**In the Shadow of Settlement – the Israeli Progressive Scholars’ Critical Analyses of the Decision-Making Policies of the Israeli Supreme Court Sitting as the High Court of Justice**

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27. **Introduction**

This book, *The Occupation of Justice -*The Supreme Court of Israel and the Occupied Territories*,* written by two distinguished Israeli professors of international law (Prof. David Kretzmer, the emeritus professor at Hebrew University, the former member of the Human Rights Committee; and Prof. Yael Ronen, professor at the Academic Centre for Science and Law), aims to engage in a thorough assessment of the case-law of the Israeli Supreme Court of Justice (hereinafter, the ‘SC’) through the authors’ refreshingly critical lenses. The SC, when sitting as the High Court of Justice (hereinafter ‘the HCJ’), is distinctive in recognizing the jurisdiction to receive petitions from inhabitants of the occupied territories contesting measures taken by the occupying authorities since the early days of the occupation.[[2]](#footnote-2) The Israeli government did not contest the jurisdiction as a matter of policy.[[3]](#footnote-3) To its credit, the SC has consistently asserted its power of reviewing acts of the military commanders in the Palestine occupied territories.[[4]](#footnote-4) Further, since the adoption of the two Israeli Basic Laws in 1992, the SC has recognized its power to carry out judicial review even of the Knesset laws affecting occupied territories in light of the basic laws.

When equipped with such distinct power of judicial review, the most pertinent question is what role the SC’s supervision has played in relation to the Palestinians’ rights derived from international humanitarian law (IHL) and international human rights law (IHRL). Confronted with the hard reality of the prolonged regime of military occupation, the expectation that Israel’s bastion of the rule of law should play a pivotal role in implementing the rights of Palestinians in the occupied territories is all the higher.

From the outset, it is clear that Kretzmer’s and Ronen’ critical analyses are purported to corroborate their core thesis that through its controversial interpretations of IHL the SC has given implicit endorsement, if not express imprimatur, to controversial policies pursued by the right-wing government in breach of international law. They provide a scathing critique that the cumulative effect of the SC’s ‘pro-government’ interpretations over years makes the SC even ‘complicit’ in creating a ‘settler colonial regime’,[[5]](#footnote-5) which constitutes a fundamental obstacle to the peace process.

While engagingly closely with Kretzmer’s and Ronen’s book, the main body of this paper dissects the SC’s judicial policies through this author’s own analytical prisms by focusing on six issues: the applicable laws overall; Article 43 Hague Regulations; the SC’s controversial interpretations of IHL; the areas where the SC has shown the mixture of restrictive interpretation and some progressive features in relation to IHL; progressive approaches to IHL and IHRL; and the critique of certain modalities of the SC’s proportionality appraisals. These issues are addressed in Sections II to VII respectively. Finally, Section VIII furnishes concluding appraisals.

1. **Applicable Laws**
2. **Overview – the Israeli Supreme Court’s Judicial Review of Cases Relating to the Palestine Occupied Territories**

As Kretzmer and Ronen write, when Israel took control of the West Bank and the Gaza Strip, there was no precedent of the occupying power’s domestic courts reviewing measures taken by its military forces in the occupied territory.[[6]](#footnote-6) The history of the SC second-guessing the occupying authority’s measures is nearly as old as the Israeli occupation.[[7]](#footnote-7) In *Christian Society* (1972),[[8]](#footnote-8) which concerned the challenge against the commander’s authority to change the local law relating to arbitration for labour disputes of Palestinian civilians, the SC did not even bother to address the question of jurisdiction. While taking for granted its competence to adjudicate on petitions which were raised by foreigners (Palestinians) contesting acts committed beyond Israel’s sovereign territory, the SC examined the merits of the petition.

1. **The Impact of the Israeli Public Law and IHRL**

Since 1992, Israel has been possessed with two constitutional laws on fundamental rights: Basic Law: Human Dignity and liberty; and Basic Law: Freedom of Vocation. According to Kretzmer and Ronen,[[9]](#footnote-9) the SC’s policy since 1990s, albeit erratically, shows the applicability of the Israeli constitutional law to all persons in the West Bank (Jewish and Arabs).[[10]](#footnote-10) While the seed for such extraterritorial application of the constitutional law was sown already in Justice Cheshin’s view in *Al-‘Amarin* (1992),[[11]](#footnote-11) the landmark appeared in *Haas* (2004)[[12]](#footnote-12) and *Bethlehem* (2005).[[13]](#footnote-13) Kretzmer and Ronen[[14]](#footnote-14) explain that such extraterritorial operationalization of the Israeli constitutional law for the Palestinians in the occupied territories has been triggered by the need to address a wave of orders for punitive house demolitions in East Jerusalem,[[15]](#footnote-15) the area which is unilaterally annexed into Israel’s sovereign territory under Israeli law.[[16]](#footnote-16) These East Jerusalem cases are considered to precipitate the applicability of the Basic Law to similar punitive house demolitions in the West Bank.[[17]](#footnote-17) One crucial question remains: whether the Basic Law applies to the military commander’s conduct in the occupied territories, and if so, on what basis.[[18]](#footnote-18) Further, one ought to be circumspect about extrapolating any general inferences from the cases that are still in flux. It is suggested that since the SC’s references have been couched in vague terms, its evolving case-law needs to be carefully dissected to verify if it speaks of constitutional law, IHRL or even human rights aspect of IHL.[[19]](#footnote-19)

In other cases, the SC has countenanced the notion that in the occupied territories, different legal regimes apply to the Israeli settlers and the Palestinians. In *Gaza Coast Council*,[[20]](#footnote-20) the Israelis in the occupied territory were found to enjoy the constitutional safeguards, subject, however, to the limits imposed by the law of occupation. In *Mara’abe* (2005),[[21]](#footnote-21) the SC ruled that the discretion of the commander had to be guided not only by two countervailing interests of the security considerations and the rights of the Palestinian population. It held that the commander could reckon also with the rights and security of the Israeli settlers as the third factor.[[22]](#footnote-22) Hence, *Mara’abe* suggests that the legal regimes applicable to Israelis and Palestinians are different,[[23]](#footnote-23) an approach that has been confirmed later in *Al-Ram* (2006).*[[24]](#footnote-24)*

With respect to the relationship between the Israeli constitutional law and international law, Kretzmer’s and Ronen’s analyses reveal the SC’s propensity to give precedence to the Israeli constitutional rights over the Palestinians’ rights derived from the law of occupation.[[25]](#footnote-25) This is said to be the case even though in some cases as in *Mara’abe*[[26]](#footnote-26) the rights of Israelis have been constrained by the law of belligerent occupation. In *Bethlehem* (2005),[[27]](#footnote-27) the right to worship and the free movement of the Israelis from Jerusalem were favoured over the IHL-based property rights of the West Bank Palestinians. In *Abu Daher* (2005),[[28]](#footnote-28) the security concern of an incumbent Israeli minister was found to overweigh the Palestinian landowner’s property right. Those judgments unveil how the application of the constitutional law may result in relinquishing the law of occupation as the primary analytical framework.

In other cases, however, the constitutional law safeguards did serve to reinforce the claims of the Palestinians in occupied territories. In *Settlement Regularisation* (2020),[[29]](#footnote-29) the Court invalidated a highly controversial law, the Law for the Regularisation of Settlement in Judea and Samaria, as unconstitutional. This law obligated the commander to take private land of occupied territories on which illegal settler construction was erected in ‘good faith’ or ‘with state consent’. The commander was supposed to declare land on which an outpost had been built as public property if no one had rights in the land concerned. The SC found violations of two fundamental rights (the right to property; the right to equality of Palestinians in the West Bank,) and the failure to meet the demands of the limitation clauses in the Basic Law (Basic Law: Human Dignity and Liberty).[[30]](#footnote-30)

Turning to Israeli administrative law, in view of Israel’s sophisticated principles of administrative law, one may ask if these have galvanized the SC to strengthen its standard of reviewing issues relating to the occupying authority’s security power.[[31]](#footnote-31) However, according to Kretzmer and Ronen, there is a considerable limit to their potential benefit for the occupied Palestinian population. Reliance on the administrative law principles has given the SC a peg on which to hang its holding that the presumption of legality of the administrative act should gain upper hand over specific rights derived from the law of occupation.[[32]](#footnote-32) Under the Israeli public law (as with many other common law countries), the judiciary starts with presuming the legality of measures taken by the administrative organs in deference to the legitimacy of latter’s authority. Kretzmer and Ronen argue that this has resulted in the tendency to relinquish the law of occupation to ‘a secondary standing’.[[33]](#footnote-33)

Further, there is a problem of the decontextualized way in which public law doctrines have been operationalised.[[34]](#footnote-34) According to Kretzmer and Ronen, whenever the Israeli public law principles or doctrines are applied to petitions from Palestinians in the occupied territories, the judgments fail to take adequately into account that belligerent occupation is characterized by the inherent power disparity and the lack of political accountability of the authorities toward the Palestinian population.[[35]](#footnote-35) One does not need to rely on Critical Legal Studies or postcolonial theory to grasp that the law of occupation epitomises how closely the sheer naked power and the process of law-making and application are intertwined with each other.

As regards implications of IHRL for the occupied territories, Kretzmer and Ronen contend that while having never explicitly found IHRL treaties to be *de jure* applicable, the SC has favoured the application of (some provisions of) IHRL treaties in different ways.[[36]](#footnote-36) Their analyses reveal the SC’s three salient approaches that allow IHRL to be infiltrated into its judicial review: (i) the approach of viewing IHRL as already reflecting customary law; (ii) the approach of applying IHRL *arguendo*, according to which even when the *de jure* applicability of (treaty-based) IHRL rules is rejected, those rules are invoked as the guiding principles for the occupying authorities; and (iii) the approach of assuming human rights law as already established in the case-law. Despite the merit of such approaches, it may be asked why the SC has hesitated to recognize openly the applicability of the IHRL treaties to which Israel is a party to the occupied territories. Indeed, such a straight-forward approach is the one that the ICJ followed in *Wall* Advisory Opinion.[[37]](#footnote-37) As Kretzmer and Ronen explain, it seems that those judicial approaches constitute the SC’s tactics to evade the question of the *de jure* applicability of IHRL treaties in occupied territories.[[38]](#footnote-38)

1. **The Israeli Supreme Court’s Approach to the Law of Occupation - An Overall Assessment**

The Israeli government’s earlier position was that since neither the West Bank nor the Gaza Strip was under the sovereignty of any ‘High Contracting Party’ when occupied by Israel in 1967, this was not an occupied territory within the meaning of Article 2 common to the Geneva Conventions (GCs), but an ‘administered territory’.[[39]](#footnote-39) When the text of common Article 2(2) GCs was read ‘disjunctively’,[[40]](#footnote-40) this interpretation might appear *prima facie* credible. Yet, once this provision is construed together with the first paragraph, it becomes clear that the second paragraph deals with the specific circumstances of occupation where an occupying power is not met with any armed resistance of the local population. Indeed, this construction, which is bolstered by the *travaux preparatoires,*[[41]](#footnote-41)was confirmed by the International Court of Justice (ICJ) in *Wall* Advisory Opinion.[[42]](#footnote-42)

Any legal concern over the government’s refusal to treat the West Bank and the Gaza (prior to the withdrawal of the Israeli Defence Forces) as the occupied territory is, however, dispelled by the SC’s principled stance from its earlier case-law. As seen from its reasoning in *Electricity Co (No 2)* (1981),[[43]](#footnote-43) the SC made plain that the legal regime in the West Bank was the one of belligerent occupation subject to customary international law.[[44]](#footnote-44) In *Jamait Askan*, the SC (*per* Justice Barak) confirmed this precedent, expressly recognising the applicability of the law of occupation to the West Bank.[[45]](#footnote-45)

