al-Fitr). For over 1000 residents of the villages of Masafer Yatta, in the Southern Hebron Hills in Area C of the West Bank,[2] that night took a woeful turn: just before the stroke of midnight, the Israeli Supreme Court, sitting in its capacity as a High Court of Justice ("HCJ"),[3] issued a judgment authorizing their eviction from their land for the purpose of implementing the order of the military commander declaring the area a "firing zone" for military training.[4] This judgment is the point of departure of this article.[5]

The proposition advanced in this article is three-fold: first, from the perspective of international legal doctrine, the judgment lacks any foundation. The eviction amounts to forcible transfer, a grave breach of the

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[1] ALICE IN WONDERLAND (Walt Disney Productions 1951) (Cheshire Cat speaking).

[2] Following the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (also known as "Oslo II"), *infra* note 212, the West Bank was divided into three areas—Areas A, B, and C. Area A is under full civil and security control of the Palestinian Authority. Area B is under Palestinian civil control and joint Israeli-Palestinian security control. Area C, covering more than 60% of the West Bank, is under full Israeli control. The fragmentation of the Palestinian territory to further zones and areas is discussed in Part 3 below.

[3] § 15(c), Basic Law: Judicature, 5748–1984, LSI 38 101 (Isr.), https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawTheJudiciary.pdf [https://perma.cc/5NTG-H782] (unofficial English translation). This statute provides that the Supreme Court of Israel may also sit as a High Court of Justice, and "[w]hen so sitting, it shall hear matters, in which it deems it necessary to grant relief for the sake of justice, and which are not within the jurisdiction of another court or tribunal." *Id*. In 1972, the Court made an unprecedented decision to open its gates to petitions emanating from the Occupied Palestinian Territory ("oPt") and to determine them in the light of both international law and Israeli law. *See* HCJ 337/71 Christian Society for the Holy Places v. Minister of Defense, 26(1) PD 574 (1972). For a summary in English, see Nitza Shapiro-Libai, *Judgments of the Supreme Court of Israel*, 2 ISR. Y.B. HUM. RTS. 317, 354–56 (1972). The engagement of the HCJ with international law in respect of such petitions is the focus of Part 4.

[4] *See* HCJ 413/13 Abu Aram v. Minister of Defense, Isr. Sup. Ct. Database (2022) [hereinafter Masafer Yatta Judgment] (authors use "*Abu Aram*" for textual references to HCJ 413/13 and HCJFH 4144/22); S.2.80 Area Closure Order (June 8, 1980) [hereinafter 1980 Area Closure Order] (on file with authors); S.5.82 Area Closure Order (Nov. 12, 1982) [hereinafter 1982 Area Closure Order] (on file with authors); S.6.99 Area Closure Order (May 5, 1999) [hereinafter 1999 Area Closure Order] (on file with authors).

[5] Masafer Yatta Judgment, *supra* note 4. The petitioners' subsequent request for a further hearing before an extended panel of the HCJ was rejected by the Court's Chief Justice, leaving the judgment in place. *See* HCJFH 4144/22 Abu Aram v. Minister of Defense, Isr. Sup. Ct. Database (2022).

Fourth Geneva Convention[6] and a war crime under the Statute of the International Criminal Court.[7] The eviction also entails a violation of other provisions of international law regarding the administration of private and public property in occupied territories and concerning a range of human rights. Part 2 offers a close reading of the judgment to substantiate this assessment. Second, the designation of the area as a "firing zone" must be read in context. That context, discussed in Part 3, discloses that it is but one of myriad legal technologies enabling the fragmentation of the occupied territory into numerous zones. This legal production and regulation of the Palestinian space generates facts on the ground that increasingly ensures that the Palestinians inhabit a "no-place."[8] Over the 55 years of Israel's exercise of control over the territory, the HCJ has facilitated this process.[9] The Masafer Yatta judgment is, in that sense, no exception. But this, as suggested in the third element comprising our proposition, is not the only sense in which the judgment should be read. The contemptuous treatment of international law by the HCJ indicates change over time in judicial effort to engage with international law seriously. This change is the focus of Part 4. The Israeli court is not the only judicial institution in a state proclaiming to be a democracy whose rulings suggest that it is "not all there," insofar as international law is concerned.[10] Part 5 offers some concluding thoughts on this withering away of the "global community of courts,"[11] a phenomenon of the times we live in, times which render the international college of lawyers

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[6] Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 49(1), 147, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV].

[7] Rome Statute of the International Criminal Court art. 8(a)(vii), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

[8] "No-Place" is a term depicting an extreme form of heterotopia. *See* MICHAEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 198 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977). The oPt has become a heterotopia because the Palestinians are separated from their land, from other Palestinians and from Israelis, yet closely controlled by the latter. Note that the term "no-place" should be distinguished from "non-place." The latter, first introduced by Marc Augé, is used to oppose the concept of a sociological "place." If a place can be defined as relational, historical, and concerned with identity, then it is a "place." The rest would be "non-places," such as for example highways, airports, and supermarkets. *See* MARC AUGÉ, NON-PLACES: INTRODUCTION TO ANTHROPOLOGY OF SUPERMODERNITY 111 (John Howe trans., Verso 1995).

[9] *See generally* Alice M. Panepinto, *Jurisdiction as Sovereignty Over Occupied Palestine: The Case of Khan-al-Ahmar*, 26 SOC. & LEGAL STUD. 311 (2016).

[10] *See generally* Tamar Hostosvky Brandes, *International Law in Domestic Courts in an Era of Populism*, 17 Int'l J. Const. L. 576 (2019); *see also id*. at 584–86 (discussing Israel's HCJ).

[11] *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192 (2003).

ever more invisible.[12]

2. MASAFER YATTA: READING THE JUDGMENT

"I only wish I had such eyes," the King remarked in a fretful tone.

"To be able to see Nobody! And at that distance, too!"[13]

2.1 Background

On July 11, 1967, shortly after the Palestinian territory came under Israeli occupation, a legal opinion titled "Training Zones in West Bank" was issued by the Israeli Military Advocate General ("MAG") Corps.[14] Signed on behalf of Col. Meir Shamgar, who was then the MAG and who would later become Chief Justice of the Israeli Supreme Court, the opinion cautioned that "civilians should not be evicted from an area for the purpose of establishing training zones for the Israel Defense Forces."[15] It noted that this was merited "both for political and humanitarian reasons, and for reasons related to the provisions of international law."[16] More specifically, the opinion observed that:

> Article 49 of the Convention relative to the Protection of Civilian Persons in Times of War, to which Israel is party, expressly prohibits the forcible transfer of civilians in an occupied territory, unless so required for imperative military reasons. In the case at hand, it cannot be said that military reasons clearly compel the evacuation of the territories designated to become training zones, and it follows that the forcible evacuation of population from these areas would constitute a breach of the provisions of the above Convention.[17]

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[12] *See* Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. UNIV. L. REV. 217, 217 (1977).

[13] LEWIS CARROL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE 65 (Palmyra Classics ed. 2017) (1871).

[14] Memorandum from the Off. of the Mil. Advoc. Gen. to Cent. Command (July 11, 1967) (Isr.). An original copy and English translation of the opinion was published by the Akevot Institute for Israeli-Palestinian Conflict Research ("Akevot"), which had located it in the IDF and Security Establishment Archives. *See Firing Zone 918: A 1967 Legal Opinion Presented to the High Court*, AKEVOT (Jan. 11, 2017), https://www.akevot.org.il/en/article/firing-zone-918-case-1967-legal-opinion-presented-high-court/ [https://perma.cc/WRZ4-KWFM].

[15] Memorandum from the Off. of the Mil. Advoc. Gen. to Cent. Command, *supra* note 14 (author translation). Please note this excerpt is translated by the authors. Other author translations throughout the article are noted. Translations by the authors may differ from the unofficial English translations otherwise provided. Please also note that the spelling of a party's name from Israeli caselaw may vary, especially if an English translation is not available.

[16] *Id.*

[17] *Id.*

Any influence that this opinion might once have had on Israeli decisionmakers was evidently on the wane by the early 1980s. On June 8, 1980, the Israeli military authorities designated an area of some 15,000 dunams (about 3,700 acres) in the northwestern part of Masafer Yatta as a firing zone.[18] Minutes from a meeting of the Israeli Ministerial Committee for Settlement Affairs held a year later, on July 12, 1981, indicate that the concerned authorities were well aware that civilians resided in the Southern Hebron Hills where Masafer Yatta is located.[19] In the meeting in question, then Minister of Agriculture, Ariel Sharon, proposed that land in the area be allocated to the military for the purpose of live-fire training.[20] Sharon—whose activities at the time subsequently earned him a reputation as a chief architect of the Israeli settlement enterprise in the oPt[21]—clarified that he was motivated by concerns regarding "the expansion of the Arab villagers from the hill," adding that "we have an interest in expanding and enlarging the firing zones there in order to keep these areas, which are vital, in our hands."[22] These minutes suggest that the presence of Palestinians in the area was known, and that far from serving as a deterrent it was in fact the motivating drive for the expansion of the firing zones. The firing zones in Masafer Yatta were indeed expanded in 1982,[23] and again in 1999,[24] eventually encompassing an area of some 33,000 dunams (8,155 acres) which the Israeli military refers to as Firing Zone 918.[25]

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[18] 1980 Area Closure Order, *supra* note 4.

[19] Protocol of the Gov't & World Zionist Org. Joint Comm. for Settlement Affs. (July 12, 1981) (Isr.). Akevot found a copy of the minutes in the Israel State Archive and made them available to the public. *See Document Exposed by Akevot: Ariel Sharon Instructed IDF to Create Training Zone to Displace Palestinians*, AKEVOT (Aug. 9, 2020) [hereinafter *Document Exposed by Akevot*], https://www.akevot.org.il/en/news-item/document-revealed-by-akevot-ariel-sharon-instructed-idf-to-create-training-zone-to-displace-palestinians/ [https://perma.cc/YK82-L98M].

[20] *See Document Exposed by Akevot*, *supra* note 19; *see also* Ofer Aderet, *40-Year-Old Document Reveals Ariel Sharon's Plan to Evict 1,000 Palestinians from Their Homes*, HAARETZ (Aug. 9, 2020), https://www.haaretz.com/israel-news/2020-08-09/ty-article/.premium/40-year-old-document-reveals-ariel-sharons-plan-to-expel-1-000-palestinians/0000017f-e4f9-d804-ad7f-f5fba0ee0000 [https://perma.cc/L8JZ-RFAR].

[21] *See* Eyal Weizman, *The Architecture of Ariel Sharon*, AL JAZEERA (Jan. 11, 2014), https://www.aljazeera.com/opinions/2014/1/11/the-architecture-of-ariel-sharon [https://perma.cc/K6XK-H9AJ]. *See generally* EYAL WEIZMAN, HOLLOW LAND: ISRAEL'S ARCHITECTURE OF OCCUPATION (2017).

[22] *See* Aderet, *supra* note 20.

[23] *See* 1982 Closure Order, *supra* note 4 (expanding the firing zone to the south-east of Masafer Yatta).

[24] *See* 1999 Closure Order, *supra* note 4 (redesignating the area as a firing zone following the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip).

[25] Christian Sowa, *Smoothing the Striated Space of Occupation: The Struggle over Space in the West Bank*, PAL PAPERS, June 14, 2014, at 11.

The closure orders prohibiting access to the area designated as a firing zone were issued by the military commander pursuant to (i) a provision of the emergency regulations introduced by the British Mandate for Palestine, which Israel maintains are still in force in the West Bank;[26] and (ii) a provision of the military legislation that Israel enforces in the West Bank.[27] The latter provision grants the military commander sweeping authority "to declare that an area or place are closed" and to introduce conditions restricting or permitting access to the closed zone.[28] The military is also granted authority to remove a person who enters the area in violation of the closure order except in the case of a "permanent resident of the closed zone."[29] The latter exception may have been included in the military order as a nod to the MAG's aforementioned legal opinion. Whether the inhabitants of Masafer Yatta in fact fall within the category of permanent residents exempt from eviction would later become a central point of contention. However, it would be decades until such disputes would be brought before the Israeli courts.

Indeed, residents of Masafer Yatta report that, until the late 1990s, the Israeli military rarely served eviction orders in the area and the few such orders that were served were hardly ever enforced.[30] This changed

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[26] *See* Defence (Emergency) Regulations, Regulation 125 (1945). For an English translation, see 1442 PALESTINE GAZETTE 1055, 1090 (1945), https://www.nevo.co.il/law_word/law21/pg-e-1442-2.pdf [https://perma.cc/KKR2-2UZM]. Israel's position that these regulations remain in force has been disputed on the grounds that the UK Parliament adopted an Order-in-Council revoking them three days before the termination of the British Mandate over Palestine. *See* DAVID KRETZMER & YAËL RONEN, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 42–45 (2d ed. 2021).

[27] At the time when the closure orders were issued for Masafer Yatta, this provision was contained in Section 90 of a 1970 military order. *See* § 90, 378 *Order Regarding Security Directives (Judea and Samaria)* (1970). The identical provision currently in force is contained in an updated order. *See* § 318, 1651 *Order Regarding Sec. Provisions (Judea and Samaria)* (2009), https://www.nevo.co.il/law_html/law65/666_027.htm#Seif317 [https://perma.cc/RE7F-CAW5]. For an English translation, see https://hamoked.org/files/2017/1055_eng.pdf [https://perma.cc/68M2-ANML].

[28] *Order Regarding Sec. Provisions (Judea and Samaria)*, *supra* note 27, § 318.

[29] *Id.*

[30] *See* ANTIGONA ASHKAR, B'TSELEM, MEANS OF EXPULSION: VIOLENCE, HARASSMENT AND LAWLESSNESS AGAINST PALESTINIANS IN THE SOUTHERN HEBRON HILLS 11, 17 (2005). The Israeli authorities have contested this account maintaining that enforcement efforts were consistently undertaken from the 1980s. *See* HCJ 413/13 Abu Aram v. Minister of Defense, Respondent's Brief, ¶¶ 45–66 (Mar. 20, 2018) [hereinafter Masafer Yatta Respondent's Brief] (on file with authors). On both accounts, eviction orders were first contested in petitions before the HCJ in 1997 and 1998. In those cases, the petitions were withdrawn after the State agreed to allow the petitioners to enter the area during certain times of year. *See* HCJ 6754/97 Ali v. Military Commander for the West Bank, Isr. Sup. Ct. Database (1999) (in which three

dramatically in 1999, when the Israeli military authorities issued eviction orders to residents of twelve hamlets in the area and proceeded to forcibly remove some 700 people from their homes.[31] Over 200 families that had been uprooted filed petitions before the HCJ demanding that the eviction orders be cancelled and that they be permitted to return to their homes.[32] In the wake of the petitions, the HCJ issued an interim order instructing that, pending another decision on the matter, the authorities were to maintain the status quo that had existed prior to the evictions.[33]

With the interim order in force the Court urged the parties to reach a compromise directing them to a mediation procedure that went on for years and ultimately failed.[34] Still more years went by until, in July 2012, the State eventually notified the HCJ that it had revisited its position and decided to allow petitioners to reside in the northwestern part of the firing zone.[35] The State went on to insist that Firing Zone 918 remains necessary for maintaining the general preparedness of its armed forces, noting that this was confirmed by the lessons drawn from Israel's 2006 military campaign in Lebanon which involved combat in similar terrain.[36] Accordingly, the State notified that the rest of the firing zone would remain a closed area which Palestinians would be permitted to access only for herding and farming purposes at designated times of the year.[37] The HCJ ruled that this decision marked a change in the State's normative position and consequently removed the petitions from the docket.[38] The petitioners promptly filed amended petitions.[39]

The HCJ judgment which dampened Eid al-Fitr celebrations in Masafer Yatta on May 4, 2022, was finally published after another long period during which the parties were encouraged to reach a compromise but failed to do

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petitions were jointly decided); HCJ 6754/97 Ali v. Military Commander for the West Bank, Respondent's Brief, ¶¶ 22–23 (May 8, 1999) (on file with authors).

[31] ASHKAR, *supra* note 30, at 11.

[32] *See* HCJ 517/00 Hamamdeh v. Minister of Defense, Filed Petition (Jan. 19, 2000) (on file with authors); HCJ 1199/00 Abu Aram v. IDF Commander, Judea and Samaria, Filed Petition (Feb. 21, 2000) (on file with authors). The two petitions were unified.

[33] HCJ 517/00 Hamamdeh v. Minister of Defense, Interim Order, Isr. Sup. Ct. Database (Mar. 29, 2000).

[34] ASHKAR, *supra* note 30, at 14.

[35] HCJ 517/00 Hamamdeh v. Minister of Defense, ¶ 2, Isr. Sup. Ct. Database (2012).

[36] *Id.*; HCJ 517/00 Hamamdeh v. Minister of Defense, Notice on Behalf of the Respondents ¶¶ 11–12 (July 19, 2012) (on file with authors).

[37] HCJ 517/00 Hamamdeh, Notice on Behalf of the Respondents, *supra* note 36, ¶ 3.

[38] HCJ 517/00 Hamamdeh, *supra* note 35, ¶ 5.

[39] HCJ 413/13 Abu Aram v. Minister of Defense, Filed Petition (Jan. 16, 2013) [hereinafter Masafer Yatta Petition] (on file with authors); HCJ 1039/13 Yunis v. Minster of Defense, Filed Petition (Feb. 7, 2013) (on file with authors). The two petitions were unified.

so.[40] Decided unanimously by the three justices on the panel, the judgment rejected the petition on both procedural and substantive grounds, thereby authorizing the eviction of over 1,000 people from the Palestinian communities that now reside in the area.[41]

The remainder of this Part reviews and critically appraises the legal reasoning for the judgment as set forth in the lead opinion by Justice David Mintz, with whom Justices Amit and Grosskopf concurred.[42] Three elements of the reasoning are considered in turn. First, the ruling that the petition ought to be dismissed *in limine* on procedural grounds due to laches and unclean hands on the part of the petitioners.[43] Second, the factual assertion that the petitioners had not resided in Masafer Yatta on a permanent basis prior to the area's designation as a firing zone and consequent substantive ruling that the evictions are permissible under the applicable military order.[44] Third, a brusque dismissal of the petitioners' argument that international law renders the evictions unlawful.[45] In converse to the approach taken by the HCJ, this third element is examined here in most detail. Finally, concerns are raised about a colonial and discriminatory approach evinced in the judgment.

2.2 Grounds for in Limine *Rejection of the Petition: Laches and Unclean Hands*

The authorities advanced claims of laches and unclean hands to argue that the petition should be rejected *in limine*.[46] They based the laches claim on the observation that the petitioners waited almost twenty years until they first petitioned against the closure order that the military had issued in 1980.[47] The petitioners were accused of unclean hands because they had continued to build in the firing zone during the period when the Court's interim order was in force protecting them from evictions.[48] The HCJ accepted both claims.[49]

The petitioners had argued with respect to laches, that their original petition in 2000 was not unduly delayed as it was directed against evictions

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[40] Masafer Yatta Judgment, *supra* note 4, ¶ 11.

[41] *See id*.; Press Release, Office for the Coordination of Humanitarian Affairs, Fact Sheet: Masafer Yatta Communities at Risk of Forcible Transfer, at 3 (June 2022), https://www.un.org/unispal/wp-content/uploads/2022/07/OCHAFACTSHEET_060722.pdf [https://perma.cc/5CV7-2VMS].

[42] Masafer Yatta Judgment, *supra* note 4.

[43] *Id*. ¶¶ 26–28.

[44] *Id*. ¶¶ 33–41, 43–45.

[45] *Id*. ¶¶ 31–32.

[46] *Id*. ¶¶ 26–28. *See* Masafer Yatta Respondent's Brief, *supra* note 30, ¶¶ 93–97, 109–17.

[47] Masafer Yatta Judgment, *supra* note 4, ¶ 25.

[48] *Id*. ¶ 26.

[49] *Id*. ¶¶ 26–28.

implemented in 1999 pursuant to an area closure order issued that year.[50] This argument evidently failed to impress the HCJ which ruled that the petitions were indeed marred by a "clear, lengthy and significant" delay for which no adequate justification was provided.[51] The HCJ further noted that the delay compromised the gathering of evidence necessary to decide the factual dispute as to whether Masafer Yatta was a place of permanent residence for the petitioning communities prior to the imposition of the closure in 1980.[52]

The main difficulty with this ruling by the HCJ is that it comes far too late. If *in limine* dismissal for laches was justified when the petitions were filed in 2000, the case should have been dismissed at the time. Instead, the HCJ had elected to keep the case open, had accepted an amended petition in 2013, and had repeatedly issued order *nisi* in response to the petition.[53] In so doing, the Court had indicated that it was willing to examine the merits of the case. When it finally delivered its judgment in May 2022, the time for *in limine* dismissal had thus long since passed.[54]

The long duration of the proceedings also mitigates the HCJ's finding that the petitioners had acted with unclean hands. The petitioners did not deny that they had built structures without a permit during the twenty-two-year period in which the interim order was in force.[55] However, they argued that life in the area could not be expected to grind to a halt for over two decades and that construction was necessitated by the evolving needs of their communities as they naturally grew over the years.[56] They added that it was pointless to seek a building permit as there was no prospect of obtaining one in an area designated as a firing zone (indeed, as elaborated below, Palestinians have precious little chance of obtaining a permit to build even in parts of Area C that are not so designated).[57] The petitioners' argument, pithily expressed by their counsel who quipped that "life is stronger than any interim order," was resoundingly rejected by the HCJ which deemed it

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[50] *Id*. ¶ 25.

[51] *Id*. (author translation).

[52] *Id*.

[53] *Id*. ¶¶ 10–11.

[54] Detailed arguments against the *in limine* dismissal for laches have been presented in a request for a further hearing that the petitioners submitted. *See* HCJFH 4144/22 Abu Aram v. Minister of Defense, Request for Further Hearing ¶¶ 26–54 (June 19, 2022) [hereinafter Masafer Yatta Request for Further Hearing] (on file with authors).

[55] *Id*. ¶ 57; Masafer Yatta Judgment, *supra* note 3, ¶¶ 20, 26; *see also id*. ¶ 1 (Grosskopf, J., concurring).

[56] Masafer Yatta Petition, *supra* note 39, ¶ 91; *see also* Masafer Yatta Judgment, *supra* note 4, ¶¶ 27, 36.

[57] Masafer Yatta Petition, *supra* note 39, ¶ 91. For elaboration on the general constraints that Israel imposes on construction in Area C, see *infra* notes 231–35 and accompanying text.

"nothing short of outrageous."[58] The HCJ insisted that interim orders are meant to preserve the status quo while the case is pending and that the petitioners had breached this principle when they took advantage of interim orders protecting them from eviction to expand construction in the area designated as a firing zone.[59] The HCJ further noted that interim orders that it had issued in other proceedings relating to home demolitions in Masafer Yatta (which involved some of the same petitioners) were explicitly conditioned on the petitioners refraining from further construction.[60]

Besides the argument that changes to the status quo were an all but unavoidable consequence of the long duration of the proceedings, the *in limine* dismissal of the case for unclean hands is also open to challenge on the grounds that this drastic measure should be reserved for actions by the petitioner that relate directly to the petition in question. This is not the case here. The petition in *Abu Aram* concerns *evictions* from Masafer Yatta and the interim order given in the case did not establish a prohibition on *construction*.[61] The interim orders that did prohibit construction were issued in separate petitions directly concerned with construction and demolition in the area.[62] The fact that construction undertaken by some of the petitioners was at odds with the terms of the interim orders pertaining to a separate case to which some of those petitioners were party is no justification for a finding of unclean hands in *Abu Aram*. In fact, doing so arguably amounts to imposing a collective punishment on those petitioners in *Abu Aram* who did not engage in construction in breach of interim orders to which they were subject.[63]

The HCJ's professed outrage at the unclean hands it attributed to the petitioners itself seems rather outrageous when considering the same Court's forgiving attitude towards Israeli settlers' illegal construction on Palestinian land. As discussed *infra*, in a case of the latter kind recently decided by an extended panel of the HCJ, the Court made no finding of unclean hands and

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[58] Masafer Yatta Request for Further Hearing, *supra* note 54, ¶ 57; Masafer Yatta Judgment, *supra* note 4, ¶ 27.

[59] Masafer Yatta Judgment, *supra* note 4, ¶¶ 26–27.

[60] *Id*. ¶ 26. The Court was referring to interim orders issued following petitions against demolition orders for structures in Masafer Yatta. *See* HCJ 805/05 'Awad v. IDF Commander in Judea and Samaria, Interim Order, Isr. Sup. Ct. Database (Feb. 17, 2005); HCJ 5901/12 Dababseh v. Head of the Civil Administration in Judea and Samaria, Interim Order, Isr. Sup. Ct. Database (Jan. 11, 2017).

[61] HCJ 5901/12 Dababseh, Interim Order, *supra* note 60, *referenced in* Masafer Yatta Request for Further Hearing, *supra* note 54, ¶ 12.

[62] *See* HCJ 805/05 'Awad, Interim Order, *supra* note 60; HCJ 5901/12 Dababseh, *supra* note 61.

[63] For an elaborated argument along these lines, relying on the jurisprudence of the HCJ itself, see Masafer Yatta Request for Further Hearing, *supra* note 54, ¶¶ 56, 58–59.

instead ruled in favor of the settlers accepting a defense of "good faith."[64]

Finally, and most crucially, when deciding whether and how to apply the procedural rules on laches and unclean hands, the Court should guard against overzealous enforcement and should therefore be mindful not only of the values protected by those rules but also of the rights and interests that are likely to be compromised by *in limine* dismissal of the petition.[65] In the case at hand, the HCJ decided that procedural considerations of dubious merit were of sufficient weight to justify disregarding concerns about the legal merits of a decision threatening to displace more than 1,000 people. Had all the considerations at stake been properly weighed up against each other, the scales of justice would have tilted the other way.

