Quid? Special Edition 2017: The Law in These Parts

QUID?

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Contact
Quid? Fribourg Law Review
Case postale 51, Miséricorde,
Avenue de l'Europe 20, 1700 Fribourg
www.unifr.ch/ius/quid
fribourglawreview@unifr.ch

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Johann-Jakob Chervet, Simon Mazidi

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Dear Reader,

This special edition is the fruit of a Joint Seminar in International Law organized by the University of Fribourg and the Hebrew University of Jerusalem with the support of the Jean and Bluette Nordmann Foundation. The Seminar enabled six students from each university to meet in Israel and Switzerland and discuss a wide range of international law issues centred around the film *The Law in These Parts* (Ra'anan Alexandrowicz, 2012). The discussion predominantly focused on the applicable law in the Occupied Palestinian Territories, addressing issues such as legal and political philosophy, the notion of the state of emergency, separation of powers, international human rights law and international humanitarian law, *inter alia*. Additionally, the experience of the students was enhanced by presentations by legal professionals, visits to international human and humanitarian rights bodies (such as the Office of the United Nations High Commissioner for Human Rights and the International Committee of the Red Cross in Geneva), and an Israeli military court.

The seminar culminated with the students writing essays on a particular relevant topic. Each Swiss student worked in common with an Israeli student, which led to debates, mutual compromises, and above all, articles of high quality. Thus, the idea for a special issue of *Quid? Fribourg Law Review* emerged, supported by the great enthusiasm of both students and professors involved in the seminar. We are pleased to present you with a shortened version of some of these essays in the following pages.

In the foreword, Ambassador François Nordmann explains the history and the *raison d'être* of the Jean and Bluette Nordmann Foundation , which supported financially both the Joint Seminar and this special edition.

In the first article, Professor Samantha Besson raises the issue of the balance between human rights and security. In particular, she analyses whether the Israeli practice should be followed in this regard. Adrien Folly then addresses the issues raised by the Israeli settlements in the Occupied Palestinian Territories. In the third article, Camille Goy questions the legality of the Israeli military courts' jurisdiction on the Palestinian civilian population, considering the length of the occupation. Amit Haïm and Lucien Hürlimann thereafter examine the administrative detention regime. As well, they develop a model allowing for better accommodation of security needs and the protection of individual rights in cases of prolonged occupation. In the fifth article, Galaad Loup analyses a ruling in which the Supreme Court of Israel imposed the requirements of the "least harmful means" upon any targeted killing conducted. Finally, Rotem Bavli and Eva Müller question the validity of the Court's reasoning on the demolition of houses in the Occupied Palestinian Territories.

In the creation of this edition, we have received varied and much-needed assistance. Hence, we would like to express our gratitude to Professors Samantha Besson (University of Fribourg) and Yuval Shany (Hebrew University of Jerusalem) for their support and confidence, and to the Jean and Bluette Nordmann Foundation for having made the publication of this edition possible.

We wish you a good read and look forward to your comments, questions and suggestions!

The Editorial Board

La raison d'être de la Fondation Jean et Bluette Nordmann

François Nordmann (président du conseil de fondation)

Une plaque apposée dans le hall de l' Université de Fribourg commémore la visite en 1949 de Haim Weizmann, premier président de l'Etat d'Israël, venu renouveler le doctorat en chimie qui lui a été décerné par cette université cinquante ans auparavant. Haim Weizmann fut aussi en 1925, à sa création, le premier président de l'Université hébraïque de Jérusalem. Donnant corps à cette remarquable coïncidence historique, la Fondation Jean et Bluette Nordmann met en valeur le partenariat entre les deux institutions. Elle a été établie pour perpétuer la mémoire de deux personnalités de la vie fribourgeoise. Bluette Nordmann en a conçu le projet après la disparition de Jean, son mari, en 1986. Elle entendait mettre en valeur un aspect des combats qu'ils avaient menés côte à côte pour rapprocher le monde juif du monde chrétien et approfondir la connaissance du judaïsme et du christianisme comme religions et cultures. Jean Nordmann n'avait-il pas lui-même encouragé de son vivant des professeurs de l'Université de Fribourg à se rendre à l'Université hébraïque de Jérusalem pour approfondir des connaissances en droit ou en théologie ? Il avait de même accueilli enseignants et étudiants israéliens venus à faire leur médecine ou leur droit à Fribourg. Le dévouement de Bluette à la Fondation et la collaboration instituée d'emblée avec l'Université de Fribourg lui valut de devenir sénatrice honoraire.

Dans un premier temps, la Fondation a organisé des colloques et des conférences, soit à Fribourg soit à Jérusalem. L'Institut du Fédéralisme alors dirigé par le professeur Thomas Fleiner, qui fut membre du Conseil de fondation, a abrité des journées consacrées à la question de savoir si les méthodes et les vertus du fédéralisme permettaient de résoudre le conflit israélo-palestinien. Une autre manifestation a été consacrée à l'analyse comparative du droit constitutionnel de la Confédération et de l'Etat d'Israël sous l'impulsion du professeur Claude Klein, professeur de droit constitutionnel à l'Université hébraïque de Jérusalem et également membre du Conseil.

Puis, sur les conseils de Mme Samantha Besson, vice-doyenne de la Faculté de droit, la relation entre les deux Universités a été formalisée en 2011 dans une convention en bonne et due forme. Ainsi se forma le cadre juridique des échanges entre enseignants, chercheurs et étudiants qui constituent aujourd'hui l'activité principale de la Fondation.

L'engagement du couple Nordmann s'inscrit dans le prolongement d'une action constante au service d'un triple idéal : favoriser l'insertion de la minorité juive au sein de la société suisse et lutter contre l'antisémitisme, ses origines et ses manifestations ; venir en aide aux victimes de la discrimination, à partir de leur expérience de la situation des réfugiés juifs hébergés dans la région de Fribourg pendant la guerre ; favoriser la compréhension mutuelle et l'amitié entre la Suisse et Israël.

Témoins angoissés de la montée des périls, à travers les informations et les réactions du Congrès mondial juif fondé à Montreux en 1936, mes parents ont pu se rendre compte par eux-mêmes de la réalité de la persécution lors d'un voyage qu'ils ont entrepris avec témérité dans la zone libre en France en 1941. Ils ont tenté de faire sortir un de leurs amis du camp de Gurs. Tandis que mon père était mobilisé, ma mère se chargeait de visiter et d'assister des réfugiés à la Chassotte, Bellechasse ou Givisiez. Amis de Gerhardt Riegner, secrétaire général du Congrès juif mondial qui fut l'un des premiers à alerter les Alliés sur les horreurs de la solution finale mise en œuvre par les Nazis, ils ont tenté en vain de partager cette information au plus noir de la guerre avec une presse incrédule.

Quoi d'étonnant à ce qu'ils soutiennent, au sortir de la guerre, les efforts de ceux qui, autour de Jules Isaac ont analysé les racines chrétiennes de l'antisémitisme, relançant en même temps les amitiés judéo-chrétiennes ? Jean Nordmann participera au rassemblement de Seelisberg de 1947 qui en jeta les bases et sera le point de départ des efforts qui permettront la rédaction de la déclaration du Concile de Vatican II, Nostra Aetate, en 1965. Comment ne pas évoquer dans la même veine l'appui qu'ils ont apporté plus tard à l'organisation des cours donnés à l'Université de Fribourg par le professeur Emmanuel Levinas ?

Jean et Bluette Nordmann se rendirent en Israël pour la première fois en 1955 et cherchèrent depuis lors à jeter des ponts entre la Suisse et ce pays, dans le cadre

de la section de Fribourg de l'association Suisse-Israël. Ils passèrent chaque année des vacances dans leur appartement de Haïfa.

Parallèlement à ces actions, Jean Nordmann a été pendant trente ans président de la communauté israélite de Fribourg et de 1973 - 1984 de la Fédération suisse des Communautés israélites dont il fut membre du comité depuis 1943 ; son épouse présida quant à elle la section fribourgeoise puis la Fédération suisse de la Wizo, organisation féminine qui réalisait des programmes sociaux en faveur des nouveaux immigrants en Israël. Patriote engagé, Jean Nordmann termina sa carrière militaire avec le grade de colonel et fut conseiller général puis député au Grand Conseil de Fribourg.

La Fondation Jean et Bluette Nordmann n'est pas un monument, mais il est utile de savoir comment ce projet s'est développé, reflétant les heures sombres et les heures claires de l'époque contemporaine telles que ses fondateurs les ont traversées.

C'est en même temps un pan de l'histoire tout court vécue à Fribourg et reliée à l'évolution du monde dans la deuxième moitié du siècle dernier.

Avant tout, la Fondation sert à faciliter la recherche et la connaissance, qui bénéficient aujourd'hui de conditions inimaginables il y a trente ans, et dans des domaines très variés. Mais heureusement la rigueur scientifique et la discipline académique demeurent le cadre indispensable de l'activité intellectuelle.

Ce qui frappe dans les sujets choisis par les participants au programme de bourse de la Fondation, c'est la diversité des objets d'étude et des intérêts: théologie, philosophie, recherche biblique, archéologie, littérature, droit et science politique, histoire… Le programme s'est en quelque sorte normalisé, dans la mesure où il se compare avec l'offre en vigueur dans la plupart des universités. Il n'en reste pas moins attractif. Et comme le démontre le séminaire qui fait l'objet de la présente édition de *Quid* ?, il n'exclut pas que la Fondation se livre à d'autres activités.

La Fondation est apolitique : le thème retenu, connoté d'une évidente signification émotionnelle, ne pouvait être traité que dans sa composante juridique. Il a été également l'occasion de rencontres notamment avec la Cour suprême israélienne et le CICR, offrant ainsi un panorama complet de la question aux étudiants. Et de fait, il envisage la question du droit de l'occupation sous tous ses aspects, s'inscrivant ainsi dans un débat très pointu et combien actuel. La Fondation remercie Madame la Professeure Samantha Besson, vice-doyenne de la Faculté de droit de l'Université de Fribourg, et le Professeur Yuval Shany, de l'Université hébraïque de Jérusalem, d'avoir conçu, organisé et dirigé ce séminaire et d'avoir mené à bien ce projet qui illustre si bien ses activités.

Security and Human Rights – Mind the Balance!

On Security in International Human Rights Law and the Dangers of the Normalization of Emergency

Samantha Besson (Professor of Public International Law and European Law, University of Fribourg)*

In this article, the author analyzes the issue of the balance between human rights and security. More precisely, she addresses three specific questions: Firstly, should human rights be "balanced" against security *per se*? Secondly, considering that human rights may be restricted on security grounds in certain circumstances, should the Israeli practice of balancing human rights and security be taken as an example? And thirdly, if one does so, should the Israeli practice also be followed by transposing this reasoning onto circumstances where the state of emergency has become ordinary?

Abstract provided by the Editorial Board

Introduction: The Balance between Human Rights and Security

Security is routinely invoked as a ground to justify "limits" on human rights (HR), and this is the case both in domestic human rights law (DHRL) and in international human rights law (IHRL).

The relationship between HR and security in a democracy has become particularly pressing recently in the United States and in Europe, especially post-2001 with the rise of terrorism and the corresponding invocation of security by domestic authorities to justify measures affecting the rights of individuals in the context of the prevention or repression of terrorism. In the last fifteen years or so, cases have multiplied in practice giving rise to a detailed case-law[1] and nuanced doctrinal analyses of what is usually described as the "balance" between HR and security[2].

While the potential conflict between HR and security is one that can be encountered in any democracy, it is obviously more often in a context of armed conflict that their balancing becomes a common operation for lawyers. Once emergency and insecurity have become so ordinary as to constantly call for security-based limits on HR, however, one may wonder about the applicability of the usual HR reasoning and tests used to justify such security-based limitations on HR. As a matter of fact, other regimes of international law, such as international humanitarian law (IHL) in particular, have been developed to address emergency and security threats in the context of armed conflicts. They have gradually given rise to adapted tests that do not consider insecurity as an exception to individual rights as it would be the case in peacetime, but as a routine concern. No wonder therefore that the relationship between IHL's and IHRL's respective treatment of the relationship between individual rights and security is of primary concern to specialists when they discuss the relationship between those two concurrently applicable regimes of international law.[3]

In this context, the Israeli practice of balancing HR and security stands out, both in its sheer volume and its degree of detail. This is due in large part to its routine application to the military occupation of the Occupied Palestinian Territories (OPT) by Israel ever since 1967, and the alleged constant state of emergency that has ensued both for and within the (1948 borders of the) State of Israel.

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* This article is the written version of one of the two lectures I gave during the *Fribourg-Hebrew University Joint Seminar in International Law* at the Hebrew University of Jerusalem on 5th September, 2016, and it has largely kept its oral style. Many thanks to Matthieu Loup for his editorial assistance; to Yuval Shany, Aurélie Galetto, Tal Mimran and the twelve students from both universities for our lively discussions; and to the Jean and Bluette Nordmann Foundation for their generous financial support of the seminar.

1 See e.g. CJEU, *European Commission and Others v. Yassin Abdullah Kadi*, C-584/10 P, EU:C:2013:518 (*Kadi II*).

2 See J. Waldron, 'Security and Liberty: The Image of Balance', (2003) 11:2 *The Journal of Political Philosophy* 191-210; J. Waldron, 'Security as a Basic Right (After 9/11)', in C. R. Beitz / R. E. Goodin (eds), *Global Basic Rights*, Oxford: OUP 2009, 207-26; D. Cole / J. Lobel, *Less Safe, Less Free – Why America is Losing the War on Terror*, New York / London: New Press 2007; D. Cole (ed.), *Securing Liberty: Debating Issues of Terrorism and Democratic Values in the Post-9/11 United States*, New York: International Debate Education Association 2011.

3 See Y. Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror', in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights – Pas de Deux*, Oxford: OUP 2011, 13-33; E. Benvenisti, *The International Law of Occupation*, 2nd edn, Oxford: OUP 2012, Introduction.

More specifically, there are three kinds of situations which, at different times, or even at the same time and in a merged fashion, have led to the balancing between HR and security in Israel: (i) military security in the context of occupation in the OPT; (ii) settlers' security in the context of occupation in the OPT; (iii) and civilian security in the context of terrorist attacks on Israeli territory.[4] Importantly, the majority view in Israel is that there should be no distinction between the HR and security balancing in time of war and military occupation and that same balancing in time of peace, and no discontinuity as a result between times of emergency and ordinary life.[5] While some arguments for this position have been advanced (e.g. the extension of the scope of ordinary judicial review to cover activities related to the military occupation of the OPT and, accordingly, of HR protection in that context as well), there are important arguments against that extension.[6] One may mention, first of all, the fact that there have hardly been any cases in practice where the Israeli Supreme Court (Israeli SCt) has decided against the executive (and the military) in that context, hence actually playing a legitimizing and condoning role of violence across the board;[7] second, the contamination of ordinary HR reasoning in IHRL through different restriction tests coming from IHL; and, finally, the threat to the purpose and integrity of IHL itself.

Nevertheless, and despite those controversies in the Israeli case-law and scholarship[8], the Israeli practice is regularly invoked in current American and European debates as an example about how to balance HR with security concerns in the context of the application of IHRL in a democracy.[9] True, the sheer quantity of that balancing practice by Israeli authorities, but also the detail of the conceptualization it has given rise to, both in judicial reasoning and academic analysis,[10] provide a ready explanation for its relevance abroad where the problem is more recent.[11] Still, it is important to pause to reflect about the justification of balancing HR with security before endorsing it too quickly, both in future Israeli cases and in other contexts and especially the American and European ones.

Three questions arise in this respect. (i) Should we actually "balance" HR against security *per se* and, if so, how should we do that? This is a legal-philosophical question pertaining to the moral justifications of HR restrictions and the kinds of restrictions one should deem justified. (ii) Provided security may amount to a ground to restrict HR in certain circumstances, should we take the Israeli practice of balancing HR and security as an example in this respect? This is a legal-doctrinal question pertaining to the international legal validity, in both IHRL and IHL, of the reasoning of the Israeli SCt pertaining to the balance between HR and security. (iii) Provided we do, should we also follow the Israeli example in transposing what should amount to exceptional reasoning in situations of armed conflict onto circumstances where emergency has become ordinary as it is the case of the long-term occupation of Palestine by Israel? This is a legal-structural question pertaining to the transposition of a form of reasoning adapted to emergency situations such as armed conflicts, mostly stemming from IHL, to ordinary circumstances of life in a democracy where terrorist attacks occur that lie at the core of IHRL, and hence to the content of so-called international occupation law (IOL).

Critical reflection, and caution about balancing HR with security does not only matter for the legitimacy of future HR reasoning in Europe, and in particular for the securing of justice in democracies facing terrorism, but also for future HR protection in the OPT

[4] See D. Kretzmer, *The Occupation of Justice*, Albany: State University of New York Press 2002, Ch. 7 and 8.

[5] See on the case-law of the Israeli SCt, Kretzmer (n 4); A. Barak, *The Judge in a Democracy*, Princeton: Princeton University Press 2006, Ch. 7.

[6] See Kretzmer (n 4), Ch. 7 and 8.

[7] See O. Ben-Naftali, 'PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies', in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law – Pas de Deux*, Oxford: OUP 2011, 129-200.

[8] See e.g. O. Ben-Naftali / A. M. Gross / K. Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', (2005) 23:3 *Berkeley Journal of International Law* 551-614; A. M. Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?', (2007) 18:1 *European Journal of International Law* 1-35; Ben-Naftali (n 7); A. M. Gross, *The Writing on the Wall – Rethinking the International Law of Occupation*, Cambridge: CUP 2017.

[9] See e.g. A. Barak, 'Human Rights in Times of Terror – A Judicial Point of View', Opening of the Judicial Year Seminar, European Court of Human Rights, Strasbourg, 29th January, 2016, http://www.echr.coe.int/Documents/Speech_20160129_Barak_JY_ENG.pdf; J. Limbach, 'Human Rights in Times of Terror. Is Collective Security the Enemy of Individual Freedom?', (2009) 1:1 *Goettingen Journal of International Law* 17-27.

[10] See Barak (n 5), Ch. 16 and 7.

[11] Other explanations may include the tight relationship between German and Israeli constitutional traditions (e.g. on notions such as "democratic self-defence" or "militant democracy"), especially among the older generation of Israeli judges. See also Kretzmer (n 4), 15.

and, by extension, in Israel itself. It has long become clear indeed that Israeli democracy has paid a heavy toll for the banalization or, worse, normalization of HR violations and injustices occurring in the OPT.[12] The quasi-automatic way in which HR are balanced against security is arguably a central part of that problem. Drawing from the Israeli experience with HR balancing with security and transplanting it elsewhere should clearly be resisted therefore.

The structure of the argument defended in this article is three-pronged. We first need to clarify what is meant by "human rights" and "security" (I.) and how the restrictions of HR work in general (II.), before addressing the security-based restrictions to HR more specifically and how some form of balancing may be justified among them, both in general and in the context of the Israeli occupation of Palestine (III.).

I. Basic Notions

Among the basic notions required for a discussion of the potential balancing between HR and security, it is important to clarify at the outset what is meant by "human rights" (A.) and by "security" (B.).

A. Human Rights

The HR, and the duties they give rise to, applicable to HR violations committed by Israel in the OPT stem from DHRL, IHL and IHRL.

DHRL binds Israel in the shape of that State's own catalogue of basic rights arising under the Israeli Basic Law and their respective interpretations by the Israeli Supreme Court. It also includes the DHRL that was applicable in Palestine before the occupation, provided there was any under British Mandate or Jordanian law, and that binds Israel as an Occupying Power.[13]

IHL also protects some of the individual rights of the occupied population.[14] To that extent, those IHL individual rights duties also bind Israel towards the Palestinian population *qua* Occupying Power under IOL.