When it comes to the relationship between international law and domestic law, Israel, a common law country, takes a dualist position. On one hand, customary international law is considered the law of the land. On the other hand, as for treaties, the SC has held that it is a well-established principle that the local statutes ought to be read in conformity to the conventions ratified by the government.[[46]](#footnote-46) Kretzmer and Ronen argue that this principle is, however, undermined when it comes to the SC’s approaches to the Interim Agreement (or the Oslo Accords),[[47]](#footnote-47) and that these can be taken as signalling the SC’s reversal of its precedent establishing the presumption of compatibility of domestic laws with international law.[[48]](#footnote-48) Their argument rests on the assumption that the Interim Agreement constitutes a treaty within the meaning of the Vienna Convention on the Law of Treaties.[[49]](#footnote-49) By comparison, it is plausible that the SC has proceeded on the premise that this should instead be characterised as a *sui generis* instrument. Irrespective, Kretzmer’s and Ronen’s book reveals that crudely put, three patterns can be identified with respect to the SC’s approach to the Oslo Accords. First, in some cases, the political question doctrine has been invoked to justify SC’s non-intervention in matters arising from the Interim Agreements.[[50]](#footnote-50) Second, in some other areas,[[51]](#footnote-51) the SC, even rejecting the petition, has ensured the authorities to accommodate the petitioners’ requests as much as possible.[[52]](#footnote-52) Third, still other cases are marked by a more controversial approach of privileging the local laws over the Interim Agreement. In *Qawasmi[[53]](#footnote-53)* and other cases,[[54]](#footnote-54) this third approach was applied to legitimize such harsh treatment as punitive demolition of houses done even in Area A, where the security matters were supposed to be transferred in full to the Palestinian authorities.[[55]](#footnote-55)

Once the applicability of customary international law to the West Bank and the Gaza Strip was confirmed, the focus of the SC turned on whether specific provisions of GCV were reflective of customary law. In *Qawasmi* *(No 2)* (1980),[[56]](#footnote-56) the majority rejected customary law status of Article 49(1) GC IV. Any potentially serious ramification of the non-application *de jure* of the Geneva Conventions was mitigated by the Israeli government’s pledge to act in accordance with their humanitarian provisions. While satisfied with such commitment,[[57]](#footnote-57) the SC evaded the key question of the customary law nature of the GC IV (and the extent to which its provisions have attained such status).[[58]](#footnote-58)

The trouble arises in relation to the SC’s interpretation of customary law equivalents of some GCIV rules which are directly germane to the occupied territories. This is especially true of Articles 49 and 76 GC IV relating to administrative detention, deportation and settlements. Here, the SC read the straight textual meaning very narrowly[[59]](#footnote-59) to endorse the occupying authorities’ impugned measures. Two patterns may be identified in this light. First, what Kretzmer and Ronen label as ‘a highly formalistic semantic theory’[[60]](#footnote-60) operates when construing Article 49(1) GC IV to justify the measure of holding administrative detainees in Israel, that is, outside occupied territories. The SC’s rationale is that the requirement to detain persons in the occupied territories is confined only to the accused and convicted under Article 76 GCIV. However, it can be countered that since the administrative detainees are not criminally charged, this should provide all the more reason for their internment in the occupied territories closer to their family members.[[61]](#footnote-61) Second, the SC’s interpretive technique may be seen as going beyond even the formalistic construction[[62]](#footnote-62) and tantamount to a ‘restrictive interpretation’.[[63]](#footnote-63) For instance, in *Abed Al-‘Afou*[[64]](#footnote-64) the SC ruled that the prohibition of deportation under Article 49(1) GCIV and its customary law counterpart were limited only to an extremely narrow form of deportation, namely, the mass and systematic deportation of the kind carried out by Nazi Germany.[[65]](#footnote-65) Such an overtly restrictive interpretation would pitch the threshold for this rule as high as the heading requirement of crimes against humanity under Article 7 of the Rome Statute of the International Criminal Court (ICC). As Kretzmer and Ronen note,[[66]](#footnote-66) cogency of such a narrow view is disproved by the ICRC’s Tokyo Draft (1934),[[67]](#footnote-67) the genesis of the Geneva Civilians Convention. This Draft clearly suggests the intention to outlaw deportation, whether collective or individual.

1. **Article 43 Hague Regulations**
2. **Overview – ‘Battle of Interpretation’**

Article 43 Hague Regulations may be seen as the ‘mini-constitution’ for occupied territories.[[68]](#footnote-68) According to this provision, the occupying power’s duty to restore and ensure public order and (civil) life constitutes the general duty of the occupying power. Some preliminary explanations are needed. The meaning of the words ‘l’ordre et la vie publics’ in the authentic French text goes beyond that of the English translation of ‘public order and safety’. In *Christian Society*, the SC specifically took issue with the English translation of the word ‘safety’, holding that the more precise meaning should be ‘civil life’.[[69]](#footnote-69) By referring to Schwenk’s seminal article,[[70]](#footnote-70) the SC suggested that the duty to ensure ‘public order and civil life’ be understood so broadly as to realise ‘the whole commercial, economic and social life’.[[71]](#footnote-71) As stretched as this may appear, this interpretation is well-accepted in the doctrines.[[72]](#footnote-72)

On the first reading, Article 43 Hague Regulations requires the occupying authorities to preserve the laws (and administrative structures) of the occupied territories, ‘unless absolutely prevented’ to do so (or ‘sauf *empêchement* absolu’ in the authentic French text). In the doctrine and in State practice, the meaning of this exception ‘absolutely prevented’ has been construed as suggesting the concept of *military* necessity.[[73]](#footnote-73) Indeed, this exception is considered to correspond to the concept of necessity (‘nécessité’) used in Article 3 of the 1874 Brussels Declaration.[[74]](#footnote-74) The crux of such a construction is that under Article 43 Hague Regulations the exceptions to the general principle of preserving the status-quo of the occupied territory may be recognised far beyond the narrow parameters that are connoted by the wording ‘absolutely prevented’.[[75]](#footnote-75) Julius Stone, one of the towering figures of public international law in the twentieth century, went to the length of suggesting that whenever there was need to prescribe laws to accomplish ‘public order and civil life’, there was correlative justification for the occupying power to make an exception to the pro-status quo principle.[[76]](#footnote-76) Still, his view relating to the Arab-Israeli conflict ought to be contextually evaluated with circumspection.[[77]](#footnote-77) Be that as it may, the crux is that this correlative reading of the two elements under Article 43 Hague Regulations unveils how the purpose of ensuring ‘public order and safety’ can serve as the discursive yardstick for legitimizing the expanding parameter of the exception based on the concept of (military) necessity. This issue will be revisited with more details below.

This author suggests that the SC’s approaches to interpreting the meaning of the notion ‘public order and civil life’ under Article 43 Hague Regulations be examined through the analytical prism of five salient features emerging from its case-law: (1) the wider interpretation of the notion of (military) necessity; (2) inclusion of settlers’ interests as part of the concept ‘public order and (civil) safety’; (3) reading the concept of ‘public order and (civil) safety’ in corelation to the malleable scope of the (military) necessity exception; (4) the ‘dominant factor’ test; and (5) the role of the general concept of military necessity in loosening the pro-status quo constraint on the occupying power contained in specific provisions of the Hague Regulations.[[78]](#footnote-78) The following analyses will turn to each of those interpretive

1. **Wider Notion of (Military) Necessity**

Starting with the first feature, Kretzmer’s and Ronen’s study reveals the SC’s gradual expansion of the concept of (military) necessity under Article 43 Hague Regulations.[[79]](#footnote-79) There has been a notable exception like *Elon Moreh* (1979)[[80]](#footnote-80) where the SC confirmed the narrow meaning of the concept of military necessity by focussing on ‘a rational, military-strategic analysis of the dangers’.[[81]](#footnote-81) However, according to Kretzmer and Ronen, the SC’s preferred approach leans toward lumping together diverse considerations, such as military needs, reasons of security and public order within this conceptual framework.[[82]](#footnote-82)

Over years the SC has stretched the amorphous concept of necessity to embrace the security concern of three ‘stakeholders’ other than the Palestinian inhabitants: (i) the Israeli settlers; (ii) Israeli visitors to, or commuters passing through, the occupied territories;[[83]](#footnote-83) (iii) the Israelis in Israel ‘proper’ and of the State of Israel in view of deteriorating security.[[84]](#footnote-84) In view of numerous deadly terrorist attacks originating from the occupied territories, there is every reason to suggest that the security concern should encompasses (iii). Yet, what is controversial to be included in the cost-benefit equation of Article 43 Hague Regulations is the security concern of personal categories (i) and (ii). It is unclear what relative weight should be apportioned to it when this is weighed in balance against the rights of the Palestinians that are supposedly prioritised under the law of belligerent occupation. According to Weil, the upshot of the SC’s approach of stretching the parameters of the notion of security under Article 43 Hague Regulations is that ‘the endless security concerns of the Israeli army, Israel, and the settlers’ constitute a powerful barrier to the Palestinians invoking their rights derived from the law of occupation.[[85]](#footnote-85)

1. **Inclusion of Settlers’ Interests as part of ‘Public Order and (Civil) Safety’ under Article 43 Hague Regulations**

Article 43 Hague Regulations conceives a three-way balancing between the occupying power, the ousted territorial sovereignty, and the population in the occupied territory.[[86]](#footnote-86) Yet, the triad relationship is not of equal weight under the law of occupation. What should matter most here is the bi-dimensional balancing between the security concern of the occupying authorities and humanitarian needs of the occupied population. In the occupied Palestinian territories, such a cumbersome cost-benefit assessment is compounded none other than by the presence of the ever-growing number of Jewish settlers that have generated the ‘quasi-settler-colonial system’. The SC has unhesitatingly suggested that settlers’ security concern be subsumed into the notion of (military) necessity under Article 43 Hague Regulations. In most cases, the SC has felt uninhibited to embrace settlers as part of the ‘local inhabitants’ within the meaning of this provision,[[87]](#footnote-87) and this, no matter the legality of their presence in the occupied territories.[[88]](#footnote-88) As a step further, the SC has come to recognise settlers’ rights pertaining to civil life and wellbeing as the factors to be taken into account by the military commanders. Harpaz and Shany argue that there is the ‘hierarchy of protections of the rights of several ‘stakeholders’ under Article 43 Hague Regulations.[[89]](#footnote-89) There is concern that within such a hierarchy the SC’s multi-faceted balancing[[90]](#footnote-90) may dilute the ‘absolutely prevented’ rider under this provision, with the effect (intended or unintended) of lessening the relative weight of the occupied Palestinians’ rights under the law of occupation.