Fortunately, even while it had decided that it was not, in fact, obligated to do so, the HCJ did assess the merits of the petitioners' substantive claims.[66] Unfortunately, as discussed in the next two sections, that assessment leaves a lot to be desired.

2.3 Factual Dispute: Permanent Residents?

The decades-long dispute that the HCJ decided in *Abu Aram* revolved in part around a factual disagreement as to whether the area had been a permanent place of residence for Palestinian communities prior to its designation as a firing zone.[67] While acknowledging that much of the area was privately owned, the Israeli authorities maintained that it had been used only for seasonal herding and farming purposes and that no one had been permanently residing in Masafer Yatta when it was designated as a firing zone.[68] The petitioners, by contrast, insisted that the area had long since been inhabited by their communities, serving as a permanent place of residence for some and a seasonal residence for others.[69] This factual dispute was pertinent to the case because, as aforementioned, the military order authorizing the removal of persons from a closed military zone contains an exception which proscribes the eviction of permanent residents of the area.[70]

While acknowledging that HCJ petitions are "generally not the appropriate venue for a thorough examination of complex factual questions," Justice Mintz went on to assert that the factual question at hand "is not complex in any way," and that "the clear conclusion arising from the overall materials brought before us is that in the time leading up to the declaration of the firing

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[64] *See* CAFH 6364/20 Minister of Defense v. Salha, Isr. Sup. Ct. Database (2022). For further discussion on this and other such cases, see *infra* text accompanying notes 167–72.

[65] Collective punishment is prohibited under GC IV, *supra* note 6, art. 33.

[66] *See* Masafer Yatta Judgment, *supra* note 4, ¶ 29.

[67] *Id*. ¶ 2.

[68] Masafer Yatta Respondent's Brief, *supra* note 30, ¶¶ 13–28.

[69] Masafer Yatta Petition, *supra* note 39, ¶¶ 34–50.

[70] *Order Regarding Sec. Provisions (Judea and Samaria)*, *supra* note 27, § 318.

zone, there was *no* permanent habitation within its boundaries."[71] The materials that Justice Mintz found so convincing included aerial photographs submitted by both parties.[72] As he put it:

> Though there is no dispute that the interpretation of aerial photographs is a matter of expertise, a review of the aerial photographs filed by both the Respondents and the Petitioners reveals, even to the unprofessional, untrained, layman's eye, the clear, unequivocal conclusion that the law is on the side of the Respondents.[73]

There is, however, reason to question whether the unequivocal conclusion that Justice Mintz and his fellow justices drew from the images presented to them was well-founded.

For one thing, scholarship about the evidentiary value of visual images has cautioned, inter alia, that they are too readily regarded as accurate and neutral and consequently elude due skepticism and can prejudice judgment;[74] that, even while they seem to speak for themselves, they are in fact inscrutable,[75] or open to a range of interpretations;[76] and that they give rise to interpretive demands that legal practitioners generally lack the visual literacy to contend with.[77] It has further been argued that visual evidence may compromise decision-making because of viewers' tendency to inappropriately prioritize the information derived from them.[78] Viewers may also willfully ignore the mechanisms by which the images are made and constructed,[79] and their interpretation of the images before them may well be distorted by the unconscious influence of factors such as the picture's framing and their own preferences, expectations, and preconceptions.[80]

More specifically, when it comes to aerial photographs, scholars have

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[71] Masafer Yatta Judgment, *supra* note 4, ¶ 33 (emphasis in original) (author translation).

[72] *Id.* ¶ 17.

[73] *Id.* ¶ 34 (author translation).

[74] *See, e.g.*, Hampton Dellinger, *Words Are Not Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704, 1707–08 (1996).

[75] *See, e.g.*, Jessica Silbey, *Images in/of Law*, 57 N.Y. L. SCH. L. REV. 171, 172–74 (2012).

[76] *See, e.g.*, Jennifer Mnookin, Commentary, Semi-Legibility *and Visual Evidence: An Initial Exploration*, 10 LAW, CULTURE & HUMAN. 43 (2014).

[77] *See, e.g.*, Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1694–96 (2014); Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227, 260 (2006).

[78] *See* Benjamin V. Madison III, *Seeing Can Be Deceiving: Photographic Evidence in a Visual Age: How Much Weight Does It Deserve,* 25 WM. & MARY L. REV. 705, 722–23 (1983).

[79] Jennifer L. Mnookin & Nancy West, *Theatres of Proof: Visual Evidence and the Law in Call Northside 777*, 13 YALE J.L. & HUMAN. 329, 334 (2001).

[80] *See, e.g.*, Yael Granot et al., *In the Eyes of the Law: Perception Versus Reality in Appraisals of Video Evidence*, 24 PSYCH. PUB. POL'Y & L. 93, 97–99 (2018).

noted that crucial visual data may fall below the "threshold of detectability" and have cautioned against positive inferences from "negative evidence" (such as the absence of something from a photo).[81] This certainly appears to be the case with respect to the aerial photographs from which Justice Mintz had so confidently drawn his conclusions. Indeed, aerial photographs of Masafer Yatta that were taken at the time when the area was designated as a firing zone failed to register signs of permanent residence not because the area was not inhabited, but because at the time the residents still lived in their traditional dwellings, namely caves.[82] This was recently confirmed by the anthropologist Ya'akov Havakook, a former employee of the Israeli Ministry of Defense, who conducted extensive field research about the cave dwellers of the Southern Hebron Hills between 1977 and 1982.[83]

Havakook's input is especially significant because a book resulting from his field work, *Life in the Caves of Mount Hebron,* published by the Israeli Ministry of Defense in 1985, was another key piece of the evidentiary material in the case.[84] Both the petitioners' and the State's response to the petition relied heavily on the book to support competing claims about the question of permanent residence.[85] The HCJ adopted the State's reading of Havakook's findings according to which the hamlets in the area had been inhabited only on a seasonal basis at the time when it was designated as a firing zone.[86] However, when asked about the matter, the author himself contradicted the State's account.[87] In 2000, Havakook had agreed to submit a deposition on behalf of the petitioners along with many photographs that he had taken in the 1970s and 1980s which lend credence to their claims.[88] Havakook did not submit this deposition in the end because the Ministry of Defense, his employer at the time, forbade him to do so, warning that he

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[81] *See* EYAL WEIZMAN, FORENSIC ARCHITECTURE: VIOLENCE AT THE THRESHOLD OF DETECTABILITY 18 (2017).

[82] The failure to register the cave dwellings as a permanent place of residence may have resulted not only from their undetectability from the air but also from a cultural-epistemological barrier that prevented such dwellings from being recognized as a settlement. *See* Masafer Yatta Judgment, *supra* note 4, ¶¶ 21, 36, 37, 39–41.

[83] Yuval Avraham, *Israel Says This Book Justifies Masafer Yatta Expulsions. Its Author Begs to Differ,* +972 MAG. (May 25, 2022), https://www.972mag.com/anthropologist-masafer-yatta-firing-zone/ [https://perma.cc/P88C-U6XD].

[84] *See id*.; *see also* YA'AKOV HAVAKOOK, LIFE IN THE CAVES OF MOUNT HEBRON (1985) (Hebrew).

[85] *See, e.g*., Masafer Yatta Petition, *supra* note 39, ¶¶ 33–40; Masafer Yatta Respondent's Brief, *supra* note 30, ¶¶ 13–27; *see also* Masafer Yatta Judgment, *supra* note 4, ¶¶ 14, 21, 39–41, 43.

[86] Masafer Yatta Judgment, *supra* note 4, ¶¶ 40–41.

[87] *See* Avraham, *supra* note 83.

[88] *Id*.

would be subjected to disciplinary action if he did.[89]

The State's selective reliance on (and disregard of) Havakook's expertise is not the only example of evidentiary cherry picking that may have tarnished the HCJ's assessment of pertinent facts.[90] Evidence presented by the petitioners demonstrating that there were stone houses in hamlets in the area in 1966 were dismissed by Justice Mintz on the grounds that "it is not indicative of the state of affairs in 1980" when the area was first designated as a firing zone.[91] The expert opinion of a social anthropologist commissioned by the petitioners was dismissed on the grounds that it relied on field work undertaken years after the designation.[92] Implicit in this rejection was the view that the multiple testimonies of the local residents whom the social anthropologist had interviewed were of no evidentiary value. Indeed, in line with the approach that Israeli courts have taken in other cases concerning an indigenous community facing displacement, the HCJ relied on the writings and expert opinions of Israeli scholars while altogether disregarding the testimonies of the Palestinian residents of Masafer Yatta about their own lived experiences.[93]

2.4 A Flawed and Flippant Account of International Law

The flaws in the HCJ's reasoning on *in limine* dismissal and on the question of permanent residence notwithstanding, the weakest part of the *Abu Aram* judgment is the two paragraphs in which Justice Mintz attempted to set aside arguments derived from international law.[94] The international law-

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[89] *Id*.

[90] *See id*.

[91] Masafer Yatta Judgment, *supra* note 4, ¶ 45 (author translation).

[92] *See id*. ¶ 39.

[93] For analysis of a similar approach in cases concerning the displacement of Bedouin communities in the Naqab/Negev, see Noa Kram, *The Naqab Bedouins: Legal Struggles for Land Ownership Rights in Israel*, *in* INDIGENOUS (IN)JUSTICE: HUMAN RIGHTS LAW AND BEDOUIN ARABS IN THE NAQAB/NEGEV 126, 126, 129, 131 (Ahmad Amara, Ismael Abu-Saad & Oren Yiftachel eds., 2012); Noa Kram, *El-Uqbi v. The State of Israel: Concealing Bedouin Law and History in Determining Land Ownership in the Negev*, *in* LAW, MINORITY, AND NATIONAL CONFLICT 389, 421–23 (Raef Zreik & Ilan Saban eds., 2017) (Hebrew). This contrasts with the approach that has been taken by courts in other jurisdictions with a history of colonial repression and dispossession. *See* BRUCE GRANVILLE MILLER, ORAL HISTORY ON TRIAL: RECOGNIZING ABORIGINAL NARRATIVES IN THE COURTS 4–5 (2011).

[94] Masafer Yatta Judgment, *supra* note 4, ¶¶ 31–32. The flaws in this part of the judgment were quickly pointed out by commentators. *See* Eliav Leiblich, *Wrong to the Core: The Supreme Court of Israel's Ruling on Masafer Yatta*, VERFASSUNGSBLOG (May 8, 2022), https://verfassungsblog.de/wrong-to-the-core/ [https://perma.cc/Z3Q6-F3JV]; Amichai Cohen & Yuval Shany, *Israel's Supreme Court Issues Regressive Judgment on West Bank Deportations,* LAWFARE (May 19, 2022, 9:26 AM), https://www.lawfareblog.com/israels-

related concerns which the Court treated with marked inadequacy emerge from three lines of argumentation. First, that indefinitely closing off a large area of occupied territory, including privately owned land, to facilitate its use as a firing zone violates rules of international humanitarian law (IHL) regulating conduct in occupied territory.[95] Second, that evicting the Palestinian inhabitants from the area would constitute a prohibited act of forcible transfer (even if the closure itself is lawful).[96] Third, that the designation and planned eviction constitute a violation of Israel's obligations under international human rights law ("IHRL").[97] This section explores these lines of argumentation in turn, highlighting shortcomings in the HCJ's treatment thereof.

A. Imposition of a Closure for Military Training Purposes

The argument that the designation of Masafer Yatta as a firing zone was itself incompatible with the law of occupation derives, first, from Article 43 of the Hague Regulations, a core provision of the law of occupation which defines the scope of the occupying power's authority.[98] Pursuant to this provision, the occupying power is charged with administering the occupied territory in lieu of the displaced sovereign with a view to ensuring public order and civil life.[99] To that end, the occupant is required to secure the basic

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supreme-court-issues-regressive-judgment-west-bank-deportations [https://perma.cc/NLB2-CFGA]; Yaël Ronen, *Abu 'Aram: Displacement of Persons, Displacement of Law*, LIEBER INST. (May 20, 2022), https://lieber.westpoint.edu/abu-aram-displacement-persons-displacement-law/ [https://perma.cc/F5HJ-GY7Y]; *see also Eviction of Palestinian Communities in Masafer Yatta: A Failed Account of International Law*, DIAKONIA INT'L HUMANITARIAN L. CTR. (May 13, 2022), https://www.diakonia.se/ihl/news/analysis-international-law-evictions-masafer-yatta/ [https://perma.cc/9H7K-7G5K].

[95] These rules, sometimes referred to as "the law of occupation," are contained in GC IV, *supra* note 6, art. 53; in Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23, Oct. 18, 1907, 36 Stat. 2277 [hereinafter The Hague Regulations]; and in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 54, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Most, if not all, of these provisions reflect customary international law and as such are binding on all States.

[96] GC IV, *supra* note 6, art. 49.

[97] International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

[98] The Hague Regulations, *supra* note 95. This has been stated by the HCJ itself. *See, e.g.*, HCJ 2164/09 Yesh Din: Volunteers for Human Rights v. Commander of the IDF Forces in the West Bank, ¶ 8, Yesh Din (2011), https://perma.cc/8ZDL-JZN8 (unofficial English translation); *see also* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 68–69 (2d ed., 2012).

[99] The Hague Regulations, *supra* note 95, art. 43.

needs and well-being of the local population.[100] While the occupying power is also authorized to implement measures that it deems necessary for military and security purposes,[101] it may not pursue its security goals in a manner which unduly or excessively compromises the interests of the local population.[102] Moreover, the occupying power is only permitted to pursue security interests that are linked to the occupied territory and may not exploit its authority in that territory to advance other security objectives such as training troops for a conflict elsewhere.[103]

The authority of the occupying power is also circumscribed by Article 27 of the Fourth Geneva Convention ("GC IV"), which establishes, inter alia, that protected persons (a category that includes the local population in occupied territory)[104] "are entitled, in all circumstances, to respect for their persons . . . and their manners and customs."[105] This limitation is significant in the case of Masafer Yatta where the local residents' traditional way of life is said to be threatened by the measures that the Israeli military authorities have imposed.

Further, Article 55 of the Hague Regulations establishes that the occupying power "shall be regarded only as administrator and usufructuary" over immovable public property in occupied territory (including all land therein that is not privately owned) and must "administer them in accordance with the rules of usufruct."[106] This provision is understood to authorize the

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[100] *Bruges Declaration on the Use of Force*, INST. DE DROIT INT'L (2003), https://www.idi-iil.org/app/uploads/2017/06/2003_bru_en.pdf [https://perma.cc/HDV7-8YZW].

[101] This authority also emerges from Article 27(4) of GC IV. *See* GC IV, *supra* note 6, art. 27(4).

[102] This requirement, which reflects IHL's foundational demand to establish an equitable balance between competing humanitarian and military considerations, has been recognized by the HCJ. *See* HCJ 2056/04 Beit Sourik Village Council v. Government of Israel, ¶ 58, Versa (2004), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Beit%20Sourik%20Village%20Council%20v.%20Government%20of%20Israel_0.pdf [https://perma.cc/V4KF-ABLG] (unofficial English translation); HCJ 2150/07 Abu Safiya, Beir Sira Village Council Head et al. v. Minister of Defense, ¶¶ 9–35, HaMoked (2007), https://hamoked.org/files/2011/8865_eng.pdf [https://perma.cc/JH4F-EMUT] (unofficial English translation).

[103] This too has been asserted by HCJ. *See* HCJ 390/79 Dweikat v. Government of Israel, at 17, Versa (1979), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Dweikat%20et%20al.%20v.%20State.pdf [https://perma.cc/8LS7-56MD] (unofficial English translation); HCJ 393/83 Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF Forces in Judea and Samaria Area, ¶¶ 12–13, HaMoked (1983), https://hamoked.org/items/160_eng.pdf [https://perma.cc/KR46-BUWG] (unofficial English translation); HCJ 2056/04 Beit Sourik Village Council, *supra* note 102, ¶ 32.

[104] For the definition of "protected persons," see GC IV, *supra* note 6, art. 4.

[105] *Id*. art. 27.

[106] The Hague Regulations, *supra* note 95, art. 55.

occupant to make use of such property "to the extent necessary for the current administration of the territory and to meet the essential needs of the population."[107] Accordingly, the occupant may not use immovable public property for its own domestic purposes and should exercise its authority and right over this property for the benefit of the local population or to meet security needs linked to the occupied territory.[108] Use of land in occupied territory for training purposes not linked to that territory does not satisfy these requirements and is consequently *ultra vires*.

Since much of the land in the area designated as Firing Zone 918 is privately owned,[109] the IHL rules concerning private property in occupied territory also have bearing on the case at hand. These establish that private property must be respected and may not be confiscated.[110] Nor may such property be destroyed by the occupying power except where required by military necessity.[111] Recognizing that situations of belligerent occupation may give rise to circumstances in which there is a pressing military need for the occupying power to take possession of private property, IHL does nevertheless authorize the occupying power to temporarily seize private property in the occupied territory, including immovables.[112] Pursuant to the duty to respect such property, however, this may only be done for a military purpose linked to the occupied territory, and then only for a fixed period of time, in a manner that does not impose disproportionate strain on the resources of the occupied territory and in return for compensation both for the use of the property and for any damage caused to it.[113] Seizure which

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[107] *Bruges Declaration on the Use of Force*, *supra* note 100.

[108] *See* ANTONIO CASSESE, *Powers and Duties of an Occupant in Relation to Land and Natural Resources*, *in* THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS OF ANTONIO CASSESE 250, 251–52 (1992); BENVENISTI, *supra* note 98, at 82; *see also* MICHAEL SFARD, *U: Usufruct*, *in* ORNA BEN-NAFTALI, MICHAL SFARD & HEDI VITERBO, THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 417, 417–19 (2018) [hereinafter THE ABC OF THE OPT].

[109] *See* Masafer Yatta Request for Further Hearing, *supra* note 54, ¶ 9 (including information from the Civil Administration indicating that some 12,000 dunams (2,965 acres), or thirty-six percent of the area, is privately owned).

[110] The Hague Regulations, *supra* note 95, art. 46.

[111] GC IV, *supra* note 6, art. 53.

[112] NILS MELZER, INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION 245 (2006).

[113] The Hague Regulations, *supra* note 95, art. 52; *see also The Krupp Trial*, *reprinted in* 10 LAW REPS. TRIALS WAR CRIMS. 69, 137 (1949) [hereinafter *The Krupp Trial*], https://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-10/Law-Reports_Vol-10.pdf [https://perma.cc/7MFN-R5QR]; HCJ 290/89 Juha v. Military Commander of Judea and Samaria, 43(2) PD 116, 118–20 (1989). Some commentators maintain that Article 52, which regulates requisitions in kind and services, covers only movable private property. That said, the commentators in question appear to accept that seizure of private immovables must

actually prevents owners from exercising their rightful prerogatives over their property amounts to a prohibited form of confiscation.[114]

Taken together, these provisions give reason to question the legality of the military commander's order closing off Masafer Yatta for military training purposes, on the grounds that he had exceeded his authority. For one thing, they imply that the only legitimate purpose for imposing such a measure would be to promote the welfare of the local population or to attain a security objective linked to the occupied territory. In this case, the closure brings harm rather than benefit to the local population, and evidence submitted by the petitioners—notably the aforementioned protocol recording statements by then Agriculture Minister Ariel Sharon[115]—suggests that it was not motivated by any real military needs, but rather by the illegitimate goal of preventing Palestinian expansion into the area. The contention that Firing Zone 918 was meant to serve general training purposes would not help the military's case as such training is not directly linked to security in the oPt and is therefore not a legitimate security purpose. Moreover, even if the closure were imposed for a legitimate security objective, it would have to be shown that it is indeed a necessary measure for achieving that objective and that it does not impose disproportionate harm on the local population. This would not be the case, for instance, if the security need for a firing zone could be achieved by other unharmful or less harmful means, such as by training troops in Israel's own territory. Indeed, given the extensive and long-lasting harm that the closure inflicts on the basic rights of many members of the local population, the security need attained by imposing it would have to be shown to be extremely weighty.

Where the closure and designation of the area as a firing zone impinge on private property, there are still more reasons to question their legality. This is particularly true given the long and indefinite duration of the closure, which seems to be in sharp contrast with the rule permitting only temporary seizure of private property for a fixed time to serve the occupant's immediate operational needs.[116] Given the continuous nature of the restrictions imposed on the landowners' access and use of their property, the closure might amount to a prohibited act of confiscation.[117] There is also reason to doubt that the

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be for a security need, temporary, for a fixed time, and subject to compensation. *See* YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 225–28 (2009).

[114] *The Krupp Trial*, *supra* note 113, at 137; *see also* Loizidou v. Turkey, App. No. 15318/89, ¶ 57 (Dec. 18, 1996), https://hudoc.echr.coe.int/eng?i=001-58007 [https://perma.cc/E4PE-YZ72] (holding that continuous denial of access to land amounts to effective loss of ownership rights over it).

[115] *See supra* notes 19–22 and accompanying text.

[116] The Hauge Regulations, *supra* note 95, art. 46.

[117] This point, which can be drawn from *The Krupp Trial*, *supra* note 113, and from *Loizidou*, *supra* note 114, was raised in an expert opinion by Professors Eyal Benvenisti,

establishment of a firing zone on thousands of acres of private land meets the requirement that requisitions be in proportion to the resources of the occupied territory.[118]

The HCJ's ruling in *Abu Aram* fails to consider any of these issues nor does it address the general question of whether the military commander's decision to designate the area as a firing zone was lawful under the law of occupation. Instead, citing the mandatory regulation and military order mentioned above,[119] it simply asserts that the military commander "is competent to declare closed zones and prohibit entry into them without a permit" and that this is "a broad power designed to serve military-security interests, including the assignment of training grounds for the purpose of training combatants and maintaining their fitness."[120] Referencing the HCJ's past jurisprudence, the judgment acknowledges that this authority derives from the law of occupation and suggests that it is rooted, inter alia, in the occupying power's obligation to ensure the welfare and security of the population in the territory.[121] No effort is made to explain how the order issued in the present case might promote the safety and security of the local population. Indeed, in what she described as "a woeful display of lack of self-awareness," one commentator observed that the HCJ not only "upheld a measure denying entire communities the right to reside in their homes as one justified by the obligation to ensure their welfare and security," but also, "[n]o less audaciously," sought support for this position by quoting from a past decision in which it had ruled that it was *unlawful* to deny Palestinians access to their lands as a means to protect their safety (in that case from settler violence).[122]

In previous cases in which it had ruled that the military commander's power and authority in the oPt derives from the law of occupation, the HCJ proceeded to observe that any exercise of such authority is therefore subject

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David Kretzmer, and Yuval Shany that was submitted in support of the petition in *Abu Aram*. *See* Expert Opinion Regarding the Petition Filed by Residents of Villages in Firing Zone 918 Against Plans to Evict Them, ¶ 36 (Jan. 16, 2013) [hereinafter Expert Opinion], https://www.breakingthesilence.org.il/inside/wp-content/uploads/2020/09/expert-opinion-zone-918-eng.pdf [https://perma.cc/6QSW-6V73] (unofficial English translation).

[118] *See id.* ¶ 35.

[119] *See* sources cited *supra* notes 26–27.

[120] Masafer Yatta Judgment, *supra* note 4, ¶ 30 (author translation).

[121] *Id.* ¶ 31.

[122] Ronen, *supra* note 94. The prior case in reference is HCJ 9593/04 Morar v. IDF Commander in Judea and Samaria, Versa (2006), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Morar%20v.%20IDF%20Commander%20in%20Judaea%20and%20Samaria.pdf [https://perma.cc/DY3P-FNZ9] (unofficial English translation), *quoted in* Masafer Yatta Judgment, *supra* note 4, ¶ 31.

to the obligations and limitations set in that body of law.[123] The latter observation is wholly absent from the *Abu Aram* judgment. Instead, and rather bewilderingly, Justice Mintz asserted that "there is no dispute that when an express provision of Israeli law is at odds with international law, Israeli law supersedes."[124] This is a correct description of Israeli domestic law's approach to situations in which there is a direct clash between its own provisions and those of international law, but that is not what is at issue here. The mandatory regulation and military order that the military commander relied upon in this case are not part of *Israel's* domestic law, but of the domestic law of *the occupied territory*. The military commander cannot rely on that law—and certainly not on a military order that he himself introduced—to override his obligations under the law of occupation which is the source of his authority.[125] Baron Münchhausen might be able to pull himself out of the mire by his own hair, but the military commander cannot.[126] Moreover, there is no actual conflict of laws in the case. While authorizing the military commander to establish a closed military area, neither the British Mandate regulations nor the military legislation dictate that this be done in a way that does not correspond with the rules of the law of occupation such as the requirements of necessity and proportionality discussed above.[127] To the contrary, the military commander is obliged to apply his authority under those provisions in such a manner as to accord with IHL.

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[123] *E.g.*, HCJ 393/83 Jam'iat Iscan, *supra* note 103, ¶ 10 (Barak, J.) ("the exercise of power must uphold the rules of public international law concerning belligerent occupation"); HCJ 2056/04 Beit Sourik Village Council, *supra* note 102, ¶ 33 (Barak, J.) ("The military commander is not at liberty to pursue, in the area held by him in belligerent occupation, every activity which is primarily motivated by security considerations."); HCJ 7957/04 Mar'abe v. Prime Minister of Israel, ¶ 16, Versa (2005) (Barak, J.), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Mara%27abe%20v.%20Prime%20Minister.pdf [https://perma.cc/KMJ6-ELZH] (unofficial English translation) (discussing obligations under Articles 52 and 53 of the Hague Regulations).