Last but not least, IHRL binds Israel as a State, and stems from the most important IHRL treaties ratified by Israel[15], but also from customary IHRL[16]. It also binds Israel as an Occupying Power to the extent that the IHRL that was applicable in Palestine before occupation, provided there was any under British Mandate or Jordanian law, is to be respected as well.[17] One may also mention, to the same effect, the IHRL principle under which the IHRL applicable to a population follows that population in all circumstances, and even in case of occupation.[18]

Importantly, IHL and IHRL may overlap to the extent that the scope of IHRL is materially and territorially such that it also applies to armed conflicts, including occupation,[19] and applies outside of the State's official territorial boundaries, provided its authorities exercize personal or territorial jurisdiction (or effective control) outside of its territory[20].

This last point is particularly sensitive with respect to the individual HR that are also protected under IHL. Indeed, the individual rights protected under IHL/IOL are not protected in the same way as in IHRL. In particular, first of all, they only pertain to the HR of the occupied population, and not of the population of the Occupying Power. Second, they are submitted to a (military) necessity test that differs from the proportionality test used in IHRL. And, finally, the competing security concern that may apply to set limits upon them are strictly military and do not extend to the security concern of the civilian population of the Occupying Power, whether in the occupied territories or on its official territory.[21] To that extent, the relationship between IHL and IHRL matters when both regimes apply concurrently to a given individual

[12] See Kretzmer (n 4), Conclusion; D. Shulman, 'Israel's Irrational Rationality', *New York Review of Books*, 22nd June, 2017, http://www.nybooks.com/articles/2017/06/22/israels-irrational-rationality.

[13] Art. 43 Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907; Hague Regulations), and its reference to the "laws in force in the country".

[14] E.g. Geneva Convention (IV) on Civilians (1949; Geneva Convention [IV]); Hague Regulations.

[15] E.g. International Covenant on Civil and Political Rights (1966; ICCPR); International Covenant on Economic, Social and Cultural Rights (1966; ICESCR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984; CAT); International Convention on the Elimination of All Forms of Racial Discrimination (1965; CRC).

[16] See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, par. 157.

[17] See Art. 43 Hague Regulations.

[18] See HRC, *General Comment 20*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 200.

[19] See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226; ICJ, *The Wall* (n 16); ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168.

[20] See ICJ, *The Wall* (n 16).

[21] See Gross, 'Human Proportions' (n 8), 25-6; Ben-Naftali (n 7), 177-8.

right's violation,[22] since their joint application may affect the content and restriction of that right in those cases.[23]

B. Security

Security is a vague and polysemic concept. Although it is used broadly, especially with respect to ways of protecting it and to the consequences of not doing so, it is almost never defined.

From a *philosophical* perspective, security refers to a collective good (and, potentially, an individual/collective interest in that good), i.e. the absence (and not only the "freedom from") of risk/threat of violation of another good (individual or collective), i.e. usually life or (physical or material) integrity.

Depending on its subjects, there are many types of security:[24] (i) personal security, i.e. the individual security of people; (ii) public/collective/"homeland"[25] security, i.e. the collective security of a whole population; (iii) national security, i.e. the security of the State or its government (e.g. its sovereignty, integrity, or capacity to function); (iv) international security (pertaining either to the State's external or to the international community's security as a whole). Those different types of security may pull into different directions and do not necessarily overlap with one another. For instance, public or homeland security is not necessarily aggregative of personal security, and national security may be at risk without public insecurity.

Security needs to be distinguished from *safety*, which refers to the absence of threat to life/physical integrity of an individual. Safety differs from security to the extent that it is only individual and physical as opposed to individual and/or collective and material and/or physical for security. Security also needs to be distinguished from *violence*: not all security threats are violent, but violence is the main case of insecurity.

In terms of its relationship to HR, security may itself be considered a HR to the extent that there may be an individual interest in the collective good of (public or homeland) security protected as HR. Some authors, like Henry Shue, actually consider the HR to security as a "basic" right, i.e. a HR whose protection is indispensable to the effective protection of other HR.[26] When security is considered a HR, the conflicts between HR and security become conflicts of rights, and, as we will see, the justifications of the mutual restrictions those rights set on one another are different from those that arise from the relationship between HR and the collective good of security.

In *legal* terms, security is just as vague a concept. One should distinguish between the different types of security protected under domestic and international law, on the one hand, and the normative forms they take depending on whether they are protected as HR or as collective goods, on the other.

In *domestic* law, security is referred to as a legal concept both under domestic security legislation and under DHRL. In the latter case, security is invoked both as a HR and as a collective good justifying restrictions to HR. In the case of security norms applicable to the OPT, one should also mention the questionable validity under IOL of the reference by Israeli authorities to pre-IHRL British Mandate and Jordanian drastic legislation pertaining to security detention.[27]

In *international* law, security arises as a legal concept in the United Nations Charter (UNC) and its so-called "collective security system" (both as a collective good [public, national and/or international security] and as a HR [personal security])[28]; under international development law (as a collective good [human security, i.e. some collective form of personal security]); under IHL/IOL (as a collective good [military security])[29]; and under IHRL (as a collective good [public or national security] restricting HR and as a HR itself [personal security or safety])[30].

The terminology varies a lot between domestic and international law and the respective regimes within them.[31] The case-law remains largely silent about how to interpret those different types of security, however.

[22] See ICJ, *The Wall* (n 16), par. 136.
[23] See Kretzmer (n 4), Ch. 7.
[24] See Waldron, 'Security as a Basic Right' (n 2), 210-5.
[25] See on this post-9/11 notion, Waldron, 'Security as a Basic Right' (n 2), 212.
[26] See H. Shue, *Basic Rights – Subsistence, Affluence and U.S. Foreign Policy*, 2nd edn, Princeton: Princeton University Press 1996, 20 ff. For a discussion, see L. Lazarus, 'The Right to Security', and V. Tadros, 'Rights and Security', in R. Cruft / M. Liao / S. M. Renzo (eds), *The Philosophical Foundations of Human Rights*, Oxford: OUP 2015, 423-41 and 442-58.
[27] See Kretzmer (n 4), 121-4. See also Benvenisti (n 3), Ch. 8.
[28] E.g. Art. 1, 33, 39 and 42 UNC.
[29] E.g. Art. 5, 27 par. 4, 49, 53, 78 Geneva Convention IV; Art. 52 Hague Regulations.
[30] E.g. Art. 5 European Convention on Human Rights (1950; ECHR); Art. 9 ICCPR.
[31] See e.g. the reference to "public safety and public life", in Art. 43 Hague Regulations.

It usually conflates personal, public and national security, and sometimes even assimilates security and safety or security and public order. Moreover, States are usually granted a broad margin of appreciation in this respect. Accordingly, those different types of security protected under domestic and international law, and within each of them and their respective regimes, may conflict with one another or some of them may be subsumed under stronger or weaker ones depending on the needs of the authorities invoking security to limit HR.

This is particularly problematic in the OPT due to the joint application of IHL and IHRL by Israeli authorities when identifying a threat to security and the conflation between IHL's "military and security needs" with the security needs of the State of Israel and its citizens, both in the OPT and in Israel, and not only of the military, including interest in land and economic interests.[32]

II. Restrictions of Human Rights in General

HR are only rarely absolute, and their restrictions are a central part of HR reasoning in practice. After explaining why HR restrictions are justifiable in the first place (A.), this section distinguishes between different grounds for the justification of HR restrictions (B.).

A. Justifying Human Rights Restrictions

HR practice shows that, in some cases, HR have to be restricted to further other moral or social interests or the HR of others with which they conflict. Thus, free movement may sometimes have to be restricted in the interest of security. When such restrictions are justified, the right is not deemed as violated.

At the same time, however, we like to think that free speech, like other HR, is not reducible to other moral interests such as security and cannot simply be weighed and balanced against those interests like any other interest.[33] That resistance to balancing HR grows even stronger when it is meant to take place against other HR, as in balancing the right to free movement against the right to security. This puzzling position is difficult to define with precision, but it clearly holds a middle ground between the two positions that long prevailed over how to resolve conflicts between moral rights, on the one hand, and between moral rights and other moral considerations, on the other: in short, Kantian absolutism, and the derived prioritization of HR, on the one hand, and utilitarian relativism, and the corresponding weighing and balancing of HR, on the other.

The puzzle that faces HR theorists is reconciling the specific stringency of HR for them to be able to protect individuals as ends in themselves with the reality of their conflict with other moral considerations, including other HR, and the need to settle such conflicts. It reflects the sheer theoretical difficulty of conceptualizing moral trade-offs that are not quantitative and do not actually imply "weighing and balancing" HR. This theoretical puzzle is well reflected in James Griffin's contention that "human rights are resistant to trade-offs, but not completely so".[34] Solving the puzzle requires, as I have argued elsewhere,[35] finding a way between stating the radical incommensurability of HR (literally, their inability to be compared and ranked to one another) and resorting to pragmatic solutions to settle their conflicts, on the one hand, and emphasizing their commensurability and applying quantitative weighing and balancing to reconcile them in case of conflict, on the other.

Interestingly, this theoretical ambivalence is echoed in the HR practice, and in particular in IHRL.[36] Restrictions to HR are usually hard to justify legally. Moreover, even though trade-offs are common in practice, HR reasoning is also structured so as to exclude them in some cases. As a result, an important part of the practice endorses a form of HR balancing,[37] while other parts reveal attempts to "restrict restrictions" of HR (from the German *Schrankenschranken*) and even to organize hierarchies between HR with certain rights being deemed as absolute (so-called "absolute rights")[38] or with absolute thresholds of protection being established within the content of certain HR (so-called "core duties" or "inner core" – from the

[32] See Israeli SCt, 15 March 1979, *Ayub et al. v. Minister of Defence et al.*, H.C. 606/78 (the *Beth El* case). See Kretzmer (n 4), 116-8.

[33] See R. Nozick, *Anarchy, State and Utopia*, Oxford: Harper Collins 1974, 28 ff. on human rights as "side-constraints"; R. Dworkin, *Taking Rights Seriously*, London: Duckworth 1994, 190 ff. on human rights as "trumps".

[34] J. Griffin, *On Human Rights*, Oxford: OUP 2008, 76.

[35] See S. Besson, 'Human Rights in Relation', in S. Smet / E. Brems (eds), *When Human Rights Clash at the European Court of Human Rights – Conflict or Harmony?*, Oxford: OUP 2017, 23-37.

[36] See E. Brems (ed.), *Conflicts Between Fundamental Rights*, Antwerp: Intersentia 2008.

[37] E.g. Art. 8 to 11 par. 2 ECHR.

[38] E.g. Art. 3 ECHR.

German *Kerngehalt*).

As I have argued elsewhere, there is actually a third and principled way between quantitative weighing and balancing, on the one hand, and categorical prioritizing, on the other.[39] Following Jeremy Waldron, one may refer to it as "qualitative balancing".[40] Qualitative balancing aims at the conciliation of the reasons underpinning the conflicting HR duties in case of conflict. It may therefore be described as "balancing" by lack of a better term for the comparison and mutual restriction of reasons, on the one hand, and as "qualitative" to distinguish it from quantitative balancing, on the other. One should indeed consider that HR duties do not have "weight" strictly speaking, but "stringency". Qualitative balancing, so defined, is justified and operates by reference to the relational and egalitarian nature of HR.[41] It differs from the other two alternative methods to resolve conflicts of rights mentioned before. It is clearly distinct, first of all, from the identification of formal and abstract hierarchies of rights. Such hierarchies do not correspond to the egalitarian dimension of HR: all HR and right-holders are equal. Nor do they fit the duty to reconcile reasons as far as possible rather than abide by one only. HR duties should therefore be balanced in case of conflict and cannot merely be ranked. This does not mean, however, that we should resort to a quantitative balancing of rights, and this is my second distinction. The consequentialist and even utilitarian take on HR and their relations implied by quantitative balancing does not correspond to their egalitarian dimension either.

So how does qualitative balancing work? It is equality that provides the internal ground common to all HR on the basis of which they can relate qualitatively to one another and on the basis of which they may be compared and mutually restricted in the balancing exercize. This implies resorting to the socio-comparative and hence collective dimension of all HR as equal rights *qua* internal basis of comparison and restriction between them. Importantly, the egalitarian dimension of HR dispenses from identifying a meta-value or principle external to the rights themselves as a basis for the comparison and restriction. It avoids thereby undermining the specificity of HR, and especially their incommensurability and special stringency.[42]

Of course, the role of equality in qualitative balancing also implies the existence of inherent egalitarian limitations on the justifiable restrictions to every human right: the ultimate egalitarian limit to restriction is the erosion of the right itself, as this would threaten the basic moral equality of its right-holder. This is how one could interpret the role played by the so-called "inner core" of every HR among the limitations to justifiable restrictions to that right in the reasoning of the European Court of Human Rights (ECtHR). Last but not least, the egalitarian dimension of HR and their relations has institutional implications for the procedure through which their mutual restrictions are justified in case of conflict. These procedures should be democratic.[43] This is confirmed by the reference to the test of "democratic necessity" in the restriction test under the paragraphs 2 of Art. 8-11 ECHR and to its requirement of a (democratic) legal basis for any restriction.

B. Grounds for Human Rights Restrictions

If certain HR restrictions are justifiable in general and provided HR duties may be balanced qualitatively either when they conflict with other moral considerations (i) or among themselves (ii), more needs to be said about those two grounds for the restriction of HR and the exact conditions for those respective justifications.

Of course, both grounds are not always easy to keep apart, especially as some may argue that certain (not all) public interests are aggregative and may consist in the sum of other fundamental individual interests and the corresponding HR, as a result. This may be the case of certain types of public or national security in particular. The distinction between HR and other moral considerations matters in practice, however. Moreover, it also matters for reasons that have to do with the moral non-consequentialist specificities of HR by comparison to other moral considerations, as

[39] See Besson (n 35).

[40] J. Waldron, *Liberal Rights: Collected Papers 1981-1991*, Cambridge: CUP 1993.

[41] See S. Besson, 'La structure et la nature de droits de l'homme', in M. Hottelier / M. Hertig (eds), *Introduction aux droits de l'homme*, Brussels: Bruylant 2014, 19-38, 19; S. Besson, 'Justifications of Human Rights', in D. Moeckli / S. Shah / S. Sivakumaran (eds), *International Human Rights Law*, 2nd edn, Oxford: OUP 2013, 34-52.

[42] See Waldron (n 40); Waldron, 'The Image of Balance' (n 2).

[43] See O. de Schutter / F. Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in E. Brems (ed.), *Conflicts Between Fundamental Rights*, Antwerp: Intersentia 2008, 169-216.

explained before. Individual rights amount to more normatively than the individual interests they protect and, even if some collective interests are aggregative, they cannot aggregate individual rights equally to other individual interests.[44]

First of all, HR restrictions based on *other moral considerations*. Those may include, depending on the HR and the IHRL regime at stake, in particular the public order, morals, public health or security.[45]

Depending on the IHRL regime, and the respective general or HR-specific restriction clause therein, there are usually three other conditions for the justification of HR restrictions grounded in those moral considerations. First, the justification of a HR restriction mostly requires a democratic procedure to establish the democratic necessity of the restriction. This is what one may refer to as the "necessity in a democratic society" test. Moreover, the restriction usually needs to rely on a legislative and hence public basis. Finally, it should not infringe absolute rights or core duties corresponding to the HR "inner core".

All three conditions fit the egalitarian and, by extension, democratic justification for the qualitative balancing of HR against other moral considerations proposed in the previous section, as opposed to either quantitative "weighing and balancing" or qualitative prioritizing of HR over other moral considerations. Importantly for our purpose, the democratic necessity test is not explicitly referred to as a "proportionality test" in IHRL.[46] As I have argued elsewhere, this may actually be used in order to interpret that test differently in IHRL from the mainstream three-prong proportionality test used in many domestic traditions of public law, such as the German and Israeli ones in particular.[47] The latter proportionality test amounts either to an instrumental rationality test or to a cost-benefit test (and especially its "suitability" and "necessity" prongs). Accordingly, it brings with it a quantitative and consequentialist flavour criticized in the previous section and tends to assume the commensurability of HR and duties. So-doing, it risks watering down the equality of HR, therefore. There is, however, an alternative way to understanding "proportionality"" and that is as a co-relation between equal human right-holders or between them and duty-bearers.

Second, HR restrictions based on *other HR* when HR are in conflict with one another. The common view, and one that can be read in the ECtHR's judgments, is that HR conflicts are conflicts between the interests these rights protect.[48] As a result, the resolution of HR conflicts is often approached as the resolution of conflicts between interests.

As I have argued elsewhere, rather than consider conflicts of HR as pertaining to rights *stricto sensu*, we should understand them as conflicts between one or many of the specific duties corresponding to those rights in a given context.[49] This qualification was first made by Jeremy Waldron.[50] Once conflicts of HR are approached as conflicts of HR duties, it is easy to see that they are best understood as conflicts of reasons, and not (only) as conflicts of interests. This confirms, as I argued in the previous section, the inadequacy of the consequentialist and quantitative approach to their "weighing and balancing".

True, HR protect individual objective interests that are sufficiently and equally important to give rise to duties: they work as intermediaries, in other words, between these interests and the duties. However, the *content* of HR, i.e. their corresponding duties to respect, protect, and aid, should not be equated normatively with those interests they protect as an *object* and should not be reduced to them. There is much more to the duties than the interests they are protecting against a specific threat in specific circumstances and this added normative content may enter into conflict too. Accordingly, some conflicts of rights may be traced back to conflicts of interests, of course, but they need not. Nor, and this is a second distinction,[51] should the *content* of HR, i.e. their duties, be conflated with what makes them of *value*, i.e. their justifications. This is particularly important for it prevents conflating the stringency of their duties with that of their value(s) (e.g. dignity or equality). The resolution of conflicts of rights should not therefore necessarily be guided by the value(s) related to the HR.

Reducing HR conflicts to conflicts of either interests or values would approach the content of HR not only

[44] See R. Dworkin, 'Principle, policy, procedure', in *A Matter of Principle*, Cambridge, Mass.: Harvard University Press 1985, 72-103.

[45] E.g. Art. 10 par. 2 ECHR; Art. 12 par. 3 ICCPR.

[46] See ECtHR, *Chassagnou and Others v. France*, app. nº 25088/94, ECLI:CE:ECHR:1999:0429JUD002508894, par. 113.

[47] See Besson (n 35).

[48] See ECtHR, *Odièvre v. France*, app. nº 42326/98, ECLI:CE:ECHR:2003:0213JUD004232698, par. 41-9.

[49] See Besson (n 35).

[50] Waldron (n 40).

[51] See Besson, 'Justifications' (n 41).

erroneously as unique and stable over time (all the duties corresponding to a HR would have the same stringency), but also as completely unrelated to other HR and their corresponding duties (all the duties corresponding to a HR would always conflict with all the duties corresponding to another HR merely because they conflict with them in one case), thereby cutting HR duties off from their relational and egalitarian dimension to others. Considering conflicts of rights from their duty-side is actually the only way to explain some of the variations in the *occurrence*, on the one hand, and in the *scope* of those conflicts, on the other, even when they are pertaining to the same HR. It accounts for how conflicts between the same HR may give rise to different moral issues in each case and in turn to different resolutions. Protecting the egalitarian and relational dimension of HR when they conflict is precisely what the qualitative balancing of HR proposed in the previous section aims to achieve.

III. Security-Based Limits of Human Rights

There are four main constellations in HR reasoning where security may be invoked to "limit" HR *lato sensu*: security-based reservations (A.), exceptions (B.), derogations (C.) and restrictions (D.) to HR.

The main and most common kind of limits are security-based HR restrictions. It is also the one where the so-called "balancing" between HR and security should allegedly take place. Before focusing on the latter, and explaining why it is wrong to endorse the "weighing and balancing" approach in that context as well, it is important to briefly introduce the other three constellations of security-based HR limitations in this section.

Of course, there are, at least, three other contexts in HR reasoning where security may be invoked. First of all, security may be mentioned as a ground for the limitation of domestic judicial jurisdiction over the executive or the military's security policy, and hence of domestic judicial review (e.g. on grounds of the "political question" or the "act of State" doctrines). Second, security may be invoked as a ground for the forfeiture of one's individual rights due to anti-security activity. This is a radical consequence that only applies in IHL,[52] however, and not in IHRL, except maybe in the guise of the prohibition of the abuse of rights under Art. 17 ECHR. Third, security may be mentioned, in the context of "self-defence"[53] or "state of necessity"[54], as circumstances precluding wrongfulness and hence State responsibility.