At first glance, such a broader interpretation of Article 43 Hague Regulations to encompass settlers as part of the local inhabitants might not appear inconsistent with the term ‘inhabitants’ used in Section III of the 1907 Hague Regulations. The question who constitutes the ‘inhabitants’ in the occupied territories was not discussed in the *travaux préparatoires*.[[91]](#footnote-91) Still in the doctrine most writers do not contemplate the ‘inhabitants’ to include nationals of the occupying power, especially those who settle after the commencement of occupation.[[92]](#footnote-92) Moreover, this author proposes that the Hague Regulations be read together with GC IV,[[93]](#footnote-93) not least with the concept of ‘protected persons’ defined under Article 4 GC IV.[[94]](#footnote-94) This concept excludes any nationals of the occupying power,[[95]](#footnote-95) save in the exceptional circumstances where they switch their allegiance and take up arms against their own country that act as an occupying power.[[96]](#footnote-96)

According to the SC’s case-law, the settlers’ interests are supposed to be reckoned with in the ‘horizontal balancing’ between the two civilian populations (settlers and Palestinians).[[97]](#footnote-97) The gist of the problems is that settlers’ interest, once taken into account, tends to operate as the decisive vector in swinging the balance against the rights of the ‘indigenous’ Palestinians under occupation. According to Kretzmer and Ronen, such tendency is borne out chiefly by two traits underlying the SC’s interpretation of Article 43 Hague Regulations: (1) the SC’s position, as discussed above, that not only settlers’ security concern but even the rights concerning their wellbeing should be privileged over and above the rights of Palestinians derived from the law of occupation; and (2) its assumption that the pro-status quo principle should be of diminished tenability in view of evolving social and economic needs of the local population, including those of the Israeli settlers in the context of prolonged occupation.[[98]](#footnote-98)

With regard to trait (1), whenever axiomatic human rights such as the right to life are raised, unsurprisingly, this provides a robust vehicle for outstripping the putatively ‘less important rights’ such as the property rights secured under the law of occupation and the right to free movement derived from IHRL.[[99]](#footnote-99) Even the cutting edge of proportionality loses its lustre. As suggested by Weil, the extent to which the judges can ascertain any alleged violations of customary rules of occupation may be compromised by their national instinct to give primacy to human rights of their citizens.[[100]](#footnote-100)

As regards trait (2), in *Hebron Municipality* (2019),[[101]](#footnote-101) which concerned the military order for settlements that created different legal regimes between the Israeli settlers and the Palestinians, the SC endorsed the commanders’ power to reflect changes as part of their duty to ensure public order under Article 43 Hague Regulations. Yet, there is much of persuasive force in Kretzmer’s and Rone’s criticism that the SC stood blind to epistemic difference between changes occurring as a natural consequence of the passage of time and deliberate changes wrought by the occupying power in breach of the law of occupation.[[102]](#footnote-102)

As a possible solution to the question who constitutes the local people under the law of occupation, this author suggests that Article 43 Hague Regulations be read together with Article 64 GC IV[[103]](#footnote-103) whose declaratory attribute is beyond dispute. As Ferraro notes, the latter provision, influenced by IHRL and the welfare concept, underscores a vertical configuration[[104]](#footnote-104) between the occupying authority and the occupied population. Admittedly, even Article 64 GC IV mentions the ‘population of the occupied territories’ rather than ‘the protected persons’, the distinct term defined in Article 4 GC IV. Yet, the provisions of GC IV, save for Part II, contemplate that the scope of application *ratione personae* is confined only to the ‘protected persons’ defined in Article 4 GC IV.

1. **The Correlative Reading between the Purpose of Ensuring ‘Public Order and (Civil) Safety’ and the Expanding Parameters of the Necessity Exception to the General Principle of Preserving the Status Quo**

Since *Christian Society* (1972), the SC has confirmed that insofar as the motives behind the measures are well-intended and purported to enhance the wellbeing of the general population, even some far-reaching alterations should pass the test of ensuring the ‘public order and (civil) safety’. This approach proves to be vindicated by the text of Article 64 GC IV which admit of a wide range of exceptions to the ‘preservation’ principle.[[105]](#footnote-105) It gives more leeway of prescriptive powers to the occupying authorities. It broadens the exception to the ‘general principle’ of preserving the status quo, allowing modifications pursuant to the (evolving) welfare needs of the local population.[[106]](#footnote-106) Still, one ought to be cautious of changes or transformations made for the alleged benefit of the population,[[107]](#footnote-107) lest this might be perceived as smacking of colonialism. In this respect, Justice Sussman’s reasoning in *Christian Society* that the concept of ‘absolutely prevented’ could be considered to exist whenever the existing local laws in the occupied territories do not enable the occupying authority to fulfil the duty to ensure the ‘public order and safety’ ought to be criticised.[[108]](#footnote-108) This reasoning, in this author’s view, would result in the permutation of the general principle (status quo) and the exception (change). The more cogent view is to suggest that it is the determining of the meaning of the phrase ‘public order and safety’ that is pivotal in setting correlatively the outer boundaries of the exception ‘absolutely prevented’.[[109]](#footnote-109)

1. **The ‘Dominant Factor’ Test**

When confronted with diverging interests of different ‘stakeholders’, the SC has developed a useful allocative benchmark to assist its cost-benefit analyses under Article 43 Hague Regulations: the ‘dominant factor’ test.[[110]](#footnote-110) As explained by Weil, this test asks if the two main factors, namely, the benefit for the local population and (military) necessity, are intended to be the rationale or motive that is dominant rather than minor or secondary in relation to the occupying power’s own political interests.[[111]](#footnote-111) The dominant factor test has promising potential in clarifying whose interests should be prioritized when assessing the legality of measures under Article 43 Hague Regulations.

Yet, what compounds the assessment of the dominant factor test is the SC’s gradual policy shift to embracing the factor that is not prioritized in the law of occupation, namely, the human rights concerning the general wellbeing of Jewish settlers (and hence not their life or bodily security). This implies that the dominant benefits for the welfare of the local population may be gauged on the basis of the aggregate of the ‘local’ inhabitants, with no distinction between the ‘indigenous’ Palestinian inhabitants and the post-Six-Day-War (June 1967) Israeli settlers.[[112]](#footnote-112) Here comes a potential risk that there may be a disproportionate allocation of anticipated benefit for the sake of the Jewish settlers or even a ‘trade-off’ between the rights of the ‘indigenous’ Palestinians and those of the settlers within such a composite notion of the ‘local inhabitants’.

According to Kretzmer and Ronen, such a potential danger seems to be warranted by the incongruent trajectory of how this test has been applied.[[113]](#footnote-113) In some cases as in *Electricity Co (No.1)* (1972),[[114]](#footnote-114) the specific outcome of the dominant factor test may be criticised as distortion in its distributive justice evaluations due to emphasis on the short-term material gains without taking heed of the Palestinian population’s long-term political interests.[[115]](#footnote-115) In *Abu Safiya* (2009),[[116]](#footnote-116) the SC struck down a military order banning Palestinian vehicles on Highway 443 that connected through the occupied territories. The exclusion of the Palestinian vehicles was held to exceed the authority of the commander and to flout proportionality. While salutary, this decision was built on a tacit premise that the main beneficiaries were indeed the Israeli drivers who had the right of unbridled use of this highway, as compared with the Palestinians subjected to the regime of restricted movement.[[117]](#footnote-117) As Weil criticises,[[118]](#footnote-118) such an implied assumption is all the more problematic as it disproves the SC’s earlier finding in *Jam’iyat Iskan[[119]](#footnote-119)* that the construction of this motorway was intended dominantly for the Palestinians’ benefit.

Ultimately the heart of the issue is for whose dominant benefit the commanders should reckon with when exercising their discretion conferred upon them under the law of belligerent occupation.[[120]](#footnote-120) Again this assessment is overshadowed by the judicial policy of subsuming the rights of settlers’ wellbeing into the amalgamated interest of the local population. Nonetheless, it should be pointed out that the SC has not abandoned the framework of this test as an evaluative tool.[[121]](#footnote-121) Crucially, it continues to engage in scrutinizing whether or not measures sacrificing the IHL rights of Palestinians in the occupied territories are intended exclusively for the benefit of the Israelis.[[122]](#footnote-122)

1. **The Approach of Grafting the General Necessity Exception onto a Specific Provision to Amplify Exceptions to the Status-Quo Principle**

In *Beit El* (1979),[[123]](#footnote-123) by invoking the ‘power to restore, and ensure, as far as possible, public order and safety’ under Article 43 Hague Regulations, the SC endorsed the authority’s claim that establishing a civilian settlement in a strategic position would serve the defence of the area. Hence, this was found to meet ‘the needs of the army of occupation’, the rider under Article 52 Hague Regulations, which can justify requisition of private land. The SC’s interpretive tactics operate in two steps. First, the SC has confirmed that the wide discretionary power is conferred upon the occupying authorities within the notion of a (military) necessity to ensure ‘public order and safety’ under the general clause (Article 43). Second, it has applied the notion of necessity to the specific provisions of the Hague Regulations. This two-step approach suggests that the general clause of Article 43 can be invoked to have decisive leverage over interpreting all specific provisions of the Hague Regulations and to diminish limitative conditions included in those provisions.[[124]](#footnote-124) In short, this is an approach of ‘grafting’ the general limitation clause of Article 43 onto specific provisions of the Hague Regulations with a view to recognising wider exceptions to the status-quo principle underlying those specific provisions. Such a legal outcome may be reinforced, as it transpires in reality that any occupying authority prefers to reserve to itself amplified latitudes of discretion under the general clause (Article 43 Hague Regulations).

However, it should be submitted here that this interpretive approach reveals some incongruency.[[125]](#footnote-125) Several specific provisions of the Hague Regulations, such as Articles 49, 52-54, already contain express ‘escape valves’ based on the concept equivalent to that of (military) necessity. The thrust of the SC’s approach is that even where the rider contained in such an escape valve is not sufficiently met to justify modifications of the local law, the occupying power would always be able to fall back on the general necessity clause under Article 43 Hague Regulations. The effect of such an interpretive tactic is to enable the occupying power to have ‘the second bite of the apple’ when demarcating the parameters of its discretion to derogate from the status quo principle. Further, if one were to follow the ICJ’s reasoning in *Nuclear Weapons* Advisory Opinion, one might contemplate even a hypothesis of ‘three bites of the apple’. On top of those two necessity exceptions which are ingrained in the Hague Regulations,[[126]](#footnote-126) there might operate the concept of ‘necessity’ under the general law of State responsibility,[[127]](#footnote-127) even though such a hypothesis has not materialised.

1. **Controversial Interpretations Adduced by the Israeli Supreme Court**
2. **Overview**

The extensive survey carried out by Kretzmer and Ronen reveals the Israeli SC’s rather controversial interpretations of the relevant laws especially when dealing with issues connected to settlements and deportation. For sure, there is no coincidence that these are all sensitive matters in internal Israeli politics.

1. **Settlements, Settlers and Creeping Colonization through Planning Policies in Area C**

With respect to planning and building in Area C, Israel retains full powers over land, including planning and building.[[128]](#footnote-128) In the wake of the Israeli occupation of the West Bank and the Gaza Strip, the military commander appointed a Custodian of Government Property, who is authorized to take possession of government property and to regulate its use. Subsequently, the custodian has been granted the power to presume the absentees’ land as government property. Under this scheme, the onus is imposed on those claiming land rights to establish that the land is not government lands. As held by Justice Shamgar in *Al-Nazeer* (1982),[[129]](#footnote-129) in case of doubt over the public or private nature of the property, this is presumed public until proven otherwise.[[130]](#footnote-130) Not only such presumption is irreconcilable with the underlying assumption of the law of occupation – preservation of the *status quo ante* as far as possible. What is even more disconcerting is the policy that such property, once presumed public, is used dominantly for the sake of the citizens of the occupying power[[131]](#footnote-131) or even ‘exclusively to serve Israeli settlements’.[[132]](#footnote-132) Some Israeli scholars’ views are unapologetically stern. In their opinions, by endorsing the military authorities’ decisions on such inequitable distribution of the land through the narrower reading of Articles 49(1) and (6) GCIV,[[133]](#footnote-133) the SC has played a complicit role in transforming the occupied territories into a ‘segregated regime’[[134]](#footnote-134) or ‘settler colonial regime’[[135]](#footnote-135)

1. **Deportation**

With regard to issues of deportation, on one hand, as briefly discussed above, the SC has applied the restrictive interpretation of Article 49(1) GC IV,[[136]](#footnote-136) ruling that this provision forbids only the Nazi-type massive deportation.[[137]](#footnote-137) A similarly narrow construction typifies the decisions relating to the order of assigned residence, which enjoined the West Bank residents to reside in Gaza.[[138]](#footnote-138) Such a seemingly ‘intra-occupied territory’ displacement appears to be defensible when the text of Article 49 GCIV is read literally. This provision forbids only ‘deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country’. Further, Article XI of the 1995 Interim Agreement[[139]](#footnote-139) refers to the West Bank and the Gaza Strip as a single territorial unit.[[140]](#footnote-140) Nevertheless, one should not overlook that Israel forestalled the freedom of intra-Palestine movement between the West Bank and Gaza. Further, it can be suggested that Article 78 GC IV assumes that administrative detainees be allowed to receive visit from their family members with due respect for family rights.[[141]](#footnote-141)

1. **Areas where the Israeli Supreme Court’s Policy Has Shown the Mixture of Restrictive Interpretation and Some Progressive Tendencies**
2. **Overview**

Next, reading Kretzmer’s and Ronen’s rigorous analyses of the SC’s case-law reveals what this author considers to be a nuanced approach that is marked by the mixture of both some regressive elements and progressive propensities. Here, inquiries will be made into the SC’s policy of reviewing issues relating to the methods of interrogation and the security barrier.