[124] Masafer Yatta Judgment, *supra* note 4, ¶ 31 (author translation).

[125] *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION IV OF 12 AUGUST 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 336 (Jean S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY]. While the HCJ has in the past taken the counter view that the local law of the occupied territory has primacy over conflicting international law, Justice Mintz is incorrect to maintain that there is no dispute about this position.

[126] *See* GOTTFRIED AUGUST BÜRGER, DES FREYHERRN VON MÜNCHHAUSEN WUNDERBARE REISEN [THE ADVENTURES OF BARON MUNCHAUSEN] 54 (1786) (Ger.); *see also* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 21 (Rolf-Peter Horstmann & Judith Norman eds., 2001) (1886).

[127] Ronen, *supra* note 94.

B. The Eviction Amounts to Forcible Transfer

The argument that evicting the residents of Masafer Yatta from the firing zone would be unlawful, indeed criminal, rests on the view that it would constitute an act of forcible transfer. Article 49(1) of the GC IV provides that "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . are prohibited, regardless of their motive."[128] Article 147 thereto establishes that unlawful transfer of a protected person amounts to a grave breach of the convention. As such, this act constitutes a war crime.[129] For the purposes of these provisions, the term "forcible transfer" refers to the displacement of protected persons within the occupied territory, as opposed to "deportation" which concerns removal therefrom.[130] The language of Article 49(1) makes it plain that forcible transfer of all kinds, "[i]ndividual or mass," are absolutely prohibited, "regardless of their motive."[131] The only exception to this absolute prohibition is set in Article 49(2) GC IV, which provides that "[t]he Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand."[132]

Removing the residents of Masafer Yatta from the area for the purpose of facilitating its use as a firing zone clearly falls outside of this exception and is consequently subject to the prohibition. In this regard, the question of whether the firing zone was the petitioners' place of permanent residence discussed above is of no significance. The absolute prohibition in Article 49(1) encompasses persons who actually reside in the area and is not restricted to those persons whom the Israeli military authorities categorize as permanent or lawful residents.[133]

Justice Mintz nevertheless bluntly dismissed the petitioners' arguments based on Article 49 GC IV on two grounds. First, he asserted that "it [has] been determined that this is a treaty law provision that does not reflect customary international law."[134] Second, he insisted that the provision "is

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[128] GC IV, *supra* note 6, art 49(1). *See* ICRC COMMENTARY, *supra* note 125, at 277.

[129] Forcible transfer is indeed included among the war crimes over which the International Criminal Court has jurisdiction. *See* ICC Statute, *supra* note 7, arts. 8(2)(a)(vii), 8(2)(b)(viii).

[130] *See* Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 521 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2021).

[131] GC IV, *supra* note 6, art 49(1). *See* ICRC COMMENTARY, *supra* note 125, at 277.

[132] GC IV, *supra* note 6, art 49(2). *See* ICRC COMMENTARY, *supra* note 125, at 277–78 (observing that "[t]he prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2").

[133] *See* ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ¶ 99 (Nov. 14, 2019) (stating "[t]he lawful presence of a person must be assessed on the basis of international law, and should not be equated with the requirement of lawful residence").

[134] Masafer Yatta Judgment, *supra* note 4, ¶ 32 (author translation).

designed to prevent mass expulsions in an occupied territory for purposes of extermination, forced labor or for various political ends" and consequently "has nothing whatsoever to do with the case at hand."[135]

Neither of these propositions stands up to scrutiny.

The first marks a return to an approach that the HCJ had taken in the 1980s when it ruled that the prohibition on deportation from the occupied territory is not part of customary international law and is consequently not enforceable.[136] That this position had any merit even at the time is highly questionable, but given developments in international law that have occurred in the ensuing decades there is no longer any doubt that the prohibition on forcible transfer is now part of customary international law; GC IV has been universally ratified and the convention as a whole is generally recognized as constituting customary law.[137] Indeed, in the years leading up to *Abu Aram,* the HCJ itself has so often ruled on the basis of GC IV that commentators reviewing its jurisprudence implied that it had tacitly accepted the Convention's customary status even while not openly renouncing its previous rulings.[138] Moreover, when it comes specifically to the prohibition on forcible transfer, the International Committee of the Red Cross's authoritative study of customary IHL has explicitly affirmed that it is a customary norm on the basis of a comprehensive review of state practice and *opinio juris*.[139]

Justice Mintz provided no sources or reasoning to substantiate his second contention, that Article 49(1) GC IV is only meant to prohibit mass

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[135] *Id*. (author translation).

[136] *See* HCJ 698/80 Kawasme v. Minister of Defense, 38(1) PD 617 (1981). For a summary in English, see Fania Domb, *Judgments of the Supreme Court of Israel Relating to the Administered Territories*, 11 ISR. Y.B. HUM. RTS. 344, 349–51 (1981). *See also* HCJ 606/78 Ayoub v. Minister of Defense, at 6–7, HaMoked (1979), https://hamoked.org/files/2016/3860_eng.pdf [https://perma.cc/ZY7L-4CQV] (unofficial English translation) (stating that provisions of GC IV regarding the transfer of population from or to occupied territory are constitutive rather than declaratory). Under the Israeli legal system, an international treaty provision that has not been incorporated into domestic legislation is not enforceable by the courts. By contrast, norms of customary international law are considered part of Israel's domestic law and are thus automatically enforceable. *See* Ruth Lapidoth, *International Law Within the Israel Legal System*, 24 ISR. L. REV. 451, 452–55 (1990).

[137] *E.g*., Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AM. J. INT'L L. 357, 361 (2017).

[138] *See* David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT'L REV. RED CROSS 207, 213 (2012); KRETZMER & RONEN, *supra* note 26, at 68–72.

[139] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 457 (2005) (discussing rule 129). For an updated review of practice supporting the conclusion that the prohibition is part of customary IHL, see *Practice Relating to Rule 129. The Act of Displacement*, IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule129 [https://perma.cc/86FG-28FD].

expulsions for purposes of extermination, forced labor, or for various political ends. He would have been hard pressed to do so as this proposition lacks any foundation. The closest he might have come would have been to recall much criticized HCJ rulings from decades ago concerning the prohibition on deportations from occupied territory. In these—manifestly erroneous—decisions, the HCJ asserted that even while worded as an absolute prohibition, the purpose of the prohibition on deportation in Article 49(1) GC IV was to prevent mass deportation of the protected civilian population for extermination or forced labor, or for political or ethnic reasons of the kind that had been perpetrated by the Nazis in the Second World War.[140] Accordingly, it ruled that the prohibition does not apply to the deportation of individual persons who pose a security risk.[141] Even those unfortunate precedents—which are completely at odds with the plain language and drafting history of Article 49(1)[142]—could not support Justice Mintz's contention in *Abu Aram*. For one thing, *Abu Aram* does not concern the transfer of individuals found to pose a security threat but rather the mass transfer of over 1,000 people without assessing their individual cases.[143] For another, the suggestion that Article 49(1) prohibits forcible transfer only "for purposes of extermination, forced labor or for various political ends" cannot be reconciled with the provision of Article 49(2) from which it emerges that all forms of forcible transfer (not just those for purposes of extermination, etc.) are prohibited with the sole exception of evacuations which may be undertaken when the security of the population or imperative military reasons so demand.

C. The Closure and Eviction Violate International Human Rights Law

As an occupying power, Israel's conduct in the oPt is subject not only to the IHL rules forming the law of occupation discussed above but also to IHRL.[144] This includes an obligation to adhere to provisions enshrined in the

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[140] *See* HCJ 97/79 'Awad v Commander of the Judea and Samaria Area, 33(3) PD 309, 316 (1979); HCJ 785/87 Al-Aziz v. Commander of IDF Forces in the West Bank, ¶ 3(g), Versa (1988), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Al-Aziz%20v.%20Commander%20of%20IDF%20Forces%20in%20the%20West%20Bank.pdf [https://perma.cc/RVN8-WH4Z] (unofficial English translation); *see also* Masafer Yatta Judgment, *supra* note 4, ¶ 32.

[141] *See* HCJ 97/79 'Awad, *supra* note 140, at 316; HCJ 785/87 Al-Aziz, *supra* note 140, ¶ 3(g).

[142] *See* KRETZMER & RONEN, *supra* note 26, at 425–29 (arguing that the HCJ's interpretation of Article 49 GC IV in those precedents is at odds with the principles of treaty interpretation set in the Vienna Convention on the Law of Treaties (1969) and relies on an erroneous account of its drafting history and of the drafters' intent).

[143] *See* Ronen, *supra* note 94.

[144] Legal Consequences of the Construction of a Wall in the Occupied Palestinian

International Covenant on Economic, Social and Cultural Rights ("ICESCR") which Israel has ratified.[145] Pursuant to the ICESCR, Israel has an obligation to take appropriate steps to ensure that the individuals in the oPt, over whom it wields power, including the Palestinian residents of Masafer Yatta, will be able to realize their right to an adequate standard of living as well as their interrelated rights to food, clothing, housing, and water.[146] Far from protecting these rights, with the closure and planned evictions in Masafer Yatta, the Israeli authorities have placed them at risk.

Secure access to land, which has been compromised by the closure that Israel has imposed in Masafer Yatta, is considered a precondition for the realization of the right to an adequate standard of living as well as the associated rights to adequate food, water, and housing.[147] This is certainly true of the communities of Masafer Yatta which depend on access to the land in the area that Israel has designated as a firing zone for their livelihood. By removing these communities from the land that sustains their traditional farming and herding practices as well as the unique cave dwelling lifestyle they have maintained at least since the 1830s,[148] the closure and evictions in Masafer Yatta also undermine the community members' right to take part in cultural life.[149]

The evictions also clearly threaten the residents' right to adequate housing, a right which is considered of "central importance for the enjoyment of all economic, social, and cultural rights,"[150] and which concerns not just the

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Territory, Advisory Opinion, 43 I.L.M. 1009, ¶ 112 (July 9, 2004) [hereinafter Wall Advisory Opinion]; *see also*, Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17, 24 (2003); Noam Lubell, *Human Rights Obligations in Military Occupation*, 94 INT'L REV. RED CROSS 317, 318–19 (2012).

[145] *See* ICESCR, *supra* note 97; Wall Advisory Opinion, *supra* note 144, ¶ 112; Comm. on Econ., Soc. and Cultural Rts., Concluding Observations on the Fourth Periodic Report of Israel, ¶ 9, U.N. Doc. E/C.12/ISR/CO/4 (Nov. 12, 2019).

[146] ICESCR, *supra* note 97, art. 11(1).

[147] Comm. on Econ., Soc. and Cultural Rts., Draft General Comment 26 on Land and Economic, Social and Cultural Rights, ¶ 1, U.N. Doc. E/C.12/69/R.2 (May 3, 2021) [hereinafter CESCR Draft General Comment 26].

[148] *See* HAVAKOOK, *supra* note 84, at 26. For an oral history account, see Aurélie Bröckerhoff & Mahmoud Soliman, *The Palestinian Territory Israel Has Turned into a Firing Zone: Meet the Cave-Dwelling People of Masafer Yatta*, CONVERSATION (Oct. 3, 2022, 4:05 AM), https://theconversation.com/the-palestinian-territory-israel-has-turned-into-a-firing-zone-meet-the-cave-dwelling-people-of-masafer-yatta-191356 [https://perma.cc/9ESF-Q5MY].

[149] *See* ICESCR, *supra* note 97, art. 15(1)(a); CESCR Draft General Comment 26, *supra* note 147, ¶ 12.

[150] Comm. on Econ., Soc. and Cultural Rts., General Comment 4: The Right to Adequate Housing, ¶ 1, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter CESCR General Comment 4].

shelter provided by having a roof over one's head but also a right to live in "security, peace, and dignity."[151] Among other things, respect for this right necessitates protection against forced eviction, which should be guaranteed regardless of the type of residence,[152] and consequently includes seasonal residence of the kind that the Israeli authorities have attributed to the residents of Masafer Yatta.

When it comes to assessing whether the evictions from Masafer Yatta amount to forced evictions entailing a violation of ICESCR, attention must be paid to the IHL rules that apply alongside IHRL and constitute *lex specialis* in occupied territory.[153] More specifically, the IHRL norm should be interpreted in the light of the IHL prohibition on forcible transfers discussed above.[154] Since the Masafer Yatta evictions fall outside the exceptions to the prohibition established in IHL, they also appear to be incompatible with—and in violation of—the ICESCR.[155]

There is little room to question that the closure and evictions in Masafer Yatta compromise the local residents' capacity to realize a host of other human rights to which they are entitled, including civil and political rights such as the freedom of movement[156] and rights to equality and non-discrimination.[157] These rights are not absolute and their implementation in situations of occupation in particular may be lawfully circumscribed under certain circumstances.[158] In the *Abu Aram* judgment, however, no effort was made to assess whether the authorities might have had sufficient justification to restrict the residents' human rights. Israel itself has often maintained that its IHRL obligations are not binding in the oPt (though as discussed *infra* in Part 4, the HCJ, at times, did apply them), and perhaps for this reason its legal representatives simply disregarded the petitioners' IHRL-based arguments.[159] The HCJ followed suit mentioning IHRL only in parentheses while failing to conduct any substantive engagement with this body of law or

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[151] *Id*. ¶ 7.

[152] *See id*. ¶ 8(a) ("Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction. . . .").

[153] *See* Wall Advisory Opinion, *supra* note 144, ¶ 106.

[154] *See* Comm. on Econ., Soc. and Cultural Rts., General Comment 7: The Right to Adequate Housing: Forced Evictions, ¶ 12, U.N. Doc. E/1998/22 (May 20, 1997).

[155] As observed, IHL permits forcible transfer only for the purpose of short-term evacuations in the circumstance specified in Article 49(2) GC IV. *See* GC IV, *supra* note 6, art. 49(2).

[156] International Covenant on Civil and Political Rights art. 12(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[157] *See* discussion *infra* Part 2.5, referencing ICCPR art. 26 and ICESCR art. 2(2).

[158] *See* DINSTEIN, *supra* note 113, at 77.

[159] *See* Hum. Rts. Comm., Fifth Periodic Report Submitted by Israel Under Article 40 of the Covenant Pursuant to the Optional Reporting Procedure, ¶¶ 22–25, U.N. Doc. CCPR/C/ISR/5 (Oct. 30, 2019).

even to determine whether it is applicable.[160]

2.5 A Colonial and Discriminatory Approach

In addition to the shortcomings in its legal reasoning, the *Abu Aram* judgment exhibits a dismissive approach towards the Masafar Yatta communities' way of life, that is both redolent of colonialism and inherently discriminatory. Discrimination is all the more evident when the judgment is juxtaposed against the HCJ's approach in petitions concerning the eviction of Jewish Israeli settlers from Palestinian land, including in judgments issued just days before and weeks after *Abu Aram*.[161]

The establishment of a firing zone in Masafer Yatta in disregard of the seasonal cave dwelling way of life that local inhabitants have been maintaining for generations involved a breach of Israel's duty, as an occupying power, to respect the indigenous population's customs and traditions.[162] In its rejection of the petition the HCJ discounted the importance of preserving seasonal dwelling traditions, instead taking the view—which has no foundation in international law—that only permanent places of residence are protected from closure and eviction.[163] The HCJ also accepted the State's argument that the absence of housing structures in the area prior to its designation as a firing zone proved that no one resided in it on a permanent basis.[164] Both the view that seasonal residence is not entitled to protection and the assumption that permanent residence can only be deduced from the presence of structures of the type prevalent in contemporary inhabited areas reflect what one commentator has aptly described as "a colonial approach which constructs rights worthy of protection in a manner intended to exclude the indigenous population."[165]

By giving precedence to other forms of life over the rural and pastoral traditional lifestyle of the Masafer Yatta communities, the judgment also sanctioned a double standard that falls short of the principle of non-discrimination.[166] Discrimination is even more apparent when one compares the HCJ's acquiescent attitude towards the displacement of Palestinians from Masafer Yatta with other case law in which it has refused to endorse the removal of Jewish settlers from Palestinian land in the West Bank.[167] This

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[160] Masafer Yatta Judgment, *supra* note 4, ¶ 31.

[161] *See infra* notes 167–72 and accompanying discussion.

[162] Pursuant to GC IV, *supra* note 6, art. 27(1). *See also* ICESCR, *supra* note 97, art. 15(1)(a); CESCR Draft General Comment 26, *supra* note 147, ¶ 12.

[163] *See* Masafer Yatta Judgment, *supra* note 4, ¶¶ 21, 33, 46.

[164] *Id.* ¶¶ 34–35.

[165] Leiblich, *supra* note 94.

[166] *See* ICESCR, *supra* note 97, art. 2(2); ICCPR, *supra* note 156, art. 26.

[167] *See, e.g.*, HCJ 5480/15 Mussa v. Minister of Defense, Isr. Sup. Ct. Database (2022); CAFH 6364/20 Salha, *supra* note 64.

was given striking illustration when, two days before publishing its judgment in *Abu Aram,* the HCJ issued a judgment in the case of *Mussa v. Minister of Defense* rejecting a petition in which it was asked to instruct the State to halt the construction of houses in an "unauthorized" settler outpost in the West Bank.[168] Like all settlements in the West Bank, such outposts entail a grave breach of GC IV, but unlike other settlements their illegality is also recognized by the Israeli authorities.[169] In this case, the HCJ affirmed that the structures in question were built in "blatant violation of the law."[170] Noting, however, that the petitioners' claims that the land is privately owned by Palestinians were still being debated in other proceedings and that the Israeli authorities had expressed their intention to retroactively approve the construction, the HCJ decided to dismiss the petition.[171]

More recently, in the case of *Minister of Defense v. Salha,* a panel of seven HCJ justices sitting in a Further Hearing procedure reversed a previous HCJ decision and ruled that Israeli settlers residing in the outpost of Mitzpe Kramim, constructed on private Palestinian land, are not to be evicted on the grounds that their homes had been built on the "good faith" assumption that the land was not privately owned.[172] The care which the HCJ took not to frustrate the Mitzpe Kramim settlers' expectations is in sharp contrast to the Court's approach to the impoverished residents of Masafer Yatta on whom it imposed legal expenses to be paid to the very authorities which the HCJ authorized to evict them.[173] The contrast was further highlighted when the Court's Chief Justice, Esther Hayut, later rejected a request for further

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[168] HCJ 5480/15 Mussa, *supra* note 167, ¶ 1 (author translation).

[169] In Israeli legal discourse, the term "unauthorized outposts" is used to differentiate it from "settlements." The main distinction between these categories is that the former have not been built pursuant to governmental authorization. *See* TALIA SASSON, INTERIM REPORT ON THE SUBJECT OF UNAUTHORIZED OUTPOSTS 92–93 (2005), http://www.pmo.gov.il/NR/rdonlyres/0A0FBE3C-C741-46A6-8CB5-F6CDC042465D/0/sason2.pdf [https://perma.cc/VC4B-EGDA] (Hebrew). For an unofficial English translation of Sasson's report summary, see *The Sasson Report About Illegal Outposts*, MIDEASTWEB (Mar. 2005), http://www.mideastweb.org/sassonreport.htm [https://perma.cc/65HA-FTV4]. The report was endorsed by Ariel Sharon's government on March 13, 2005. Government Decision No. 3376, *Attorney Talia Sasson's Opinion on Unauthorized Outposts* (Mar. 13, 2005) (Hebrew), https://web.archive.org/web/20160304052516/http://www.pmo.gov.il/Secretary/GovDecisions/2005/Pages/des3376.aspx. From an international legal perspective, there is no difference between an "unauthorized outpost" and a "settlement" as both violate Article 49(6) GC IV. The Israeli government is devising legal ways and means to retroactively authorize such outposts. *See* ZIV STAHL, YESH DIN, FROM OCCUPATION TO ANNEXATION: THE SILENT ADOPTION OF THE LEVY REPORT ON RETROACTIVE AUTHORIZATION OF ILLEGAL CONSTRUCTION IN THE WEST BANK 4 (2016).

[170] HCJ 5480/15 Mussa, *supra* note 167, ¶ 5 (author translation).

[171] *Id.* ¶¶ 6, 8.

[172] *See* CAFH 6364/20 Salha, *supra* note 64.

[173] Masafer Yatta Judgment, *supra* note 4, ¶ 47.

hearing[174] submitted on behalf of the residents of Masafer Yatta.[175] In her decision, Chief Justice Hayut ruled that there were no grounds to reassess Justice Mintz's ruling that the petition should be rejected *in limine*.[176] Despite the gravity of the issue at hand—the forcible transfer of over 1,000 people and eradication of their communal way of life—the Chief Justice saw no need to reassess Justice Mintz's reading of international law, ruling that it was merely an obiter.[177]

Comparing the judgments in *Abu Ar*am and *Mussa*, one commentator observed that when taken together they "tell the story of the Israeli Apartheid in the West Bank" and implicate the Supreme Court in its creation.[178] Some support for this contention might be gleaned from the fact that, even while approving the eviction of Palestinians from Masafer Yatta, the HCJ refused to relate to the presence of settler outposts within the firing zone during its deliberations in the *Abu Aram* case. Indeed, the tolerance that the Israeli courts and other authorities routinely exhibit towards Israeli settlers' illegal incursions and construction on Palestinian land, and the contrasting ease with which they have been willing to sanction the displacement of Palestinian communities and demolition of Palestinian homes, suggests not only a double standard but also support for a program entailing systematic oppression of Palestinians to maintain Israeli domination over them and their territory.[179]

2.6 Conclusion

The archival materials quoted at the beginning of this section show that the Israeli authorities were aware from the very outset of the occupation that displacing Palestinian protected persons to make way for a firing zone would constitute a grave breach of international law. They also show that, in the early 1980s, the authorities knew that Palestinians were residing in the Southern Hebron Hills and that, despite this fact, and indeed because of it, they decided to designate Masafer Yatta as a firing zone. Displacement of

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[174] Masafer Yatta Request for Further Hearing, *supra* note 54.

[175] Masafer Yatta, Further Hearing, *supra* note 4.

[176] *See id*. ¶ 26.

[177] *Id*. ¶ 24.

[178] Ziv Stahl, *The Israeli Apartheid in a Nutshell, in Two HCJ Judgments*, SIHA MEKOMIT (May 25, 2022), https://www.mekomit.co.il/האפרטהייד-הישראלי-בקליפת-אגוז-בשתי-פס/ [https://perma.cc/GKZ4-GRQ7] (Hebrew).

[179] For an analysis suggesting that such a program may violate the prohibition on apartheid binding on States, see Miles Jackson, *Expert Opinion on the Interplay Between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law*, DIAKONIA INT'L HUMANITARIAN L. CTR. (Mar. 2021), https://www.diakonia.se/ihl/news/expert-opinion-occupation-palestine-apartheid/ [https://perma.cc/5HWY-E2RG].

Palestinians was thus—knowingly and intentionally—undertaken in disregard of the law to advance expansionist goals that the Israeli government has been pursuing relentlessly in the West Bank.[180]

What was once demonstrably known was apparently forgotten when the Masafer Yatta villagers brought their case to court. By that time, the Israeli authorities insisted that no one had actually resided in the area when it was closed off to serve as a firing zone and that it would be lawful to displace those living there now.[181] The HCJ accepted the State's factual claims on dubious grounds following a selective analysis of the evidence and accepted its normative position while ignoring some key provisions of international law and blatantly misinterpreting others.[182] International law was again set aside when Chief Justice Hayut later dismissed the petitioners' motion requesting a further hearing without finding it necessary to examine the international law aspects of the judgment deemed an obiter.

In its reshaping of facts and norms to accommodate an act of dispossession in Masafer Yatta, the approach taken by the State and endorsed by the HCJ is but an example of an approach that the Israeli judiciary has consistently taken to reconcile the State's professed values and normative commitments with the project of dispossession, oppression, and domination that it purses in the oPt.[183] The next part of this article takes a closer look at the wider project of dispossession of which the Masafer Yatta case is a manifestation. Part 4 goes on to consider how the HCJ's jurisprudence has morphed to serve this project, gradually disengaging from international law even while insisting on good faith.

3. MASAFER YATTA IN CONTEXT: THE LEGAL PRODUCTION OF THE PALESTINIAN NO-PLACE

"There's no use trying," she said; "one can't believe impossible things."

"I daresay you haven't had much practice," said the Queen.[184]

3.1 The Contextual Framework

The designation of Masafer Yatta as a "firing zone" is but a piece in a

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[180] *See* discussion *infra* Parts 3 and 4.1.

[181] Masafer Yatta Respondent's Brief, *supra* note 30, ¶ 7.

[182] Masafer Yatta Judgment, *supra* note 4.

[183] For elaboration on techniques of normative reframing and factual denial employed by the Israeli authorities, see Eitan Diamond, *Before the Abyss: Reshaping International Humanitarian Law to Suit the Ends of Power*, 43 ISR. L. REV. 414 (2010) and Eitan Diamond, *Killing on Camera: Visual Evidence, Denial and Accountability in Armed Conflict*, 6 LONDON REV. INT'L L. 361 (2018).