A. Security-Based Reservations to Human Rights

Reservations to HR enable States to limit abstractly, and *ex ante*, the applicability of certain HR to given contexts, and hence to restrict their material scope. They may do so with a view to security considerations (e.g. scope exclusions at times of war).

The validity of such reservations is limited, however, both under general international treaty law and IHRL. The general limits to their content are to be found under Art. 19-20 VCLT (compatibility with the "object and purpose of the treaty" and the absence of other States parties' objections) and Art. 53 VCLT (respect of *jus cogens*). Additional specific conditions arise under IHRL. They include, under most IHRL regimes, the requirement of an explicit statement addressed to the other State parties or the international body or court to be sent before ratification and with a sufficiently specific content, the necessity of approval by that international treaty body or a court, followed by a requirement of regular updates, often combined with regular pressure on the part of the international treaty body or court to withdraw the reservations.

The consequences of a valid security-based reservation are a State-relative and HR-specific abstract restriction of the material scope of a HR in order to avoid its application to concrete cases that would imply a conflict with personal/public/national security. In such cases, no HR duties arise and there is no need therefore to justify a security-based restriction to that HR. To date, Israel has filed no such security-based reservations pertaining to its IHRL duties.[55]

B. Security-Based Exceptions to Human Rights

Exceptions to HR amount to a delineation of the material scope of HR, so as to exclude certain areas or conducts. When they are security-based, they draw

[52] See e.g. Art. 5 Geneva Convention IV.

[53] E.g. Art. 51 UNC; Art. 21 Articles on the Responsibility of States for Internationally Wrongful Acts (UN Doc. A/RES/56/83, 12th December, 2001; ARSIWA). See ICJ, *The Wall* (n 16).

[54] Art. 25 ARSIWA. See ICJ, *The Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, p. 7; ICJ, *The Wall* (n 16).

[55] See ICJ, *The Wall* (n 16).

the boundaries of HR in such a way as not to give rise to tensions with security concerns or alleviate security risks.

Importantly, exceptions are easier for some HR than for others depending on how open-ended their content is and whether it is a matter of degree or not.[56] Such exceptions may result from the HR provision itself in IHRL treaties.[57] Most of the time, however, they emanate from its interpretation by the competent international body or court.[58] Unlike reservations and derogations, therefore, exceptions are general and not State-relative, and apply to all States parties to a given IHRL regime.

In case of a valid security-based exception, a given HR will not give rise to duties outside its security-sensitive scope. As a result, potential conflicts are circumvented through a narrow definition of the HR's material scope and this dispenses of the need to balance that HR and security outside of that scope. The consequences of a valid security-based exception are a general and HR-specific abstract restriction of the material scope of a HR in order to avoid its application to concrete cases that would imply a conflict with personal/public/national security. Israel has invoked and benefited from such security-based exceptions to its IHRL duties.[59]

C. Security-Based Derogations to Human Rights

Derogations to HR amount to their suspensions. The suspension of a specific HR prevents its application for a certain period of time, and, as a result, no rights and duties arise from that HR in concrete cases even if those cases actually fall within the HR's scope of application. It is justified by the exceptional inability of State to protect HR due to a situation of emergency. Such emergency-based suspensions actually aim at enabling the State to set the emergency aside and to get back to full HR protection.

Of course, there are conditions to fulfil before suspending a given HR. The conditions for a HR derogation vary among IHRL regimes, but they usually include an explicit notification to the international body or court, the existence of security concerns – and those include both national security (State) and public/collective security (people) –,[60] a time-limit based on strict conditions of necessity, the exclusion of its application to non-derogable rights (such as, in particular, the prohibition of torture, discrimination, slavery or murder), and regular updates to the international body or court.

Provided it is valid, a security-based HR derogation is both State-relative and HR-specific. It differs from a security-based HR reservation to the extent that it arises only in a case of emergency and not abstractly in all cases, and it differs from a security-based HR exception to the extent that it is State-relative and not general.

Importantly, security-based derogations are also allowed in circumstances of extraterritorial application of IHRL,[61] and in the context of both an international armed conflict (IAC) and a non-international armed conflict (NIAC), thereby leading to the concurrent application with IHL.[62] To that extent, they may apply to a context of military occupation, as it has been argued by Israel with respect to Art. 9 ICCPR.[63] However, as explained before, a HR derogation can only last as long as it is necessary and cannot be permanent. Moreover, it is only justified to the extent that the return to normalcy is possible and that it enables such a development. Derogations are not meant to back a long-term status of emergency and therefore should not be allowed to cover long-term occupation, especially when that occupation is intentional ("self-imposed risk" or "emergency").

D. Security-Based Restrictions to Human Rights

Restrictions to HR are the most common kind of limits to HR, and this is also true of security-based limits to HR that usually take the shape of security-based restrictions. In such cases, a specific HR violation falls within the scope of application of that right in the ab-

[56] See Waldron, 'The Image of Balance' (n 2), 198.
[57] E.g. Art. 2 par. 2 ECHR.
[58] E.g. Art. 5 par. 1 ECHR. See ECtHR, *Hassan v. the United Kingdom*, app. nº 29750/09, ECLI:CE:ECHR:2014:0916JUD002975009, par. 104.
[59] See ICJ, *The Wall* (n 16).
[60] See e.g. Art. 4 ICCPR; Art. 15 ECHR.
[61] See ECtHR, *Hassan* (n 58). In that decision, however, the ECtHR interprets Art. 5 ECHR so as to expand the latter's list of scope-exclusions and hence to make the concurrent application of IHL compatible with it without resorting to derogations under Art. 15 ECHR. For a critique, see M. Milanovic, 'A Few Thoughts on Hassan v. United Kingdom', *EJIL: Talk!*, 22nd October, 2014, http://www.ejiltalk.org/a-few-thoughts-on-hassan-v-united-kingdom.
[62] See UK House of Lords, *R. (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, [2007] UKHL 58.
[63] See ICJ, *The Wall* (n 16).

sence of reservations or exceptions, and there are no derogations affecting its applicability, but restricting the HR may still be justified under certain conditions or grounds. The consequence of a justified HR restriction is a State-relative and HR-specific concrete restriction to specific HR duties.

The justifications of security-based HR restrictions vary, as I explained before, depending on whether security is considered as a "public interest" conflicting with HR (1.) or as another conflicting HR (2.).

1. As a Public Interest Restriction to Human Rights

Security-related public interests, including "national security", "public security" or "public safety", are mentioned as grounds for HR restrictions in IHRL. This is the case in general restriction clauses,[64] but also in particular restriction clauses specific to a given HR[65].

The types of "security" at stake in those restriction clauses remain indeterminate, however, and need to be further elaborated through interpretation in each case. Depending on its subjects, the kind of security envisaged is in principle the State's (national security), but can also amount in some cases to personal or public security, or even to personal or public safety. Most of the time, those different types of security are actually straddled in practice.

Another difficulty encountered in practice is the recourse to "weighing and balancing" between those types of security and individual HR as if justifying a HR restriction was a matter of quantitative balance between an individual's interest (i.e. her HR) and the collectivity's or majority of individuals' interest (e.g. their security). In the same vein, proportionality is usually the test resorted to in this balancing exercize between HR and security.

Following Jeremy Waldron, there are four critiques one may make to the "weighing and balancing" of HR and security.[66]

First of all, weighing and balancing HR and security has consequentialist and even utilitarian implications. This is problematic because, as I explained before, HR duties *qua* moral reasons should not be "weighed" and then added/deducted like interests in a quasi-algebraic fashion. Nor should the proportionality test used in this balancing exercize be equated either with a means/end rational assessment or with a cost/benefit economic calculus. It is better approached, as I argued before, as a test of the equal relation between human right-holders. Second, balancing HR and security may give rise to an unequal and hence unjust distribution of the burden of security. There is a substantial risk indeed that the same people (and hence a minority) will be those bearing the burden of the security of a majority, whereas we should all bear it equally (or, at least, take turns). This is contrary to the equality of HR and their right-holders. Third, balancing HR and security may have unintended consequences. It may enhance the States' security powers and generalize HR restrictions and even State-originating security threats, including for the majority whose security was allegedly at stake in the first place. To quote David Cole, people may end up being "less safe and less free" as a result of the balancing of HR and security.[67] Finally, balancing HR and security may lead to an unfair assessment of risks. Security is difficult to assess objectively. As a result, it is difficult to avoid political and strategic considerations from being merged into security concerns. This is problematic because HR restrictions should not be driven merely by the subjective perception of risk, but by an assessment of whether the restriction taken in the name of security could actually have the desired consequences.

Interestingly, those critiques of the indeterminacy of the notion of "security" and of the moral downsides of the "weighing and balancing" of HR and security, but also of the rational instrumentality-approach to proportionality,[68] apply particularly well to what is practised by the Israeli SCt in relationship to security-based restrictions of the HR of the Palestinian population in the OPT.

First of all, with respect to the type of "security" considered by the Israeli SCt, one observes the straddling between IHRL and IHL notions of HR and security. To start with, the Court considers not only the individual rights of the occupied population, as it should under IHL, but the HR of everyone, including of Israelis in Israel and of settlers in the OPT, as one would under IHRL. The security considered by the Court,

[64] E.g. Art. 4 ICESCR.
[65] E.g. Art. 8-10 par. 2 ECHR; Art. 12 par. 3 ICCPR.
[66] See Waldron, 'The Image of Balance' (n 2), 195 ff.
[67] Cole / Lobel (n 2).
[68] Compare e.g. Barak's rationalized notion of proportionality (Barak [n 5], Ch. 7), with Waldron's critique of proportionality-algebra (Waldron, 'The Image of Balance' [n 2], 192-4).

moreover, is not only military security, as should be the case under IHL, but the personal and public security of all Israelis in Israel and in the OPT, i.e. settlers, as it may under IHRL. To do so, the Court relies in particular on an extensive interpretation of "public safety and public life" in Art. 43 Hague Regulations.[69] Second, with respect to "proportionality", the Court does not endorse the strict military necessity test of IHL, but the three-prong proportionality test used in public law and by extension, some argue wrongly, in IHRL (i.e. suitability, necessity and proportionality *stricto sensu*).[70] This has led to the increase of military commanders' discretion, and actually to condoning it.[71] Worse, applying that instrumental rationality test of proportionality to military occupation rationalizes it and makes it a "zone of reasonableness", to quote Martti Koskenniemi.[72]

In short, what characterizes the Israeli SCt's reasoning in this respect is the straddling of IHRL and IHL depending on what gives the Occupying Power most leeway in the name of security at the expense of the HR of the occupied population, and eventually of their equality as human right-holders under IHRL. This has been criticized, therefore, as a perversion of the equality of HR and hence of IHRL itself by applying that law to the circumstances of long-term military occupation.[73]

With its utilitarian flavour, first of all, the reasoning of the Israeli SCt imposes the unequal burden of security onto the Palestinians and makes them a permanent minority under IHRL.[74] It also expands, secondly, the Israeli State's powers. This has become clear within Israeli territorial jurisdiction as well, and not just in the OPT. It suffices, for instance, to observe the extension of national security powers of the State inside Israel in response to protection again security threats posed by Palestinians, the extension of the practice of administrative detention without trial, or that of the use of torture beyond ticking-bomb cases.[75] All this, in turn, necessarily has an impact on the civil liberties of Israelis themselves. Finally, the Israeli SCt's reasoning also leads to an unfair assessment of risks. The (subjective) assessment of insecurity is informed by political and strategical concerns (pertaining e.g. to the settlements, the so-called "separation barrier", natural resources and esp. water, etc.), and not only focused on military concerns.[76]

2. As Human Rights-based Restriction to Human Rights

Security may also be approached as a HR in itself,[77] and its potential conflict with other HR as a HR conflict, thereby leading to justified HR-based restrictions of HR in IHRL. This is the case in general restriction clauses,[78] but also in particular restriction clauses specific to given HR[79].

Following Henry Shue, the HR to security may actually be considered a basic right, because it is indispensable to the realization of other HR.[80] The consequence would seem to be that it can only be limited by another basic right in case of conflict, and this may imply the priority of the basic HR to security over non-basic HR.

According to Jeremy Waldron, there are three specific critiques one may oppose to the alleged priority of the HR to security in case of HR conflict.[81]

First, the circularity threat. If restricting a HR is necessary to protect a basic right whose protection is necessary to other HR, the result may be to lose what we were aiming to protect in the first place. Worse, such a conflict may quickly become a conflict between basic rights to security and the resolution of such conflicts in favour of one of those basic rights may violate the equality of HR. So, the only way to save the argument from circularity would be to give up on HR equality. However, this would undermine the justification of HR altogether and especially that of basic HR, thereby setting the basic rights of others, including to se-

[69] See Israeli SCt, *Beth El* case (n 32). See Kretzmer (n 4), 119.
[70] See Israeli SCt, 30 June 2004, *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank*, HCJ 2056/04.
[71] See Gross, 'Human Proportions' (n 8), 9, 29; Kretzmer (n 4), 118-20.
[72] M. Koskenniemi, 'Occupied Zones – "A Zone of Reasonableness?"', (2008) 41:1-2 *Israel Law Review* 13-40.
[73] See Gross, 'Human Proportions' (n 8), 28 ff.; Ben-Naftali (n 7), 198 ff.
[74] See Gross, 'Human Proportions' (n 8), 8, 18, 31, 35.
[75] See also Gross, 'Human Proportions' (n 8), 28. On the "metastatic tendency of torture", H. Shue, 'Torture', (1978) 7:2 *Philosophy and Public Affairs* 124-43, 142-3.
[76] See Kretzmer (n 4), 195-6.
[77] E.g. Art. 5 ECHR; Art. 9 ICCPR.
[78] E.g. Art. 4 ICESCR.
[79] E.g. Art. 8-10 par. 2 ECHR; Art. 12 par. 3 ICCPR.
[80] See Shue (n 26), 20 ff.
[81] See Waldron, 'Security as a Basic Right' (n 2), 221 ff.

curity, as a core limit to the priority of the basic right to security of some. Second, the absence of clear-cut answers. Security is a matter of degree and not "an all or nothing" matter. It is not clear therefore when the indispensability of the HR to security really comes in as a criterion for the justification of a HR restriction. Finally, necessary conditions for the indispensability of the HR to security to the realization of other HR cannot replace sufficient ones. Evidence that the protection of security is even sufficient to their realization should be provided for the indispensability of the HR restriction to be established, and that is not easy to provide.

In the OPT, those critiques of HR restrictions grounded in the priority of HR to security over other HR should be of special concern. Indeed, the HR to security usually considered in the balancing exercize is only that of Israelis (whether settlers or mainland residents), thereby treating both groups of right-holders unequally or, worse, by artificially masquerading their inequality into a facade of equality and turning IHRL into an instrument of oppression.[82] Treating both groups of human right-holders of the equal basic HR to security, i.e. Palestinians and Israelis, as proper equals would be the ultimate challenge for the Israeli SCt.

Conclusions: Beware of Ordinary Emergencies and their Banalization

To conclude, let us go back to the three questions raised in the introduction: first, about the justification of the balancing of HR and security *per se*; second, about that balancing in the Israeli SCt's reasoning with IHRL and IHL; and finally, and more generally, about its application to long-term occupation and its respective international law regime in IOL.

First of all, the balancing of HR and security, as it is generally practised, is not an easy feature of IHRL reasoning. It is actually one we should be particularly weary of in America and Europe in the current anti-terrorism context. In short, it needs to be approached with care so as not to threaten HR reasoning with a fatal form of utilitarianism; generate an unjust distribution of the burden of security; give rise to unintended consequences including an increase in security-oriented State powers; and lead to unfair assessments of risk. To address those shortcomings, this article has proposed to replace quantitative weighing and balancing of HR and security, and the related understanding of the proportionality test, by a more qualitative and egalitarian form of balancing, and the corresponding relational comparison and restriction test. It has also developed a taxonomy of the types of security at stake in HR reasoning depending on their subjects, thereby hopefully encouraging more fine-tuned assessments of their identification and relations in the future. It has also mapped the different constellations in which those different kinds of security concerns may be invoked to limit HR either as security-based reservations, exceptions, derogations or restrictions *stricto sensu*.

Secondly, the Israeli practice of balancing HR and security, and its recourse to proportionality may not only be criticized on those general grounds, but also on their own. The practice of the Israeli SCt is characterized indeed by the straddling of IHL rules and principles with HR-restrictions reasoning under IHRL. Over time, this has affected, within the balancing exercize: the scope of human right-holders, that has been extended by the Israeli SCt from Palestinian residents under IHL to Israeli residents and nationals (both on the mainland and in the OPT); the subjects of security, that has been extended by the Court to cover not only military security under IHL, but also the personal and public security of all Israelis as would be the case under IHRL; and the use of a three-prong public law proportionality test by the Court, instead of the military necessity test that should apply under IHL. While the concurrent application of IHL and IHRL is not in question, the application of IHRL presumes peace and ordinary circumstances of equality between human right-holders. Drawing on IHRL in spite of the lack thereof has proven problematic both for the protection of the HR of the occupied population as it is formally put on a par with Israelis whereas they are clearly not equal in practice, thereby begging the very question of the protection of their HR and making their situation worse under IHRL, on the one hand, and for the protection of military security concerns of the Occupying Power under IHL, on the other.

Finally, when applied to a long-term military occupation context such as the Israeli occupation of Palestine, security-based HR balancing under IHRL, including in its revisited qualitative and egalitarian form, may actually be counterproductive both for IHRL and IHL. The resort to security-based HR restrictions

[82] See Gross, 'Human Proportions' (n 8), 28 ff.

(that are meant to be exceptional under IHRL) in order to cover military emergency situations in the OPT (that are common under IHL) has contributed to banalizing the emergencies related to occupation and has turned the exception into the norm. There are ways of protecting HR in the context of long-term occupation while taking into account security concerns, without, however, incurring the consequences identified in this article. This requires, however, going back to the drawing board of IOL and devising a set of international rules and principles that do not pretend to apply IHRL as if the basic conditions of equality in a democracy were respected in order to justify the recourse to exceptional "democratic self-defence", on the one hand, and do not merely revert to IHL as if the military emergency in the OPT was new and all that was needed to fix the ills of occupation was the use of force, on the other.

Israel, Palestine, and Settlement Expansion, or: What to Expect from a Benevolent King?

Adrien Folly (MLaw, assistant to Prof. Samantha Besson, University of Fribourg)

In the following article, the author develops the notion of "Benevolent King", which personifies the institutional framework managing occupation. By doing so he underlines an assumed contrast, within that framework, between a claim for justice and protection, on the one hand, and a lack of legitimation on the other. Among other issues, the author argues that the HCJ's weighting between the human rights of the settlers and of the Palestinians doesn't take into account this lack of legitimation, nor the importance of democratic and egalitarian considerations in the discourse of human rights.

Abstract provided by the Editorial Board

> "When the tasks of the de facto authority are characterized as maintaining stability and policing the welfare of the population, it becomes impossible to distinguish temporary occupation from the commencement of sovereignty."
>
> Martti Koskenniemi, *Occupied Zone – 'A Zone of Reasonableness'?*, 2008.[1]

Introduction

When I first reached my correspondent from Israel to introduce myself and talk about our topic for the Joint Seminar – settlements – he told me, after introducing himself, that we had a "very broad topic." And it is a broad topic – which deserves far more attention than this modest paper, especially in the light of recent events. I will do my best, therefore, to gather together and condense some thoughts about settlements and the role played by the law in this conflict, which was one of the grand centres around which the seminar revolved.

More precisely, I will focus here on the way law, i.e. humanitarian and human rights law, can be distorted from its original goals and promote one or another form of domination and oppression, including settlement expansion over Palestinian territories and its implications for Palestinians' lives (*infra* I and II).