1. **Interrogation Techniques**

In relation to issues of interrogation practices, in the *Public Committee against Torture in Israel* case (*PCATI* case) (1999), the SC found that the government and the Israeli Security Agency (ISA) had no authority to ‘lay down guidelines, rules or permits for use of physical means in the course of investigating those suspected of hostile terrorist activity’.[[142]](#footnote-142) This judgment can be hailed as a refreshingly salutary move to vindicate the SC’s ‘clear and unequivocal position on a substantive question of a principle’.[[143]](#footnote-143) Plausibly, the SC felt the need to curb the slippery slope of the ‘special methods of interrogation’, which were recognized as the lesser evil in the Landau Report (1987).[[144]](#footnote-144) According to progressive Israeli scholars, such methods have become the ‘almost standard practice’ in interrogating Palestinians even outside the ‘ticking bomb’ situations.[[145]](#footnote-145)

Still, Israeli critics point out that two interconnected analytical flaws impair this judicial reasoning. First, the SC’s otherwise clear message against the risk of throttling the absolute prohibition of torture is contradicted by its holding that the Knesset had the power to enact a law that would enable the ISA to use special methods of interrogation forbidden by the SC.[[146]](#footnote-146) Second, a loophole or ‘backdoor’ is left open for the necessity defence against ill-treatment of the kind that falls short of the threshold of torture.[[147]](#footnote-147) This is the ‘Achiless’ heel of the judgment’,[[148]](#footnote-148) as revealed in the subsequent case of *Abu Ghosh* (2017).[[149]](#footnote-149) In that case, the SC endorsed the decision of the Attorney-General not to prosecute the interrogators that used ‘pressure techniques’ to the petitioner who was a Hamas member residing in the West Bank.[[150]](#footnote-150) While rejecting *ex ante* authorization for physical interrogation methods, again the SC did recognise the attorney general’s *ex ante* regulation of the conditions for the necessity defence. This reasoning suggests that the SC authorised the *ex post* exemptions from criminal liability for employing such methods. As Chachko argues,[[151]](#footnote-151) there is concern that this would effectively achieve the same outcome as the measure that the SC in *PCATI* rejected, namely issuing the *ex ante* authorization for physical ill-treatment that does not amount to the threshold of torture. Such concern was compounded by the SC’s decision in *Abu Ghosh* to pitch the bar for torture (as opposed to cruel, inhuman or degrading treatment/punishment in its ‘dualist’ conception of proscribed ill-treatment)[[152]](#footnote-152) considerably high.[[153]](#footnote-153) Yet, even supposing the ‘ticking bomb’ exception might have been recognized for the ‘necessity defence’ against unlawful methods of physical interrogations of the kind failing to reach the watershed of torture, it was far from clear if the condition of imminency for invoking this exception and hence the second subtest of proportionality (that of less restrictive alternatives such as other preventive measures) were satisfied in that case.[[154]](#footnote-154)

1. **The Security Barrier**

Issues relating to the security barrier and its specific routes are seen as the existential matters for the two peoples living side by side for different reasons. On one hand, for the Israelis living in Israel proper, the number of seriously lethal terrorist attacks has significantly dropped owing to the construction of the wall. On the other, for the Palestinians, the wall has created not only the semi-permanent and *de facto* boundaries. It has also segregated their families living across the barrier. The worst fate awaits the Palestinians who are trapped in the ‘seam zone’ (namely, between the barrier and the Green Line). They are riddled with the complex entry permits regime. With their right to free movement severely curtained, this hampers their right to engage in agricultural activities on their cut-off farmland and to travel for other work, education, or for medical treatment.[[155]](#footnote-155) In the landmark decision in *Beit Sourik* (2004), handed down shortly before the ICJ’s *Wall* Advisory Opinion, the SC found that with respect to most of the relevant segments of the barrier, disproportionate harm was occasioned on the Palestinian residents, and that this outweighed the security’s benefits. Hence, it revoked the land requisition orders relating to the impugned segments at issue and demanded the authorities to search for an alternative route for the barrier. It was significant that this decision prompted the government to revise the route and to re-evaluate other segments of the barrier. Still, in *Beit Sourik,* sharp-eyed criticspoint to the SC’s failure to problematize the authority’s admission that the barrier was also purported to protect some Israeli settlements.[[156]](#footnote-156) Nor did the SC venture to address the key question whether there should be a barrier in the relevant segment at all. As noted by Kretzmer and Ronen, the SC’s prudent tactic was to avoid those *policy* questions while focusing its proportionality appraisal on a narrow issue of detrimental impact of the segment of the barrier upon the Palestinian villagers.[[157]](#footnote-157) This stands in tension with the ICJ’s conclusion in *Wall* that ‘the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law’.[[158]](#footnote-158) Admittedly, the ICJ’s conclusion as to the illegality of *all* the segments of the barrier may be criticised for its little empathy for the Israeli’s embedded collective consciousness over security intertwined with their memory of survival over the Holocaust.

In another landmark case of *Mara’abe* (August 2004) decided just after the ICJ’s *Wall* Advisory Opinion, the petitioners contested a different segment of the barrier, which included rerouting to encompass a Jewish settlement on the ‘Israeli side’. When evaluating the second limb of proportionality (the subtest of necessity or the less restrictive alternative subtest),[[159]](#footnote-159) the SC held that the authorities failed to seek a less injurious route, ordering the evaluation of feasibility of alternative routes. Even so, the SC’s recapitulation that the Israeli settlers formed part of the local population under Article 43 Hague Regulations helped again to bypass the politically thorny question of the legality of the settlement.

Moreover, the SC’s proportionality assessment of deleterious effect of the barrier was handicapped by its exclusion of the city of Qalquilya with 40,000 residents that were enclaved and cordoned off by the barrier.[[160]](#footnote-160) Such narrow analytical prism may be criticised as the ‘micro-proportionality assessment’.[[161]](#footnote-161) The downscaled mode of proportionality can be seen to operate in tandem with the pattern of rating the right to life of settlers as the primordial interests in the cost-benefit equation. This prompted Weil to arrive at a sharply unmitigated conclusion that the SC’s contribution in this case for the local Palestinians turned out to be ‘negiligible’.[[162]](#footnote-162) Further, as in *Beit Sourik*, another questionable modality of proportionality appraisal in *Mara’abe* is the SC’s omission to explore any means of safeguarding rights of settlers other than by including the settlements within the ‘Israeli perimeter’ and hence *de facto* annexing the relevant areas.[[163]](#footnote-163) Insightfully, Kretzmer and Ronen suggest that the SC appeared to *preordain* the available options narrowly when ascertaining the second subtest of proportionality (necessity or less restrictive alternative).[[164]](#footnote-164) Arguably, such an approach was calculated to temper any serious ramifications of applying the less restrictive alternative subtest. Yet, as will be examined below, its analytical process is unpersuasive.

1. **Progressive Approaches disclosed by the Israeli Supreme Court**
2. **Overview**

In contrast to the approaches examined above, analyses of the SC’s approaches to some thematic issues show its impressively progressive strides and even policies. In some areas, their approach should be appreciated even as compared with some treaty bodies of IHRL. In this subsection, the examinations focus on two areas in which such markedly liberal stances can be identified: issues concerning economic and social rights of the Gaza civilians during active hostilities; and issues of means and methods of warfare relating to conduct of hostilities.

1. **Economic and Social Rights of the Gaza Inhabitants**

The question whether or not Gaza since the disengagement of the Israeli Defence Forces (IDF) in 2005 can still be considered the occupied territory within the meaning of Article 42 Hague Regulations divides opinions of the IHL experts.[[165]](#footnote-165) It is generally accepted that occasional successes of armed resistance fighters in an occupied territory do not terminate the regime of belligerent occupation as such.[[166]](#footnote-166) Shany argues that the territory now falls under effective control of the local Palestinian government. His rationale is that any attempt by IDF to exert its authority would be met with considerable military engagement with the local organised resistance forces.[[167]](#footnote-167) At least, this author is of the view that the applicability of some obligations derived from the law of occupation should be evaluated pursuant to the ‘functional analysis’[[168]](#footnote-168) based on varying level of territorial or personal control.[[169]](#footnote-169)

The SC in *Al-Bassiouni Ahmed* (2008) started with the premise that Gaza is no longer an occupied territory.[[170]](#footnote-170) Even so, it did not recoil from reminding the IDF of the positive duty to allow the passage of a limited supply of fuel and electricity, even though the petition itself was denied. The positive obligation that the SC imposed on the IDF for the Gazan civilians would exceed the bounds of duties that are normally required of a belligerent State party that is engaged in active hostilities of an IAC or in an extraterritorial NIAC occurring beyond the territory under that party’s effective control. The SC rationalised its reasoning by expressly invoking Articles 54 and 70 API, as well as the customary IHL duty to allow the passage of humanitarian relief supplies for the civilian population.[[171]](#footnote-171) In this author’s opinion, the SC’s reasoning could have been bolstered by additionally referring to such factors as the degree of continuing control exerted by Israel over the border crossings and over territorial waters and airspace, and Gaza’s preponderant dependence on Israel for supply of essential services before the end of occupation. For sure, even such a putatively liberal stance exhibited by the SC may still be criticised from a courageously progressive Israeli academic anchored in a functional approach. Starting with the premise that the (former) occupier’s ambit of duties should be assessed along its sliding scale of different modalities of control, Aeyal Gross rebukes the SC in *Al-Bassiouni* for having limited the scope of duties only to the basic humanitarian needs.[[172]](#footnote-172)

1. **Judicial Review of Means and Methods of Active Hostilities**

Another progressive feature can be vindicated by the Israeli SC’s affirmation that it undertakes judicial review even of acts that have occurred during the active phase of extraterritorial hostilities. As a point of departure, the SC has fleshed out a principle that a paradigm of active hostilities does not necessarily render the petition non-justiciable. Much of uncertainty overshadows an attempt to assess the legality of methods and means while hostilities are still ongoing.[[173]](#footnote-173) Yet, in the *Targeted Killing* judgment,[[174]](#footnote-174) the SC (*per* Chief Justice Barak) warratned judicial review over actions of IDF during ongoing hostilities. It has highlighted the principle that whenever the human rights are at stake, even issues arising from conduct of hostilities in progress cannot be dismissed out of hand and must be subject to its scrutiny. Indeed, in *B’Tselem* (2011),[[175]](#footnote-175) the SC held that whenever the right to life was implicated, there was the State’s duty to investigate.[[176]](#footnote-176) Returning to the *Targeted Killing* judgment, remarkably the SC held that when what was contested is the legality of means and methods of warfare rather than their desirability or advisability, the question could be formulated in legal terms and hence justiciable. This holding should be seen as a highly salutary move, because the ‘fog of war’[[177]](#footnote-177) argument based on epistemic uncertainty in assessing conduct of warfare seems particularly susceptible to judicial self-restraint and to discursive suspension (if not closure). The SC, refusing to succumb to any temptation to turn to some avoidance technique, saw itself fully capable of adjudications without being inhibited by politico-military considerations.[[178]](#footnote-178)

Another crucial principle enunciated in *Targeted Killing* is that there is a need for the authority to undertake an *ex post facto* examination of the legality of specific action, *and* that such an examination must be subject to the judicial review to ensure objectivity.[[179]](#footnote-179) Such an *ex post facto* duty of investigations should bring about significant normative constraint on the military authorities (not least on commanders under Article 28 ICC Statute).[[180]](#footnote-180) Yet, several authors[[181]](#footnote-181) caution against transplanting the procedural duty of positive obligations derived from the case-law of IHRL into the context of killing in active phases of hostilities. Such cautious stance may resonate when lethal means are levelled at a member of an armed group who assumes ‘continuous combat function’[[182]](#footnote-182) and when that group is deemed a party to the conflict.[[183]](#footnote-183)

In *Early Warning* (2005), the SC’s liberal stance was equally applied to a particular method of warfare. Here, the alleged use of civilians as human shields became an issue.[[184]](#footnote-184) Palestinian civilians were requested to warn inhabitants of a house where the IDF was set to arrest someone, on the proviso that there was no danger to the civilians involved. The SC found the measures unlawful by reference to two grounds: (i) the ban on coercing protected persons in the occupied territory into participating in war effort of the occupying army; and (ii) an occupying power’s duty to remove civilians from the vicinity of the military objective.