[184] CARROL, *supra* note 13, at 47.

territorial puzzle. Given that the Israeli-Palestinian conflict has been about territory since its very beginning, the judgment should be read in this context.[185]

A cursory glance at maps, from the United Nations partition plan[186] to date, tells the story of the expansion of the Israeli space at the expense of the Palestinian space.[187] Maps alone, however, disclose neither the vision nor the reality behind the story. That vision relates to the territory as *terra nullius*,[188] an empty space, "a land without people" to be repossessed by "a people without a land."[189] The land is impregnated with Jewish sovereignty. The means to realize the vision have been clearly articulated by one of the leaders of the settlers' movement: "[O]ur very presence or mobility makes contiguous Arab control more difficult. . . . Jewish presence in the settlements, and the connections between them, will in effect confine the area of influence of the Arab block."[190] He proceeded to suggest that, in addition to the settlements and measures designed to ensure their interconnectedness, another technology is required to achieve the objective of exclusive Israeli sovereignty over the area: "This block, if only for the sake of future generations, must be cut into slices."[191] This vision materialized through land expropriation, the spread of Jewish settlements, the physical fragmentation of the West Bank, and the construction of material and legal barriers within these fragments.[192] Consequently, the oPt has become a no-place for Palestinians.[193] The separation of Palestinians not only between the oPt and the parts of historical Palestine where the State of Israel has been

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[185] *See* Masafer Yatta Judgment, *supra* note 4.

[186] G.A. Res. 181 (II), at 151 (Nov. 29, 1947).

[187] For the notion that the maps are misleading, first, because they assume that both Israelis and Palestinians share the same space whereas the spatial control exercised by Israel creates a division, and second, because they create a false picture of symmetry obfuscating the asymmetry in the actual possibility of using the land, see Ariel Handel, *Where, Where to, and When in the Occupied Territories: An Introduction to Geography of Disaster*, *in* THE POWER OF INCLUSIVE EXCLUSION: ANATOMY OF ISRAELI RULE IN THE OCCUPIED PALESTINIAN TERRITORIES 179, 180 (Adi Ophir, Michal Givoni & Sari Hanafi eds., 2009).

[188] *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 79–80 (Oct. 16).

[189] This phrase, attributed to British writer Israel Zangwill, was first used in the writings of nineteenth-century Evangelical writers. On its genesis, see Diana Muir, *"A Land Without People for a People Without a Land,"* 15 MIDDLE E. Q. 55 (2008).

[190] Ariel Handel, *Gated/Gating Community: The Settlement Complex in the West Bank*, 39 TRANSACTIONS INST. BRIT. GEOGRAPHERS 504, 510–11 (2014) (quoting Pinchas Wallerstein, *That's How We Will Prevent the Establishment of a Palestinian State*, 182 NEKUDA 28, 29 (1994) (Hebrew)).

[191] *Id*. at 511.

[192] *Id*. at 512.

[193] *See supra* note 8.

established,[194] but also between different parts of the oPt, has unraveled the fabric of Palestinian communal space diminishing Palestinians' capacity to pursue joint political, social, economic, or cultural projects and thus to realize their collective right of self-determination.[195] At an individual level, it has become almost impossible for Palestinians in the oPt to lead a normal life, a life in which they can use space in a predictable manner to engage in routine social and economic activities.[196]

This no-place is not lawless. Indeed, it overflows with laws and regulations that have played a major role in its production.[197] A key legal technology employed for this purpose is the dissection of the territory into a multitude of zones.[198]

The term "zone" commonly denotes the legal regulation of land and its designated use.[199] The law of belligerent occupation regulates certain areas

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[194] According to estimates published by Israel's Central Bureau of Statistics on December 31, 2020, Arab citizens of Israel, who self-identify as Palestinians, then numbered just under two million people, comprising 21.1 percent of the State's population. *See Population of Israel on the Eve of 2021*, CENT. BUREAU OF STAT., https://www.cbs.gov.il/en/mediarelease/Pages/2020/Population-of-Israel-on-the-Eve-of-2021.aspx [https://perma.cc/F8VK-CF3H]. For a critical analysis of the rift that Israel has created between Palestinians in its territory and those residing in the oPt, see, e.g., BADIL, FORCED POPULATION TRANSFER: THE CASE OF PALESTINE – SEGREGATION, FRAGMENTATION AND ISOLATION 102 (2020). *See generally* BEN WHITE, PALESTINIANS IN ISRAEL: SEGREGATION, DISCRIMINATION AND DEMOCRACY (2012).

[195] *See* Wall Advisory Opinion, *supra* note 144, ¶¶ 122, 149, 155 (affirming that Israel has an obligation to respect the Palestinian people's right to self-determination). For the effects of fragmentation on Palestinians' right to self-determination, see U.N. Secretary-General, *Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan*, ¶ 11, U.N. Doc. A/67/375 (Sep. 18, 2012). The report observed that "the current configuration and attribution of control over land in the Occupied Palestinian Territory severely impedes the possibility of the Palestinian people expressing their right to self-determination in the Occupied Palestinian Territory," "the territory of the Palestinian people is divided into enclaves with little or no territorial contiguity," and "[t]he fragmentation of the West Bank undermines the possibility of the Palestinian people realizing their right to self-determination." *Id*.; *see also* Human, Rts. Council, Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem, ¶¶ 32–38, U.N. Doc. A/HRC/22/63 (Feb. 7, 2013) [hereinafter 2013 Settlement Report] (discussing rights to self-determination).

[196] *See, e.g*., 2013 Settlement Report, *supra* note 195, ¶ 58; Handel *supra* note 190, at 515.

[197] *See generally* Handel, *supra* note 190.

[198] *See id*. at 512–14.

[199] *See Zone*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/zone [https://perma.cc/T6NL-YNFL]; *see also Zoning*, MERRIAM-WEBSTER https://www.merriam-webster.com/dictionary/zoning [https://perma.cc/RCB9-6AW3]. For more analysis on the

designated as "danger zones," "safety zones," and "neutralized zones" to advance humanitarian purposes but does not otherwise specify spatial regulation. From its perspective, an occupied territory in its entirety is one zone, a delimited and exceptional space, subject to its regulation.[200] The exceptionality of the space derives from the severance of the normal link between sovereignty and effective control exercised over it. The law of belligerent occupation regulates this exceptionality in two primary ways: first, it provides that annexation of occupied territory is legally null and void[201] and prohibits the occupant from otherwise introducing major systemic changes in the occupied territory, including the transfer of its own population thereto;[202] second, it entrusts the occupant with the management of the territory in a manner designed to protect the well-being of the occupied population, designated as "protected persons."[203]

It is by now a cliché that all happy families are alike and that every unhappy family is unhappy in its own way.[204] Israel entered its unhappy marriages with the occupied Palestinians in 1967, coveting "the dowry but not the bride."[205] Its interest in the dowry, the territory of the West Bank, remains the driving logic of the occupation. Jerusalem was annexed and the first Jewish settlement in the West Bank was built in 1967.[206] As of 2022,

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concept of zoning, see Michael Allan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771, 777 (2019).

[200] The terms "safety zones" and "neutralized zones" are referred to in Articles 14–15 and in Annex I of the GC IV. The term "danger zones" is referred to in Article 28 of the GC IV, *supra* note 6, and the term "demilitarized zones" in Article 60 of AP I, *supra* note 95. The Hague Regulations contain the term "zone" only once, in the context of the definition of spies. Article 29 and otherwise refer only to the term "territory," mainly in the context of occupied territory. GC IV, *supra* note 6, arts. 14–15, 29, 42–56. *See generally* ORNA BEN-NAFTALI, *Z: Zone*, *in* THE ABC OF THE OPT *supra* note 108, at 516–47. What follows is a condensed and updated version of that text.

[201] *See* GC IV, *supra* note 6, art. 47; *see also* DINSTEIN, *supra* note 113, at 50 (observing that "any unilateral annexation of an occupied territory—in whole or in part—by the Occupying Power would be legally stillborn").

[202] GC IV, *supra* note 6, art. 49(6).

[203] *Id*. art. 4; The Hague Regulations, *supra* note 95, art. 43.

[204] LEO TOLSTOY, ANNA KARENINA 1 (Louise & Aylmer Maude trans., Macmillan Collector's Libr. 2017) (1878)

[205] In 1967, in a Labor Party meeting, Levi Eshkol, then Prime Minister, said to Golda Meir, then secretary general of the party and future Prime Minister: "[Y]ou covet the dowry, not the bride. . . ." SHLOMO GAZIT, THE CARROT AND THE STICK: ISRAEL'S POLICY IN JUDEA AND SAMARIA 1967-68, at 135 (1995).

[206] *See* § 5, Basic Law: Jerusalem, the Capital of Israel, 5740–1980, LSI 34 309 (1979–80), as amended (Isr.), https://ecf.org.il/media_items/461 [https://perma.cc/H3WN-B5ER]. For an unofficial English translation, see https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawJerusalem.pdf [https://perma.cc/344B-23VU]. The first settlement

there are 132 Jewish settlements in the West Bank, excluding East Jerusalem (where there are fourteen additional Jewish settlements/neighborhoods), and 147 outposts.[207] Some 670,000 Israeli settlers live in the oPt, of whom 450,000 live in the West Bank and an additional 220,000 reside in East Jerusalem.[208] Over 2.8 million Palestinians live in the West Bank and close to 360,000 live in East Jerusalem.[209] The Gaza Strip, "the forgotten corner of Palestine,"[210] has been separated from the West Bank and essentially sealed off from the rest of the world.[211] Given that Israel has no interest in retaining

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was Kfar Etzion. Hillel Bardin & Dror Etkes, *The Fraud of Gush Etzion, Israel's Mythological Settlement Bloc*, +972 MAG (Feb. 1, 2015), https://www.972mag.com/the-fraud-of-gush-etzion-israels-mythological-settlement-bloc/ [https://perma.cc/6YP4-USMR]. The territory on which the settlement had been established was officially seized by the Military Commander for military purposes, following a governmental decision to resettle the Hebron area. *See* CivC (DC Jer) 2581/00 G.A.L. Ltd. v. State of Israel, Nevo Legal Database (2007).

[207] *See Settlement Watch: Data*, PEACE NOW, https://peacenow.org.il/en/settlements-watch/settlements-data/population (last visited Dec. 20, 2022); *Israeli Settlements: 14 East Jerusalem Homes Approved*, BBC (Mar. 2, 2011), https://www.bbc.com/news/world-middle-east-12626758 [https://perma.cc/EN4E-FEY2].

[208] *See* Elliott Mokski, *Pragmatic Settlements in the West Bank and Implications for Israel and Palestine*, HARV. INT'L REV. (June 29, 2022, 9:00 AM), https://hir.harvard.edu/pragmatic-settlements-in-the-west-bank-and-implications-for-israel-and-palestine/ [https://perma.cc/C5AF-FLQ7]; Joseph Krauss, *Palestinians Fear Loss of Family Homes as Evictions Loom*, AP NEWS (May 10, 2021), https://apnews.com/article/middle-east-religion-2ba6f064df3964ceafb6e2ff02303d41 [https://perma.cc/4GF7-D3NH].

[209] *See Settlement Watch: Data*, *supra* note 207; Daoud Kuttab, *Jerusalem's 360,000 'Orphans,'* HUFFPOST (Oct. 17, 2022), https://www.huffpost.com/entry/jerusalems-360000-orphans_b_1784904 [https://perma.cc/WSV8-J6RA].

[210] Ann M. Lesch, *Gaza: Forgotten Corner of Palestine*, 15 J. PALESTINE STUD. 43 (1985).

[211] With a population of over two million people, and comprising around 365 square kilometers, some of which are depopulated buffer zones on both the Egyptian and the Israeli sides, Gaza is one of the most densely populated areas in the world. The territory was captured from Egypt in 1967 and remained under Israeli military administration until 1994. *See Gaza*, CIA: WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/countries/gaza-strip/ [https://perma.cc/RF4Y-2BPQ]; DRAWING A LINE IN THE SEA: THE 2010 GAZA FLOTILLA INCIDENT AND THE ISRAELI-PALESTINIAN CONFLICT 24–25 (Thomas E. Copeland et al. eds., 2011). In 2005, Israel decided on a unilateral disengagement plan, evicted some 9,000 settlers from the territory, and declared the end of the occupation. *See* Disengagement Plan Implementation Law, 5765–2005, SH 1982 142 (Isr.), https://www.knesset.gov.il/Laws/Data/law/1982/1982.pdf [https://perma.cc/Q86Z-P5CN]; *Israel's Disengagement Plan: Renewing the Peace Process*, GOV.IL: MINISTRY FOREIGN AFFS. (Apr. 20, 2005), https://www.gov.il/en/Departments/General/israel-s-disengagement-plan-renewing-the-peace-process-20-apr-2005 [https://perma.cc/YM9U-P3EG]; HCJ 1661/05 Gaza Coast Regional Council v. Knesset, Isr. Sup. Ct. Database (2005). The status of Gaza received international legal attention revolving around the question whether, following its

a territorial presence in this part of the oPt, this section focuses solely on the West Bank, including East Jerusalem.

Territorial expansion has been coupled with a major change over time in attitude towards the Palestinian residents of the oPt. Whereas between 1967 and the beginning of the Oslo process in the early 1990s, Israel shouldered the responsibility for the management of Palestinian civil institutions, it has since outsourced this obligation to the Palestinian Authority ("PA"). The eight Oslo agreements[212] transfer responsibilities related to the management of the population to the PA but left spatial control with Israel.[213] In that sense, the Oslo process has not been about Israel's withdrawal from the West Bank, much less about the dismantlement of settlements; it has been about the fragmentation of the oPt and the reorganization of Israeli power.[214]

The fragmentation is not about separating Israel from a nascent Palestinian

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disengagement, Israel still exercises effective control over the Gaza Strip to qualify as its occupying power. For the debate whether or not the occupation of Gaza has ended, revolving around the notion of "effective control," see, e.g., HCJ 9132/07 Al-Bassiouni v. Prime Minster of Israel, ¶ 12, Versa (2008), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ahmed%20v.%20Prime%20Minister.pdf [https://perma.cc/XR65-24TU] ("We should point out in this context that since September 2005 Israel no longer has effective control over what happens in the Gaza Strip.") (unofficial English translation); SARI BASHI & KENNETH MANN, GISHA, DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA (2007); Yuval Shanny, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement*, 8 Y.B. INT'L HUMANITARIAN L. 369 (2005); AEYAL GROSS, *Indeterminacy and Control in the Occupied Palestinian Territory*, *in* THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION 52 (2017); Tristan Ferraro, *Determining the Beginning and End of an Occupation Under International Humanitarian Law*, 94 INT'L REV. RED CROSS 133 (2012).

[212] The agreements comprise of the following: Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., Sept. 13, 1993, 32 I.L.M. 1525 [hereinafter Oslo Accords]; Protocol on Economic Relations Between the Government of the State Israel and the P.L.O., Isr.-P.L.O., Apr. 29, 1994, 33 I.L.M. 696; Agreement on the Gaza Strip and the Jericho Area, Isr.-P.L.O., May 4, 1994, 33 I.L.M. 622; Agreement on Preparatory Transfer of Powers and Responsibilities Between Israel and the P.L.O., Isr.-P.L.O., Aug. 29 1994, 34 I.L.M. 455; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip Oslo II, Sept. 28, 1995, Isr.-P.L.O., 36 I.L.M. 551 [hereinafter Oslo II]; Protocol Concerning the Redeployment in Hebron, Jan. 17, 1997, 36 I.L.M. 650 [hereinafter Hebron Protocol]; Wye River Memorandum, Oct. 23, 1998, 37 I.L.M. 1251 [hereinafter Wye River Memorandum]; Sham el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, Sept. 4, 1999, 38 I.L.M. 1465 [hereinafter Sham el-Sheikh Memorandum].

[213] *See* Rawan Damen, *The Price of OSLO*, AL JAZEERA: PALESTINE REMIX, https://interactive.aljazeera.com/aje/palestineremix/the-price-of-oslo.html [https://perma.cc/7UAN-MQ5E].

[214] *See* Neve Gordon, *From Colonization to Separation: Exploring the Structure of Israel's Occupation*, 29 THIRD WORLD Q. 25, 34–35 (2008); Omar M. Dajani, *Shadow or Shade: The Roles of International Law in Palestinian-Israeli Peace Talks*, 32 YALE J. INT'L L. 61 (2007).

state; it is about separating Palestinians from their land, from other Palestinians, and from Israelis.[215] It is not about borders between states; it is about bordering the Palestinians to effectively deprive them of the possibility to assert their sovereignty over their land and to pave the way for Israel to assert its own sovereignty over it.[216] The production of this relationship between place and people in a manner that affects people's sense of belonging and shapes the economic, social, and political course of their life and identity has been affected by law and legal practices.[217] This material and legal reality, detailed below, is very different from that envisaged by the law of belligerent occupation.

3.2 Territorial Fragmentation of the West Bank: Many Zones, No Place

The West Bank is a land-locked territory.[218] It borders (as demarcated by the 1949 Jordanian-Israeli armistice line, known as the "Green Line") to the west, north, and south with Israel and to the east, across the Jordan River, with Jordan.[219] Its land area, including East Jerusalem, comprises some 5,650 square kilometers, and its water area of 220 square kilometers consists of the northwestern quarter of the Dead Sea.[220] The fragmentation of the territory in the wake of the Oslo Accords is detailed below.[221]

A. The Partition of the West Bank into Areas A, B, and C

The Interim Agreement on the West Bank and the Gaza Strip ("Oslo II"),[222] designed to implement the Oslo Accords,[223] divided the West Bank into three areas:[224] Area A, where 26% of the Palestinian population resides in the major cities, comprising 18% of the land,[225] is divided into eleven clusters; Area B, where 70% of the population resides, currently comprises

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[215] *See* Gordon, *supra* note 214, at 35–40.

[216] *See id*.

[217] *See* Noura Erakat, *Taking the Land Without the People: The 1967 Story as Told by the Law*, 47 J. PALESTINE STUD. 18 (2017) (arguing that Israel has deployed the law of occupation in strategic ways to incrementally take the land of Palestine without its people).

[218] *West Bank*, CIA: WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/countries/west-bank/ [https://perma.cc/5A6A-G5QD] (Dec. 14, 2022).

[219] *Id*.; *see* Mitchell Bard, *Fact Sheets: The "Pre-1967 Border" – The "Green Line*," JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/the-1967-border-the-quot-green-line-quot [https://perma.cc/JCH3-7VQK].

[220] *West Bank*, *supra* note 218.

[221] *Id*.

[222] Oslo II, *supra* note 212.

[223] *Id*. at 8; Oslo Accords, *supra* note 212.

[224] Oslo II, *supra* note 212, at annex I, art. V(2)–(3). It also divided the city of Hebron, discussed below, *infra* Part 3.2.C, and Gaza, a division that eventually lost its meaning, discussed above, *supra* Part 3.2.A.

[225] *See* Gordon, *supra* note 214, at 35–36.

22% of the land, and is divided into 120 clusters, and Area C, comprising the rest of the West Bank where 4% of the Palestinian population lives in villages,[226] primarily covering the Jordan Valley and areas where most of the Jewish settlements are located.[227] It disrupts the territorial contiguity of the West Bank.[228] These internal boundaries, each with their own laws and regulations, signify the Oslo-generated new distribution of power between Israel and the PA: in Area A, the PA was given full responsibility for law and public order; in Area B, the PA shoulders responsibility for public order, and Israel maintains overriding responsibility for security.[229] In both Areas A and B, the PA was given "civil powers and responsibilities, including planning and zoning."[230] In Area C, Israel retains full responsibility for security and public order as well as for civil issues related to territory, including zoning and planning.[231] In this manner, Israel was relieved of Palestinian pressure relative to building permits in Areas A and B, yet retained control over planning and building permits in Area C, that is, over the growth of settlements.[232]

Data on allocation of public land in Area C[233] discloses that 99.76% of public land (674,459 dunams, equivalent to 166,662 acres) was allocated to settlements and 0.24% to Palestinians.[234] The net result of this division, detailed below, was that the Palestinian space was further curtailed by both the expansion of settlements and various mechanisms of control of movement and construction, separating Palestinians from other Palestinians, as well as from Israelis, and allowing Israel to enjoy much of the dowry without the burden of caring for the bride.[235]

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[226] *Id*.

[227] *Area C*, PASSIA, http://www.passia.org/maps/view/75 [https://perma.cc/EXJ5-QY2D].

[228] *See id*. For access to the map, see https://perma.cc/QJW4-9RZS.

[229] PASSIA, *supra* note 227. This agreed arrangement has not been implemented in practice, as Israeli military law continues to be enforced in Area A.

[230] Oslo II, *supra* note 212, art. XI(2)(c).

[231] PASSIA, *supra* note 227.

[232] NIR SHALEV & ALON COHEN-LIFSHITZ, BIMKOM, THE PROHIBITED ZONE: ISRAELI PLANNING POLICY IN THE PALESTINIAN VILLAGES IN AREA C 7 (2008).

[233] Israel uses the term "State land" to differentiate between public and private land. Thus, the term obfuscates the fact that it is not the sovereign but the occupying power in the area, yet discloses whose interests the State promotes when it comes to the allocation of public land resources.

[234] *See State Land Allocation: For Israelis Only*, PEACE NOW, https://peacenow.org.il/en/state-land-allocation-west-bank-israelis (last visited Dec. 20, 2022).

[235] Oslo II envisioned a phased redeployment of the Israeli military from the three areas, with complete redeployment within eighteen months of the inauguration of the Palestinian

B. The Partition of Hebron into Zones H-1 and H-2

Hebron was the last major city of the West Bank that was subject to a redeployment agreement,[236] dividing it internally into two zones: H-1 and H-2, a Palestinian and an Israeli-controlled area respectively.[237] The redlined map attached to the Hebron Protocol further provides for a buffer zone and numerous checkpoints, police stations, and other security arrangements.[238] Over H-1, comprising 80% of Hebron, and home to some 160,000 Palestinians, the PA has powers similar to those it has over Area A.[239] H-2, the remainder, comprises the entire old city, including the Cave of the Patriarchs, the al-Ibrahimi Mosque, and five settlements, where Israel retains all powers and responsibilities for internal security and public order.[240] Some 800 Jewish settlers live in H-2 and some 7,000 more live in the adjacent settlement of Kiryat Arba.[241] The number of Palestinians living in H-2 is

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government. Oslo II, *supra* note 212, art. X(2). In Area C, Israel would remain in control of both police and security but would turn them over the PA by the end of the eighteen-month period. *Id*. art. XIII. Between 1995 and 1996, the initial deployment in Areas A and B occurred mostly on schedule. With Yitzhak Rabin's murder and the election of Benjamin Netanyahu to Prime Minister, the third deployment still awaits implementation. *See State Land Allocation: For Israelis Only*, *supra* note 234; *see also* Gordon, *supra* note 214, at 35–37.

[236] This was due to the explosive religious sensitivity of Hebron. Hebron is where the Jews established their oldest legal deed, with Abraham buying a burial place, known today as the Cave of the Patriarchs from the Hittites. *See Genesis* 23:8–16. It is believed that Abraham, Isaac, and Jacob and some of their wives are buried here. It is one of Judaism's four holy cities. Following a 1929 massacre resulting in the murder of sixty-nine Jews, the remaining community of 400 people fled the town. On the significance of the 1929 events for the formation of national consciousness, see HILLEL COHEN, YEAR ZERO OF THE ARAB-ISRAELI CONFLICT: 1929 (Haim Watzman trans., 2015). Settlers returned to the heart of Hebron in 1968. Muslims, who also venerate Abraham, father of Ishmael, have lived continuously in Hebron for over 1300 years. In the 13th century, they converted the Cave of the Patriarchs and the surrounding compound into the al-Ibrahimi Mosque. In 1995 Baruch Goldstein, a settler, murdered twenty-nine Muslim worshippers there. *See infra* notes 243–48 and accompanying discussion; Justus R. Weiner, *The Hebron Protocol: The End of the Beginning or the Beginning of the End of the Israeli-Palestinian Peace Process*, 15 B.U. INT'L L.J. 373, 375 (1997).

[237] Hebron Protocol, *supra* note 212; *The Hebron Protocol*, 26 J. PALESTINE STUD. 131, 131 (1997).

[238] *See The Hebron Protocol*, *supra* note 237, at 133–34, 137.

[239] *Hebron: History & Overview*, JEWISH VIRTUAL LIBR., https://www.jewishvirtual library.org/history-and-overview-of-hebron [https://perma.cc/86B3-L28R].

[240] *Id*. When the Protocol was signed, there were four settlements in the heart of old Hebron. In 2014, a fifth settlement was established. *Hebron: Life Under Siege,* OAKLAND INST., https://www.oaklandinstitute.org/hebron-life-under-siege [https://perma.cc/6MRD-VKY8].

[241] *Hebron: Life Under Siege*, *supra* note 240.

consistently declining and currently comprises some 30,000 people.[242]

In many ways, Hebron—much like Masafer Yatta—is a microcosm of the control Israel exercises over the West Bank.[243] This control guarantees that the interests of the settlers, often themselves armed, and protected by IDF soldiers,[244] prevail consistently over those of the Palestinian population. Thus, for instance, following the 1994 al-Ibrahimi Mosque massacre by Dr. Baruch Goldstein, a Jewish settler who went on a shooting spree and murdered twenty-nine Muslim worshippers, Israel placed Palestinians under a strict curfew and closed off the al-Shuhada Street, once the thriving marketplace of old Hebron, to all Palestinians.[245] The street remains closed to Palestinians to date.[246] Settlers and other Israelis enjoy free access.[247] Consequently, Palestinian economic life in the area collapsed and most Palestinian families who lived there were effectively displaced.[248] Various other measures restricting Palestinian freedom of movement are imposed. These range from the blocking of the main north-south traffic artery of the city, along which the movement of Palestinian vehicles—and in some sections the movement of Palestinian pedestrians—is forbidden (with the exception of the street's few remaining residents who hold a special permit), to the designation of certain areas inhabited by Palestinians as "closed military zones," to curfews, closures, and the installation of permanent and flying checkpoints disconnecting Hebron from other Palestinian towns and villages.[249] The increased presence of soldiers and police, and their close contacts with the settlers, further generate daily harassment, including arbitrary house searches, seizure of houses, and detention of passersby.[250] In the wake of Israel's recent elections, the already bleak situation is becoming darker still. The nascent government will include, as its Minster of Public Security in charge of the Israel Police, Itamar Ben-Gvir, a resident of the settlement of Kiryat Arba and head of the Jewish Might Party.[251] Israeli

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[242] *See* Peter Beaumont, *Inside Hebron's Pressure Cooker: The West Bank's Most Troubled City*, GUARDIAN (Nov. 14, 2015, 6:30 PM), http://www.theguardian.com/world/2015/nov/14/hebron-west-bank-troubled-city-palestine-israel [https://perma.cc/CBA5-NRZA]; AL-HAQ, SPECIAL FOCUS ON HEBRON: A MICROCOSM OF THE ISRAELI OCCUPATION 5 (2015); OFIR FEUERSTEIN, GHOST TOWN: ISRAEL'S SEPARATION POLICY AND FORCED EVICTION OF PALESTINIANS FROM THE CENTER OF HEBRON 13–16 (2007).