This distortion, I would like to argue, is to be expected when moral objectives are interpreted and implemented by a "Benevolent King", that is, an authority who claims to spread justice and protection, but whose power lacks legitimation, in this sense that not all the population living under that power has much to say about it and, more importantly, is not part of the decision-making process which shapes their everyday life. Put differently, this also reveals the importance of (genuine) democracy in the discourse of human rights[2] and questions the ways human rights law is being implemented in times of occupation.[3]

Finally, it is worth noting that "double standards" and political or other interests are not relevant here: what will be referred to as Benevolent King is both a doctrine and the institutional framework managing the occupation. It is also important to note that the question is not whether a Benevolent King can, occasionally, promote justice. The focus is rather on the questions raised by the promotion of moral objectives through an authority which lacks legitimation.

I. Settlements, occupation law, and the ghost of the Benevolent King

> "Appeals to the past are among the commonest of strategies in interpretations of the present. What animates such appeals is not only disagreement about what happened in the past and what the past was, but uncertainty about whether the past really is past, over and concluded, or whether it continues, albeit in different forms, perhaps."
>
> Edward Said, *Culture and Imperialism*, 1994.[4]

A. Settlements in Palestine: a brief historical and legal background

The year 2017 marks a few important milestones

[1] Martti Koskenniemi, "Occupied Zone – 'A Zone of Reasonableness'?", (2008) 41 *Israel Law Review* 13-40, p. 32.

[2] See e.g. Samantha Besson, "The Egalitarian Dimension of Human Rights", (2013) 136 *Archiv für Sozial- und Rechtsphilosophie Beiheft* 19-52.

[3] See e.g. Ayal M. Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?", (2007) 18:1 *European Journal of International Law* 1-35; Koskenniemi, fn.1.

[4] Edward Said, *Culture and Imperialism*, New York 1994, p. 3.

pertaining to the Israeli-Palestinian conflict. It first marks the centenary of the Balfour Declaration of 1917. It then marks seven decades since the UN GA Resolution 181 (II) of 1947 ("Partition Plan"). More notably, it marks half a century since the beginning of the Israeli occupation of the Palestinian territories (West Bank and Gaza), in the aftermath of the June 1967 War. It also marks three decades since the first *Intifada* – the Palestinian popular revolt against the Israeli occupation – which began in December 1987. Finally, it marks a decade since Israel imposed the Blockade of Gaza, shortly after Hamas took full control over it, in 2007.

It goes without saying that, although near all these events relate, in a way or another, to the question of settlements, space available doesn't allow for deep inspection into them. For practical reasons, I will have to limit myself on the period following the Israeli occupation of the Palestinian territories in 1967, thus putting aside the first Jewish settlements in Palestine, the UN "Partition Plan" of 1947 and the creation of the state of Israel in 1948, as well as the questions these events imply.[5]

Shortly after the June 1967 War, the UN SC unanimously approved Resolution 242, calling for the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict", and "[*e*]*mphasizing* the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security" (emphasis in original). It is also worth remembering that signals did not only come from the "outside": shortly after the June 1967 War, former Israeli Foreign Ministry's legal counsel Theodor Meron, acknowledged and warned, though privately, about the illegality of building settlements in the occupied territories.[6]

Much time has passed since then, but "change" still seems to be out of the spectrum: the occupation remains, and so do the settlements. Today, despite the broad consensus on the illegality of settlements under international law,[7] over half a million Israeli settlers live across the Occupied Palestinian Territory (OPT), fragmenting the region in many isolated factions, thus rendering prospects for Palestinian coalition and development even harder.

In this context, it is also worth remembering the International Court of Justice (ICJ) Advisory Opinion of 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[8] After recalling a variety of UN SC findings, as well as Art. 49 (6) of the Fourth Geneva Convention (GC IV), the ICJ concluded, unanimously,[9] that the "Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law."[10] The ICJ also observed that "it is apparent from an examination of the map […] that the wall's sinuous route has been traced in such a way as to include within [the 'Israeli side'] the great majority of the Israeli settlements in the [OPT] (including East Jerusalem)."[11]

Such expansion shouldn't come as a surprise, for many factions of the Israeli government still refute the fact that there is an occupation. But, most importantly, even when it does recognize the occupation and applicability of international humanitarian law (IHL), such as the Israeli High Court of Justice (HCJ) did in many occasions, it is still haunted, as we will see, by the ghost of the Benevolent King, spreading words of justice and protection, while closing its eyes on the actual expansion and domination aspects of its rulings.

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[5] Regarding the legal questions, see James Crawford, "The Former Palestine Mandate: Israel and Palestine", in *The Creation of States in International Law*, 2nd edn., Oxford 2006, 421-48. Regarding the historical questions, see e.g. Simha Flapan, *The Birth of Israel: Myths and Realities*, New York 1987; Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949*, Cambridge 1989; Avi Shlaim, *Conclusion Across the Jordan*, Oxford 1988; Norman Finkelstein, *Image and Reality of the Israel-Palestine Conflict*, 2nd edn., New York 2003.

[6] Gershom Gorenberg, *The Accidental Empire: Israel and the Birth of Settlements – 1967-1977*, New York 2006, pp. 99-102.

[7] See e.g. Eyal Benvenisti, *The International Law of Occupation*, 2nd edn., Oxford 2012, pp. 239 ff.; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, Albany, NY 2002, pp. 75 ff.; Orna Ben-Naftali, "PathoLAWgical Occupation", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford 2011, 129-200, pp. 142 ff.; Gross, fn.3, p. 18.

[8] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004 136.

[9] Although the final findings gathered 14 of the 15 votes, Judge Thomas Buergenthal, the sole negative vote, explicitly declared, in his "Declaration" (interestingly, not a "dissenting opinion"), that he agrees on the illegality of settlements and that Art. 49 (6) GC IV applies: "Declaration of Judge Buergenthal", in ICJ, *Wall*, 2004, 240-5, para. 9.

[10] ICJ, *Wall*, 2004, paras. 119-20.

[11] ICJ, *Wall*, 2004, para. 119.

B. From exception to normality, or: the revival of the Benevolent King

As seen, one of the key provisions under international law regarding settlement is Art. 49 (6) GC IV, which provides that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." Still according to the ICJ, "[t]hat provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory."[12]

Such interpretation relies on a few principles of international occupation law, including the protection of the occupied population original demography and other considerations of self-determination, as well as the temporary nature of occupation, which is inconsistent with the concept of settlements, usually intended to be permanent.[13]

Interestingly, the HCJ consistently refused to tackle the question of settlements' legality, arguing that "[t]he status of settlements will be determined in the peace treaty. Until that time, respondent has the duty to defend the population (Arab and Jewish) in the territory under his military control."[14] Again, this is what one would expect from a Benevolent King: simply close your eyes on what you believe would be damaging for yourself, and focus on the noble and pure goals you are promoting. The Benevolent King has no choice but to mask, including to himself, a part of the picture: if the picture is full – namely, if the occupied population is actually taken into consideration – objectivity can be reached, and that would, of course, be intolerable for an illegitimate authority, whose own survival depends on mere opinions, as Hume already pointed out a couple of centuries ago.[15]

Meanwhile, time is still passing by and the further it goes, the more the exceptional and temporal character of the occupation becomes normalized and permanent.[16] Everything gets clearer when we reach the heart of the Benevolent King: it is, first, an authority. But unlike authorities which may claim for legitimation,[17] this one lies on a notion of *effective control*, which, under occupation law, implies mere power and *de facto* authority, without claims or appeal for justification and compliance.[18] This emanates, *inter alia*, from Art. 43 of The Hague Regulation of 1907, which provides that "[t]he authority of the legitimate power [passes] *in fact* into the hands of the occupant […]" (emphasis added), therefore distinguishing the "legitimate power" – which needs to be (re)established – and the "*de facto* power" – embodied by the occupant.

Such statement still needs to be completed: The Benevolent King, notwithstanding its illegitimacy, is here to promote justice and protection. This lies on the second part of Art. 43 of The Hague Regulation of 1907, which provides that "the [occupant] shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." This would therefore explain the perception of occupation as a form of *trust*, in which the occupying power is entrusted with the management of public order and civil life in the territory under its control, and whose beneficiaries are the people under occupation.[19]

In brief, occupation can be resumed as *illegitimate power*, on the one hand, and *administration* or *promotion* of welfare and other moral or social considerations, on the other. Such features cast inevitably an inherent tension and instability within occupation law: "[w]hen the tasks of the *de facto* authority are characterized as maintaining stability and policing the welfare of the population, it becomes impossible to distinguish temporary occupation from the commencement of sovereignty."[20] As a result, "[t]he status of occupation as a distinct kind of rule between war and sovereignty disappears".[21] And how can one effectively and fairly promote and protect moral and social objectives through the exercise of a power which lacks legitimation, i.e. which doesn't take into account

[12] ICJ, *Wall*, 2004, para. 120.
[13] See e.g. Ben-Naftali, fn.7, p. 135; Gross, fn.3, p. 25.
[14] HCJ, *Yusef Mohammed Gossin v. IDF Commender in the Gaza Strip*, Case 4219/02, para. 112.
[15] David Hume, 'Of the First Principles of Government' (1742), in *Essays: Moral, Political and Literary*, New York 2007, 29-34.
[16] On this matter, see Ben-Naftali, fn.7; Gross, fn.3; Koskenniemi, fn.1, p. 32.
[17] See e.g. Besson, fn.2. See also Nicola Perugini/Neve Gordon, *The Human Right to Dominate*, Oxford 2015, p. 128.
[18] See e.g. Benvenisti, fn.7, p. 3; Ben-Naftali, fn.7, p. 134. See also Samantha Besson, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to", (2012) 25:4 Leiden Journal of International Law, 857-884, p. 882.
[19] See e.g. Ben-Naftali, fn.7, pp. 135 and 138 f.
[20] Koskenniemi, fn.1, p. 32.
[21] Ibid.

egalitarian considerations and one own control over its life?

It follows that it becomes irrelevant, on the matter of settlements, whether the HCJ sees the Palestinian territories as occupied or not, and indeed whether it sees the territories as Palestinian. At the end of the day, what remains is the mere *de facto* and illegitimate authority, while the principles guiding occupation law and the illegality of settlements – namely, the protection of the occupied population self-determination and the temporary character of the occupation – fade out. In this context, it shouldn't come as a surprise that the HCJ recognized, in a few occasions, the duty to protect Israeli settlers on the basis of IHL itself,[22] therefore upsetting, and indeed neglecting the *rationale* behind the regime of occupation law – as imperfect as it may be.

II. Expansion under the guise of human rights: The Benevolent King strikes again

> "All nationalists have the power of not seeing resemblances between similar sets of facts. A British Tory will defend self-determination in Europe and oppose it in India with no feeling of inconsistency."
>
> George Orwell, *Notes on Nationalism*, 1945.[23]

A. The "Balance" as the Benevolent King's favourite tool

One would think that, considering the rise of human rights discourses over the past decades, and the pressure generated by human rights bodies – whether governmental or not, international or domestic – the Benevolent King would start to question itself and its ability to ensure "public order and safety". But reason seems to encounter some difficulties in dealing with "power hunger", and "self-deception"[24] seems to prevail even when reason would be for one own interest, providing that this interest is indeed "order and safety". Instead of acknowledging the flaws within its benevolence, the Benevolent King would therefore rather appropriate the language of human rights, thus convincing himself that he's in fact promoting justice and protection.

For instance, one year after the ICJ ruling on the *Wall*, the HCJ was asked (again) whether the separation barrier was legal. As it is usually the case, the question was answered in the light of IHL, as seen previously, but also human rights law, where the HCJ had to decide whether the restrictions imposed on Palestinians' rights were justified.[25] In order to "strike the right balance", the HCJ not only relied on Israeli settlers' *interests*, but also on their own *human rights*, thus marking a step forward into the normalization of the occupation: "the constitutional rights which our Basic Laws and our common law grant to every person in Israel are also granted to Israelis who are located in territory under belligerent occupation which is under Israeli control […] Israelis present in the area have the rights to life, dignity and honour, property, privacy, and the rest of the rights which anyone present in Israel enjoys."[26]

This approach led to what is often called "conflicts of human rights",[27] whose resolution would require a "horizontal balancing."[28] In overall, these "conflicts" seem to converge into the following cases: a Palestinians' right to property or freedom of movement *versus* Israeli settlers' rights to security/safety, freedom of religion and/or freedom of movement.[29] For instance, in the *Hass* case, involving Palestinians' right to property against Israeli settlers' right to freedom of religion and movement, the HCJ stated: "[i]ncluded among the protected constitutional rights are the rights to freedom of movement, freedom of religion and worship, and property rights. Sometimes this protection requires a decision between conflicting human rights. Such a decision requires a balance that satisfies the constitutional test, namely the existence of a proper purpose and proportionality in the harm to one right in order to allow the relative realization of the other right."[30]

The fact that cases occasionally come up in favour of the occupied population is not relevant here: as said,

[22] See e.g. HCJ, *Gossin*, 2002; HCJ, *Electricity Company for Jerusalem Ltd. V. Minister of Defense*, Case 256/72.

[23] George Orwell, Notes on Nationalism (1945), in George *Orwell: Essays*, London 2000, 300-17, p. 307.

[24] Orwell, fn.23, p. 301.

[25] HCJ, *Ma'arabe*, 2005, paras. 29 ff. See also HCJ, *HCJ, Beit Sourik Village Council v. The Government of Israel*, Case 2056/04, paras. 44 ff.

[26] Ibid., para. 21.

[27] See e.g. Gross, fn.3, pp. 13 ff.; Koskenniemi, fn.1, pp. 28 f.

[28] See e.g Aharon Barak, *The Judge in a Democracy*, Princeton 2008, pp. 171 f.; Koskenniemi, fn.1, p. 14.

[29] Interestingly, Israeli settlers' property rights have also been put forward, although not necessarily in a context of "conflicts of rights." See *e.g.* HCJ, *The Gaza Coast Regional Council v. The Knesset et alii*, Case 1661/05. See also Perugini/Gordon, fn.17, p. 106.

[30] HCJ, *Hass*, 2004, para. 14.

the question is not whether a Benevolent King cannot occasionally promote justice, but rather that of the implications of an illegitimate power for the occupied population, as described below.

B. Promoting moral objectives through illegitimate power: between faith and despair

While this "balance" may look like a noble tool, and while it occasionally led to some forms of partial justice, it doesn't take into account the importance of democratic and egalitarian considerations in the discourse of human rights.[31] Put differently, the method also reveals the inconsistencies between a Benevolent King, that is, an institution which seeks to promote moral objectives through power without appeal to legitimation, and human rights, that is, an institution whose whole purpose is to give at least a minimum of legitimation to power.[32] In this context, it is also no surprise that the HCJ merges human rights and humanitarian concepts of "proportionality" (aka "balance"), while both mechanisms embody radically different logics.[33]

Furthermore, the situation reveals the flaws within the way human rights are being implemented in the OPT: at the end of the day, it all relies on the faith that the Benevolent King would be willing to adhere to some higher moral principle, while its foundational authority derives from an immoral situation. In other words, compliance to moral principles would first require the dismantlement of the authority's illegitimacy, and this can only happen when the Benevolent King will take into account democratic and egalitarian considerations in its decisions.

Of course, the Benevolent King is not leaving the stage any time soon, and, in desperate times, all means seem good to limit its power. But human rights law is not the cure to all ills. Actually, as Perugini/Gordon put it, "[t]he different histories and experiences of dispossession have taught us that the demands for reforms and correction of the institutionalized excesses of oppressive legal regimes ended up reorganizing domination instead of dissolving it. If the use of the law confers legitimacy to the dominant, a short circuit has to be created, combining human rights with other political discourses and practices of emancipation in order to undo the law-legitimacy nexus."[34]

Conclusion

> "The time has finally come to join and recognize these two peoples together as indeed their common actuality in historic Palestine already has joined them together. Only then can interpretation be for, rather than only about, freedom."
>
> Edward Said, *Nationalism, Human Rights, and Interpretation*, 1993.[35]

Throughout this paper, I tried to cast some lights on a few questions that arise when an illegitimate power is asked to fulfil moral objectives. To concretize these questions, I took the example of the implementation of moral and social objectives by the HCJ in the OPT, and its implications for Palestinians and Israeli settlers. I have argued that, while such statement may embody noble and pure intentions, it is also vulnerable to the distortions of the Benevolent King – a doctrine which should stay where it belongs: in the past.

Needless to say, in this context, that reviving these sorts of ghosts doesn't come without uncertainties, for doctrines of the past often hide many skeletons in their closet. Of course, this doesn't mean that human rights lost their relevance. On the contrary, it is an opportunity to revive, reappropriate, and redefine human rights, not by the means of external decisions, but through emancipatory projects and solidary movements. In this context, it is indeed worth remembering Hume's observation that rulers only have opinions to support themselves, while "force is always on the side of the governed."[36]

Put differently, this also reveals that authority cannot be detached from the people living under its power. And this questions not only the way occupation law was forged, but also the way human rights law is being implemented in the OPT: as long as a Benevolent King will reign and Palestinians will not be (part of) the authors and interpreters of their rights and obligations, the whole discourse of human rights will be phoney.[37]

[31] See e.g. Besson, fn.2.
[32] Ibid.
[33] See e.g. Gross, fn.3, p. 17.
[34] Perugini/Gordon, fn.17, p. 137.
[35] Edward Said, "Nationalism, Human Rights, and Interpretation" (1993), in *Reflexions on exile and other Essays*, 2nd edn., Cambridge, MA 2001, 411-36, p. 435.
[36] Hume, fn.15, p. 29.
[37] For a legal argument, see e.g. Besson, fn.18, particularly on the notion of "State jurisdiction" *qua* normative relationship, as well as democratic considerations when human rights are restricted.

The irony is that human rights as a legal practice can only be truly restored once the occupation is put to an end and the Palestinians can regain full control over their lives, possibly in concert with some of those who are now Israeli settlers. And although prospects for peace may seem slim, one should not fall into the trap of a blind application of human rights law, for other paths can and ought to be found – some of which may indeed imply more active actions.

The Israeli Military Justice System and the Prolonged Occupation of Palestinian Territories: Military Courts' Legality in Light of International Law

Camille Goy (Master Student, University of Fribourg)

Occupation means temporariness and the Occupying Power is, by definition, a transitional authority. Nevertheless, the Palestinian civilian population is still, to this day, being tried in Israeli military courts. In the following article, the author questions the legality of those courts' jurisdiction considering the length of the occupation. She argues that the extensive use of penal provisions' promulgation goes beyond what IHL allows. She further argues that the prolonged application of Israeli law in the Occupied Palestinian Territories perpetuates the situation of occupation. The author concludes on the need of a cooperation which takes into account the indigenous community to restore an effective local administration.

Abstract provided by the Editorial Board

Introduction

Since the beginning of the occupation in 1967, Palestinians civilians are tried in Israeli military courts. Even though these courts also have jurisdiction over members of the Israeli military corps – and even if the way they exercise it raises several international law issues – this paper focuses on the jurisdiction over the Palestinian civilian population. Most papers or reports on the Israeli military justice system focus on the international law of procedural rights and fair trial guarantees jeopardized or breached by military tribunals. However, as important as those rights are, such an approach seems to skip fundamental and primary legal questions. Limiting the assessment of military courts to specific procedural due process guarantees might indeed prevent to question the very legality of their jurisdiction, in particular considering the length of the occupation. It is indeed important to recall that even when a legal system enforces rules of fair trial, it can still violate individual rights by adjudicating on acts beyond its authority[1].

Therefore, this paper aims to address this issue and question the exercise of military courts' jurisdiction over an occupied population in the context of a prolonged occupation. We will hence let aside individual technical discriminations or decisions, to favour a systemic approach and critique of the Israeli military justice system. We will thus discuss the impacts of the prolonged occupation, first on the military justice system, its jurisdiction and control of the occupied population (I), and then on the development of Palestinian judicial institutions (II).