Still, according to Kretzmer and Ronen,[[185]](#footnote-185) the SC’s perceived ‘judicial activism’ may be compromised by the reality of ‘fog of war’ when asked to examine a particular means and method of warfare. As with other national courts, a tilt toward non-justiciability is discernible when the SC is asked to decide the question of the legality of using particular weapons such as flechette bombs when there is no international treaty outlawing them.[[186]](#footnote-186) As for the method of warfare, the SC’s ‘hand-off’ approach was observable when asked to examine if the permissible distance of a military target from civilians can be narrowed.[[187]](#footnote-187) As Kretzmer and Ronen note,[[188]](#footnote-188) such a question tends to require ‘professional-operational’ expertise of the military. The judiciaries in most democracies are likely to hold that this would fall squarely within the military authority’s wide margin of appreciation.

The SC’s principled approach that whenever human rights are raised, even issues relating to conduct of ongoing hostilities should deserve judicial supervision may be tested when ascertaining social rights. In *Rafah* (2004),[[189]](#footnote-189) the SC’s liberal stance was manifest in its implicit suggestion that the commanders of the army engaged in a military operation in Gaza are bound to take steps to provide food, water, and medical equipment to civilians even in the course of ongoing hostilities. Notably, the SC held that this duty must be observed irrespective of whether civilians are actively or passively supporting the action of the armed group.[[190]](#footnote-190) The kernel of the SC’s suggestion is that insofar as military operations against armed groups are undertaken in the (former) occupied territories, the (ex-)occupying power remains bound by the positive duty to respond to the subsistence and medical needs of the occupied population. The SC went even so far as to detail the commander’s specific positive obligations relating to the right to health.[[191]](#footnote-191)

The SC’s practice since around the turn of the century can be commended for exhibiting pioneering features that should inspire regional or even global monitoring bodies of IHRL. For instance, the SC’s policy can be compared with the thin veneer of judicial self-restraint that marked the case of *Georgia v. Russia (No. 2)*. There, the more muted stance of the Grand Chamber of the European Court of Human Rights (ECtHR) can be discerned with respect to the complainant State’s challenge against acts or omission of the respondent State during the ‘active phase of hostilities’ of the impugned IAC taking place outside its territory. The ECtHR held that:

…having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the [European] Convention [on Human Rights] (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of “jurisdiction” as established to date.[[192]](#footnote-192)

The Grand Chamber’s putative rationale based on the complex and unwieldy nature of empirical evaluations during active hostilities has certain merit. It seems aligned with military practitioners’ debates over ‘fog of war’. Yet, what this author finds fault with is its reluctance to undertake even legal questions on the pretext that these are governed ‘predominantly’ by IHL. Such a stance marks a stark contrast to the Israeli SC’s two-fold assumptions that there is no *a priori* exclusion of petitions relating to conduct of hostilities as being not justiciable, and that whenever human rights are at stake, this calls for judicial intervention.

1. **Critiques of Certain Modalities of the Proportionality Appraisal Undertaken by the Israeli Supreme Court**

Some comments may be apposite in relation to how the Israeli SC has applied the principle of proportionality to petitions stemming from occupied territories. In the cases relating to the security barrier, the appraisal conducted by the SC following the tripartite tests of proportionality appears rigorous. Yet, on closer inspection, certain irregularities are observable in respect of the modality of deploying the second and the third subtests of proportionality.[[193]](#footnote-193) First in *Mara’abe,[[194]](#footnote-194)* as briefly discussed above, the SC shrank the parameters of options that should have been searched when evaluating the subtest of necessity (less restrictive alternative). It is unclear why the SC left out of consideration any other possible avenue of protecting the settlers than by including the settlements on the ‘Israeli side’ of the barrier.[[195]](#footnote-195) Admittedly, as Weil notes,[[196]](#footnote-196) judges’ evaluations of such alternative options may be susceptible to their subjective convictions and even ‘political’ ideologies. The question of judicial discretion in respect of ‘hard cases’ is a matter of theoretical debates on the nature of law among positivist law scholars.[[197]](#footnote-197) Nonetheless it is crucial that the SC should remove any impression of implicitly upholding ‘the state’s political plan to create a *de facto* border annexing territories beyond the Green Line’.[[198]](#footnote-198)

Second, in *Beit Sourik,[[199]](#footnote-199)* the SC treaded on an unusual course of proportionality appraisal by proposing the method of what Kretzmer and Ronen calls the ‘relative examination of proportionality’.[[200]](#footnote-200) According to this, the rigour of the third limb of proportionality (proportionality *stricto sensu*) should be attenuated by reading it together with the second limb (the less restrictive alternative subtest). The gist of this method applied in the relevant case was that if there was no alternative route, the contested segment of the route should be deemed proportionate, irrespective of the harm it causes. As Kretzmer and Ronen note,[[201]](#footnote-201) it may well be that the SC struck a careful balance between its need to defer to the military authorities’ expertise in security matters and its role in addressing rights of petitioners. Yet, this deviates from the reasoning of the Court of Justice of the European Union[[202]](#footnote-202) discernible in its application of the test of proportionality with its tripartite rationalising process.[[203]](#footnote-203) As De Búrca observes in the context of the EU law, the effect of the third limb of proportionality (the subtest of proportionality in a narrow sense) is to prevent even the measure that is likely to cause the least harm to the individual persons among the feasible options but nonetheless to upset the balance due to the anticipated harm.[[204]](#footnote-204)

Further, in the overall picture of its proportionality appraisals, the SC’s modality of proportionality reveals some incongruency. On one hand, even when the advantage for the Palestinian population is only indirect, it seems that the SC has found the test of ‘benefit for the local population’ under Article 43 Hague Regulations to be satisfied.[[205]](#footnote-205) On the other, when it comes to the assessment of adverse effect on the Palestinian inhabitants in the occupied territories, the SC’s proclivity seems to be to reckon only with the deleterious effect of immediate (geographic and temporal) nature, to the exclusion of long-term harm on Palestinians’ political interests (such as political autonomy or independence) and economic self-sufficiency.[[206]](#footnote-206) Such an incoherent feature seems to contribute to the SC’s deferential standard of proportionality review whenever rights of settlers (or other Israelis) are marshalled as the robust counterweight to the IHL rights of the Palestinians.

1. **Concluding Observations**

Liberal Israeli scholars suggest that any good intention behind the SC’s receptiveness to petitions from occupied territories is tempered by the implicit or express operationalization of some judicial techniques, which constrain the degree of its review.[[207]](#footnote-207) On their view, the SC’s supervision for the occupied Palestinian petitioners tends to be of limited potential, even though the SC has treated as justiciable all petitions relating to *specific* measures.[[208]](#footnote-208) The SC’s considerably deference approaches are discernible not least in relation to the heart of occupation, namely issues relating to the land and people of the occupied territories. This is where interests of settlements and a variety of civil, economic and social rights of settlers are poised to serve as the powerful countervailing interests against the rights of Palestinians derived from the law of occupation. Kretzmer’s and Ronen’s work suggests that the SC has nearly consistently recoiled from challenging the right-wing government’s settlement policies in the occupied Palestinian territories.

Perusing this book would leave readers with an inescapable impression that the SC has tended to grant an imprimatur to controversial policies even when in defiance of various obligations of IHL. Nevertheless, this author believes in the discursive potential of the SC’s continuing engagement with the petitions relating to the occupied territories when the reining influence of IHL and IHRL come gradually to obtain. It bears reiterating how the SC’s bold policy of subjecting measures taken even during active phases of hostilities to judicial supervision can proffer useful lessons for the monitoring bodies of IHRL. On the practical dimension for Palestinian petitioners, the SC’s added value of reviewing petitions by reference to rules of IHL and IHRL can be corroborated by many of the SC’s decisions having resulted in remedies for human rights violations either in or out of court. Kretzmer and Ronen observe that ‘When modification of the authorities’ position after submission of a petition and out-of-court settlements are taken into account, the rate of actual success of Palestinian petitioners from the Occupied Territories, measured in terms of their receiving at least part of the remedy requested, is higher than the overall success rate in petitions to the Supreme Court as a High Court of Justice’.[[209]](#footnote-209)

In the context of occupation, needly to say, there is no ‘social contract’ between the occupied ‘indigenous’ population and the occupying organs. The Israeli *demos* do not include the Palestinian residents of the occupied territories.[[210]](#footnote-210) The drafters of the law of occupation were fully aware of such general precarity of the local population under occupation, the lack of political accountability, and of the structural power imbalance between the occupying power and the inhabitants of the occupied territory. It is for this reason that the law of belligerent occupation confers special obligations on the occupying authorities to fill a vacuum created by the ousting of the territorial government. Such underlying rationales of the law of occupation make it clear why integrating the settlers who are nationals of the occupying power as part of the ‘local inhabitants’ is counter-sensical by upsetting a delicate equilibrium between the (military) necessity and humanitarian needs of the occupied population under Article 43 Hague Regulations and Article 64 GCIV (and their corresponding customary rules).[[211]](#footnote-211) This observation is aptly applicable to the meaning of proportionality appraisal in liberal democracy. Given that proportionality balancing is often about weighing inherently incommensurable values and interests,[[212]](#footnote-212) this author considers it crucial to stress legitimacy of the interests or rights of persons to be reckoned with in the equation.

In this book, Kretzmer and Ronen have successfully carried out the Herculean task of analysing voluminous amount of ‘raw materials’ (both primary and secondary sources), extrapolating numerous inferences, and weaving them into a coherent thread of arguments. In view of its rigorous analyses, critical but balanced assessments corroborated by ample references to primary and secondary sources, this book is an outstanding scholarly achievement. This should constitute the ‘instant classic’ treatise in the genres of IHL, IHRL and comparative public law. Together with other recent cutting-edge monographs of liberal Israeli scholars,[[213]](#footnote-213) it also manifests the vitality of the Israeli legal scholars’ enduring quest for the rule of law in their discursive critical mind.