[243] AL-HAQ, *supra* note 242, at 13.

[244] *See, e.g.*, FEUERSTEIN, *supra* note 242, at 24, 44.

[245] AL-HAQ, *supra* note 242, at 3.

[246] *Id.*

[247] *Id.*

[248] FEUERSTEIN, *supra* note 242, at 18–19.

[249] *Id.* at 17–40.

[250] AL-HAQ, *supra* note 242, at 2; FEUERSTEIN, *supra* note 242, at 53.

[251] Joshua Leifer, *Israel's New Kingmaker Is a Dangerous Extremist, and He's Here to*

soldiers in the area, emboldened by his appointment, have now begun to violently harass not only Palestinians but also Israeli activists who come to the area in solidarity with its Palestinian residents.[252]

The right of worship in the al-Ibrahimi Mosque has also been periodically restricted. Palestinians were prohibited from entering it for a period following the massacre; thereafter it was divided so that a synagogue was also established on the premises.[253] Throughout the years, Israel has repeatedly closed the mosque to Muslim worshippers to accommodate Jewish worship.[254]

These measures are coupled with routine violence perpetrated by settlers against Palestinians in H-2.[255] The combination of severe restrictions on Palestinian movement, daily harassment, and a systematic failure to enforce law and order on the settlers reflects a policy of separation which generates a virtually Palestinian-free zone.[256] The HCJ never sanctioned this policy explicitly, but its judgments have contributed to its realization.[257]

Stay, N.Y. TIMES (Nov. 7, 2022), https://www.nytimes.com/2022/11/07/opinion/itamar-ben-gvir-israel-election.html [https://perma.cc/9VM3-EV5L]; *Far-Right Extremist Gets Israeli Security Job as Coalition Deals Struck*, GUARDIAN (Nov. 25, 2022, 5:29 AM), https://www.theguardian.com/world/2022/nov/25/far-right-extremist-itamar-ben-gvir-to-be-israel-national-security-minister [https://perma.cc/S8AA-VK3A].

[252] Hagar Shezaf, *'Ben-Gvir Is Going to Bring Order:' Activists Attacked by Israeli Soldiers in West Bank*, HAARETZ (Nov. 25, 2022), https://www.haaretz.com/israel-news/2022-11-25/ty-article/activists-attacked-by-israeli-soldiers-in-west-bank-ben-gvir-is-going-to-bring-order/00000184-ae91-dabe-a7ac-eedb0b280000 [https://perma.cc/9KTS-WHWB].

[253] AL-HAQ, *supra* note 242, at 4.

[254] *Id*.

[255] *E.g*., Gideon Levy & Alex Levac, *There's Only One Way to Describe This Settler Attack: A Pogrom,* HAARETZ (Nov. 18, 2022), https://www.haaretz.com/israel-news/twilight-zone/2022-11-18/ty-article-magazine/.highlight/theres-only-one-way-to-describe-this-settler-attack-a-pogrom/00000184-89c7-d9ce-a1f6-9be796390000 [https://perma.cc/QS38-H7L7].

[256] FEUERSTEIN, *supra* note 242, at 75.

[257] *See*, *e.g*., HCJ 72/86 Zalum v. Military Commander for Judea and Samaria, 41(1) PD 528 (1987) (settlers' security justifies preventing Palestinian access to their stores and their shutting down); HCJ 7007/03 Kawasme v. IDF Commander for Judea and Samaria, Int'l Humanitarian L. Database (2005), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/BB2DB3F831CABD7DC12575BC00454E90 [https://perma.cc/7PCG-YLP3] (unofficial English translation) (settlers' security justifies the shutting down of Palestinian stores, i.e., the elimination of their livelihood); HCJ 4547/03 Chalbi v. Prime Minister, Isr. Sup. Ct. Database (2005) (settlers' security overrides a woman's right to freely access her home); HCJ 3435/05 Elnatsha, Director of the Wakf in Hebron v. IDF Commander for Judea and Samaria, Isr. Sup. Ct. Database (2005) (seizure of Palestinian land within H-2 to build an "emergency road" safeguarding settlers' security is justified); HCJ 4661/06 Comm. for the Dev. of Hebron v. State of Israel, Int'l Humanitarian L. Database (June 27, 2006), https://ihl-databases.icrc.org/en/national-practice/committee-development-hebron-et-al-v-state-israel-et-al-hcj-466106-supreme-court [https://perma.cc/KD5G-KMQE] (unofficial English

C. The Liminal Zone of Jerusalem

Whereas much of Area C of the West Bank land is being annexed *de facto*,[258] East Jerusalem and twenty-eight neighboring villages were annexed *de jure* two weeks after the 1967 war ended.[259] This measure, a clear contravention of international law, was rejected by the international community, which regards the area as occupied territory.[260] Yet, while Israel declared sovereignty over the entire city, incessantly refers to a "unified Jerusalem," and has moved some of its governmental offices (notably the Ministry of Justice, to the East side),[261] it also acts in a manner that defies these very claims. The route of the "separation barrier" does not merely separate Jerusalem from the rest of the West Bank, but also, as it partly follows the 1949 Green Line and partly cuts through the city, effectively undoes any unity.[262] Indeed, some neighborhoods have been rendered a no

translation) (security concerns override Palestinian freedom of religion); HCJ 10356/02 Hass v. Commander of the IDF Forces in the West Bank, Versa (2004), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Hass%20v.%20IDF%20Commander%20in%20West%20Bank.pdf [https://perma.cc/JS2Z-KY84] (unofficial English translation) (Palestinian land seizure and buildings' demolition is justified to secure the settlers' access to the Cave of the Patriarchs). For a critical analysis of HCJ 10356/02 Hass and other cases, see Aeyal Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUR. J. INT'L L. 1, 14–15 (2007).

[258] STAHL, *supra* note 169. In February 2016, the Minister of Justice, Ayelet Shaked, said she intends to promote a law that would apply Israeli law to Jewish settlers in the West Bank. *See* Tova Tsimuki, *Shaked Seeks to Apply Israeli Law on West Bank Jewish Settlers*, YNETNEWS (Feb. 5, 2016, 1:44 PM), http://www.ynetnews.com/articles/0,7340,L-4798296,00.html [https://perma.cc/9C9V-JZ2B].

[259] *The Separation Barrier: Introduction*, IR AMIM, https://www.ir-amim.org.il/en/issue/separation-barrier [https://perma.cc/N57B-4ELV].

[260] Israel imposed its law and administration on East Jerusalem on June 28, 1967. It initially objected to the use of the term "annexation" to describe this move, claiming it was done for purely municipal and administrative reasons. The Basic Law: Jerusalem, the Capital of Israel, put this objection to rest. *See* Basic Law: Jerusalem, the Capital of Israel, *supra* note 206, §§ 5–6. From an international legal perspective, the annexation of East Jerusalem (expanding gradually its boundaries from 6.5 to 71 square kilometers) is illegal. This illegality was affirmed by the Security Council, the General Assembly, and the ICJ. *See* S.C. Res. 478, ¶¶ 1–2 (Aug. 20, 1980); G.A. Res. 35/169, ¶¶ 8–10, 12 (Dec. 15, 1980); S.C. Res. 673, ¶¶ 1–2 (Oct. 24, 1990); Wall Advisory Opinion, *supra* note 144, ¶¶ 74–75, 120–22.

[261] *See, e.g.*, Basic Law: Jerusalem, the Capital of Israel, *supra* note 206, § 1 ("The complete and united Jerusalem is the capital of Israel."); *Defense Minister Ariel Sharon Plans to Move His Office...*, UPI: UPI ARCHIVES (Mar. 24, 1982), https://www.upi.com/Archives/1982/03/24/Defense-Minister-Ariel-Sharon-plans-to-move-his-office/5255385794000/ [https://perma.cc/Y5ZS-PBBU].

[262] Yishai Blank, *Legalizing the Barrier: The Legality and Materiality of the Israel/Palestine Separation Barrier*, 46 TEX. INT'L L.J. 309, 314 (2011).

man's land where virtually no sovereign responsibilities are exercised.[263]

There are some 360,000 Palestinians living in East Jerusalem.[264] More than a third of them reside in neighborhoods that the separation barrier has disconnected from the rest of the city.[265] Various legal technologies have been employed to control their numbers, ranging—as briefly explained below—from their *sui generis* legal status to curtailing their living space.[266]

Following the annexation of East Jerusalem, its inhabitants were not automatically granted Israeli citizenship.[267] In 1967, a census was conducted.[268] At the time, 66,000 Palestinians resided there, but only those physically present received residency status.[269] Of these, those who could demonstrate allegiance to Israel, Hebrew proficiency, and the relinquishing of other citizenships—all conditions not required of Jews who wish to become Israeli citizens—were eligible to apply for Israeli identity cards ("IDs").[270] Few availed themselves of this option.[271] Given that the PA lacks the power to grant them Palestinian citizenship, most are thus bereft of any

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[263] These neighborhoods are Kafr 'Aqab and Semiramis, Ras Khamis, Ras Shehada, Dahiyat al-Salam, and the Shuafat Refugee Camp. OSHRAT MAIMON & ABIGAIL MACK, IR AMIM, RESPONSE BY IR AMIM TO THE FOURTH PERIODIC REPORT OF ISRAEL (CCPR/C/ISR/4) 3, 10 (2014), https://www.ecoi.net/en/file/local/1070303/1930_1412855061_int-ccpr-css-isr-18193-e.pdf [https://perma.cc/VA99-LX3L].

[264] *See* Kuttab, *supra* note 209.

[265] ASS'N FOR CIV. RTS. IN ISR. (ACRI), East Jerusalem: Facts and Figures, 2021 (2021) [hereinafter ACRI, EAST JERUSALEM 2021], https://www.english.acri.org.il/post/__283 [https://perma.cc/BZC5-KM92] (observing that 120,000 to 140,000 of the 358,000 Palestinian residents of Jerusalem reside in neighborhoods that the barrier has separated from the rest of the city).

[266] Mark LeVine & Lisa Hajjar, *International Law, the Gaza War, and Palestine's State of Exception*, AL JAZEERA (Nov. 21, 2012), https://www.aljazeera.com/opinions/2012/11/21/international-law-the-gaza-war-and-palestines-state-of-exception [https://perma.cc/BKR8-CG4F].

[267] Karin Laub & Mohammed Daraghmeh, *More East Jerusalem Palestinians Seek Israeli Citizenship*, TIMES ISR. (Mar. 22, 2017, 4:21 PM), https://www.timesofisrael.com/more-east-jerusalem-palestinians-seek-israeli-citizenship/ [https://perma.cc/F4EM-NKUK].

[268] Hum. Rts. Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* 187 (Apr. 2021), https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution [https://perma.cc/E3SD-8ACE].

[269] *Id*. at 64, 187–88.

[270] *See* Taghreed Ali, *Palestinians Seek Israeli Citizenship in Jerusalem*, AL-MONITOR (Jan. 5, 2022), https://www.al-monitor.com/originals/2022/01/palestinians-seek-israeli-citizenship-jerusalem [https://perma.cc/96CJ-PC3P].

[271] *Breaking a Taboo, Jerusalem Palestinians Increasingly Seek Israeli Citizenship*, REUTERS (Aug. 5, 2015, 7:16 AM), https://www.reuters.com/article/idUS233321939020150805 [https://perma.cc/AF4M-6T5J].

citizenship.[272] Instead, they are permanent residents of Israel.[273] This status is conditional;[274] does not entail the right to vote for or seek election to the Israeli parliament, but does guarantee all other rights and social services provided to Israeli citizens.[275] The net result is that, on both the national and the municipal levels, they have not been engaged in policy decisions that shape their lives.[276]

Permanent residents have blue IDs, externally identical to those of Israeli citizens, though internally discerned by various indicators, differentiating them from Israeli citizens, including Palestinian citizens of Israel.[277] They are also differentiated from Palestinian residents of the West Bank, who hold green IDs, and from Palestinians with previous arrest records, who hold orange IDs.[278] This color-coded bureaucratic mechanism signifies both the

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[272] Helga Tawil-Souri, *Uneven Borders, Coloured (Im)mobilities: ID Cards in Palestine/Israel*, 17 GEOPOLITICS 153, 157–60 (2012).

[273] REUTERS, *supra* note 271.

[274] Palestinians have been required to prove time and again to the bureaucracy of the Israeli Ministry of the Interior that they did not leave Jerusalem for an extended period of time and that it remains the center of their lives. If they fail to do that, their status may be revoked and they would be barred from returning to live in their place of birth. In this manner, between 1967 and 2015, the permanent residency status of 14,416 Palestinian residents of Jerusalem were revoked. *See* Daniel Seidemann, *East Jerusalem: The Myth of Benign Occupation Disintegrates*, 45 J. PALESTINE STUD. 3, 5 (2016); *see also* HCJ 7603/96 Mal'abi v. Director of Civilian Registry, Ministry of Interior, Isr. Sup. Ct. Database (2005) (dismissing petition to prevent state from revoking residence permit for time spent in Jordan); HCJ 282/88 'Awad v. Prime Minister and Minister of Interior, HaMoked (1988), https://hamoked.org/files/2010/1430_eng.pdf [https://perma.cc/VTB4-JDL4] (unofficial English translation) (dismissing petition against deportation and arrest for student that obtained American citizenship but intended to retain Israeli residence permit). In 2017, this practice was put to rest by the Supreme Court. *See* AdminA 3268/14 Al-Haq v. Minister of the Interior, HaMoked (2017), https://hamoked.org/files/2018/1159582_eng.pdf [https://perma.cc/BWM7-RT9M] (unofficial English translation).

[275] Comm. on the Elimination of Racial Discrimination, Combined Tenth to Thirteenth Periodic Reps. of Isr., ¶ 272, U.N. Doc. CERD/C/471/Add.2 (2005); ACRI, EAST JERUSALEM 2021, *supra* note 265, at 2.

[276] *See* ACRI, EAST JERUSALEM 2021, *supra* note 265, at 3.

[277] In 1952, Israel granted citizenship to Palestinians who could prove continuous residence in Israel between 1948 and 1952. *See* § 2(b)(1), Nationality Law, 5712–1952, LSI 6 50 (1951–52) (Isr.). Some 160,000 Palestinians thus became citizens and they and their offspring have blue IDs. Palestinians who fled or were expelled during the 1948 war, and thereafter designated as "absentees," were not eligible; unlike Jews worldwide, they do not enjoy a right of return. *See* NAT'L COMM. FOR THE HEADS OF THE ARAB LOC. AUTHS. IN ISR., THE FUTURE VISION OF THE PALESTINIAN ARABS IN ISRAEL 5, 15 (Ghaida Rinawie Zoabi ed., 2006).

[278] Marthe de Roos, Making a Home in Palestine: Revealing the True Colours of the Israeli ID Card System, at 13 (June 18, 2020) (Masters dissertation, University of Amsterdam),

fragmentation within the Palestinian society and uneven mobilities based on ethno-national and spatial distinctions.[279]

The objective of limiting Palestinian living space in East Jerusalem is achieved by various distinct yet complementary mechanisms. One such mechanism is direct Judaization activities, operating in two main forms. The first form is expropriation. Since 1967, Israel has expropriated approximately 26,300 dunams (equivalent to 6,500 acres) in East Jerusalem for the purpose of building Jewish settlements and Israeli government offices.[280] The result is a significant reduction in land reserves that would have enabled the natural growth of Palestinian neighborhoods.[281] The second form consists of establishing settlements mainly amidst Palestinian neighborhoods in properties said to have been owned by Jews before 1948 and where Palestinians have resided since.[282] The result is both the eviction of Palestinians from homes they have occupied for decades and the destruction of the fabric of life in the neighborhoods.[283] The Israeli legal system and the courts enable this process for Jews but not for Palestinians who owned property prior to 1948 in the western part of the city or elsewhere in Israel.[284]

A unique zone—E-1—should be introduced here. It is an area of some 12,000 dunams (equivalent to 2,965 acres) located east of the municipal boundary, between Jerusalem and the settlement town of Ma'aleh Adummim, which functions as the main artery between the northern and southern West Bank. Israel began construction in the area in 2004.[285] In 2005, the municipality of the settlement approved two detailed urban plans for the development E-1, one for approximately 3,500 housing units, a commercial center etc., and the second for a police headquarters.[286] Neither refers to the local 15,000 Palestinians who reside there. At the urgings of the United States and the European Union, the execution of the first plan was frozen, but

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https://leonhardwoltjer-stichting.nl/2.0/wp-content/uploads/2020/12/Marthe-de-Roos.pdf [https://perma.cc/RPX6-6TC4].

[279] Tawil-Souri, *supra* note 272, at 155.

[280] ACRI, EAST JERUSALEM 2015: FACTS AND FIGURES 8 (2015) [hereinafter ACRI, EAST JERUSALEM 2015].

[281] AVIV TATARSKY & EFRAT COHEN-BAR, BIMKOM, DELIBERATELY PLANNED: A POLICY TO THWART PLANNING IN THE PALESTINIAN NEIGHBORHOODS IN JERUSALEM 5, 8 (2017) [hereinafter BIMKOM 2017].

[282] *Id*. at 5, 8.

[283] *Id*.

[284] *See, e.g*., CivA 4126/05 Hajazi v. Sephardic Community Committee, Isr. Sup. Ct. Database (2006); HCJ 6358/08 Al-Kurd v. Land Registry and Settlement of Rights Department, Isr. Sup. Ct. Database (2008).

[285] IR AMIM, E-1 SETTLEMENT IS NOT MA'ALEH ADUMMIM 4 (2005), https://www.ir-amim.org.il/sites/default/files/E1PositionPaperEng%281%29.doc [https://perma.cc/5AF9-SC7N].

[286] *Id*. at 2, 4.

construction of the police headquarters continued.[287] In 2012, ostensibly in response to the Palestinian membership bid at the U.N., the Israeli government announced that it would promote a zoning plan for E-1 which will allow the construction of 3,000 housing units for Jews.[288] Once fully executed, the Palestinian neighborhoods of East Jerusalem will be cut off from the West Bank, effectively preventing the emergence of a contiguous Palestinian state.[289] Demolition of Palestinian houses in the area has already begun.[290]

The abdication by the Jerusalem municipality of its responsibility to plan adequately in East Jerusalem is yet another mechanism designed to limit the number of Palestinian residents. The result is a housing shortage, inadequate urban development, and an appalling lack of infrastructure and public structures including schools, roads, transportation, water and sewage networks, parks, and playgrounds.[291] In areas for which outline plans for Palestinian neighborhoods do exist, some 55% of the requests for building permits are approved, compared to an approval rate of some 85% in West Jerusalem;[292] in areas for which there are no outline plans, applying for a building permit is as useless as it is costly.[293]

The net result is that Palestinian residents are in effect legally compelled to violate the law. Some 40% of Palestinian structures—amounting to some 20,000 buildings—have been built without a permit.[294] Their owners are thereby exposed to demolition orders, legal proceedings, fines, and loss of their home.[295]

The final major mechanism designed to reduce the number of Palestinians residing in East Jerusalem is governmental failure to allocate resources or welfare services to the Palestinian neighborhoods which found themselves on the 'other side' of the separation barrier. 75% of Palestinians and close to

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[287] Nadav Shragai, *Israel's E1 Building Plan: The Most Strategic, Consensual – and Frozen – Project,* JERUSALEM CTR. FOR PUB. AFFS. (June 13, 2022), https://jcpa.org/article/israels-e1-building-plan-the-most-strategic-consensual-and-frozen-project/ [https://perma.cc/WE3V-QJCY].

[288] *Id*.

[289] *Id*.

[290] ACRI, EAST JERUSALEM 2015, *supra* note 280, at 9; ACRI, EAST JERUSALEM 2021, *supra* note 265, at 4.

[291] ACRI, EAST JERUSALEM 2021, *supra* note 265, at 1, 4–5.

[292] ACRI, EAST JERUSALEM 2015, *supra* note 280, at 8.

[293] *See id*.

[294] *Id*. at 1

[295] *Id*. at 7. Residents who receive demolition orders often prefer to demolish their houses themselves in view of the costs imposed on them when the demolition is executed by the authorities. *See id*. at 9; NADERA SHALHOUB-KEVORKIAN, SECURITY THEOLOGY, SURVEILLANCE AND THE POLITICS OF FEAR 73–115 (2015).

84% of Palestinian children in East Jerusalem live below the poverty line.[296] This staggering rate is due mainly to the impact of the separation barrier severing Jerusalem from the West Bank, disconnecting Palestinian neighborhoods from each other, and cutting off some of them from other parts of the city altogether. It also halts economic activities and reduces the accessibility of social services.[297] Thus, for instance, of the forty-eight postal offices in Jerusalem, only eight service Palestinian neighborhoods.[298] Basic infrastructure is in a dismal state, with only 64% of Palestinian households connected officially to the city's water network and a shortage of some twenty-four kilometers of sewage pipes.[299] For tens of thousands of Palestinian residents of the five neighborhoods that have been completely isolated by the separation barrier, the situation is even worse.[300]

The HCJ rejected petitions against the construction of the separation barrier in these areas.[301] Its determination that the harm to the residents' rights is reasonable and proportionate in relation to Jewish security thereby achieved, rested, *inter alia*, on governmental and municipal commitments to set up arrangements and provide the services that would allow for normal life to be maintained.[302] Almost two decades later, these commitments have yet to be honored.[303] The space, bordered by a barrier which does not signify a boundary, has becomes a forsaken no man's land which Israel insists is part of the "unified Jerusalem" subject to its sovereignty. It is populated by bare lives.[304]

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[296] ACRI, EAST JERUSALEM 2021, *supra* note 265, at 2.

[297] *Id*. at 1.

[298] ACRI, EAST JERUSALEM 2015, *supra* note 280, at 2.

[299] ACRI, EAST JERUSALEM 2021, *supra* note 265, at 5.

[300] *Id*. at 1.

[301] *See, e.g*., HCJ 5488/04 Al-Ram Local Council v. Government of Israel, Isr. Sup. Ct. Database (2006); HCJ 4289/05 Bir Nabala Local Council v. Government of Israel, Isr. Sup. Ct. Database (2006); HCJ 940/04 Abu Tir v. Military Commander for Judea and Samaria, Isr. Sup. Ct. Database (2004).

[302] Government Decision No. 3873, *Preparations by Government Ministries Regarding the Jerusalem Seam and Attention to the Population in the Jerusalem Area Due to the Construction of the Fence* (July 10, 2005) (Hebrew), https://web.archive.org/web/20160104235106/http://www.pmo.gov.il/Secretary/GovDecisions/2005/Pages/des3873.aspx (obligating various government ministries and the Jerusalem Municipality, to develop and supply services, including health, education, welfare, employment and postal services, to these neighborhoods); *see also* IR AMIM, DESTRUCTIVE UNILATERAL MEASURES TO REDRAW THE BORDERS OF JERUSALEM 5 (2018).

[303] ACRI, IMPLICATIONS OF ESTABLISHING A SEPARATE LOCAL AUTHORITY FOR THE NEIGHBORHOODS BEYOND THE BARRIER IN JERUSALEM 4 (2017).

[304] *See* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 50–55 (Daniel Heller-Roazen trans., 1998).

D. The Enclaves

The "enclaves" are areas throughout the West Bank where some 300,000 Palestinians live, cut off from other parts as well as from their agricultural land in a manner that adversely affects all aspects of their lives.[305] Some 200 Palestinian enclaves have been generated by the juxtaposition of the material and legal barriers inscribing on both land and life the logic of Israel's expansion and Palestinian constriction, separation, and exclusion.[306] There are two types of enclaves: "seam-enclaves" and "internal enclaves."[307]

Seam-enclaves are home to Palestinian communities trapped between the separation barrier and the Green Line.[308] Their residents' entry to other areas of the West Bank is restricted by the separation barrier; their entry to Israel is restricted by checkpoints and not by the barrier.[309] A military order, which designated the seam zone as a "closed military zone," states at the outset that no one may enter it and that anyone in it must leave immediately.[310] The next provision exempts Israel nationals as well as others granted a permit by the military from the prohibition to enter the seam zone.[311] The trapped Palestinians must have a "permanent resident permit," which must be renewed periodically, to continue living in their homes.[312] Non-inhabitants, classified into various categories, must enter the bureaucratic maze of requesting a special permit, normally given only for a limited period at a specifically named entrance gate.[313]

Internal-enclaves have been generated by the route of the barrier and its interface with other physical barriers such as roads prohibited for Palestinians, fences, and checkpoints, preventing access to the rest of the West Bank, agricultural lands, the settlements, and Israel proper.[314] The

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[305] *See* BIMKOM, BETWEEN FENCES: THE ENCLAVES CREATED BY THE SEPARATION BARRIER (2006) [hereinafter BIMKOM 2006].