I. The prolonged Israeli military justice system and the establishment of a judicial control

A. Promulgation of penal legislation

The authority to promulgate penal legislation and to try a civilian population before military courts for fifty years certainly wasn't foreseen by international humanitarian law (IHL). One of the core elements of the notion of occupation is its temporariness. Indeed, occupation differs from annexation by its temporary nature and the limited powers conferred to the Occupying Power by occupation law. Article 43 of the Hague Regulations prevents an Occupying Power from extending its own legislation over the occupied territory or from acting as a sovereign legislator[2]. The occupant must restore and ensure public order and safety, while keeping in force the laws existing prior to the occupation, unless absolutely prevented from doing so.

Article 64 of the Fourth Geneva Convention (GCIV) provides more details on the authority of the Occupying Power to legislate, stating that the Occupying Power may "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory [i.e. public order], and to en-

[1] Weill Sharon, "The judicial arm of the occupation: the Israeli military courts in the occupied territories", *International Review of the Red Cross*, No. 89 (2007), p. 397.

[2] Sassòli Marco, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *The European Journal of International Law*, Vol. 16, No. 4 (2005), p. 668.

sure the security of the Occupying Power". In case of a breach of the legislation promulgated in virtue of Article 64 GCIV, Article 66 GCIV recognizes the right of the Occupying Power to "hand over the accused to its properly constituted, non-political military courts, in condition that the said courts sit in the occupied country". The authority of an Occupying Power to establish military courts in the occupied territories in which it may prosecute civilians rely thus on Article 66 GCIV. The Israeli military administration exercised that authority in establishing two military courts in the Occupied Palestinian Territories (OPT), composed by a panel of three judges or a single judge, depending on the level of punishment[3].

The Occupying Power being a transitional authority deprived of sovereign power, its authority to promulgate penal provisions is limited. The scrutiny of the crimes charged before the Israeli military courts shows, however, an extensive use of this legislative power over the years. Offenses leading to a criminal proceeding are divided by the Israel Defense Forces (IDF) into five categories: "hostile terrorist activity" which includes involvement in terrorist attacks, military training, offenses concerning weapons and arms, as well as gathering and membership in associations that have been declared forbidden by the Military Commander; "disturbance of public order" which includes stone-throwing and incitement to violence; "classic criminal offenses" such as theft, robbery and trading in stolen property; "illegal presence in Israel"; and "traffic offenses" committed in the OPT[4]. Different aspects of this extended jurisdiction deserve further attention.

First, the category of "illegal presence in Israel", under which Palestinians entering Israel without a permit are charged[5], is neither within the scope of public order nor of the occupant's security. It is indeed aimed at protecting security interests of the State of Israel by regulating who may enter its territory. It should therefore be covered by Israeli domestic extraterritorial jurisdiction, but not by the military court system which is responsible only for the public order of the OPT[6] and the security of the occupying forces.

As for the categories of offenses considered as "classic" and traffic offenses, they are the ones which go most clearly beyond the scope of the security of the Occupying Power, but may be seen as a way to implement IHL's obligation to ensure public order, provided that they are absolutely necessary. One must, however, underline the difference between maintaining public order in a temporary situation of occupation as intended in IHL, and the adjudication of such acts in a system installed for almost fifty years.

Finally, the categories of "hostile terrorist activity" and "disturbance of public order" include a wide range of offenses. Contrary to the previous categories of offenses, these might be at first sight linked to the protection of the Occupying Powers' security. If the right of the Occupying Power to protect its security is recognized by international law[7], it can nevertheless be difficult to maintain a clear distinction between legitimate security concerns and political considerations[8]. Some scholars describe the extensive exercise by the Occupying Power of its authority to legislate and prosecute Palestinians as a criminalisation of non-violent resistance[9].

The scrutiny of several military orders indeed reveals a broad use of the legislative power by the Military Commanders. Military Order 101, for instance, forbids several forms of political expression and activities unless being authorized by the Military Commander via licenses or permits, such as organizing of assemblies, processions and vigils; participating in protests; printing or publicizing documents containing material having political significance; and holding, waving, or displaying flags or other political symbols.

Some may argue, as it will be discussed below, that the justification lies in the broadening of the occupant's powers in the situation of a prolonged occupation.

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[3] Security Provisions Order, Art. 4A(d): a single judge is competent to impose a maximum of ten years' imprisonment.

[4] Addameer Prisoner Support and Human Rights Association, *Presumed Guilty: Failures of the Israeli Military Court System. An International Law Perspective*, November 2009, p. 9; Yesh Din, *Backyard Proceedings. The Implementation of Due Process Rights in the Military Courts in the Occupied Territories*, December 2007, p. 42.

[5] Yesh Din, n4, p. 42.

[6] Weill, n1, p. 414.

[7] Pictet Jean (edit.), *Commentary on the Geneva Conventions of 12 August 1949 relative to the Protection of Civilian Persons in Time of War*, Geneva 1956, p. 337; *Final record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 672, 833.

[8] Kretzmer David, *The Occupation of Justice*, Albany 2002, p. 117.

[9] See Hajar Lisa, *Courting Conflict. The Israeli Military Court System in the West Bank and Gaza*, London 2005, p. 44; Berda Yael, "The Security Risk as a Security Risk: Notes on the Classification Practices of the Israeli Security Services", in: Baker A. / Matar A. (edit.), *Threat: Palestinian Political Prisoners in Israel*, London 2011, p. 54.

Still, prosecuting and judging these offenses over the years participate overall in the construction of a legal regime which goes beyond what IHL allows and hence becomes a wide and permanent jurisdiction over the occupied population.

B. Establishment of a permanent judicial control under the cover of International Humanitarian Law

The critique of blurring the boundaries between Israel and the OPT is generally made about Israel's policy to apply Israeli law to settlers in the OPT[10]. Ben-Naftali describes this application of Israeli law in the OPT as a "veiled annexation of the territories"[11]. The maintenance of a military court system and an extended penal legislation for an indefinite amount of time can nevertheless also participate in such a blurring of the lines. While ostensibly complying with IHL, which grants the Occupying Power the authority to legislate and establish military courts, it introduces and establishes a permanent judicial control. It, however, does so under the legal cover of a law which sets jurisdictional limits and which is supposed to be applicable in temporary situations[12].

Once again, the promulgation of military orders and the adjudication of various offences rely on the recognized right of the Occupying Power to promulgate penal legislation to protect its security or ensure public order while in a situation of occupation[13]. One can, however, not ignore the extension of Israeli military courts' jurisdiction over the years and the effects of a prolonged occupation on the exercise of that jurisdiction. What was intended as a right to ensure security in a temporary timeframe and a specific situation where civilians may be tried by military courts, becomes the basis of a wide long-term judicial control in breach of the interdiction for the Occupying Power to use any of its powers as a means of oppressing the population[14], not to mention human rights violations[15].

The normative regime of occupation was designed to ensure an effective but temporary control leading to a return of normalcy[16]. A prolonged occupation which leads to a permanent and wide judicial control of the occupied population[17], along with a decades-long criminalization of various forms of political activities compromises that return to normalcy and perpetuates the situation of occupation. The OPT have become territorially and organisationally fragmented, rendering Palestinian legal structures deficient in stability and in "monopoly over coercive power"[18]. The Palestinian Independent Commission for Human Rights (ICHR)[19] qualifies the occupation as an undermining factor of Palestine's ability to perform its functions and legal responsibilities[20]. To address the stake of a return to normalcy more specifically, we will thus now focus on the development of local judicial institutions.

II. The prolonged Israeli military justice system and the development of Palestinian judicial institutions

A. Status quo dilemma

As previously underlined, the general principle of Article 64 GCIV and Article 43 of the Hague Regulations is that the Occupying Power is a "transitional authority without assuming sovereign power"[21]. Therefore, it must not alter the administrative structure or local institutions[22]. This conservationist principle effectively protects the *status quo ante* in a temporary situation, but does not as such address issues raised by a prolonged occupation. In such a situation, the main-

[10] Benvenisti Eyal, *Legal Dualism: The Absorption of The Occupied Territories into Israel*, Boulder 1990; Rubinstein Amnon, "The Changing Status of the Territories (West Bank and Gaza): From Escrow to Legal Mongrel", *Tel Aviv University Studies in Law*, Vol. 8 (1998), pp. 59-79; Ben-Naftali Orna, "PathoLAWgical occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies", in: Ben-Naftali Orna (edit.), *International Humanitarian Law and International Human Rights Law*, Oxford 2011.

[11] Ben-Naftali, n10, p. 148.

[12] Roberts Adam, "Prolong military occupation: The Israeli-Occupied Territories Since 1967", *The American Journal of International Law*, Vol. 84, No. 1 (1990), p. 98.

[13] Pictet, n7, p. 337.

[14] Pictet, n7, p. 337.

[15] See: La Rue Frank, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 11th June 2012, A/HRC/20/17/Add2, para. 76-89.

[16] Ben-Naftali, n10, p. 154.

[17] Weill, n1, p. 419; Benvenisti Eyal, *The International Law of Occupation*, 2nd edn, Oxford 2012, p. 239.

[18] Kelly Tobias, "Access to Justice: The Palestinian Legal System and the Fragmentation of Coercive Power", Development Research Centre LSE, Working Paper No. 41 (March 2004), p. 16.

[19] The ICHR was established in 1993 upon a Presidential Decree issued by Yasser Arafat and seeks to promote and protect human rights in Palestinian laws and institutions.

[20] ICHR, *Narrative and Financial Report*, January-December 2013, p. 22.

[21] Clapham Andrew / Gaeta Paola / Sassòli Marco, *The 1949 Geneva Conventions: A Commentary*, Oxford 2015, p. 1428.

[22] Benvenisti, n17, p. 1.

tenance of the *status quo ante* could indeed freeze the legal situation and become insupportable for the local population[23].

When Israel started to occupy the West Bank and the Gaza Strip in 1967 as a belligerent occupant, the existing laws were left in force as far as they did not contradict "the proclamations [of the Commander] or conflict with the changes arising by virtue of the occupation of the Israel Defence Forces of the area"[24]. Some significant changes have, however, been made in local laws and judicial institutions[25], such as the abolition of the Court of Cassation in the West Bank[26], the numerous legislative orders issued by the Military Commanders and the wide judicial jurisdiction exercised by military courts, as we have discussed above. With Oslo II, an attempt was made to confer jurisdiction to the Palestinian National Authority over all the offenses committed by Palestinians in the areas under Palestinian control, and to establish independent Palestinian courts[27]. After the collapse of the interim and the second Intifada, the military court system was, however, said to be back to "full-time business"[28]. These developments have altered the local law, making the coercive power of the law increasingly fragmented in the OPT[29]. In the aftermath of Oslo II, the legal system in the OPT lacks a comprehensive legal structure to deal with violations of criminal laws committed by a Palestinian whose victim is a Palestinian, leaving the occupied population without an effective access to justice[30]. Besides, the Palestinian ICHR has set in its strategic objectives the enhancement of the justice system and the development of national mechanisms to ensure Palestinians access to justice[31]. In this context, we can question the obligation of Israel to help developing these judicial institutions to provide for the needs of the occupied population.

Neither the Hague Regulations nor the GCIV provide clear guidelines for "lawful deviations from the regular rules of occupation" in cases of prolonged occupation[32]. Most scholars, however, agree that a prolonged occupation is one of the exceptional reasons under which certain transformations are permissible in order to comply with the obligation to restore and maintain public order and civil life in the occupied territory, and to adapt to evolving circumstances[33]. The Occupying Power may therefore be obliged to introduce long-term changes to local infrastructures and institutions. Some scholars underline, however, the risk of abuse that such an extension of authority might involve[34]. There is indeed a thin line between unlawful transformations of local institutions implying disruptions of sovereignty, and helping to maintain functioning institutions in the OPT.

The Israeli Supreme Court has also held that as the occupation period gets longer, the occupant's powers widen[35]. This has been ruled about changes in labour law, construction of highways or improvements to the electricity network, giving the occupant the power to make legislative changes that would normally not be necessary during short-term occupation. However, if we apply this reasoning to the development of Palestinian judicial institutions, it reveals to some extent to be disturbing and incoherent with other IHL principles. Considering that organizing the administration of justice via the construction of judiciary institutions is an act of sovereignty, if the IDF were to install major changes in the Palestinian judicial institutions - even in view of ensuring the local population an effective access to justice - it would be at odds with the basic principle of the law of occupation under which the Occupying Power is not sovereign, and the occupation does not lead to a transfer of sovereignty[36].

B. Finding a way between illegal transformations and neglect of the occupied population

The way to reconcile the occupant's obligation to ensure public order with the interdiction to act as a sovereign must thus still be found. Benvenisti's analysis of the law of occupation might be helpful in this context.

[23] Benvenisti, n17, p. 1.
[24] Proclamation Order No 2.
[25] See: Kassim Anis, "Legal Systems and Developments in Palestine", *Palestinian Yearbook of International Law*, pp. 19-35, 1984; Shehadeh Raja, *The West Bank and the Rule of Law*, International Commission of Jurists, Geneva 1980.
[26] Military Order No. 80.
[27] Cavanaugh Kathleen, "The Israeli Military Court System in the West Bank and Gaza", *Journal of Conflict & Security Law*, No. 12 (2007), p. 201.
[28] Hajar, n9, p. 15.
[29] Kelly, n18, p. 7.
[30] Addameer, n4, p. 22.
[31] ICHR, *Strategic Plan 2014-2018*, September 2013, p. 29.
[32] Benvenisti, n17, p. 244.
[33] ICRC, *Occupation and other forms of administration of foreign territories. Report of the expert meeting*, March 2012, p. 72.
[34] Sassòli, n2, p. 674; Weill Sharon, "Legitimating Role of the Israeli Hight Court of Justice", *Global Jurist*, Vol. 15 (2015), p. 147.
[35] HCJ 337/71, *The Christian Society for the Sacred Places v Minister of Defence*, 26(1), PD 574, 582 (1971).
[36] Sassòli, n2, p. 668.

First, he underlines that the need to prevent adaptations in a prolonged occupation does not mean "that it is the occupant which is entitled to assume the duty to update the law", but rather that the aim of the law of occupation "encourage[s] the participation of the indigenous community and the ousted government"[37]. This might be the thin line we underlined above, which allows the differentiation between illegal transformations and maintenance of normal life, the thin way that could differ both from an illegal transfer of sovereignty and from a complete inaction leaving the occupied population without proper access to justice.

Secondly, in a more recent paper, Benvenisti brings international human rights law (IHRL) into the picture as well. He explains that the occupant's human rights obligations – triggered by the judicial jurisdiction of Israeli military courts[38] – may require it to depart from the *status quo* and modify local laws in ways that promote the local population's rights, while this authority to modify laws must be exercised in conformity with Israel's human rights obligations, including the maintenance of the rule of law[39]. Resorting to the application of IHRL in a situation of occupation contains, however, the risk of normalising the occupation[40], placing the Occupying Power in a situation alike any regular government. Furthermore, it imposes rights in a top-down manner rather than giving the local population the right to determine those rights. But this need not necessarily be the case if all aspects of human rights would be considered, including the limits they set[41], but also their indivisibility and, consequently, "the right to have rights"[42]. Human rights thus also bring self-determination forward, and with it the obligation to include the population in decision-making processes that affect their interests[43].

Both approaches eventually point to the need of a cooperation taking the local population into account, and an active assistance in gradually restoring an effective sovereign local administration and legal processes as a key step in the construction of a stable Palestinian State, and a stage to reach a peaceful solution[44].

Conclusion

This paper tries to provide a basis to discuss the legality of military courts in the prolonged occupation of the Palestinian Territories. It eventually shows how the law of occupation is ill-fitting for a long-lasting occupation, and how it can be observed apparently and misused in effect. Indeed, while ostensibly complying with IHL which grants the Occupying Power the authority to promulgate penal legislation and establish military courts, the Israeli military justice system makes an extensive use of this legislative power and exercises a wide judicial jurisdiction over an occupied population. What was intended as a right to ensure security and public order in a temporary timeframe and a specific situation, becomes the basis of a wide long-term judicial control. It hence goes beyond what IHL originally authorized, and jeopardizes a return to normalcy and the restoration of an effective local administration.

[37] Benvenisti, n17, pp. 246-247.

[38] Benvenisti Eyal, « Occupation and Territorial Administration », *GlobalTrust Working Paper,* No. 11 (2015), p. 4.

[39] Milanovic Marko, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", *Human Rights Law Review*, vol. 8 (2008), pp. 411-448.

[40] See: Ben-Naftali, n10; Gross Aeyal M., "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?", *European Journal of International Law*: vol 18 (2007), pp. 1-35.

[41] Benvenisti, n38, p. 5.

[42] Furthermore, the right to belong to a political community have a particular meaning in criminal law. In accordance with the republican legal theory, law is indeed seen as "the language of a political community that expresses shared values and minimal norms of social cooperation". Citizens who disobey the law are then called to respond before their community, criminal justice thus aiming at prevention and rehabilitation. See further: Besson Samantha / Marti Jose Luis (edit.), *Legal Republicanism. National and International Perspectives*, Oxford: 2009.

[43] Benvenisti, n38, p. 5.

[44] Lynk Michael, "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967", 19th October 2016, par. 56.

Ordinary or Extraordinary: A Model for Concurrent Application of IHRL and IHL in Administrative Detention in the Occupied Palestinian Territories

Amit Haim (Student, Hebrew University of Jerusalem) and Lucien Hürlimann (Master Student, University of Fribourg)

Administrative detention is construed as a forward-looking preventive measure that is linked to the risk arising from a specific person who represents a threat to public security. The authors, however, argue that there is a shift towards applying administrative measures in a manner which is at odds with this purpose. In having a closer look at how Israeli authorities employ administrative detention in the Occupied Palestinian Territories, they demonstrate that detentions might be perceived as arbitrary. In taking into account IHRL and IHL, they develop a more balanced model that allows for better accommodation of security needs and the protection of individual rights in a case of prolonged occupation.

Abstract provided by the Editorial Board

Introduction

Administrative detention is widely seen as an exceptional measure to be taken very cautiously, at times of emergency.[1] However, in the last two decades, since the "War on Terror" was proclaimed, it appears that the notion of emergency has been altered, allowing some democracies to claim a continuous state of emergency is in place.[2] The persistent use of exceptional measures results in normalizing and establishing them as the rule and therefore calls for increased scrutiny over their deployment.

This observation plays into the specific case of the Israeli situation, where we can witness almost 50 years of continuous occupation and control over another territory and people.[3] Israel repeatedly claims it deals with an unending state of emergency, due to, among other things, the situation in the Occupied Palestinian Territories (OPT).[4] In connection to this, Israel has been using administrative detentions in the OPT ever since they were occupied in 1967. Detention warrants are issued under Administrative Detention Order 1651 (2009), which applies in the West Bank only to Palestinians from the region, and not to Israelis who reside there.

The number of detentions in the OPT fluctuates but largely stays on a level of several hundred detainees at any given time.[5] The average detention period is several months, while the longest detention period to date is twelve years.[6] The stark characteristic is that administrative detentions are widely used in the OPT as a matter of routine, since they are used as a law and order mechanism – unlike administrative detention within Israel, which is regarded as highly exceptional.[7]

The aim of this paper is to discuss the use of administrative detention from an international law point of view, focusing on detention in the OPT as a case study. We will first offer a model for the interplay between International Human Rights Law (IHRL) and International Humanitarian Law (IHL) in a situation of prolonged occupation. The second and third chapters will explore this model in relation to the norms regarding the grounds for authorizing administrative detentions and the judicial review of this procedure. Finally, we will draw conclusions from this analysis, suggesting that a flexible legal oscillation in changing factual circumstances could allow for an accommodation of security needs with adequate protection of individual rights.

[1] Jelena Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375, 380.

[2] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (2nd ed, CUP 2015).

[3] Shiri Krebs, 'Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court' (2012) 45 Vanderbilt Journal of Transnational Law 639, 646.

[4] Hamoked/B'Tselem, *Without Trial – Administrative detention of Palestinian by Israel and the Internment of Unlawful Combatants Law*, 2009 (http://www.hamoked.org/items/111942_eng.pdf), 6.

[5] For updated statistics until December 2015, see: Addameer, *A Legal Analysis Report: Administrative Detention in the OPT 2016* (1.11.2016), 47.