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2. HCJ 337/71, *The Christian Society for the Holy Places v. Minister of Defense*, (1971) 26(1) PD 574. [↑](#footnote-ref-2)
3. S. Weil, *The Role of National Courts in Applying International Humanitarian Law,* (Oxford: OUP, 2014) at 19. [↑](#footnote-ref-3)
4. D. Kretzmer and Y. Ronen, *The Occupation of Justice*, 2nd ed., (2021), at 51. See also G. Harpaz and Y. Shany, ‘The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation’, (2010) 43 *Israel Law Review* 514 at 514; Weil, *ibid.,*at 18-20. [↑](#footnote-ref-4)
5. Kretzmer and Ronen, ibid., at 25-26, 213-214, 220, 256, and 513. [↑](#footnote-ref-5)
6. Kretzmer and Ronen, supra note 3, at 29. [↑](#footnote-ref-6)
7. See, for instance, HCJ 302/72, *Abu Hilou et al v. Government of Israel,* (1972) 27(2) PD 169, 176. [↑](#footnote-ref-7)
8. *The Christian Society for the Holy Places*, *supra* n. 1. [↑](#footnote-ref-8)
9. HCJ 8276/05, *Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of Defence* (12 Dec 2006) (Chief Justice Barak holding that the occupying authorities had the duty to safeguard the rights under the Basic Law in the area under their effective control, but that while the Israelis enjoyed such a constitutional safeguard, the Palestinians should be seen as beneficiaries of international law). [↑](#footnote-ref-9)
10. Kretzmer and Ronen, supra note 3, at 102-103. [↑](#footnote-ref-10)
11. HCJ 2722/92, *Al-‘Amarin v. IDF Commander in the Gaza Strip* (4 June 1992). [↑](#footnote-ref-11)
12. HCJ 10356/02, *Haas v. IDF Commander in the West Bank* (3 March 2004), paras, 14, 15, para 16 heading, 21. [↑](#footnote-ref-12)
13. HCJ 1890/03, *Bethlehem Municipality v. State of Israel* (3 Feb 2005). [↑](#footnote-ref-13)
14. Kretzmer and Ronen, supra note 3, at 103. [↑](#footnote-ref-14)
15. See the cases cited in ibid, n. 24, that is, HCJ 10467/0, Sharabati v Commander of the Home Front Command (15 Dec 2003); HCJ 8084/02, ‘Abassi v. Commander of the Home Front Command (5 Jan 2003); HCJ 6288/03, S’aada v. Commander of the Home Front Command (27 Nov 2003). [↑](#footnote-ref-15)
16. As Dinstein notes, this annexation is unlawful: Y. Dinstein, *The International Law of Belligerent Occupation*, (Cambridge: CUP, 2009), at 19, para. 45. [↑](#footnote-ref-16)
17. Kretzmer and Ronen, supra note 3, at 103. [↑](#footnote-ref-17)
18. Kretzmer and Ronen, ibid, at 103. [↑](#footnote-ref-18)
19. Email from Prof. Yael Ronen, 30 September 2021 (case on this author’s file). [↑](#footnote-ref-19)
20. HCJ 1661/05, *Gaza Coast Regional Council v. Knesset of Israel* (9 June 2005), paras 126-128. [↑](#footnote-ref-20)
21. HCJ 7957/04, *Mara’abe et al. v. Israel Prime Minister et al*, (15 September 2005). [↑](#footnote-ref-21)
22. #  Kretzmer and Ronen, supra note 3, at 247-252. Compare, Harpaz and Shany, supra note 3.

 [↑](#footnote-ref-22)
23. Kretzmer and Ronen, supra note 3, at 110. [↑](#footnote-ref-23)
24. HCJ 5488/04, *Al-Ram v. Government of Israel* (13 Dec 2006). [↑](#footnote-ref-24)
25. Kretzmer and Ronen, supra note , at 105-109. [↑](#footnote-ref-25)
26. HCJ 7957/04, *Mara’abe et al. v. Israel Prime Minister et al*, (15 September 2005), paras 22 and 24. [↑](#footnote-ref-26)
27. HCJ 1890/03, *Bethlehem Municipality v. State of Israel* (3 Feb 2005), paras 20-21. [↑](#footnote-ref-27)
28. HCJ 7862/04, Abu Daher v. IDF Commander in Judea and Samaria (16 Feb 2005), para.8. [↑](#footnote-ref-28)
29. HCJ 1308/17, *Silwad Municipality v. Knesset* (9 June 2020), para 32 (*Settlement Regularisation*). [↑](#footnote-ref-29)
30. It should be noted that in this case, whatever its added value may be, the Court relied not only on the Israeli constitutional safeguards but also on the law of occupation to boost the rights of the Palestinians in the occupied territory. See Kretzmer and Ronen, supra note 3, at 111-115. [↑](#footnote-ref-30)
31. Ibid, at 318. [↑](#footnote-ref-31)
32. Ibid, at 271. [↑](#footnote-ref-32)
33. Ibid, at 52. [↑](#footnote-ref-33)
34. Weil, supra note 2, at 36 and 40-4. [↑](#footnote-ref-34)
35. Kretzmer and Ronen, supra note 3, at 109, 151 and 155. See also Weil, ibid, at 44-45. [↑](#footnote-ref-35)
36. Kretzmer and Ronen, ibid, at 89. [↑](#footnote-ref-36)
37. ICJ, *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004. [↑](#footnote-ref-37)
38. Kretzmer and Ronen, supra note 3, at 97. [↑](#footnote-ref-38)
39. Y.Z. Blum, ‘The Missing Reversioner: Reflections on the Status of Judea and Samaria’, (1968) 3 Israel Law Review 279. [↑](#footnote-ref-39)
40. Dinstein (2009), supra note 15, at 21, para. 51. [↑](#footnote-ref-40)
41. The drafters had in mind the German occupation of Denmark and during the Second World War. See D. Schindler, ‘The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols’, (1979) 163 RCADI 117 at 132. See also International Military Tribunal (IMT), *Case of the Major War Criminals,* Judgment, 1946, at 198-199, 217, 254, 270, 286, 300-2, 333-5 (suggesting that it treated Bohemia and Moravia as the occupied territories). [↑](#footnote-ref-41)
42. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004 (hereinafter *Wall* Advisory Opinion), para. 95. [↑](#footnote-ref-42)
43. HCJ 351/80, *Electricity Company for Jerusalem District Ltd .v Minister of Energy and Infrastructure* (16 Feb 1981) (*Electricity ((No 2).* [↑](#footnote-ref-43)
44. Kretzmer and Ronen, supra note 3, at 66-67. [↑](#footnote-ref-44)
45. HCJ 393/82, *Jamait Askan et al. v. IDF Commander of Judea and Samaria et al.*, 37(4) PD 785, 792. [↑](#footnote-ref-45)
46. Kretzmer and Ronen, supra note 3, at 63. [↑](#footnote-ref-46)
47. Kretzmer and Ronen, ibid, at 124. [↑](#footnote-ref-47)
48. This presumption was established in HCJ 6713/95, *Padesco v. Minister of Defence* (2 Sept 1998), para. 19. [↑](#footnote-ref-48)
49. Kretzmer and Ronen, supra note 3, at 120. *Contra*, Y.Z. Blum, ‘From Camp David to Oslo’, (1994) 28 *Israel Law Review* 211, at 211-3. [↑](#footnote-ref-49)
50. HCJ 2690/09, *Yesh Din v. IDF Commander in the West Bank* (28 March 2010). [↑](#footnote-ref-50)
51. HCJ 8355/12, *Al-Batran v. Committee for Supervision of Construction in Judea and Samaria* (21 May 2017) (right to water); HCJ 4920/06, *Physicians for Human Rights v. IDF Commander in Judea and Samaria* (25 June 2007) (right to health). See also and HCJ 6288/09, *‘Ara’arah v. Head of the Civil Administration for Judea and Samaria* (2 March 2010) (right to education). [↑](#footnote-ref-51)
52. Kretzmer and Ronen, supra note 3, at 128-129. [↑](#footnote-ref-52)
53. HCJ, 5290/14, *Qawasmi v. Military Commander in the West Bank* (11 Aug 2015), [↑](#footnote-ref-53)
54. See the cases cited in Kretzmer and Ronen, supra note 3, at 124, n. 31. [↑](#footnote-ref-54)
55. *Qawasmi* (2015), *supra* note 52, para. 28. [↑](#footnote-ref-55)
56. HCJ 698/80, *Qawasmi v. Minister of Defence* (4 Dec 1980) (*Qawasmi* *(No 2)*) [↑](#footnote-ref-56)
57. Kretzmer and Ronen, supra note 3, at 70. [↑](#footnote-ref-57)
58. *Yesh Din, supra* note 49, para 6. [↑](#footnote-ref-58)
59. This is what Kretzmer and Ronen call ‘contrived interpretation’: Kretzmer and Ronen, supra note 3, at 493-4. See also ibid, at 81, 197; Weil, *supra* note 2, at 25 (‘selective use (or misuse)’ of international law). [↑](#footnote-ref-59)
60. Kretzmer and Ronen ibid, at 81. [↑](#footnote-ref-60)
61. Ibid, at 76-77. [↑](#footnote-ref-61)
62. Kretzmer and Ronen, supra note 3, at 80-81, 85 (describing this as ‘anti-formalist’ construction). [↑](#footnote-ref-62)
63. Compare A. Orakhelashvili, ‘Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights’, (2003) 14(3) EJIL 529. [↑](#footnote-ref-63)
64. HCJ 785/87, *‘Abed Al-‘Afou v. IDF Commander in the West Bank* (10 April 1988). [↑](#footnote-ref-64)
65. Ibid, para 3(4) (*per* Justice Shamgar). [↑](#footnote-ref-65)
66. Kretzmer and Ronen, supra note 3, at 429. [↑](#footnote-ref-66)
67. See Article 19(b) of the ICRC’s Tokyo draft, which provides that ‘Deportations outside the territory of the occupied State are forbidden, unless they are evacuations intended, on account of the extension of military operations, to ensure the security of the inhabitants’. Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who Are on Territory Belonging to or Occupied by a Belligerent (ICRC 1934). [↑](#footnote-ref-67)
68. E. Benvenisti, *The International Law of Occupation*, 2nd ed, (Oxford: OUP, 2012), at 69. [↑](#footnote-ref-68)
69. *The Christian Society for the Holy Places*, supra note 1, at 82. [↑](#footnote-ref-69)
70. E.H. Schwenk, ‘Legislative Power of the Military Occupant under Article 43, Hague Regulations’, (1945) 54 *Yale Law Journal* 393. [↑](#footnote-ref-70)