[306] On the HCJ's role in authorizing the construction of the separation barrier, see MICHAEL SFARD, *B: Border/Barrier*, *in* THE ABC OF THE OPT, *supra* note 108, 43–59. On the hybrid nature of the separation barrier, see Blank, *supra* note 262.

[307] *See* BIMKOM 2006, *supra* note 305, at iii–iv.

[308] *Id*.

[309] *Id*.

[310] 378 Order Regarding Defense Regulations (Judea and Samaria), *Declaration Regarding Closure of Area No. S/2/03 (Seam Area),* §§ 2–3, https://hamoked.org.il/items/3190.pdf [https://perma.cc/GF5C-K7SR]. For an unofficial English translation, see https://www.un.org/unispal/document/auto-insert-195380/ [https://perma.cc/CM9S-3LQR].

[311] *Id*. § 4.

[312] *Id*. § 5; Civil Administration, Regulations for Entrance into the Seam Zone, at 14 (June 12, 2022) (Isr.), https://hamoked.org.il/files/2022/1664627.pdf [https://perma.cc/N5M4-88LK].

[313] Civil Administration, *supra* note 312, at 20–29.

[314] *See* BIMKOM 2006, *supra* note 305, at iv–v.

reference to the roads requires a pause; the roads stretch over hundreds of miles, bypassing Palestinian villages and cities, connecting the settlements to each other and to Israel west of the Green Line.[315] These roads, thus, are an integral part of the settlement project. Strengthening and connecting the settlements, they pull apart and wear off the Palestinian communities, generate a sense of displacement, insecurity,[316] and the destruction of the Palestinian fabric of life. This destruction, which the HCJ authorized so long as it is "reasonable" and "proportionate,"[317] has been further affected by a few additional zoning designations discussed below.

E. Additional Military and Civilian Zoning Designations

A multiplicity of zoning designations has devastated the Palestinian space. These cover the whole gamut from the classification of vast areas as "state land," as distinct from privately owned land, on which the HCJ authorized the construction of settlements, to various zoning decisions made by both the military commander and the civil administration in the oPt.[318]

In the West Bank, some areas have been designated as a "closed military zone" or as a "special security zone."[319] The latter designation refers to areas outside of Jewish settlements, where there is no separation barrier.[320] Indeed, the construction of separation barriers is neither necessarily nor exclusively a material matter.[321] It may be generated by nothing more than a legal order.[322] The effect of this designation, the exact location and scope of which is not marked, has been two-fold: first, to expand the *de facto* territory of

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[315] Ahmad Al-Bazz, *In the West Bank, Segregated Roads Displace Palestinians*, NORWEGIAN REFUGEE COUNCIL (Mar. 31, 2022), https://www.nrc.no/shorthand/stories/in-the-west-bank-segregated-roads-displace-palestinians/index.html [https://perma.cc/64DJ-DE2N]; B'TSELEM, FORBIDDEN ROADS: THE DISCRIMINATORY WEST BANK ROAD REGIME (2004).

[316] Tobias Kelly, *Returning Home? Law, Violence, and Displacement Among West Bank Palestinians*, 27 POL. L. ANTHROPOLOGY REV. 95, 96 (2004).

[317] In various appeals against the route of the separation barrier, the HCJ followed the logic of its first decision on the matter in the *Beit Sourik* case, *supra* note 102. Thus, for instance, in *Mar'abe v. Prime Minister of Israel*, it determined that the route of the barrier failed to meet the "least injurious means" test and ordered the army to devise new plans. *See* HCJ 7957/04 Mar'abe, *supra* note 123. By the same logic, in other decisions, it was determined that the injury to Palestinian rights was proportionate. *See e.g.*, HCJ 426/05 Bido Village Council v. Government of Israel, Isr. Sup. Ct. Database (2006).

[318] SHALEV & COHEN-LIFSHITZ, *supra* note 232, at 7, 12, 17.

[319] *Id.* at 17.

[320] *Id.* at 15, 19.

[321] *See* Blank, *supra* note 262, at 322.

[322] *See* B'TSELEM, GROUND TO A HALT: DENIAL OF PALESTINIANS' FREEDOM OF MOVEMENT IN THE WEST BANK 18–20 (2007) [hereinafter GROUND TO A HALT].

Jewish settlements without legally expropriating Palestinian land;[323] and second, to restrict Palestinian movement.[324]

Approximately 20% of the West Bank, a space larger than Area A, has been designated as a "firing zone," a special category of a closed military zone for training.[325] The fate of the communities of Masafer Yatta, discussed in Part 2, exemplifies the devastating consequences of this designation.

The civil administration of the military commander, on its part, has designated certain zones in a manner designed to restrict Palestinian construction even in those lands not allocated for settlements in Area C.[326] Thus, for instance, the 1991 plan for roads in the West Bank, in addition to connecting the main roads to Israel to maximize their use value for Jewish settlers, further imposed excessive right of way and building lines, as compared to those applicable in Israel, where construction is prohibited.[327] Areas designated as "natural reserves," a noble cause no doubt, and on which construction, cultivation, and herding is forbidden, have limited Palestinian development—only to be amended periodically to allow the construction of Jewish settlements on those very lands.[328] Similar cynicism characterizes the designation of national parks.[329] Finally, due to different types of planning for the settlements and for the Palestinian communities, areas designated as "archeological sites" generate sweeping prohibitions on Palestinian construction, whereas in the settlements they do not.[330]

Use of zoning laws and regulations to separate, discriminate, dispossess, and force the transfer of Palestinians has been complemented by bureaucratic

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[323] *See* B'TSELEM, ACCESS DENIED: ISRAELI MEASURES TO DENY PALESTINIANS ACCESS TO LAND AROUND SETTLEMENTS 9, 10 (2008).

[324] *Id*. at 48–49.

[325] U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS (OCHA) OPT, FACT SHEET: MASAFER YATTA COMMUNITIES AT RISK FOR FORCIBLE TRANSFER 1 (July 6, 2022), https://www.ochaopt.org/sites/default/files/Factsheet-Masafer-Yatta-june-2022.pdf [https://perma.cc/4ZLB-V96B].

[326] NORWEGIAN REFUGEE COUNCIL, A GUIDE TO HOUSING, LAND AND PROPERTY LAW IN AREA C OF THE WEST BANK 68 (2012) [hereinafter NRC GUIDE].

[327] *See id*. at 68.

[328] *See id*. at 69–70; PEACE NOW, THE GOVERNMENT OF UNEQUIVOCAL ANNEXATION: DEEPENING OF THE SETTLEMENT PROJECT, DISPOSSESSION AND OPPRESSION: ONE YEAR OF THE ISRAELI GOVERNMENT HEADED BY YAIR LAPID AND NAFTALI BENNETT 9 (2022) [hereinafter PEACE NOW 2022].

[329] NRC GUIDE, *supra* note 326, at 69–70. The NRC's guide details the example of the designation, in 1985, of 350 dunams of the land of the Palestinian village of Bil'in, as nature reserve due to old oaks planted in thirty-five dunams of the land. In 1993, an amendment reduced the natural reserve to thirty-five dunams; in 1999, it was reduced to thirty dunams and, in 2007, to twenty-five-and-a-half dunams. In all these cases the land was used for settlements' construction. In 2021 to 2022, 22,000 dunams of land were designated as a "nature reserve" in an area south of Jericho. *See* PEACE NOW 2022, *supra* note 328, at 9.

[330] NRC GUIDE, *supra* note 326, at 71.

apparatuses exercising control through permit regimes.[331] There are two major permit regimes, one concerning planning and building and one concerning human movement.[332] Both are best characterized as "prohibitive permit regimes."

The main feature of the planning process in Area C is Israel's exclusive control; Palestinians are prevented from participating in the shaping of their space.[333] There are currently two types of outline plans for Area C: regional outline plans prepared during the British mandate and a special outline plan made by the civil administration.[334] The vast majority of Palestinian villages are still subject to the mandatory plan under which most of the area was classified as an agricultural zone where, subject to certain specified exceptions, no construction is allowed.[335] It may be recalled in this context that much of the area has also been designated as a closed military zone where construction is prohibited.[336] It is thus perfectly legal to reject Palestinian requests for building permits and to not recognize their villages in planning or municipal terms.[337] Lack of updated plans further prevents many villages from building crucial infrastructure including roads and structures for water and electricity.[338]

A building permit is required to add to an existing building or construct a new one. This normal process is, however, fraught with bureaucratic difficulties and very costly.[339] Data disclose that between 2000 and 2020 only 3.7% of requests for building permits were approved.[340] In 2021, fifty-five

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[331] *See* SHALEV & COHEN-LIFSHITZ, *supra* note 232, at 43, 78.

[332] *See generally id*.

[333] *Id*. at 55–58. For a background review, see Shelby Leighton, Note, *Al-'Aqaba: What One Village Can Teach Us About the Law of Occupation*, 45 GEO. J. INT'L L. 523, 535 (2014). Note further that when the law was amended to exclude Palestinians from participating in the planning committees, it was also amended to empower the local authorities in the Jewish settlements to issue building permits. *See* KRETZMER & RONEN, *supra* note 26, at 275–80; SHALEV & COHEN-LIFSHITZ, *supra* note 232, at 39–45.

[334] SHALEV & COHEN-LIFSHITZ, *supra* note 232, at 55.

[335] *Id*. at 55, 61, 102.

[336] *Id*. at 26.

[337] *Id*. at 12, 17

[338] B'TSELEM, ACTING THE LANDLORD: ISRAEL'S POLICY IN AREA C, THE WEST BANK 13 (2013).

[339] *See* SHALEV & COHEN-LIFSHITZ, *supra* note 232, at 29. A 1968 military order froze the land registration process that began during the Mandate in 1928, leaving 66% of the West Bank and 69% of Area C unregistered. *See* 291 Israel Military Order, *Concerning the Settlement of Disputes over Titles in Land and the Regulation of Water*, http://www.geocities.ws/savepalestinenow/israelmilitaryorders/fulltext/mo0291.htm [https://perma.cc/C764-VJBS] (unofficial English translation).

[340] Hagar Shezaf, *Israel Rejects Over 98 Percent of Palestinian Building Permit Requests in West Bank's Area C,* HAARETZ (Jan. 21, 2020), https://www.haaretz.com/israel-news/2020-

plans were approved for 7,292 housing units in the settlements, while "the government approved only six plans for Palestinians with 1,303 housing units in the entire Area C."[341] It is thus not surprising that many buildings are constructed without a permit. Illegal construction generates demolition orders.[342] Thousands have been executed; thousands more are pending.[343] Palestinian petitions challenging the process of issuing building permits and demolition orders were mostly rejected by the HCJ.[344]

Significantly, the applicable law enforcing land regulations in Area C contains different enforcement priorities relative to Jewish and Palestinian construction.[345] The law reflects governmental policy that has been reiterated in the government's responses to petitions to the HCJ concerning the construction on privately owned Palestinian land in "outposts";[346] when the court issues demolition orders, the government regularly asks for deferral of their execution to allow it to find alternative land for their construction in the oPt.[347] This discriminatory treatment is evident even when it comes to Jewish outposts near, and encroaching into, the very firing zone that the residents of Masafer Yatta were ordered to evict, and whose houses are demolished. Demolition orders that were issued against the outposts are few and far between and are yet to be executed.[348]

01-21/ty-article/.premium/israel-rejects-98-of-palestinian-building-permit-requests-in-west-banks-area-c/0000017f-f7ce-d044-adff-f7ff0b250000 [https://perma.cc/UC3K-KF9D].

[341] PEACE NOW 2022, *supra* note 328, at 7.

[342] OCHA OPT, "LACK OF PERMIT" DEMOLITIONS AND RESULTANT DISPLACEMENT IN AREA C 1 (2008), https://www.ochaopt.org/sites/default/files/ocha_opt_special_focus_demolition_area_c.pdf [https://perma.cc/RC56-TLY5].

[343] *Id*.

[344] *See*, *e.g*., HCJ 11/5667 Dirat-Al Rfai'ya Village Council v. Minister of Defense, Isr. Sup. Ct. Database (2015); HCJ 143/04 Jaber et al. v. State of Israel, Isr. Sup. Ct. Database (2006); HCJ 2389/04 Bisharat v. Military Commander in the West Bank, Isr. Sup. Ct. Database (2006).

[345] *See* KRETZMER & RONEN, *supra* note 26, at 280 ("Israeli construction is facilitated subject to the obligation to protect private Palestinian property. Palestinian construction is hampered.").

[346] *Id*.

[347] *See*, *e.g*., YESH DIN, THE ILLEGAL OUTPOST OF AMONA: THEFT OF PRIVATE PALESTINIAN LAND – A CHRONOLOGY (1995 - ?) 25 (2020).

[348] See, Yuval Avraham, *Classified Document Reveals IDF 'Firing Zones' Built to Give Land to Settlers*, +972 MAG. (July 11, 2022), https://www.972mag.com/firing-zones-sharon-settlements/ [https://perma.cc/Q2KU-7KJD] (observing that "the Settlement Division allocated land in Firing Zone 918 to one of the settlers living nearby," that "[a]erial photos show that new structures belonging to three outposts — Mitzpe Yair, Avigayil, and Havat Ma'on — which were established in the area in 2000, have been built in the firing zone," and that "settlers even tried to establish a brand new outpost directly inside the firing zone"); Yuval Avraham, *This Israeli Forbids Palestinians from Building. He Lives in an Illegal Outpost*,

The above-described regime clearly violates the fundamental obligation of the military commander—enshrined in both the Hague Regulations and the GC IV, and indeed recognized, in principle, by the HCJ—to protect the fundamental human rights of the occupied population.[349] The right to adequate housing is a fundamental human right.[350] This regime further entails a violation of the basic principle of good faith in carrying out international legal obligations,[351] and a violation of the principle of equality enshrined in both international and Israeli law and recognized by the HCJ with respect to the oPt.[352]

These violations are not, however, arbitrary whims. They express a coherent vision and follow a settler colonial logic. The very same vision and logic which have been driving the spatial violation of the oPt through zoning, also dictated the development of movement control technologies.[353] The bureaucratic apparatus known as the "permit regime" supplies them.[354]

The permit regime is a regulatory system administered by several District Liaison and Coordination Offices ("DCLs"), established pursuant to the Oslo Accords.[355] It requires every Palestinian who wishes to travel between the

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+972 MAG. (July 28, 2022), https://www.972mag.com/settler-inspector-outpost-palestinians/ [https://perma.cc/WF5N-97BN]; Steve Hendrix & Shira Rubin, *Ahead of Biden Visit, Israel Launches Biggest Eviction of Palestinians in Decades*, WASH. POST (May 22, 2022, 3:18 PM) https://www.washingtonpost.com/world/2022/05/22/israel-palestinian-masafer-yatta-biden/ [https://perma.cc/YZB4-9MAJ].

[349] *See*, *e.g.*, HCJ 10356/02 Hass, *supra* note 257.

[350] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948); ICESCR, *supra* note 97, art. 11(1); CESCR General Comment 4, *supra* note 150.

[351] *See* Nuclear Test (Austl. v. Fr.), 1974 I.C.J. Rep. 253, ¶ 46 (Dec. 20).

[352] *See, e.g.*, HCJ 168/91 Marcus v. Minister of Defense, 45(1) PD 467 (1991) (obliging the military commander, during the first Gulf War, to distribute gas masks not merely to IDF soldiers and to the Jewish inhabitants but also to the Palestinian residents of the oPt).

[353] In 1972, an "open borders" policy was declared between Gaza, the West Bank, and Israel. The genesis of the permit regime began in 1989, when the IDF demanded workers from Gaza to carry a magnetic card as a prerequisite for obtaining permission to enter Israel. In 1991, during the first Gulf War, the general permit of entry was cancelled, and a new military decree required Palestinians to obtain individual permits for entry into Israel at the full discretion of the military commander distribution. During the 1990s, closure became institutionalized as the rule and the exit permit became the exception. The fragmentation of the oPt and the reorganization of power bureaucratized the permit process. *See* EITAN DIAMOND, B'TSELEM, CROSSING THE LINE: VIOLATION OF THE RIGHTS OF PALESTINIANS IN ISRAEL WITHOUT A PERMIT 13–19 (2007); GROUND TO A HALT, *supra* note 322, at 7–8.

[354] *See* AELAD CAHANA & YANATAN KANONICH, THE PERMIT REGIME: HUMAN RIGHTS VIOLATIONS IN THE WEST BANK AREAS KNOWN AS THE "SEAM ZONE" 9–11 (Maya Johnston trans., 2013).

[355] *See id.* at 24; YESH DIN, "THROUGH THE LENS OF ISRAEL'S INTERESTS": THE CIVIL ADMINISTRATION IN THE WEST BANK 5–7, 13–14 (2017); BREAKING THE SILENCE, MILITARY RULE: TESTIMONIES OF SOLDIERS FROM THE CIVIL ADMINISTRATION, GAZA DCL AND COGAT

West Bank and Israel (including East Jerusalem), as well as those wishing to travel or from Gaza, and in some cases even those wishing to travel between parts of the West Bank, to obtain a special permit.[356] Given that every human interaction that necessitates travelling between zones—be it for accessing medical and educational services, work, engaging in commercial transactions, or visiting relatives—requires a permit, the meaning of the regime far exceeds restrictions on freedom of movement; it impacts accessibility to most rights and the ability to realize them, thus shaping both private and community life.[357] Indeed, the very possibility to lead a normal life depends on one's ability to navigate in the bureaucratic maze comprising the regime.[358] Detailing this labyrinth is beyond the scope of this paper,[359] and one example suffices to shed light on the nature of the process: a classification of a Palestinian as "denied entry for security reasons," or the requirement that they be subject to such a classification process, suspends the permit process.[360] Hundreds of thousands of Palestinians have been thus classified over the years by either the police[361] or the General Security Service ("GSS").[362] The criteria for this classification are not published since the information itself has been construed as a security threat.[363] The information whether one is denied entry for having been thus classified,

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2011-2021, at 6–12 (2022). For reference to the DCLs, see Oslo II, *supra* note 212, art. 1(6), annex III, art. 1(3).

[356] On the operation of the permit regime in the seam zone, see CAHANA & KANONICH, *supra* note 354, at 9–12.

[357] *E.g.*, SARI BASHI & EITAN DIAMOND, GISHA, SEPARATING LAND, SEPARATING PEOPLE: LEGAL ANALYSIS OF ACCESS RESTRICTIONS BETWEEN GAZA AND THE WEST BANK 6, 12, 14 (2015) (observing that movement and access restrictions imposed, inter alia, via the permit regime have far reaching implications for Palestinians' individual and collective rights).

[358] *Id.* at 10–14 (noting that movement and access restrictions undermine normal civilian life).

[359] For a more comprehensive and insightful analysis of the structural underpinnings of the permit regime, see YAEL BERDA, LIVING EMERGENCY: ISRAEL'S PERMIT REGIME IN THE OCCUPIED WEST BANK (2017).

[360] *Id.* at 45.

[361] This classification includes people who have pending cases in criminal or civil courts, cases open by the police though never investigated, people who served jail sentence for any charge and are denied entry after release, and people who have not paid their traffic tickets. *See Blacklisting: The Prevention of Entry*, MACHSOM WATCH, https://machsomwatch.org/en/content/blacklisting-prevention-entry [https://perma.cc/35BT-S74N].

[362] *See* CAHANA & KANONICH, *supra* note 354, at 79. The name GSS, as well as Shabak and Shin Beit by which the organization is also known, is drawn from its Hebrew name and acronym. Its current official English name is the Israel Security Agency ("ISA"). *The Israeli Security Agency (ISA)/Shin Bet/Shabak*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/the-israeli-security-agency-isa-shin-bet-shabak [https://perma.cc/UB6T-RAJK].

[363] BERDA, *supra* note 359, at 47.

though not its reasons, may be obtained.[364] There are a few fora before which it is possible to challenge such classifications, but these forums also withhold information about the reason for the classification from the persons concerned and their lawyers.[365] The GSS is the surest way to change the classification.[366]

Knowledge of the applicable rules is a necessary but insufficient condition to receive a permit.[367] The process engages a wide array of administrative bodies and departments,[368] and applicants are often sent from one office to another in the quest for a permit, only to find out that working hours or even access routes to the offices have changed, as they regularly do.[369] This bureaucracy may appear inefficient insofar as its working is evaluated in the light of its stated objective: regulating movement. But insofar as it is evaluated in the light of its otherwise hidden objective, the prevention of Palestinians from using the space, and the production of constant uncertainty, it is quite effective.[370] Indeed, even if a Palestinian successfully navigates this exhausting, humiliating, often costly, and ultimately uncertain process—a navigation they are to repeat in view of the time limits attached to permits—they may find out that a permit is of little value in the face of a closed checkpoint or just an unaccommodating soldier.[371]

This routine production of Palestinian bureaucratic bare life by the permit regime stems from the spatial reorganization of the oPt. It does not regulate movement in and between the oPt and Israel; it minimizes their movement. It disrupts Palestinian ability to use their land in a predictable manner that allows them to engage in the routine activities comprising life. Acknowledging that the permit regime imposes hardships on Palestinians, the HCJ nevertheless determined that the regime is proportionate and dismissed a petition against it.[372]

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[364] *See, e.g.*, *id.* at 54.

[365] *See, e.g.*, *id.* at 76.

[366] *See, e.g.*, *id.* at 61.

[367] *See id.* at 35–36.

[368] *See id.* at 83–85, 110–22.

[369] Ariel Handel, *Exclusionary Surveillance and Spatial Uncertainty in the Occupied Palestinian Territories*, *in* SURVEILLANCE AND CONTROL IN ISRAEL/PALESTINE: POPULATION, TERRITORY AND POWER 259, 268–70 (Elia Zureik et al. eds., 2011).

[370] The process has been aptly characterized by Berda as one of "effective inefficiency." *See* BERDA, *supra* note 359, at 107–24.

[371] *See* Alexandra Rijke, *Checkpoint Knowledge: Navigating the Tunnels and Al Walaja Checkpoints in the Occupied Palestinian Territories*, 26 GEOPOLITICS 1586, 1588, 1602 (2020) (discussing arbitrary decision making by soldiers at checkpoints).

[372] CAHANA & KANONICH, *supra* note 354, at 7; *see* HCJ 9961/03 HaMoked: Center for the Defense of the Individual v. Government of Israel, HaMoked (2011), https://hamoked.org/files/2013/114260_eng.pdf [https://perma.cc/6S4G-EM6P] (unofficial

3.3 Conclusion

This part, placing the Masafer Yatta judgment in context, discloses that the legal production of the occupied Palestinian space has generated a Palestinian no-place. The combined effect of material regulations (such as those designed to encourage the thriving of Jewish settlements) and material deregulation (such as its lack of planning and building permits) with the dissection of the land, various barrier artifacts and their attendant permit regime, has been to generate a socially and mentally distorted space.[373] It is socially distorted because it prevents Palestinians from engaging in routine socio-economic, personal, and political activities that comprise life. It is mentally distorted because of the sense of disorientation, displacement, anxiety, and uncertainty experienced by Palestinians caught in its violent orbit.[374] This "spacio-cid[e]"[375] or "[geography of] continuous disaster,"[376] where one finds oneself displaced at home, is a site of recurrent loss.[377] This is the very reality that the international law of belligerent occupation was designed to avert.[378] Part 4 focuses briefly on the role the HCJ has played in the production of this reality.

4. CHANGE OVER TIME IN THE HIGH COURT OF JUSTICE'S ATTITUDE TOWARDS THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."[379]

English translation). The Court did find that the military commander must relax the rules applicable to Palestinians living in the "seam zone" and instructed the respondent to establish a clear and efficient timetable for processing applications. *Id.* ¶ 36. In this manner it rejected the petition in principle but opened the door for specific petitions.

[373] *See generally* Yishai Blank & Issi Rosen-Zvi, *The Spatial Turn in Legal Theory*, 10 HAGAR: STUD. CULTURE, POLITY & IDENTITIES 37 (2010).

[374] *See* Kelly, *supra* note 316, at 96–97.

[375] Sari Hanafi, *Explaining Spacio-cide in the Palestinian Territory: Colonization, Separation, and State of Exception*, 61 CURRENT SOCIO. 190 (2013).

[376] Handel, *supra* note 187, at 193–94.

[377] *See* Nadera Shalhoub-Kevorkian, *Counter-Spaces as Resistance in Conflict Zones: Palestinian Women Recreating a Home*, 17 J. FEMINIST FAM. THERAPY 109, 120 (2006).

[378] Most notably in the core provision of Article 43 of the Hague Regulations of 1907 which obliges the occupying power to ensure and maintain civil life in the occupied territory. *See generally* Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INTL. L. 661 (2005).

[379] CARROL, *supra* note 13, at 57.

4.1 "Enlightened Occupation" and Its Discontents

The first legal step that Israel took with respect to the oPt on June 7, 1967, at the very outset of the occupation, was to apply GC IV to it.[380] This was established by a military order that had been prepared well in advance of the actual occupation, reflecting the legal assumption that the eventuality of an occupation will be regulated by GC IV.[381] The second legal step, taken in August 1967, was to revoke that Order. The revocation echoed governmental references to the territories as being "liberated"[382] rather than occupied, thus signifying the nascent political narrative of Jewish sovereignty over the territory,[383] a narrative which defies the most fundamental precept of the law of belligerent occupation.[384] In the following months, Israel devised its governing policy towards the oPt. Its core values were the facilitation of Palestinian daily life while simultaneously suppressing any form of resistance.[385] The oxymoronic nature of the policy was manifested in the

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[380] *See* RABAH ET AL., ISRAELI MILITARY ORDERS IN THE OCCUPIED PALESTINIAN WEST BANK, 1967-1992, at 1 (2d ed. 1995). On June 7, 1967, the military commander issued a proclamation that he had assumed all governmental powers in the area and that the prevailing law would remain in force subject to any orders he would promulgate. Attached to this proclamation was a Security Provisions Order. *See id*. Its detailed provisions for the military rule in the area, including the establishment of military tribunals that,

> should adhere to the terms of the Geneva Convention of 12 August 1949 [Relative to the Protection of Civilian Persons in Time of War] regarding all matters relating to judicial procedure. If there is a contradiction between this order and the above-mentioned convention then the regulations of the convention will take precedent.