[6] Addameer (n 5) p. 31.

[7] Elad Gil, 'Administrative Detention in a Jewish and Democratic State – Revisited', in Mordechai Kremnitzer and Yuval Shany (eds), *Exceptional Measures for Combatting Terrorism* (Israel Democracy Institute 2010), 81.

I. The Interplay between IHL and IHRL in a Prolonged Occupation

Traditionally, IHL, as it developed as the "laws of war", was the sole applicable law during armed conflicts.[8] Conversely, IHRL was conceived and perceived as a regulatory system designed for periods of "normalcy".[9] However, the mutual exclusiveness of the two systems was challenged with growing fervor, eventually leading to a consensus that there is at least a minimal degree of overlap, hence the discussion today focuses on the scope of application of the two systems.[10]

Generally speaking, in situations of dual application the prevailing principle is *lex specialis*.[11] *Prima facie*, since IHL, and specifically the Law of Occupation, was directly designed to regulate a situation of armed conflict, it would prevail. However, the evolution of the law, and the application of IHRL in various extraterritorial and armed contexts, calls for a subtler analysis, which follows.

A. The "Sliding Scale" Model

In this paper, we suggest a model of application which is sensitive to the factual situation on the ground. It should be able to accommodate considerable security needs and practical constraints of the Occupying Power (OP) with sufficient safeguards on the rights of individuals facing severe infringement of their liberties.

Under this model, *lex specialis* may still be implemented to detect the applicable scope of discretion and the judicial scrutiny applied to administrative measure-taking. In essence, it aims to assert that while both bodies of law retain their application at all times, the legal emphasis oscillates between different norms according to the factual situation. Accordingly, *lex specialis* must be understood as an interpretative tool, rather than a tool to resolve conflicts of norms.[12]

When tension on the ground rises, the OP may resort to exceptional measures to maintain the calm and in periods of decreased violence, the most adequate law would be IHRL, since it is designed to regulate situations of this kind, which resembles internal disturbances rather than full-blown perilous emergencies. This can be assessed using the objective tests developed in IHL jurisprudence to identify the threshold for commencement of a non-international armed conflict, focusing on different criteria for intensity.[13]

This is highlighted in the case of a prolonged occupation in which the incentive to apply more robust human rights standards grows in the face of the need to retain the legal *status quo* of the territory and the population inhabiting it.[14] This corresponds to the notion that law of occupation was conceived for short terms occupations, and as time elapses the balance shifts in favor of legal change.

B. Taking Legal Reasoning into Account

Besides accommodating the competing interests of the OP and its population with the Occupied Population, this model allows to preserve the fundamental purposes the law is designed to promote. From the perspective of the Law of Occupation, the ultimate aim is to preserve the rights of the Occupied while taking into account the needs of the Occupier. Article 43 of the Hague Regulations stipulates the Occupier may take reasonable measures to sustain public order. It is in the authority of the OP to curtail rights and liberties in the interest of security, as we will show further on, as is generally the prerogative in IHL.

This model is also supported by the derogation mechanism, a logic inherent to IHRL. IHRL conventions are not intended to suspend their application during armed conflicts. Conversely, Article 4 ICCPR stipulates that under a state of emergency threatening the life of a nation certain rights can be temporarily put on hold. The very option to derogate entails that unless a state has done so, it has considered the provisions as applying.[15]

Thus, as long as the situation is not of amplified intensity, the provisions of ICCPR must not be derogated

[8] Orna Ben-Naftali, 'The Extraterritorial Application of Human Rights to Occupied Territories' (2006) 100 ASIL Proceedings 90.

[9] Yukata Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 401.

[10] For an elaborate account of this process, see eg Arai (n 9) Chapter 17.

[11] ICJ, Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 226, para 25.

[12] Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law', (2008) 90 IRCC 501.

[13] ICTY, Case no. IT-94-1-T, *The Prosecutor v. Duško Tadić*, Trial Chamber Opinion and Judgement (7 May 1997), para 562.

[14] Eyal Benvenisti, *The International Law of Occupation* (2nd ed, OUP 2012), 246.

[15] See eg Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflicts', in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (OUP 2016).

from. To support this, we claim that an occupation as such is not sufficient to achieve the "state of emergency threatening the life of a nation" required under Article 4 ICCPR. This is especially true in our case, a prolonged occupation, which has also evolved into a state of partial self-administration on behalf of the local population. From IHRL perspective, the derogation criterion becomes the limit and tipping-point to a more permissive IHL regime.

Even if rights are derogated from lawfully, Article 4 requires that the measures implemented must be proportional to the "exigencies of the situation" without exceeding them. This predication allows to measure the legality of detentions, since, eg a continuous detention which lasts beyond the receding of violence can be rendered as exceeding the necessities, thus illegal.

II. The Issue of an Administrative Detention Order

A. Authority to Detain in the OPT

Administrative detention is an administrative measure and thus is not directly composed of judicial authority and guarantees.[16]

The terms of detention, which are the threats to public security or "security of the area", are not defined at length and are left to be interpreted by the military commander of the area. Judicial review does not, generally, intervene with the expertise of the security apparatuses and does not prescribe the contours of what composes a public security risk. All is required, is that the military commander must be able to assess, each time a warrant is issued, that there is "evidentiary basis to believe the detainee endangers public security and the detention represents a balance between national security and the liberty of the individual".[17]

The Israeli High Court of Justice (HCJ) has stressed that administrative detention, just like any other action carried out by the executive branch, is subject to the principle of proportionality.[18] Since detention without trial and without criminal responsibility is an extreme measure which greatly hinders the liberty of the person, it can only be possible as a forward-looking preventive measure, and not as a punishment for past actions.[19] The detention can only be linked to a risk arising from the specific person itself, if there are "activities that lead or are likely to lead to violence and danger to security".[20] It cannot be implemented for the sole purpose of deterrence of other people.[21] The court has also maintained that a person can not be detained for their views,[22] or as "bargaining chips".[23]

Several human rights groups accuse the security services of conducting arbitrary detentions.[24] These claims focus on two main arguments: first, the orders and court decisions are laconic, general and do not provide any specific circumstances for arrest. Second, the orders are mostly given to the maximum period possible of six months, and only in rare cases less than three months. Had the detention been preventive, it should have been correlative to each individual case.[25] The high average number of detentions over the years, combined with very limited evidence as a basis for detention, suggests the motive is punitive rather than strictly preventive.[26]

B. Administrative Detention in the Law of Occupation

Article 78 of the Fourth Geneva Convention (GC-IV) states that the OP must consider a detention absolutely necessary for imperative reasons of security, which makes it clear that it aims to be an exceptional measure,[27] and that security is the only admissible ground to such a measure. What security means is left largely to the states to define since it could not be concretized in the Convention.[28]

This does not mean states can do as they please. The International Criminal for the Former Yugoslavia (ICTY) interpreted Article 42 GC-IV as permitting

[16] Gil (n 7) 28-9.
[17] H CJ, 3239/02, *Marab v. IDF Commander in the West Bank*, (2002) 57:2 *PD* 349, para. 18-21.
[18] See, e.g. HCJ, 9441/07, *Ploni v. IDF Commander*, (2007) 77 [Heb].
[19] HCJ 88/253 (1988), *Sajda et al. v. Minister of Defense*, at 821 [Heb].
[20] David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press 2002), 31.
[21] See HCJ 7019/02 (2002), *Ajuri v IDF Commander* which discusses limitations on residency, and by analogy applies to the more extreme measure of internment.
[22] Kretzmer (n 20) 132.
[23] HCJ, 97/7048 (2000), *Plonim v. Minister of Defense*, at 721 [Heb].
[24] Hamoked/B'Tselem (n 4) 15.
[25] *Id.*
[26] Gil (n 7) 83.
[27] Jean Pictet, *The Geneva Conventions of 12 August 1949: Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958), 367.
[28] *Ibid.* 257.

internment only if there are "serious and legitimate reasons" to think that the interned persons may seriously prejudice the security of the detaining power by means such as "sabotage or espionage"". Article 78 only applies to the occupied territory whereas Article 42 also applies to the territory of the OP. By analogy, it could be maintained that since the standard in Article 78 is even stricter than Article 42, internment can only be permitted in exceptional cases. The individual must represent a real threat to the state's present or future security.[29]

Administrative detention is preventive and not punitive, and cannot replace a proper criminal proceeding. Past acts should thus be irrelevant to the ordering of a detention order.[30] Even though GC-IV does not mention the prohibition of collective internment the ICTY ruled that it is unlawful, because of the gravity of detention. Therefore, each case must be dealt with individually.[31]

C. The Prohibition of Arbitrary Detention in IHRL

Article 9 ICCPR protects individuals from arbitrary detention, and provides several requirements thereof. The first is lawfulness - detention must both have a legal basis in domestic law and conform to the relevant procedure under it.[32] The domestic law must also respect the principles of the ICCPR and States must have implemented the requirements of Article 9 domestically.[33]

Yet, a lawful detention order can still be deemed to be arbitrary. In one case brought before the Human Rights Committee (hereafter: HRC), it stated that "[arbitrariness] must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. […] Remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances", and concluded that an arbitrary detention would include elements of inappropriateness, injustice, lack of predictability and lack of necessity.[34] The HRC also emphasized the requirement of proportionality and its three aspects: the legitimate aim of the measure, the relationship of reasonable necessity that must exist between the detention and its ground and the nonexistence of a less invasive measure for achieving the same ends.[35] Accordingly, administrative detention is only allowed when an individual represents a present, direct and imperative threat, with focus on the proportionality requirement of the length of the detention. Furthermore, the burden of the proof for the threat lies on the state.[36]

Administrative detention thus is hardly compatible with the human right to personal liberty. The requirements of proportionality, predictability and necessity protects the individual from administrative detention unless a specific and concrete crime is about to be committed.

D. Application of the Model

The difference between IHL and IHRL norms regarding the ground justifying administrative detention orders is not to be found in the reason of such an order, which in both cases is "security", but in the interpretation of this reason. IHL offers less protection to the individuals because the meaning of security is not as closely circumscribed in IHL as in IHRL, as the state is given more margin of appreciation to define what represents a threat.

According to the model put forth, in times of armed conflict arbitrary detention must be understood in terms of permissible IHL provisions and the state must be given more margin of appreciation to define what a threat to security means.[37] However, in calmer times, IHL is pushed to the background, and IHRL's stricter test comes to the foreground.

[29] ICTY, Case no. IT-96-21-T, *The Prosecutor v. Zejnil Delalic and others*, Trial Chamber Judgement (16 November 1998), para. 576-7.
[30] Laura Olson, 'Admissibility of and Procedures for Internment', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015), 1332.
[31] *Delalic* (n 29) paras 578-83.
[32] Manfred Nowak, 'Article 9 ICCPR', in *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, NP Engel 2005), paras 25-7.
[33] Claire Macken, *Counter-terrorism and the Detention of Suspended Terrorists: Preventive Detention and International Human Rights Law* (Routledge 2011), 40.
[34] HRC, Communication no. 305/1988, *Hugo van Alphen v The Netherlands*, 23 July 1990, para. 5.8.
[35] Macken (n 33) 50.
[36] HRC, General Comment 35, *Article 9 (Liberty and Security of person)*, 16 December 2014, CCPR/C/GC/35, para 15.
[37] Duffy (n 2) 708.

III. Judicial Review of Administrative Detention

Judicial review is considered an inherent and integral component of the mechanism since deprivation of liberty is one of the most severe measures at hand.[38] Judicial review is meant to be a safeguard, a check and balance on the majoritarian power.[39] One of the most fundamental functions of the judiciary in this respect is, evidently, a review of the length of detention, which will be examined subsequently.[40]

A. Judicial Review in the OPT

According to Israeli Law (Order 1651), a detainee must be brought before a military judge within eight days of internment. The Judge must approve the detention for it to be valid, and can repeal or shorten the detention period.[41] A detainee has the right to appeal to the military appellate court at any time, which reviews the order *de-novo*.[42] Even if a judge decides on release, the court can delay the release for 72 hours or until a judgment is made in the appeal. [43]A detention can last six months, and be renewed indefinitely, in which case the detainee will be brought again before a judge and assessed anew.[44]

In addition to this system, a detainee has the right to petition to the HCJ. The petition tackles the legality of the use of authority under a *habeas corpus* doctrine, and not a formal process of appeal.[45] Three judges sit on a case; after hearing both sides, the court holds an *ex-parte* hearing in which the secret evidence is presented without the presence of the detainee. The court is left on its own to investigate the evidence and the agents presenting it.[46]

The HCJ sees itself as speaking for the detainees.[47] In some landmark decisions, the HCJ had indeed passed a substantive criticism of the actions of the legislative and the executive branches, even during intense fighting.[48]

However, the tendency of the HCJ to intervene in administrative detention cases is minor.[49] First, the court might choose not to hear a case unless all other options are exhausted.[50] Second, the court has exclaimed it does not serve as appellate court, justifying its tendency not to intervene in the judicial discretion of inferior military courts.[51] Moreover, the court has consistently refrained from substantially examining international law provisions on detention and probing into the intricacies of IHRL and IHL, only noting that detention is not disallowed altogether in order to legitimize the measures.[52]

B. Review of Length of Detention in IHL

As aforesaid, IHL is constructed on the premise of military necessity. As long as the military necessity is presumed to persist, it is entirely legitimate and lawful to continue implementing security measures. In general, IHL allows detaining enemy combatants until the end of a conflict,[53] while civilians can be detained for security reasons for as long as they persist, as noted above. A detention may continue for an unlimited period, provided there is a military justification for it, but regardless of any temporal element. Moreover, the Law of Occupation does not offer any limit how long a conflict can last. It could be argued, as some have,[54] that as time elapses, scrutiny must be enhanced. However, this does not appear to be a textual reading of the law, but rather a complementary notion affected by IHRL.

C. Review of Length of Detention in IHRL

As mentioned above, Article 9 ICCPR allows for deprivations of liberty which are not arbitrary, or if derogated from, those who are proportional to the exigencies of the situation. Namely, a detention which lasts for a prolonged period, whilst not in itself necessarily illegal, might prove to be so if it cannot be

[38] *Marab* (n 17) para. 32.
[39] Krebs (n 3) 650.
[40] One of the biggest problem of the review is the existence of a secret evidence system which strongly limits the ability of detainees to defend themselves, however this will not be addressed in this paper, see eg Daphne Barak-Erez and Matthew C Waxman, 'Secret Evidence and the Due Process of Terrorist Detention', (2009) 48 Columbia Journal of Transnational Law 3.
[41] Order 1651, article 287.
[42] *Ibid*. article 288.
[43] *Ibid*. article 289.
[44] *Ibid*. article 285(b).
[45] Hence, it is the Supreme Court in its seat as the High Court of Justice.
[46] Krebs (n 3) 667.
[47] HCJ, 11006/04 (2004), *Khadri v. IDF Commander in Judea & Samaria* (unpublished decision) [Heb.].
[48] Eileen Kaufman, 'Deference of Abdication : A Comparison of the Supreme Court of Israel and the United States Cases Involving Real of Perceived Threats to National Security' (2013) 12 Washington University Global Studies Law Review 96, 130.
[49] Kretzmer (n 20) 131; Hamoked/B'Tselem (n 4) p. 13.
[50] Kretzmer (n 20) 131.
[51] HCJ, 86/460 (1986), *Matar v. Military Court of Nablus*, p. 17.
[52] Kretzmer (n 20) 135.
[53] GC-IV, Article 46.
[54] Duffy (n 2) 717; Pejic (n 1) 386.

maintained that security needs prevail. Moreover, the HRC notes that "States parties also need to show that detention does not last longer than absolutely necessary, [and] that the overall length of possible detention is limited".[55] This requirement is supplemented by the need to have an independent and impartial tribunal as a judicial guarantee for this condition.[56] A potentially unlimited detention, without a foreseeable limit, appears to be contradictory to the qualified interpretation of the law. It is possible, however, that an effective judicial review would suffice to balance this drawback.

D. Application of the Model

We suggest applying IHRL would be useful to strengthen the control of the review concerning the length of the detention. All the while IHL is implemented, a detention could not be rendered arbitrary, and would be approved as long as there is military necessity. However, a continuous detention, which lasts beyond the receding of violence, can be rendered as arbitrary from an IHRL perspective. Even if Article 9 would be derogated from a prolonged detention could violate IHRL. This is something which cannot be achieved through IHL alone, since there might still be a military necessity in detaining a person, but holding him in detention without pressing charges becomes an arbitrary measure.

The advantage of such a legal construction is the empowerment it bestows upon the judiciary, which can measure the discretion of the military commander not only against the more permissive IHL framework, but also against a more restraining one, while notwithstanding the exceptional security needs of certain times. This will also, we believe, affect the bargaining dynamics between the detainee and the state. A visible finite detention period will incentivize the state to press criminal charges against the individual, or withdraw the detention warrant.

Conclusion

The importance of applying legal rules and judicial review to security-related matters is not founded upon the urge to curtail the actions of the state as a political entity, but rather it reveals the need to regulate exceptional circumstances. Succumbing to the notion that there could be a legal "black hole", beyond the reach of the law, is tantamount to giving absolute discretion to the executive branch. It renders the decision on the necessity of measures to be solely in the realm of the sovereign. In the heart of this is the Schmittian notion that it is impossible to create a legal norm dividing normalcy from emergency.[57]

This idea, perhaps appealing today just as it was in other times in history, runs against the basic logic of international law, both of IHL and IHRL, which holds even the most exceptional circumstances cannot be left without second-guessing. Simultaneously, the law requires accommodation to factual constraints, which call for freedom of action for those in charge of protection and security of the population.

This paper examined the provisions in both IHRL and IHL for administrative detention, and applied the standards on the current situation in Israel and the Occupied Palestinian Territories. We have identified, along with many parallel stipulations, a few discrepancies between IHRL and IHL which require legal resolution.

Hence, we have suggested a model for the application of IHRL and IHL in a case of prolonged occupation with shifting levels of intense violence, which allows for accommodation of security needs of the OP and rights of individuals which are posited at the other end of the scale. This model attempted to accommodate these observations, creating a flexible legal oscillation between adequate legal regimes to different factual circumstances, and highlighting the areas in which the discrepancies between the regimes require careful attention when applying the law.

[55] HRC (n 36) para. 15.
[56] *Id.*
[57] Carl Schmitt, *Political Theory: Four Chapters on the Concept of Sovereignty* (Chicago UP 2005, [1934]), 5.

Targeted Killings in Occupation: Least Harmful Means Requirement

Galaad Loup (MLaw, University of Fribourg)*

In an important ruling, the Supreme Court of Israel imposed the requirement of the "least harmful means" upon any targeted killing conducted. This principle prohibits targeted killings where a less harmful solution (e.g. arrest, interrogation, and trial) may be employed. In this article, the author attempts the difficult task to fit this new requirement of the Supreme Court of Israel in today's international legal spectrum. According to the author, the Court based its judgement on international human rights law without real reasoning. However, he argues that this principle can be justified under various sources of international humanitarian law and of international human rights law.

Abstract provided by the Editorial Board

Introduction

The 2006 *Targeted Killings* ruling of the Israeli Supreme Court[1] took on the controversial policy of targeted killings in the West Bank and Gaza Strip. The High Court of Justice (HCJ), while applying International Humanitarian Law (IHL), introduced human rights-based restraints on targeted killings, notably a "least harmful means requirement": a duty to capture instead of killing whenever possible. I will analyse the foundations of this requirement in the context of targeted killings conducted during prolonged occupation.

"Targeted killings" is not a legal concept, but a term describing a practice: "a use of lethal force … that is directed against an individually selected person who is not in custody and that is intentional… premeditated… and deliberate".[2] Targeted killings, potentially legal in situations of conflicts, are to be distinguished from "extrajudicial killing", which are "unlawful and deliberate… even though arrest is an option… without the guarantees of due process".[3]

Legal Regimes

During an occupation, IHL and International Human Rights Law (IHRL) interact in a controversial relation.