71. Weil, supra note 2, at 26. [↑](#footnote-ref-71)
72. See, for instance, V. Koutroulis, ‘The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?’ (2012) 92 IRRC165 at 177-178 and the sources cited therein. [↑](#footnote-ref-72)
73. Schwenk, *supra* n. 69; L. Oppenheim, *International Law* 434 (7th ed., by H. Lauterpacht, 1952); Y. Dinstein, ‘The International Law of Belligerent Occupation and Human Rights’, (1978) 8 *Israel Yearbook on Human Rights* 104 at 112. [↑](#footnote-ref-73)
74. See Y. Arai-Takahashi, *The Law of Occupation Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law,* (2009) at 93-97. [↑](#footnote-ref-74)
75. R.Y. Jennings, ’Government in Commission’, (1946) 23 BYIL at 132, n. 1; M. Sassoli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 (4) EJIL 661, at 676-678. See also UK Military Manual, (Oxford: OUP, 2004), at 278—9, para. 11.11. [↑](#footnote-ref-75)
76. J. Stone, ‘Aspects of the *Beit-El* and *Eilon Moreh Cases* – Use of the Terms “Municipal Law”, “International Law”, “Justiciability”, and “Military Needs”’, (1980) 15(4) *Israel Law Review* 476, at 486; Koutroulis, *supra* note 71, at 177-8. [↑](#footnote-ref-76)
77. For a critique of Stone’s apologetic stance on Israel’s approach to Palestine, see B. Saul, ‘Julius Stone and the Question of Palestine in International Law’, Sydney Law School Legal Studies Research Paper No. 09/106 October 2009 at 4. [↑](#footnote-ref-77)
78. Compare Kretzmer and Ronen, supra note 3, at 159-160. They identify the SC’s three approaches when interpreting the meaning of ‘public order and civil life’ under Article 43 Hague Regulations: (1) a readiness of the Court to endorse measures which are ostensibly purported to serve the Israeli interests as befitting for the local population; (2) the approach of reading broadly the phrase ‘public order and (civil) safety’ so as to demarcate the outer boundaries of the (military) necessity exception to the status quo principle; (3) the tendency that Palestinians’ long-term political end is either overlooked or downplayed to favour their short-term material and economic gains. [↑](#footnote-ref-78)
79. Kretzmer and Ronen, ibid, at 159. [↑](#footnote-ref-79)
80. HCJ 390/79, *Dweikat v. Government of Israel* (22 Oct. 1979), 34(1) PD 34 1 *(Elon Moreh).* [↑](#footnote-ref-80)
81. Kretzmer and Ronen, supra note 3, at 203. See also HCJ 393/82 *Jam’iyat Iskan v. IDF Commander in Judea and Samaria* (28 Dec 1983) para. 13 (Justice Barak’s criticism of the wider reading of the concept of ‘the needs of the army of occupation’ in *Beit El).* [↑](#footnote-ref-81)
82. Kretzmer and Ronen, ibid, at 159. [↑](#footnote-ref-82)
83. Ibid., at 108. [↑](#footnote-ref-83)
84. Harpaz and Shany, *supra* note 3, at 518, 529, 534, 537, 541. [↑](#footnote-ref-84)
85. Weil, *supra* note 2, at 33. [↑](#footnote-ref-85)
86. Harpaz and Shany, *supra* note 3, at 525, 540. [↑](#footnote-ref-86)
87. Weil, *supra* note 2, at 44. Harpaz and Shany, ibid., at 542. [↑](#footnote-ref-87)
88. Kretzmer and Ronen, supra note 3, at 258. [↑](#footnote-ref-88)
89. Harpaz and Shany, supra note 3, at 533. [↑](#footnote-ref-89)
90. Ibid, at 542. [↑](#footnote-ref-90)
91. See J.B. Scott (ed.), *Proceedings of the Hague Peace Conferences* Vol. I, (New York: Oxford University Press, 1920). [↑](#footnote-ref-91)
92. See, for example, G. Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent occupation* (1957), at 33-34; A. Roberts, ‘Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967’, (1990) 84 *American Journal of International Law* 44, at 46. [↑](#footnote-ref-92)
93. The ‘supplementary’ character of GC IV to the 1907 Hague Regulations is confirmed in Article 154 GC IV. See Pictet’s Commentary to GCIV, at 335; R.T. Yingling and R.W. Ginnane, ‘The Geneva Conventions of 1949’, (1952) 46 AJIL 393, at 422. [↑](#footnote-ref-93)
94. Article 4(1) GC IV provides that ‘Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power *of which they are not nationals’* (emphasis added). [↑](#footnote-ref-94)
95. Kretzmer and Ronen, supra note 3 at 300. [↑](#footnote-ref-95)
96. ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A, 15 July 1999, para. 166. [↑](#footnote-ref-96)
97. Weil, *supra* note 2, at 32-33. [↑](#footnote-ref-97)
98. See, however, Harpaz and Shany, *supra* note 3, at 527 (cautiously endorsing the Court’s incremental challenge to the pro-status quo tilt of the law of occupation in situations of long-term occupation). [↑](#footnote-ref-98)
99. Kretzmer and Ronen, supra note 3, at 254. [↑](#footnote-ref-99)
100. Weil, *supra* note 2, at 32-33. [↑](#footnote-ref-100)
101. HCJ 358/18, *Hebron Municipality v. State of Israel* (30 June 2019). [↑](#footnote-ref-101)
102. Kretzmer and Ronen, supra note 3, at 225. Compare Harpaz and Shany, *supra* note 3 at 537 (conciliatory to the SC’s impulse to consider the rights of the Israeli settlers as one of the ‘stakeholders’). [↑](#footnote-ref-102)
103. See Benvenisti, *supra* note 67, at 72-74; Dinstein (2009), *supra* note 15, at 110-116, paras. 257-259. [↑](#footnote-ref-103)
104. T. Ferraro, ‘Determining the Beginning and End of an Occupation under International Humanitarian law’, (2012) 94 IRRC 133 at 149. [↑](#footnote-ref-104)
105. For the pro-status quo principle, see N. Ando, Surrender, Occupation, *and Private Property in International*Law*: An Evaluation of U.S. Practice in*Japan*.* (Oxford: Oxford University Press, 1991) (‘preservation principle’); G.H. Fox, *Humanitarian Occupation,* (Cambridge: Cambridge University Press, 2008), at 233–237 (‘conservation principle’). [↑](#footnote-ref-105)
106. Benvenisti, *supra* n. 66, at 72-74; Dinstein (2009), supra note 15, at 110-116, paras. 257-259. [↑](#footnote-ref-106)
107. Kretzmer and Ronen, supra note 3 at 139. See also Y. Dinstein, ‘The Israel Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulations’, (1996) 25 *Israel Yearbook on Human Rights* 1. [↑](#footnote-ref-107)
108. Kretzmer and Ronen, ibid, at 138-139. See also Weil, *supra* note 2, at 26-27. [↑](#footnote-ref-108)
109. See Schwenk, *supra* note 69; Benvenisti *supra* n. 66, at 76-77; Dinstein (2009), supra note 15, at 89; M. Sassoli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 (4) EJIL 661, at 676-678; Koutroulis (2012), *supra* note 70, at 178. [↑](#footnote-ref-109)
110. Kretzmer and Ronen, supra note 3, at 149-156. See also Stone (1980), *supra* note 75, at 489-490; Weil, supra note, 2, at 34-35. [↑](#footnote-ref-110)
111. Weil, *ibid*, at 34-35. [↑](#footnote-ref-111)
112. Harpaz and Shany, *supra* note 3, at 529 (describing such judicial policy as part of the ‘second-generation jurisprudence’ on Article 43 Hague Regulations). See also ibid., at 534 (‘third-generation jurisprudence’ which includes even Israeli non-residents such as travellers). [↑](#footnote-ref-112)
113. Kretzmer and Ronen, supra note 3, at 148-149. [↑](#footnote-ref-113)
114. HCJ 256/72, *Electricity Corporation for Jerusalem District Ltd v. Minister of Defence* (20 Dec. 1972) (*Electricity Co (No 1*)). [↑](#footnote-ref-114)
115. Kretzmer and Ronen, supra note 3, at 147. Contrast *Electricity (No 2) supra* note 42*.* [↑](#footnote-ref-115)
116. HCJ 2150/07, *Abu Safiya v. The Minister of Defense* (29 Dec 2009). [↑](#footnote-ref-116)
117. Kretzmer and Ronen, supra note 3, at 152-154. [↑](#footnote-ref-117)
118. Weil, *supra* note 2, at 35. [↑](#footnote-ref-118)
119. *Jam’iyat Iskan,* supra note 80. [↑](#footnote-ref-119)
120. See Harpaz and Shany, *supra* note 3, at 524. [↑](#footnote-ref-120)
121. As confirmed by Prof. Yael Ronen in her email correspondence on 30 Sept 2021 (case on this author’s file). [↑](#footnote-ref-121)
122. See HCJ 794/17, *Ziada v. IDF Commander in the West Bank* (31 Oct. 2017) (despite recogning commander’s authority to take land for the benefit of settlers: Kretzmer and Ronen supra note 3, at 228). [↑](#footnote-ref-122)
123. HCJ **606/78, *Ayub et al. v. Minister of Defence et al* (the *Beth El* case) (*per* Justice Landau).** [↑](#footnote-ref-123)
124. Ibid., at 136-7. [↑](#footnote-ref-124)
125. See Stone, supra note 75 at 486-487; J. Stone, *Legal Controls of International Conflict* (1954), at 721, n. 176. [↑](#footnote-ref-125)
126. Incidentally, Gabrielle Blum argues that ‘…the necessity discussed in Article 31(1)(d) [of the ICC Statute] is military necessity: G. Blum, ‘The Laws of War and the “Lesser Evil”’, 35 *Yale Journal of International Law* (2010) 1, at 14. Yet, this is flawed, as it would then allow the ‘third bites’ of necessity for the defendants of war crimes, say, of destruction of private property in occupied territory. [↑](#footnote-ref-126)
127. The ICJ held that:

The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation [Article 53 GCIV, and derogations clause of HRL]. Since those treaties already address considerations of this kind [‘military exigencies’] within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged.

ICJ, *Wall* Advisory Opinion, supra note 41, para. 140. [↑](#footnote-ref-127)
128. As explained by the Kretzmer and Ronen: ibid, at 273. [↑](#footnote-ref-128)
129. HCJ 285/81, *Al-Nazer v. IDF Commander in Judea and Samaria* (7 Feb 1982), 36(1) PD 701. [↑](#footnote-ref-129)
130. A. Cassese, ‘Powers and Duties of an Occupant in Relation to Land and Natural Resources’ in E. Playfair, *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip,* (Clarendon, 1992) 419, at 437-8 (considering this presumption incompatible with Article 55 Hague Regulations). [↑](#footnote-ref-130)
131. Kretzmer and Ronen, supra note 3, at 207. [↑](#footnote-ref-131)
132. Ibid., at 213. [↑](#footnote-ref-132)
133. Ibid, at 493-4. [↑](#footnote-ref-133)
134. Weil, supra note 2, at 25 (even describing them as ‘apartheid’: ibid., at 41, 44-46). [↑](#footnote-ref-134)
135. Kretzmer and Ronen, supra note 3, at 25-26, 213-214, 220, 256, and 513. [↑](#footnote-ref-135)
136. See A. Margalit and S. Hibbin, ‘Unlawful Presence of Protected Persons in Occupied Territory? An Analysis of Israel’s Permit Regime and Expulsions from the West Bank under the Law of Occupation’, (2010) 13 *Yearbook of International Humanitarian Law* 245. [↑](#footnote-ref-136)
137. HCJ 97/79, ‘*Awad v. Commander of the Judea and Samaria Area* (3 May 1979); *Qawasmi* *(No 2)*, supra note 55; HCJ 785/87, *‘Abed Al-‘Afou v. IDF Commander in the West Bank* (10 April 1988). [↑](#footnote-ref-137)
138. HCJ 7015/02, *Ajouri v The Commander of the IDF Forces in the West Bank* (3 Feb 2002). [↑](#footnote-ref-138)
139. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip: [*(1997) 36(3) International Legal Materials*](https://www.cambridge.org/core/journals/international-legal-materials) (ILM) 551-649; and https://www.un.org/unispal/document/auto-insert-185434/ (last accessed on 17 Sep 2021). [↑](#footnote-ref-139)
140. Kretzmer and Ronen, supra note 3, at 452. [↑](#footnote-ref-140)
141. Compare the issue relating to the right to visits by immediate family members of prisoners which became an issue in HCJ 6314/17 *Namnam v. Israel* (4 June 2019). For critical analyses of this case, see Y. Ronen, ‘On Prisoners, Family Life and Collective Punishment: The *Namnam* Case’, (2021) 102 IRRC 1. [↑](#footnote-ref-141)
142. Israel, HCJ 5100/94 *Public Committee against Torture in Israel v. Government of Israel* (6 Sept 1999) (*PCATI*), para. 38. [↑](#footnote-ref-142)
143. Kretzmer and Ronen, supra note 3, at 358-359. [↑](#footnote-ref-143)
144. Ibid. [↑](#footnote-ref-144)
145. E. Chachko, ‘Pressure Techniques’ and Oversight of Shin Bet Interrogations: *Abu Gosh v. Attorney General’*, Lawfare bog, December 22, 2017. See also Kretzmer and Ronen, supra note 3, at 358-359. [↑](#footnote-ref-145)
146. Kretzmer and Ronen, ibid, at 360. [↑](#footnote-ref-146)
147. Ibid., at 361. See also Chachko, supra note 144. [↑](#footnote-ref-147)
148. Kretzmer and Ronen, supra note 3 at 368. [↑](#footnote-ref-148)
149. Israel, Supreme Court (acting as the HCJ), *Abu Ghosh v. Attorney General*, 12 December 2017. The case is summarised and assessed in Chachko, supra note 144. [↑](#footnote-ref-149)
150. Under the pressure of ill-treatment which the SC considered not to cross the bar for torture, the petitioner disclosed the information about the second suspect, which led eventually the Israeli Security Agency (ISA or Shin Bet) to trace the whereabouts of the explosive vest and ‘bomb laboratory’ in Tel-Aviv, averting potentially fatal terrorist attacks. [↑](#footnote-ref-150)
151. Chachko, supra note 144. [↑](#footnote-ref-151)
152. By comparison, the ECtHR has consistently recognised the tripartite hierarchy of ill-treatment under Article 3 ECHR. See Y. Arai-Yokoi, ‘Grading Scale of of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR’, (2003) 21(3) *Netherlands Quarterly of Human Rights* 385. [↑](#footnote-ref-152)
153. Y. Shany, ‘Back to the ‘Ticking Bomb’ Doctrine’, Lawfare Blog, December 27, 2017. [↑](#footnote-ref-153)
154. Ibid (criticising also the SC’s putative attempt to distinguish between torture and other forms of ill-treatment, to set a high onus of medical proof on the petitioner that claims to be a victim of ill-treatment). See also Kretzmer and Ronen, supra note 3, at 373 (criticising the SC for its ‘legitimization of interrogation practices that amount either to torture or come very close to the line that distinguishes torture from cruel, inhuman, or degrading treatment’. [↑](#footnote-ref-154)
155. See ICJ, *Wall* Advisory Opinion, supra note 41, para. 133. [↑](#footnote-ref-155)
156. Kretzmer and Ronen, supra note 3, at 244; and Weil, supra note 2, at 36. [↑](#footnote-ref-156)
157. Kretzmer and Ronen, ibid. [↑](#footnote-ref-157)
158. ICJ, *Wall* Advisory Opinion, supra note 41, paras 162. For the Court’s opinion that focused more on illegality of the *consequences* flowing from the construction of the wall, rather than the wall itself, see ibid, paras 159 and 160. [↑](#footnote-ref-158)
159. This subtest requires that among measures available to attain the legitimate purpose, the least restrictive of individual persons’ rights should be chosen. See Y. Arai-Takahashi, ‘Proportionality’ in D. Shelton (ed), *Oxford Handbook on International Human Rights Law* (Oxford: OUP, 2013). [↑](#footnote-ref-159)
160. Kretzmer and Ronen, at 256. [↑](#footnote-ref-160)
161. Ibid, at 254. See also ibid, at 270 (‘compartmentalization’ in the proportionality examination). [↑](#footnote-ref-161)
162. Weil, supra note 2, at 38. See also Kretzmer and Ronen, ibid, at 254 and 323. [↑](#footnote-ref-162)
163. As noted by Kretzmer and Ronen, ibid, at 256. [↑](#footnote-ref-163)
164. Ibid, at 249-251. [↑](#footnote-ref-164)
165. Ibid, at 165. For those who deny the status of occupation, see, for instance, Y. Shany, ‘Faraway, So Close: the Legal Status of Gaza after Israel’s Disengagement’, (2005) 8 YIHL 369; Benvenisti, supra note 67, at 211-212. For the opposite view, see Dinstein (2009), supra note 15, at 278*; V. Kattan, ‘Operation Cast Lead: Use of Force Discourse and Jus ad Bellum Controversies’, (2009) 15 Palestinian Yearbook of International Law* 95, at 107; D. Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts*, (Oxford: Oxford University Press, 2012), at 48; Koutroulis, supra note 71, at 170; S. Darcy and J. Reynolds, ‘An Enduring Occupation: the Status of the Gaza Strip from the Perspective of International Humanitarian law’, (2010) 15 *Journal of Conflict and Security Law* 211, at 235. [↑](#footnote-ref-165)
166. V. Koutroulis, *Le début et la fin de l’application du droit de l’occupation,* (Paris: Pedone, 2010), at 54. [↑](#footnote-ref-166)
167. Y. Shany, ‘The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v. The Prime Minister of Israel*’, (2009) 42 *Israel Law Review* 101. [↑](#footnote-ref-167)
168. The so-called ‘Pictet’s theory’ is credited with marking the genesis of the ‘functional approach’. [↑](#footnote-ref-168)
169. See Ferraro (ed), *ICRC’s Expert meeting, Occupation and Other Forms of Administration of Foreign Territory* (ICRC, 2012) at 113. See also N. Kalandarishvili, *Occupation and Control in International Humanitarian Law* (2021), at 136-137, 140-142, 160-164. [↑](#footnote-ref-169)
170. HCJ 9132/07, *Jaber Al-Bassiouni Ahmed and Others,* 27 January 2008, paras 12 and 15. [↑](#footnote-ref-170)
171. Ibid, para. 14. [↑](#footnote-ref-171)
172. A. Gross, *The Writing on the Wall* – *Rethinking the International Law of Occupation* (Cambridge: CUP, 2017), at 217-20. [↑](#footnote-ref-172)
173. Kretzmer and Ronen, supra note 3, at 460. [↑](#footnote-ref-173)
174. HCJ 769/02, *The Public Committee against Torture in Israel v. The Government of Israel et al.,* (14 Dec 2006) (*Targeted Killing*). [↑](#footnote-ref-174)
175. HCJ 9594/03 *B’Tselem v. Military Advocate General* (21 August 2011). [↑](#footnote-ref-175)
176. Kretzmer and Ronen, supra note 3, at 482-3. [↑](#footnote-ref-176)
177. For this term, see M. Warren, ‘The “Fog of Law”: The Law of Armed Conflict in Operation Iraqi Freedom’, 86 *International Law Studies* 167. [↑](#footnote-ref-177)
178. Kretzmer and Ronen, supra note 3, at 463. [↑](#footnote-ref-178)
179. Ibid, at 464 and 467. [↑](#footnote-ref-179)
180. See A. Cohen and Y. Shany, ‘A Development of Modest Proportions: the Application of the Principle of Proportionality in the Israeli Supreme Court Judgment on the Lawfulness of Targeted Killings’, The Hebrew University of Jerusalem, Faculty of Law, Research Paper No. 5-07 April 2007, at 11, 12, 13-14. [↑](#footnote-ref-180)
181. Y. Shany, ‘Human Rights and Humanitarian Law as Competing Paradigms for Fighting Terror’, in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP, 2011), 13 at 29. See also D. Bethlehem, ‘The Relationship between International Humanitarian Law and International Human Rights Law and the Application of International Human Rights Law in Armed Conflict’, (2013) 2 *Cambridge Journal of International and Comparative Law* 180, at 186-7, 195; M. Milanovic, ‘Norm Conflicts, International Humanitarian Law, and Human Rights’, in Ben-Naftali (ed), ibid., 95, at 97; and M. Sassòli.  ‘[International Humanitarian Law and International Human Rights Law](https://opil.ouplaw.com/view/10.1093/law/9780198855309.001.0001/law-9780198855309-chapter-17)’, in B. Saul and D. Akande (eds), [*The Oxford Guide to International Humanitarian Law*](https://opil.ouplaw.com/view/10.1093/law/9780198855309.001.0001/law-9780198855309) (OUP, 2020) 381, at 400-1. [↑](#footnote-ref-181)
182. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* (ICRC, 2009)at 27, 33-36. [↑](#footnote-ref-182)
183. R. Bartels, ‘When Do Terrorist Organisations Qualify as “Parties to an Armed Conflict” under International Humanitarian Law?’, (2017-18) 56 *Military Law and Law of War Review* 451. With specific regard to the ISIS, see V. Koutroulis, ‘The Fight Against the Islamic State and Jus in Bello’, (2016) 29 Leiden JIL 827. [↑](#footnote-ref-183)
184. HCJ 3799/02, *Adalah v. Officer of Commanding Central Command* (6 Oct. 2005) (*Early Warning).* [↑](#footnote-ref-184)
185. Kretzmer and Ronen, supra note 3, at 462. [↑](#footnote-ref-185)
186. As disputed in HCJ 8990/02, *Physicians for Human Rights v. Commander of Southern Command* (27 April 2003) 57(4) PD 193, 195. [↑](#footnote-ref-186)
187. HCJ 3261/06, *Physicians for Human Rights, v. Minister of Defence* (31 Jan 2011) para. 10. [↑](#footnote-ref-187)
188. Kretzmer and Ronen, supra note 3, at 462. [↑](#footnote-ref-188)
189. HCJ 4764/04, *Physicians for Human Rights et al v. Commander of the IDF Forces in the Gaza Strip* (30 May 2004) (The *Rafah* case), available at https://casebook.icrc.org/case-study/israel-rafah-case. [↑](#footnote-ref-189)
190. Ibid, paras. 30 and 34. [↑](#footnote-ref-190)
191. Ibid, para. 18. [↑](#footnote-ref-191)
192. ECtHR, GC, *Georgia v. Russia (No. 2),* Judgment, 21 January 2021, paras. 138-144. [↑](#footnote-ref-192)
193. The test of proportionality consists of: (1) suitability/rational basis; (2) necessity or less restrictive alternative; and (3) proportionality in a narrow sense. For the tripartite system of this test, N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (The Hague: Kluwer 1996); G. Gerapetritis , *Proportionality in Administrative Law: Judicial Review in France, Greece, England and in the European Community* (Sakkoulas, 1997). [↑](#footnote-ref-193)
194. HCJ 7957/04, *Mara’abe v. Prime Minister* (15 Sept 2005). [↑](#footnote-ref-194)
195. Kretzmer and Ronen, supra note 3, at 256. [↑](#footnote-ref-195)
196. Weil, supra note 2, at 37-38. [↑](#footnote-ref-196)
197. See, for instance, K.E. Himma, ‘Judicial Discretion and the Concept of Law’, (1999) 19(1) *Oxford Journal of Legal Studies* 71. [↑](#footnote-ref-197)
198. Weil, supra note 2., at 36. [↑](#footnote-ref-198)
199. HCJ 2056/04, *Beit Sourik Village Council v. Government of Israel* (30 June’ 2004). [↑](#footnote-ref-199)
200. Kretzmer and Ronen, supra note 3 at 244. [↑](#footnote-ref-200)
201. Ibid., at 244. [↑](#footnote-ref-201)
202. G. De Búrca, ‘The Principle of Proportionality and its Application in EC Law’, (1993) 13(1) Yearbook of European Law 105; Y. Arai-Takahashi, *idem*, ‘”Scrupulous but Dynamic”—the Freedom of Expression and the Principle of Proportionality under European Community Law’, (2005) 24(1) Yearbook of European Law 27. [↑](#footnote-ref-202)
203. This test and its three-tier evaluative process originate from German administrative law. See, for instance, Y. Arai-Takahashi, ‘Administrative Discretion in German Law: Doctrinal Discourse Revisited’, (2000) 6 *European Public Law* 69-80. [↑](#footnote-ref-203)
204. #  De Búrca, ibid.

 [↑](#footnote-ref-204)
205. As exemplified in *Yesh Din, supra* note 49. [↑](#footnote-ref-205)
206. As typified in *Electricity Co (No 1*), supra note 112. [↑](#footnote-ref-206)
207. Kretzmer and Ronen, supra note 3, at 36. See also Weil, *supra* note 2, at 46; HCJ 4481/91, *Bargil v. Government of Israel* (25 Aug 1993). [↑](#footnote-ref-207)
208. Kretzmer and Ronen, ibid, at 32-37. [↑](#footnote-ref-208)
209. Ibid, at 509-10. [↑](#footnote-ref-209)
210. Ibid, at 496 and 501. [↑](#footnote-ref-210)
211. Weil, *supra* note 2, at 33. See also A. Gross, **‘**Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?’, (2007) 18(1) EJIL 1. [↑](#footnote-ref-211)
212. #  Y. Hasebe, *Hikaku-funo-na Kachi-no Meiro -riberaru-demokurashi-no Kenpo-Riron,(The Maze of Incommensurable Values – the Constitutional Doctrines of Liberal Democracy),* (Tokyo, 2000, revised ed, 2018); V.A. Da Silva, ‘Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision’, (2011) 31(2) *Oxford Journal of Legal Studies* 273 at 277.

 [↑](#footnote-ref-212)
213. Weil, supra note 2; and Gross supra note 171. [↑](#footnote-ref-213)