See id.; *see also* ORNA BEN-NAFTALI, *G: Geneva Law*, *in* THE ABC OF THE OPT *supra* note 108, at 144–45; KRETZMER & RONEN, *supra* note 26, at 55–56.

[381] *See generally* Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government: The Initial Stage*, *in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967-1980, THE LEGAL ASPECTS 13 (Meir Shamgar ed., 1982).

[382] *See* KRETZMER & RONEN, *supra* note 26, at 56 & n.7 (noting Minister of Justice Ya'acov Shimshon Shapira's statement that the territory is within Israel's sphere of sovereignty (citing DK, 6th Knesset, Session No. 49 (1967) (Isr.), https://fs.knesset.gov.il/6/Plenum/6_ptm_252415.pdf [https://perma.cc/FSW6-C7J9])); *see also* Asher Maoz, *Application of Israeli Law to the Golan Heights Is Annexation*, 20 BROOK. J. INT'L. L. 355, 69 & n.72 (1994).

[383] *See* Amnon Rubinstein, *The Changing Status of the 'Territories' (West Bank and Gaza): From Escrow to Legal Mongrel,* 8 TEL AVIV U. STUD. L. 59 (1988).

[384] *See* Lassa Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 LAW Q. REV. 363, 364 (1917) ("There is not an atom of sovereignty in the authority of the occupant . . . ."); *see also* DINSTEIN, *supra* note 113, at 49–55.

[385] The policy is attributed to Moshe Dayan, then Defense Minister, and Shlomo Gazit, then chairman of the Coordinating Committee for Activities in the Occupied Territories. *See The Man Behind the "Enlightened Occupation,"* AKEVOT (Oct. 2020), https://www.akevot.org.il/en/article/gazit-davis-interview_en/?full [https://perma.cc/J98H-UVFA].

name given to it: "enlightened occupation."[386]

Israel's adventure in the oPt thus began with a first step that was promptly followed by its negation. Walking simultaneously on two roads that diverge may appear counter-productive. Appearances, however, are notoriously deceptive;[387] such moves were to become the defining feature of Israel's long and ever-deepening control over the oPt and of the role law was to play in it. By 1972, the Israeli Supreme Court, operating in its capacity as HCJ, had made the unprecedented decision to subject military actions in the territories to judicial review by opening its gates to Palestinian petitioners—and to determine them based on both international law and Israeli law.[388] This move gave a legal face to the "enlightened occupation."[389] It also rendered it the most legalized occupation in world history and generated faith, both locally and globally, in the integrity of Israel's judiciary and its commitment to international law.[390]

The Court's judicial oversight did not, in fact, prove an especially effective shield for Palestinian protected persons.[391] It provided an appearance of justice that may have effectively shielded the State from international censure, fortifying its pretenses to enlightened benevolence. The indeterminate nature of the legal framework that the HCJ applied (consisting of often open-ended rules of IHL interacting with layers of local legislation including Ottoman, British Mandate, and Jordanian law, all complemented by Israeli military orders)[392] opened wide interpretive horizons.[393] These became wider still as the occupation became indefinite as distinct from

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[386] *Id*.

[387] In reference to the language used by Judge Krylov in his dissenting opinion in Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, at 107 (May 28).

[388] Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT'L J. CON. L. 540, 542 & n.6 (2006).

[389] This decision was first made in 1972. *See* HCJ 337/71 Christian Society for the Holy Places, *supra* note 3. For a summary in English, see Shapira-Libai, *supra* note 3.

[390] *See Jurists for Palestine Forum Holds Panel Discussion: "Israeli Judiciary and International Law: Can Palestinians Get Justice?,"* LAW FOR PALESTINE (July 30, 2021), https://law4palestine.org/jurists-for-palestine-forum-holds-panel-discussion-israeli-judiciary-and-international-law-can-palestinians-get-justice/ [https://perma.cc/J3MY-FTRG] (referencing Mueen Odeh's panel discussion).

[391] *See* Gad Barzilai, *The Agonizing Absurdity of "Enlightened Occupation,"* 45 ADALAH NEWSL. (2008), https://www.adalah.org/uploads/oldfiles/newsletter/eng/feb08/roundtable/gadi.html [https://perma.cc/D43J-87BW] ("[R]ather than providing Palestinians with a shield of human rights, the [HCJ] is shielding the state from effective judicial review.")

[392] *See* KRETZMER & RONEN, *supra* note 26, at 41.

[393] For a comprehensive analysis of indeterminacy as a core feature of Israel's occupation of Palestinian territory, see Orna Ben-Naftali, Aeyal Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKLEY J. INT'L L. 551 (2005) and GROSS, *supra* note 211.

temporary.[394] The Court employed its broad discretion to establish and then expand the military commander's legal authority in the oPt and facilitate its exercise.[395] In this manner, the HCJ enabled Israel to defy the basic tenets of the law of belligerent occupation, while avoiding the wrath of the international community.[396]

This assessment rests on both quantitative and qualitative grounds.

Over 5,000 petitions challenging Israel's policies and practices in the oPt have been submitted to the HCJ over the years by Palestinians or on their behalf. Some 98% of them have been rejected.[397] This is a rate of rejection far higher than the rate of dismissal for petitions against Israeli authorities within Israel proper, which stands at around 70%.[398] Moreover, the few incidents in which the HCJ did rule in favor of Palestinian petitioners—all of which are highly publicized, often also in English translation—did not have a significant long-run impact on Israel's conduct in the oPt or promote normal life for Palestinians.[399]

A partial list of the of measures which the HCJ has legitimized over the

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[394] The "temporary" definitely has an end; the "indefinite" may or may not have an end. *See* ORNA BEN-NAFTALI, *T: Temporary/Indefinite*, *in* THE ABC OF THE OPT, *supra* note 108, at 399.

[395] *See* RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK (1988) (arguing that Israel has employed the complex and confusing legal regime to mask and facilitate its goal of displacing and disposing Palestinians with a view to eventually annex their territory).

[396] *See* Ben-Naftali et al., *supra* note 393, at 610–11.

[397] The composite database that we have compiled includes 5,373 petitions filed by Palestinians or on their behalf between 1970 and 2020. *See also* Ronen Shamir, *"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice,* 24 LAW & SOC'Y REV. 781, 783–85 (1990) (providing data on judgments rendered by the HCJ between 1967 to 1986, indicating that relief was not granted in 99% of Palestinian petitions); Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the Intifada,* 33 LAW & SOC'Y REV. 319, 334 (1999) (providing data according to which, from 1986 to 1995, 98.5% of Palestinian petitions were not granted relief, and an additional 3% were partly accepted). Our own data, up to 2020, indicates that some 99% of Palestinian petitions were not granted relief.

[398] The High Court of Justice granted the petitioner relief, either fully or partially, in approximately 33% of all cases in which a judgment was delivered between 2017 and 2020. *See* MINISTRY OF JUST., STATE ATTORNEY: ANNUAL SUMMARY 2017, at 68 (2018), https://www.gov.il/BlobFolder/reports/annual-report-2017/he/files_data-report-2017.pdf [https://perma.cc/MG5H-NG24] (Hebrew); MINISTRY OF JUST., STATE ATTORNEY: ANNUAL SUMMARY 2018, at 97 (2019), https://www.gov.il/BlobFolder/generalpage/files-general/he/files_report-2018.pdf [https://perma.cc/YUP5-J3XT] (Hebrew); MINISTRY OF JUST., STATE ATTORNEY: ANNUAL SUMMARY 2019, at 107 (2020), https://www.gov.il/BlobFolder/generalpage/files-general/he/DATA%202019.pdf [https://perma.cc/YRP6-UTKY] (Hebrew); MINISTRY OF JUST., STATE ATTORNEY: ANNUAL SUMMARY 2020, at 64 (2021), https://www.gov.il/BlobFolder/reports/office_of_the_state_2020/he/office_of_the_state_2020.pdf [https://perma.cc/UQR4-DQ5A] (Hebrew).

[399] *See* HEDI VITERBO, *L: Lawfare*, *in* THE ABC OF THE OPT, *supra* note 108, at 251.

years includes the settlement enterprise,[400] home demolitions,[401] separation of families,[402] exploitation of the occupied territory's natural resources,[403] construction of the West Bank Barrier,[404] and displacement in the form of deportations[405] as well as forcible transfers, such as in the case of Masafer Yatta. All this was done in such manner as to simultaneously serve the State's (perceived) interests and reenforce its self-perception and external image as a democracy fighting "with one hand tied behind its back."[406] To sustain this posture, from time to time, it was necessary for the HCJ to gesture towards international law and impose certain constraints on the State: preserving basic procedural guarantees for Palestinians,[407] prohibiting the "neighbor procedure,"[408] requiring a partial re-routing of the West Bank Barrier,[409] and limiting targeted killings.[410] In addition to these rare court room victories,

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[400] *See* discussion *infra* notes 416–23 and accompanying text.

[401] *See, e.g.*, HCJ 361/82 Hamari v. Commander of Judea and Samaria Area, 36(3) PD 439 (1982); HCJ 8084/02 Abbasi v. GOC Home Front Command, HaMoked (2003), https://hamoked.org/items/6181_eng.pdf [https://perma.cc/B6S3-BCDL] (unofficial English translation).

[402] *See, e.g.*, HCJ 7052/03 Adalah v. Minister of Interior, Versa (2006), https://perma.cc/8VA2-LDXQ (unofficial English translation).

[403] *See, e.g.*, HCJ 2164/09 Yesh Din, *supra* note 98.

[404] *See, e.g.*, HCJ 2056/04 Beit Sourik Village Council, *supra* note 102.

[405] *See, e.g.*, HCJ 97/79 'Awad, *supra* note 140; HCJ 698/80 Kawasme, *supra* note 136; HCJ 785/87 Al-Aziz, *supra* note 140.

[406] *See* HCJ 5100/94 Public Committee Against Torture in Israel v. Israel, ¶ 39, Isr. Sup. Ct. Database (1999), https://perma.cc/4LPB-Q7YF (unofficial English translation reuploaded by Versa). For a critical appraisal of this judgment, see Ardi Imseis, *Moderate Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgement Concerning the Legality of General Security Service Interrogation Methods*, 19 BERKELEY J. INT'L L. 328, 338–49 (2001).

[407] *See, e.g.*, HCJ 87/85 Arjoub v. IDF Commander in Judea and Samaria, 42(1) PD 353 (1988) (recommending that an instance of appeals be established in the military court system trying Palestinian cases); HCJ 7015/02 Ajuri v. Commander in the West Bank, Versa (2002), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ajuri%20v.%20IDF%20Commander%20in%20West%20Bank_0.pdf [https://perma.cc/4RLM-Z7XM] (unofficial English translation) (establishing a right to a hearing prior to deportation or assigned residence).

[408] The procedure, known colloquially as the "Neighbor Procedure" and officially named the "Early Warning Procedure," was implemented by the Israeli army to obtain the assistance of local Palestinian residents during arrest operations conducted in the West Bank. The HCJ deemed this practice unlawful despite claims that it served to reduce the risk of civilian and military casualties. *See* HCJ 3799/02 Adalah v. GOC Central Command, IDF et al., Int'l Humanitarian Law Database (2005), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/7ffdda5378172c9cc12573870052330f [https://perma.cc/Y6A5-AEAW] (unofficial English translation).

[409] *See* HCJ 7957/04 Mar'abe, *supra* note 123.

[410] *See* HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel,

and more commonly, Palestinian petitioners have managed to secure concessions from the State via out-of-court settlements, in "the Court's shadow."[411] On balance, however, judicial review by the HCJ enabled and legitimized Israel's actions in the oPt far more frequently and more substantially than it constrained them.

4.2 Diverging Judicial Roads Leading to One Political Destination

The staggering gap between the promise of justice and its delivery that has characterized the judicial review process *ab initio* has been facilitated by legal conjuration enabling the Court to navigate between dichotomies, walking simultaneously on diverging roads that somehow always lead to the same destination. For our present purposes, it is sufficient to point to a few milestones along these roads, concerning: the applicable legal framework; the legality of the settlements and the related grabbing of Palestinian land; and the HCJ's changing approach regarding the very recourse to international law.

With regards to the applicable legal framework, the Israeli governmental authorities have consistently insisted that GC IV is not binding upon Israel as a matter of law.[412] Other States, international organizations, and virtually all other relevant authorities have rejected this position.[413] The HCJ for its part has refrained from clarifying what law is in fact binding upon Israel in the oPt. Instead, it has been content to leave this question open, drawing on GC IV provisions on the basis of the State's undertaking to comply—as a matter of policy, rather than law—with the Convention's "humanitarian" provisions.[414] Similarly, the HCJ has not taken a clear stand on the *de jure* applicability of IHRL in the oPt, even while often relying on this body of

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Versa (2006), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel.pdf [https://perma.cc/F5ZA-7PA6] (unofficial English translation) (permitting targeted killings against civilians only when they are directly participating in hostilities).

[411] *See* KRETZMER & RONEN, *supra* note 26, at 4 (drawing on the notion of the "shadow of the law"). For more background on the notion of the "shadow of the law," see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) and Jacob Herbert, *The Elusive Shadow of the Law,* 26 LAW SOC'Y REV. 565 (1992).

[412] *See* BENVENISTI, *supra* note 98, at 206–07; KRETZMER & RONEN, *supra* note 26, at 56–59.

[413] *See e.g.*, Wall Advisory Opinion, *supra* note 144, ¶¶ 117–21; S.C. Res. 242, ¶¶ 1, 3 (Nov. 22, 1967); S.C. Res. 446, ¶¶ 1, 3 (Mar. 22, 1979); S.C. Res. 1435 (Sept. 24, 2002); Peter Maurer, *Challenges to International Humanitarian Law: Israel's Occupation Policy*, 94 INT'L REV. RED CROSS 1503, 1506 (2012); BENVENISTI, *supra* note 98, at 207; KRETZMER & RONEN, *supra* note 26, at 59–60.

[414] *See* KRETZMER & RONEN, *supra* note 26, at 70–72 (noting neither State nor HCJ has specified which provisions of IHL fall in this category in their view).

law.[415] In this way the HCJ has been able to oscillate at its preference between competing views about the applicability of international norms.

The HCJ has also avoided the question of the legality of the Israeli settlement enterprise in the oPt. Resolving this highly charged and contentious question would require the Court to determine, first and foremost, whether Israel has violated Article 49(6) GC IV, which provides that an occupying power may not transfer parts of its own civilian population into the territory it occupies.[416] A finding in the affirmative would implicate the State in the commission of a serious violation of IHL and could further implicate the responsible State officials in the commission of a war crime.[417] At first, the HCJ sidestepped the question by ruling that GC IV is not enforceable in Israeli courts (even if it is applicable *de jure*) as it has not been incorporated into Israeli law and is not customary.[418] Turning instead to the Hague Regulations, and accepting the—extremely dubious—argument that the burgeoning civilian settlements of the time were established on a temporary basis to serve a security purpose, it reframed the matter before it as a question of property rights rather than displacement: whether the temporary seizure of private land in occupied territory for security reasons is lawful. Ruling in the affirmative, the HCJ dismissed the petitions.[419] When a case later came before the Court in which the evidence, including the settlers' own testimonies, made it plain that the settlement had been established for reasons that had nothing to do with security, the Court ruled that it is unlawful to seize private land for non-security related purposes.[420] Any setback that this might have caused to the settlement scheme was quickly overcome as the Israeli authorities rushed to classify as much of the West Bank as possible as non-privately owned "State lands" on which they permitted, and indeed encouraged, Israeli settlement.[421] When later faced with petitions seeking to challenge the use of public land for the mushrooming settlement enterprise, the HCJ has relied on the doctrine of institutional non-justiciability, consistently refusing to pronounce judgment on the matter by insisting that it is an inherently political issue that it would be inappropriate to resolve in

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[415] *See id*. at 89–95.

[416] GC IV, *supra* note 6, art. 49(6).

[417] ICC Statute, *supra* note 7, art. 8, ¶ (2)(b)(viii) (stating "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies" is among the war crimes over which the ICC has jurisdiction).

[418] *See* HCJ 606/78 Ayoub, *supra* note 136; *see also supra* note 136 and accompanying text.

[419] *See* HCJ 606/78 Ayoub, *supra* note 136.

[420] *See* HCJ 390/79 Dweikat, *supra* note 103.

[421] *See* YEHEZKEL LEIN, B'TSELEM, LAND GRAB: ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK 48–51 (2002).

court.[422] The resulting indeterminacy about the legality of the settlements has enabled the HCJ to appeal to IHL in apparent fidelity to its dictates, while disregarding provisions of this body of law most at odds with Israel's policies and practices in the oPt.[423]

The duality inherent in international law, being simultaneously both utopian and apologetic,[424] provided a near-perfect fit for the HCJ's application of IHL, and at times IHRL, to the oPt.[425] The Court's sophisticated engagement with international law, indeed active membership in the "global community of courts,"[426] reached its peak during the tenure of Aharon Barak as its Chief Justice between 1995 and 2006, a period coinciding with the advent of international criminal law and institutions.[427] Thus, Barak repeatedly wrote that

> The saying that "when the canons roar, the muses are silent," is incorrect. The dictum, attributed to Cicero, that *inter arma enim silent leges*[428] does not reflect modern reality. . . . When the state fights against international terror, it must act according to international law.[429]

and that

> Israel is not an island unto itself. It is part of an international setting . . . . [M]ilitary war activities are not undertaken in a legal vacuum. There are legal norms—partly in customary international law, partly in treaties to which Israel is a party, and partly in the basic rule of Israeli

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[422] *See* HCJ 4481/91 Bargil v. Government of Israel, Versa (1993), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Bargil%20v.%20Government%20of%20Israel_0.pdf [https://perma.cc/EY6G-8EC6] (unofficial English translation).

[423] *See* GROSS, *supra* note 211, at 152–53 ("Indeterminacy and selective application of the law have allowed for a legal interpretation that enabled the settlements, which are this occupation's most outstanding feature.").

[424] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (re-issued with epilogue, Cambridge Univ. Press 2005).

[425] *See, e.g.*, HCJ 3239/02 Mar'ab v. IDF Commander in the West Bank, Isr. Sup. Ct. Database (2002), https://hamoked.org/files/2012/3720_eng.pdf [https://perma.cc/QWC9-YHT5] (unofficial English translation reuploaded by HaMoked) (nullifying order of military commander in light of Article 9.3 of ICCPR).

[426] *See* Slaughter, *supra* note 11, at 211–12.

[427] *See* Tamar Hostovsky Brandes, *The Diminishing Status of International Law in the Decisions of the Israeli Supreme Court Concerning the Occupied Territories*, 18 INT'L J. CONST. L. 767, 768 (2020).

[428] In times of war, the law falls silent.

[429] *See* HCJ 3451/02 Almandi v. Minister of Defense, ¶¶ 9–10, Versa (2002), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Almandi%20v.%20Minister%20of%20Defense.pdf [https://perma.cc/6G5U-6NLK] (unofficial English translation) (author translation).

law—which stipulate rules about conduct in warfare.[430]

Supreme courts, however, are comprised of judges of diverse world views, and the HCJ is no exception. Justice Cheshin, who served on the Court from 1992 and was Barak's deputy from 2005 until his retirement in 2006, was of a different persuasion. Unabashedly nostalgic for the bygone era of his student years when "international law was . . . negligible and marginal" and when the "[students did not consider it] worthy of being called 'law,'" he grudgingly admitted that it "had started standing on its own two feet as a legal system . . . [at least] this is how it is considered in relation to certain areas or certain regions around the world."[431] Israel, in his view, was not like those other "certain regions or states," and its judges should not partake in the global community of courts:

> We are judges of Israel; we judge in Israel, and we sit amidst our people. And even though as a rule it is worthwhile to inquire into foreign legal systems to study and get inspiration, we should always remember that normative arrangements made and existing in other places were made and exist against the reality in those places. . . . [W]e should not follow blindly—by way of assimilation and self-depreciation—the normative arrangements of these places.[432]

In a different judgment, Justice Cheshin conceded that "when the trumpets of war sound, the rule of law shall make its voice heard" but proceeded to state, tongue-in-cheek, that nevertheless "let us acknowledge the truth: in such places its sound is like that of the piccolo, clear and pure but drowned in bustle."[433]

For Cheshin, international law was not utopian and apologetic. It was simply utopian—a fantasy. Israel may not be an island unto itself, but it certainly is not the island of Utopia. Siding with the six to five majority decision rejecting a petition against a legislative amendment which prevented the unification between Palestinian families in Israel and the West Bank, the opening paragraph of Cheshin's judgment describes the judicial journey he and Barak took in their quest for the right determination which, alas, led to

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[430] *See* HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza, ¶ 7, Versa (2004), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Physicians%20for%20Human%20Rights%20v.%20IDF%20Commander%20in%20Gaza.pdf [https://perma.cc/8DEF-G8UP] (unofficial English translation) (author translation) (internal citation omitted).

[431] HCJ 7957/04 Mar'abe, *supra* note 123, ¶ 2 (Cheshin, J., concurring) (author translation).

[432] HCJ 7052/03 Adalah, *supra* note 389, ¶ 72 (Cheshin, J., concurring) (author translation).

[433] HCJ 1730/96 Sabih v. IDF Commander in the Judea and Samaria Area, ¶ 10, HaMoked (1996) (Cheshin, J., concurring), https://hamoked.org/files/2010/4930_eng.pdf [https://perma.cc/3SAC-CVDN] (unofficial English translation) (author translation).

disagreement.[434] Sailing on a boat, they reach an island in the middle of the ocean where they are greeted warmly by a dignified man who introduces himself as Thomas More.[435] More explains that they landed in Utopia:[436]

> "The State of Utopia," he says, "was established according to a blueprint I designed in a book I have written, the name of which is like the name of the state. . . . Incidentally, Utopia is a Greek word, and in Hebrew it means 'no place.'"[437]

The justices then ask him about the legal system in Utopia and whether it resembles the Israeli legal system:

> More smiled and responded: "I am sorry, but there are deep differences between the two legal systems, and much time will pass until Israel reaches the level of Utopia. For the time being, you are fighting for your lives, for the existence of the state, for the ability of the Jewish people to have community life and a state like all other states. The laws of Utopia . . . are not for you at this state. Not yet. . . ."
>
> Then I awoke. It was a dream.[438]

4.3 Conclusion: The HCJ's Disenchantment with International Law

The dismissive attitude towards international law evidenced in the Masafer Yatta judgment—and in most judgments since the mid-2000s[439]—suggests that it is Cheshin's, not Barak's, legacy that has carried the day; the HCJ no longer partakes in the "invisible college of international lawyers."[440] Indeed, it is international law that has become virtually invisible in its jurisprudence regarding the oPt.[441]

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[434] HCJ 7052/03 Adalah, *supra* note 389, ¶ 1 (Cheshin, J., concurring).

[435] *Id*.

[436] *Id*. (author translation)

[437] *Id*. (author translation). Note that the unofficial English translation uses the phrase "nowhere." The literal translation of Utopia is "no place." *Utopia*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/utopia [https://perma.cc/B9D6-EDAT].

[438] HCJ 7052/03 Adalah, *supra* note 389, ¶ 1 (Cheshin, J., concurring) (author translation).

[439] *See* Brandes, *supra* note 10, at 584.

[440] Schachter, *supra* note 12.

[441] In matters not linked to the occupation, the Israeli Supreme Court does still refer at times to judgments rendered by international and foreign national courts, especially when it comes to novel situations where Israeli precedent is lacking. *See, e.g.*, HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance, Versa (2009), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Academic%20Center%20of%20Law%20and%20Business%20v.%20Minister%20of%20Finance.pdf [https://perma.cc/U963-DRG5] (unofficial English translation) (privatization of prisons); HCJ

There are various explanations for this change over time, ranging from the composition of the court—including lack of relevant expertise on the part of most justices and the absence of internationally-minded leadership—to the global and local political ecosystem. The crisis of liberalism and the rise of populism generate both hostility towards foreign influence and a challenge to courts' authority to engage in judicial review (perceived as limiting the freedom of action of democratically elected governments).[442] In Israel, this political climate has been exacerbated by the indefinite duration of the occupation, coupled with the phenomenal success of the settlers' narrative, which denies the very existence of the occupation.[443] Moreover, the notion that settlements are a war crime,[444] the submission of the prosecutor of the International Criminal Court ("ICC") regarding the situation in Palestine,[445] and instances of noteworthy international human rights organizations accusing Israel of apartheid[446] are perceived by most Israelis as nothing but blatant anti-Semitism.[447]

8425/13 Eitan – Israeli Immigration Policy Center v. Government of Israel, UNHCR (Sept. 22, 2014), https://www.refworld.org/cases,ISR_SC,54e605334.html [https://perma.cc/PHC4-ZQ3J] (unofficial English translation) (detention of asylum seekers); HCJ 1661/05 Gaza Coast Regional Council, *supra* note 211 (compensation to Israeli citizens who were expelled from their homes following the withdrawal from the Gaza Strip); HCJ 721/94 El-Al Israel Airlines Ltd. v. Danielowitz, Versa (1994), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/El-Al%20Israel%20Airlines%20v.%20Danielowitz.pdf [https://perma.cc/7JSD-BK4G] (unofficial English translation) (non-discrimination against same-sex couples at the workplace). *See generally* Leonardo Pierdominici, *The Supreme Court of Israel and the Use of Comparative Law, in* JUDICIAL COSMOPOLITANISM: THE USE OF FOREIGN LAW IN CONTEMPORARY CONSTITUTIONAL SYSTEMS 853 (Giuseppe Franco Ferrari ed., 2019).