On the one hand, IHL needs an international (IAC) or a non-international armed conflict (NIAC) to be triggered.[4] An IAC is an inter-states conflict, i.e. recourse to armed force by a state against another, whatever the level of violence.[5] A NIAC is conflict between state's armed forces and non-state armed groups, or between armed groups.[6] Two criteria are needed for a NIAC to exist: a threshold of structured organisation of the fighting parties,[7] and a certain intensity of violence of the conflict in extensive casualties/destruction and/or in duration.[8] The customary principles of distinction, proportionality, and precaution are applicable in both types of conflict, limiting the conducts authorised in warfare.[9] A greater emphasis in this paper will be put on the principle of distinction, which permits to target and kill lawfully combatants (i.e. members of the armed forces or of the military wing of the armed groups)[10] just because of their status.[11] Civilians (i.e. anyone who is not a combatant)[12] are

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1 *Public Committee against Torture in Israel et al. v. Government of Israel et al*, HCJ 769/02, 13 December 2006 [*Targeted Killings*].

2 Michael Elliot, Where Precision is the Aim, Canadian J. Int'l L., 99-158 (2009), 121-122.

3 Elliot (n.2), 120.

4 *Id.*, 102.

5 Dapo Akande, Classification of Armed Conflicts: Relevant Legal Concepts, International Law and the Classification of Conflicts, Oxford 2012, 33-79, 41.

6 David Kretzmer, Targeted Killings of Suspected Terrorists, Eur. J. Int'l L. 171-212 (2005) 197; Akande (n.6) 51.

7 Nils Melzer, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Committee of the Red Cross, 2009 [DPH Guide], 32; Jérôme de Hemptinne, 8. Le principe de distinction, Droit International Humanitaire, Paris 2012, 175-216 [Hemptinne, Distinction], 193; Akande (n.7) 51.

8 Akande (n.7) 52-53.

9 Jean-Marie Henckaerts et Louise Doswald-Beck, Customary International Humanitarian Law – Vol. 1: Rules, Cambridge 2009, 3, 46, 51.

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 1125 U.N.T.S. 3 (1979) [API], art. 43(1); DPH Guide (n.8) 32.

11 *Targeted Killings* (n.2) 23; Kretzmer (n.7) 191; Elliot (n.3) 122-123.

12 API (n.12) art. 50(1).

immune to direct attack, and are never valid targets,[13] except if they are directly participating in hostilities (DPH).[14] Contrary to members of armed groups, civilians fight sporadically, spontaneously or in an unorganized way.[15]

On the other hand, IHRL applies in cases of law enforcement situations and in absence of an armed conflict. The test of presence of lethal force is one of a strict,[16] or absolute[17] necessity, considering the imminence and the gravity of the threat.[18] Lethal force can only be used in self-defence and cannot be punitive.[19] Authorities may use force only after all less harmful means have been exhausted.[20] Finally, the State must investigate and prosecute allegations of arbitrary deprivation of life.[21] Under a law enforcement paradigm, the objective of an operation cannot be solely to kill. Hence, targeted killings would be illegal.[22]

Oscillation – Law Enforcement and Conduct of Hostilities

In a situation of occupation – i.e. an effective territorial control of the territory of another state[23] – the occupant has the duty to "restore, and ensure, as far as possible, public order and safety"[24] in the occupied territory. However, if hostilities begin[25] the occupant has the duty to police the local population (law enforcement situation [LE]) and at the same time the necessity to deal with the hostilities (conduct of hostilities [COH]).[26] The COH regime will rule the relations between the warring parties, while the LE (for the use of lethal force) and the law of occupation (for other aspects of civilian life) will apply to the entire occupied territory in order to protecting the civilians not DPH.[27]

The COH regime triggers IHL norms, requiring that the hostilities reach either the level of an IAC or of a NIAC.[28] As no IHL norm rule governs the use of force for police operations (LE), there is a *lacunæ*, filled by the IHRL complementarily, including a "least harmful means requirement".[29]

It exists few theories to regulate the relation between the LE and COH regimes. The "either/or" theory proposing exclusive applications of one of the both has to be rejected. It either hinders the occupant's ability to repress waves of violence by forcing him to operate under IHRL, or it gives it almost unlimited powers by triggering IHL norms. Hostilities do not release the occupant from his duties to maintain order.[30] Simultaneous application is therefore preferable: quiet locations under LE regime can co-exist in parallel with hostilities under COH rules.[31] There are two simultaneous application theories.

The first simultaneous application theory is the "situation-based", "sliding scale" one, arguing for a smooth transition between the two regimes, depending of the

[13] *Targeted Killings* (n.2) 23; DPH Guide (n.8) 5; Trevor A. Keck, Not All Civilians are Created Equal, Mil. L. R., 115-128 (2012), 128; Elliot (n.3) 122.

[14] *Targeted Killings* (n.2) 26; DPH Guide (n.8) 12; Keck (n.14) 128, 141; Elliot (n.3) 145; Kretzmer (n.7) 199.

[15] DPH Guide (n.8) 34.

[16] Michael Ramsden, Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki, J. Int'l Conflict & Sec. L. 385-397 (2011).

[17] European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950) art. 2; *McCann et al v. UK,* ECHR 18984/91 (1995) 148; *Isayeva, Yusupova and Basayeva v. Russia*, ECHR 57947/00 (2005) 169.

[18] Christof Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (2014) 59; Michael Ramsden (n.17) 403; Human Rights Comm., Draft General Comment 36, Article 6: Right to life, CCPR/C/GC/R.36/Rev.2 (2015) [GC 36] 18; Kretzmer (n.7) 206.

[19] Ramsden (n.17) 397; 16; Heyns (n.19) 58; U.N. Human Rights Comm., UN Human Rights Committee: Concluding Observations: Israel, 21 August 2003, CCPR/CO/78/ISR, 11 [Concluding Observations] 15.

[20] Kretzmer (n.7) 178; Concluding Observations (n.20) 15.

[21] GC 36 (n.19) 29.

[22] Philip Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/14/24/Add. 6 (2010), 33; Kenneth Watkin, Maintaining Law and Order during Occupation: Breaking the Normative Chains, Isr. L. Rev. 175-200 (2008) 188-9.

[23] Jean d'Aspremont, 6. L'occupation, Droit International Humanitaire, Paris 2012, 119-154, 122, 127.

[24] Regulation concerning the Laws and Customs of War of Land, Annex to the Convention IV Respecting the Laws and Customs of War on Land, 36 Stat. 2277, art. 43 (1907).

[25] Keck (n.14) 169; Kenneth Watkin, Use of Force during Occupation: Law Enforcement and Conduct of Hostilities, Int'l Rev. Red Cross, 267-315 (2012) [Watkin 2012], 299-300.

[26] Tristan Ferraro, Expert Meeting - Occupation and Other Forms of Administration of Foreign Territory, Third Meeting: The Use of Force, International Committee of the Red Cross, 2012, 109; Keck (n.14) 169; Watkin 2012 (n.26) 268, 314.

[27] Marko Milanovic, Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case, Int'l Rev. Red Cross 373-393 (2007), 386; Andreas Paulus, Appendix I: Background Document *in* Ferraro (n.27) 140-141.

[28] Ferraro (n.27) 118; Watkin 2012 (n.26) 310.

[29] Ferraro (n.27) 118-120; Watkin 2012 (n.26) 296; Kretzmer (n.7) 182.

[30] Ferraro (n.27) 112-113; Watkin 2012 (n.26) 210; Paulus (n.28) 133-134, 144.

[31] Ferraro (n.27) 113.

prevailing circumstances and nature of the threat at the time of the intervention. The territorial control of the occupant and the duration of the occupation will be central.[32] COH norms will apply whenever violence exceeds what would could be expected from normal criminal activity (e.g. mortars, suicide bombs).[33]

The "jump" approach posits that the dichotomy between the two regimes do not allow a smooth transition. To pass from a LE to a COH logic, a "break", or a "jump" is needed, defined by the same criteria used to determine the existence of a NIAC: degree of organisation of the parties and intensity of violence.[34] The control over the location of the planned operation is indirectly taken into account: whenever the conditions of NIAC are not fulfilled, the occupant will control the area (occupation meaning *per se* effective territorial control). On the contrary, when the conditions *are* fulfilled, we can doubt the effectiveness of the occupant's control.

In these two theories, LE will always be the default regime, as the occupation resembles more to an ordinary governmental regime than to an armed conflict.[35]

If the hostilities are launched by armed forces belonging to the occupied state, resuming or continuing the struggle against the occupant-invader, an IAC will be triggered and no particular threshold of violence would have to be passed.[36] In the case of armed groups not linked to the occupied state, we must consider that multiple parallel armed conflicts in a single arena are now the common rule.[37] I am of the opinion that the situation where non-state armed groups fighting above all to take power (and not as state organs) looks far more closely to a situation of internal strife rather than to an IAC. In opposition to the view expressed by the HCJ,[38] I do support the necessity to apply the NIAC regime, and endorse the need of the structure and violence threshold to be met.[39] Not demanding a certain intensity of violence will increase the risk to blur the differences between simple criminal activity,[40] and military armed groups.

[32] Ferraro (n.27) 113-114; Watkin 2012 (n.26) 294-296, 300-301.
[33] Watkin 2012 (n.26) 286, 301, 311-313.
[34] Ferraro (n.27) 115.
[35] Watkin 2012 (n.26) 311.
[36] Ferraro (n.27), 121.
[37] *Id.* (n.28) 122, 127; Paulus (n.28) 135.
[38] *Targeted Killings* (n.2) 18.
[39] Kretzmer (n.7) 212; Milanovic (n.28) 373.
[40] E.g., shootings between drug dealers.

The occupant cannot start the hostilities: he has to wait for his opponent to strike first (and in case of a NIAC, for the criteria to be fulfilled).[41] Once the COH regime applies, it extends throughout the entire occupied territory, alongside the LE one.[42]

As an intermediate conclusion, during an occupation, in LE situations, which should be the rule (otherwise we can doubt whether the territory is still occupied), the "least harmful means requirement" applies. Interestingly enough, the existence of a LE situation will be connected to the degree of control of the state's forces over a location.

A final simultaneous application approach is the mixed approach, which borrows from IHL and IHRL to create a unique regime applying to all use of force during an occupation.[43] This regime mixing up IHRL and IHL, which created a blurred regime without justification, was clearly rejected by the ICRC's group of experts.[44] It nevertheless hints at a least harmful means requirement within IHL norms.

Least Harmful Means in Humanitarian Law

The DPH Guide embodied a new trend of doctrine that included a "least harmful means requirement" in the IHL framework[45] and added a necessity criterion similar to the one of IHRL: a combatant should always consider the possibility of capturing before using lethal means.[46]

This requirement applies only where the attacking forces have effective control over the territory of the operation, and thus behave more or less as police forces in peacetime (i.e. mainly in NIAC, low-level conflict situations, or occupation).[47] It would not

[41] Ferraro (n.27) 122-123; Keck (n.14) 172.
[42] ICTY, *Prosecutor v. Tadić*, IT-94-1-I, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 69-70, Ferraro (n.28) 124; ICRC, 32nd International Conference of the Red Cross and Red Crescent, International humanitarian law and the challenges of contemporary armed conflicts, 32IC/15/11, Geneva 2015, 13.
[43] *Id.*, 115; Keck (n.14) 170; Kretzmer (n.7) 201-203.
[44] Ferraro (n.27) 115.
[45] DPH Guide (n.8) 77.
[46] *Targeted Killings* (n.2) 40; Jérôme de Hemptinne, 9. Les principes de conduites des hostilités, Droit International Humanitaire, Paris 2012, 217-305 [Hemptinne COH], 227; Keck (n.14) 176; Elliot (n.3), 151; Jann K. Kleffner, Section IX of the ICRC Interpretative Guidance on Direct Participation in Hostilities, Isr. l. Rev., 35, 52, (2012), 42.
[47] *Targeted Killings* (n.2) 40; DPH Guide (n.8) 80-81; Hemptinne COH (n.47) 227; Keck (n.14) 155; Elliot (n.3) 153; Watkin 2012 (n.26) 300; Kleffner (n.47) 38; Paulus (n.28) 139.

be implemented in "hot" hostilities as it is doubtful whether any power could have an effective control over a battlefield.[48] Finally, a capture option applies only if it does not put the soldiers of the attacking force or civilian bystanders under excessively high risks.[49]

The main argument to justify this requirement is the military necessity principle. This principle only authorises the degree and kind of force necessary in order to achieve the final military purpose: "the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources".[50] This meta-principle of IHL, along with its twin-principle of humanity, can be used to interpret IHL norms,[51] and, in case of a loophole, to fill the gap, restricting the freedom of the states. IHL does not and cannot regulate every situation:[52] whenever there is a loophole, the use of these essence-principles in order to complete IHL represents a much more reasonable solution, rather than settling for a free-rein or distorting existing rules.[53]

In most situations, IHL is quite clear: combatants and civilians who DPH can be targeted.[54] But this does not make any sense in a firmly controlled area, where the operation of neutralizing the threat is more akin to peacetime police interventions than to open battlefields. It defies logic to launch a drone strike in a city kept under effective control and authorise civilian casualties if the forces could have simply seize the target by capturing it.[55] Drawing from counter-insurgency strategy, the "least harmful means requirement" is far more likely to win the "hearts and minds" of the population, and to reduce the recruiting capabilities of the adverse party, therefore making the conflict much easier to win.[56]

I am of the view that a loophole exists since no black-letter law takes these "peacetime similarities" into consideration yet[57] and it is filled by the principle of military necessity. It does not lead to a revival of the *Kriegsraison*,[58] as these principles only permit to fulfil a *lacuna* and not to bypass an IHL rule.[59] Even without the independence of the military necessity principle, this loophole would be filled by the IHRL norms according to the complementary application of this regime.[60]

Countries like the US and the UK have adopted the "least harmful means requirement" in counter-insurgency operations.[61] This is particularly interesting because counter-insurgencies usually deal with operations in firmly controlled areas, which is the main criteria for the "least harmful means requirement".

As a result, we can conclude that a "least harmful means requirement" exists even in the IHL regime (subjected to the conditions delineated by the ICRC regulation).

Procedural Safeguards

The Court's interpretation of IHL draws strongly from IHRL. The "least harmful means requirement" is more akin to IHRL, even if it does exist also in IHL as said beforehand.[62]

Similarly, however, the *ex ante* and *ex post* review requirements of the HCJ[63] are more akin to IHRL,[64] especially when it comes to the level of severity demanded by the Court,[65] which could be justified under IHL.[66] The requirement of independent *ex post* review after an attack on a civilian DPH,[67] confirmed by the

[48] DPH Guide (n.8) 80; Keck (n.14) 155; Elliot (n.3) 153.
[49] *Targeted Killings* (n.2) 40; DPH Guide (n.8) 81-82; Hemptinne COH (n.47) 227; Keck (n.15) 176; Elliot (n.3) 141; Watkin 2012 (n.26) 300.
[50] Quote: DPH Guide (n.8) p. 79; Hemptinne COH (n.47) 224; Elliot (n.3) 152; Kleffner (n.47) 35.
[51] ICTY, *Prosecutor v. Mario Kordic and Mario Cerkez*, IT-95-14/2-A, 17 December 2004, 686; *Prosecutor v. Zoran Kupreskic and al.*, IT-95-16/T, 14 January 2000, 527; DPH Guide (n.8) 78-79; Keck (n.14) 154.
[52] Hemptinne COH (n.47) 223-224; Elliot (n.3) 142, 157.
[53] Elliott (n.3) 157-158.
[54] Richard S. Taylor, The Capture versus Kill Debate, Army Law. 103-111 (2010) 108-109.
[55] DPH Guide (n.8) 82; Keck (n.14) 156; Elliott (n.3) 155.
[56] Ferraro (n.7) 116; Keck (n.14) 140; Elliot (n.3) 126, 139; Watkin 2012 (n.26) 284.
[57] Keck (n.14) 157, 169-175; Elliot (n.3) 154-155.
[58] Kleffner (n.47) 43.
[59] Hemptinne COH (n.47) 221-222.
[60] Keck (n.14) 157.
[61] Headquarters, Department of the US Army, Counterinsurgency, FM 3-24, MCWP 3-33.5, 2006, 7-36; British Army, Field Manual, Vol. 1 Part. 10, Countering Insurgency, 71876, 2009, 12-17; Keck (n.14) 175.
[62] Also see: Alston (n.23) 75-77.
[63] *Id.*
[64] *McCann* (n.18) 194, 210.
[65] Amichai Cohen - Yuval Shany, A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case, J. Int'l. Crim. Justice 310-315 (2007), 318.
[66] The *ex ante*, for example, under art. 57 to API (n.12); or they could be justified by the spirit of the law, if not state practice or case law – Antonio Cassese, On Some Merits of the Israeli Judgment on Targeted Killings, 5 J. Int'l. Crim. Justice 339, 345 15 (2007).
[67] *Targeted Killings* (n.2) 40.

HCJ in 2011,[68] is gradually supported by scholars,[69] by European Court of Human Rights (ECHR) decisions concerning occupation[70] and by the modifications of the Minnesota Protocol.[71] Also the obligation to compensate victims[72] begins to see support by scholars.[73] This introduces a strict constraint on the military policy, which is most welcome, particularly in the context of the prolonged occupation. The great breakthrough of this case may be this imposition of strict procedural requirements. The existence of normative standards requires supporting procedures in order to ensure compliance. Only in this way is the rule of law maintained.[74] We consider these requirements justified, taking into consideration the subjectivity and the vagueness of the principle of proportionality and of notions such as DPH.[75] Few assessments can be deemed absolute in these circumstances, demonstrating the need for procedural safeguards.

Conclusion - Dangers of Pragmatism

A "least harmful means requirement" exists, first because of the inherent bouncing relation between the LE and the COH regimes during an occupation, then finally because of the loophole existing in the IHL norms.

While the *Targeted Killings* ruling could be construed as a victory for human rights, the Court gives little concrete guidance to the armed forces for determining the permissibility of targeted killings.[76] This underlines the value of the procedural safeguards that the Court implemented, but the lack of clarity may undermine their utility. Critical views see the Court's jurisprudence in general as *legitimizing*, not restricting, controversial or illegal government policy regarding the occupation.[77] Therefore, instead of protecting, is the Court essentially giving *carte blanche* to a policy that, though it must be legally justified, may still be morally untenable?[78] Has it created a dangerous slippery slope between "legal" targeted killings and extrajudicial killing or assassination?[79]

The conflagration of IHL and IHRL seems at this point to be an established fact, with a worthy goal: extending the protection of civilians. While the goals of the two regimes are complementary, their contents can clash, leading to decision-makers having to choose between them.[80] Does this expand protection, or are we creating a situation in which human rights are used to enable something that they are actually in conflict with at their very core?[81] Or even a situation, in which the underlying logic of IHL is undermined by a distorted application of IHRL?[82]

[68] *Tabet v. Attorney General*, HCJ 474/02, 30 January 2011, 10.

[69] E.g.: Michelle Lesh, Accountability for Targeted Killing Operations: International Humanitarian Law, International Human Rights Law and the Relevance of the Principle of Proportionality, Accountability for Violations of International Humanitarian Law, Essays in Honour of Tim McCormack, London-New-York 2016; Michael Drabik, A Duty to Investigate Incidents Involving Collateral Damage and the United States Military's Practice, Minnesota J. Int'l L., 15-34, (2013).

[70] ECHR, *Case of Jaloud v. the Netherlands*, ECHR 47708/08, Novembre 20, 2014, 186, *Case of Al-Skeini and Others v. the United Kingdom*, ECHR 55721/07, Case Report 2011-IV, 99, 7 July 2011, 163.

[71] Human Rights Council, The Minnesota Protocol on the investigation of Potentially Unlawful Deaths, A/HRC/32/39/Add.4, June, 2016, § 26.

[72] *Targeted Killings* (n.2) 40.

[73] See: Yaël Ronen, Liability for Incidental Injury in Armed Conflict, Vand. J. Int'l L. 181-225, (2009) 186-187.

[74] Nils Meltzer, Targeted Killings in International Law, Oxford 2008, 431-433.

[75] Lesh (n.70), 109; Drabik (n.70) 20-21.