[442] *See* Nadiv Mordechay & Yaniv Roznai, *A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel*, 77 MD. L. REV. 244, 252, 264 (2017).

[443] *See, e.g.*, Thomas Friedman, *The Israel We Knew Is Gone,* N.Y. TIMES (Nov. 4, 2022), https://www.nytimes.com/2022/11/04/opinion/israel-netanyahu.html [https://perma.cc/87CS-BR7J].

[444] ICC Statute, *supra* note 7, art. 8(2)(b)(viii).

[445] Statement of Fatou Bensouda, ICC Prosecutor, ICC, Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction (Dec. 20, 2019) [hereinafter Bensouda Statement], https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine [https://perma.cc/XV2R-VU2W].

[446] *See, e.g.*, Amnesty Int'l, *Israel's Apartheid Against Palestinians: Cruel System of Domination and Crime Against Humanity*, AI Index MDE 15/5141/2022 (Feb. 1, 2022); Hum. Rts. Watch, *supra* note 268; *see also* B'TSELEM, A REGIME OF JEWISH SUPREMACY FROM THE JORDAN RIVER TO THE MEDITERRANEAN SEA: THIS IS APARTHEID (2021); MICHAEL SFARD, YESH DIN, THE ISRAELI OCCUPATION OF THE WEST BANK AND THE CRIME OF APARTHEID: LEGAL OPINION (2020).

[447] Jeffrey Heller, *Netanyahu Accuses ICC of Anti-Semitism in Pursuit of War Crimes*

From the perspective of the Palestinians, this change has made little difference, given that the engagement of the HCJ with international law has always been the tribute instrumentalism pays to virtue.[448] From an institutional and an international legal perspective, it does make a difference.

It is ironic, though not altogether surprising, that a court, which in the context of the occupation, has functioned mainly as an executive agency for a succession of Israeli governments, while still cloaking them (for the most part) with a mantle of international legitimacy, would find itself on the losing side in the battle of internal separation of powers. Caught between the Scylla of national wrath and the Charybdis of international unacceptability, the court has opted for minimizing the cost of the former by shying away from international law.

That stand may come with an international and an internal price-tag. Internationally, it would make it more difficult for Israel to rely on the complementarity principle to shield its agents against the exercise of jurisdiction by the ICC.[449] Internally, judicial imploding is further diminishing the court's status in respect of both the two other governmental branches and the public.[450] But the withering away of the law of belligerent occupation in the HCJ may have its benefits too.

The presupposition of the law of belligerent occupation is that an occupation is an exception to the normal international legal order and, thus, of temporary and finite duration. An occupation lasting for over five decades with no end in sight defies the basic premises of the applicable paradigm. If the paradigm no longer fits, it is only to be expected that it will be abandoned. This is what the HCJ has been doing, increasingly substituting IHL with Israeli administrative and constitutional law.[451] The application of Israeli law

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Probe, REUTERS (Dec. 22, 2019), https://www.reuters.com/article/us-icc-palestinians-israel/netanyahu-accuses-icc-of-anti-semitism-in-pursuit-of-war-crimes-probe-idUSKBN1YQ0KC [https://perma.cc/B4GY-JG7U]. *See generally* Brandes, *supra* note 427, at 769.

[448] *E.g.*, Nimer Sultany, *Activism and Legitimation in Israel's Jurisprudence of Occupation*, 23 SOC. & LEGAL STUD. 315 (2014).

[449] *See* ICC Statute, *supra* note 7, art. 17.

[450] *See* Dahlia Scheindlin, *The Assault on Israel's Judiciary*, CENTURY FOUND. (July 7, 2021), https://tcf.org/content/report/assault-israels-judiciary/ [https://perma.cc/J75P-5KU6] ("The media coverage, the public debate, and the advocacy for [proposals for fundamental changes to the Supreme Court] all bolster the story the populist nationalist right wing has been telling: the judiciary is suppressing the true will of the people and suffocating society, and must be constrained."); Rivka Weill, *The High Stakes Israeli Debate over the Override*, VERFASSUNGSBLOG (Nov. 25, 2022), https://verfassungsblog.de/the-high-stakes-israeli-debate-over-the-override/ (discussing Israeli legislators' stated intention to introduce an override clause into the Israeli constitutional system that would undermine judicial oversight over Knesset legislation).

[451] *See* Brandes *supra* note 427, at 777–85; Amichai Cohen & Yuval Shany, *Occupation, Annexation and the Regularization Law*, 55 IYUNEY MISHPAT FORUM, 1–36 (2022) (Hebrew).

to the West Bank contravenes the law of belligerent occupation, but it is in tandem with reality—both with the blurring of the boundaries between Israel and the oPt and with the dominant political discourse in Israel. While there are no doubt strong normative grounds to object to an approach nullifying the distinction between Israel and the oPt,[452] from the perspective of normative coherence, *de jure* annexation is better fitted to the reality of progressively expanding *de facto* annexation.[453] The *de jure* annexation of Area C is informal, but "a rose is a rose is a rose," even if it goes by any other name.[454] The smell of the rose,[455] however, depends on the normative consequences of the demise of the occupation paradigm. In this context too, two roads diverge.[456]

One road leads to apartheid;[457] the other, to the equal application of human rights law to both Palestinians and Israelis. As observed,[458] the HCJ has been applying human rights law to the people residing in the oPt, but in this respect too it has embraced ambiguity; while not explicitly refuting the State's contention that its IHRL obligations do not apply in the oPt,[459] it has occasionally turned to this body of law,[460] resorted to reasonableness and proportionality to strike a balance between security considerations and Palestinian rights,[461] and determined that Israeli human rights law applies to settlers[462] while leaving aside the question of whether or not it applies to Palestinians as well.

Equality is at the heart of human rights law, both Israeli and international.

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[452] This would be at odds with the Palestinian people's right to external self-determination and with international law's prohibition on the annexation of foreign territory through force of arms. *See* Ralph Wilde, *Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation,* 22 PALESTINE Y.B. INT'L L. 3 (2021) (arguing that the inaptitude of IHL merits a turn to legal paradigms—namely *jus ad bellum* and the right to self-determination—that require a sharp and immediate break between Israel and Palestine rather than a blurring of the distinctions between them).

[453] The *de facto* annexation was already recognized by the ICJ, albeit in a tentative manner. *See* Wall Advisory Opinion, *supra* note 144, ¶ 1, 121–22.

[454] Gertrude Stein, *Sacred Emily* (1913), *reprinted in* GEOGRAPHY AND PLAYS 178, 187 (1922).

[455] *See* WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2, ll. 43–44.

[456] *See* ROBERT FROST, *The Road Not Taken*, *in* THE ROAD NOT TAKEN AND OTHER POEMS 87 (David Orr ed., Penguin Classics 2015).

[457] As noted, many have concluded that Israel is already subjecting Palestinians to apartheid. Since apartheid and occupation are not mutually exclusive legal categories, it is possible to maintain this position while insisting that Israel remains bound by the law of occupation. *See generally* Jackson, *supra* note 170.

[458] *See supra* note 415 and accompanying text.

[459] *See* Ben-Naftali & Shany, *supra* note 144, at 87–88 (discussing the State's position).

[460] *See, e.g.*, HCJ 3239/02 Mar'ab, *supra* note 425 (applying Article 9.3 of the ICCPR).

[461] *See, e.g.*, HCJ 7957/04 Mar'abe, *supra* note 123.

[462] *See* HCJ 1661/05 Gaza Coast Regional Council, *supra* note 211.

Thus far, equality has played different roles in judgments relative to the oPt: to protect settlers' rights in a manner that obviates the status of Palestinians as "protected persons" under IHL, thus ignoring the inherent imbalance in the power-relations between the two groups;[463] to determine, conversely, that the application of human rights retroactively can neither be blind to the power discrepancies nor deprive Palestinians of the protections ensuing from their status as "protected persons";[464] and more recently, to annul a law which purported to regularize retroactively settlements built on Palestinian private property.[465]

It thus seems that holding the rope at both ends by obfuscating the applicable law and employing a "pick and choose" interpretive methodologies characterizes the HCJ's jurisprudence relative to the oPt even when it speaks the language of human rights. If that language is to be a viable alternative to apartheid, it must be spoken loudly and clearly. And it must do so in reference to all rights, including the right to have rights.[466]

5. CONCLUDING THOUGHTS: A GRIN WITHOUT A CAT

> *"How queer everything is to-day! And yesterday things went on just as usual. I wonder if I've been changed in the night? Let me think: *was* I the same when I got up this morning?"*[467]

The change over time in the HCJ's attitude towards international law underscores ironically that Israel is not in fact an island unto itself. On the contrary, the withering away of the "global community of courts"[468] over the past two decades is a world-wide phenomenon.

The hitherto "invisible college of international lawyers"[469] gained visibility roughly around the time the Hegelian "end of history" was announced to much acclaim.[470] The argument was that the coupling of the

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[463] *See* HCJ 3435/05 Elnatsha, Director of the Wakf in Hebron, *supra* note 243. *See generally* Gross, *supra* note 257.

[464] *See* HCJ 794/17 Ziada v. IDF Commander in the West Bank, Isr. Sup. Ct. Database (2018). But see criticism in YESH DIN, INFRINGEMENT OF PALESTINIANS' PROPERTY RIGHTS FOR THE BENEFIT OF ISRAELI SETTLERS IN THE WEST BANK 8–10 (2018).

[465] *See* HCJ 1308/17 Silwad Municipality v. Knesset, ¶¶ 40–74, Adalah (2020), https://www.adalah.org/uploads/uploads/PDF_Final_English_translation_Settlements_Regularization_Petition_May_2017.pdf [https://perma.cc/CL9K-H8WY] (unofficial English translation).

[466] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 (1951).

[467] LEWIS CARROL, ALICE'S ADVENTURES IN WONDERLAND 16 (Princeton University Press ed. 2015) (1865) (Alice speaking).

[468] Slaughter, *supra* note 11.

[469] Schachter, *supra* note 12.

[470] Francis Fukuyama, *The End of History?*, 16 NAT'L INT. 3 (1989). The article was expanded into a book. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

post-world war demise of fascism with the downfall of communism indicates that history, being the process by which liberal institutions become universal, has reached its goal.[471] This thesis appealed to the international legal imagination; research found that local, regional, and international courts engaged with each other more vigorously and explicitly than ever before; the advent of international criminal law and judicial institutions was heralded as an end to impunity, and judges felt that they were part of an ever-interactive community and shared a common identity.[472] This engagement was neither complete nor did it deny that the community comprises a plurality of legal systems and differing interests, but recognized that its participants did contribute to the development of a common transnational legal discourse.[473] It was during that time that the Israeli HCJ's active engagement with international law reached its peak. We live in different times. Indeed, even Fukuyama had to concede that the end of history has been postponed.[474]

This change has been attributed to post 9/11 world security concerns enabling states to channel their fear to loathing of foreigners, even in states that are considered liberal,[475] and indeed to the crisis of liberalism and the related rise of populism.[476] Some States attribute their disengagement to the perception that international law mechanisms are "instrument[s] of post-colonial hegemony" or that they are otherwise tainted by bias.[477]

Within this context, disenchantment with international law has been most visible in the trend of leaving or threatening to leave international courts or institutions. Three African states—Burundi, Gambia, and South Africa—withdrew from the ICC in 2016, though eventually only Burundi retained its

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[471] FUKUYAMA, *supra* note 470, at xi.

[472] *See* Slaughter, *supra* note 11, at 192.

[473] *Id*. at 219; *see also* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by Domestic Courts*, 102 AM. J. INT'L L. 241 (2008); Daniel Hoadley et al., *A Global Community of Courts? Modelling the Use of Persuasive Authority as a Complex Network*, 9 FRONTIERS PHYSICS 1 (2021). Note that mere cross-referencing does not necessarily generate better protection of human rights. Judges might reject the final holdings of the cases they are citing and cite judgments that rejected petitions relating to the protection of human rights. *See e.g*., Deepa Kansra, *Human Rights and the Practice of Cross by Domestic Courts*, 4 KAMKUS L. REV. 117 (2020) (discussing human rights and diverging results in jurisdiction, exemplified by three cases in India, Nepal, and Singapore).

[474] *See* FRANCES FUKUYAMA, IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT (2018).

[475] *See* Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1, 1–4 (2017).

[476] *See* Brandes, *supra* note 427; Ian Seiderman, *The UN High Commissioner for Human Rights in the Age of Global Backlash*, 37 NETH. Q. HUM. RTS. 5, 6 (2019).

[477] *E.g*., Lucrecia García Iommi, *Whose Justice? The ICC 'Africa Problem*,' 34 INT'L REL. 101, 114 (2019) (quoting President Yoweri Museveni of Uganda).

withdrawal.[478] Kenya, Namibia, and Uganda have threatened to withdraw.[479] In Asia, the Philippines informed the ICC of its withdrawal from the Court, following a preliminary examination into alleged crimes carried out involving the killing of thousands in the state's war on drugs.[480] A petition to the Philippines Supreme Court against the withdrawal was dismissed in 2021.[481] The U.S., which never joined the ICC, imposed sanctions on its members of organs following an investigation into whether American forces committed war crimes in Afghanistan.[482] Though the sanctions were eventually lifted following the change in the administration, the U.S. maintains its longstanding objection to efforts to assert jurisdiction over personnel of non-state parties.[483]

Regional human rights courts have not been exempted from this trend.[484]

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[478] Mariama Sow, *Figure of the Week: African Indictments and Withdrawals from the International Criminal Court,* BROOKINGS (Mar. 29, 2017), https://www.brookings.edu/blog/africa-in-focus/2017/03/09/figure-of-the-week-african-indictments-and-withdrawals-from-the-international-criminal-court-and/ [https://perma.cc/WS2X-CB3Y]; Elise Keppler, *Human Rights Watch Gambia Rejoins ICC: South Africa, Burundi Now Outliers on Exit*, HUM. RTS. WATCH (Feb. 27, 2017), https://www.hrw.org/news/2017/02/17/gambia-rejoins-icc [https://perma.cc/P334-FLJ8].

[479] Sow, *supra* note 478.

[480] *Philippines Informs U.N. of ICC Withdrawal, Court Regrets Move*, REUTERS (Mar. 16, 2018), https://www.reuters.com/article/us-philippines-duterte-icc-un-idUSKCN1GS0Y5 [https://perma.cc/5H2G-MZFC].

[481] *Philippines Supreme Court Dismisses Challenge to Duterte's ICC Withdrawal*, REUTERS (Mar. 16, 2021), https://www.reuters.com/article/philippines-icc-idUSL4N2LE2JW [https://perma.cc/RJ3K-4EHH].

[482] *US Sets Sanctions Against International Criminal Court: Trump Executive Order Seeks to Thwart Justice for Victims*, HUM. RTS. WATCH (June 11, 2020, 8:40 PM), https://www.hrw.org/news/2020/06/11/us-sets-sanctions-against-international-criminal-court [https://perma.cc/TS9W-ZF2B].

[483] *U.S. Lifts Trump's Sanctions on ICC Prosecutor, Court Official*, REUTERS (Apr. 2, 2021), https://www.reuters.com/article/us-usa-icc-sanctions-idUSKBN2BP1GY [https://perma.cc/RMF3-Q4P5]. Note that this approach does not prevent the U.S. from cooperating with some forty states in gathering evidence to facilitate the investigation of war crimes allegedly carried out by Russians in the war in Ukraine, despite the fact that Russia is not a state party. In that sense, it has not disengaged completely from international law, but uses it as a tool of *raison d'état*. *See* Anthony Deutsch & Robin Emmott, *Forty-five Nations Pledge to Coordinate Evidence of War Crimes in Ukraine*, REUTERS (July 14, 2022), https://www.reuters.com/world/west-seeks-coordinate-evidence-war-crimes-ukraine-2022-07-14/ [https://perma.cc/RE7Z-AG36].

[484] *See generally* Ximena Soley & Silvia Steininger, *Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights*, 14 INT'L J.L. CONTEXT 237 (2018) (discussing Trinidad and Tobago, the Dominican Republic, Peru, and Venezuela); Øyvind Stiansen & Eric Voeten, *Backlash and Judicial Restraint: Evidence from the European Court of Human Rights*, 64 INT'L STUD. Q. 770 (2020) (discussing United

Latin America has seen several states leaving the jurisdiction of the Inter-American Court of Human Rights ("IACHR").[485] In 2012, Venezuela denounced the American Convention on Human Rights, which grants jurisdiction to the IACHR.[486] In 2014, the Dominican Republic Constitutional Tribunal held that the government's declaration which accepted the IACHR's jurisdiction was unconstitutional.[487] In 2021, Nicaragua denounced the Organization of American States, thus revoking the jurisdiction of the IACHR as of 2023.[488] In Africa, Rwanda revoked the jurisdiction of the African Court on Human and Peoples' Rights in 2016.[489] Europe has also seen its share of states withdrawing or threatening withdrawal from the European Court of Human Rights. In 2022, the Russian Parliament voted to withdraw from the Court which President Putin signed into law,[490] and the UK too has indicated that it might do so following

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Kingdom, Denmark, the Netherlands, Italy, and Switzerland); Martin Lolle Christensen & William Hamilton Byrne, *Two Paths in the Future Relationship of the European Court of Human Rights and the African Court of Human and Peoples' Rights*, 40 NORDIC J. HUM. RTS. 250, 252 (2022) ("[A]spirational goals of unity and the cynicism of insularity are likely to be prominent and overlapping themes in the perilous future of regional human rights courts.").

[485] Soley & Steininger, *supra* note 484, at 244–45.

[486] *Id*.; Letter from Nicolás Maduro Moros, Minister of Foreign Affs. of Venezuela, to José Miguel Insulza, Sec'y Gen., Org. of Am. States, at 11–12 (Sept. 6, 2012), https://www.oas.org/DIL/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SG.English.pdf [https://perma.cc/G9LB-JSTK]; *see* Organization of American States, American Convention on Human Rights art. 33, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[487] Dinah Shelton & Alexandra Huneeus, In re *Direct Action of Unconstitutionality Initiated Against the Declaration of Acceptance of the Jurisdiction of the Inter-American Court of Human Rights*, 109 AM. J. INT'L L. 866, 866 (2015).

[488] Amnesty Int'l, *Nicaragua: Denunciation of OAS Charter Heightens Lack Protection for the Victims of Human Rights Violations, Their Families and Nicaraguan Society in General*, AI Index AMR 43/5030/2021 (Nov. 22, 2021), https://www.amnesty.org/en/wp-content/uploads/2021/11/AMR4350302021ENGLISH.pdf [https://perma.cc/L5WN-EB24].

[489] *Rwanda's Withdrawal of Its Special Declaration to the African Court: Setback for the Protection of Human Rights*, FIDH (Mar. 17, 2016), https://www.fidh.org/en/region/Africa/rwanda/joint-civil-society-statement-on-rwanda-s-withdrawal-of-its-article [https://perma.cc/H8LD-5LZF].

[490] Federal'nyĭ Zakon RF o vnesenii izmeneniĭ v nekotorye zakonodatel′nye akty Rossiĭskoĭ Federatsii i priznanii utrativshimi silu otdel′nykh polozheniĭ zakonodatel′nykh aktov Rossiĭskoĭ Federatsii [Federal Law of the Russian Federation on Amendments to Certain Legislative Acts of the Russian Federation and Recognizing as Invalid Certain Provisions of Legislative Acts of the Russian Federation], June 11, 2022, No. 183, http://publication.pravo.gov.ru/Document/View/0001202206110028 [https://perma.cc/BB2E-Z6DH] (Rus.); *Russian MPs Vote to Quit European Court of Human Rights*, AL JAZEERA (June 7, 2022), https://www.aljazeera.com/news/2022/6/7/russia-exits-european-court-of-human-rights-jurisdiction [https://perma.cc/Y5UQ-DY7U].

challenges to its plans to deal with asylum seekers.[491]

Thus far, compliance with the decisions of the ICJ has generally escaped this backlash.[492] Notable exceptions do exist, however, primarily the U.S. Supreme Court's holding that judgments of the ICJ, though binding under international law,[493] are not binding under U.S. law if Congress has not enacted a statute implementing them,[494] and the Italian Supreme Court of Cassation holding that actions taken by the Italian legislature in order to comply with a judgment of the ICJ were unconstitutional.[495]

The proposition that history necessarily repeats itself, first as tragedy and then as farce,[496] may not be true. It can be a tragedy and a farce simultaneously. From the perspective of the Palestinians, the Masafer Yatta judgment, discussed in Part 2, is a tragedy. From the perspective of international law, it is a farce. The same could be said of both the larger territorial puzzle of which Masafer Yatta is a piece, discussed in Part 3, and of the role that international law has played in the HCJ's judicial review of governmental actions in the oPt, discussed in Part 4. The observation that the change in the HCJ's approach to international law is in tandem with the times we live in, and that the Masafer Yatta judgment and others like it may consequently carry little or no costs in terms of international legitimacy, merely underscores the point. The point has become all the more poignant in the wake of Israel's 2022 elections. Indeed, the first principle on which the newly elected Israeli government rests and its highest priority is to the "exclusive and indisputable" rights of the Jewish people over all of the Land

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[491] David Hughes, *No 10 Not Ruling Out Human Rights Convention Withdrawal After Rwanda Flight Blow*, INDEPENDENT (June 15, 2022), https://www.independent.co.uk/news/uk/priti-patel-rwanda-european-convention-on-human-rights-suella-braverman-government-b2101813.html [https://perma.cc/E2BG-5KVK].

[492] *See* Heather L. Jones, *Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice Since Nicaragua*, 12 CHI.-KENT J. INT'L & COMP. L. 57 (2012); Colter Paulson, *Compliance with the Final Judgements of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 434–37 (2004).

[493] ICC Statute, *supra* note 7, art. 59.

[494] *See* Medellín v. Texas, 552 U.S. 491, 503 (2008) (citing Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31)).

[495] *See* Cass., sez. un., 22 ottobre 2014, n. 238, Foro it. 2015, I, 1152 www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf [https://perma.cc/LL7Y-V3KC] (official English translation). For the decision of the ICJ, see Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 99 (Feb. 3). The matter has recently been resubmitted by Germany to the ICJ. *See* Lorenzo Gradoni, *Is the Dispute Between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?*, EJIL:TALK! (May 10, 2022), https://www.ejiltalk.org/is-the-dispute-between-germany-and-italy-over-state-immunities-coming-to-an-end-despite-being-back-at-the-icj/ [https://perma.cc/X5AG-GA2R].

[496] KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 15 (Int'l Publishers Co. 1972) (1852).

of Israel committing the government "to advance and develop Jewish settlement in all part of this land" including "Judea and Samaria" (the West Bank).[497]

The HCJ's jurisprudence with regards to the oPt is a tragic farce in large part because of the awkward oscillation between dichotomies described above. This simultaneous walk on diverging paths recalls Lewis Carrol's Wonderland where logic gives way to nonsense. Indeed, the passages of the Masafer Yatta judgment in which international law appears fleetingly—a mere obiter—without substance or foundation, echo Alice's encounter with the Cheshire Cat:

> *"I wish you wouldn't keep appearing and vanishing so suddenly; you make one quite giddy!"*
>
> *"All right," said the Cat; and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.*
>
> *"Well! I've often seen a cat without a grin," thought Alice; "but a grin without a cat! It's the most curious thing I ever saw in all my life!"*[498]

Is this all we now have of international law? Neither apology nor utopia, just a curiosity lingering, tragically, farcically, at the point of vanishing?

In Wonderland, Alice eventually confronts the Queen and challenges her authority: "You're nothing but a pack of cards!"[499] With that the trial literally collapses like a house of cards, and Alice's dream ends. In our world too we would do well to challenge the authorities that have brought us down the rabbit hole so that we might dismiss their warped reasoning. It is time to wake up lest the rule of law becomes but a rule by law.[500]

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[497] Benjamin Netanyahu (@netanyahu), TWITTER (Dec. 28, 2022, 11:59 AM), https://twitter.com/netanyahu/status/1608039943817007105 [https://perma.cc/75XQ-GXU7] (author translation); *Netanyahu Government Makes West Bank Settlement Expansion Its Priority*, GUARDIAN (Dec. 28, 2022), https://www.theguardian.com/world/2022/dec/28/benjamin-netanyahu-government-makes-west-bank-settlement-expansion-its-priority [https://perma.cc/Y4S4-JEXJ].

[498] CARROL, *supra* note 467, at 54.

[499] *Id*. at 100.

[500] *See* FRANZ NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM, 1934-1944, at 447–48 (Ivan R. Dee ed. 2009) (1942) ("Law is now a technical means for the achievement of specific political aims. It is merely the command of the sovereign."). For an analysis of rule by law as it applies to the question of Palestine, see ARDI IMSEIS, THE UNITED NATIONS AND THE QUESTION OF PALESTINE: RULE BY LAW AND THE STRUCTURE OF INTERNATIONAL LEGAL SUBALTERNITY (forthcoming); *see also* Ardi Imseis, The United Nations and the Question of Palestine: Rule by Law and the Structure of International Legal Subalternity (Sept. 2018) (Ph.D dissertation, University of Cambridge), https://www.repository.cam.ac.uk/bitstream/handle/1810/290775/PhD%20Thesis%20to%20be%20Bound%20Imseis.pdf [https://perma.cc/RB5B-WWYW].