[76] Meltzer (n.75) 36.

[77] Nimer Sultany, Activism and Legitimation in Israel's Jurisprudence of Occupation, Social & L. Stud. 315-339 (2014).

[78] Jeff McMahan, Targeted Killings: Murder, Combat or Law Enforcement? Targeted Killings: Law and Morality in an Asymmetrical World, Oxford 2012, 135-156, 136.

[79] Jeremy Waldron, Justifying Targeted Killing with a Neutral Principle, Targeted Killings (n.79), 112-135, 130-131.

[80] Marko Milanovic, A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law, J. Conflict & Security L. 459-483 (2010), 482-483.

[81] William Schabas, Lex Specialis? Belt and Suspenders?, Isr. L. Rev. 592-613 (2007).

[82] Geoffrey Corn, Mixing Apples and Hand Grenades, Int'l Humanitarian L. Studies 52-92 (2010).

Crumbling under the Pressure: Punitive Demolition of Palestinian Houses and the Right to Equality

Rotem Bavli (Student, Hebrew University of Jerusalem) and Eva Müller (Master Student, University of Fribourg)

Demolishing houses of Palestinians perpetrators has become a cornerstone of the Israeli government's response to terrorism. It has to date only been applied against Palestinians, even though the law allows for an application to any perpetrator. In their article, the authors argue that the Court's reasoning in that context runs afoul of the prohibition of discrimination under both international and Israeli law. They further argue that international law prohibits punitive house demolition altogether. They conclude that the political pressure exercised over the judicial apparatus of the State in times of crisis is likely to push courts to reason and decide in political, rather than legal terms.

Abstract provided by the Editorial Board

Introduction

In order to meet an increased threat to security in the Occupied Palestinian Territories (hereinafter: OPT) and on Israeli land, the Israeli government has developed – among others – a practice to seal or demolish Palestinian houses belonging to perpetrators of terror attacks and their families. This policy began in June 1967 in the West Bank and Gaza Strip, very early in the history of the occupation.[1] Its use increased during times of high tension but there were also years in which the punitive house demolition practice was not used at all. After the kidnapping and killing of three Israeli students in 2014, the government renewed the policy. Its basis is the British Defence Emergency Regulation (hereinafter: DER 119) which remains applicable law in Israel.[2] The reasoning behind the policy, according to both Israeli authorities and the High Court of Justice (hereinafter: HCJ), is to deter terrorists from committing attacks, particularly suicide attacks.[3] The policy's theoretical base is the utilitarian approach, according to which it is just to operate in a certain way, even if it means damage to one person or more, to maximize the well-being of the greater number of people.[4]

Since the house demolition practice became a clear part of the Israeli punitive policy, it was subjected to intense scrutiny, both nationally and internationally. Organizations such as the International Committee of the Red Cross and the United Nations (hereinafter: UN) began monitoring and supervising Israel's use of house demolition. Since the measure was first used, the Israeli authorities have faced various kinds of criticism and the HCJ had to assess several petitions against house demolition orders. Some scholars consider the measure a punitive sanction, while others – supported by the HCJ – argue rather that house demolitions belong in the category of prevention by deterrence.[5]

The current discussion raises the question of whether the policy of punitive house demolition is discriminatory due to the fact that it is only applied against Arabs having committed a crime, and not against Jews. This claim has only been raised by a few scholars, and not yet before international humanitarian or human rights bodies. This article tries to fill this gap. After a brief description of the HCJ's role in the house demolition practice, this role will be analysed in light of international law and the Court's own rulings and principles. The article concludes by highlighting implications of the practice for international law.

I. The Role of the High Court of Justice

After a demolition order is issued, any affected person may approach the responsible military commander to object. If this objection fails, the affected person has the opportunity to file a petition challenging demolition orders and actions of the military government before the HCJ. In practice, however, no demolition

[1] Shalem Daniel, *Justifying Demolition: The Rhetoric of Israel's Policy of House Demolition in the Occupied Territories 1967-1997*, MA Thesis in the Faculty of Law at the Hebrew University, p. 20.

[2] Quigley John, *Punitive Demolition of Houses: A Study in International Rights Protection*, 5 St. Thomas L. Rev. 359 1992-1993, p. 361.

[3] See e.g. HCJ 2828/16 *Abu Zayid v. Commander in Judaea and Samaria* (unpublished, 7 July 2016), para. 9.

[4] Shaw H. William, *Contemporary Ethics: Taking Account Of Utilitarianism*, (Blackwell, 1999) p. 8.

[5] E.g. Halabi Usama, *Demolition and Sealing of Houses in the Israeli Occupied Territories: A Critical Legal Analysis*, 5 Temp. Int'l & Comp. L.J. 251 1991, pp. 253 and 256.

or sealing order was ever subject to judicial review before 1979, twelve years after the policy began, as demolitions were executed without any warning.[6] The first case concerning DER 119 was the *Sakhawil* case, in which the HCJ rejected a petition against the sealing of a room because the room in question was used to plan a terroristic offence.[7] This case set an important legal precedent for the HCJ's practice throughout the 1980s.[8] In the *Hamara* case, the HCJ approved for the first time the sealing of an entire house which had not been used in the execution of the offence.[9] Since this case, most houses have been destroyed rather than sealed, and almost every house has been an offender's residence rather than the site of the crime.[10]

Lately, a new direction of criticism surfaced and forced the Court to address the question: why was the punitive house demolition policy never used against Jewish-Israelis? The HCJ repeatedly stated that the measure is meant to function as a deterrent rather than as punishment. Furthermore, it affirmed that the qualitative and quantitative differences between attacks committed by Palestinians and attacks committed by Jews indicate that there was no need for deterrence for Jews – but only for punishment through a firm and resolute condemnation.[11]

This differentiation between Jews and Palestinians in the application of the house demolition policy can be interpreted as an infringement of the principle of equality. We will now move on to examine this principle, both from an international and national perspective.

II. The Right to Equality in International Law

Even though international humanitarian law (hereinafter: IHL) and international human rights law (hereinafter: IHRL) are oftentimes incompatible, they complement each other in situations that involve armed conflicts or internal violence;[12] the rules and principles of each are applicable to the OPT.[13] While IHL provides protection to war victims, IHRL protects everyone affected by the conflict. Additionally, common Article 3 of the Geneva Conventions (hereinafter: GC) and its prohibitions – such as the prohibition of discriminatory treatment – overlap with rights protected under IHRL.[14]

A. Prohibition of Discrimination under International Human Rights Law

The guarantee of equality has been integrated in both the International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESC) and the International Covenant on Civil and Political Rights (hereinafter: ICCPR) and was further strengthened by the adoption of the International Convention of the Elimination of All Forms of Racial Discrimination (hereinafter: ICERD). Israel has signed and ratified these international instruments.

1. International Covenant on Economic, Social and Cultural Rights (ICESC)

Article 2(2) ICESC contains the obligation for each state party to guarantee the rights protected without discrimination of any kind – such as race, colour, religion, national or social origin. The Economic and Social Council defines differential treatment likely to result in systematic direct or indirect discrimination as "legal rules, policies, practices or predominant cultural attitudes".[15]

Article 11(1) guarantees the right of everyone to have an adequate standard of living for himself and his family; this includes food, clothing and housing. General Comment No. 4 indicates that "this right must, in accordance with article 2(2) of the Covenant, not be subjected to any form of discrimination." Furthermore, the Council defended that these rights shall not to be subject to arbitrary or unlawful interference with one's privacy, family, home or correspondence.[16] In its 2015 session, the Council adopted a resolution

[6] Shalem (Fn. 1), p. 30.
[7] HCJ 434/79 *Sakhawil v. IDF Commander in Judea and Samaria* 1979 PD 34(1) 464, para. 3-4.
[8] Shalem (Fn. 1), p. 31.
[9] HCJ 274/82 *Hamara v. IDF Commander in Judea and Samaria* 1982 PD *755 (2)36,* pp. 755-757.
[10] Shalem (Fn. 1), p. 36.
[11] See e.g. HCJ 5290/14 *Qawasmeh v. The Military Commander in the West Bank* (unpublished, 11 August 2014).
[12] See, for more information on the applicability of human rights law to the OPT, Quigley (Fn. 2), p. 363 ff.
[13] Halabi (Fn. 5), pp. 258-259.
[14] Emanuelli Claude, *International Humanitarian Law*, (Bruylant, 2009), p. 26.
[15] Economic and Social Council, General Comment No. 20: Non-discrimination in economic, social and cultural rights [Article 2 para. 2, of the ICESC], forty-second session (2009), E/C.12/GC/20, at 10 ff.
[16] Economic and Social Council, General Comment No. 4: The right to adequate housing (Article 11(1) of the Covenant), sixth session (1991), E/1992/23, at 6 and 9.

addressing the economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the OPT. One concern was the "extensive destruction by Israel […] of properties, including the increased demolition of homes […]" and the displacement and dispossession of Palestinian civilians related to this policy, leading to significant harm to the economic and social infrastructure of the OPT and violating several rights protected by IHL.[17] These matters were part of the agenda for the Council's 2016 session;[18] however, the *punitive* house demolition practice in light of the peoples' right to equality, has not yet been addressed.

2. International Covenant on Civil and Political Rights (ICCPR)

Article 2(1) ICCPR states an obligation for each state party "to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The right to private housing is guaranteed in Article 17 ICCPR. In addition, Article 26 ICCPR states a general, self-standing non-discrimination clause.[19] According to the Human Rights Committee (hereinafter: HRC), Article 26 extends further than Article 2 ICCPR because its scope is not limited to the rights provided in the ICCPR; rather, "it prohibits discrimination in law or in fact in any field regulated and protected by public authorities."[20]

The HRC, monitoring the implementation of the ICCPR, asked Israel in its list of issues for the Fourth periodic report to provide information on "the practice of the collective punitive demolition of houses and private property", referring amongst others to the right to equality and non-discrimination protected by Article 26 ICCPR.[21] Although shadow reports addressed the issue of house demolitions under the light of discrimination,[22] the answer to the question given in the report was, disappointingly, only one sentence long: "Demolition of illegal constructions is done in accordance with the relevant law and regulations, and according to the specific circumstances, and not as collective punishment."[23] This response fails to distinguish between demolitions of illegally built houses versus demolitions of houses as punishment for a criminal offense and lacks any explanation of why the policy is considered to be legal.

3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

In addition to the general principle of equality protected by Article 2 ICERD, regarding the right to housing, Article 5(e)(III) ICERD guarantees equality before the law and non-discriminatory treatment before the tribunals and other authorities. In 2005, the Committee on the Elimination of Racial Discrimination held in its general recommendations that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[24] The Committee specified that a state party must "ensure that measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin […]."[25] Once again, the house demolition policy as *punitive sanction* was not discussed.

[17] Resolution adopted by the Economic and Social Council on 20 July 2015, Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and the Arab population in the occupied Syrian Golan, Resolution 2015/17.

[18] Provisional agenda of the 2016 session of the Economic and Social Council, E/2016/1, point 16.

[19] De Schutter Olivier, *International Human Rights Law*, 2nd edn., (Oxford, 2014), p. 634.

[20] HRC, General Comment No. 18, Non-discrimination (1989), at 12.

[21] List of issues prior to the submission of the fourth periodic report of Israel adopted by the HRC at its 105th session, 9-27 July 2012, at 6 (a).

[22] See e.g. Negev Coexistence Forum for Civil Equality (NCF), Alternative NGO Report, Information for Establishing List of Issues for the State of Israel before the Committee on Civil and Political Rights (ICCPR), April 2012, p. 14.

[23] HRC, Consideration of reports submitted by States parties under article 40 of the Covenant pursuant to the optional reporting procedure, Fourth periodic reports of States parties due in 2013, Israel, CCPR/C/ISR/4, at 57.

[24] Committee on the Elimination of Racial Discrimination, General Recommendation 30 on discrimination against non-citizens), at 4.

[25] *Id.*, at 10.

B. Prohibition of Discrimination under International Humanitarian Law

The principle of non-discrimination is a fundamental component in international humanitarian law.[26] It is cited in various norms but most importantly in common Article 3 GC and further strengthened by Additional Protocols I and II.[27] The Preamble of Additional Protocol I states that the "Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict."

Even though Israel is not a State Party to the Protocol, the principle reaffirms that humanitarian law is applicable in all circumstances, to all persons protected.[28] Referring to common Article 3, Pejic considers the principle of non-discrimination to be a part of the category of *jus cogens*.[29]

C. Analysis of the *Punitive* House Demolition practice under International Law

As highlighted above, the policy of house demolitions is shaped by rulings of the HCJ reacting to petitions and criticism. The Court argues that there is no discrimination prohibited by international law because the unequal treatment of Jews and Arabs is based on a neutral criterion, deterrence, which fulfils the requirement of objective justification. The Court defends the practice by referring to an "artificial symmetry" being made by petitioners between Jews and Arabs, as the measure of house demolition is not taken in cases of incitement and violence, but only in extreme cases of murder.[30] Even if that is true and the house demolition practice is based on a neutral criterion, the Court's conclusion is wrong. Given the criterion "need for deterrence" only applies to the Arab population, present day applications of DER 119 lead, at least to indirect discrimination in the same way as direct discrimination.

The right to be treated equal is protected, as has been presented, by various norms of international conventions, signed and ratified by Israel, applicable to the OPT. The prohibition of discrimination, be it direct or indirect, is not based on an artificial symmetry but rather on an obligation of the State of Israel under international law. Therefore, the rulings of the HCJ supporting the punitive house demolition practice violate general principles and norms of IHL and IHRL – especially the ICESC, the ICCPR and the ICERD that represent binding law for Israel.

Not only are the Court's rulings an infringement of international law, they are also incompatible with the domestic Israeli domestic law, and with the Court's principles and previous rulings. This will be further discussed in the next section.

III. The Right to Equality in Domestic Israeli Law

The right to be treated equally has been protected as a basic right since its implementation by the Israeli Supreme Court in the early seventies. According to this principle, a treatment is discriminatory when entities are treated differently, and their differences are irrelevant to the matter.[31] In the *Morcous* case, the HCJ admonished the military government for discriminating between the Jewish and Palestinian populations, and stressed that the commitment to equality must prevail even in the face of security tensions.[32] In more recent cases, however, the HCJ argued that the security situation in Israel classifies as a proper justification for the government to make a distinction based on national identity.[33] A similar distinction is made, *de facto*, in the use of the punitive house demolition policy. No demolitions have been carried out against Jewish settlers in the West Bank and Gaza – not even against those who have been convicted of committing violent offences, such as murder of Palestinians. To date, the measure has only been used against Palestinian homes

[26] Pejic Jelena, *Non-discrimination and armed conflict*, 83 International Review of the Red Cross 183 2001, p. 184 f.

[27] Preamble and Article 74 Additional Protocol I; Article 4 Additional Protocol II.

[28] Sandoz Yves / Swinarski Christophe / Zimmermann Bruno (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, 1987), p. 29.

[29] Pejic (Fn. 26), p. 188.

[30] *Qawasmeh case*, para. 30 (Fn. 11).

[31] Supreme Court of Israel *Boronovsky v. Chief Rabbi of Israel* 1971 PD 25(1) 7, para. 35.

[32] HCJ 168/91 *Morcous v. Minister of Defense* 1991PD 45(1) 467, para. 8; Simon Dan, *The Demolition of Homes in the Israeli Occupied Territories*, 19 Yale J. Int'l L. 1 1994, p. 79.

[33] The Law of Citizenship and Entry into Israel (Temporary Order), section 3; HCJ 7052/03 *Adalah – The Legal Center for Arab Minority Rights in Israel and Others v. Minister of Interior Affairs and Others* (unpublished, 14 May 2006), President Barak, para. 36 f.

in the West Bank and Gaza,[34] even though DER 119 is considered an applicable law in Israel as well.[35]

One may say, similar to the Court's ruling, that Jews are responsible for a lower number of deadly attacks than Palestinians. However, if the authorities and Court are committed to the goal of deterrence and of lowering the number of attacks, the initial number per racial group is insignificant. If the Court rules that these goals represent the interests of justice and the rule of law, then this policy needs to be coherently exercised with its principles supporting equally.

IV. Implications of House Demolitions for International Law

On a broader level, Israel's house demolition practice derives important conclusions regarding the application of international law as such. This article highlighted the role of national courts in high tension situations, based on the example of Israel's HCJ. The HCJ's approach to petitions against house demolition orders ignores the policy's incompatibility with the right to equality – protected not only by international law, but also by the Court's own rulings and principles. This deviation from the Court's own principles has been analysed by Harpaz in the last few years. He concluded that in normal times the HCJ applies international law but in extreme times its rulings differ from previous statements.[36] The Court has difficulty reconciling its values with its ability to defend its institutional autonomy due to pressure by the executive branch and the population. These institutional constraints impede the Court's ability to impose restrictions on the military authorities in the name of civil liberties. Even more problematic is the consideration that such restrictions should be justified with liberties of individuals being considered as terrorists.[37] The case of the HCJ is only one example, but it calls into question whether Supreme Courts are the appropriate bodies for applying, judging and enforcing the rule of law in times of high tension. Courts may find it increasingly difficult to defend human rights and international law yet remain faithful to their previous rulings and principles. As a result, they are crumbling under the pressure of security fears, with the consequence that they are legitimising extreme governmental acts even if it threatens their own legitimacy.

Conclusion

This article argues that the policy of punitive house demolition is unlawful because it violates the right to be treated equally, protected by international law. Punitive demolition contradicts fundamental principles and doctrines of the HCJ as well as the constitutional principle of equality. Even though DER 119 is applied differently to Palestinians and Jews, the Court never explicitly held that the practice is discriminatory. Even if compliance with international law may be gained by applying punitive house demolition to both Arabs and Jews, we argue that the practice should be stopped altogether as it violates additional norms of international conventions, for instance the prohibition of collective punishment[38] and family rights[39].

In the last three years, there has been a possible shift in the rulings of the HCJ. There are several statements from judges, claiming that the Court's legal stance with regards to the demolition policy should be re-examined.[40] In a petition recently discussed by the HCJ, the government was asked to respond to the issue of deterrence among the Jewish community and to whether the use of DER 119 will benefit the prevention of terrorist attacks against Palestinians by Jews.[41] This is the first time the Court has pressured the State to officially react to the argument of discrimination between Palestinians and Jews in the application of DER 119.

One can only hope that the HCJ will choose to fight terrorism using only measures that are coherent with international humanitarian law, international human

[34] Darcy Shane, *Punitive House Demolitions, the Prohibition of Collective Punishment, and the Supreme Court of Israel*, 21 Penn St. Int'l L. Rev. 477 2002-2003, p. 485; Farrell (Fn. 3), p. 890; see also p. 900.

[35] Playfair Emma, *Demolition and Sealing of Houses as a Punitive Measure in the Israeli-occupied West Bank*, (Al-Haq 1987), p. 11.

[36] Harpaz Guy, *Being Unfaithful to One's Own Principles: The Israeli Supreme Court and House Demolitions in the Occupied Palestinian Territories*, 47 Israel Law Review 401 2014, p. 425.

[37] Dotan Yoav, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada,* 33 Law&Soc'y Rev. 319 1999, p. 346; Harpaz Guy, *When Does a Court Systematically Deviate from its Own Principles? The Adjudication by the Israel Supreme Court of House Demolitions in the Occupied Palestinian Territories*, 28 Leiden Journal of International Law 31 2015, p. 37.

[38] Article 50 of the Hague Regulations (hereinafter: HR) and Article 33 GC.

[39] Article 46 HR, Article 27 GC.

[40] HCJ 1125/16 *Mare'ey v. IDF commander in the West Bank* (unpublished, 31 March 2016), Justice Mazuz, para. 10, Justice Baron, para. 4-5.

[41] HCJ 5376/16 *Abu-Hdeir v. Minister of Defense* (unpublished, 4 July 2017), para. 3.

rights law, and national laws and principles. By abandoning the illegal practice of punitive house demolition, the Courts will recover the legitimacy required to operate with stability and independence from the political establishment, a vital characteristic of a democratic state.

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